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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

Public redacted version of “Prosecution’s request for reconsideration or leave to appeal the ‘Decision on the confirmation of charges against Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’)’ (ICC-02/05-01/20-433) and for correction/clarification of discrete findings”, 6 September 2021

Source: Office of the Prosecutor

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

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I. INTRODUCTION

1. The Prosecution respectfully requests Pre-Trial Chamber II (“Chamber”) to reconsider its findings in the “Decision on the confirmation of charges against Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’)” (“Confirmation Decision”)¹ with respect to the number of persons killed in relation to the Kodoom/Bindisi and the Deleig criminal incidents.

2. The Chamber confirmed the charges of murder as a crime against humanity and as a war crime in these locations concerning only victims specifically named or otherwise identified by the Prosecution in the respective annexes to the Document Containing the Charges (“DCC”).² Accordingly, the Chamber found that only 51 persons were killed as a result of the attack on Kodoom and Bindisi,³ and only 34 persons were killed in Deleig and surrounding areas.⁴

3. The Prosecution presented evidence that at least 100 persons were killed in each of these locations, as alleged in the DCC.⁵ Although the Prosecution was unable to identify all of these victims by name, the evidence in relation to the killing of the unidentified victims was nonetheless strong and met the standard for confirming charges. Furthermore, the material facts were pleaded with sufficient specificity to enable Mr Abd-Al-Rahman to understand the nature, cause and content of the charges, and to effectively prepare his defence, notwithstanding that the lists of victims were non-exhaustive.

4. While an exceptional remedy, reconsideration is necessary in this case to prevent an injustice. The Prosecution respectfully requests the Chamber to reconsider

¹ ICC-02/05-01/20-433.

² ICC-02/05-01/20-325-Anx1-Corr2-Red; ICC-02/05-01/20-Anx1A-Corr; ICC-02/05-01/20-Anx1D.

³ ICC-02/05-01/20-433, para. 92 (paras. 29, 33 of the confirmed charges) (Counts 2-3); ICC-02/05-01/20-433-Conf-Anx1, p. 2. There appear to be clerical errors in Counts 2-3 with respect to the number of persons killed. *See below*, para. 41.

⁴ ICC-02/05-01/20-433, para. 112 (para. 112 of the confirmed charges) (Counts 27-28); ICC-02/05-01/20-433-Conf-Anx1, p. 4.

⁵ ICC-02/05-01/20-325-Anx1-Corr2-Red, paras. 32, 37 (Counts 2-3) (Kodoom/Bindisi) and 132 (Counts 27-28) (Deleig).

its findings to ensure that the confirmed charges are based on a full appreciation of the available evidence, as comprehensively set out in this request. In this way, an injustice will be prevented because both named/identified *and unnamed/unidentified* victims will be properly reflected in the murder charges related to the two incidents.

5. In the alternative, the Prosecution seeks leave to appeal the Confirmation Decision, under article 82(1)(d) of the Rome Statute, on the following Issues:

- i. Whether the Pre-Trial Chamber erred in law when it confirmed charges of murder in relation to the Kodoom/Bindisi and the Deleig incidents only with respect to persons specifically named and/or identified in the respective annexes to the DCC, but not in relation to unnamed/unidentified victims as alleged in the DCC and supported by the available evidence; and/or
- ii. Whether the Pre-Trial Chamber erred in fact when it found that only 51 persons were killed in relation to the Kodoom/Bindisi incident, and only 34 persons in relation to the Deleig incident, rather than at least 100 persons in relation to each incident, as alleged in the DCC.

6. These Issues arise from the Confirmation Decision and would significantly affect the fair and expeditious conduct of the proceedings, and the outcome of the trial. Moreover, immediate resolution of the Issues by the Appeals Chamber may materially advance the proceedings.

7. Finally, the Prosecution requests the Chamber to clarify and/or correct a number of discrete findings in the Confirmation Decision, so as to resolve any potential ambiguity in the factual parameters of the charges confirmed for trial based on apparent clerical errors or inconsistent use of language.

II. CLASSIFICATION

8. Pursuant to regulation 23*bis*(1) of the Regulations of the Court, this request is filed confidentially because it contains information that could identify Prosecution witnesses. A public redacted version will be filed simultaneously.

III. SUBMISSIONS

1) Request for reconsideration

9. Although an exceptional measure, pre-trial and trial chambers of the Court have reconsidered their own decisions in some limited circumstances. As previously held by this Chamber, such circumstances could include “where, for instance, ‘a clear error of reasoning’ has been demonstrated, or if it ‘is necessary to prevent an injustice’ or if the decision rendered is ‘manifestly unsound’.”⁶ Consistent with the majority of the Court’s case law,⁷ this Chamber has held that such criteria need not be demonstrated cumulatively.⁸

10. Reconsideration is necessary in this case to prevent an injustice.⁹ Since the Pre-Trial Chamber only confirmed the murder charges for the two incidents in relation to those victims specifically named or identified in the annexes to the DCC, the scope of the Prosecution’s case has been significantly reduced without apparent reasons. This is despite the Prosecution having presented evidence establishing substantial grounds to believe that at least 100 persons were murdered in relation to each of the Kodoom/Bindisi and the Deleig incidents. Furthermore, the material facts alleged in the DCC were sufficiently detailed to properly inform Mr Abd-Al-Rahman of the

⁶ ICC-02/05-01/20-163-tENG, para. 12. *See also* ICC-02/05-01/20-372, para. 8; ICC-01/04-02/06-519, para. 12; ICC-02/04-01/15-468, para. 4; ICC-02/04-01/15-1547, paras. 6-7; ICC-01/14-01/18-447, para. 16; ICC-01/04-02/06-1049-Red, para. 12.

⁷ *See e.g.* ICC-01/04-02/06-519, para. 12; ICC-02/04-01/15-468, para. 4; ICC-01/04-02/06-1049-Red, para. 12.

⁸ ICC-02/05-01/20-163-tENG, para. 12.

⁹ The current request is based on the Prosecution’s understanding that the Chamber intended to restrict the number of victims in the confirmed charges by using the term “exhaustive” in the Confirmation Decision and limiting the scope of Annex 1. *See* ICC-02/05-01/20-433, para. 117. Should the Chamber not have intended any such restriction, then this request need not be entertained further.

nature, cause and content of the charges against him, and to enable him to effectively prepare his defence.

11. As it stands, the Trial Chamber will be unable to consider charges against Mr Abd-Al-Rahman for the murders of any victims of these incidents who have not yet been specifically named or identified, even if evidence proving their murders beyond reasonable doubt is adduced at trial. This would impact on the scope of any potential conviction and also the sentence imposed on Mr Abd-Al-Rahman given that the Trial Chamber, when determining the sentence of a convicted person, must consider the extent of the damage caused, in particular the harm caused to the victims and their families.¹⁰

12. Furthermore, confirmation of an exhaustive list of named/identified victims, to the exclusion of a significant number of unidentified persons, could impact the ability of victims to participate in the proceedings and, ultimately, to obtain adequate reparations following any conviction.¹¹ For instance, the family members of a person killed in the course of the Kodoom/Bindisi or the Deleig incidents, who is not currently named in Annex 1 to the Confirmation Decision,¹² may be prevented from participating in the proceedings and/or from receiving individual reparations in connection with that person's murder in the absence of a conviction.¹³

13. Moreover, as consistently held by the Inter-American Court of Human Rights, the right of victims of serious human rights violations to the truth is important not only for individuals but for the society as a whole, and is itself an important means of

¹⁰ Rule 145(1)(c) of the Rules of Procedure and Evidence.

¹¹ Reparations may only be ordered directly against a convicted person after the trial is concluded. *See* Article 75 of the Statute and rule 97 of the Rules; ICC-02/05-01/20-237, para. 20.

¹² ICC-02/05-01/20-433-Conf-Anx1.

¹³ The Appeals Chamber has held: "A convicted person's liability for reparations must be proportionate to the harm caused and, *inter alia*, his or her participation in the commission of the crimes for which he or she was found guilty, in the specific circumstances of the case." *See* ICC-01/04-01/06-3129, para. 118.

reparation.¹⁴ The current limited scope of the confirmed charges will significantly constrain the Trial Chamber in exercising its truth-seeking function in this case.¹⁵

14. The following sections demonstrate that the Chamber had sufficient evidence before it to confirm the charges of murder in relation to at least 100 persons for each incident, and that the material facts relating to the charges were pleaded with sufficient specificity.

a) The evidence established the murders of at least 100 persons in each of the Kodoom/Bindisi and the Deleig incidents

15. As the Chamber observed in the Confirmation Decision, the purpose of 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.”¹⁶ Furthermore, the evidentiary standard at the confirmation stage is met “as soon as the Prosecutor offers concrete and tangible proof demonstrating a clear line of reasoning underpinning the specific allegations.”¹⁷

16. As held by the Appeals Chamber, consistent with its role as a “gatekeeper”, the Pre-Trial Chamber conducts a “macro-level” or “light review” when compared with the fact-finding role of the Trial Chamber.¹⁸ Accordingly, the Pre-Trial Chamber may define the factual parameters of the confirmed charges broadly, and is not always required to make exhaustive findings on each individual criminal act underlying the crimes charged (including an exhaustive list of victims).¹⁹

¹⁴ See e.g. IACHR, *Case of Blanco-Romero et al. v. Venezuela*, “Order of the Inter-American Court of Human Rights”, 28 November 2005, paras. 95-96; IACHR, *Case of the “Mapiripán Massacre” v. Colombia*, “Judgment”, 15 September 2005, paras. 216, 297-298; IACHR, *Case of the Moiwana Community v. Suriname*, “Judgment”, 15 June 2005, paras. 204-205.

¹⁵ Article 69(3) of the Statute.

¹⁶ ICC-02/05-01/20-433, para. 36.

¹⁷ ICC-02/05-01/20-433, para. 37.

¹⁸ ICC-01/12-01/18-1562-Red, para. 92.

¹⁹ ICC-01/12-01/18-1562-Red, para. 92; ICC-01/04-02/06-266-Red, paras. 326-327; ICC-01/05-01/08-3636-Anx1-Red, paras. 20- 21.

17. The Appeals Chamber approved this approach in *Ntaganda*, where the charges were framed with respect to a non-exhaustive list of victims within confined temporal and geographical parameters,²⁰ and in *Al Hassan*, where the Pre-Trial Chamber did not make exhaustive findings about the role and functions of the accused during the relevant period.²¹ Furthermore, the Pre-Trial Chamber in *Al Hassan* did not consider it necessary to identify all victims at the confirmation stage.²² Similarly, in *Ongwen*, the Pre-Trial Chamber confirmed charges of murder with respect to an open-ended number of victims without identifying each victim.²³

18. The evidence establishing the killing of at least 100 persons in relation each of the Kodoom/Bindisi and the Deleig incidents is summarised below. This is done to provide the greatest possible clarity to the Chamber with respect to the evidence relied upon by the Prosecution. Although this evidence was disclosed to the Defence and put before the Chamber,²⁴ the Prosecution recognises that, to more effectively communicate the strength of the evidence relating to the unnamed/unidentified victims, it would have been of greater assistance to the Chamber if the Prosecution had set out this evidence comprehensively in its Pre-Confirmation Brief (“PCB”).²⁵

i. Kodoom, Bindisi and surrounding areas

19. The Chamber confirmed charges of murder as a crime against humanity and as a war crime as a result of the attack on Kodoom and Bindisi for only the 51 persons

²⁰ ICC-01/04-02/06-2666-Red, paras. 326-331.

²¹ ICC-01/12-01/18-1562-Red, para. 100.

²² ICC-01/12-01/18-459-tENG, paras. 55-56 (“It is the Chamber’s view that it is unnecessary, especially at the confirmation of charges stage, to identify the victims, in particular in the case of the crime of persecution.”); ICC-01/12-01/18-143-tENG, paras. 30-31 (“Where crimes such as torture or rape are concerned, the Prosecutor must describe the criminal acts in issue, stating the date and place of the acts, along with the number of victims, or at the very least a clear estimate of that number, and their identities as far as at all possible.”).

²³ ICC-02/04-01/15-422-Red, paras. 21, 33, 46, 59 of the confirmed charges (the open-ended nature of the number of victims was indicated by use of the terms “at least” and “approximately”).

²⁴ See esp. ICC-02/05-01/20-346-AnxA-Red, paras. 160-164 (Bindisi/Kodoom) and para. 328, fn. 1023-1026 (with cross-references to paras. 287, 300, 306-307, 310 and 314-323) (Deleig). All of the evidence referenced in the current request was disclosed to the Defence and included on the Prosecution’s list of evidence (ICC-02/05-01/20-346-Conf-AnxB).

²⁵ ICC-02/05-01/20-346-AnxA-Red.

listed in Annex 1 to the Confirmation Decision.²⁶ The Chamber did not expressly find that any unidentified persons, other than the three listed in Annex 1,²⁷ were killed in the course of the attack.

20. The evidence before the Chamber, when assessed in its totality,²⁸ established substantial grounds to believe that at least 100 persons were killed as a result of the attack on Kodoom and Bindisi. Such evidence includes:

- a. P-0012, who states that he helped to bury the corpses of 105 people from Bindisi killed on 15 and 16 August 2003.²⁹ P-0012 also states that on 16 August 2003, after seeing a man shot to death, he found eight to ten dead bodies in Bindisi, including five old men, two young men, one woman and one girl.³⁰
- b. P-0011, who states that on 15 August 2003, approximately 105 people, including about 50 men, were surrounded by Militia/*Janjaweed* and/or GoS Forces in the area surrounding Bindisi as they tried to flee.³¹ The Militia/*Janjaweed* tied the hands of these 50 men behind their backs, laid them face down and shot them with their Kalashnikovs.³²

²⁶ ICC-02/05-01/20-433, para. 92 (paras. 29, 33 of the confirmed charges); ICC-02/05-01/20-433-Conf-Anx1, p. 2. The Chamber did not confirm that a certain “[u]nidentified female (elderly woman)” was killed in Bindisi during the attack. *See* ICC-02/05-01/20-433, para. 93.

²⁷ ICC-02/05-01/20-433-Conf-Anx1, p. 2 (no. 14, 50, 51).

²⁸ The evidence relating to the number of persons killed in Bindisi town (70, including 17 or 19 persons in some parts of the town) should be assessed in combination with the evidence of persons killed in the fields around Bindisi (ranging from about 50 to at least 62 persons) and in both Bindisi and surrounding areas (105), along with the evidence of the number of persons killed in Kodoom (ranging from 40 to 47 or 48). *See below*, para. 20(a)-(f). The figure of “at least 100” is therefore a conservative approximation based on all of the available evidence.

²⁹ P-0012, [DAR-OTP-0119-0503-R01](#) at 0506, para. 11 and 0522, paras. 85-87. According to P-0012, he hid between the two villages (this is understood as a reference to Old Bindisi and New Bindisi, which form part of the town of Bindisi) during the attack on 16 August 2003 and did not leave Bindisi until 17 August 2003. It is therefore reasonable to infer that the persons he helped to bury on 16 August 2003 were killed in Bindisi or surrounding areas.

³⁰ P-0012, [DAR-OTP-0119-0503-R01](#) at 0522, para. 85.

³¹ P-0011, [DAR-OTP-0088-0219-R01](#) at 0229, para. 61.

³² P-0011, [DAR-OTP-0088-0219-R01](#) at 0231, para. 73. Although P-0011 does not explicitly state that 50 men were shot and killed, it can reasonably be inferred that this is her evidence from the preceding paragraphs, especially paragraph 61.

- c. P-0007, who states that he saw 17 dead bodies of men, women and children in Bindisi after the 15 August 2003 attack. He later compiled information indicating that about 32 men, 30 children and an unknown number of women were killed in the fields outside of Bindisi.³³
- d. P-0085, who saw 4 of his neighbours being shot in Bindisi and was later told that 70 dead bodies had been collected in the centre of Bindisi, while other dead bodies were collected in other parts of town.³⁴
- e. P-0717, who helped to gather the corpses of 18 unidentified victims bearing signs of gunshot wounds in Bindisi on 15 August 2003 and to bury them in two holes. P-0717 states that 19 people were killed that day (18 persons whom he helped to bury and another person he later learned about), but he believes there were far more persons killed because Bindisi is a large town and he only saw dead bodies in the nearby streets.³⁵ P-0717 later learned from people involved in the burials that 47 or 48 people were killed during the 15 August 2003 attack on Kodoom.³⁶
- f. P-0834, who was told by a woman who had just fled the Kodoom attack that this woman's husband had been killed in the Kodoom mosque along with 40 other people.³⁷

21. This evidence, taken together, establishes substantial grounds to believe that at least 100 persons were killed in Kodoom, Bindisi and surrounding areas between 15 and 16 August 2003.

³³ P-0007, [DAR-OTP-0088-0060-R01](#) at 0071, para. 42.

³⁴ P-0085, [DAR-OTP-0110-0054-R01](#) at 0062, para. 31. The Chamber initially indicated that it would not rely on P-0085 in the Confirmation Decision (*see* ICC-02/05-01/20-386, paras. 26-29 and p. 15), but ultimately did so (*see* ICC-02/05-01/20-433, para. 86). *See also* ICC-02/05-01/20-404, para. 13; ICC-02/05-01/20-404-Conf-Exp-Anx3, para. 4.

³⁵ P-0717, [DAR-OTP-0210-0187-R01](#) at 0202, paras. 79-80.

³⁶ P-0717, [DAR-OTP-0210-0187-R01](#) at 0201, para. 75.

³⁷ P-0834, [DAR-OTP-0214-0686-R01](#) at 0693, para. 37. This unnamed male is included in the list of victims contained in Annex 1 to the Confirmation Decision. *See* ICC-02/05-01/20-433-Conf-Anx1, p. 2 (no. 14).

ii. Deleig and surrounding areas

22. The Chamber confirmed charges of murder as a crime against humanity and as a war crime in Deleig and surrounding areas only for the 34 persons listed in Annex 1 to the Confirmation Decision.³⁸ These 34 persons included i) 3 persons that the Chamber confirmed were killed directly by Mr Abd-Al-Rahman in Deleig on Friday, 5 March 2004,³⁹ and ii) 5 persons that the Chamber confirmed were killed on Sunday, 7 March 2004.⁴⁰

23. The Chamber thus found that only 26 persons (i.e. the remainder of the victims named in the list of victims annexed to the DCC⁴¹) were killed on Friday, 5 March 2004 at execution sites in the areas surrounding Deleig. The Chamber did not expressly find that any unnamed/unidentified persons were killed.

24. The evidence before the Chamber established that a large-scale arrest and killing operation took place in Deleig over the course of three days, with the major part of the operation occurring on Friday, 5 March 2004. The Chamber confirmed that between 100 and 200 Fur males were arrested and detained outside the Deleig police station on that day.⁴² The Chamber further confirmed that groups of these detained males were loaded onto vehicles and driven to locations outside of Deleig where they were unloaded and shot at, killing *most or all* of the detainees in each group – a process that was repeated several times.⁴³

25. Multiple items of evidence, assessed in their totality and in light of this overall context,⁴⁴ clearly established that far more than the 26 named victims were transported

³⁸ ICC-02/05-01/20-433, para. 112 (para. 112 of the confirmed charges) (Counts 27-28); ICC-02/05-01/20-433-Conf-Anx1, p. 4.

³⁹ ICC-02/05-01/20-433, para. 109 (paras. 109, 126-128 of the confirmed charges); ICC-02/05-01/20-433-Conf-Anx1 (no. 7, 18 and 27). *See also* ICC-02/05-01/20-325-Anx1-Corr2-Red, paras. 129, 146.

⁴⁰ ICC-02/05-01/20-433, para. 111 (para. 111 of the confirmed charges); ICC-02/05-01/20-433-Conf-Anx1 (no. 8, 13, 16, 19 and 22). *See also* ICC-02/05-01/20-325, para. 131.

⁴¹ ICC-02/05-01/20-325-Anx1D.

⁴² ICC-02/05-01/20-433, para. 109 (paras. 100, 106 of the confirmed charges).

⁴³ ICC-02/05-01/20-433, para. 110 (para. 110 of the confirmed charges) (emphasis added).

⁴⁴ Although it is not possible to make a precise mathematical calculation, especially at this stage of the proceedings, the evidence of how many detainees were loaded onto each vehicle (e.g. 7 or 8 (P-0879), 10 (P-0092), 16 or 17 (P-0736), 20 (P-0617), about 30 (P-0584)) should be assessed in combination with the evidence of how many

to execution sites in the areas surrounding Deleig on Friday, 5 March 2004, where most or all of them were killed. Such evidence includes:

- a. [REDACTED], who observed that between 70 and 100 persons were lying on the ground outside the police station, and that all 12 cars in the convoy were loaded with detainees.⁴⁵ The whole convoy travelled to an execution site, where Mr Abd-Al-Rahman ordered that the detainees be shot and killed.⁴⁶
- b. [REDACTED]⁴⁷ [REDACTED] indicating that 101 persons had been detained and killed during the operation.⁴⁸
- c. P-0651, who observed that between 150 and 200 detainees were lying face down outside the police station, and that the process of loading vehicles and the vehicles returning empty was repeated at least twice until all of the detainees were gone.⁴⁹
- d. [REDACTED]⁵⁰ [REDACTED]⁵¹
- e. [REDACTED], who states that he was detained with 170 people outside the police station and that, over several days, names were called out and the persons who responded were loaded onto vehicles. [REDACTED]⁵²

vehicles were loaded and how many trips the vehicles made (e.g. loaded and returned empty at least twice (P-0651), loaded and returned empty at least twice (P-0617), loaded 3 times (P-0607), loaded and returned empty 4 times (P-0736), loaded 4 times (P-0714), 4 vehicles loaded and returned empty (P-0584), 5 vehicles loaded (P-0027), 7 vehicles loaded of which 3 were reloaded (P-0060), loaded vehicles made several trips (P-0106), loaded and returned empty multiple times (P-0879)), and in light of other corroborative evidence (e.g. overall estimates given by witnesses, information given by witness from intelligence reports, numbers of bodies found, and the lists of victims compiled by different persons/organisations). *See below*, para. 25(25.a)-25.n).

⁴⁵ [REDACTED].

⁴⁶ [REDACTED].

⁴⁷ [REDACTED].

⁴⁸ [REDACTED].

⁴⁹ P-0651, [DAR-OTP-0205-0015-R01](#) at 0029-0030, paras. 49-53.

⁵⁰ [REDACTED].

⁵¹ [REDACTED].

⁵² [REDACTED].

- f. P-0617, who states that the detainees outside the police station were loaded onto vehicles in groups of 20, and when the vehicles returned empty the process was repeated. He estimates that 116 people were killed.⁵³
- g. P-0879, who observed many people, possibly over 100, lying face down outside the police station. These people were loaded in groups of seven or eight onto the backs of many vehicles, which returned empty and the process was repeated multiple times.⁵⁴
- h. P-0736, who saw a vehicle carrying 16 or 17 males drive out of Deleig and return empty after approximately 30 minutes. He then saw another vehicle carrying 16 or 17 males drive out in the same direction and again return empty after some time. P-0736 saw the vehicles going and coming back four times on this day.⁵⁵
- i. Several Prosecution witnesses, who give additional estimates of the number of detainees loaded onto vehicles, the number of vehicles loaded, and the number of trips these vehicles made on Friday, 5 March 2004:
 - i. P-0060, who [REDACTED] saw seven trucks loaded with detainees, of which three returned empty and were reloaded.⁵⁶
 - ii. P-0027, who states that five separate vehicles were loaded with detainees outside the police station.⁵⁷

⁵³ P-0617, [DAR-OTP-0202-1496-R01](#) at 1525-1526, paras. 84-85.

⁵⁴ P-0879, [DAR-OTP-0217-0033-R01](#) at 0047-0049, paras. 74, 77-80.

⁵⁵ P-0736, [DAR-OTP-0210-0248-R01](#) at 0268-0269, para. 76. While the majority of Prosecution witnesses state that the process of loading detainees onto vehicles outside the Deleig police station occurred on Friday, 5 March 2004, P-0736 states that it occurred on Saturday, 6 March 2004.

⁵⁶ P-0060, [DAR-OTP-0097-0328-R01](#) at 0342, paras. 52-55.

⁵⁷ P-0027, [DAR-OTP-0094-0091-R01](#) at 0105, paras. 56-57; P-0027, [DAR-OTP-0216-0738-R01](#) at 0741, para. 16.

- iii. P-0714, who states that vehicles loaded with detainees left from outside the police station loaded with detainees about four times.⁵⁸
- iv. P-0607, who states that the vehicles were loaded three times.⁵⁹
- v. P-0106, who saw the vehicles loaded with detainees make several trips.⁶⁰
- j. Several other Prosecution witnesses, who state that they discovered dead bodies in separate locations outside of Deleig: near Tolda mountain (between 20 and more than 40 bodies)⁶¹ and Koska mountain (about 20 bodies)⁶² to the south, and near Fere village to the west (13 to 15 bodies).⁶³
- k. P-0714, who states that two persons known to him, with the assistance of some *sheikhs*, the Red Cross and possibly some other aid agencies, created a list of persons detained and killed in Deleig, which contained the names of 126 executed males.⁶⁴
- l. Lists compiled or collected by several organisations, including the United Nations Commission of Inquiry on Darfur (“UNCOI”), contain the names of between 120 and 131 persons killed in Deleig/Wadi Salih between 5 and 7 March 2004.⁶⁵

⁵⁸ P-0714, [DAR-OTP-0209-1916-R02](#) at 1936-1937, paras. 70-74.

⁵⁹ P-0607, [DAR-OTP-0203-0164-R01](#) at 0179-0180, paras. 53-55.

⁶⁰ P-0106, [DAR-OTP-0116-1005-R01](#) at 1019-1020, paras. 72-73.

⁶¹ P-0651, [DAR-OTP-0205-0015-R01](#) at 0031, paras. 56-58; P-0651, Annex B, [DAR-OTP-0205-0042](#) (Translation at [DAR-OTP-0219-1687](#) at 1689); P-0671, [DAR-OTP-0206-0105-R01](#) at 0118-0119, paras. 51-56.

⁶² P-0714, [DAR-OTP-0209-1916-R02](#) at 1940, para. 84; P-0714, Annex D, [DAR-OTP-0209-1953-R01](#) (about 20 bodies near Koska mountain, south of Deleig). The timing of the discovery of these bodies about two weeks after the Deleig events indicates that this is a different execution site than that discovered near Tolda mountain, given that P-0671 indicates that the bodies at Tolda mountain were buried several days after the executions.

⁶³ [REDACTED].

⁶⁴ P-0714, [DAR-OTP-0209-1916-R02](#) at 1939, para. 82.

⁶⁵ Amnesty International, [DAR-OTP-0002-0201](#) at 0201-0202; UNCOI, [DAR-OTP-0020-0216](#) at 0245-0247; Sudan Advisory Council on Human Rights (received from Sudan Organisation against Torture), [DAR-OTP-0053-0068](#) (Translation at [DAR-OTP-0153-0211](#) at 0212-0218); Darfur Peace and Development Organization, [DAR-OTP-0060-0222](#) (Translation at [DAR-OTP-0153-0917](#) at 0918-0927); International Federation for Human Rights, [DAR-OTP-0090-0377](#) at 0384-0385; Human Rights Watch, [DAR-OTP-0003-0099](#) at 0122-1023 and 0172-0175.

m. The conclusion of the UNCOI that over 120 men were killed during the Deleig incident.⁶⁶

n. Approximations given by multiple other Prosecution witnesses of the total number of persons killed during the Deleig incident, ranging from 116 to 153.⁶⁷

26. This evidence, taken together, establishes substantial grounds to believe that at least 100 males were killed in Deleig and surrounding areas between 5 and 7 March 2004.

b) The material facts were pleaded with sufficient specificity

27. The degree of specificity required in a DCC must be assessed on a case-by-case basis taking into account, among other things, the scale of criminality and the mode of individual criminal responsibility alleged.⁶⁸ The Appeals Chamber has held that, depending on the circumstances of the case, the charges “may be described in a less specific manner, for instance, by specifying a period of time during which [...] an area where criminal acts were allegedly committed by an identifiable group of perpetrators against an identifiable group of victims”.⁶⁹

As noted in the PCB, while some lists contain additional names, and the transliteration of some names from Arabic into English varies, the lists are generally similar in relation to both content and sequence of names. At least two of the names relate to persons killed outside of Mukjar: Umdah Yahya Ahmad Zarruq and Muhammad Umar Ahmad Zarruq. *See* ICC-02/05-01/20-346-AnxA-Red, fn. 1025.

⁶⁶ [DAR-OTP-0018-0010](#) at 0078, para. 275.

⁶⁷ P-0059, [DAR-OTP-0095-0095-R01](#) at 0115, para. 129 (153); P-0119, [DAR-OTP-0124-0196-R01](#) at 0214-0215, para. 116 (135); P-0592, [DAR-OTP-0209-0825-R01](#) at 0841, para. 92 (125); P-0617, [DAR-OTP-0202-1496-R01](#) at 1526, para. 85 (116); P-0129, [DAR-OTP-0128-0128-R03](#) at 0151, para. 86 (128); P-0091, [DAR-OTP-0112-0142-R02](#) at 0163, para. 102 (123); P-0021, [DAR-OTP-0153-1868-R01](#) at 1887, para. 96 (120).

⁶⁸ ICC-01/04-02/06-2666-Red, para. 326; ICC-01/04-01/06-3121-Red, para. 123. *See also* *Prosecutor v. Sesay et al.*, Judgment, 26 October 2009, SCSL-04-15-A, paras. 48, 830; *Prosecutor v. Blaškić*, Judgment, 29 July 2004, IT-95-14-A, paras. 209-213; *Prosecutor v. Brima et al.*, Judgment, 22 February 2008, SCSL-2004-16-A, paras. 37-41; *Prosecutor v. Kupreškić et al.*, Appeal Judgment, 23 October 2001, IT-95-16-A, paras. 89-90; *Prosecutor v. Ndindabahizi*, Judgment, 16 January 2007, ICTR-01-07-A, para. 16; *Prosecutor v. Ayyash et al.*, Decision on alleged defects in the form of the indictment against Hassan Habib Merhi, 28 March 2014, STL-11-01/T/TC, para. 11.

⁶⁹ ICC-01/04-02/06-2666-Red, para. 326.

28. In cases involving mass criminality, it may be impracticable or unnecessary for the Prosecution to exhaustively identify every victim by name.⁷⁰ Moreover, it is not a legal requirement that the Prosecution establish the identity of the victim by name in order to prove the crime of murder.⁷¹

29. In this case, the DCC amply identified the material facts relevant to the charges, within narrow and clearly defined temporal and geographical parameters. The identities of the alleged victims were provided to the greatest degree of specificity possible in the circumstances.⁷² Where direct perpetration of murder was alleged, given the close proximity of Mr Abd-Al-Rahman to the crime, the victims were identified by name.⁷³ In Kodoom/Bindisi and Deleig, where mass killings occurred and Mr Abd-Al-Rahman was not alleged to have been present at each specific location where the killings took place,⁷⁴ the Prosecution pleaded the names of victims when conclusively established by the evidence, and otherwise alleged an approximate figure encompassing unnamed/unidentified victims.

30. In relation to the Deleig incident, although not listed in the respective annexes to the DCC, the evidence containing the possible names of the unnamed/unidentified victims was disclosed to the Defence and described in the PCB.⁷⁵ The Prosecution intended, and still intends, to notify Mr Abd-Al-Rahman of the names of the victims

⁷⁰ ICC-01/05-01/08-3343, para. 43; ICC-01/04-01/10-465-Red, para. 11. *See also Prosecutor v. Kupreškić et al.*, Appeal Judgement, 23 October 2001, IT-95-16-A, paras. 89-90; *Prosecutor v. Nindabahizi*, Judgment, 16 January 2007, ICTR-01-07-A, para. 16; *Prosecutor v. Elizaphan Ntakirutimana & Gérard Ntakirutimana*, Judgment, 13 December 2004, ICTR-96-10A & ICTR-96-17-A, para. 73; *Prosecutor v. Rukundo*, Judgment, 20 October 2010, ICTR-2001-70-A, paras. 158-160; *Prosecutor v. Sesay et al.*, Judgment, 26 October 2009, SCSL-04-15-A, para. 52; *Prosecutor v. Brima et al.*, Judgment, 22 February 2008, SCSL-2004-16-A, para. 41; *Prosecutor v. Šainović*, Judgment, 23 January 2014, IT-05-87-A, para. 235.

⁷¹ ICC-01/05-01/08-3343, para. 88. *See e.g.* ICC-01/04-01/07-3436, paras. 838-841 and ICC-01/04-01/07-3436-Conf-AnxF; ICC-02/04-01/15-1762-Red, paras. 152, 168, 174-175, 183, 188, 197-198; ICC-01/04-02/06-2359, para. 873.

⁷² ICC-01/04-01/06-3121-Red, para. 123.

⁷³ *Prosecutor v. Elizaphan Ntakirutimana & Gérard Ntakirutimana*, Judgment, 13 December 2004, ICTR-96-10A & ICTR-96-17-A, para. 74.

⁷⁴ Mr Abd-Al-Rahman is alleged to have been present at only one of several execution sites around Deleig. The approximate location of this site and the facts relating to this event are detailed in the PCB. *See* ICC-02/05-01/20-346-AnxA-Red, paras. 308-309.

⁷⁵ ICC-02/05-01/20-346-AnxA-Red, para. 328, fn. 1024.

of the two incidents who are presently unnamed/unidentified if and when sufficient evidence is obtained to establish their names/identities conclusively.

31. In the context of this case, and given the level of specificity with which the related material facts were pleaded in the DCC, the victim groups were therefore sufficiently identified to enable Mr Abd-Al-Rahman to prepare an effective defence, and no prejudice is caused to him by the non-exhaustive nature of the lists of victims.

32. For these reasons, the Prosecution respectfully requests the Chamber to reconsider its findings in the Confirmation Decision with respect to the number of persons killed in relation to the Kodoom/Bindisi and the Deleig incidents, and to confirm that at least 100 persons were killed in each of these locations, as alleged in the DCC.

2) Request for leave to appeal

33. If the Chamber declines the above reconsideration request, in the alternative, the Prosecution respectfully requests the Chamber's leave to appeal the Confirmation Decision and to certify the following Issues for appeal before the Appeals Chamber:

- a. Whether the Pre-Trial Chamber erred in law when it confirmed charges of murder in relation to the Kodoom/Bindisi and the Deleig incidents only with respect to persons specifically named and/or identified in the respective annexes to the DCC, but not in relation to unnamed/unidentified victims as alleged in the DCC and supported by the available evidence; and/or
- b. Whether the Pre-Trial Chamber erred in fact when it found that only 51 persons were killed in relation to the Kodoom/Bindisi incident, and only 34 persons in relation to the Deleig incident, rather than at least 100 persons in relation to each incident, as alleged in the DCC.

a) The Issues arise from the Confirmation Decision and are appealable

34. An appealable issue must be an integral part of the decision, and comprise “an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion.”⁷⁶

35. The Issues arise squarely from the Confirmation Decision and are appealable. The purpose of the Confirmation Decision is to delineate the scope of the charges on which Mr Abd-Al-Rahman will be tried by the Trial Chamber.⁷⁷ The Issues pertain to the Chamber’s findings on material facts. Such findings have a direct impact on the scope of the confirmed charges and are an integral part of the Confirmation Decision. Moreover, the Issues raise legal and factual questions pertaining to pleading requirements in relation to unnamed/unidentified murder victims, and regarding the evaluation of evidence at the confirmation stage. The determination of these Issues is critical for establishing the proper scope of the charges against Mr Abd-Al-Rahman for trial.

b) The Issues meet the criteria for leave to appeal under article 82(1)(d)

i. The Issues would significantly affect the fair and expeditious conduct of the proceedings

36. For the same reasons detailed above at paragraphs 11 to 13, and articulated below,⁷⁸ the Issues would significantly affect the fairness of the proceedings. As it stands, a substantial proportion of the victim group for the murder charges for the Kodoom/Bindisi and the Deleig incidents is excluded from the scope of the charges confirmed for trial without apparent reasons. As a result, the Trial Chamber may be prevented from recognising the full harm caused to the victims and their families in its judgment under article 74, and in any potential sentence. The current limited scope

⁷⁶ ICC-01/04-168, para. 9; ICC-02/11-01/11-464, para. 8; ICC-01/05-01/08-75, paras. 10-11.

⁷⁷ Article 61(7)(a) of the Statute. *See* ICC-01/04-01/06-3121-Red, para. 124; ICC-01/05-01/13-2275-Red, para. 196; ICC-01/04-02/06-2666-Red, para. 325.

⁷⁸ *See below*, para. 38.

of the charges also impacts on the rights of victims to the truth, to participate in the proceedings, and to receive adequate reparations.

37. Furthermore, resolution of the Issues by the Appeals Chamber would avoid any potential delay occasioned by an application by the Prosecution to amend the charges under article 61(9) of the Statute in order to reflect the full extent of the victimisation in this case.

ii. The Issues would significantly affect the outcome of the trial

38. For the same reasons detailed above at paragraphs 11 to 13, the Issues would significantly affect the outcome of the trial with respect to i) the Trial Chamber's ability to enter convictions for murder in relation to *all* victims established by the evidence (both named/identified victims and unnamed/unidentified victims) and therefore to fully recognise the harm caused to *all* victims and their families, ii) the potential impact that this would have on the sentence imposed after any conviction, and iii) the impact on the right of *all* victims of the crimes attributed to Mr Abd-Al-Rahman to the truth, to participate in the proceedings and to receive adequate reparations.

iii. The Appeals Chamber's immediate resolution of the Issues may materially advance the proceedings

39. Resolution of the Issues by the Appeals Chamber will clarify whether the murder charges, and any convictions by the Trial Chamber for murder, can encompass the unnamed/unidentified victims who may be established on the evidence to have been murdered (in addition to the named/identified victims). Immediate resolution of the Issues is necessary because they directly impact the scope of the charges confirmed for trial: if the Chamber has confirmed an exhaustive list of victims, the Trial Chamber will most likely be constrained from entering convictions with respect to the (as yet)

unnamed/unidentified victims.⁷⁹ This would be the case even if further investigations were to lead to their names/identities being conclusively established.

3) Additional request for clarification and/or correction

40. Finally, and partially subject to the Chamber's findings on the above requests, the Prosecution respectfully requests the Chamber to clarify and/or correct the following discrete findings in the Confirmation Decision so as to resolve any potential ambiguity in the factual parameters of the charges confirmed for trial based on apparent clerical errors or inconsistent use of language.

a) Number of victims

41. There is an apparent inconsistency in the number of murder victims confirmed by the Pre-Trial Chamber (51) and the number reflected in the particulars of Counts 2 and 3 (52). The Prosecution understands that the Chamber confirmed charges of murder as a crime against humanity and as a war crime in relation to the attack on Kodoom and Bindisi with respect to 51 persons.⁸⁰ The particulars of Counts 2 and 3 in the list of confirmed charges, on the other hand, refer to 52 persons/civilians.⁸¹ The number of murder victims in the particulars of Counts 2 and 3 should therefore be adjusted from 52 to 51 persons.

42. In addition, the possible name of one unidentified female victim is omitted in entry number 50 of Annex 1 to the Confirmation Decision.⁸²

43. The Prosecution also understands that the Chamber confirmed charges of rape as a crime against humanity and as a war crime in Bindisi and surrounding areas with

⁷⁹ Although article 74(2) of the Statute states that the trial judgment "shall not exceed the facts and circumstances described in the charges and any amendments to the charges", the Appeals Chamber has found that "other criminal acts not mentioned in the document containing the charges may still fall within the – broadly described – facts and circumstances of the charges". See ICC-01/04-02/06-2666-Red, para. 326. See also ICC-01/12-01/18-1562-Red, paras. 92-94.

⁸⁰ ICC-02/05-01/20-433, para. 92 (paras. 29, 33 of the confirmed charges); ICC-02/05-01/20-433-Conf-Anx1, p. 2. The Prosecution alleged at least 52 victims, but the Chamber did not confirm the allegation that an "[u]nidentified female (elderly woman)" was killed during the attack. See ICC-02/05-01/20-433, para. 93.

⁸¹ ICC-02/05-01/20-433, p. 67-68.

⁸² ICC-02/05-01/20-433-Conf-Anx1, p. 2. See ICC-02/05-01/20-325-Anx1A-Corr (no. 50).

respect to 16 women and girls.⁸³ However, the particulars of Counts 8 and 9 in the list of confirmed charges refer to 13 women and girls.⁸⁴

44. The Prosecution therefore respectfully requests the Chamber to correct the particulars of Counts 2 and 3 to refer to 51 persons/civilians,⁸⁵ to include the possible name of one unidentified female victim in Annex 1 to the Confirmation Decision, and to correct the particulars of Counts 8 and 9 to refer to 16 women and girls.

b) Geographical scope

45. The Prosecution notes the Chamber's finding that "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".⁸⁶ Consistent with this finding, the heading for the relevant section of the confirmed charges reads "Crimes committed in Kodoom, Bindisi and surrounding areas between 15 and 16 August 2003",⁸⁷ and includes a footnote explaining that:

"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."⁸⁸

46. Furthermore, in Annex 1 to the Confirmation Decision, the Chamber refers to persons "killed in Kodoom, Bindisi and surrounding areas (Counts 2-3)" and persons

⁸³ ICC-02/05-01/20-433, para. 89 (paras. 29, 46 of the confirmed charges); ICC-02/05-01/20-433-Conf-Anx1, p. 2. The Prosecution alleged at least 17 victims, but the Chamber did not confirm the allegation that one of the women was raped. *See* ICC-02/05-01/20-433, para. 90.

⁸⁴ ICC-02/05-01/20-433, p. 68.

⁸⁵ This request is, of course, subject to the Chamber's decision on the Prosecution's requests for reconsideration or leave to appeal.

⁸⁶ ICC-02/05-01/20-433, para. 25.

⁸⁷ ICC-02/05-01/20-433, p. 54 (fn. omitted).

⁸⁸ ICC-02/05-01/20-433, p. 54, fn. 104.

“raped in Bindisi and surrounding areas (Counts 8-9)” in the headings for the respective lists of victims.⁸⁹

47. Given the above findings, the Prosecution understands that the Chamber intended the geographical scope of Counts 2 and 3 to include persons killed not only in Kodoom and Bindisi, but also in the surrounding areas. However, the phrase “surrounding areas” does not appear in the particulars of these counts in the list of confirmed charges.⁹⁰

48. In the same context, the Prosecution understands that the Chamber confirmed that the conduct underlying the crime against humanity of persecution (Count 11) includes criminal acts listed in Counts 1 to 10 in Kodoom, Bindisi *and surrounding areas*, despite the phrase “surrounding areas” not appearing in the particulars of Count 11 as confirmed.⁹¹

49. The Prosecution therefore respectfully requests the Chamber to add the phrase “surrounding areas” to the particulars of Counts 2 and 3, or to clarify that the geographical scope of these counts includes the surrounding areas. The Prosecution also respectfully requests the Chamber to clarify that the criminal acts underlying Count 11 include those committed in Kodoom, Bindisi *and surrounding areas*.

IV. RELIEF REQUESTED

50. For the above reasons, the Prosecution respectfully requests the Chamber to:

- a. reconsider the specific findings in the Confirmation Decision identified in this request; or
- b. in the alternative, grant leave to appeal the Confirmation Decision in relation to the Issues identified above.

⁸⁹ ICC-02/05-01/20-433-Conf-Anx1, p. 2.

⁹⁰ ICC-02/05-01/20-433, paras. 67-68. The phrase “surrounding areas” does appear in Counts 8 and 9.

⁹¹ ICC-02/05-01/20-433, paras. 51-52 of the confirmed charges (Count 11).

51. Finally, the Prosecution respectfully requests the Chamber to provide the clarifications and/or corrections detailed above at paragraphs 41 to 49.



Karim A. A. Khan QC
Prosecutor

Dated this 6th day of September 2021

At The Hague, The Netherlands