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

Date: **9 July 2021**

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PRE-TRIAL CHAMBER II

Before: **Judge Rosario Salvatore Aitala, Presiding Judge**
Judge Antoine Kesia-Mbe Mindua
Judge Tomoko Akane

SITUATION IN DARFUR, SUDAN

IN THE CASE OF *THE PROSECUTOR v. ALI MUHAMMAD ALI ABD-AL-RAHMAN ('ALI KUSHAYB')*

Public with confidential Annex 1

Corrected version of 'Decision on the confirmation of charges against Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')', 9 July 2021, ICC-02/05-01/20-433

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

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**Victims Participation
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PRE-TRIAL CHAMBER II of the International Criminal Court issues, pursuant to article 61(7) of the Rome Statute (the ‘Statute’), this Decision on the confirmation of charges against Mr Ali Muhammad Ali Abd-Al-Rahman (‘Mr Abd-Al-Rahman’), also known as ‘Ali Kushayb’, a national of the Republic of the Sudan (‘Sudan’), born on 15 October 1949 in Rahad al-Berdi, South Darfur, Sudan,¹ currently detained at the seat of the Court.²

1. The full text of the charges on which the Prosecutor seeks that Mr Abd-Al-Rahman be committed for trial is available in the ‘Document Containing the Charges’ (the ‘DCC’) filed by the Prosecutor on 29 March 2021,³ to be read in conjunction with the ‘Pre-Confirmation Brief’ (the ‘PCB’) filed on 16 April 2021.⁴
2. The issue relating to the existence of a link between the nickname ‘Ali Kushayb’ and the suspect was first raised during Mr Abd-Al-Rahman’s first appearance before the Court, and has been the subject of litigation throughout these proceedings. The Chamber’s determination on the matter is to be found in section IV(A) of this decision.

¹ As stated by the suspect during his first appearance before the Court; see [Transcript of hearing](#), ICC-02/05-01/20-T-001-ENG.

² As to proper nouns and words in a language other than English, the Chamber adopts the spelling used by the Prosecutor in the DCC and PCB, bearing in mind that there exist spelling variations in the available evidentiary material.

³ ICC-02/05-01/20-325-Conf-Anx1 (first corrected version notified on 9 April 2021, ICC-02/05-01/20-325-Conf-Anx1-Corr; second corrected version and its public redacted version notified on 22 April 2021, ICC-02/05-01/20-325-Conf-Anx1-Corr2 and [ICC-02/05-01/20-325-Anx1-Corr2-Red](#)) *annexed to Prosecution’s submission of the Document Containing the Charges*, 29 March 2021, ICC-02/05-01/20-325. The Arabic translation of the DCC was also notified on 29 March 2021, ICC-02/05-01/20-325-Conf-Anx2 (first corrected version notified on 9 April 2021, ICC-02/05-01/20-325-Conf-Anx2-Corr; second corrected version notified on 22 April 2021, ICC-02/05-01/20-325-Conf-Anx2-Corr2) *annexed to Prosecution’s submission of the Document Containing the Charges*, 29 March 2021, ICC-02/05-01/20-325.

⁴ ICC-02/05-01/20-346-Conf-AnxA (public redacted version notified on 21 May 2021, [ICC-02/05-01/20-346-AnxA-Red](#)) *annexed to Prosecution’s submission of the Pre-Confirmation Brief and the List of Evidence*, 16 April 2021, ICC-02/05-01/20-346-Conf (reclassified as public on 18 May 2021, [ICC-02/05-01/20-346](#)). The Arabic translation of the PCB was notified on 23 April 2021, ICC-02/05-01/20-367-Conf-AnxA *annexed to Prosecution’s submission of Arabic translations of the Pre-Confirmation Brief and the List of Evidence*, 23 April 2021, ICC-02/05-01/20-367.

I. Background and procedural history

3. On 31 March 2005, pursuant to article 13(b) of the Statute, the United Nations Security Council referred to the Prosecutor the situation in Darfur, Sudan, as of 1 July 2002.⁵

4. On 27 April 2007, Pre-Trial Chamber I issued a warrant of arrest against Mr Abd-Al-Rahman (the ‘First Warrant of Arrest’).⁶ On 16 January 2018, Pre-Trial Chamber II, in its previous composition, issued a second warrant of arrest against Mr Abd-Al-Rahman (the ‘Second Warrant of Arrest’).⁷

5. On 9 June 2020, Mr Abd-Al-Rahman surrendered himself to the Court and, on 15 June 2020,⁸ following the severance of the case against him from that against Mr Ahmad Muhammad Harun,⁹ he made his first appearance before Judge Rosario Salvatore Aitala, acting as Single Judge on behalf of Pre-Trial Chamber II.¹⁰ On that occasion, the Single Judge set 7 December 2020 as the date of commencement of the confirmation of charges hearing (the ‘Confirmation Hearing’); this date was later postponed, together with all related time limits, first to 22 February 2021¹¹ and then to 24 May 2021,¹² upon the Prosecutor’s requests.¹³ A number of Defence requests¹⁴

⁵ [S/RES/1593 \(2005\)](#).

⁶ [Decision on the Prosecution Application under Article 58\(7\) of the Statute](#), ICC-02/05-01/07-1-Corr; [Warrant of arrest for Ali Kushayb](#), ICC-02/05-01/07-3-Corr.

⁷ Second warrant of arrest for Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”), ICC-02/05-01/07-74-Conf (public redacted version notified on 11 June 2020, [ICC-02/05-01/07-74-Red](#)).

⁸ [Transcript of hearing](#), ICC-02/05-01/20-T-001-ENG.

⁹ [Decision severing the case against Mr Ali Kushayb](#), 12 June 2020, ICC-02/05-01/07-87.

¹⁰ [Decision on the designation of a Single Judge](#), 9 June 2020, ICC-02/05-01/07-80.

¹¹ [Decision on Prosecutor’s Request for Postponement of the Confirmation Hearing and related deadlines](#), 2 November 2020, ICC-02/05-01/20-196.

¹² [Decision on the Prosecutor’s Second Request to Postpone the Confirmation Hearing and Requests for Variation of Disclosure Related Time Limits](#), 18 December 2020, ICC-02/05-01/20-238.

¹³ Corrected Version of “Prosecution’s request to postpone the confirmation hearing”, 16 September 2020, ICC-02/05-01/20-157-Conf-Exp-Corr with confidential *ex parte* Annexes 1-3 (confidential and public redacted versions notified on the same day, ICC-02/05-01/20-157-Conf-Red-Corr and [ICC-02/05-01/20-157-Corr-Red](#)); Prosecution’s second request to postpone the confirmation hearing and related deadlines, 3 December 2020, ICC-02/05-01/20-218-Conf (public redacted version notified on 4 December 2020, [ICC-02/05-01/20-218-Red](#)).

¹⁴ [Requête aux fins d’arrêt ou de suspension temporaire des procédures](#), 5 October 2020, ICC-02/05-01/20-174; [Requête en vertu des Articles 4-2 et 68-1 du Statut](#), 14 December 2020, ICC-02/05-01/20-231-Conf-Exp (public redacted version notified on the same day, [ICC-02/05-01/20-231-Red](#)); [Requête en vertu de l’Article 87-5-b du Statut de la Cour](#), 19 January 2021, ICC-02/05-01/20-263-Conf-Exp with annexes A-C (confidential and public redacted versions notified on the same day; ICC-02/05-01/20-263-Conf-Red and [ICC-02/05-01/20-263-Red2](#)); [Requête en vertu des Articles 2, 67-1-b et 87-6 du Statut et de la Norme 24bis-1 du Règlement de la Cour](#), 26 January 2021, ICC-02/05-01/20-269; [Requête en vertu](#)

seeking to convene a hearing, further postpone or cancel the Confirmation Hearing and/or stay the proceedings were rejected by the Chamber.¹⁵

6. In the subsequent period and until the Confirmation Hearing, the Chamber issued a number of decisions and orders relating to the conduct of the proceedings, including:

- (i) the ‘Order seeking observations on disclosure and related matters’ on 2 July 2020,¹⁶ followed by the first ‘Order on disclosure and related matters’,¹⁷ *inter alia* adopting the ‘Unified Technical protocol (“E-court Protocol”) for the provision of evidence, witness and victims information in electronic form’¹⁸ and the ‘Protocol on the handling of confidential information during investigations and contact between a party or participant and witnesses of the opposing party or of a participant’,¹⁹ and the ‘Second Order on disclosure and related matters’,²⁰ respectively issued on 17 August and on 2 October 2020;
- (ii) the ‘Decision on the Defence Request for Interim Release’ on 14 August 2020,²¹ rejecting the request, and three subsequent decisions on the review of the detention of Mr Abd-Al-Rahman pursuant to rule 118(2) of the Rules of Procedure and Evidence (the ‘Rules’),²² respectively issued on 11

de l’Article 43-1 du Statut et de la Règle 13 du Règlement de Procédure et de Preuve, 29 January 2021, ICC-02/05-01/20-272-Conf-Exp with confidential *ex parte* Annexes 1-4 (public redacted version notified on the same day, [ICC-02/05-01/20-272-Red](#)); *Requête aux fins d’audience*, 22 March 2021, ICC-02/05-01/20-317-Conf (public redacted version notified on the same day, [ICC-02/05-01/20-317-Red](#)); *Nouvelle Requête aux Fins de Convocation Urgente d’une Audience*, 9 April 2021, ICC-02/05-01/20-336; *Observations relatives à l’audience de confirmation des charges*, 23 April 2021, ICC-02/05-01/20-363-Conf-Exp (public redacted version notified on the same day, [ICC-02/05-01/20-363-Red](#)).

¹⁵ [Decision on Defence Request for a Stay of Proceedings](#), 16 October 2020, ICC-02/05-01/20-186; [Decision on the Defence request pursuant to article 87\(5\)\(b\) of the Statute](#), 9 March 2021, ICC-02/05-01/20-295; [Decision on Defence requests and procedural challenges](#), 21 May 2021, ICC-02/05-01/20-402.

¹⁶ [ICC-02/05-01/20-14](#).

¹⁷ [ICC-02/05-01/20-116](#).

¹⁸ [ICC-02/05-01/20-116-Anx1](#).

¹⁹ [ICC-02/05-01/20-116-Anx2](#).

²⁰ [ICC-02/05-01/20-169](#).

²¹ [ICC-02/05-01/20-115](#).

²² *Decision on the Review of the Detention of Mr Abd-Al-Rahman pursuant to rule 118 (2) of the Rules of Procedure and Evidence*, ICC-02/05-01/20-230-Conf (public redacted version notified on the same day, [ICC-02/05-01/20-230-Red](#)); [Decision on the review of detention](#), ICC-02/05-01/20-338; [Decision on the review of detention](#), 5 July 2021, ICC-02/05-01/20-430. Pursuant to rule 118(3) of the Rules, a hearing was held on 27 May 2021 ([ICC-02/05-01/20-T-010-ENG](#)).

December 2020, 12 April 2021 and 5 July 2021, confirming the necessity for and ordering Mr Abd-Al-Rahman’s continued detention;

- (iii) the ‘Order instructing the parties to liaise with a view to reaching an agreement as to evidence pursuant to rule 69 of the Rules of Procedure and Evidence’ on 8 December 2020,²³ pursuant to which the Prosecutor and the Defence for Mr Abd-Al-Rahman filed two joint reports respectively on 18 January 2021 and 14 April 2021;²⁴
- (iv) a number of decisions on disclosure and evidence-related requests submitted by both the Prosecutor²⁵ and the Defence²⁶ (namely, the ‘Decision extending

²³ [ICC-02/05-01/20-226](#).

²⁴ [First Joint Report regarding the “Order instructing the parties to liaise with a view to reaching an agreement as to evidence to rule 69 of the Rules of Procedure and Evidence”](#), ICC-02/05-01/20-260; [Second Joint Prosecution and Defence submission on agreed facts](#), ICC-02/05-01/20-343. *See also* Office of Public Counsel for Victims, [Notification on behalf of Applicant Victims on the “Joint Prosecution and Defence submission on agreed facts”](#), 16 March 2021, ICC-02/05-01/20-304; [Notification on behalf of Applicant Victims on the “Second Joint Prosecution and Defence submission on agreed facts”](#), 19 April 2021, ICC-02/05-01/20-352.

²⁵ Prosecution’s first request for the authorisation of non-disclosure of witness identities, 18 December 2020, ICC-02/05-01/20-242-Conf-Exp with confidential *ex parte* annexes 1-9 (confidential and public redacted versions notified on 18 December 2020, 12 January 2021 and 6 April 2021; ICC-02/05-01/20-242-Conf-Red, ICC-02/05-01/20-242-Conf-Red2 and [ICC-02/05-01/20-242-Red3](#)); Prosecution’s second request for the authorisation of non-disclosure of witness identities, 26 February 2021, ICC-02/05-01/20-287-Conf-Exp with confidential *ex parte* annexes 1-19 (confidential and public redacted versions notified on 26 February 2021 and 6 April 2021; ICC-02/05-01/20-287-Conf-Red and [ICC-02/05-01/20-287-Red2](#)); Prosecution’s request for non-disclosure of six documents obtained pursuant to article 54(3)(e), 5 March 2021, ICC-02/05-01/20-293-Conf-Exp with confidential *ex parte* annexes 1-7 (confidential redacted version notified on 9 March 2021; ICC-02/05-01/20-293-Conf-Red); Prosecution’s application under 54(3)(f) to apply redactions and other conditions to documents obtained under article 54(3)(e), 12 March 2021, ICC-02/05-01/20-300-Conf-Exp with confidential *ex parte* annex 1 (confidential redacted version notified on 24 March 2021; ICC-02/05-01/20-300-Conf-Red); Prosecution’s application under 54(3)(f) to apply redactions and other conditions to documents obtained under article 54(3)(e), 19 March 2021, ICC-02/05-01/20-312-Conf-Exp with confidential *ex parte* annexes 1-2 (confidential redacted version notified on 24 March 2021; ICC-02/05-01/20-312-Conf-Red); Prosecution’s urgent request for variation of disclosure related time limit, 26 March 2021, ICC-02/05-01/20-324-Conf (public redacted version notified on 31 March 2021, [ICC-02/05-01/20-324-Red](#)); Prosecution’s request for variation of time limits for the newly collected materials, and third request for the authorisation of non-disclosure of witness identities, 13 April 2021, ICC-02/05-01/20-341-Conf-Exp with confidential *ex parte* annexes 1-3 (confidential and public redacted versions notified on 13 and 15 April 2021; ICC-02/05-01/20-341-Conf-Red and [ICC-02/05-01/20-341-Red2](#)); Prosecution’s request for variation of time limits for the newly collected materials of Witnesses P-0926 and P-0935, 22 April 2021, ICC-02/05-01/20-359-Conf (public redacted version notified on the same day, [ICC-02/05-01/20-359-Red](#)).

²⁶ [1ère Requête aux fins d’exclusion de moyens de preuve](#), 26 March 2021, ICC-02/05-01/20-322; [2ème Requête aux fins d’exclusion de moyens de preuve](#), 16 April 2021, ICC-02/05-01/20-349-Conf-Exp (public redacted version notified on the same day, [ICC-02/05-01/20-349-Red](#)); [Soumission de l’inventaire des preuves de la Défense en vertu de la Règle 121-6](#), 7 May 2021, ICC-02/05-01/20-381 with confidential annex 1.

the time limit for disclosure and translation’, on 29 March 2021;²⁷ the ‘Decision on the Prosecutor’s request for non-disclosure pursuant to article 54(3)(e) and applications under 54(3)(f) of the Statute’, on 20 April 2021;²⁸ the ‘Decision on two requests to vary the time limit for disclosing incriminating evidence’, on 6 May 2021;²⁹ the ‘Decision on the Prosecutor’s requests for non-disclosure of witness identities’, on 12 May 2021;³⁰ the ‘Supplementary Decision on the Prosecutor’s requests for non-disclosure of witness identities’, on 20 May 2021;³¹ the ‘Decision on variation of the time limit for presenting evidence’, on 20 May 2021;³² the ‘Decision on Defence requests and procedural challenges’, on 21 May 2021);³³ and

- (v) a number of decisions on victims’ participation and representation (notably, the ‘Decision on the Registry’s Request for Authorisation to use a Modified Standard Application Form for Victim Participation’, on 4 November 2020;³⁴ the ‘Decision establishing the principles applicable to victims’ participation and representation during the Confirmation Hearing’, on 18 January 2021;³⁵ the ‘Decision supplementing the Chamber’s first decision on victims’ participation and representation and providing additional guidance’, on 5 February 2021;³⁶ the ‘Decision on victim applications for participation, legal representation, leave to appeal and amicus curiae requests’, on 20 May 2021).³⁷ The Chamber admitted 151 victims to participate in the proceedings and appointed the Office of Public Counsel for Victims (the ‘OPCV’), Mr Nasser Mohamed Amin Abdalla and Ms Amal Clooney as their legal representatives (the ‘LRVs’).

²⁷ [ICC-02/05-01/20-326](#).

²⁸ [ICC-02/05-01/20-354](#).

²⁹ [ICC-02/05-01/20-379](#).

³⁰ [ICC-02/05-01/20-386](#).

³¹ [ICC-02/05-01/20-400](#).

³² [ICC-02/05-01/20-401](#).

³³ [ICC-02/05-01/20-402](#).

³⁴ [ICC-02/05-01/20-198](#).

³⁵ [ICC-02/05-01/20-259](#).

³⁶ [ICC-02/05-01/20-277](#).

³⁷ [ICC-02/05-01/20-398](#) with an annex.

7. On 29 March 2021, the Chamber received the ‘Prosecution’s submission of the Document Containing the Charges’³⁸ and, on 16 April 2021, the ‘Prosecution’s submission of the Pre-Confirmation Brief and the List of Evidence’.³⁹

8. On 17 May 2021, the Chamber rejected the Defence’s challenge to the jurisdiction of the Court under article 19(2) of the Statute⁴⁰ and held that ‘the present case satisfies all the relevant statutory requirements of jurisdiction: Mr Abd-Al-Rahman is charged with crimes against humanity and war crimes, which are among those provided for in the Statute (jurisdiction *ratione materiae*), in respect of events having allegedly [taken] place within the perimeters of the territory of Darfur, Sudan (jurisdiction *ratione loci*) between August 2003 and March 2004, i.e. after the entry into force of the Statute (jurisdiction *ratione temporis*): ‘[s]ince the requirements relating to the Court’s jurisdiction *ratione loci* and *ratione personae* are alternative, and the *ratione loci* parameter is satisfied, the fact that the suspect is not a national of a State Party is irrelevant for the purpose of establishing the jurisdiction of the Court’.⁴¹

9. On 18 May 2021, the Defence filed its list of evidence.⁴²

10. On 19 May 2021, the Defence filed its ‘*Notification des motifs exonérateurs de responsabilité plaidés par la Défense*’.⁴³

³⁸ [ICC-02/05-01/20-325](#) with confidential Annexes 1 (containing the DCC) and 1A-1D (first corrected version of Annex 1 and corrected version of Annex 1A notified on 9 April 2021, ICC-02/05-01/20-325-Conf-Anx1-Corr and ICC-02/05-01/20-325-Conf-Anx1A-Corr; second corrected version and its public redacted version of Annex 1 notified on 22 April 2021, ICC-02/05-01/20-325-Conf-Anx1-Corr2 and [ICC-02/05-01/20-325-Anx1-Corr2-Red](#)) and their Arabic translations Annexes 2 (containing the Arabic translation of the DCC) and 2A-2D (first corrected version of Annex 2 and corrected version of Annex 2A notified on 9 April 2021, ICC-02/05-01/20-325-Conf-Anx2-Corr and ICC-02/05-01/20-325-Conf-Anx2A-Corr – reclassified as public on 18 May 2021, [ICC-02/05-01/20-325-Anx2A-Corr](#) –; second corrected version of Annex 2 notified on 22 April 2021, ICC-02/05-01/20-325-Conf-Anx2-Corr2).

³⁹ ICC-02/05-01/20-346-Conf (reclassified as public on 31 May 2021, [ICC-02/05-01/20-346](#)) with confidential Annexes A (containing the PCB), A1-A13 and B (the ‘Prosecutor List of Evidence’) (corrected version of Annex A13 notified on 19 May 2021, [ICC-02/05-01/20-346-AnxA13-Corr](#); public redacted version of Annex A notified on 21 May 2021, [ICC-02/05-01/20-346-AnxA-Red](#)). The Prosecutor submitted the Arabic translations of Annexes A, A1-A13 and B on 23 April 2021 (see [ICC-02/05-01/20-367](#) and its annexes).

⁴⁰ [Exception d’incompétence](#), 15 March 2021, ICC-02/05-01/20-302.

⁴¹ [Decision on the Defence ‘Exception d’incompétence’ \(ICC-02/05-01/20-302\)](#), ICC-02/05-01/20-391.

⁴² [Soumission de l’inventaire consolidé des preuves de la Défense](#), ICC-02/05-01/20-392 with confidential Annex 1 (ICC-02/05-01/20-392-Conf-Anx1) (the ‘Defence List of Evidence’).

⁴³ [ICC-02/05-01/20-395](#) with Annex A ([ICC-02/05-01/20-395-AnxA](#)).

11. On 21 May 2021, the OPCV and the LRVs respectively filed the ‘Victims’ Submissions under Rule 121(9) of the Rules of Procedure and Evidence’⁴⁴ and the ‘Written submissions pursuant to rule 121(9) of the Rules of Procedure and Evidence’.⁴⁵

12. Pursuant to the schedule set by the Chamber,⁴⁶ the Confirmation Hearing was held from 24 to 26 May 2021.⁴⁷

II. Preliminary and procedural matters

A. Pending motions

1. *Defence request for reclassification of a Registry report and communication of documents relating to Mr Abd-Al-Rahman’s surrender*

13. On 22 March 2021, the Defence requested to be provided with copies of a number of Registry documents pertaining to Mr Abd-Al-Rahman’s surrender, pursuant to regulation 23bis(3) of the Regulations of the Court (the ‘Regulations’).⁴⁸ The Defence subsequently amended its request,⁴⁹ reducing its subject matter by limiting it to (i) the reclassification of the Registry’s *Information et demande d’instructions concernant les objets en possession du Greffe suite à la remise d’Ali Muhammad Ali Abd-Al-Rahman (« M. Kushayb »)*;⁵⁰ and (ii) the disclosure of the Registry’s receipt form for the funds seized from Mr Abd-Al-Rahman as well as the inventory of his personal belongings at the time of his surrender (together, the ‘Documents’).

14. The Chamber is of the view that the request is without merit. First, the Defence does not adequately explain why it needs access to the Documents, contenting itself with a vague affirmation that they are necessary for the preparation of Mr Abd-Al-Rahman’s defence and for a ‘perfect comprehension’ of the conditions of his surrender. Second,

⁴⁴ ICC-02/05-01/20-403-Conf (public redacted version notified on 24 May 2021, [ICC-02/05-01/20-403-Red](#)).

⁴⁵ ICC-02/05-01/20-405-Conf (public redacted version notified on 24 May 2021, [ICC-02/05-01/20-405-Red](#)).

⁴⁶ [Order setting the schedule for the confirmation of charges hearing and convening annual hearing on detention](#), 5 May 2021, ICC-02/05-01/20-378.

⁴⁷ Transcripts of hearing ICC-02/05-01/20-T-007-CONF-ENG to ICC-02/05-01/20-T-009-CONF-ENG (public redacted versions [ICC-02/05-01/20-T-007-Red-ENG](#) to [ICC-02/05-01/20-T-009-Red-ENG](#)).

⁴⁸ *Requête aux fins de reclassification de document et d’injonction au Greffe*, ICC-02/05-01/20-316-Conf.

⁴⁹ *Addendum à la Requête ICC-02/05-01/20-316-Conf*, ICC-02/05-01/20-331-Conf.

⁵⁰ ICC-02/05-01/07-86-US-Exp.

as a matter of principle, the Defence does not have a right to access internal Registry reports and documents. Even though the Chamber may, in certain circumstances, order the Registry to hand over documents to the Defence pursuant to article 57(3)(b) of the Statute, such an intervention is contingent upon a demonstration that the items in question constitute evidence that may be material to the determination of an issue being adjudicated or to the proper preparation of the person's defence. No such demonstration was made by the Defence. Accordingly, the Chamber rejects the request.

2. Defence request alleging violation of disclosure obligations and for exclusion of eight transcripts

15. On 17 May 2021, the Defence requested the Chamber to (i) note that the Prosecutor had violated her disclosure obligations by refusing to hand over information and documents pertaining to the Court's internal investigations into corruption allegations made by Mr David Nyekorach Matsanga (the 'Internal Documents'); and (ii) declare inadmissible eight transcripts of a meeting between officials of the Sudanese Government and representatives of the Office of the Prosecutor that took place in Sudan in 2007 on the ground that their credibility cannot be assessed without the Internal Documents.⁵¹

16. In relation to the Prosecutor's alleged disclosure violation, the Chamber stresses that article 67(2) of the Statute – despite not imposing any preconditions for disclosure of potentially exculpatory material⁵² – cannot be read as an automatic entitlement to the Defence to demand access to any document in the Prosecutor's possession, regardless of its relevance and potential significance for the proceedings.⁵³ In principle, it is for the Prosecutor to determine whether any given item is subject to disclosure; in this case, the Prosecutor has determined that the Internal Documents do not fall under article 67(2) of the Statute. Since there are no credible indications that the Prosecutor has violated her disclosure obligations, there is no reason for the Chamber to intervene. As

⁵¹ [3ème Requête aux fins d'exclusion de moyens de preuve](#), ICC-02/05-01/20-389. See also [Prosecution's Response to Defence's "3ème Requête aux fins d'exclusion de moyens de preuve"](#) (ICC-02/05-01/20-389), ICC-02/05-01/20-399.

⁵² See [Decision on Defence Request for Leave to Appeal Decision ICC-02/05-01/20-216](#), 12 May 2021, ICC-02/05-01/20-384, para. 19.

⁵³ See, Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, [Annex 2 of Decision issuing a confidential and a public redacted version of "Decision on disclosure issues, responsibilities for protective measures and other procedural matters"](#), 9 May 2008, ICC-01/04-01/06-1311-Anx2, para. 94.

regards the request to exclude the eight transcripts, the Chamber notes that the Defence has failed to demonstrate how the Internal Documents could possibly affect the credibility of the transcripts. Moreover, the Chamber notes that the Prosecutor has not relied on the transcripts in the PCB. There is therefore no potential prejudice to the rights of the suspect that could warrant excluding the eight transcripts. Accordingly, the Chamber rejects the request.

3. *Defence request for leave to appeal the ‘Decision on Defence requests and procedural challenges’ dated 21 May 2021*

17. On 28 May 2021, the Defence filed a request for leave to appeal the ‘Decision on Defence requests and procedural challenges’ (the ‘21 May 2021 Decision’),⁵⁴ which rejected nine Defence requests.⁵⁵ The Defence wishes to submit eight issues to the Appeals Chamber, alleging a number of legal and factual errors.⁵⁶ On 3 June 2021, the Prosecutor responded submitting that none of these issues meets the criteria under article 82(1)(d) of the Statute.⁵⁷

18. The Chamber notes articles 67 and 82(1)(d) of the Statute and recalls the Court’s jurisprudence regarding requests for leave to appeal, as set out in its previous decisions.⁵⁸ The Chamber finds that issues (iv) and (vi) constitute a mere disagreement

⁵⁴ [ICC-02/05-01/20-402](#).

⁵⁵ [Demande d’autorisation d’appel de la Décision ICC-02/05-01/20-402](#), ICC-02/05-01/20-413.

⁵⁶ In particular, the Defence formulated the following issues: (i) *En vertu de l’Article 74-5 du Statut, l’Honorable Chambre Préliminaire II pouvait-elle rejeter nombre de demandes et soumissions de la Défense sans les examiner et sans motiver sa décision ?*; (ii) *En vertu de l’Article 67-1 du Statut, l’Honorable Chambre Préliminaire II pouvait-elle fonder sa Décision sur, inter alia, des soumissions Ex parte du Greffe non soumises au débat judiciaire ?*; (iii) *En vertu de l’Article 69 du Statut, l’Honorable Chambre Préliminaire II pouvait-elle se dispenser de l’examen de la recevabilité des preuves pour les besoins de la confirmation des charges ?*; (iv) *En vertu de l’Article 4-2 du Statut, la Résolution 1593 du Conseil de Sécurité supplée-t-elle à la conclusion d’une convention pour la conduite des activités de la Cour sur le territoire d’un État non-Partie ?*; (v) *L’Article 68-1 du Statut requiert-il de prévenir le risque potentiel encouru par les victimes, témoins et autres personnes à risque du fait des activités de la Cour ou ce risque doit-il se matérialiser pour être pris en compte ?*; (vi) *L’intégrité des procédures continue-t-elle d’être assurée en dépit de la violation constatée de la Politique de protection de l’information de la Cour par le Bureau du Procureur ?*; (vii) *Le principe d’égalité des armes a-t-il été rompu en ce qui concerne l’accès au terrain ?*; (viii) *L’Honorable Chambre Préliminaire II a-t-elle privé la Défense du temps nécessaire à sa préparation en violation de l’Article 67-1-b du Statut en ne rendant ses décisions sur certaines des neuf Requêtes le dernier jour ouvré précédent l’ACdC ?*.

⁵⁷ [Prosecution’s Response to “Demande d’autorisation d’interjeter appel de la Décision ICC-02/05-01/20-402”](#), ICC-02/05-01/20-416.

⁵⁸ See e.g. [Decision on victim applications for participation, legal representation, leave to appeal and amicus curiae requests](#), 20 May 2021, ICC-02/05-01/20-398, paras 55-61.

with the 21 May 2021 Decision, and that issue (v) is based on a misunderstanding of that decision. As regards the remaining issues, the Chamber notes that they do not affect the fair and expeditious conduct of the proceedings and that their immediate resolution would not advance the proceedings. To the extent that they may still be relevant at that time, the Defence will be able to litigate any of these matters before the Trial Chamber. Accordingly, the Chamber rejects the Defence request for leave to appeal.

B. Objections and observations pursuant to rule 122(3) of the Rules

19. On 12 and 17 May 2021, the Defence submitted its written observations under rule 122(3) of the Rules (respectively, the ‘Defence First Rule 122(3) Observations’ and the ‘Defence Second Rule 122(3) Observations’),⁵⁹ raising six objections in relation to the proper conduct of the proceedings prior to the Confirmation Hearing (the ‘Defence Rule 122(3) Objections’).

1. Request to exclude the Prosecutor’s consolidated response

20. On 28 May 2021, the Defence requested the Chamber to reject *in limine* the Prosecutor’s consolidated response.⁶⁰ In relation to the Defence First Rule 122(3) Observations, the Defence points out that the time limit for responding expired on 24 May 2021 in accordance with regulation 34(b) of the Regulations. As regards the Defence Second Rule 122(3) Observations, the Defence considers that the last possible moment for the Prosecutor to respond was orally during the Confirmation Hearing, before the Chamber closed the procedural phase and opened the debate on the merits, and that filing written submissions after that stage constitutes an abuse of process and violates rule 122 of the Rules.

21. As regards the Defence First Rule 122(3) Observations, the Chamber notes that the Prosecutor’s time limit to respond was indeed the 24 May 2021. Accordingly, the

⁵⁹ *Premières observations de la Défense en vertu de la Règle 122-3 (Régularité du Document indiquant les charges)*, ICC-02/05-01/20-387-Conf (public redacted version notified on the same day, [ICC-02/05-01/20-387-Red](#)); *Deuxièmes observations de la Défense en vertu de la Règle 122-3 (régularité de l’Inventaire des Preuves et autres questions touchant à la régularité de la phase préliminaire)*, ICC-02/05-01/20-390 with confidential Annexes A-B.

⁶⁰ Prosecution’s consolidated Response to Defence’s observations under Rule 122(3) (ICC-02/05-01/20-387-Conf and ICC-02/05-01/20-390), ICC-02/05-01/20-411-Conf (reclassified as public on 31 May 2021, [ICC-02/05-01/20-411](#)); *Requête aux fins de respect des délais et de la publicité des débats*, ICC-02/05-01/20-412.

Chamber will disregard the Prosecutor's consolidated response as it addresses the Defence First Rule 122(3) Observations. As regards the Defence Second Rule 122(3) Observations, the Chamber recalls that it suggested that the Prosecutor submit a written response in accordance with regulations 24 and 34 of the Regulations.⁶¹ The Chamber notes that the Prosecutor's consolidated response was filed within the statutory time limit and, accordingly, will only consider it insofar as it relates to the Defence Second Rule 122(3) Observations.

2. *Objection to the inclusion of new charges*

22. The Defence objects to the inclusion in the DCC of charges which were not mentioned in the applications for either the First or Second Warrant of Arrest (i.e. Counts 4, 7, 13-16, 19-23, 25-26 and 29-30)⁶² as inexcusably late and in violation of article 67(1)(a) of the Statute; accordingly, these Counts should be discarded from the scope of the Confirmation Hearing and rejected.

23. The Chamber recalls article 61(3)(a) of the Statute and rule 121(3) of the Rules, providing that it is the DCC which formally informs a suspect and provides detail of the charges.⁶³ Therefore, the Prosecutor is not bound by the charges as formulated in the warrant(s) of arrest. The Defence's reference to the practice of *ad hoc* tribunals is immaterial, given the explicit time limit set out in rule 121(3) of the Rules and the structural difference in procedures.⁶⁴ As regards the Defence's argument that there would be a tension between the suspect's right to be informed 'promptly and in detail' of the charges and the 30-day deadline provided for in rule 121(3) of the Rules, the

⁶¹ Email from the Chamber to the parties and participants sent on 17 May 2021 at 17:07.

⁶² The Chamber notes that paragraph 15 of the Defence First Rule 122(3) Observations also lists Count 31. However, no reference to Count 31 is included either elsewhere in these observations or in their subject matter, as summarised at the end of the observations.

⁶³ See e.g. Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, [Public redacted Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction](#), 1 December 2014, ICC-01/04-01/06-3121-Red, paras 188-199; Appeals Chamber, *The Prosecutor v. Laurent Koudou Gbagbo*, [Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled "Decision adjourning the hearing on the confirmation of charges pursuant to article 61\(7\)\(c\)\(i\) of the Rome Statute"](#), 16 December 2013, ICC-02/11-01/11-572, para. 36; Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Decision on Defence requests relating to the Prosecution's Pre-Trial Brief](#), 16 September 2015, ICC-02/11-01/15-224, para. 13.

⁶⁴ See Pre-Trial Chamber I, *The Prosecutor v. Germain Katanga*, [Decision on the Three Defences' Requests Regarding the Prosecution's Amended Charging Document](#), 25 June 2008, ICC-01/04-01/07-648, paras 8-9.

Chamber notes that in this case the Prosecutor was instructed to file the DCC considerably sooner than the statutory deadline, specifically ‘in light of the large amount of evidence the Prosecutor intend[ed] to rely on at the confirmation hearing and the need to ensure that the suspect has sufficient time to prepare his defence’.⁶⁵ In addition, the fact that the Prosecutor is entitled to continue investigating after the issuance of the warrant(s) of arrest makes it predictable that the precise nature and contours of the charges will be refined over time. The Defence’s argument that the Prosecutor should have applied for an amendment of the First and Second Warrants of Arrest pursuant to article 58(6) of the Statute is therefore inapposite, since this would impose an obligation on the Prosecutor to seize the Chamber each time the precise conception of the criminal responsibility of the suspect evolves as new evidence is found.

3. Objection to the geographical scope of the charges

24. The Defence submits that the charges would lack precision in terms of their geographical scope, namely in light of the Prosecutor’s use of the phrase ‘surrounding areas’ in Counts 1-11, 17-21 and 27-31 of the DCC; accordingly, the Chamber should reject all references to the surrounding areas and strictly limit the geographical scope of the charges to Kodoom, Bindisi, Mukjar and Deleig only, excluding any neighbouring areas.

25. The Chamber notes that, at the Confirmation Hearing,⁶⁶ the Prosecutor explained that the charges pertaining to Kodoom and Bindisi, whilst focused on events that took place inside these locations, also include crimes allegedly committed against victims who were pursued by the attackers as they were fleeing these places. Accordingly, the geographical scope of Counts 1-11 is to be understood as extending to the roads and fields surrounding Kodoom and Bindisi insofar as the victims were present in these locations when initially targeted; as regards the crimes that allegedly took place in Mukjar and Deleig, the Prosecutor clarified that the geographical scope of the charges extends beyond the boundaries of these two towns only insofar as some of the victims were transported from there to other locations where they were allegedly executed. The

⁶⁵ [Decision on the Prosecutor’s Second Request to Postpone the Confirmation Hearing and Requests for Variation of Disclosure Related Time Limits](#), 18 December 2020, ICC-02/05-01/20-238, para. 43.

⁶⁶ [Transcript of hearing](#), 24 May 2021, ICC-02/05-01/20-T-007-RED-ENG, p. 49; [Transcript of hearing](#), 26 May 2021, ICC-02/05-01/20-T-009-Red-ENG, pp. 41-42.

Chamber understands from these clarifications that the reference to ‘surrounding areas’ does not result in either extending the geographical scope of the charges or in making them unduly broad or vague.

4. *Objection to the inclusion of cumulative charges*

26. Although the Defence acknowledges that cumulative charging is, in principle, permissible, it submits that the Prosecutor’s failure to indicate precisely how the elements of the charges differ from each other, or how each of them relates to the factual allegations mentioned in the DCC and the corresponding evidence in the PCB, would make it impossible to know how each of those charges is specifically linked to the relevant evidence, in violation of articles 67(1)(a) and (b) of the Statute. Accordingly, Counts 6-9, 12-20 and 22-30 should be discarded.

27. The Chamber notes that the objection is phrased in very broad, generic and abstract terms: the Defence has not made any attempt to demonstrate which of the cumulative charges would be insufficiently clear or how this alleged lack of clarity would have prevented it from preparing properly for the Confirmation Hearing, nor did it address the substance of the charges during the Confirmation Hearing.

5. *Objection to alternative modes of liability*

28. The Defence also objects to the systematic recourse to alternative modes of liability in the DCC, submitting that this would violate the rights of the Defence under articles 67(1)(a) and (b) of the Statute.

29. As discussed in the section illustrating its general approach on the matter,⁶⁷ the Chamber notes that alternative charges are, in principle, permissible⁶⁸ and do not *per se* necessarily prejudice the suspect’s right to be informed in detail of the charges. The Chamber observes that the DCC specifies the charged acts and conduct of the suspect in relation to each alternative form of criminal responsibility and that the Defence has

⁶⁷ See section III(B).

⁶⁸ See e.g. Pre-Trial Chamber II, *The Prosecutor v. Bosco Ntaganda*, [Decision Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda](#), 14 June 2014, ICC-01/04-02/06-309, para. 100; Pre-Trial Chamber I, *The Prosecutor v. Charles Blé Goudé*, [Decision on the “Defence request to amend the document containing the charges for lack of specificity”](#), 2 September 2014, ICC-02/11-02/11-143, paras 7-9; Pre-Trial Chamber I, *The Prosecutor v. Laurent Gbagbo*, [Decision on the confirmation of charges against Laurent Gbagbo](#), 12 June 2014, ICC-02/11-01/11-656-Red, para. 227. See also [Chambers Practice Manual](#), para. 67.

not explained why this information would have been insufficient to allow it to prepare for the Confirmation Hearing. The Chamber emphasises, yet again, that abstract and unsubstantiated complaints cannot be entertained and recalls that the Defence has not challenged the substance of the charges during the Confirmation Hearing. Under these circumstances, the Chamber cannot discern any prejudice deriving from the fact that the Prosecutor charged alternative forms of criminal responsibility.

6. Objections relating to the Prosecutor List of Evidence and the PCB

30. The Defence submits a twofold objection relating to the Prosecutor List of Evidence and the PCB: (i) the Prosecutor would have not followed the Chamber's instructions on disclosure by failing to provide a detailed explanation as to the relevance of 2.591 of the 2.837 items included in the Prosecutor List of Evidence; (ii) the clarification provided as to the relevance of items of evidence explicitly referenced in the PCB would have come inexcusably late, in violation of article 67(1)(b) of the Statute. The Defence therefore requests the Chamber to (i) declare all items included in the Prosecutor List of Evidence that are not referenced in the PCB inadmissible; (ii) enter a finding that the Prosecutor violated the suspect's rights under article 67(1)(b) of the Statute and draw the necessary consequences from this in the context of its review of the evidence.

31. The Chamber concurs with the Defence that the inclusion of a considerable volume of evidence in the Prosecutor List of Evidence not specifically relied upon in the PCB may potentially be prejudicial to the right of the Defence to have adequate time and facilities for its preparation. The Chamber particularly deplores that the Prosecutor did not heed its instruction to disclose and, *a fortiori*, include in the Prosecutor List of Evidence only evidence that is truly relevant and probative to its case.

32. However, the Chamber finds that the sanction for the Prosecutor's evidentiary profusion cannot be the wholesale exclusion of all the items of evidence included in the Prosecutor List of Evidence but not expressly relied upon in the PCB. The Chamber never ordered the Prosecutor to provide a detailed explanation as to the relevance of each individual item of evidence. Since the PCB was filed on time in accordance with rule 121(3) of the Rules and did not refer to an inordinate number of items of evidence, the Chamber finds no violation of article 67(1)(b) of the Statute.

III. The Chamber's approach

A. Nature and purpose of the present decision

33. In the present decision, the Chamber renders its determination under article 61(7) of the Statute as to whether there is sufficient evidence to establish substantial grounds to believe that Mr Abd-Al-Rahman committed the crimes with which he is charged.

34. The purpose of the pre-trial proceedings, and specifically of the Confirmation Hearing, is to determine whether the case as presented by the Prosecutor is sufficiently established to warrant a full trial. The Statute mandates that this is decided by answering the question of whether there are substantial grounds to believe that the person committed the crimes charged. Therefore, the confirmation of charges procedure protects the suspect from wrongful and unfounded accusations, by ensuring that only those persons against whom sufficiently compelling charges going beyond mere theory or suspicion have been brought are committed for trial.

35. The confirmation of charges procedure also ensures that the parameters of the case are set for trial and that the charges are clear and not deficient in form, and resolves possible procedural issues in order that such issues do not taint trial proceedings.

36. Therefore, the purpose of the pre-trial proceedings is to ensure that only charges which are sufficiently supported by the available evidence and which are clear and properly formulated, in their factual and legal aspects, are submitted to a Trial Chamber for its determination.

37. The evidentiary standard applicable at this stage of proceedings is a lower standard than that required at trial, and is met as soon as the Prosecutor offers concrete and tangible proof demonstrating a clear line of reasoning underpinning the specific allegations. The Appeals Chamber held that

[i]n determining whether to confirm charges under article 61 of the Statute, the Pre-Trial Chamber may evaluate ambiguities, inconsistencies and contradictions in the evidence or doubts as to the credibility of witnesses. Any other interpretation would carry the risk of cases proceeding to trial although the evidence is so riddled with ambiguities, inconsistencies, contradictions or doubts

as to credibility that it is insufficient to establish substantial grounds to believe the person committed the crimes charged.⁶⁹

38. At the same time, the Pre-Trial Chamber, by the very design of the pre-trial proceedings, is not in a position to conclusively determine issues relating to the probative value of evidence, including with respect to the credibility of witnesses, whose declarations are, as a rule, brought before it only in written form. Indeed, as indicated by the Appeals Chamber, ‘the Pre-Trial Chamber’s determinations will necessarily be presumptive’, and the Pre-Trial Chamber ‘should take great care in finding that a witness is or is not credible’;⁷⁰ the credibility of witnesses can only be properly addressed at trial, where they will be called to testify and their evidence properly tested.

39. The Chamber has analysed the totality of the evidentiary material disclosed by the Prosecutor, including all 2.837 items of evidence enumerated in the Prosecutor List of Evidence⁷¹ (particularly, the statements and transcripts of interview of the 111 Witnesses upon whom the Prosecutor relies for the purposes of these confirmation proceedings and the others included in the Prosecutor List of Evidence). However, in light of the limited and specific scope and purpose of this stage of the proceedings, and also to avoid any pre-determination of issues or pre-adjudication regarding the probative value of evidence, this decision only addresses what the Chamber considers necessary and sufficient for its determination on the charges – namely, whether there is sufficient evidence to establish substantial grounds to believe that Mr Abd-Al-Rahman committed the crimes charged and therefore that the case brought by the Prosecutor warrants a trial. Whilst having carefully considered all of the arguments advanced by the parties and participants as part of its determination, the Chamber will only refer in this decision to those elements (i.e., submissions and items of evidence) which it considers necessary to show the line of reasoning underpinning its conclusions. The

⁶⁹ *The Prosecutor v. Callixte Mbarushimana*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled ‘Decision on the confirmation of charges’, 30 May 2012, ICC-01/04-01/10-514, para. 46 (the ‘[Mbarushimana Judgment](#)’).

⁷⁰ [Mbarushimana Judgment](#), para. 48.

⁷¹ The Chamber, however, has not relied upon a number of those items for the purposes of the present decision as they were disclosed by the Prosecutor after the applicable time limit; see [Decision on two requests to vary the time limit for disclosing incriminating evidence](#), 6 May 2021, ICC-02/05-01/20-379.

Chamber must engage in an overall assessment of the entire evidentiary basis relied upon by the Prosecutor, including with a view to detecting inconsistencies, ambiguities, contradictions or other weaknesses which would result in the allegations not being supported to the relevant standard.⁷²

40. Furthermore, the Chamber is persuaded that the specific and limited function of the confirmation proceedings also calls for a style and structure of the decision under article 61(7) of the Statute which is as simple and straightforward as possible; this also with a view to meaningfully implement the principle that the confirmation hearing is not, nor should be seen or become, a ‘mini-trial’ or ‘a trial before the trial’.⁷³ The adequacy of the reasoning is to be assessed against the specificity, the rigour and the clarity of the formulation of the findings made by the Chamber. While article 74(5) of the Statute provides that the decision of the Trial Chamber of acquittal or conviction ‘shall be in writing and shall contain a full and reasoned statement of the Trial Chamber’s findings on the evidence and conclusions’, the statutory texts do not contain a similar provision in respect of the decision on the confirmation of the charges. By providing, throughout its reasoning, detailed and specific references to the content of the evidence retained as instrumental to its findings, as well as to all the factual and legal elements relevant to its conclusions, the Chamber believes having fully met its duty to provide adequate reasoning for its determination on the charges brought by the Prosecutor.

B. Individual criminal responsibility

41. The Chamber notes that the Prosecutor requests the Chamber to confirm as cumulative and/or alternative modes of liability in connection with the charges brought against Mr Abd-Al-Rahman those pursuant to articles 25(3)(a) (direct perpetration and/or co-perpetration), 25(3)(b) (ordering and/or inducing), 25(3)(c) (aiding, abetting

⁷² Pre-Trial Chamber I, *The Prosecutor v. Callixte Mbarushimana*, [Decision on the confirmation of charges](#), 16 December 2011, ICC-01/04-01/10-465-Red, paras 45-47; [Mbarushimana Judgment](#), paras 1, 37-49.

⁷³ Pre-Trial Chamber I, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, [Decision on the confirmation of charges](#), 30 September 2008, ICC-01/04-01/07-717, para. 64; Pre-Trial Chamber I, *The Prosecutor v. Bahr Idriss Abu Garda*, [Decision on the Confirmation of Charges](#), 8 February 2010, ICC-02/05-02/09-243-Red, para. 39.

or otherwise assisting), 25(3)(d)(i) and (ii) (common purpose liability) and 25(3)(f) (attempt) of the Statute.⁷⁴

42. In particular, the Prosecutor charges Mr Abd-Al-Rahman with direct co-perpetration, pursuant to article 25(3)(a) of the Statute, for crimes allegedly committed in Mukjar (Counts 12 to 21) and Deleig (Counts 22 to 31) based upon the allegation that, with regard to each of these locations, Mr Abd-Al-Rahman (i) ‘was part of a common plan or an agreement with one or more persons’; and (ii) ‘carried out an essential contribution in a coordinated manner with other co-perpetrators that resulted in the fulfilment of the material elements of the crimes’.⁷⁵ In the course of the DCC and PCB narratives, these common plans are respectively defined as the ‘Mukjar Common Plan’ and the ‘Deleig Common Plan’. While the former would have existed ‘[a]t least between late February and early March 2004’ and the latter ‘[a]t least between about 5 and about 7 March 2004’, the objective of both common plans would have been ‘to target persons in’ Mukjar and Deleig, ‘including those displaced to’ these locations ‘from locations in the surrounding areas, perceived as belonging to, or being associated with, or supporting the rebel armed groups, including through the commission of the crimes of torture, other inhumane acts, cruel treatment, outrages upon personal dignity, murder and persecution’; Mr Abd-Al-Rahman would have shared such common plans ‘with a group consisting of members of the Militia/*Janjaweed* and GoS Forces’.⁷⁶

43. The Chamber believes that it is conceptually and methodologically appropriate to address the issue of the individual criminal responsibility of the suspect by looking at his alleged contributions in respect of each of the charged incidents and at the evidence cited in support of those allegations. Furthermore, since the purpose of the pre-trial procedure consists of determining whether an individual should be sent to trial, the Chamber considers it critical for such purposes to be in a position to establish a link between the events as charged and the alleged perpetrator(s) as identified by the Prosecutor.

44. The notion of a common plan as a vehicle for imputing individual responsibility for the charged crimes has been a recurrent feature of the cases brought before the

⁷⁴ DCC, paras 13, 27-29, 59-69, 95-114, 138-158; PCB, paras 57, 114-124, 198-224, 258-279, 331-371. See also [ICC-02/05-01/20-346-AnxA13-Corr](#).

⁷⁵ DCC, paras 27(a), 97-102, 140-145; PCB, paras 115-116, 259-273, 331-357.

⁷⁶ DCC, paras 98, 141; PCB, paras 260, 332.

Chambers since the Court's early days, in line with the jurisprudence of the *ad hoc* tribunals. Here, the Prosecutor relies on a variation of this notion, alleging the existence of the 'Mukjar Common Plan' and the 'Deleig Common Plan': the Chamber is mindful of the jurisprudence of the Appeals Chamber to the effect that the common plan may be one of the shapes taken by a criminal agreement,⁷⁷ and that, despite its apparent ubiquity, the very compatibility of the notion of a common plan with the statutory framework and its usefulness vis-à-vis article 25 of the Statute is far from being a foregone conclusion.⁷⁸

45. Being aware of the limited and specific purpose of the confirmation of charges stage of the proceedings, the Chamber does not consider it necessary or appropriate, for the purposes of the present decision, to determine or otherwise address the extent to which either the notion of a common plan, or its specific variation used in this case, are compatible with the statutory framework; nevertheless, the Chamber notes that the Appeals Chamber held that there is no formal requirement that certain terminology, particularly labels used by the Prosecutor such as 'common plan' and 'essential contribution', be used by a Pre-Trial Chamber, as that would be tantamount to favour form over substance.⁷⁹ Departing from the model of the *ad hoc* tribunals, the Statute lists in article 25 different modes of liability, thus making it a comprehensive provision, suitable to encompass any and all possible forms and manners of contribution to a crime. Accordingly, the Chamber will assess the evidence in light of the elements of each of the modes of liability listed in that provision, in line with the Appeals Chamber's jurisprudence to the effect that, for the requirement of sufficient notice to be met, it suffices that the charges 'set out the exact sub-provision applicable in article

⁷⁷ Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, [Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction](#), 1 December 2014, ICC-01/04-01/06-3121-Red, para. 445.

⁷⁸ Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Separate Opinion of Judge Adrian Fulford in [Judgment pursuant to Article 74 of the Statute](#), 5 April 2012, ICC-01/04-01/06-2842; Trial Chamber II, *The Prosecutor v. Germain Katanga*, Dissenting Opinion of Judge Christine Van Den Wyngaert in [Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons](#), 21 November 2012, ICC-01/04-01/07-3319-tENG/FRA, paras 38, 43, fn. 59.

⁷⁹ Appeals Chamber, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Judgment on the appeal of Mr Alfred Yekatom against the decision of Trial Chamber V of 29 October 2020 entitled 'Decision on motions on the Scope of the Charges and the Scope of Evidence at Trial', 5 February 2021, ICC-01/14-01/18-874, paras 58-60 (the '[Yekatom and Ngaïssona Judgment](#)').

25 of the Statute and the specific form of participation within that sub-provision’, and notify the suspect ‘of the material facts associated with his or her particular form of participation’.⁸⁰ As a result of this assessment, the Chamber will confirm all those modes of liability charged by the Prosecutor which it will find adequately supported by the evidence before it. When the Prosecutor pleads alternative modes of liability, each of them will be considered in light of the allegations and the supporting evidence; when more than one mode of liability is mentioned in the charges as confirmed, linked by the conjunction ‘and’, this is the result of the Chamber having considered and being satisfied that each of those modes is supported by a specific, distinct factual allegation relating to the conduct underlying that particular charge and that the standard applicable at confirmation is met for each of those modes. This is of course without prejudice to the power of the Trial Chamber to come to a different determination, in light of its own assessment and analysis of the evidentiary basis of the case.

IV. The Chamber’s findings

A. Mr Abd-Al-Rahman’s identity: the link between the nickname ‘Ali Kushayb’ and the suspect

46. During his first appearance, the suspect affirmed, and his Counsel confirmed, that he does not recognise ‘Ali Kushayb’ as his name and that he is to be referred to as Mr Abd-Al-Rahman.⁸¹ On 26 June 2020, the Single Judge rejected the Defence request to amend the name of the case⁸² and, noting that neither the Prosecutor, nor previous Chambers provided any detailed reasons for using the name ‘Ali Kushayb’ as a short form when referring to Mr Abd-Al-Rahman, or for deciding to include this ‘nickname’ or ‘alias’ in the name of case ICC-02/05-01/07 in the context of the issuance of either the First or the Second Warrant of Arrest, decided that the suspect would have to be addressed as ‘Abd-Al-Rahman’ or ‘Mr Abd-Al-Rahman’ (as opposed to ‘Ali Kushayb’) in court proceedings, official court documents and filings, as well as in public information material.⁸³

⁸⁰ [Yekatom and Ngaïssona Judgment](#), para. 1.

⁸¹ [Transcript of hearing](#), ICC-02/05-01/20-T-001-ENG, p. 3, lines 19-23 and p. 5, line 15.

⁸² [Requête aux fins de modification du nom porté au dossier de l’affaire ICC-02/05-01/20](#), 17 June 2020, ICC-02/05-01/20-1.

⁸³ [Decision on the Defence request to amend the name of the case](#), ICC-02/05-01/20-8.

47. On 2 November 2020, the Chamber observed that (i) the link between Mr Abd-Al-Rahman and the nickname or alias ‘Ali Kushayb’, and the reasons warranting the reference of the latter to the suspect, did not form the specific subject matter of any of the materials initially disclosed by the Prosecutor; and (ii) various spelling alternatives of the name ‘Ali Kushayb’ appear in many of the disclosed items, including several witness statements. In light of the fundamental importance to determine the extent to which references to ‘Ali Kushayb’ can or should be read as referring to the suspect, the Chamber decided to instruct the Prosecutor (i) to identify all items relied upon for the purposes of establishing this link and to disclose them as one single, discrete package; and (ii) to accompany this disclosure with submissions, exhaustively illustrating the way in which each of the disclosed items would support the conclusion that the suspect is, or was at the time of the relevant events, (also) known as ‘Ali Kushayb’.⁸⁴

48. On 7 December 2020, the Chamber received the ‘Prosecution’s submissions on the evidence demonstrating that Ali Abd-Al-Rahman is also known as Ali Kushayb pursuant to ICC-02/05-01/20-196’,⁸⁵ setting out ‘the evidence that the Prosecution has identified which establishes that references to Ali Kushayb relate to Mr Abd-Al-Rahman’. The Defence responded on 17 December 2020⁸⁶ and also disclosed evidentiary material relevant to the matter before the Confirmation Hearing.⁸⁷

49. The Chamber notes the abundant and varied nature of the material submitted by the Prosecutor in support of the contention that, at the time of the relevant events, the suspect was known, and referred to, as ‘Ali Kushayb’. It includes *inter alia* (i) a number of testimonies of (former) members of the Army or of the Sudanese secret service, who would be familiar with the appearance, background and actions of the man known as ‘Ali Kushayb’ by reason of their function and role, and some of whom either explicitly refer to ‘Ali Kushayb’ as the ‘nickname’ attributed to the suspect (like Witnesses P-0117, P-0012, P-0878, P-0905, P-0912 and P-0921), or juxtapose the name ‘Abd-Al-Rahman’ and ‘Ali Kushayb’ as interchangeable (Witness P-0131); (ii) testimonies of people originating from, or living in, the same area as the man they and others would

⁸⁴ [Decision on the Prosecutor’s Request for Postponement of the Confirmation Hearing and related deadlines](#), ICC-02/05-01/20-196.

⁸⁵ [ICC-02/05-01/20-224](#) with Annex A.

⁸⁶ [Réponse aux Observations ICC-02/05-01/20-224](#), ICC-02/05-01/20-235.

⁸⁷ See Defence List of Evidence.

know, refer and see referred to as ‘Ali Kushayb’, some of whom would also be familiar with ‘Abd-Al-Rahman’ being that person’s real name (Witness P-0879); (iii) documents emanating from Sudanese authorities referring to one ‘Ali Muhammad Ali Abd-Al-Rahman’ as the beneficiary of supplies of vehicles and weapons, commented upon by Witness P-0769 as this individual being known as Ali Kushayb; (iv) signal communications from the Sudanese Central Reserve Forces likewise referring to ‘Ali Mohamed Ali Abdelrahman’; (v) a number of pictures and documents, of various origin and quality; (vi) an audio file retrieved from Mr Abd-Al-Rahman’s phone, seized upon his arrest, featuring a poem celebrating a ‘hero Kosheib’; (vii) two videos provided by the suspect to the Prosecutor, featuring himself making a statement and dating back to shortly before his appearance before the Court.

50. During the Confirmation Hearing, the Defence challenged the material submitted by the Prosecutor under several profiles, in an attempt to show, based both on the evidentiary material relied upon by the OTP and a few own evidentiary items, that the conclusion that the person in the custody of the Court is the individual referred to as ‘Ali Kushayb’ in the context of this case would not be adequately established to the relevant standard.

51. The Chamber agrees with the Defence that not all of the material relied upon by the Prosecutor appears suitable to meaningfully substantiate the connection between the suspect and the nickname ‘Ali Kushayb’. Particularly weak, in this sense, appear (i) the pictures and pictures of documents, the quality, origin or age of which makes it impossible for the Chamber to determine that they actually pertain to the suspect; (ii) documents of uncertain origin, such as a purported ‘curriculum vitae’; (iii) testimonies based more on hearsay and common knowledge than on direct information (such as Witness P-0884’s). Furthermore, no conclusive inference can indeed be made either from those testimonies assuming the nickname nature of ‘Ali Kushayb’ (or a similar version of it) as a fact, in the absence of a specific connection to the name ‘Abd-Al-Rahman’ or of any other elaboration, or from publicly available documents where either only the name ‘Ali Kushayb’ appears, or the names ‘Abd-Al-Rahman’ and ‘Ali Kushayb’ are connected without explanation. Similarly, such an inference cannot be drawn from documents post-dating the Court’s arrest warrants – such as those emanating from Sudanese authorities – in which the connection seems simply to mirror and echo the Prosecutor’s own choices as to the naming of the suspect and remains

stated without further explanation. Also, the fact that Mr Abd-Al-Rahman's phone contained an audio file of a poem featuring a 'hero Kosheib' is *per se* neutral as to whether this would refer to the suspect.

52. Furthermore, the Prosecutor's own presentation of some of the items incurs in such inaccuracies as to possibly result in being misleading. Nowhere is this more apparent than in the argument developed on the basis of the testimony of Witness P-0123: whilst, in the Prosecutor's submission, Witness P-0123 would have personally and directly spoken to 'Ali Kushayb' on numerous occasions, his testimony only refers to this Witness's unilateral (and unsuccessful) attempts at doing so. The Chamber acknowledges that witnesses across the board show a significant amount of consistency in describing the identifying features of an individual known, or identified to them, as 'Ali Kushayb'; however, in the absence of a specific connection between the nickname and the patronym, this consistency is not sufficient to substantiate and support the conclusion that Mr Abd-Al-Rahman and 'Ali Kushayb' are one and the same person. As also remarked upon by the Defence, the entire Section b of the Prosecutor's 7 December 2020 submissions on identity (replete with the same quotes as appearing in other sections) amounts to a large extent to a circular argument.

53. By the same token, however, the Chamber notes that the evidence relied upon by the Prosecutor in maintaining that the suspect and the man referred to in the testimonies as 'Ali Kushayb' are one and the same person also includes items providing better and stronger support for the conclusion. Some testimonies do make an explicit and credible connection between the nickname and the name 'Abd-Al-Rahman', pointing to the witnesses' awareness of the connection between the two; open source documents (such as a newspaper interview) also rely on the connection.

54. The Chamber finds that the circumstances surrounding and following the suspect's appearance before the Court are also significant. First, and fundamentally, it was Mr Abd-Al-Rahman's own decision to surrender. Neither in the context of his arrest, nor during his appearance before the authorities of the Central African Republic did Mr Abd-Al-Rahman mention or otherwise raise the issue of mistaken identity: all these acts were undertaken on the basis of the First and the Second Warrants of Arrest, both using the name 'Ali Kushayb' to identify the suspect. Furthermore, one of the two videos acquired by the Prosecutor in the context of the preparation for the surrender shows Mr

Abd-Al-Rahman using the name 'Ali Kushayb' when introducing himself, with no hint or attempt at a denial, *distinguo* or additional qualification.

55. The Chamber is not persuaded that, as stated by the Defence in its submissions dated 17 December 2020 and at the Confirmation Hearing, this would exclusively be the consequence of Mr Abd-Al-Rahman's need to be consistent with the choices made by the Court in its own documents. In the view of the Chamber, it is highly unlikely that an individual opting to surrender only because honestly believing that it has been befallen by an instance of casual and unfortunate homonymy, this purportedly being the only element connecting him with a suspect referred to as 'Ali Kushayb', would choose this approach. Also, the Chamber considers that there is no impropriety in relying on information relating to the circumstances of Mr Abd-Al-Rahman's surrender, as emerging either from the Registry's reports or from material emanating from and provided by the suspect in connection with his arrest, for the purposes of determining that the suspect is the man referred to as 'Ali Kushayb'. The Registry's reports are official documents emanating from an organ of the Court in the exercise of the specific responsibilities vested in it in accordance with the Statute: as such, they are certainly suitable to be relied upon for the purpose of establishing information which constitutes their subject matter without this impacting or otherwise affecting the neutrality of the Registry. As to the videos created by the suspect, the Chamber is not persuaded by the Defence's submissions at the Confirmation Hearing to the effect that the Chamber's reliance on them would be contrary to the rights of the suspect, in particular in light of the fact that Mr Abd-Al-Rahman would not have benefitted from legal assistance in the context of their recording and subsequent handover to the Office of the Prosecutor. Whilst obviously not decisive on their own, the videos are suitable to be considered by the Chamber in the context of its overall assessment of the evidence submitted in support of the issue of the identity and the conduct of the suspect, and specifically for the purposes of establishing the plausibility of the line of defence to the effect that the man in the custody of the Court is the wrong one for this case.

56. Neither is the Chamber satisfied by the additional submissions presented by the Defence at the Confirmation Hearing, revolving in essence around two main arguments: (i) the meaning of 'Kushayb', a name which would refer to a sort of alcohol and be therefore incompatible with the personal beliefs and traits of character of Mr Abd-Al-Rahman; (ii) a number of inconsistencies relating to physical features, circumstances

of his biography or professional affiliations, as surfacing from some documents (including one emanating from the Office of the Attorney general of Sudan) and the narrative of a number of witnesses. The Chamber finds that none of these lines of argument is strong enough as to disturb its conclusion.

57. As regards the meaning of ‘Kushayb’, the evidentiary basis relied upon by the Defence is limited. The few available items are not sufficient to conclude that the word would exclusively refer to alcohol consumption. Rather, there is evidence suggesting that it is meant to evoke strength and courage, as opposed to a dangerous addiction, which would make it suitable to be attributed to an individual engaged in the type of events as those underlying the charges; a position which is shared at the Confirmation Hearing by some of the victims admitted to the case specifically requested to voice their views on the matter. It is therefore unnecessary for the Chamber to address in detail the contents of the medical report relied upon by the Defence for the purpose of substantiating the alleged incompatibility between Mr Abd-Al-Rahman and the consumption of alcoholic beverages.

58. As regards the inconsistencies detected in some of the statements in respect of personal features, biographical information or details of the professional affiliations held by Mr Abd-Al-Rahman at various points in time, and their respective chronological placing, the Chamber notes that, whilst some of them do seem to exist, they only arise from a very limited portion of the evidentiary basis of the case. As such, they are unsuitable to weaken the persuasive effect entailed by the remarkable degree of consistency shown by a considerable wealth of witnesses’ narrative as to the features, circumstances, role and deeds of an individual named ‘Abd-Al-Rahman’, also known as ‘Ali Kushayb’ at the times and locations relevant to the charges. It appears of particular significance (i) that the Defence neither challenges the fact that the Mr Abd-Al-Rahman in the custody of the Court opened a veterinary pharmacy in Garsila upon his retirement from the Army, nor offers an alternative narrative as to the circumstances where Mr Abd-Al-Rahman would have found himself at the time of the charged events, but only in respect of the period starting in 2005, which would have seen him as a newly recruited member of the police; (ii) that a significant number of witnesses link the individual they initially knew as a retired military man, owner of a pharmacy in Garsila, to the one involved in the charged events; (iii) that the Defence has not challenged this

link, except as regards minor profiles of inconsistency affecting an extremely limited portion of the testimonies relied upon, or on the basis of isolated documents.

59. In particular, the Defence repeatedly referred to one document, which would indicate that an individual named ‘Abd-Al-Rahman’ would have joined the ranks of the police in 2005 as a junior recruit: even assuming that this refers to the suspect (which, in light of the fact that the name ‘Abd-Al-Rahman’ emerges from the evidence as quite common, is not a foregone conclusion), it remains that it refers to a period subsequent to the events of the charges and remains isolated. This is also the case for the Defence’s submissions as to the Prosecutor’s theory on the specific role played by various actors of the conflict in Darfur at the relevant time (in particular, the role of the People’s Defence Forces and their relationship to the *Janjaweed* and the Sudanese Army), or the suspect’s alleged (lack of) relationship to and with each of them. It will be the responsibility of the Trial Chamber, in the context of its assessment of the admissibility and reliability of the entire evidentiary basis, to detect and closely analyse each and every alleged instance of inconsistency, and their impact on the Prosecutor’s narrative and theory of the case.

60. Accordingly, the Chamber is satisfied that the material before it allows to conclude that the person currently in the custody of the Court for this case, who refers to himself as Ali Muhammad Ali Abd-Al-Rahman, decided in June 2020 to surrender to the Court being persuaded that he was the person addressed in the First and the Second Warrants of Arrest, both of which rely on the connection between the name Abd-Al-Rahman and the nickname ‘Ali Kushayb’, and in the determination to come and defend himself from the charges brought against him.

B. Contextual elements of war crimes and crimes against humanity: the armed conflict and the attack on the civilian population

61. The events in this case took place in the Wadi Salih and Mukjar localities, situated in the Darfur region, close to the western border of Sudan.⁸⁸ At all relevant times, an armed conflict not of an international character was ongoing in Darfur. This is not

⁸⁸ At the time relevant for this case, both the Wadi Salih and Mukjar localities were located in the state of West Darfur. Since then, the administrative boundaries have been redrawn and both localities are now in Central Darfur.

contested by the parties⁸⁹ and abundantly demonstrated by the evidence. The nature of this armed conflict was a (counter)insurgency. On the side of the insurgents, the two main organised armed groups were the Sudan Liberation Movement/Army ('SLM/A') and the Justice and Equality Movement ('JEM'). On the side of the Government of Sudan ('GoS'), the forces involved were the Sudanese Armed Forces ('SAF') and the Sudanese Police ('Police'), as well as several auxiliary forces, including the Popular Defence Forces ('PDF'), the Central Reserve Forces ('CRF'), and the Popular Police Forces ('PPF') (together, the 'GoS Forces'). The government also relied on paramilitary forces, commonly referred to as *Janjaweed*, who were integrated into the government's command and control mechanisms to varying degrees (the 'Militia/*Janjaweed*'). The armed violence was protracted and took place in a vast geographical area.

62. The evidence further supports the Prosecutor's submission that, as part of its counterinsurgency strategy, the GoS adopted a policy to attack certain civilian populations of Darfur, including the Fur, the Zaghawa and the Masalit tribes (the 'State Policy'). The policy was initiated following a number of successful military operations by the insurgents, most notably the 25 April 2003 attack on the El Fashir airport.

63. The immediate purpose of the State Policy was to establish control over the areas inhabited by the rebellious tribes and to deny the insurgents their civilian support base. This was achieved by committing indiscriminate acts of violence as well as by destroying the homes of villagers perceived as associated with the insurgents and depriving them of their means of living. By adopting this scorched earth policy, thousands of civilians, including women and children, were forced to flee their places of residence and seek refuge in camps for internally displaced people ('IDPs') inside Sudan as well as in neighbouring Chad.

64. The State Policy was implemented by military as well as civilian authorities at both central and local levels. In the Wadi Salih and Mukjar localities, the civilian population that was targeted belonged mainly to the Fur tribe. Government representatives branded

⁸⁹ See [ICC-02/05-01/20-291-AnxA](#) annexed to [Joint Prosecution and Defence submission on agreed facts](#), 4 March 2021, ICC-02/05-01/20-291.

members of the Fur tribe as rebels and declared that their belongings had become spoils of war.

65. Many of the crimes that were perpetrated pursuant to the policy were committed by the Militia/*Janjaweed*. As noted, some of the Militia/*Janjaweed* were integrated in the SAF chain of command. Those who were not often acted with the authorisation of or in close consultation with the GoS. In many instances, crimes were committed during joint operations in the presence of the official GoS Forces. The GoS also did little to nothing to prevent or stop the violence by the Militia/*Janjaweed*. On the contrary, the GoS continued to supply the Militia/*Janjaweed* with weapons, funds, and other support, despite being aware of widespread atrocities against civilians. No serious efforts were made to discipline the Militia/*Janjaweed* or to hold those who perpetrated crimes against Fur civilians to account.

66. Furthermore, the GoS made no genuine attempt to protect the Fur civilian population. During counterinsurgency operations villagers were attacked and sometimes bombed indiscriminately. In many cases, villages were violently attacked even though the local population offered no resistance. Unarmed and defenceless persons were summarily executed and other acts of violence were perpetrated against them. After hostilities had ended, it was often made impossible for civilians to return to their homes; when they did return, many found that their houses and crops had been destroyed and that their livestock and belongings had been stolen.

67. Based on the above, the Chamber finds that there are substantial grounds to believe that, in addition to an armed conflict not of an international character, a widespread or systematic attack directed against the Fur civilian population was taking place in the Wadi Salih and Mukjar localities during all relevant times for the charges.

68. The Chamber also finds that there are substantial grounds to believe that Mr Abd-Al-Rahman was aware of the factual circumstances that established the existence of an armed conflict and that he knew and intended his conduct to be part of a widespread or systematic attack directed against the Fur population of the Wadi Salih and Mukjar localities. As detailed in sections C-F below, this is evident from his interactions with GoS representatives, his own utterances, as well as by his senior position in the hierarchy of the Militia/*Janjaweed* and his personal involvement in the preparation and execution of the operations that were part of the attack.

C. Mr Abd-Al-Rahman's individual criminal responsibility

1. Mr Abd-Al-Rahman's status and role at the time relevant for the charges

69. Before addressing the charges presented by the Prosecutor, the Chamber lays out its conclusions as regards the status and role of Mr Abd-Al-Rahman at the time relevant for the charges, namely between August 2003 and March 2004. These facts are relevant for all the charges presented, as they form an integral part of the facts considered by the Chamber when addressing the Prosecutor's allegations that Mr Abd-Al-Rahman is individually criminally responsible under the Statute for the crimes charged (sections D-F below).

70. The evidence demonstrates that, both before and throughout the times relevant to the charges, it was common knowledge among the population that Mr Abd-Al-Rahman held the position of *agid al-ogada* ('colonel of colonels' or 'commander of the commanders') of the Militia/*Janjaweed* in the Wadi Salih and Mukjar localities, as supported by the fact that the overwhelming majority of the witnesses refer to him in that capacity; when they do not use that specific title as such, they still describe him as the head, the highest leader, chief and commander of the Militia/*Janjaweed*, as well as the highest ranking *agid* in those localities. One witness also indicates that Mr Abd-Al-Rahman was appointed to that senior leadership position prior to the period relevant to the charges, as early as in March 2003, by senior GoS Officials, namely Ja'afar Abd-Al-Hakam, Commissioner of Garsila, Ali Uthman Muhammad Taha, Vice President of Sudan, and Abdel Raheem Muhammad Hussein, Sudan's Minister of the Interior. On several occasions, Mr Abd-Al-Rahman also publicly introduced himself as *agid al-ogada* of the Militia/*Janjaweed*, particularly when visiting and delivering speeches in various towns and villages in the Wadi Salih and Mukjar localities throughout the relevant period: by his own acts and words, Mr Abd-Al-Rahman, who was often accompanied by a security escort, would instil such fear in the inhabitants of these localities that several witnesses report that the population was terrified by him. Witnesses also report that he was often seen carrying an axe-like object or stick, of a type 'you would see a military leader or someone important holding'.

71. In this capacity, Mr Abd-Al-Rahman also instilled deference among the Militia/*Janjaweed*, who saluted him as their commander and promptly obeyed his

orders, and held authority over lower ranking Militia/*Janjaweed* commanders (*agids*) operating in the region, including his four deputies Al-Dayf Samih, Muhammad Adam Bonjouse, Hamdan Umar and Hamuda Hamdan. At all times relevant to the charges, including on the ground during armed operations, Mr Abd-Al-Rahman exerted such authority by issuing orders and instructions to various subordinate Militia/*Janjaweed* leaders, including his deputies, as well as members of the GoS Forces accompanying him, such as elements of the SAF, the PDF and the CRF; they then conveyed his orders and instructions to the men under their command for implementation.

72. Based on his role of *agid al-ogada*, in August 2003 Mr Abd-Al-Rahman was also appointed, upon suggestion of the Commissioner of Garsila, Ja'afar Abd-Al-Hakam, as the head of the Mujahidin Committee, created to recruit and arm the Militia/*Janjaweed*. Mr Abd-Al-Rahman supervised the training of new recruits of the Militia/*Janjaweed*, particularly by visiting a training ground in Mukjar, where he would arm and select them at graduation ceremonies, and provided the men under his command with weapons, ammunitions and uniforms, which he had received from GoS Officials, including elements of the SAF and the PDF. Mr Abd-Al-Rahman publicly acknowledged his role of supplier of military equipment, and personally coordinated and, at all times relevant to the charges, participated in distribution operations in several localities, particularly at the SAF base in Garsila. In addition, Mr Abd-Al-Rahman also provided funding to the Militia/*Janjaweed*, who came to and queued in front of his pharmacy in Garsila, which became their meeting point where they would collect their salaries and ID cards.

73. Mr Abd-Al-Rahman had affiliations and connections with the GoS and several of its Officials, whom he welcomed, greeted and met on a number of occasions when governmental delegations would visit the area in order to discuss with local and military leaders the mobilisation of the Militia/*Janjaweed*. In particular, Sudan's State Minister for the Ministry of the Interior Ahmad Muhammad Harun ('Mr Harun') travelled to several locations in order to disseminate and exhort to implement the GoS State Policy by calling upon the armed forces and the Militia/*Janjaweed* to wage war against the Fur rebels who had created an opposition movement. Mr Abd-Al-Rahman, who repeatedly personally expressed his adherence to the State Policy in public by calling for the extermination of the Fur people, whom he assimilated to the rebels, was also present at meetings where Mr Harun delivered speeches, for instance in Mukjar in August 2003,

in Garsila in February 2004 and again in Mukjar in February 2004. At one of these meetings, Mr Harun publicly recognised the Militia/*Janjaweed* as government forces and directly addressed Mr Abd-Al-Rahman ordering him to implement the State Policy. Mr Harun was in contact with and issued instructions to Mr Abd-Al-Rahman also during the charged events, in the course of which he contributed by his own words and conduct to the furtherance of the State Policy, as detailed in sub-sections D-F below.

2. Grounds raised by the Defence to exclude Mr Abd-Al-Rahman's individual criminal responsibility

74. During the Confirmation Hearing, the Defence reiterated⁹⁰ that Mr Abd-Al-Rahman cannot be held criminally responsible for any of the crimes charged because he acted on the mistaken perception that the victims could be lawfully attacked.⁹¹ The Defence claims that this misperception was due to the fact that Mr Abd-Al-Rahman has a low level of education, never received any training in international humanitarian law and to the fact that Sudanese law made it a capital offence to support the rebels. Furthermore, the State Policy and the narrative transmitted by the GoS, describing the Fur population as rebels, would have reinforced Mr Abd-Al-Rahman's mistaken perceptions. According to the Defence, Mr Abd-Al-Rahman could not have understood what constitutes due process and that he was not authorised to engage in the charged conduct, also because it would be very difficult to apply the principle of distinction in the context of counterinsurgency warfare. In the view of the Defence, these mistakes of fact and/or law negate the mental elements required by the charged crimes pursuant to article 30(3) of the Statute and constitute grounds to exclude Mr Abd-Al-Rahman's individual responsibility under article 32(1) and/or (2) of the Statute.

75. In addition, in the view of the Defence, Mr Abd-Al-Rahman would have acted on the mistaken perception that he was obliged to attack the civilian population by virtue of Sudanese law and repeated orders from GoS authorities, including from Mr Harun. This mistake of law, the fact that Mr Abd-Al-Rahman was under a legal obligation to obey orders from competent public authorities, and the fact that refusal to obey such orders could incur the capital punishment under the People's Armed Forces Acts 1986

⁹⁰ [Notification des motifs exonérateurs de responsabilité plaidés par la Défense](#), ICC-02/05-01/20-395 with Annex A.

⁹¹ [Transcript of hearing](#), ICC-02/05-01/20-T-009-Red-ENG, 26 May 2021, p. 5, line 10 to p. 34, line 12.

would constitute a ground to exclude Mr Abd-Al-Rahman's individual responsibility under articles 32(2) and 33 of the Statute. The Defence submits that, due to the abovementioned lack of education and training, Mr Abd-Al-Rahman could not have known or understood whether or not the orders to attack the civilian population that he allegedly received from Sudanese authorities, including from Mr Harun, were lawful.

76. The Chamber begins by noting that, in relation to more than half of the counts, the suspect is not required to have made a legal evaluation of the status of the victims. In particular, as the Elements of Crimes make plain in relation to the war crimes of murder – article 8(2)(c)(i)-1, cruel treatment – article 8(2)(c)(i)-3, torture – article 8(2)(c)(i)-4, outrages upon personal dignity – article 8(2)(c)(ii), and destroying or seizing the enemy's property – article 8(2)(e)(xii), the Prosecutor is only required to show that the perpetrator was aware of the factual circumstances that establish the protected status of the persons or objects that are the subject of these crimes. It is therefore not possible to invoke a mistake of law in relation to these charges.⁹² Moreover, the Appeals Chamber has confirmed that, in relation to the war crime of rape – article 8(2)(e)(vi), no status requirement applies.⁹³ Furthermore, in relation to the war crime of pillaging – article 8(2)(e)(v), the Chamber notes that the status of the individuals whose properties were stolen is irrelevant: all that matters is their lack of consent and the absence of a military justification for taking the goods. Accordingly, in relation to these crimes, Mr Abd-Al-Rahman's alleged lack of understanding of the laws of war is irrelevant.

77. In relation to the remainder of the charged crimes, the Chamber considers that the suspect need not have been familiar with the technical legal definition of who qualifies as a civilian under humanitarian law. It suffices that he was aware that the notion of 'civilian' relates to someone who is not involved in military matters and does not engage in acts of warfare.⁹⁴ There is no indication that Mr Abd-Al-Rahman lacked such understanding.

⁹² See, *ceteris paribus*, Pre-Trial Chamber I, *The Prosecutor v. Bahr Idriss Abu Garda*, [Decision on the Confirmation of Charges](#), 8 February 2010, ICC-02/05-02/09-243-Red, para. 94.

⁹³ Appeals Chamber, *The Prosecutor v. Bosco Ntaganda*, [Judgment on the appeal of Mr Ntaganda against the 'Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9'](#), 15 June 2017, ICC-01/04-02/06-1962, para. 66.

⁹⁴ Pre-Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, [Decision on the confirmation of charges](#), 29 January 2007, ICC-01/04-01/06-803-tEN, para. 316.

78. In relation to the Defence's claim that Mr Abd-Al-Rahman lacked the necessary education or training to understand that the victims of the three charged incidents qualified as civilians or otherwise had protected status, the Chamber notes that, apart from a general reference to a report by the United States Institute of Peace ('UPIS'), which is not in evidence, the Defence has not referred to any specific evidentiary material. Contrary to what the Defence seems to suggest, the Prosecutor was not required to submit evidence showing that Mr Abd-Al-Rahman received such training. Although the burden to prove the required mental elements always remains with the Prosecutor, the latter is not called upon to rebut claims of mistakes of law or fact that are frivolous or merely hypothetical. It is thus incumbent upon suspects invoking a mistake of fact or law to identify sufficient evidence to properly raise the issue.

79. Given that it is not contested that Mr Abd-Al-Rahman spent a considerable part of his career in the military as a non-commissioned officer, the Chamber finds it implausible that he would never have received any training on this subject. The Chamber notes, in this regard, that the report by Colonel Strite Murnane⁹⁵ does not support the proposition that no proper training programme in the laws of war existed in Sudan. On the contrary, her report quotes the abovementioned UPIS report as indicating that junior officers as well as non-commissioned officers were the recipients of such training. The fact that such training may have been based on locally produced training materials does not, as such, provide any indication as to its quality.

80. The Chamber also rejects any suggestion that Mr Abd-Al-Rahman could have mistakenly believed that the victims of this case had lost their protected status because they were directly participating in the hostilities or exercised a continuous combat function. It is not clear from the Defence's rather convoluted submissions whether it actually advanced such a claim. Indeed, it would be somewhat contradictory in light of its abovementioned argument that Mr Abd-Al-Rahman lacked any understanding of the principle of distinction. In any case, the Chamber has not been presented with any evidence to support such an argument.

81. The Defence submits, in this regard, that Mr Abd-Al-Rahman erroneously believed that the victims had lost their protected status because they were branded as (supporters

⁹⁵ This report by an expert in international humanitarian law was commissioned by the Defence for the purpose of the confirmation proceedings and is included in the Defence List of Evidence.

of) rebels and refers to certain provisions from Sudan's Criminal Act 1991 and the People's Armed Forces Act 1986 to buttress this argument. The Chamber considers that (i) it has not been established that Mr Abd-Al-Rahman was actually familiar with these laws; and (ii) the Defence's argument that Mr Abd-Al-Rahman could not have known about international humanitarian law because of his low level of education and lack of military training presumably also applies to domestic legal provisions. Even if Mr Abd-Al-Rahman genuinely believed that these national laws allowed him to kill, ill-treat, and sexually abuse the alleged victims of this case, this would not negate the required mental element of the relevant provisions under the Statute. It could therefore not exclude his criminal responsibility.

82. As regards the suggestion that Mr Abd-Al-Rahman may have been induced in error because the GoS had declared all Fur to be rebels, the Chamber observes that the fact that someone belongs to or supports a rebel movement does not automatically cause them to lose their protected status as a civilian. The fact that the GoS had labelled the Fur as rebels could therefore not supplant Mr Abd-Al-Rahman's own awareness that none of the individuals that were targeted were combatants or otherwise participated in hostilities.

83. The Chamber notes that the Defence relies on the report by Colonel Strite Murnane to suggest that it is often difficult to distinguish between insurgents and civilians in the context of counter-insurgency warfare. While this may be true in general, this is hardly relevant to the facts of this case. Indeed, the Defence has not pointed to any specific factual indication that the victims were carrying weapons or could otherwise have been mistaken for being engaged in hostilities. Indeed, the majority of victims in this case appear to have been in captivity or otherwise under the control of the GoS and/or Militia/*Janjaweed* at the time the alleged crimes were committed against them.

84. The Chamber therefore concludes that it has not been shown that Mr Abd-Al-Rahman lacked the necessary awareness of the law or the facts that established the civilian status of the victims.

85. Finally, the Defence relies on alleged orders by Mr Harun as a ground to exclude Mr Abd-Al-Rahman's criminal responsibility. The Chamber is not persuaded by this argument. First, it has not been established that Mr Abd-Al-Rahman had a legal obligation to obey Mr Harun's orders. The Defence's reference to article 4 of the

People's Armed Forces Act 1986 does not suffice in this regard, because it is unclear if it applied to Mr Abd-Al-Rahman. Moreover, it appears from the evidence that Mr Abd-Al-Rahman did not always obey orders from Mr Harun, as is illustrated by Witness P-0188's statement. Second, the evidence reveals that Mr Abd-Al-Rahman enjoyed a level of discretion as to how to implement the instructions. Third, there appear to be no references to committing cruelty or sexual abuse in Mr Harun's utterances.

D. Crimes committed in Kodoom, Bindisi and surrounding areas between 15 and 16 August 2003

86. The Chamber's findings in relation to the crimes allegedly committed in Kodoom, Bindisi and surrounding areas between 15 and 16 August 2003 (which form the basis of Counts 1 to 11) are based on the evidence relied upon by the Prosecutor as referenced in the relevant sections of the PCB, and particularly on the statements and transcripts of interview of Witnesses P-0007, P-0011, P-0012, P-0015, P-0029, P-0085, P-0106, P-0131, P-0717, P-0757, P-0816, P-0834, P-0868, P-0878, P-0882, P-0913, P-0917, P-0918, P-0921.

87. The evidence establishes that, in July or early August 2003, members of the rebel armed groups carried out an attack on Bindisi police station and other municipality buildings, during which they killed a man and abducted several others. Shortly after, Mr Abd-Al-Rahman was put in charge to direct an attack against the Bindisi locality by Mr Harun, who also provided vehicles and weapons for that purpose: Mr Abd-Al-Rahman arranged the attack accordingly, including by setting its time and route and gathering the necessary number of Militia/*Janjaweed*. On 15 August 2003, Mr Abd-Al-Rahman led the planned armed operation during which the Militia/*Janjaweed* and GoS Forces advanced towards and attacked several locations around Kodoom and Bindisi with a predominantly Fur population following his instructions: in particular, Mr Abd-Al-Rahman ordered to move from Tiro to Kodoom and, later, to proceed from Merly to Bindisi market, situated in the northern part of the town, where his forces took up positions. There, following new instructions he had received, Mr Abd-Al-Rahman took the decision to attack the southern part of the town on the next day.

88. Heavily armed ground forces composed of elements of the Militia/*Janjaweed* and GoS Forces led by Mr Abd-Al-Rahman entered both Kodoom and Bindisi either on-board of Landcruiser vehicles or on horses, camels and on foot. Upon his arrival in

Kodoom on 15 August 2003, Mr Abd-Al-Rahman used a whistle to distribute his men in different areas of the village and ordered them to ‘wipe out and sweep away’: the attackers thus chased and shot at the inhabitants from all directions, killing several of them. Events unfolded similarly over the two-day attack on Bindisi on 15 and 16 August 2003, during which Mr Abd-Al-Rahman was in the front line of Militia/*Janjaweed* and GoS Forces, whom he was directing and distributing in different directions. Upon Mr Abd-Al-Rahman’s orders, the Militia/*Janjaweed* and GoS Forces assaulted the population by insulting, chasing and opening fire against the civilians, either wounding or killing several and causing the rest of them to flee.

89. In Bindisi and surrounding areas, some elements of the Militia/*Janjaweed* and GoS Forces pursued and captured a number of civilians during their flight, and then mistreated and inflicted serious physical and mental injury upon them: (i) the Militia/*Janjaweed* and GoS Forces caught a woman whilst she was running away and cut off her arm in order to rob her of jewellery; (ii) a group of around 105 fleeing civilians was caught by elements of the Militia/*Janjaweed* and GoS Forces, who then separated the men from the women: the former were searched and beaten while being labelled, *inter alia*, as slaves and servants, and three of them were killed; the latter were stripped of their clothes, robbed and beaten by the attackers; (iii) a group of around 15 fleeing civilians was also caught by elements of the Militia/*Janjaweed* and GoS Forces and similarly mistreated; one of the attackers took a baby from a woman and threw him in the air. Throughout the attack on Bindisi, and during these events in particular, elements of the Militia/*Janjaweed* and GoS Forces raped 16 women.⁹⁶

90. The Chamber notes that the Prosecutor alleges that one additional woman was raped by the Militia/*Janjaweed* and GoS Forces in Bindisi.⁹⁷ However, the supporting evidence only consists of the statement of a witness who merely heard reports, and thus indirectly came to know, that this woman was raped during the attack. In light of the fact that such evidence is indirect and too vague, which renders it impossible to ascertain the identity of the alleged victim and/or perpetrator(s), as well as the factual

⁹⁶ See Annex 1 to the present decision.

⁹⁷ Number 9 in ICC-02/05-01/20-325-Conf-Anx1B *annexed to* the DCC and in ICC-02/05-01/20-346-Conf-AnxA8 *annexed to* the PCB (public redacted version notified on 21 May 2021, [ICC-02/05-01/20-346-AnxA8-Red](#)).

circumstances of the alleged crime, the Chamber finds that the factual allegation of the Prosecutor regarding the rape of this woman is not established to the relevant standard.

91. Over the course of the attack on Kodoom and Bindisi, groups of the Militia/*Janjaweed* and GoS Forces pillaged houses and shops, specifically targeting those belonging to the Fur inhabitants, as well as public places in Bindisi such as the market, the hospital, the *zakat* office and the municipality building, and looted all sorts of goods and personal belongings, including medicine, food supplies, furniture and livestock, which they brought away on board of their vehicles and using camels, horses and donkeys. The looters acted upon Mr Abd-Al-Rahman's orders and instructions. Also upon Mr Abd-Al-Rahman's orders, the Militia/*Janjaweed* and GoS Forces destroyed, particularly by setting them on fire, houses and buildings both in Kodoom and Bindisi, where the attackers also destroyed shops, warehouses where food supplies were stored, a mosque with its Islamic books, the police station and the house of the chief of police.

92. As a result of the attack on Kodoom and Bindisi, 51 persons, who were predominantly Fur civilians not taking part in hostilities or persons *hors de combat*, were killed;⁹⁸ those who survived were forced to leave their hometowns and flee, first by hiding in other parts of these towns and in their surroundings, for instance into nearby fields, forests and mountains, and eventually by finding refuge in other locations, particularly in Mukjar.

93. The Chamber notes that the Prosecutor alleges that one additional person was killed in Bindisi, described as an '[u]nidentified female (elderly woman)'.⁹⁹ However, the supporting evidence only consists of the statement of a witness who merely indicates having found the corpse of an old woman near Bindisi market after the attack. In light of the fact that such evidence is too vague to allow ascertaining the identity of the alleged victim and/or perpetrator(s), as well as the factual circumstances of the alleged crime, the Chamber finds that the factual allegation of the Prosecutor regarding the killing of this person is not established to the relevant standard.

⁹⁸ See Annex 1 to the present decision.

⁹⁹ Number 50 in [ICC-02/05-01/20-325-Anx1A-Corr](#) annexed to the DCC and in ICC-02/05-01/20-346-Conf-AnxA7 annexed to the PCB (public redacted version notified on 21 May 2021, [ICC-02/05-01/20-346-AnxA7-Red](#)).

94. In light of the available evidence, the Chamber considers that the objective elements of the following crimes are sufficiently established to the relevant standard: (i) intentionally directing attacks against the civilian population as such as a war crime pursuant to article 8(2)(e)(i) of the Statute (Count 1); (ii) murder as a crime against humanity and a war crime pursuant to articles 7(1)(a) and 8(2)(c)(i) of the Statute (Counts 2-3); (iii) pillaging as a war crime pursuant to article 8(2)(e)(v) of the Statute (Count 4); (iv) intentionally destroying the property of an adversary as a war crime pursuant to article 8(2)(e)(xii) of the Statute (Count 5); (v) other inhumane acts as a crime against humanity pursuant to article 7(1)(k) of the Statute (Count 6); (vi) outrages upon personal dignity as a war crime pursuant to article 8(2)(c)(ii) of the Statute (Count 7); (vii) rape as a crime against humanity and a war crime pursuant to articles 7(1)(g) and 8(2)(e)(vi) of the Statute (Counts 8-9); (viii) forcible transfer of population as a crime against humanity pursuant to article 7(1)(d) of the Statute (Count 10); (ix) persecution as a crime against humanity pursuant to article 7(1)(h) of the Statute (Count 11).

95. As regards the individual criminal responsibility of Mr Abd-Al-Rahman, the Chamber considers that there are substantial grounds to believe that Mr Abd-Al-Rahman's contribution to the abovementioned crimes may be legally qualified under article 25(3)(b) of the Statute. The Chamber is further satisfied that Mr Abd-Al-Rahman's contribution establishes that he (i) fulfils the specific *mens rea* elements pertaining to the aforementioned crimes; and (ii) had intent and knowledge in relation to these crimes under article 30 of the Statute. Accordingly, the Chamber deems it unnecessary to address Mr Abd-Al-Rahman's alleged individual criminal responsibility under article 25(3)(c) or (d) of the Statute.

96. Whilst the Prosecutor is solely responsible for selecting and formulating the charges, the Chamber notes that the decision not to seek confirmation of the charges relating to the incident in Kodoom and Bindisi under article 25(3)(a) of the Statute does not seem entirely consistent with the role played by Mr Abd-Al-Rahman throughout all of the charged events, including in those two localities: in particular, with the senior position he occupied and the ensuing authority over the Militia/*Janjaweed*, as well as the latter's deference and immediate obedience to him.

E. Crimes committed in Mukjar and surrounding areas between the end of February 2004 and the beginning of March 2004

97. The Chamber's findings in relation to the crimes allegedly committed in Mukjar and surrounding areas between the end of February 2004 and the beginning of March 2004 (which form the basis of Counts 12 to 21) are based on the evidence relied upon by the Prosecutor as referenced in the relevant sections of the PCB, and particularly on the statements and transcripts of interview of Witnesses P-0008, P-0012, P-0028, P-0029, P-0041, P-0105, P-0129, P-0188, P-0675, P-0717, P-0720, P-0755, P-0756, P-0757, P-0877, P-0884, P-0892, P-0905, P-0913, P-0919.

98. The evidence establishes that, in February 2004, following an attack of the rebel forces on the Mukjar police station, local authorities and military leaders gathered in Mukjar at a meeting in which Mr Abd-Al-Rahman and Mr Harun also took part: the latter addressed the assembly and called to wage war against the Fur rebels. Soon after, between February and March 2004, Mr Abd-Al-Rahman directed an armed operation to attack the area around Sindu: a convoy composed of Militia/*Janjaweed* and GoS Forces, led by Mr Abd-Al-Rahman's vehicle, left from Garsila and passed through Mukjar before proceeding towards Sindu; during the operation, the Militia/*Janjaweed* and GoS Forces launched several attacks on villages in the area surrounding Mukjar (including Tendy, Abirla, Arada, Dembow Kabdy, Kirarow, Sigirgir and Nyerli) and eventually returned to Mukjar.

99. As a consequence, civilians escaped from their villages and towns to seek shelter in Mukjar. Before leaving for Sindu, Mr Abd-Al-Rahman had ordered the Mukjar chief of police to arrest all persons coming from the Sindu area who would have attempted to enter Mukjar: the IDPs were accordingly prevented from accessing the town and arrested, both at checkpoints established and manned by the Militia/*Janjaweed* and GoS Forces to the north and east of Mukjar, and during house to house searches. Mr Abd-Al-Rahman was present and personally conducted arrests throughout this operation, which lasted until early March 2004: by that time, a large number of persons had been imprisoned at the Mukjar police station and adjacent detention facilities. The prisoners were predominantly male civilians of Fur ethnicity, as they were specifically targeted among the IDPs by the Militia/*Janjaweed* and GoS Forces who perceived them as members or supporters of the rebel armed groups.

100. The conditions of detention at the Mukjar police station were inhumane: the prisoners were kept in cramped and overcrowded cells, where they were so squeezed next to each other that they could not sit and properly move, and were insufficiently fed or simply left with no water and food; the inside temperature was so hot that the prisoners' sweat was flowing on the ground, where they had to urinate and defecate as limited or no access to toilet facilities was provided. The Militia/*Janjaweed* and GoS Forces present at the Mukjar police station, as well as Mr Abd-Al-Rahman, interrogated, verbally abused and accused the prisoners of being rebels, including while torturing them: a number of detainees were flogged, beaten with sticks and hit with water hoses, which caused them to bleed profusely; two prisoners were injured by being shaved with knives on their scalp, three had their ears cut off and three others died of the injuries they sustained while being tortured. Mr Abd-Al-Rahman also mistreated the detainees, particularly by striking with an axe three *Umdahs*, two *Sheikhs* and three other prisoners, as well as by whipping another one across the back.

101. Later on, Mr Abd-Al-Rahman requested the Mukjar chief of police, who granted his permission, that the prisoners be handed over to him in order to bring them to Garsila and Zalingei where they would be questioned. Upon Mr Abd-Al-Rahman's orders and under his supervision, the Militia/*Janjaweed* and GoS Forces took a number of detainees from their cells and, whilst beating them, loaded them in the back of several vehicles on which they were made to lie face down on top of one another, with the interdiction to raise their heads. Some detainees were personally directed to leave their cells by Mr Abd-Al-Rahman, who was standing at the entrance of the prison and striking the detainees with his axe as they came out. Once the vehicles were fully loaded, the convoy in which Mr Abd-Al-Rahman also took part drove them to several locations north of Mukjar, in the direction of Garsila; throughout the journey, the Militia/*Janjaweed* and GoS Forces continuously beat, insulted – particularly by referring to them as *tora bora* – and threatened the prisoners.

102. As reported *inter alia* by a number of survivors, the convoy stopped at a first location where Mr Abd-Al-Rahman ordered some of the detainees, while beating them together with elements of the Militia/*Janjaweed* and GoS Forces, to get out of the vehicles and lie face down on the ground in several lines. The prisoners were then shot and killed by the Militia/*Janjaweed* and GoS Forces upon Mr Abd-Al-Rahman's orders, who stood next to them as they opened fire and instructed them to repeat the operation

until all the detainees would be dead; while shooting or walking on their backs to ensure they were dead, the Militia/*Janjaweed* and GoS Forces referred to the prisoners as ‘criminals’ and ‘slaves’. Gunfire could be heard by people in Mukjar, who later saw the vehicles return to the police station empty of detainees. One of the vehicles that carried eight detainees, including a *Sheikh*, was driven further to a second location, where Mr Abd-Al-Rahman was also present: upon his orders, they were taken out of the vehicle, shot at and killed by a SAF soldier.

103. Later on, people from Mukjar found in the town’s outskirts a number of mass graves where dead bodies were lying on the ground, the vast majority presenting traces of gunshots: some of them were identified as those of the prisoners being held at and brought away from the Mukjar police station. In the course of the events which unfolded in Mukjar as described above, 49 people were killed by the Militia/*Janjaweed* and GoS Forces.¹⁰⁰

104. In light of the available evidence, the Chamber considers that the objective elements of the following crimes are sufficiently established to the relevant standard: (i) torture as a crime against humanity and a war crime pursuant to articles 7(1)(f) and 8(2)(c)(i) of the Statute (Counts 12-13); (ii) other inhumane acts as a crime against humanity pursuant to article 7(1)(k) of the Statute (Count 14); cruel treatment as a war crime pursuant to article 8(2)(c)(i) of the Statute (Count 15); outrages upon personal dignity as a war crime pursuant to article 8(2)(c)(ii) of the Statute (Count 16); murder as a crime against humanity and a war crime pursuant to articles 7(1)(a) and 8(2)(c)(i) of the Statute (Counts 17-18); attempted murder as a crime against humanity pursuant to articles 7(1)(a) and 25(3)(f) of the Statute (Count 19) and as a war crime pursuant to articles 8(2)(c)(i) and 25(3)(f) of the Statute (Count 20); persecution as a crime against humanity under article 7(1)(h) of the Statute (Count 21).

105. As regards the individual criminal responsibility of Mr Abd-Al-Rahman, the Chamber considers that there are substantial grounds to believe that Mr Abd-Al-Rahman’s contribution to the abovementioned crimes may be legally qualified under article 25(3)(a) and 25(3)(b) of the Statute. The Chamber is further satisfied that Mr Abd-Al-Rahman’s conduct establishes that he (i) fulfils the specific *mens rea*

¹⁰⁰ See Annex 1 to the present decision.

elements pertaining to the aforementioned crimes; and (ii) had intent and knowledge in relation to these crimes under article 30 of the Statute. Accordingly, the Chamber deems it unnecessary to address Mr Abd-Al-Rahman's alleged individual criminal responsibility under article 25(3)(c) or (d) of the Statute.

F. Crimes committed in Deleig and surrounding areas between 5 and 7 March 2004

106. The Chamber's findings in relation to the crimes allegedly committed in Deleig and surrounding areas between 5 and 7 March 2004 (which form the basis of Counts 22 to 31) are based on the evidence relied upon by the Prosecutor as referenced in the relevant sections of the PCB, and particularly on the statements and transcripts of interview of Witnesses P-0010, P-0013, P-0016, P-0027, P-0060, P-0092, P-0106, P-0129, P-0584, P-0585, P-0591, P-0592, P-0607, P-0617, P-0643, P-0651, P-0671, P-0697, P-0712, P-0714, P-0718, P-0725, P-0726, P-0736, P-0850, P-0879, P-0883, P-0895, P-0905.

107. The evidence establishes that in early March 2004 Deleig was used as safe haven by around 16.000 predominantly Fur IDPs, who had fled the attacks carried out since September 2003 by the Militia/*Janjaweed* and GoS Forces on several surrounding locations, including Arawala, Forgo, Taringa, Andi, Fere, Kaskeidi and Um Jameina. The living conditions of the IDPs were dire, as those who could not take refuge in the houses of relatives were forced to stay in the streets or in makeshift camps and shelters, where they were exposed to food shortages, poor sanitation and illness and had to rely on the aid provided by Deleig residents and humanitarian organisations. The IDPs were also harassed by the Militia/*Janjaweed* and GoS Forces, who would verbally abuse, threaten, beat and steal from them.

108. On Friday, 5 March 2004,¹⁰¹ Deleig was encircled by elements of the Militia/*Janjaweed* and GoS Forces who established a road blockade in order to control all movements and prevent people from either entering or leaving town. The Militia/*Janjaweed* and GoS Forces then carried out an arrest operation, both in the streets and during house to house searches, specifically targeting Fur male IDPs whom

¹⁰¹ Whilst the overwhelming majority of the relevant Witnesses indicates that the arrest operation took place on Friday, 5 March 2004, Witnesses P-0027, P-0651, P-0697, P-0850 indicate that it continued until Sunday, 7 March 2004.

they considered to be members or supporters of the rebels and which they subjected to verbal and physical abuse throughout the operation. Mr Abd-Al-Rahman was present during, directed and personally contributed to the arrest operation, particularly by (i) transporting four Fur males, including an *Umdah* and a *Sheikh*, from the Military Intelligence Office in Garsila, where they were detained, to Deleig in the days prior to and on 5 March 2004; (ii) conducting the arrest of several people in the Deleig Mosque who, upon his orders, were tied and brought away by the Militia/*Janjaweed* accompanying him; (iii) instructing the Militia/*Janjaweed* to load two arrestees in the back of his vehicle; (iv) mistreating a man, who was later brought away, within his compound together with Militia/*Janjaweed* who beat him with the back of their firearms before his wife and sons; and (v) while remaining in his vehicle, having elements of the Militia/*Janjaweed* arrest a man at his house and bring him away.

109. Some prisoners were detained inside the Deleig police station, where they were beaten and questioned as to their purported links with the rebels; there, Mr Abd-Al-Rahman also killed the Garsila PDF coordinator by striking him on the head with an axe-like object or stick. Between 100 and 200 arrested men were brought by the Militia/*Janjaweed* and GoS Forces to an open field in front of the Deleig police station, where they were made to lie face down on the ground, some of them blindfolded and/or with their hands tied behind their backs. Mr Abd-Al-Rahman personally escorted some prisoners to that location, where he also inspected newly arrived prisoners and decided whether some were to be released. The Militia/*Janjaweed* and GoS Forces mistreated the prisoners, who were left to lie under the hot sun without food, water or access to sanitary facilities for a prolonged period of time,¹⁰² by walking on their backs and heads, hitting them with their weapons and verbally abusing them, employing terms such as *tora bora* and ‘slaves’. Mr Abd-Al-Rahman was walking amongst and on the backs of the prisoners lying on the ground, ordering the Militia/*Janjaweed* and GoS Forces to strike them, which he also personally did with a black axe-like object or stick while calling them derogatory terms such as ‘slaves’ and ‘criminals’; Mr Abd-Al-

¹⁰² Whilst the overwhelming majority of the relevant Witnesses indicates that the prisoners were held in the field in front of the police station only on Friday, 5 March 2004, Witnesses P-0092, P-0591, P-0736 indicate that some prisoners were kept in that place for up to four days.

Rahman caused the death of two prisoners by striking them on their heads with that object.

110. The prisoners were then loaded in groups onto open-back trucks (Land-cruisers) by the Militia/*Janjaweed* and GoS Forces and driven outside of Deleig in different directions; the vehicles later returned empty to the open field before the Deleig police station and were reloaded with other prisoners and drove away again: an operation which was repeated several times. The Militia/*Janjaweed* and GoS Forces acted upon the orders and under the supervision of Mr Abd-Al-Rahman, who was present during the operation and left Deleig on board of a vehicle in one of the convoys. Following the departure of these vehicles, people in Deleig were able to hear gunfire coming from a distance, which generated a general understanding that all prisoners had been executed. As reported *inter alia* by a number of survivors, the prisoners were brought to several locations outside of Deleig, where they were unloaded from the vehicles, lined up, made to lay down on the ground and shot at by the Militia/*Janjaweed* and GoS Forces, who thus killed all or most of them. Mr Abd-Al-Rahman was present at one of these execution sites, located at a *chor* near the main road leading to Zalingei, where he ordered the Militia/*Janjaweed* and GoS Forces to similarly offload and kill the prisoners.

111. On Sunday, 7 March 2004, Mr Abd-Al-Rahman, together with elements of the Militia/*Janjaweed* and GoS Forces, was present in a convoy carrying five prisoners (four Fur community leaders – three *Umdahs* and one *Sheikh* – and another civilian) in Deleig. Prior to that date, Mr Abd-Al-Rahman either ordered or had a determinative role in the decisions leading to their arrest and detention in Garsila: two of the *Umdahs*, after having been released without his knowledge, fled to Deleig where they were arrested once more by the Militia/*Janjaweed* and GoS Forces on 5 March 2004; the others were taken from Garsila to Deleig by decision of Mr Abd-Al-Rahman, who led the convoy which transported them. The Militia/*Janjaweed* and GoS Forces drove the prisoners outside of Deleig and killed them.

112. In the following days, Deleig inhabitants found in the outskirts and surroundings of the town, particularly to its south and west, execution sites where dead bodies dressed in civilian clothing and presenting bullet and gunshot marks were lying lined up next to each other; some bodies could be identified as those of prisoners who had been held

before the Deleig police station. As a result of these events, 34 people were killed in Deleig.¹⁰³

113. In light of the available evidence, the Chamber considers that the objective elements of the following crimes are sufficiently established to the relevant standard: (i) torture as a crime against humanity and a war crime pursuant to articles 7(1)(f) and 8(2)(c)(i) of the Statute (Counts 22-23); (ii) other inhumane acts as a crime against humanity pursuant to article 7(1)(k) of the Statute (Count 24); cruel treatment as a war crime pursuant to article 8(2)(c)(i) of the Statute (Count 25); outrages upon personal dignity as a war crime pursuant to article 8(2)(c)(ii) of the Statute (Count 26); murder as a crime against humanity and a war crime pursuant to articles 7(1)(a) and 8(2)(c)(i) of the Statute (Counts 27-28); attempted murder as a crime against humanity pursuant to articles 7(1)(a) and 25(3)(f) of the Statute (Count 29) and as a war crime pursuant to articles 8(2)(c)(i) and 25(3)(f) of the Statute (Count 30); persecution as a crime against humanity under article 7(1)(h) of the Statute (Count 31).

114. As regards the individual criminal responsibility of Mr Abd-Al-Rahman, the Chamber considers that there are substantial grounds to believe that Mr Abd-Al-Rahman's contribution to the abovementioned crimes may be legally qualified under article 25(3)(a) and 25(3)(b) of the Statute. The Chamber is further satisfied that Mr Abd-Al-Rahman's conduct establishes that he (i) fulfils the specific *mens rea* elements pertaining to the aforementioned crimes; and (ii) had intent and knowledge in relation to these crimes under article 30 of the Statute. Accordingly, the Chamber deems it unnecessary to address Mr Abd-Al-Rahman's alleged individual criminal responsibility under article 25(3)(c) or (d) of the Statute.

V. Running of the time limit to apply for leave to appeal this decision and transfer of the case record to the Presidency

115. The Chamber recalls that, for the purposes of these proceedings, the language that Mr Abd-Al-Rahman fully understands and speaks is Arabic. The Chamber underlines the importance of the decision on the confirmation of the charges, one of the few the translation of which in the language of the accused is mandated by the statutory texts, and finds that, in line with the established practice of the Court, Counsel must be able

¹⁰³ See Annex 1 to the present decision.

to rely on his client's contribution to properly assess the advisability and feasibility of applying for leave to appeal. Accordingly, with a view to enhancing the efficiency of the proceedings, the Chamber finds it necessary to decide *motu proprio* that the time limit for filing an application for leave to appeal shall be suspended until the translation of this decision into Arabic is submitted by the Registry in the record of the case.

116. By the same token, the Chamber believes that Mr Abd-Al-Rahman's right to receive the decision on the confirmation of the charges against him in a language that he perfectly understands and speaks (including, as the case may be, for the purposes of deciding whether to apply for leave to appeal pursuant to article 82(1)(d) of the Statute) does not constitute an obstacle to the transmission of the record to the Presidency pursuant to rule 129 of the Rules. Rather, this immediate transmission will allow the Presidency to proceed without any delay to constitute the Trial Chamber, thus expediting the beginning of the preparation for the trial; as such, it will be directly instrumental and materially contribute to Mr Abd-Al-Rahman's right to have his case adjudicated as expeditiously as possible.

VI. The confirmed charges

117. The Chamber finds it appropriate to include the charges as confirmed in the operative part of the decision. The charges are based entirely on the Prosecutor's DCC, from which the Chamber has deleted factual allegations which it did not consider sufficiently supported by the evidence. For the sake of greater clarity and precision, the Chamber has also (i) removed unnecessary examples and repetitions; (ii) removed open-ended language when the Chamber has confirmed an exhaustive list of victims (*see* Annex 1 to the present decision); and (iii) harmonised the structure and added temporal/geographic elements where they were missing. It should be stressed, however, that the content and formulation of the charges has not been altered. The Prosecutor therefore remains solely responsible for any defects in the charges.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Defence request for reclassification of a Registry report and communication of documents relating to Mr Abd-Al-Rahman’s surrender (ICC-02/05-01/20-316-Conf);

REJECTS the Defence request alleging violation of disclosure obligations and for exclusion of eight transcripts (ICC-02/05-01/20-389);

REJECTS the Defence request for leave to appeal the ‘Decision on Defence requests and procedural challenges’ dated 21 May 2021 (ICC-02/05-01/20-413);

REJECTS the Defence Rule 122(3) Objections;

CONFIRMS the case name as that of *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* (‘*Ali Kushayb*’);

CONFIRMS the charges against Mr Abd-Al-Rahman as follows:

A. THE SUSPECT: ALI MUHAMMAD ALI ABD-AL-RAHMAN ALSO KNOWN AS ‘ALI KUSHAYB’

1. Ali Muhammad Ali **ABD-AL-RAHMAN**, also known as Ali KUSHAYB, was born on or about 15 October 1949 in Rahad al-Berdi, South Darfur, the Republic of the Sudan (“Sudan”). He is a national of Sudan. Between August 2003 and March 2004, **ABD-AL-RAHMAN** was a senior leader of the Militia/*Janjaweed* in the Wadi Salih and Mukjar Localities, West Darfur State (“West Darfur”), Sudan.

B. THE CHARGES

1) CONTEXTUAL ELEMENTS OF ARTICLE 7 AND ARTICLE 8

a) Contextual elements of article 7 (Crimes against humanity)

2. Between at least August 2003 and at least April 2004, Government of Sudan (“GoS”) forces and Militia/*Janjaweed* committed a widespread and systematic attack against the civilian population in the Wadi Salih and Mukjar Localities of West Darfur.

3. The GoS forces included the Sudanese Armed Forces, also known as the Sudanese People’s Armed Forces (“SAF”), the Popular Defence Forces (“PDF”), the Central Reserve Forces (“CRF”), the Popular Police Forces (“PPF”), and the Sudanese Police (“Police”) (together, the “GoS Forces”). The term Militia/*Janjaweed* is a general description for irregular fighters that originated mainly from Arab tribes and were allied with the GoS Forces in the non-international armed conflict in Darfur, Sudan. The Militia/*Janjaweed* were also known as *Bashmerga*, *Fursan* and *Mujahidin*.

4. The GoS Forces and Militia/*Janjaweed* engaged in a course of conduct that involved the multiple commission of acts referred to below. This attack was carried out pursuant to, and in furtherance of, a State policy to commit an attack

against the civilian population in the Wadi Salih and Mukjar Localities. The attack was directed predominantly against civilian members of the Fur tribe.

5. The attack involved the acts which took place in Kodoom, Bindisi and Deleig in the Wadi Salih Locality, and Mukjar in the Mukjar Locality. The attack further involved non-charged acts under article 7(1) which took place in other locations, including Arawala, Forgo, Taringa, Andi, Fere, Seder, Gausir, Kaskeidi and Um Jameina in the Wadi Salih Locality, and Tendy and Tiro in the Mukjar Locality.

6. The attack was widespread. The area encompassing the attack was approximately 1,400 square kilometres and was spread over two separate localities. The attack also resulted in a large number of victims, including thousands of civilians forcibly displaced, hundreds murdered and many raped.

7. The attack was systematic, in that it was planned, organised, and executed according to a pattern. This pattern involved GoS Forces and Militia/*Janjaweed* acting together to target civilians in towns and villages predominantly inhabited by members of the Fur tribe, including in Kodoom and Bindisi. The pattern also involved GoS Forces and Militia/*Janjaweed* acting together to search for, detain, torture and, in many cases, kill predominantly Fur males in Mukjar and Deleig.

8. As a senior leader of the Militia/*Janjaweed* in the Wadi Salih and Mukjar Localities, **ABD-AL-RAHMAN** knew that his conduct was part of this widespread and systematic attack against the civilian population pursuant to, and in furtherance of, the State policy. He cooperated with civilian officials of the GoS (“GoS Officials”) and GoS Forces to execute the State policy and participated in the attack at Kodoom, Bindisi, Mukjar and Deleig.

b) Contextual elements of article 8 (War crimes)

9. From at least April 2003 until at least April 2004, an armed conflict not of an international character was ongoing in Sudan, including Darfur. At all material times, the parties to the armed conflict in Darfur, Sudan were the GoS on one side and rebel armed groups on the other side. For the purpose of the conflict, the Militia/*Janjaweed* were allied with the GoS Forces.

10. The two main rebel armed groups opposing the GoS in Darfur, Sudan were the Sudan Liberation Movement/Army (“SLM/A”) and the Justice and Equality Movement (“JEM”). At all material times, the SLM/A and JEM were sufficiently organised.

11. The armed hostilities between the GoS together with the Militia/*Janjaweed* on one side and SLM/A and JEM on the other side in Darfur, Sudan were protracted, and exceeded internal disturbances and tensions such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

12. The conduct that forms the basis of the charges took place in the context of and was associated with the armed conflict. At all material times, **ABD-AL-RAHMAN** was aware of the factual circumstances that established the existence of the armed conflict.

2) COMMON ELEMENTS OF MODES OF INDIVIDUAL CRIMINAL RESPONSIBILITY

13. This section addresses aspects of **ABD-AL-RAHMAN**'s position and personal conduct which are common to the different criminal episodes charged against him, and relevant to elements of his individual criminal responsibility as required by articles 25(3)(a) and 25(3)(b) of the Rome Statute. This should be read in conjunction with the sub-sections related to individual criminal responsibility in Section 3 (The charged crimes), regarding the crimes committed in Kodoom, Bindisi, Mukjar and Deleig.

14. Between August 2003 and March 2004, **ABD-AL-RAHMAN**:

- a. was a senior Militia/*Janjaweed* leader;
- b. cooperated with senior GoS Officials and senior members of GoS Forces;
- c. cooperated with GoS Officials at the locality level;
- d. cooperated with and/or exerted influence over certain members of the GoS Forces at the locality level; and
- e. issued orders to members of GoS Forces including, in particular, those of lower rank.

15. The combination of the above factors placed **ABD-AL-RAHMAN** in a position of authority and influence. This, in turn, enabled **ABD-AL-RAHMAN** to contribute to the charged crimes in the manner described below.

a) ABD-AL-RAHMAN was a senior Militia/Janjaweed leader

16. Between August 2003 and March 2004, the Militia/*Janjaweed* conducted armed operations in the Wadi Salih and Mukjar Localities. During this period, **ABD-AL-RAHMAN** was a senior leader of the Militia/*Janjaweed* in these localities. **ABD-AL-RAHMAN** was the “colonel of colonels” or “*agid al-ogada*” within the Militia/*Janjaweed* in the region of the Wadi Salih and Mukjar Localities. He was an influential figure among other leaders of the Militia/*Janjaweed* in the Wadi Salih and Mukjar Localities, including Muhammad Adam BONJOUSE and Al-Dayf SAMIH. **ABD-AL-RAHMAN** was feared and respected by other members of the Militia/*Janjaweed*, in part due to his prior experience in the SAF and his senior leadership role in the Militia/*Janjaweed*. His orders, including orders to commit crimes, were obeyed by other members of the Militia/*Janjaweed*.

17. **ABD-AL-RAHMAN** played a central role in the recruitment of members of the Militia/*Janjaweed* in Darfur, including in the Wadi Salih and Mukjar Localities. He also supervised the training of members of the Militia/*Janjaweed*, often cooperating with other Militia/*Janjaweed* leaders including Al-Dayf SAMIH.

18. **ABD-AL-RAHMAN** supplied weapons and other military equipment to leaders and other members of the Militia/*Janjaweed* on multiple occasions in locations including Mukjar and Garsila. He also provided funds and other supplies to members of the Militia/*Janjaweed*.

19. **ABD-AL-RAHMAN** led Militia/*Janjaweed* armed operations in the Wadi Salih and Mukjar Localities. These included armed operations in Sindu, Kodoom, Bindisi, Arawala, Mukjar and Deleig.

b) ABD-AL-RAHMAN cooperated with senior GoS Officials and senior members of GoS Forces

20. Between August 2003 and March 2004, **ABD-AL-RAHMAN** cooperated with senior GoS Officials, including in particular, State Minister for the Ministry of the Interior, Ahmad Muhammad HARUN. **ABD-AL-RAHMAN** met with Ahmad Muhammad HARUN in Mukjar and Garsila on a number of occasions during this period. **ABD-AL-RAHMAN** also received public expressions of support from senior GoS Officials, including Ahmad Muhammad HARUN. He also communicated with senior GoS Officials, including during armed operations. **ABD-AL-RAHMAN** also received weapons and money from Ahmad Muhammad HARUN which he distributed to the Militia/*Janjaweed*.

21. **ABD-AL-RAHMAN** also cooperated with senior members of the GoS Forces. In particular, he met with a number of high-ranking officials from the SAF in Mukjar and Garsila.

c) ABD-AL-RAHMAN cooperated with GoS Officials at the locality level

22. **ABD-AL-RAHMAN** also cooperated with GoS Officials in the Wadi Salih and Mukjar Localities, including in particular, Ja'afar ABD-AL-HAKAM, Commissioner of Garsila, and Abdullah Al-Tayyib Muhammad TORSHEIN, Commissioner of Mukjar. **ABD-AL-RAHMAN** cooperated with Ja'afar ABD-AL-HAKAM in relation to the mobilisation of, and the distribution of weapons to, Militia/*Janjaweed* in Garsila. **ABD-AL-RAHMAN** also attended a number of meetings with GoS Officials in the Wadi Salih and Mukjar Localities, including with Ja'afar ABD-AL-HAKAM and Abdullah Al-Tayyib Muhammad TORSHEIN.

d) ABD-AL-RAHMAN cooperated with and/or exerted influence over certain members of the GoS Forces at the locality level

23. **ABD-AL-RAHMAN** also cooperated with, and at times exerted influence over, members of GoS Forces in the Wadi Salih and Mukjar Localities. This included Police and CRF officers in Mukjar, including Abdullah HIMEIDAN and Mustafa Ahmad AL-TAYYIB. In the SAF, this included Military Intelligence personnel, including the head of the Military Intelligence Office in Garsila, Hamdi Sharaf-Al-Din SID AHMAD, and Military Intelligence officers Mussadiq Hassan MANSUR and ABD-AL-MUN'IM, also known as ABU LAHAB, as well as various other SAF personnel.

24. **ABD-AL-RAHMAN** met and/or communicated often with such members of the GoS Forces. He also obtained their cooperation regarding, among other things, the receipt of weapons and other supplies by **ABD-AL-RAHMAN** and his subordinates, the arrest and detention of persons, the questioning by **ABD-AL-RAHMAN** and his Militia/*Janjaweed* subordinates of detainees in the custody of GoS Forces, the transfer of detainees into the custody of **ABD-AL-RAHMAN** and his Militia/*Janjaweed* subordinates, and the killing of such detainees.

25. **ABD-AL-RAHMAN** also coordinated with, and at times exerted influence over, such members of the GoS Forces during the course of armed operations. This included armed operations in Kodoom, Bindisi, Arawala, Sindu, Mukjar and

Deleig where **ABD-AL-RAHMAN** and Militia/*Janjaweed* accompanying him were supported by GoS Forces including, variously, the SAF and the PDF.

e) ABD-AL-RAHMAN issued orders to members of GoS Forces including, in particular, those of lower rank

26. **ABD-AL-RAHMAN**, at times, issued orders to certain personnel of the GoS Forces, including to personnel of the SAF and PDF, which were obeyed. In the SAF, this included soldiers Muqaddam IDRIS and one witness, as well as certain officers within the Military Intelligence Office in Garsila. In the PDF, this included PDF officer (later Garsila PDF coordinator) Abd-Al-Rahman Dawud HAMMUDA, also known as HASSABALLAH, and Mukjar PDF coordinator Al-Sadiq Ahmad Uthman ZAKARIYA. This included orders to stay in or move to certain locations, arrest and detain persons, including in police and military facilities, transport detainees, and kill detainees, particularly in the Wadi Salih and Mukjar Localities.

3) THE CHARGED CRIMES

a) Crimes committed in Kodoom, Bindisi and surrounding areas¹⁰⁴ between 15 and 16 August 2003 (Counts 1-11)

i. The crimes

27. This section should be read in conjunction with Section 1 (Contextual elements of article 7 and article 8).

28. During the charged period, Kodoom and Bindisi were located in the Wadi Salih Locality, West Darfur. The population of Kodoom, Bindisi and surrounding areas was predominantly Fur.

29. Between 15 and 16 August 2003, the Militia/*Janjaweed* and GoS Forces, including **ABD-AL-RAHMAN**, attacked Kodoom, Bindisi and surrounding areas. They entered Kodoom and Bindisi, and killed 51 persons, raped 16 women and girls, looted houses, livestock and other property, destroyed houses, warehouses, shops and at least one mosque, and caused the displacement of persons. The victims of these crimes were predominantly Fur.

30. The GoS Forces that participated in the operation in Kodoom, Bindisi and surrounding areas between 15 and 16 August 2003 included the PDF and the CRF.

Count 1: Intentionally directing attacks against the civilian population as such, as a war crime

31. Between 15 and 16 August 2003, **ABD-AL-RAHMAN**, together with Militia/*Janjaweed* and GoS Forces, carried out an attack against the civilian population of Kodoom and Bindisi and surrounding areas as such, or against individual civilians not taking direct part in the hostilities. **ABD-AL-RAHMAN** and the perpetrators of the attack intended the civilian population to be the object of the attack, or knew that this would occur in the ordinary course of events.

¹⁰⁴ As noted in paragraphs 24-25 of this decision, some of the crimes were committed in locations outside the stated towns or villages. These areas are comprised in the charges. However, the term 'surrounding areas' does not encompass other towns or villages than the ones mentioned in the charges.

32. The Militia/*Janjaweed* and GoS Forces directed numerous acts of violence against the civilian population of Kodoom and Bindisi. The attack caused actual death, injury and destruction, as described below under Counts 2-3 and 5-11.

Counts 2-3: Murder as a crime against humanity and as a war crime (violation of common article 3)

33. During the attack on Kodoom and Bindisi on 15 and 16 August 2003, Militia/*Janjaweed* and GoS Forces killed the 51 persons listed in Annex 1. These persons were either civilians taking no active part in hostilities or were persons *hors de combat*. **ABD-AL-RAHMAN** was aware of the factual circumstances that established their status.

34. The Militia/*Janjaweed* and GoS Forces did not differentiate between victims; killing young boys, men, women and children fleeing to surrounding areas including mountains, bushes and fields to escape the attack. They detained other men, tied their hands behind their backs, laid them face down and shot or beat them to death. In Bindisi and surrounding areas, some women were raped and killed.

35. To the extent that the persons killed were civilians not taking direct part in hostilities or were persons *hors de combat*, and were killed when in the power of a party to the conflict, these persons were victims of murder as a violation of common article 3 of the Geneva Conventions. This is demonstrated, for example, by the use of restraints on victims, such as the tying of hands behind backs, or other evidence showing that victims were in the power of the Militia/*Janjaweed* or GoS Forces at the material time.

Count 4: Pillaging as a war crime

36. In Kodoom and Bindisi, over the course of the attack which lasted from 15 to 16 August 2003, Militia/*Janjaweed* and GoS Forces broke into homes, shops, fenced fields, the hospital and veterinary clinic, and took food supplies, medicine, livestock and other property. The owners did not consent to the appropriation of their property, which the Militia/*Janjaweed* and GoS Forces intended to appropriate for private or personal use.

37. The Militia/*Janjaweed* and GoS Forces used their vehicles, camels, horses and donkeys to carry away furniture, television sets, mattresses, blankets, livestock and other property belonging to persons in Kodoom and Bindisi.

Count 5: Destruction of the property of an adversary as a war crime

38. In Kodoom and Bindisi the Militia/*Janjaweed* and GoS Forces between 15 and 16 August 2003 systematically destroyed properties belonging predominantly to the Fur civilian population, and these persons were perceived as the adversary. The physical perpetrators were aware of these factual circumstances establishing the status of the property. These properties were protected under the law of armed conflict. The destruction was not justified by military necessity.

39. In particular, houses were destroyed by fire in Kodoom. In addition, houses were destroyed in Bindisi, as well as shops, warehouses, and at least one mosque and its collection of Islamic books.

Count 6: Other inhumane acts as a crime against humanity; Count 7: Outrages upon personal dignity as a war crime

40. Between 15 and 16 August 2003 in Bindisi and surrounding areas the Militia/*Janjaweed* and GoS Forces detained fleeing men and women and forced them to stand in separate lines according to their sex. The men in particular were forced to keep their backs turned to their female counterparts and were threatened with death if they failed to obey the order.

41. Women and men were partially stripped of their clothing, searched, and beaten. A member of the Militia/*Janjaweed* or GoS Forces pulled a baby boy from the harness of his mother and threw him in the air. The baby boy landed on the ground and had to be assisted by a person to recover from being thrown.

42. The Militia/*Janjaweed* and GoS Forces used pejorative language against the Fur persons during the course of the attack by uttering epithets such as slave and servant, and made derogatory references linked to skin-colour, while also stating that the GoS sent them to kill every black person.

43. Members of the Militia/*Janjaweed* and/or GoS Forces stripped some of the women of their clothing and others were beaten for refusing to take off their clothing. Some of these women were raped, with their clothing stuffed in their mouths. The Militia/*Janjaweed* and/or GoS Forces then forced them to return in the direction of Bindisi, from which they had fled to escape the ongoing Militia/*Janjaweed* and GoS Forces attack.

44. The material facts relevant to the crime of rape as a crime against humanity and a war crime, as described below at paragraphs 46-47, are incorporated herein by reference. Some of these victims were raped in the full view and/or hearing of other detained persons.

45. The victims described in this section were civilians taking no active part in hostilities or were *hors de combat*. The Militia/*Janjaweed* and GoS Forces who were mistreating them were aware of the factual circumstances that established this status. By their conduct, the Militia/*Janjaweed* and GoS Forces humiliated, degraded or otherwise violated the dignity of these victims. The severity of the humiliation, degradation or other violation was of such degree as to be generally recognised as an outrage upon personal dignity. They also inflicted great suffering, or serious injury to body or to mental or physical health. The physical perpetrators were aware of the factual circumstances establishing the character (nature and gravity) of their acts.

Counts 8-9: Rape as a crime against humanity and a war crime

46. In Bindisi and surrounding areas, Militia/*Janjaweed* and GoS Forces raped 16 women, listed in Annex 1. Additionally, they attempted to rape a woman, who was killed while resisting. The perpetrators penetrated the bodies of these women and girls with a sexual organ, or the anal or genital opening of these women and girls with any object or any other part of the perpetrators' bodies.

47. Some of the women raped by members of the Militia/*Janjaweed* and/or GoS Forces were women and girls selected from a group of captured persons. Some of these victims were raped in the full view and/or hearing of other detained persons. The rapes were committed by force, by threat of force or coercion, or within the context of violent attacks against persons in Bindisi and surrounding areas, which created a coercive environment where some of the named victims were restrained, raped and verbally abused.

Count 10: Forcible transfer as a crime against humanity

48. The conduct of the Militia/*Janjaweed* and GoS Forces during the attack on Kodoom and Bindisi between 15 and 16 August 2003 served to expel or coerce the predominantly Fur population of these places into leaving Kodoom and Bindisi.

49. Thousands of persons were forced to flee from Kodoom and Bindisi, many eventually seeking refuge in Mukjar.

50. Persons who returned to Kodoom and Bindisi soon after the attack found it uninhabitable, as their livestock had been taken and homes, shops, warehouses, at least one mosque and other buildings had been partially or fully destroyed by fire.

Count 11: Persecution as a crime against humanity

51. At the material times, **ABD-AL-RAHMAN** and the other perpetrators targeted persons in Kodoom, Bindisi and surrounding areas (the populations of which were predominantly Fur) perceived as belonging to, or being associated with, or supporting the rebel armed groups. They targeted them on political and ethnic grounds. **ABD-AL-RAHMAN** and the other perpetrators severely deprived, contrary to international law, these persons of fundamental rights, including the rights to life, bodily integrity, private property, freedom of movement and residence, and not to be subjected to rape, torture or cruel, inhumane or degrading treatment.

52. The facts described under Count 1-10 form the underlying conduct of the crime of persecution. This conduct was committed in connection with these crimes.

ii. ABD-AL-RAHMAN's individual criminal responsibility

53. **ABD-AL-RAHMAN** is individually criminally responsible for the charged crimes pursuant to article 25(3)(b) (inducing) of the Rome Statute.

54. This section should be read in conjunction with Section 2 (Common elements of modes of individual criminal responsibility).

Inducing under article 25(3)(b) of the Rome Statute

55. Between 15 and 16 August 2003, **ABD-AL-RAHMAN** participated in the attack on Kodoom, Bindisi and surrounding areas with members of the Militia/*Janjaweed* and GoS Forces. **ABD-AL-RAHMAN** led these operations and decided the route, the tactics and when to move on from one village to the next. He also gave instructions during the operation to members of the GoS Forces to follow him from one village to the next and to carry on with the attack. He verbally encouraged Militia/*Janjaweed* and GoS Forces throughout the attack and organised the movement of the Militia/*Janjaweed* on the ground. Mr Abd-Al-Rahman induced by:

- a. Leading the attack, including through the actions described above, on Kodoom, Bindisi and surrounding areas between 15 and 16 August 2003;
- b. Coordinating operations with members of the PDF and other Militia/*Janjaweed* leaders during the attack on Kodoom, Bindisi and surrounding areas;

- c. Carrying on with the attack, despite objections expressed by some of those involved in the attack, including Militia/*Janjaweed*; and
- d. His conspicuous presence and approval, even if tacit, as the crimes were carried out.

56. Through this conduct, **ABD-AL-RAHMAN** induced the Militia/*Janjaweed* and GoS Forces to commit the crimes listed in Counts 1-5 and 10-11 in Kodoom, Bindisi and surrounding areas, and the crimes listed in Counts 6-9 in Bindisi and surrounding areas. **ABD-AL-RAHMAN** exerted influence over the Militia/*Janjaweed* and GoS Forces, prompting them to commit the relevant crimes.

57. **ABD-AL-RAHMAN** meant to engage in the conduct described above. **ABD-AL-RAHMAN** meant for the Militia/*Janjaweed* and GoS Forces to commit the crimes and/or was aware that the Militia/*Janjaweed* and GoS Forces would, in the ordinary course of events, commit the crimes, and was aware that his conduct would contribute to their commission.

b) Crimes committed in Mukjar and surrounding areas between the end of February 2004 and the beginning of March 2004 (Counts 12-21)

i. The crimes

58. This section should be read in conjunction with Section 1 (Contextual elements of article 7 and article 8).

59. During the charged period, Mukjar was a town located in the Mukjar Administrative Unit of Mukjar Locality in West Darfur.

60. Between February and March 2004, the Militia/*Janjaweed* and GoS Forces attacked several villages in the areas surrounding Mukjar. These attacks caused hundreds of civilians to seek shelter in Mukjar.

61. In February 2004, the Militia/*Janjaweed* and GoS Forces set up checkpoints to the north and east of Mukjar. The Militia/*Janjaweed* and GoS Forces arrested a large number of predominantly Fur males at locations including the checkpoints and during house to house searches. The Militia/*Janjaweed* and GoS Forces perceived displaced Fur males as belonging to, or being associated with, or supporting the rebel armed groups.

62. The Militia/*Janjaweed* and GoS Forces continued to arrest predominantly Fur males in Mukjar until at least early March 2004. Some of them were detained at the Mukjar police station and adjacent detention facilities ('Mukjar police station') where they were mistreated and kept in inhumane conditions.

63. The GoS Forces that participated in the operation in Mukjar between late February and early March 2004 included the SAF (including Military Intelligence), the PDF, the PPF, the CRF and the Police.

Counts 12-13: Torture as a crime against humanity and a war crime; Count 14: Other inhumane acts as a crime against humanity; Count 15: Cruel treatment as a war crime; Count 16: Outrages upon personal dignity as a war crime

64. A large number of arrested males, including community leaders such as *Umdahs*, *Sheikhs*, doctors and teachers, of predominantly Fur ethnicity, were

taken to Mukjar police station where they were interrogated and beaten over a period of at least two days.

65. The conditions of detention at Mukjar police station were inhumane. Over the course of at least two days, a large number of detainees were squeezed into rooms measuring around five by seven meters and forced to squat in place. They were scared, thirsty and tired. They had no access to toilets and were forced to urinate and defecate where they squatted. The temperature was stiflingly hot, as air only entered through one small window. Some detainees were given a loaf of stale bread to share among 10 of them, alongside dirty water to drink. Others were given nothing.

66. Over the course of at least two days, detainees were interrogated, beaten and mistreated by **ABD-AL-RAHMAN** and Militia/*Janjaweed* and GoS Forces. **ABD-AL-RAHMAN** personally beat some of the detainees with his axe, including the *Umdahs* and *Sheikhs*, while Militia/*Janjaweed* and GoS Forces beat the other detainees.

67. **ABD-AL-RAHMAN** referred to the detainees as *magus*, a derogatory term used to refer to idol worshippers. **ABD-AL-RAHMAN** beat two detainees with his whip and axe. Militia/*Janjaweed* cut off the ears of three detainees and used knives to shave the heads of two others. The detainees cried in pain and some bled profusely. None received any medical treatment.

68. The mistreatment of these males, including their conditions of detention, inflicted on them severe physical or mental pain or suffering, or great suffering or serious injury to body or to mental and physical health. The pain and suffering did not arise from and was not inherent in or incidental to lawful sanctions. The perpetrators inflicted the pain and suffering to obtain information or a confession, punish, intimidate or coerce the detained predominantly Fur males or for reasons based on political, ethnic and gender discrimination. **ABD-AL-RAHMAN** and the other physical perpetrators were aware of the factual circumstances establishing the character (nature and gravity) of their acts. At all material times, the Fur males were in the custody or under the control of the perpetrators.

69. The mistreatment, including the conditions of their detention, of these Fur males also humiliated, degraded or otherwise violated their dignity. The severity of the humiliation, degradation or other violation was of such degree as to be generally recognised as an outrage upon personal dignity.

70. These detainees were either persons *hors de combat* or were civilians taking no active part in the hostilities. **ABD-AL-RAHMAN** and the other perpetrators were aware of the factual circumstances that established their status.

Counts 17-18: Murder as a crime against humanity and a war crime; Counts 19-20: Attempted murder as a crime against humanity and a war crime

71. Between late February and early March 2004, the Militia/*Janjaweed* and GoS Forces took 49 predominantly Fur men detained at the Mukjar police station and killed them. They are listed in Annex 1.

72. The Militia/*Janjaweed* and GoS Forces, including **ABD-AL-RAHMAN**, ordered the detainees to leave their prison cells. As they walked outside the Mukjar police station, **ABD-AL-RAHMAN** personally beat some of them with his axe. The Militia/*Janjaweed* and GoS Forces then stacked them on top of one

another in the back of vehicles and ordered them to lie face down and not to raise their heads. Some of the detainees were blindfolded. The Militia/*Janjaweed* and GoS Forces accompanied them in the vehicles and continued beating and insulting them throughout the journey. **ABD-AL-RAHMAN** was part of the convoy.

73. The Militia/*Janjaweed* and GoS Forces drove the detainees north of Mukjar in the direction of Garsila and brought them to several locations outside of Mukjar. The Militia/*Janjaweed* and GoS Forces ordered the detainees to get out of the vehicles. **ABD-AL-RAHMAN** personally ordered some of the detainees, including community leaders, to do so. **ABD-AL-RAHMAN** beat them with his axe.

74. The detainees were ordered to lie face down on the ground in several lines. **ABD-AL-RAHMAN** told them *ajiro argodo*, meaning to run and sleep on their stomach. The Militia/*Janjaweed* and GoS Forces then shot and killed them. **ABD-AL-RAHMAN** stood next to the Militia/*Janjaweed* and GoS Forces as they opened fire and ordered them to repeat the shooting until the detainees were dead. Afterwards, members of the Militia/*Janjaweed* and GoS Forces walked on the bodies to make sure that they had died.

75. Eight male detainees in one of the vehicles, including a *Sheikh*, were later killed at another location. At **ABD-AL-RAHMAN**'s orders, the detainees were unloaded from the vehicle a SAF soldier shot and killed them.

76. By the above conduct, the Militia/*Janjaweed* and GoS Forces caused the deaths of 49 predominantly Fur males, listed in Annex 1.

77. Two of the detained Fur males survived, despite the intention of the perpetrators.

78. Acting on **ABD-AL-RAHMAN**'s orders, members of the Militia/*Janjaweed* and GoS Forces attempted to murder these two men by taking action that commenced the execution of the crime by means of a substantial step, but the crime did not occur because of circumstances independent of their intentions.

79. All of the persons killed, or attempted to be killed, between late February and early March 2004, through the conduct described above, were either persons *hors de combat* or were civilians taking no active part in the hostilities, and at all material times were in the power of the perpetrators of the killings. **ABD-AL-RAHMAN** and the perpetrators were aware of the factual circumstances that established the victims' status.

Count 21: Persecution as a crime against humanity

80. At the material times, **ABD-AL-RAHMAN** and the other perpetrators targeted Fur males in Mukjar perceived as belonging to, or being associated with, or supporting the rebel armed groups. They targeted them on political, ethnic and gender grounds. The victims' Fur ethnicity, combined with the socially-constructed gender role presuming males to be fighters, underpinned the perpetrators' perception of them as rebels or rebel sympathisers. **ABD-AL-RAHMAN** and the other perpetrators severely deprived, contrary to international law, these persons of fundamental rights, including the rights to life, and not to be subjected to torture or cruel, inhumane or degrading treatment.

81. The facts described above under Counts 12-20 form the underlying conduct of the crime of persecution. This conduct was committed in connection with these crimes.

ii. ABD-AL-RAHMAN's individual criminal responsibility

82. **ABD-AL-RAHMAN** is individually criminally responsible for the charged crimes pursuant to article 25(3)(a) (direct perpetration and co-perpetration) and article 25(3)(b) (ordering and/or inducing). In addition, he is responsible for the crime of attempted murder pursuant to article 25(3)(f).

83. This section should be read in conjunction with Section 2 (Common elements of modes of individual criminal responsibility).

Co-perpetration under article 25(3)(a) of the Rome Statute

84. **ABD-AL-RAHMAN** committed the crimes listed in Counts 12-21 in concert with others through his participation in, and essential contributions to, a common plan.

85. Between late February and early March 2004, **ABD-AL-RAHMAN** shared a common plan or agreement with a group consisting of members of the Militia/*Janjaweed* and GoS Forces to target persons in Mukjar, including those displaced to Mukjar from locations in the surrounding areas, perceived as belonging to, or being associated with, or supporting the rebel armed groups, including through the commission of the crimes of torture, other inhumane acts, cruel treatment, outrages upon personal dignity, murder and persecution ("Mukjar Common Plan"). The Mukjar Common Plan came into existence, at the latest, between late February and early March 2004.

86. Other persons sharing the Mukjar Common Plan included Militia/*Janjaweed* leader Al-Dayf SAMIH, Military Intelligence officer Hamdi Sharaf-Al-Din SID AHMAD, and other members of Militia/*Janjaweed* and GoS Forces.

87. Pursuant to the Mukjar Common Plan, between late February and early March 2004, **ABD-AL-RAHMAN** and his co-perpetrators engaged in conduct which led to the commission of the charged crimes.

88. **ABD-AL-RAHMAN** made an essential contribution to the Mukjar Common Plan and the charged crimes by:

- a. Instructing GoS forces to arrest persons fleeing to Mukjar from other locations, personally conducting arrests of men in Mukjar, as well as contributing to such arrests by way of his presence;
- b. Threatening and verbally abusing the detainees in Mukjar police detention facilities in February/early March 2004 in the presence of members of the Militia/*Janjaweed* and/or GoS Forces;
- c. Physically assaulting detainees at Mukjar police station in the presence of members of the Militia/*Janjaweed* and/or GoS Forces;
- d. Obtaining the transfer of detainees into the custody of **ABD-AL-RAHMAN** and his co-perpetrators;
- e. Selecting detainees, including community leaders, to be removed from Mukjar police station and executed;

- f. Supervising the transport of a group of detained men, including community leaders, from Mukjar police station to execution sites;
- g. Physically assaulting detainees, including community leaders, at one or more execution sites in the presence of members of the Militia/*Janjaweed* and/or GoS Forces; and
- h. Instructing members of the Militia/*Janjaweed* and/or GoS Forces to kill detainees at execution sites and/or exerting influence over the Militia/*Janjaweed* and/or GoS Forces, prompting them to carry out the killings.

89. **ABD-AL-RAHMAN** meant to engage in the conduct described above and intended to bring about the objective elements of the charged crimes and/or was aware that these crimes would occur in the ordinary course of events in implementing the Mukjar Common Plan. **ABD-AL-RAHMAN** was aware that the Mukjar Common Plan involved an element of criminality. He was further aware of his essential role in the Mukjar Common Plan, the essential nature of his contributions, as set out above, and of his ability, jointly with other co-perpetrators, to control the commission of the crimes.

Direct perpetration under article 25(3)(a) of the Rome Statute

90. **ABD-AL-RAHMAN** directly perpetrated the crimes listed in Counts 12-16 and 21 by:

- a. Threatening and verbally abusing the detainees at Mukjar police station; and
- b. Physically assaulting detainees at Mukjar police station.

91. **ABD-AL-RAHMAN** meant to engage in the conduct described above. **ABD-AL-RAHMAN** intended to bring about the objective elements of the charged crimes and/or was aware that these crimes would occur in the ordinary course of events as a result of his conduct.

Ordering under article 25(3)(b) of the Rome Statute

92. **ABD-AL-RAHMAN**, while being in a position of authority, ordered members of the Militia/*Janjaweed* and/or the GoS Forces to shoot and kill detained Fur males. One or more of these members carried out **ABD-AL-RAHMAN**'s orders, which led to the commission of the crimes listed in Counts 17-21.

93. **ABD-AL-RAHMAN** meant to engage in the conduct described above and was aware of his position of authority over the physical perpetrators of the crimes. **ABD-AL-RAHMAN** meant for the Militia/*Janjaweed* and GoS Forces to commit the crimes and/or was aware that the Militia/*Janjaweed* and GoS Forces would, in the ordinary course of events, commit the crimes, and was aware that his conduct would contribute to their commission.

Inducing under article 25(3)(b) of the Rome Statute

94. Through the conduct described above, **ABD-AL-RAHMAN** induced the Militia/*Janjaweed* and GoS Forces to commit the crimes listed in Counts 12-21. **ABD-AL-RAHMAN** exerted influence over the Militia/*Janjaweed* and GoS Forces, prompting them to commit the relevant crimes.

95. **ABD-AL-RAHMAN** meant to engage in the conduct described above. **ABD-AL-RAHMAN** meant for the Militia/*Janjaweed* and GoS Forces to commit the crimes and/or was aware that the Militia/*Janjaweed* and GoS Forces would, in the ordinary course of events, commit the crimes, and was aware that his conduct would contribute to their commission.

c) Crimes committed in Deleig and surrounding areas between 5 and 7 March 2004 (Counts 22-31)

i. The crimes

96. This section should be read in conjunction with Section 1 (Contextual elements of article 7 and article 8).

97. During the charged period, Deleig was a town located in the Garsila-Deleig Administrative Unit of Wadi Salih Locality, West Darfur. The population of Deleig was predominantly Fur.

98. Between September 2003 and March 2004, Militia/*Janjaweed* and GoS Forces attacked several villages in the areas surrounding Deleig. These attacks caused thousands of civilians to seek shelter in Deleig, Garsila and other towns.

99. On Friday, 5 March 2004, Militia/*Janjaweed* and GoS Forces surrounded Deleig and prevented people from leaving or entering the town. Militia/*Janjaweed* and GoS Forces went through the streets and from house to house searching for Fur males who had been displaced to Deleig from locations in the surrounding areas. The Militia/*Janjaweed* and GoS Forces perceived Fur males coming from these locations as belonging to, or being associated with, or supporting the rebel armed groups.

100. On this day, the Militia/*Janjaweed* and GoS Forces arrested between 100 and 200 Fur males in Deleig. **ABD-AL-RAHMAN** also transported four detained Fur males from Garsila to Deleig, three of whom he had arrested or ordered a member of the Militia/*Janjaweed* to arrest in the previous days.

101. The Militia/*Janjaweed* and GoS Forces continued to arrest Fur males in Deleig until at least 7 March 2004. The GoS Forces that participated in the operation in Deleig between 5 and 7 March 2004 included the SAF (including Military Intelligence), the PDF, the CRF and the Police.

Counts 22-23: Torture as a crime against humanity and a war crime; Count 24: Other inhumane acts as a crime against humanity; Count 25: Cruel treatment as a war crime; Count 26: Outrages upon personal dignity as a war crime

102. On 5 March 2004, the Militia/*Janjaweed* and GoS Forces brought the arrested Fur males to an open area near the Deleig police station where they were made to lie face down on the ground. Some had their hands tied behind their backs and some were blindfolded. The detainees were made to lie in the hot sun and were denied food, water and access to toilet facilities for prolonged periods of time, ranging from hours up to several days.

103. The Militia/*Janjaweed* and GoS Forces walked on the backs and heads of the detained males, beat them with rifle butts and sticks, and verbally abused them. They stabbed at least one detained male with a bayonet. **ABD-AL-RAHMAN** stood or walked on the backs of detainees, hit them with a stick or axe-like object, kicked them, and verbally abused them. The Militia/*Janjaweed*

and GoS Forces later threw some of the Fur males onto the backs of vehicles like objects.

104. Some of the arrested males were detained in overcrowded conditions inside the Deleig police station for up to several days. Militia/*Janjaweed* and/or GoS Forces whipped, threatened to kill, and beat at least one of these males.

105. During the search and arrest operation in different areas of Deleig, the Militia/*Janjaweed* and GoS Forces whipped, beat and kicked persons.

106. The total number of detained Fur males was between 100 and 200. The mistreatment of these males, including their conditions of detention, inflicted on them severe physical or mental pain or suffering, or great suffering or serious injury to body or to mental and physical health. The pain and suffering did not arise from and was not inherent in or incidental to lawful sanctions. The perpetrators inflicted the pain and suffering to obtain information or a confession, punish, intimidate or coerce the detained Fur males or for reasons based on political, ethnic and gender discrimination. **ABD-AL-RAHMAN** and the other physical perpetrators were aware of the factual circumstances establishing the character (nature and gravity) of their acts. At all material times, the Fur males were in the custody or under the control of the perpetrators.

107. The mistreatment, including the conditions of their detention, of these Fur males also humiliated, degraded or otherwise violated their dignity. The severity of the humiliation, degradation or other violation was of such degree as to be generally recognised as an outrage upon personal dignity.

108. These Fur males were either persons *hors de combat* or were civilians taking no active part in the hostilities. **ABD-AL-RAHMAN** and the other perpetrators were aware of the factual circumstances that established their status.

Counts 27-28: Murder as a crime against humanity and a war crime; Counts 29-30: Attempted murder as a crime against humanity and a war crime

109. On 5 March 2004, in and/or near the Deleig police station, **ABD-AL-RAHMAN** struck three Fur male detainees to the head with a stick or axe-like object. These males died as a consequence of this conduct.

110. On **ABD-AL-RAHMAN**'s orders, the Militia/*Janjaweed* and GoS Forces loaded groups of the detained Fur males onto vehicles, including two motionless bodies. The vehicles drove to different locations outside of Deleig. At these locations, the Militia/*Janjaweed* and GoS Forces unloaded the detained Fur males from the vehicles and shot at them, killing most or all of the detainees in each group. At one of these locations, **ABD-AL-RAHMAN** ordered the Militia/*Janjaweed* and/or GoS Forces to unload the males and to shoot and kill them. The vehicles returned empty of detainees to the open area near the Deleig police station. The process of loading detainees onto vehicles, transporting them to locations outside of Deleig, unloading them, and shooting them to death was repeated several times on 5 March 2004.

111. On Sunday, 7 March 2004, Militia/*Janjaweed* and/or GoS Forces drove a group of Fur males detainees, including three *Umdahs*, one *Sheikh* and another civilian to a location outside of Deleig, unloaded them, and killed them. Earlier on the same day, **ABD-AL-RAHMAN** was in a convoy of vehicles in Deleig with several of these detained Fur males.

112. By the above conduct, the Militia/*Janjaweed* and GoS Forces caused the deaths of the 34 persons listed in Annex 1.

113. Twelve of the detained Fur males survived, despite the intention of the perpetrators:

- a. Five of the males were loaded onto vehicles, transported outside of Deleig, and shot at, but were not killed.
- b. Seven other detained males were shot at as they ran away from the open area near Deleig police station.

114. The perpetrators attempted to murder these 12 males by taking action that commenced the execution of the crime by means of a substantial step, but the crime did not occur because of circumstances independent of their intentions.

115. All of the persons killed, or attempted to be killed, between 5 and 7 March 2004, through the conduct described above, were either persons *hors de combat* or were civilians taking no active part in the hostilities, and at all material times were in the power of the perpetrators of the killings. **ABD-AL-RAHMAN** and the physical perpetrators were aware of the factual circumstances that established the victims' status.

Count 31: Persecution as a crime against humanity

116. At the material times, **ABD-AL-RAHMAN** and the other perpetrators targeted Fur males in Deleig perceived as belonging to, or being associated with, or supporting the rebel armed groups. They targeted them on political, ethnic and gender grounds. The victims' Fur ethnicity, combined with the socially-constructed gender role presuming males to be fighters, underpinned the perpetrators' perception of them as rebels or rebel sympathisers. **ABD-AL-RAHMAN** and the other perpetrators severely deprived, contrary to international law, Fur males in Deleig of fundamental rights, including the rights to life, and not to be subjected to torture or cruel, inhumane or degrading treatment.

117. The facts described above under Counts 22-30 constitute the underlying conduct of the crime against humanity of persecution. This conduct was committed in connection with these crimes.

ii. ABD-AL-RAHMAN's individual criminal responsibility

118. **ABD-AL-RAHMAN** is criminally responsible for the charged crimes under article 25(3)(a) (direct perpetration and co-perpetration) and article 25(3)(b) (ordering and/or inducing) of the Rome Statute. In addition, he is responsible for the crime of attempted murder pursuant to article 25(3)(f).

119. This section should be read in conjunction with Section 2 (Common elements of modes of individual criminal responsibility).

Co-perpetration under article 25(3)(a) of the Rome Statute

120. **ABD-AL-RAHMAN** committed the crimes listed in Counts 22-31 through his participation in, and essential contribution to, a common plan.

121. Between 5 and 7 March 2004, **ABD-AL-RAHMAN** shared a common plan or agreement with a group consisting of members of the Militia/*Janjaweed* and GoS Forces to target persons in Deleig, including those displaced to Deleig from locations in the surrounding areas, perceived as belonging to, or being associated

with, or supporting the rebel armed groups, including through the commission of the crimes of torture, other inhumane acts, cruel treatment, outrages upon personal dignity, murder, and persecution (“Deleig Common Plan”). The Deleig Common Plan came into existence, at the latest, on or about 5 March 2004.

122. Other persons sharing the Deleig Common Plan included Military Intelligence officer Lieutenant Hamdi Sharaf-Al-Din SID AHMAD, Military Intelligence officer Mussadiq Hassan MANSUR, and PDF officer Abd-Al-Rahman Dawud HAMMUDAH, also known as HASSABALLAH, and other members of the Militia/*Janjaweed* and GoS Forces.

123. Pursuant to the Deleig Common Plan, between 5 and 7 March 2004, **ABD-AL-RAHMAN** and his co-perpetrators engaged in conduct which led to the commission of the charged crimes.

124. **ABD-AL-RAHMAN** made an essential contribution to the Deleig Common Plan and the charged crimes by:

- a. Arresting and ordering the arrest of Fur males in Garsila and transporting them to Deleig where they were detained, mistreated, and killed or attempted to be killed in Deleig or surrounding areas;
- b. Ordering, being present during, and participating in the search and arrest operation in Deleig;
- c. Being present in the open area near Deleig police station where the Fur males were being detained;
- d. Inspecting and questioning detainees, and deciding whether they would be released or not;
- e. Killing three Fur males by striking them to the head with a stick or axe-like object;
- f. Mistreating detainees by standing and walking on their backs, hitting them with a stick or axe-like object, kicking them, and verbally abusing them;
- g. Ordering, being present during, and supervising the loading of detainees onto vehicles that transported them to locations outside of Deleig where they were killed or attempted to be killed;
- h. Ordering the Militia/*Janjaweed* and/or GoS Forces to unload and then shoot and kill detained Fur males at one location outside of Deleig; and
- i. Being present at one or more of the locations outside of Deleig where detainees were transported and then killed.

125. **ABD-AL-RAHMAN** meant to engage in the conduct described above and intended to bring about the objective elements of the charged crimes and/or was aware that these crimes would occur in the ordinary course of events in implementing the Deleig Common Plan. **ABD-AL-RAHMAN** was aware that the Deleig Common Plan involved an element of criminality. He was further aware of his essential role in the Deleig Common Plan, the essential nature of his contributions, as set out above, and of his ability, jointly with other co-perpetrators, to control the commission of the crimes.

Direct perpetration under article 25(3)(a) of the Rome Statute

126. **ABD-AL-RAHMAN** directly perpetrated the crimes of murder listed in Counts 27-28 and 31 by striking three Fur male detainees to the head with a stick or axe-like object, killing them.

127. **ABD-AL-RAHMAN** directly perpetrated the crimes listed in Counts 22-26 and 31 by standing or walking on the backs of detainees—who had been made to lie face down on the ground in the hot sun, some with their hands tied behind their backs and some blindfolded, for prolonged periods of time without access to food, water and sanitary facilities—hitting them with a stick or axe-like object, kicking them, and verbally abusing them.

128. **ABD-AL-RAHMAN** meant to engage in the conduct described above. **ABD-AL-RAHMAN** intended to bring about the objective elements of the charged crimes and/or was aware that these crimes would occur in the ordinary course of events as a result of his conduct.

Ordering under article 25(3)(b) of the Rome Statute

129. On 5 March 2004, **ABD-AL-RAHMAN**, while being in a position of authority, ordered members of the Militia/*Janjaweed* and/or the GoS Forces to shoot and kill detained Fur males. One or more of these members carried out **ABD-AL-RAHMAN**'s orders, which led to the commission of the crimes listed in Counts 27-31.

130. **ABD-AL-RAHMAN** meant to engage in the conduct described above and was aware of his position of authority over the physical perpetrators of the crimes. **ABD-AL-RAHMAN** meant for the Militia/*Janjaweed* and GoS Forces to commit the crimes and/or was aware that the Militia/*Janjaweed* and GoS Forces would, in the ordinary course of events, commit the crimes, and was aware that his actions would contribute to their commission.

Inducing under article 25(3)(b) of the Rome Statute

131. Through the conduct described above, **ABD-AL-RAHMAN** induced the Militia/*Janjaweed* and GoS Forces to commit the crimes listed in Counts 22-31. **ABD-AL-RAHMAN** exerted influence over the Militia/*Janjaweed* and GoS Forces, prompting them to commit the relevant crimes.

132. **ABD-AL-RAHMAN** meant to engage in the conduct described above. **ABD-AL-RAHMAN** meant for the Militia/*Janjaweed* and GoS Forces to commit the crimes and/or was aware that the Militia/*Janjaweed* and GoS Forces would, in the ordinary course of events, commit the crimes, and was aware that his actions would contribute to their commission.

C. OVERVIEW OF CONFIRMED CHARGES

133. Based on the above, **ABD-AL-RAHMAN** is criminally responsible for:

COUNT 1: Intentionally directing attacks against the civilian population of Kodoom and Bindisi and surrounding areas as such, as a war crime, between 15 and 16 August 2003, pursuant to article 8(2)(e)(i) and article 25(3)(b) (inducing) of the Rome Statute.

COUNT 2: Murder as a crime against humanity, concerning 51 persons listed in Annex 1, who were killed in Kodoom, Bindisi and surrounding areas, between 15 and 16 August 2003, pursuant to article 7(1)(a) and article 25(3)(b) (inducing) of the Rome Statute.

COUNT 3: Murder as a war crime, concerning 51 civilians not taking direct part in hostilities, or persons *hors de combat* who were at the material time in the power of the Militia/*Janjaweed* or GoS Forces (listed in Annex 1), between 15 and 16 August 2003 in Kodoom, Bindisi and surrounding areas, pursuant to article 8(2)(c)(i) and article 25(3)(b) (inducing) of the Rome Statute.

COUNT 4: Pillaging as a war crime, in Kodoom and Bindisi, between 15 and 16 August 2003, pursuant to article 8(2)(e)(v) and article 25(3)(b) (inducing) of the Rome Statute.

COUNT 5: Destruction of the property of an adversary, without military necessity, as a war crime, in Kodoom and Bindisi, between 15 and 16 August 2003, pursuant to article 8(2)(e)(xii) and article 25(3)(b) (inducing) of the Rome Statute.

COUNT 6: Other inhumane acts as a crime against humanity, in Bindisi and surrounding areas, between 15 and 16 August 2003, pursuant to article 7(1)(k) and article 25(3)(b) (inducing) of the Rome Statute.

COUNT 7: Outrages upon personal dignity as a war crime, in Bindisi and surrounding areas, between 15 and 16 August 2003, pursuant to article 8(2)(c)(ii) and article 25(3)(b) (inducing) of the Rome Statute.

COUNT 8: Rape as a crime against humanity, concerning 16 Fur women and girls, listed in Annex 1, in Bindisi and surrounding areas, between 15 and 16 August 2003, pursuant to article 7(1)(g) and article 25(3)(b) (inducing) of the Rome Statute.

COUNT 9: Rape as a war crime, concerning 16 Fur women and girls, listed in Annex 1, in Bindisi and surrounding areas, between 15 and 16 August 2003, pursuant to article 8(2)(e)(vi) and article 25(3)(b) (inducing) of the Rome Statute.

COUNT 10: Forcible transfer as a crime against humanity, concerning the expulsion of Fur persons lawfully present in Kodoom and Bindisi, between 15 and 16 August 2003, pursuant to article 7(1)(d) and article 25(3)(b) (inducing) of the Rome Statute.

COUNT 11: Persecution as a crime against humanity, on political and ethnic grounds, concerning the predominantly Fur population of Kodoom, Bindisi and surrounding areas perceived as belonging to, or being associated with, or supporting the rebel armed groups, by way of the criminal acts listed in Counts 1-10, between 15 and 16 August 2003, pursuant to article 7(1)(h) and article 25(3)(b) (inducing) of the Rome Statute.

COUNT 12: Torture as a crime against humanity, concerning a large number of Fur men in Mukjar Police Station, between late February and early March 2004, pursuant to article 7(1)(f) and article 25(3)(a) (direct perpetration and co-perpetration) and article 25(3)(b) (inducing) of the Rome Statute.

COUNT 13: Torture as a war crime, concerning Fur men in Mukjar Police Station, between late February and early March 2004, pursuant to article 8(2)(c)(i) and article 25(3)(a) (direct perpetration and co-perpetration) and article 25(3)(b) (inducing) of the Rome Statute.

COUNT 14: Other inhumane acts as a crime against humanity, concerning Fur men in Mukjar Police Station, between late February and early March 2004,

pursuant to article 7(1)(k) and article 25(3)(a) (direct perpetration and co-perpetration) and article 25(3)(b) (inducing) of the Rome Statute.

COUNT 15: Cruel treatment as a war crime, concerning Fur men in Mukjar Police Station, between late February and early March 2004, pursuant to article 8(2)(c)(i) and article 25(3)(a) (direct perpetration and co-perpetration) and article 25(3)(b) (inducing) of the Rome Statute.

COUNT 16: Outrages against personal dignity as a war crime, concerning Fur men in Mukjar Police Station, between late February and early March 2004, pursuant to article 8(2)(c)(ii) and article 25(3)(a) (direct perpetration and co-perpetration) and article 25(3)(b) (inducing) of the Rome Statute.

COUNT 17: Murder as a crime against humanity, concerning the 49 persons listed in Annex 1, outside of Mukjar, between late February and early March 2004, pursuant to article 7(1)(a) and article 25(3)(a) (co-perpetration) and article 25(3)(b) (ordering and/or inducing) of the Rome Statute.

COUNT 18: Murder as a war crime, concerning the 49 persons listed in Annex 1, outside of Mukjar, between late February and early March 2004, pursuant to article 8(2)(c)(i) and article 25(3)(a) (co-perpetration) and article 25(3)(b) (ordering and/or inducing) of the Rome Statute.

COUNT 19: Attempted murder as a crime against humanity, concerning two detained Fur males, outside of Mukjar, between late February and early March 2004, pursuant to article 7(1)(a) and articles 25(3)(f) and 25(3)(a) (co-perpetration) and articles 25(3)(f) and 25(3)(b) (ordering and/or inducing) of the Rome Statute.

COUNT 20: Attempted murder as a war crime, concerning two detained Fur males, outside of Mukjar, between late February and early March 2004, pursuant to article 8(2)(c)(i) and articles 25(3)(f) and 25(3)(a) (co-perpetration) and articles 25(3)(f) and 25(3)(b) (ordering and/or inducing) of the Rome Statute.

COUNT 21: Persecution as a crime against humanity, on political, ethnic and gender grounds, concerning Fur males perceived as belonging to, or being associated with, or supporting rebel armed groups, by way of the criminal acts listed in Counts 12-20, in Mukjar and surrounding areas, in late February/early March 2004, pursuant to article 7(1)(h) and article 25(3)(a) (direct perpetration and co-perpetration) and article 25(3)(b) (inducing and/or ordering) of the Rome Statute.

COUNT 22: Torture as a crime against humanity, concerning between 100 and 200 Fur males in Deleig, between 5 and 7 March 2004, pursuant to article 7(1)(f) and article 25(3)(a) (direct perpetration and co-perpetration) and article 25(3)(b) (inducing) of the Rome Statute.

COUNT 23: Torture as a war crime, concerning between 100 and 200 Fur males in Deleig, between 5 and 7 March 2004, pursuant to article 8(2)(c)(i) and article 25(3)(a) (direct perpetration and co-perpetration) and article 25(3)(b) (inducing) of the Rome Statute.

COUNT 24: Other inhumane acts as a crime against humanity, concerning between 100 and 200 Fur males in Deleig, between 5 and 7 March 2004, pursuant to article 7(1)(k) and article 25(3)(a) (direct perpetration and co-perpetration) and article 25(3)(b) (inducing) of the Rome Statute.

COUNT 25: Cruel treatment as a war crime, concerning between 100 and 200 Fur males in Deleig, between 5 and 7 March 2004, pursuant to article 8(2)(c)(i) and article 25(3)(a) (direct perpetration and co-perpetration) and article 25(3)(b) (inducing) of the Rome Statute.

COUNT 26: Outrages upon personal dignity as a war crime, concerning between 100 and 200 Fur males in Deleig, between 5 and 7 March 2004, pursuant to article 8(2)(c)(ii) and article 25(3)(a) (direct perpetration and co-perpetration), and article 25(3)(b) (inducing) of the Rome Statute.

COUNT 27: Murder as a crime against humanity, concerning the 34 persons listed in Annex 1, in Deleig and surrounding areas, between 5 and 7 March 2004, pursuant to article 7(1)(a) and article 25(3)(a) (direct perpetration and co-perpetration) and article 25(3)(b) (ordering and/or inducing) of the Rome Statute.

COUNT 28: Murder as a war crime, concerning the 34 persons listed in Annex 1, in Deleig and surrounding areas, between 5 and 7 March 2004, pursuant to article 8(2)(c)(i) and article 25(3)(a) (direct perpetration and co-perpetration) and article 25(3)(b) (ordering and/or inducing) of the Rome Statute.

COUNT 29: Attempted murder as a crime against humanity, concerning twelve detained Fur males, in Deleig and surrounding areas, between 5 and 7 March 2004, pursuant to article 7(1)(a) and articles 25(3)(f) and 25(3)(a) (co-perpetration) and articles 25(3)(f) and 25(3)(b) (ordering and/or inducing) of the Rome Statute.

COUNT 30: Attempted murder as a war crime, concerning twelve detained Fur males, in Deleig and surrounding areas, between 5 and 7 March 2004, pursuant to article 8(2)(c)(i) and articles 25(3)(f) and 25(3)(a) (co-perpetration) and articles 25(3)(f) and 25(3)(b) (ordering and/or inducing) of the Rome Statute.

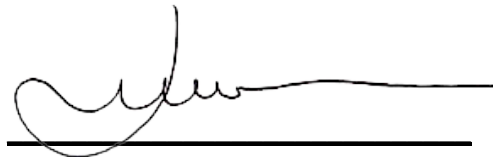
COUNT 31: Persecution as a crime against humanity, on political, ethnic and gender grounds, concerning Fur males perceived as belonging to, or being associated with, or supporting rebel armed groups in Deleig and surrounding areas, between 5 and 7 March 2004, by way of the criminal acts listed in Counts 22-30, pursuant to article 7(1)(h) and article 25(3)(a) (direct perpetration and co-perpetration) and article 25(3)(b) (ordering and/or inducing) of the Rome Statute.

COMMITTS Mr Abd-Al-Rahman to a Trial Chamber for trial on the charges as confirmed;

DECIDES that the time limit for filing an application for leave to appeal this decision shall be suspended until its translation into Arabic is notified by the Registry and **ORDERS** the Registry to make appropriate arrangements so as to ensure that the translation is completed without delay;

ORDERS the Registrar to transmit this decision on the confirmation of charges and the record of these proceedings to the Presidency.

Done in both English and French, the English version being authoritative.



**Judge Rosario Salvatore Aitala,
Presiding Judge**



Judge Antoine Kesia-Mbe Mindua



Judge Tomoko Akane

Dated this Tuesday, 23 November 2021

At The Hague, The Netherlands