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

SITUATION IN DARFUR, SUDAN

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

Public

**Public Redacted Version of
“Prosecution’s application pursuant to article 58(6) of the Rome Statute to amend
the warrant of arrest for ALI MUHAMMAD ALI ABD-AL-RAHMAN (“ALI
KUSHAYB”) by adding new crimes”, 3 November 2017, ICC-02/05-01/07-73-Secret-
Exp**

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Other

A. INTRODUCTION	4
B. PROCEDURAL HISTORY.....	5
C. URGENCY.....	5
D. CONCISE STATEMENT OF FACTS.....	5
E. INCORPORATION BY REFERENCE OF THE 2007 ARREST WARRANT APPLICATION AND THE 2007 ARREST WARRANT DECISION	6
F. ADDITIONAL CRIMES WITHIN THE JURISDICTION OF THE COURT WHICH ALI KUSHAYB IS ALLEGED TO HAVE COMMITTED (ARTICLE 58(2)(B))	10
1) Additional charges	10
2) Applicable modes of liability	10
G. SUMMARY OF THE EVIDENCE AND OTHER INFORMATION WHICH ESTABLISH REASONABLE GROUNDS TO BELIEVE THAT ALI KUSHAYB COMMITTED THE CRIMES SPECIFIED (ARTICLE 58(2)(D)).....	11
H. CONTEXTUAL ELEMENTS	29
I. JURISDICTION AND ADMISSIBILITY	31
1) Jurisdiction.....	31
2) Admissibility	31
J. THE ARREST OF ALI KUSHAYB CONTINUES TO BE NECESSARY.....	36
K. CLASSIFICATION.....	37
L. CONCLUSION.....	38

A. INTRODUCTION

1. The Prosecution applies urgently under article 58(6) of the Rome Statute (“Statute”) to Pre-Trial Chamber II (“PTC II” or the “Chamber”) to amend the current warrant of arrest issued on 27 April 2007 against Ali Muhammad Ali ABD-AL-RAHMAN, also known as Ali KUSHAYB¹ (“Ali KUSHAYB”),² in order to add two additional crimes against humanity (murder and other inhumane acts) and a war crime (murder).
2. The Prosecution seeks to add these crimes in relation to Ali KUSHAYB’s criminal responsibility for the rounding up, detention and inhumane treatment of over 100 civilian Fur men and the execution of at least 100 of these men [REDACTED] in Deleig and its surrounding areas in Wadi Salih locality, West Darfur between on or about 5 to 7 March 2004.
3. Based on the evidence and other information submitted in the present application (“Application”), as well as that included in the 2007 Arrest Warrant Application and in light of Pre-Trial Chamber I’s (“PTC I”) related findings, the Prosecution submits that there are reasonable grounds to believe that Ali KUSHAYB is criminally responsible for these additional crimes.
4. The attacks in Deleig in March 2004, and the related crimes referred to in this Application are consistent with, follow, and are part of the pattern of attacks by *Janjaweed*/Militia and Sudanese Armed Forces (“SAF”) which began in August 2003 on the villages in Wadi Salih of Kodoom, Bindisi, Mukjar and Arawala that constituted the basis of the 2007 Arrest Warrant.

¹ Ali KUSHAYB, a transliteration from Arabic, can also be spelled as Ali Kosheib, Ali Kouchib, Ali Mohamed, Ali Kosheb, Koshib and Ali Koship.

² See *Prosecutor v. Harun and Ali Kushayb*, Warrant of Arrest for Ali Kushayb, 27 April 2007, ICC-02/05-01/07-3-Corr. (“2007 Arrest Warrant”).

B. PROCEDURAL HISTORY

5. On 27 February 2007, the Prosecution applied to PTC I for summonses to appear or, in the alternative, warrants of arrest for Ahmad Muhammad HARUN (“HARUN”) and Ali KUSHAYB.³ As regards Ali KUSHAYB, the Prosecution alleged he was criminally responsible for a total of 50 crimes against humanity and war crimes.⁴
6. On 27 April 2007, PTC I issued the 2007 Arrest Warrant, based on its finding that there were reasonable grounds to believe that Ali KUSHAYB was criminally responsible for the 50 crimes alleged in the Prosecution’s application and that his arrest appeared necessary to ensure his appearance before the Court.⁵

C. URGENCY

7. This Application is filed urgently on the basis that [REDACTED]. The Prosecution therefore requests that PTC II urgently consider this Application.

D. CONCISE STATEMENT OF FACTS

8. At the end of February 2004, Ali KUSHAYB was a tribal military leader and commander of the *Janjaweed*/Militia⁶ in the Wadi Salih and Mukjar localities. He was referred to as *aqid ogada* (“Colonel of Colonels”). The fighters under his command and authority attacked the villages surrounding Deleig,⁷ together with SAF.
9. These villages were suspected of supporting the rebels based in Sindu.⁸ Thereafter, between on or about 5 to 7 March 2004, the *Janjaweed*/Militia and SAF

³ See *Situation in Darfur, The Sudan*, Prosecutor’s Application under Article 58(7), 27 February 2007, ICC-02/05-55-US-Exp (“2007 Arrest Warrant Application”).

⁴ 2007 Arrest Warrant Application, p.6-23.

⁵ 2007 Arrest Warrant, p. 6-17.

⁶ See 2007 Arrest Warrant Application, p. 4-5, for an explanation of this term.

⁷ See DAR-OTP-0194-2340 at 2347 (map of Wadi Salih).

⁸ See 2007 Arrest Warrant Application, paras. 49-56.

arrested and detained near the Deleig police station⁹ well over 100 civilian Fur men, many of whom had sought refuge in Deleig after their villages were attacked. These men were made to lie on the ground in the sun for hours without food or water. Some were beaten severely and walked on by Ali KUSHAYB and by members of his forces who detained them. Over the course of three days, Ali KUSHAYB ordered his forces to transport the detained civilian Fur men in vehicles to various locations outside of Deleig where they executed at least 100 of them by gunshot. [REDACTED]. [REDACTED].

E. INCORPORATION BY REFERENCE OF THE 2007 ARREST WARRANT APPLICATION AND THE 2007 ARREST WARRANT DECISION

10. The general case theory of the 2007 Arrest Warrant Application and the 2007 Arrest Warrant Decision against Ali KUSHAYB equally applies to this Application. The crimes referred to in this Application were committed by the same actors and in the same context.
11. With a view to focussing this Application and facilitating the PTC II's review of the information before it, the Prosecution incorporates by reference all the relevant portions of the 2007 Arrest Warrant Application, including the supporting material annexed thereto¹⁰ and the PTC I's "Decision on the Prosecution Application under Article 58(7) of the Statute" ("2007 Arrest Warrant Decision").¹¹ This material includes information and PTC I's prior findings that there are reasonable grounds to believe that:
 - a) there was a non-international armed conflict, which occurred in Darfur from about August 2002 until the time of the filing of the 2007 Arrest Warrant Application, between the SAF acting in concert with the *Janjaweed*/Militia

⁹ [REDACTED].

¹⁰ See 2007 Arrest Warrant Application, Annexes 1 to 13.

¹¹ See *Prosecutor v. Harun and Ali Kushayb*, Decision on the Prosecution Application under Article 58(7) of the Statute, 27 April 2007, ICC-02/05-01/07-1-Corr ("Arrest Warrant Decision").

against organised rebel groups, including the Sudanese Liberation Movement/Army (“SLM/A”) and the Justice and Equality Movement (“JEM”);¹²

- b) there was a widespread and systematic attack by the SAF acting in concert with the *Janjaweed*/Militia against the civilian population of Darfur, who were perceived as being associated with the rebels, namely civilians primarily from the Fur, Zaghawa and Masalit tribes in the towns of Kodoom, Bindisi, Mukjar and Arawala and surrounding areas between August 2003 and March 2004;¹³
- c) Ali KUSHAYB was one of the most senior leaders¹⁴ in the tribal hierarchy in the Wadi Salih locality.¹⁵ Around August 2003, he was formally appointed to a position within the SAF, in particular he became part of the Popular Defence Force (“PDF”), the reservist force of the SAF. By virtue of the fact that he was a senior tribal leader and member of the SAF, Ali KUSHAYB commanded thousands of *Janjaweed*/Militia;¹⁶
- d) the SAF and the *Janjaweed*/Militia, including Ali KUSHAYB, carried out a common plan or common purpose to attack the civilian population in Darfur.¹⁷ The Prosecution has previously submitted that this common plan or common purpose was launched to crush the rebellion led by the JEM and SLM/A by all means necessary which included joint attacks by the *Janjaweed*/Militia and SAF against the civilian population perceived as supporting the rebels, namely the Fur, Zaghawa and the Masalit;¹⁸

¹² See 2007 Arrest Warrant Decision, paras. 31-47.

¹³ See 2007 Arrest Warrant Decision, paras. 60-75.

¹⁴ See 2007 Arrest Warrant Decision, paras. 95-107.

¹⁵ Wadi Salih locality includes Deleig, see DAR-OTP-0194-2340 at 2347 (map of Wadi Salih).

¹⁶ See 2007 Arrest Warrant Decision, paras. 95-96.

¹⁷ See 2007 Arrest Warrant Decision, paras. 104-107; 2007 Arrest Warrant, p. 5-6.

¹⁸ See 2007 Arrest Warrant Application, paras. 38-57 and 98-111.

- e) being at the head of the *Janjaweed*/Militia during the attacks during which the crimes alleged in the 2007 Arrest Warrant Application were committed, Ali KUSHAYB was not only fully aware of the occurrence of such illegal acts, but also committed them jointly with others;¹⁹
- f) Ali KUSHAYB, as a PDF member and representative of the core *Janjaweed*/Militia leadership, intentionally and jointly with others, implemented the counter-insurgency strategy that resulted in the commission of war crimes and crimes against humanity, such as the persecution (of the primarily Fur population),²⁰ rape and killing of civilians during attacks on towns and villages in Darfur, such as Kodoom, Bindisi, Mukjar and Arawala in the Wadi Salih area;²¹
- g) between mid-2003 and early 2004 Ali KUSHAYB mobilised, recruited, armed and provided funds, equipment, food and other supplies to the *Janjaweed*/Militia under his command and he ensured the enlistment of those tribesmen mobilised by him as PDF fighters;²² and
- h) by reason of his position as a PDF member and as a senior *Janjaweed*/Militia leader, who enlisted fighters, mobilised, recruited, armed and funded the *Janjaweed*/Militia under his command and provided food, equipment and other supplies to them, Ali KUSHAYB intentionally contributed to the commission of the crimes contained in the 2007 Arrest Warrant Decision, knowing that his contribution would further the common plan carried out by the SAF and the *Janjaweed*/Militia, which consisted in attacking the civilian populations in Darfur.²³

¹⁹ See 2007 Arrest Warrant Decision, para. 103.

²⁰ See e.g. 2007 Arrest Warrant Decision, Count 1, p. 43.

²¹ See 2007 Arrest Warrant Decision, paras. 97-104 and 107.

²² See 2007 Arrest Warrant Decision, para. 105.

²³ See 2007 Arrest Warrant Decision, para. 106.

12. The foregoing facts and findings, read in conjunction with the additional information in this Application, demonstrate that:

- a) there are reasonable grounds²⁴ to believe that Ali KUSHAYB is responsible for additional crimes against humanity and a war crime in Deleig, as described below;
- b) there are reasonable grounds to believe that these crimes were committed in the context of, and associated with, the non-international armed conflict referred to in the 2007 Arrest Warrant Decision; and they were committed as part of the widespread and systematic attack against the civilian population of Darfur referred to in the 2007 Arrest Warrant Decision;
- c) the crimes in Deleig and surrounding areas between on or about 5 to 7 March 2004 fall within the jurisdiction of the Court;
- d) due to the specific circumstances of this case, it would not be appropriate to make an assessment of the admissibility of the case at this stage; and
- e) the arrest and detention of Ali KUSHAYB continues to be necessary, including in relation to the additional crimes.

²⁴ Article 58(1)(a) of the Statute. See *Prosecutor v. Katanga & Ngudjolo*, Judgment on Ngudjolo's Interim Release Appeal, 9 June 2008, ICC-01/04-01/07-572 OA 4, para. 18: "A pre-requisite for the issuance of a warrant of arrest is that the Chamber must be satisfied that there are reasonable grounds to believe that the person committed the crimes in question [...] The belief must be founded upon grounds such as to warrant its reasonableness. Suspicion simpliciter is not enough. Belief denotes, in this context, acceptance of a fact. The facts placed before the Chamber must be cogent to the extent of creating a reasonable belief that the person committed the crimes." (footnote omitted); *Prosecutor v. Al Bashir*, Judgment on the Al-Bashir Arrest Warrant Appeal, 3 February 2010, ICC-02/05-01/09-73 OA, para. 30: "[...] when disposing of an application for a warrant of arrest under article 58(1) of the Statute, a Pre-Trial Chamber should not require a level of proof that would be required for the confirmation of charges or for conviction."

F. ADDITIONAL CRIMES WITHIN THE JURISDICTION OF THE COURT WHICH ALI KUSHAYB IS ALLEGED TO HAVE COMMITTED (ARTICLE 58(2)(B))

1) Additional charges

13. The Prosecution submits that Ali KUSHAYB is responsible for the following additional crimes:

- i. Murder** as a crime against humanity, pursuant to articles 7(1)(a) and 25(3)(a), (b) or (d) or 28(a) of the Rome Statute against at least 100 civilian Fur men [REDACTED] in Deleig and surrounding areas between on or about 5 to 7 March 2004 (Count 52).²⁵
- ii. Murder** as a war crime, pursuant to articles 8(2)(c)(i)-1 and 25(3)(a), (b) or (d) or 28(a) of the Rome Statute against at least 100 civilian Fur men [REDACTED] in Deleig and surrounding areas between on or about 5 to 7 March 2004 (Count 53).
- iii. Other inhumane acts** as a crime against humanity, pursuant to articles 7(1)(k) and 25(3)(a), (b) or (d) or 28(a) of the Rome Statute against well over 100 civilian Fur men in Deleig and surrounding areas between on or about 5 to 7 March 2004 (Count 54).

2) Applicable modes of liability

14. The Prosecution submits that Ali KUSHAYB is criminally responsible for these additional crimes:

- a) as a direct perpetrator, indirect perpetrator or indirect co-perpetrator pursuant to article 25(3)(a); and/or
- b) for ordering the commission of the crimes pursuant to article 25(3)(b); and/or

²⁵ The Counts numbered herein continue on from the Counts listed in the 2007 Arrest Warrant Application.

c) for contributing to the commission of the crimes pursuant to article 25(3)(d) .

15. In the further alternative, the Prosecution submits that Ali KUSHAYB is criminally responsible under article 28(a) for the crimes committed in Deleig and its surroundings because: (i) he was a military commander or a person effectively acting as a military commander and had effective command/authority and control over the *Janjaweed*/Militia in the Wadi Salih and Mukjar localities; (ii) the *Janjaweed*/Militia forces under his effective command/authority and control committed crimes referred to under this Application; (iii) he knew, or should have known, that the *Janjaweed*/Militia forces were committing or about to commit such crimes; and (iv) he failed to take all necessary and reasonable measures within his power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.²⁶

16. The following summary of evidence and other information sufficiently illustrates Ali KUSHAYB's criminal responsibility for the crimes and the manner in which his acts and conduct satisfy the objective and subjective elements of the applicable modes of liability.

G. SUMMARY OF THE EVIDENCE AND OTHER INFORMATION WHICH ESTABLISH REASONABLE GROUNDS TO BELIEVE THAT ALI KUSHAYB COMMITTED THE CRIMES SPECIFIED (ARTICLE 58(2)(D))

17. The Prosecution relies primarily on the following categories of evidence and information to support this Application:

a. Statements taken by the Office of the Prosecutor;

²⁶ The Prosecution submits that, contrary to the Trial Judgment in the *Bemba* case (*Prosecutor v. Bemba*, Judgment pursuant to article 74 of the Statute, 21 March 2016, ICC-01/05-01/08-3343, paras. 210-213; 735-741), there is no legal requirement of causation under article 28. This issue is currently before the Appeals Chamber (*Prosecutor v. Bemba*, Prosecution's Response to Appellant's Appeal, 19 January 2017, ICC-01/05-01/08-3472-Corr-Red, paras. 226-253). However, as noted above, the information before the Chamber demonstrates that in this case, as a matter of fact, the alleged crimes resulted from Ali KUSHAYB's failure to exercise control properly over his forces.

- b. Statements taken by the United Nations (“UN”) International Commission of Inquiry (“UNCOI”);
- c. Statements taken by Sudan’s National Commission of Inquiry (“NCI”);
- d. Reports of the NCI;
- e. [REDACTED]; and
- f. [REDACTED]; and
- g. Open source reports from media organisations and NGOs, such as Amnesty International and Human Rights Watch.²⁷

18. The following summarises the evidence and other information relied on by the Prosecution in this Application.

February to March 2004: Ali KUSHAYB continues to be one of the most senior Janjaweed/Militia commanders in the Wadi Salih area during the attacks against the civilian population in Deleig and surrounding areas

19. During the period of the alleged attacks against the civilian population in Deleig and surrounding areas, outlined in detail below, Ali KUSHAYB, as Colonel of Colonels, continued to be one of the most senior *Janjaweed/Militia* commanders in the Wadi Salih area.²⁸ These attacks in the areas surrounding Deleig in February 2004 and in Deleig in March 2004, were part of a series of attacks on villages in the Wadi Salih/Mukjar localities carried out jointly by *Janjaweed/Militia* under Ali KUSHAYB’s control with SAF between August 2003 and March 2004, which included attacks on Kodoom, Bindisi, Mukjar and Arawala.²⁹

February to March 2004: Fur civilians are forced into Deleig and other major towns (Mukjar and Garsila) by SAF and Janjaweed/Militia under Ali KUSHAYB’s control

²⁷ The Prosecution relies on this open source material principally for purposes of corroboration of other evidence.

²⁸ See 2007 Arrest Warrant Application, paras. 36-37 and 161-164.

²⁹ See e.g. 2007 Arrest Warrant Application, paras. 110, 191-250. See also, Arrest Warrant Decision, paras. 64 and 67.

20. Deleig is a Fur village located in Wadi Salih locality in West Darfur and sits in the Garsila-Deleig Administrative Unit.³⁰ It is approximately 30 kilometres northeast of Garsila. Due to its location at the foot of a chain of mountains, Wadi Salih, which included Deleig, was considered a gateway to rebel headquarters in the Jebel Marra mountains.³¹ The February to March 2004 offensive on Sindu was comprehensive and coordinated to take place during the same period; it encompassed the whole region leading thousands of Fur villagers to seek shelter in the larger towns where the SAF and *Janjaweed*/Militia forces could easily round them up.
21. Despite the Government of Sudan (“GoS”) announcement that all major military operations were complete at the end of January 2004 and its declaration of victory on 9 February 2004,³² the conflict did not end.³³ To the contrary, following a string of attacks from the rebels, the SAF and *Janjaweed*/Militia began a major offensive on the area in mid to late February 2004.³⁴
22. The SAF and *Janjaweed*/Militia offensive sought to seal off the area of the Sindu Hills from both sides; they attacked from the south east of Deleig covering the area from Arawala to Sindu Hills and from the northeast of Mukjar all the way to Sindu Hills.³⁵ During this operation, which included aerial bombardment, villages in the area were attacked causing thousands of displaced persons to seek shelter in Deleig, Garsila or Mukjar in an apparent deliberate strategy to herd civilians to these areas.³⁶ The entry and exit of these towns were controlled by

³⁰ See DAR-OTP-0194-2340 at 2347 (map of Wadi Salih) and coordinates of Deleig, Garsila and Sindu, at 2352, 2353 and 2361, respectively.

³¹ [REDACTED]; Julie Flint, Sudan Tribune: “Darfur Refugees executed in desert of Sudan”, DAR-OTP-0152-0179 at 0180.

³² [REDACTED].

³³ [REDACTED].

³⁴ [REDACTED]; Human Rights Watch (“HRW”), Targeting the Fur: Mass Killings in Darfur, 21 January 2005 (“HRW, Targeting the Fur: Mass Killings in Darfur”), DAR-OTP-0107-1474 at 1485-1486.

³⁵ [REDACTED].

³⁶ [REDACTED]; UN Resident Coordinator, UN Darfur Task Force Situation Report, 4 March 2004 (“UN Darfur Task Force Situation Report”), DAR-OTP-0115-0747 at 0747, para. 4; HRW, Targeting the Fur: Mass Killings in Darfur, DAR-OTP-0107-1474 at 1485 and 1486; [REDACTED].

SAF and *Janjaweed*/Militia forces which enabled them to round up Fur civilian men, detain them for interrogation and in many instances, execute them.³⁷

23. Prior to the conflict, the population of Deleig was about 5,000.³⁸ In March 2004, Deleig's population had almost quadrupled due to the arrival of internally displaced persons ("IDPs"), in particular seeking shelter from the SAF and *Janjaweed*/Militia's attacks on the surrounding villages in December 2003 and February 2004.³⁹
24. Instead of finding sanctuary from the SAF and *Janjaweed*/Militia attacks in Deleig, hundreds of the IDPs faced detention, inhumane acts and murder by these forces. As described below, between on or about 5 to 7 March 2004, *Janjaweed*/Militia fighters under the leadership of Ali KUSHAYB and SAF troops committed one of the gravest crimes of the Darfur conflict. Well over 100 Fur civilian males almost exclusively from neighbouring villages were detained in Deleig, and kept outside, hands-bound and face down on the ground near the Deleig police station. Whilst detained, Ali KUSHAYB and other members of his forces as well as SAF soldiers and police interrogated them, beat them with sticks,⁴⁰ walked on them and insulted them, before loading a large number of them up onto trucks to be summarily executed in the outskirts of town.⁴¹
25. On the Sunday after the executions, [REDACTED] were also murdered by forces under Ali KUSHAYB's control.
26. The evidence of multiple witnesses indicates that Ali KUSHAYB: (a) was present at the commencement of the operation; (b) was the commander of the troops during the operation;⁴² (c) gave orders to his *Janjaweed*/Militia soldiers; (d) beat

³⁷ [REDACTED].

³⁸ See Doctors Without Borders, Press Release: Alarming Malnutrition Found in Darfur, Sudan, 10 March 2004, DAR-OTP-0209-0014 at 0015.

³⁹ See *ibid.* and UN Darfur Task Force Situation Report, DAR-OTP-0115-0747. [REDACTED].

⁴⁰ [REDACTED].

⁴¹ [REDACTED].

⁴² [REDACTED].

prisoners; and (e) supervised and facilitated the transport and ultimate execution of the prisoners. A summary of this evidence follows.

Friday, 5 March 2004: arrests, detention and beatings at the police station in Deleig

i. Search and arrest operations in Deleig

27. On or about Friday, 5 March 2004, SAF, including army soldiers and police, together with *Janjaweed*/Militia and local government officials, began to surround and patrol the town of Deleig.⁴³ All movement was closely controlled; no-one could leave or enter Deleig without being checked by the SAF or the *Janjaweed*/Militia. Those who tried to leave Deleig were shot.⁴⁴

28. The SAF and *Janjaweed*/Militia began to conduct house to house searches in Deleig for Fur males who came from villages on the outskirts of Deleig that had been attacked during the February offensive⁴⁵ such as Zarey, Massa,⁴⁶ Baya, Arawala,⁴⁷ Burunga,⁴⁸ Waro,⁴⁹ Umm Njamena⁵⁰ and either had found refuge in homes of Deleig residents or were living, for the most part, in make-shift camps and shelters in Deleig.⁵¹ Due to their high number, the displaced villagers stayed around the market place, slept under trees and many were also accommodated in the homes of relatives living in Deleig.⁵²

ii. Detention at the Deleig police station

29. Witnesses interviewed by the Prosecution consistently state that once arrested the Fur civilian men were taken to the area of the Deleig police station.⁵³

⁴³ HRW, Targeting the Fur: Mass Killings in Darfur, DAR-OTP-0107-1474 at 1486; [REDACTED].

⁴⁴ [REDACTED].

⁴⁵ HRW, Targeting the Fur: Mass Killings in Darfur, DAR-OTP-0107-1474 at 1486.

⁴⁶ [REDACTED].

⁴⁷ [REDACTED].

⁴⁸ [REDACTED].

⁴⁹ [REDACTED].

⁵⁰ [REDACTED].

⁵¹ [REDACTED] and NCI Report, DAR-OTP-0036-0348 (Original); DAR-OTP-0116-0380 (Partial translation) at 0389, paras. 19-14 and 19-15.

⁵² [REDACTED].

⁵³ [REDACTED].

30. P-0092 was [REDACTED].⁵⁴ [REDACTED].⁵⁵ [REDACTED]; [REDACTED].⁵⁶
[REDACTED].⁵⁷ Then P-0092 was [REDACTED].⁵⁸

31. P-0585 was from the Fur village of [REDACTED], southwest of Deleig.⁵⁹
[REDACTED].⁶⁰ [REDACTED].⁶¹ [REDACTED], he saw from a distance a large
number of men lying face down on an open, elevated area near the police
station.⁶² P-0585 could see the *Janjaweed*/Militia on horseback bringing more male
detainees from the village and market, ordering them to lie face down with the
rest of the group.⁶³ Ali KUSHAYB arrived with armed *Janjaweed*/Militia
[REDACTED] and then drove off in the direction of the market.⁶⁴

32. Upon their arrival at the police station in Deleig, these male detainees were
ordered by the *Janjaweed*/Militia and the SAF to lie face down in an open area in
the police station's vicinity.⁶⁵ The captured men numbered well over one
hundred.⁶⁶ P-0591, from [REDACTED], a village east of Deleig, remembers that
the detained men's hands were tied behind their backs.⁶⁷ He also recounts that
some of the men had blood on their clothes.⁶⁸ P-0092 states that [REDACTED].⁶⁹
Despite the heat, the men were denied food and water or access to hygiene
facilities.⁷⁰ Some witnesses recall that more men were escorted to the police
station throughout the day by armed *Janjaweed*/Militia who beat them with rifle

⁵⁴ [REDACTED].

⁵⁵ [REDACTED]

⁵⁶ [REDACTED].

⁵⁷ [REDACTED].

⁵⁸ [REDACTED].

⁵⁹ [REDACTED].

⁶⁰ [REDACTED].

⁶¹ [REDACTED].

⁶² [REDACTED].

⁶³ [REDACTED].

⁶⁴ [REDACTED].

⁶⁵ [REDACTED].

⁶⁶ [REDACTED].

⁶⁷ [REDACTED].

⁶⁸ [REDACTED].

⁶⁹ [REDACTED].

⁷⁰ [REDACTED].

butts.⁷¹ The *Janjaweed*/Militia and SAF troops walked on their backs and heads and also beat them with sticks.⁷²

iii. Ali KUSHAYB arrives at the Deleig police station and takes command of the operation

33. A number of Prosecution witnesses recall seeing Ali KUSHAYB at the Deleig police station standing near the prisoners that day, and describe Ali KUSHAYB as being “in charge of operations.”⁷³ As detailed below, [REDACTED] were detained at the Deleig police station on approximately 5 March 2004 and [REDACTED]. Five other witnesses, P-0585, P-0591, P-0651, P-0671 and P-0106 were in Deleig that day and saw the detained men lying face down while Ali KUSHAYB was standing close by.

34. Other witnesses include P-0617, [REDACTED], and P-0129. P-0617, [REDACTED], was hiding in Deleig on 5 March 2004, in the house of relatives. These relatives were able to observe the events at the police station and reported these to P-0617 contemporaneously. Later, a person who had been detained at the police station confirmed these events to P-0617. P-0129, from [REDACTED], north east of Mukjar, was told by three persons, including [REDACTED],⁷⁴ about their detention in Deleig by Ali KUSHAYB and his men.⁷⁵

35. When Ali KUSHAYB arrived on 5 March 2004 with a convoy of Land Cruiser vehicles, all the soldiers came to attention and saluted him.⁷⁶ P-0584, who had fled his village of [REDACTED], a satellite village of Arawala, heard the forces present at the police station refer to Ali KUSHAYB as “*Jenabu Ali*” (“Commander

⁷¹ [REDACTED].

⁷² [REDACTED].

⁷³ [REDACTED].

⁷⁴ [REDACTED].

⁷⁵ [REDACTED].

⁷⁶ [REDACTED].

Ali").⁷⁷ Likewise, P-0651, also from [REDACTED], was at the mosque that day and heard the elders next to him describing Ali KUSHAYB as the "commander" as they were pointing at him.⁷⁸ Furthermore, P-0651 noticed the Land Cruiser that he had identified as Ali KUSHAYB's vehicle in the past, parked under a tree near the police station.⁷⁹ [REDACTED],⁸⁰ [REDACTED]⁸¹ [REDACTED].⁸²

36. At the police station Ali KUSHAYB was in charge of the members of the *Janjaweed*/Militia and the SAF, who together with the policemen present, were all observed speaking with Ali KUSHAYB.⁸³ He was seen holding and at times speaking on a Thuraya satellite phone.⁸⁴

37. At the police station, Ali KUSHAYB appeared to be inspecting each new batch of detainees as they arrived.⁸⁵ A number of witnesses mention that while detained at the police station their identity, provenance and occupation were checked: if proof could be provided that someone was from Deleig or schooled in Deleig, the person would be released.⁸⁶ P-0617 found out from those who were released that Ali KUSHAYB decided who would be released or not based on whether the relatives of a detainee could justify his presence in Deleig.⁸⁷ Ali KUSHAYB was not from the Deleig area. Witnesses saw a man with his face covered accompanying Ali KUSHAYB in order to identify for Ali KUSHAYB specific individuals from the group of detainees lying down.⁸⁸

⁷⁷ [REDACTED].

⁷⁸ [REDACTED].

⁷⁹ [REDACTED].

⁸⁰ [REDACTED].

⁸¹ [REDACTED].

⁸² [REDACTED].

⁸³ [REDACTED].

⁸⁴ [REDACTED].

⁸⁵ [REDACTED].

⁸⁶ [REDACTED].

⁸⁷ [REDACTED].

⁸⁸ [REDACTED].

38. A number of witnesses recall that Ali KUSHAYB used an instrument that some described as a “military baton”,⁸⁹ a “black stick”,⁹⁰ a “stick with a rounded end”⁹¹ or a “small axe” to hit prisoners.⁹² P-0584 saw Ali KUSHAYB holding a “stick with a rounded end” with which he hit a man [REDACTED],⁹³ in the back of the head leaving him motionless on the ground.⁹⁴ P-0591 also recalled seeing Ali KUSHAYB hitting three prisoners, identified by a man hiding his face, with the back of a small axe he was holding.⁹⁵ Witnesses detained at the Mukjar police station a few days before the Deleig operation also stated that Ali KUSHAYB held what they described as an “axe” when he appeared in the police station’s holding cell in Mukjar and used it to beat prisoners.⁹⁶

39. Other witnesses mentioned that they saw Ali KUSHAYB “standing and walking” on the backs of other detained villagers who were lying face down.⁹⁷

Friday 5 March 2004: the execution of at least 100 Fur civilian men previously detained at the Deleig police station

40. Multiple witnesses provide evidence that once identified as not being from Deleig, the detained men were loaded onto vehicles (Land Cruisers or Land Rovers) where some armed *Janjaweed*/Militia and PDF were positioned on the sides of the open space in the back and driven to execution sites.⁹⁸ P-0060, P-0106, P-0092, P-0584 and P-0651 witnessed Ali KUSHAYB supervise the process of loading the victims onto the trucks in the area of the police station, from where they were taken to the execution site and murdered.

⁸⁹ [REDACTED].

⁹⁰ [REDACTED].

⁹¹ [REDACTED].

⁹² [REDACTED].

⁹³ [REDACTED].

⁹⁴ [REDACTED].

⁹⁵ [REDACTED].

⁹⁶ [REDACTED].

⁹⁷ [REDACTED].

⁹⁸ [REDACTED].

41. P-0651 stated that after 17:00 on Friday, he saw the prisoners being placed in the back of several Toyota Land Cruisers and driven away.⁹⁹ Because of their large number, not all of the prisoners could be loaded on the trucks at once.¹⁰⁰ According to P-0651 the vehicles carrying the detainees and armed *Janjaweed*/Militia guarding them left in two different directions which ultimately both led to Garsila.¹⁰¹ He could see the *Janjaweed*/Militia guards on the back of the vehicles with the prisoners as they left.¹⁰² Each time the vehicles returned, they were empty of prisoners.¹⁰³ The operation was repeated at least twice and Ali KUSHAYB's vehicle remained at the police station the entire time.¹⁰⁴

42. P-0060 was present in Deleig because he had fled the attack on [REDACTED] located near the Sindu area. [REDACTED].¹⁰⁵ [REDACTED].¹⁰⁶ P-0060 saw Ali KUSHAYB leave with seven trucks carrying the detained men in the direction of Andi village in the east of Deleig.¹⁰⁷ P-0060 saw that three of the trucks returned empty and the *Janjaweed*/Militia and soldiers started reloading them with detainees.¹⁰⁸ [REDACTED]. [REDACTED].¹⁰⁹ [REDACTED].¹¹⁰

43. P-0106 fled [REDACTED] and sought refuge in Deleig. He described a similar scene of detained men near the Deleig police station who were then loaded onto pick-up vehicles and driven in the direction of Koska Mountain, southwest of Deleig. [REDACTED].¹¹¹ [REDACTED].¹¹² [REDACTED].¹¹³ P-0106 later heard that the detained men had been killed at the foot of Koska Mountain.¹¹⁴

⁹⁹ [REDACTED].

¹⁰⁰ [REDACTED].

¹⁰¹ [REDACTED].

¹⁰² [REDACTED].

¹⁰³ [REDACTED].

¹⁰⁴ [REDACTED].

¹⁰⁵ [REDACTED].

¹⁰⁶ [REDACTED].

¹⁰⁷ [REDACTED].

¹⁰⁸ [REDACTED].

¹⁰⁹ [REDACTED].

¹¹⁰ [REDACTED].

¹¹¹ [REDACTED].

44. P-0092 [REDACTED]. In Deleig, he saw Ali KUSHAYB arrive at the police station [REDACTED].¹¹⁵ [REDACTED].¹¹⁶ [REDACTED].¹¹⁷ [REDACTED].¹¹⁸ [REDACTED].¹¹⁹ [REDACTED].¹²⁰ [REDACTED]. [REDACTED].¹²¹ [REDACTED].¹²² [REDACTED].¹²³ [REDACTED].¹²⁴
45. P-0591 states that prisoners in Deleig were loaded up onto the Land Rovers each guarded by four to five armed soldiers. As the vehicles were filling up with the detained men, Ali KUSHAYB came to speak to the drivers of each of the vehicles.¹²⁵ Once full, three vehicles left, one in the direction of Zalengei and two in the direction of Garsila.¹²⁶ Approximately 20 minutes later the Land Rovers returned empty of detainees.¹²⁷ P-0591 heard heavy shooting and then individual shots coming from the direction of Arawala that two of the vehicles had taken.¹²⁸ The three vehicles repeated the same operation until all the detained men had been driven away.¹²⁹ During the whole operation Ali KUSHAYB remained in the vicinity of the police station together with PDF soldiers.¹³⁰ The next day the killing of the Fur men who had been detained at the police station was confirmed.¹³¹

¹¹² [REDACTED].

¹¹³ [REDACTED].

¹¹⁴ [REDACTED].

¹¹⁵ [REDACTED].

¹¹⁶ [REDACTED].

¹¹⁷ [REDACTED].

¹¹⁸ [REDACTED].

¹¹⁹ [REDACTED].

¹²⁰ [REDACTED].

¹²¹ [REDACTED].

¹²² [REDACTED].

¹²³ [REDACTED].

¹²⁴ [REDACTED].

¹²⁵ [REDACTED].

¹²⁶ [REDACTED].

¹²⁷ [REDACTED].

¹²⁸ [REDACTED].

¹²⁹ [REDACTED].

¹³⁰ [REDACTED].

¹³¹ [REDACTED].

46. P-0584 [REDACTED]. He heard one of the men taking part in the operation, address the soldiers and say: "Soldiers, let's start the work, pick them up."¹³² Ali KUSHAYB was still in the grounds of the police station and saw the soldiers placing the detainees on the trucks.¹³³ [REDACTED],¹³⁴ [REDACTED].¹³⁵ [REDACTED] told P-0584 that the man who hit the prisoner called [REDACTED] was Ali KUSHAYB.¹³⁶

47. [REDACTED]. [REDACTED].¹³⁷ [REDACTED].¹³⁸ [REDACTED].¹³⁹ [REDACTED].¹⁴⁰ [REDACTED].¹⁴¹ [REDACTED]. [REDACTED]. [REDACTED].¹⁴² [REDACTED].¹⁴³

48. P-0671, who lived in [REDACTED] after fleeing the attack on [REDACTED] located east of Deleig, witnessed the arrest on Friday of [REDACTED] as well as other men [REDACTED] by Ali KUSHAYB and his men. At the police station P-0671 saw Ali KUSHAYB amongst the detainees hitting some of them.¹⁴⁴ Fearing arrest, P-0671 left the scene and returned to [REDACTED]. Late that evening, P-0671's neighbour told him that around 17:00 the detainees were placed in vehicles and driven in different directions.¹⁴⁵ [REDACTED]. [REDACTED].¹⁴⁶ Some days later, P-0671 [REDACTED] joined other villagers who went to Tolda Mountain in search of family members. There, P-0671 found the bodies of [REDACTED] amongst the 20-40 male bodies of those executed.¹⁴⁷ The next day,

¹³² [REDACTED].

¹³³ [REDACTED].

¹³⁴ [REDACTED].

¹³⁵ [REDACTED].

¹³⁶ [REDACTED].

¹³⁷ [REDACTED].

¹³⁸ [REDACTED].

¹³⁹ [REDACTED].

¹⁴⁰ [REDACTED].

¹⁴¹ [REDACTED].

¹⁴² [REDACTED].

¹⁴³ [REDACTED].

¹⁴⁴ [REDACTED].

¹⁴⁵ [REDACTED].

¹⁴⁶ [REDACTED].

¹⁴⁷ [REDACTED].

P-0671 heard that more bodies were found which included that of [REDACTED], whom P-0671 had known from the [REDACTED].¹⁴⁸

49. At [REDACTED], P-0617 was told by a former detainee at the Deleig police station that he witnessed Ali KUSHAYB holding a meeting some distance from the group of detainees [REDACTED],¹⁴⁹ [REDACTED]¹⁵⁰ [REDACTED].¹⁵¹ During the meeting Ali KUSHAYB spoke on his Thuraya phone¹⁵² and immediately after the call ended, Ali KUSHAYB ordered the loading of the detained men onto the trucks.¹⁵³

50. P-0585 did not see the men detained at the police station being loaded onto vehicles in Ali KUSHAYB's presence but was told by the *Janjaweed*/Militia accompanying Ali KUSHAYB that the men lying on the ground were "*Tora Bora*"¹⁵⁴ and that they were all going to be killed.¹⁵⁵

51. P-0585 returned to Deleig on Sunday, a market day, and asked [REDACTED], a resident of Deleig, about the fate of the detainees that he had seen lying on the ground close to the police station two days prior.¹⁵⁶ [REDACTED] explained that some of those from Deleig were released because their relatives successfully intervened on their behalf but the others who were not had been killed.¹⁵⁷ [REDACTED] said that "KUSHAYB in person was supervising the killing".¹⁵⁸

52. Although P-0027, from [REDACTED], a village near Arawala,¹⁵⁹ did not see Ali KUSHAYB [REDACTED], he saw four open pickup trucks and one old vehicle

¹⁴⁸ [REDACTED].

¹⁴⁹ [REDACTED].

¹⁵⁰ [REDACTED].

¹⁵¹ [REDACTED].

¹⁵² [REDACTED].

¹⁵³ [REDACTED].

¹⁵⁴ [REDACTED].

¹⁵⁵ [REDACTED].

¹⁵⁶ [REDACTED].

¹⁵⁷ [REDACTED].

¹⁵⁸ [REDACTED].

¹⁵⁹ [REDACTED].

full of men that had been taken out of the prison as well as others from the group on the ground. Before being thrown inside the vehicles, P-0027 saw the *Asakir* (members of the SAF), *Janjaweed*/Militia and police beating the prisoners.¹⁶⁰ The vehicles left the scene and drove in different directions: north, east and south.¹⁶¹ [REDACTED]. [REDACTED].¹⁶² P-0027 also saw some men being released after being beaten by the *Asakir*, *Janjaweed*/Militia and police.¹⁶³ While they were beaten and walked on, the *Asakir*, *Janjaweed*/Militia and police were saying that “the land belongs to God”, “it is not theirs”, and “that they were slaves”.¹⁶⁴ [REDACTED].¹⁶⁵

53. P-0607, who was in Deleig after having fled the February attack on [REDACTED], saw Ali KUSHAYB [REDACTED] but he could not confirm whether Ali KUSHAYB was present when he heard a vehicle arrive and people around him ordered to stand up to be loaded onto vehicles on three occasions, at one hour intervals.¹⁶⁶ P-0607 later found out that the detainees aboard the trucks had been taken to Koska Mountain to be executed and that [REDACTED], whom he had seen earlier that day during the arrests, was amongst them.¹⁶⁷ [REDACTED].¹⁶⁸

Saturday, 6 March 2004: the corpses of the victims of the executions are discovered

54. In the days following this incident, corpses were found on the outskirts of Deleig.

55. P-0591 states that on Saturday he went to the market and observed that there had been an increase in the number of men who were detained at the police station

¹⁶⁰ [REDACTED]

¹⁶¹ [REDACTED].

¹⁶² [REDACTED].

¹⁶³ [REDACTED].

¹⁶⁴ [REDACTED].

¹⁶⁵ [REDACTED].

¹⁶⁶ [REDACTED].

¹⁶⁷ [REDACTED].

¹⁶⁸ [REDACTED].

from the day before. All of the men were tied up; some were standing, while others were lying on the ground.¹⁶⁹ While present, he heard [REDACTED], reassuring the prisoners' wives who had gathered there that Ali KUSHAYB had said he would release all their men after the investigation.¹⁷⁰ On reaching home in the late afternoon, P-0591 heard sporadic shooting coming from outside of, as well as inside Deleig from the direction of the police station.¹⁷¹

56. On Saturday, the day after P-0651 had seen a number of prisoners lying face down at the police station,¹⁷² he discovered approximately 40 or more corpses on Tolda Mountain, located in *Wadi Bookla* on the outskirts of Deleig.¹⁷³ These corpses were positioned face down with their hands tied behind their backs. The bodies were lined up next to each other and had what appeared to be shots to the back or side of their heads.¹⁷⁴ P-0651 returned to Deleig on the same day and related his discovery of the bodies on Tolda Mountain.¹⁷⁵ He was informed by other villagers that they too had discovered bodies in Fereh and between the villages of Taringa and Soja.¹⁷⁶ These villages are all located within near distance of Deleig.¹⁷⁷

57. A few days later, P-0671 walked with other Deleig villagers to the outskirts of the town and found the dead bodies of 20-40 male prisoners who had been executed;¹⁷⁸ they were lined up, most had suffered gunshot wounds to their backs

¹⁶⁹ [REDACTED].

¹⁷⁰ [REDACTED].

¹⁷¹ [REDACTED].

¹⁷² [REDACTED].

¹⁷³ [REDACTED].

¹⁷⁴ [REDACTED].

¹⁷⁵ [REDACTED].

¹⁷⁶ [REDACTED].

¹⁷⁷ [REDACTED].

¹⁷⁸ [REDACTED].

and heads, and some had their hands tied behind their back.¹⁷⁹ Among the bodies, P-0671 found those of [REDACTED]¹⁸⁰ [REDACTED].¹⁸¹

58. P-0617 who is from [REDACTED], provided the following names of [REDACTED] inhabitants that were loaded onto the trucks and executed:¹⁸² [REDACTED],¹⁸³ [REDACTED],¹⁸⁴ [REDACTED],¹⁸⁵ who was P-0617's friend, [REDACTED],¹⁸⁶ and [REDACTED].¹⁸⁷ P-0617, [REDACTED] and other [REDACTED] inhabitants found out about the killings of [REDACTED],¹⁸⁸ [REDACTED], and [REDACTED] from a man who found their bodies.¹⁸⁹

59. [REDACTED].¹⁹⁰ [REDACTED]; [REDACTED].¹⁹¹ [REDACTED].¹⁹²
[REDACTED].¹⁹³

Sunday, 7 March 2004: the execution of [REDACTED]

60. In the days that followed the executions described above, approximately [REDACTED] were seen in and around Deleig, [REDACTED].¹⁹⁴ As described below, one witness, P-0060, saw this [REDACTED]. Two witnesses, P-0585, P-0027 saw this [REDACTED] in Deleig while a third witness, P-0617, [REDACTED], was told about this incident by [REDACTED] who directly witnessed it. This was the last time that [REDACTED] were seen alive.

¹⁷⁹ [REDACTED].

¹⁸⁰ [REDACTED].

¹⁸¹ [REDACTED].

¹⁸² [REDACTED].

¹⁸³ [REDACTED].

¹⁸⁴ [REDACTED].

¹⁸⁵ [REDACTED].

¹⁸⁶ [REDACTED].

¹⁸⁷ [REDACTED].

¹⁸⁸ [REDACTED].

¹⁸⁹ [REDACTED].

¹⁹⁰ [REDACTED].

¹⁹¹ [REDACTED].

¹⁹² [REDACTED].

¹⁹³ [REDACTED].

¹⁹⁴ [REDACTED].

61. Prior to being taken to Deleig, [REDACTED] were first arrested and detained [REDACTED], [REDACTED].¹⁹⁵ [REDACTED].¹⁹⁶ [REDACTED].¹⁹⁷
62. The names of [REDACTED] appear on [REDACTED].¹⁹⁸ [REDACTED],¹⁹⁹ [REDACTED]²⁰⁰ [REDACTED].²⁰¹
63. [REDACTED], P-0060 saw [REDACTED] in the direction of Deleig²⁰² One of the [REDACTED] Ali KUSHAYB.²⁰³ Amongst these men, P-0060 recognised [REDACTED],²⁰⁴ [REDACTED].²⁰⁵ They were [REDACTED]. [REDACTED] later informed P-0060 that he thought [REDACTED] was dead, and was rumoured to be [REDACTED], but it was too dangerous to check.²⁰⁶ P-0671, stated that the body of [REDACTED], previously known to him, was found with the bodies of [REDACTED] amongst the 20-40 executed persons found a 30 minute walk to the south of Deleig.²⁰⁷
64. P-0585 was in Deleig for market day when he saw Ali KUSHAYB [REDACTED].²⁰⁸ [REDACTED]. At this time, P-0585 was told by a local resident that [REDACTED],²⁰⁹ [REDACTED]²¹⁰ [REDACTED] and that these people had “been taken to be killed.” [REDACTED].²¹¹

¹⁹⁵ [REDACTED].

¹⁹⁶ [REDACTED].

¹⁹⁷ [REDACTED].

¹⁹⁸ [REDACTED].

¹⁹⁹ [REDACTED].

²⁰⁰ [REDACTED].

²⁰¹ [REDACTED].

²⁰² [REDACTED].

²⁰³ [REDACTED].

²⁰⁴ [REDACTED].

²⁰⁵ [REDACTED].

²⁰⁶ [REDACTED].

²⁰⁷ [REDACTED]

²⁰⁸ [REDACTED].

²⁰⁹ [REDACTED]

²¹⁰ [REDACTED].

²¹¹ [REDACTED].

65. P-0027 [REDACTED] saw [REDACTED] containing [REDACTED].²¹² P-0027 corroborates P-0585's information [REDACTED]²¹³ [REDACTED]. In addition, P-0027 identified [REDACTED],²¹⁴ [REDACTED].²¹⁵ [REDACTED].²¹⁶ [REDACTED].²¹⁷
66. [REDACTED], P-0027 saw [REDACTED] leave Deleig, heading east. After this, P-0027 saw [REDACTED]. P-0027 observed that Ali KUSHAYB was in uniform, held a baton and was armed with a pistol.²¹⁸ [REDACTED]. P-0027 then heard Ali KUSHAYB say that "they were going to a place where important rebels were said to have been killed."²¹⁹
67. P-0617 is [REDACTED].²²⁰ His statement corroborates the evidence of P-0585 and P-0027. P-0617 was told by [REDACTED], who were in Deleig at the time, that they witnessed [REDACTED] in [REDACTED] in Deleig, while stationed at the market place in Deleig, on Sunday.²²¹ P-0617 was also told by another that that he saw the bodies of [REDACTED] near Fereh village on the road to Zalengei.²²²
68. The Prosecution submits that there are reasonable grounds to believe that [REDACTED] seen in and around Deleig on around 7 March 2004 were killed by *Janjaweed*/Militia and SAF shortly after being seen in Deleig on 7 March 2004.

²¹² [REDACTED].

²¹³ [REDACTED].

²¹⁴ [REDACTED].

²¹⁵ [REDACTED].

²¹⁶ [REDACTED].

²¹⁷ [REDACTED].

²¹⁸ [REDACTED].

²¹⁹ [REDACTED].

²²⁰ [REDACTED].

²²¹ [REDACTED].

²²² [REDACTED].

H. CONTEXTUAL ELEMENTS

69. In issuing the 2007 Warrant of Arrest, PTC I previously found reasonable grounds to believe that the contextual elements for these crimes were satisfied for both crimes against humanity²²³ and war crimes.²²⁴ The crimes in Deleig and its surroundings were committed in the same context as previously examined by PTC I and for that reason the Prosecution submits that the threshold elements of articles 7 and 8 of the Statute are likewise satisfied for the crimes related to the Deleig episode.

70. The Prosecution submits that there are reasonable grounds to believe that the crimes detailed in this Application were committed in the context of, and were associated with, the non-international armed conflict, which occurred in Darfur from about August 2002 until at least the time relevant in this Application - between the SAF acting in concert with the *Janjaweed*/Militia against the organised rebel groups, including the SLM/A and the JEM, as determined by PTC I.²²⁵ The attacks on the towns surrounding Deleig during the offensive on Sindu - which led to the crimes alleged in this Application - were carried out by SAF and *Janjaweed*/Militia in the context of the counter-insurgency campaign marked by rebel activity and broken peace agreements.²²⁶

71. In light of PTC I's determination, there are reasonable grounds to believe that acts referred to in this Application were committed as part of a widespread and systematic attack directed against a civilian population and that they were committed in furtherance of a policy to attack the civilian population perceived

²²³ 2007 Arrest Warrant, p. 4. *See also* 2007 Arrest Warrant Application, paras. 165-169; and 2007 Arrest Warrant Decision, paras. 60-67.

²²⁴ 2007 Arrest Warrant, p. 3. *See also* 2007 Arrest Warrant Application, paras. 165, 170-173.

²²⁵ *See* 2007 Arrest Warrant Decision, paras. 46-47. Footnotes omitted.

²²⁶ *See* 2007 Arrest Warrant Decision, para. 47. Footnotes omitted.

as supporting the rebels, namely civilians primarily from the Fur, Zaghawa and Masalit tribes.²²⁷

72. The attack on the villages around Deleig during the February 2004 offensive and subsequent arrests were consistent with the pattern of attacks on civilian villages in Wadi Salih starting in August 2003 referred to in the 2007 Arrest Warrant in which Ali KUSHAYB took part as a leader of the *Janjaweed*/Militias. The rounding up, beatings and execution of Fur males between on or about 5 to 7 March 2004 in Deleig, was a continuation of the prior practice of imprisoning, interrogating, abusing and eliminating perceived supporters of the rebellion, namely the Fur, Zaghawa and Masalit communities following attacks.
73. Despite the ceasefire talks with the GoS that had been initiated in September 2003 in Abeche,²²⁸ the rebels continued their attacks on GoS positions during the fall of 2003.²²⁹ This led to the collapse of negotiations on or about December 2003 when the GoS and *Janjaweed*/Militia forces attacked Arawala town and its surrounding villages for their perceived support of the SLM/A or the JEM.²³⁰
74. Witness P-0584, an inhabitant of [REDACTED], a satellite village of Arawala, stated that in December 2003, Arawala town and its neighbouring villages of Beja, Boronga, Teje, Massa, Gorolla, Forgo, Kusu, Sirsira, Gaba, Umm Njamena and Zarey, among others, were attacked by the SAF and *Janjaweed*/Militia.²³¹ Fleeing the attack on [REDACTED], P-0584 together with other inhabitants from other neighbouring villages under attack, fled to nearby mountains seeking shelter from the *Janjaweed* and the GoS Air Force.²³² In his statement, P-0584 reveals that many of those hidden in the mountains perished pursued and killed by the

²²⁷ See 2007 Arrest Warrant Decision, para. 67. Footnotes omitted.

²²⁸ A Peace Agreement Between the Government of the Republic of Sudan and the Sudanese Liberation Army, 3 September 2003, DAR-OTP-0116-0433 at 0434-0437.

²²⁹ [REDACTED].

²³⁰ 2007 Arrest Warrant Application, paras. 236-250.

²³¹ [REDACTED]. See also 2007 Arrest Warrant Application, para. 239; [REDACTED].

²³² [REDACTED].

Janjaweed/Militia, by falling victim to the SAF shells dropped on the area or simply died of starvation.²³³

75. By January 2004, many villages around the Sindu Hills, the SLM/A base, had been repeatedly attacked and a large part of the Fur civilian population had either congregated in the larger towns of the region—Mukjar, Bindisi, Garsila, Deleig, Shattaya, Artala among others—or were living scattered in the hills and in the few villages in the area which were still inhabitable, trying to salvage parts of their harvest or because they were prevented from leaving by *Janjaweed*/Militia.²³⁴

I. JURISDICTION AND ADMISSIBILITY

1) Jurisdiction

76. On 31 March 2005, the UN Security Council (“Security Council”), acting under Chapter VII of the Charter of the UN, adopted Resolution 1593 referring the situation in Darfur, Sudan, since 1 July 2002 to the Prosecutor of the International Criminal Court.²³⁵ Accordingly, under article 13(b) of the Statute, the Court may exercise its jurisdiction over the situation in Darfur, Sudan.²³⁶

2) Admissibility

77. There is no requirement for a Chamber to determine admissibility before the issuance of a warrant of arrest pursuant to article 58(1) of the Statute.²³⁷ A Chamber may exercise its discretion and address admissibility at the warrant stage *proprio motu*, but should only do so “when it is appropriate in the

²³³ [REDACTED].

²³⁴ HRW, Targeting the Fur: Mass Killings in Darfur, DAR-OTP-0107-1474 at 1485; [REDACTED].

²³⁵ Security Council Resolution 1593, S/RES/1593 (2005).

²³⁶ See also 2007 Arrest Warrant Decision, paras. 12-17.

²³⁷ *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled “Decision on the Prosecutor's Application for Warrants of Arrest, Article 58”, 13 July 2006, ICC-01/04-169, para. 52.

circumstances of the case, bearing in mind the interests of the suspect.”²³⁸ These circumstances may include “instances where a case is based on the established jurisprudence of the Court, uncontested facts that render a case clearly inadmissible or an ostensible cause impelling the exercise of *proprio motu* review.”²³⁹

78. As explained below, there are no circumstances warranting a *proprio motu* review by the Chamber in this case. Should the Chamber nevertheless exercise its discretion to consider the admissibility of the case in relation to the person and conduct set out in this Application, the Prosecution submits that the case is admissible.

Ali KUSHAYB is not being investigated or prosecuted by the GoS (article 17(1)(a))

79. There is no indication that Ali KUSHAYB is currently being investigated or prosecuted by the GoS. To the contrary, he continues to be associated to forces supporting the GoS and allegedly committed crimes as recently as 2013 in Darfur.²⁴⁰

The decision by the GoS not to prosecute Ali KUSHAYB resulted from the unwillingness and the inability of the GoS genuinely to prosecute (article 17(1)(b) and 17(1)(c))

80. In its 2007 Arrest Warrant Application, the Prosecution indicated that on 9 December 2006, the Under-Secretary for the Sudanese Ministry of Justice wrote to the ICC Prosecutor informing him that fourteen people against whom *prima facie* evidence had been collected had been arrested in relation to incidents concerning

²³⁸ *Ibid.*

²³⁹ *Ibid.*

²⁴⁰ [REDACTED]; Human Rights Watch, “Sudan: ICC Suspect at Scene of Fresh Crimes, Surrender Ali Kosheib, Protect Civilians in Darfur”, 3 June 2013, DAR-OTP-0209-0004 at 0004-0012.

the areas of Shattaya in South Darfur and Deleig in West Darfur. Ali KUSHAYB was one of those named in connection with these incidents.²⁴¹

81. In particular, Sudan's Judicial Investigations Committee ("JIC"), created in 2005 based on a recommendation from the NCI,²⁴² stated that Ali KUSHAYB was under investigation for five separate incidents, including in Arawala and Deleig.²⁴³ The JIC declared that the investigation into Deleig began on 14 April 2005.²⁴⁴ Ali KUSHAYB was purportedly arrested on 28 November 2006²⁴⁵ and the GoS reportedly announced his release on 1 October 2007 for lack of evidence.²⁴⁶
82. In 2008, the Government of National Unity ("GoNU") provided an update to the African Union regarding investigations of crimes committed in Darfur from 2003 and thereafter.²⁴⁷ The work of the JIC was not mentioned. The GoNU stated that, on 2 September 2008, a newly constituted investigation team reported that they reviewed "the investigation diary of the report no. (2868) in which Colonel Hamdi Sharafeldin, Ali Kushaib and others are named as accused persons".²⁴⁸ The GoNU further reported that "after determining the unfinished processes relating to this case",²⁴⁹ the new investigative team decided to renew questioning of witnesses.²⁵⁰

²⁴¹ 2007 Arrest Warrant Application, para. 257; [REDACTED].

²⁴² [REDACTED]. the NCI Report, referring to "[a]llegations of extra-judicial executions in the areas of Deleig and Tanuku" stated that "on the basis of evidence, the Commission found for the detailed judicial enquiry and the bringing to trial of those with confirmed prima facie charges against them especially [where] an accusation had been levelled against specific individuals", see NCI Report, DAR-OTP-0036-0348 (Arabic); DAR-OTP-0116-0380 (Partial translation) at 0392, para. 26(a) and 0428, para. 14(a).

²⁴³ [REDACTED].

²⁴⁴ [REDACTED].

²⁴⁵ [REDACTED].

²⁴⁶ See TRIAL International, Ali Mohammed Ali Abd-Al-Rahman, 15 March 2012, DAR-OTP-0209-0018 at 0021.

²⁴⁷ GoS, A Progress Report by the Government of National Unity of the Republic of the Sudan "GoNU" to the African Union Commission, 17 September 2008 ("Progress Report by the GoNU"), DAR-OTP-0157-1350 at 1368, para. 8.9.

²⁴⁸ GoS, Progress Report by the GoNU, DAR-OTP-0157-1350 at 1368, para. 8.9 (a).

²⁴⁹ GoS, Progress Report by the GoNU, DAR-OTP-0157-1350 at 1368, para. 8.9 (a).

²⁵⁰ GoS, Progress Report by the GoNU, DAR-OTP-0157-1350 at 1368, para. 8.9 (a).

83. In their 2010 Letter to the Security Council, the Sudanese authorities stated that a Special Prosecutor appointed on 3 August 2009 “heard numerous witnesses regarding the events in Dulayq [Deleig], Mukjar, Bindisi, Garsila and neighbouring villages in West Darfur.”²⁵¹ However, the Report listed the obstacles rendering the collection of evidence to prove the guilt of an individual beyond reasonable doubt difficult, if not impossible, in view of the internal armed conflict: “[l]arge numbers of citizens affected by the events in the region have left their villages for remote and widely dispersed areas;”²⁵² “[i]t is difficult to make an accurate assessment of casualties because of the frequent lack of cooperation from the parties;”²⁵³ “[t]he opposition has influence over the witnesses in many of the camps;”²⁵⁴ and “[t]he lack of a witness-protection system”.²⁵⁵

84. The Report stated that “[t]ribal reconciliations have been conducted in conjunction with legal measures and investigations, in the belief that reconciliation is the best way to restore stability”;²⁵⁶ and “[r]econciliation conferences are conducted in a spirit of amnesty and respect for customary practice.”²⁵⁷

85. These statements by the Sudanese authorities, taken at face value, indicate that the investigation carried out by the JIC in 2005 appeared to be considered

²⁵¹ UNSC, Letter dated 15 December 2010 from the Permanent Representative of the Sudan to the UN addressed to the President of the Security Council, Annex: Report on the work of the Public Prosecutor on Crimes in Darfur and of the various investigative commissions, S/2010/642, 29 December 2010, (“GoS, Report on the work of the Public Prosecutor and various investigative commissions”), DAR-OTP-0209-0116 at 0118.

²⁵² GoS, Report on the work of the Public Prosecutor and various investigative commissions, DAR-OTP-0209-0116 at 0118.

²⁵³ GoS, Report on the work of the Public Prosecutor and various investigative commissions, DAR-OTP-0209-0116 at 0118.

²⁵⁴ GoS, Report on the work of the Public Prosecutor and various investigative commissions, DAR-OTP-0209-0116 at 0118.

²⁵⁵ GoS, Report on the work of the Public Prosecutor and various investigative commissions, DAR-OTP-0209-0116 at 0118.

²⁵⁶ GoS, Report on the work of the Public Prosecutor and various investigative commissions, DAR-OTP-0209-0116 at 0119.

²⁵⁷ GoS, Report on the work of the Public Prosecutor and various investigative commissions, DAR-OTP-0209-0116 at 0119.

“unfinished” by the investigation initiated by the GoNU in 2008, which was itself discontinued for the various reasons referred to above, including in particular, the lack of availability of witnesses. The competent authorities appear to have relied solely on the voluntary presence of victims, now dispersed to other locations, to progress the investigation. The authorities did not appear to attempt to remedy this matter to ensure a more comprehensive investigation, by for example, compelling relevant witnesses to appear or providing the necessary protective measures.

86. The limited, discrete and incomplete steps taken in these investigations by the GoS, indicate that the person and conduct which form the focus of this Application have not been subjected to relevant national proceedings, demonstrating a situation of inaction.²⁵⁸ In particular, the authorities have not undertaken tangible, concrete and progressive investigative steps to identify the criminal responsibility of those involved.²⁵⁹ In view of such inactivity, there is no conflict of jurisdiction between the Sudan and the Court with respect to the person and conduct which form the focus of this Application.

87. Alternatively, to the extent that the Chamber may hold that the person and conduct which forms the focus of this Application have been subjected to national proceedings, the Prosecution submits that the decision of the GoS to terminate the investigation before it was completed and/or its decision not to

²⁵⁸ *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, 25 September 2009, ICC-01/04-01/07-1497, para. 78.

²⁵⁹ *Prosecutor v Francis Kirimi Muthaura et al*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”, 30 August 2011, ICC-01/09-02/11-274, para. 40; *Prosecutor v William Samoei Ruto et al*. Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”, 30 August 2011, ICC-01/09-01/11-307, para. 41; *Prosecutor v Simone Gbagbo*, Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled “Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo”, 27 May 2015, ICC-02/11-01/12-75-Red, para. 122.

submit the case for prosecution was invalidated by its unwillingness to genuinely investigate and prosecute the case. Indeed, set against the evidence set out in this Application, the limited domestic proceedings undertaken appear to have been conducted in a manner which, in the circumstances, is inconsistent with the intent to bring Ali KUSHAYB to justice.

The alleged crimes in Deleig are of sufficient gravity (article 17(1)(d))

88. The crimes related to the Deleig episode that the Prosecution seeks to add to the 2007 Arrest Warrant are at least of the same scale and nature and were perpetrated in the same manner as those in the 2007 Warrant of Arrest. The allegations of the crimes inflicted on at least 100 Fur civilians [REDACTED], in such a short period of time, suggest a level of egregiousness that plainly satisfy the gravity threshold of article 17(1)(d).

J. THE ARREST OF ALI KUSHAYB CONTINUES TO BE NECESSARY

89. In the 2007 Arrest Warrant Decision, PTC I found that the arrest of Ali KUSHAYB appeared necessary because, at the time, it was believed that he was in the custody of the Sudanese police. In PTC I's view this detention prevented him from willingly and voluntarily appearing before the Court.²⁶⁰

90. This situation has now changed; Ali KUSHAYB is not detained by the Sudanese authorities.²⁶¹ His arrest, nonetheless, continues to be necessary under all three grounds under article 58(1)(b)(i) to (iii). In particular, his arrest appears necessary to ensure his appearance at trial to face not only the additional crimes referred to in this Application, but also those upon which the 2007 Arrest Warrant is based.

²⁶⁰ 2007 Arrest Warrant Decision, paras. 117-121, 132-134.

²⁶¹ [REDACTED]; Human Rights Watch, Sudan: ICC Suspect at Scene of Fresh Crimes, Surrender Ali Kosheib, Protect Civilians in Darfur, 3 June 2013, DAR-OTP-0209-0004 at 0004-0012.

91. Deemed uncooperative in 2007, the Government of Sudan is now openly hostile to the Court. [REDACTED].²⁶² [REDACTED].²⁶³ [REDACTED]²⁶⁴ and as recently as June 2017, in comments made in response to the Prosecutor’s report on Darfur to the Security Council, the representative of the GoS referred to the ICC as a “defective kangaroo court.”²⁶⁵ On this basis, it is reasonable to conclude that the GoS will not transfer Ali KUSHAYB to the Court, and given the existence of the public 2007 Arrest Warrant and his failure to surrender himself, Ali KUSHAYB has already demonstrated that he will not appear willingly.

K. CLASSIFICATION

92. Pursuant to regulation 23*bis* of the Regulations of the Court, this Application is filed under seal, *ex parte*, only available to the Prosecution, for the following reasons: (i) to protect ongoing investigations; (ii) to protect victims and witnesses; and (iii) to avoid putting Ali KUSHAYB on notice that additional crimes may be added to the 2007 Warrant of Arrest, in case he takes steps to evade future arrest.

93. For these reasons, the Prosecution requests that the Chamber issue its decision on this Application, and if applicable, any warrant of arrest under seal, *ex parte*, only available to the Prosecution.²⁶⁶

²⁶² [REDACTED].

²⁶³ *Ibid.*

²⁶⁴ [REDACTED]; *Prosecutor v. Harun & Kushayb*, Decision informing the United Nations Security Council about the lack of cooperation by the Republic of the Sudan, 25 May 2010, ICC-02/05-01/07-57, p. 4-5; *Prosecutor v. Al Bashir*, Prosecution’s request for a finding of non-compliance against the Republic of the Sudan, 19 December 2014, ICC-02/05-01/09-219, paras. 14-20; UNSC, Reports of the Secretary-General on the Sudan and South Sudan, S/PV.7080, 11 December 2013, DAR-OTP-0209-0073 at 0076-0077; *Prosecutor v. Al Bashir*, Decision on the Prosecutor’s Request for a Finding of Non-Compliance Against the Republic of the Sudan, 9 March 2015, ICC-02/05-01/09-227, paras. 9-12.

²⁶⁵ See UNSC, Reports of the Secretary-General on the Sudan and South Sudan, S/PV.7963, 8 June 2017, DAR-OTP-0209-0090 at 0106.

²⁶⁶ Chambers Practice Manual, February 2016, Issues Related to Pre-Trial Proceedings, Issuance of a warrant of arrest/summons to appear, p. 6: “The application of the Prosecutor under article 58 of the Statute and the decision of the Pre-Trial Chamber are submitted and issued *ex parte*.”

L. CONCLUSION

94. The Prosecution requests under article 58(6) of the Statute that PTC II urgently amend the 2007 Arrest Warrant for Ali KUSHAYB to add the crimes against humanity of Murder (Count 52) and Other inhumane acts (Count 54) and the war crime of Murder (Count 53) committed by Ali KUSHAYB in Deleig and the surrounding areas in the Wadi Salih locality, between on or about 5 to 7 March 2004.



Fatou Bensouda
Prosecutor

Dated this 26th day of June 2020

At The Hague, The Netherlands