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PRE-TRIAL CHAMBER II

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

SITUATION IN DARFUR, SUDAN

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

**Public
With Public Redacted Annexes 1-4**

**Public Redacted Version of “Prosecution’s application to amend the charges”, 25
January 2022, ICC-02/05-01/20-563-Conf-Exp**

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The Office of the Prosecutor

Mr Karim A. A. Khan QC

Mr Julian Nicholls

Counsel for the Defence

Mr Cyril Laucci

Mr Iain Edwards

Legal Representatives of the Victims

Ms Natalie von Wistinghausen

Mr Nasser Mohamed Amin Abdalla

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Section

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Mr Philipp Ambach

Other

I. INTRODUCTION

1. The Prosecution requests Pre-Trial Chamber II (“Chamber”) to amend the charges, pursuant to article 61(9) of the Rome Statute and rule 128 of the Rules of Procedure and Evidence, by amending:

- a. the particulars of Counts 2 and 3 (murder as a crime against humanity and a war crime), relating to the Kodoom/Bindisi incident, from 51 persons/civilians to at least 63 persons/civilians;
- b. the particulars of Counts 17 and 18 (murder as a crime against humanity and a war crime), relating to the Mukjar incident, from 49 persons to at least 122 persons; and
- c. the particulars of Counts 27 and 28 (murder as a crime against humanity and a war crime), relating to the Deleig incident, from 34 persons to at least 137 persons.

2. Consistent with these amendments, the Prosecution further requests that the Chamber amend Annex 1 to the Confirmation Decision¹ to include the identities of these additional victims, as listed in Annexes 1, 2 and 3 to this application.

3. The requested amendment of the charges enables the effective prosecution of Mr Abd-Al-Rahman, while preserving his rights under the Statute, in particular, to be informed promptly of the charges against him, to have adequate time for the preparation of his defence, and to be tried without undue delay.²

4. Amending the charges to reflect the true scope of the victimisation in this case, as established by the evidence, would allow the Trial Chamber to effectively exercise its truth-seeking function, and to recognise the full extent of the harm caused to the victims and their families in its judgment under article 74, as well as in any potential sentence. This would preserve the rights of the victims to the truth and to receive adequate reparations if convictions are entered, and may also facilitate their participation in the proceedings.

II. CLASSIFICATION

5. Pursuant to regulation 23*bis*(1) of the Regulations of the Court, this application and Annexes 2 and 4 are classified as confidential, *ex parte*, available only to the Prosecution, since they contain information that might identify Prosecution witnesses for whom delayed disclosure

¹ Annex 1 to the Confirmation Decision, [ICC-02/05-01/20-433-Conf-Anx1-Corr](#).

² Article 67(1)(a), (b) and (c) of the Statute.

of their identities was authorised by Trial Chamber I.³ Confidential redacted versions of these documents will be filed simultaneously.

III. SUBMISSIONS

6. This Chamber has previously held that amending charges pursuant to article 61(9) of the Statute is a matter of “proper balance between two concerns, namely effectiveness of the prosecution and respect for the rights of the suspect or the accused” and that “compliance with ‘standards contained in relevant human rights instruments’ would be key.”⁴

7. Striking this balance requires the weighing of factors, including i) whether the request is supported and justified, ii) whether the Prosecution has acted diligently in bringing the request in a timely manner, and iii) any impact on the fairness and expeditiousness of the proceedings and the rights of the accused as well as the victims.⁵ This approach is consistent with the prior practice of the *ad hoc* tribunals.⁶

8. As detailed below, it is appropriate to regard this application as seeking an amendment of the charges, rather than seeking to add additional charges or substitute more serious charges, since it merely identifies further victims of the *same* crimes, committed in the same incidents and factual circumstances—having regard to the “specific time, place [and] alleged perpetrators”—as confirmed by the Chamber.⁷

9. In the following sections, the Prosecution explains why the requested amendment of the charges enables the effective prosecution of Mr Abd-Al-Rahman without adversely impacting the fairness and expeditiousness of the proceedings, or the rights of the accused or the victims. The Prosecution also outlines the evidence establishing substantial grounds to believe⁸ that the additional victims sought to be specified in the charges were killed, and the reasons why the

³ See Status Conference, 17 December 2021, [ICC-02/05-01/20-T-018-Conf-ENG](#), p. 51, l. 4-p. 54, l. 11.

⁴ *Yekatom & Ngaïssona* Amendment Decision, [ICC-01/14-01/18-517](#), para. 28 (fn. omitted).

⁵ *Yekatom & Ngaïssona* Amendment Decision, para. 29; *Kenyatta* Amendment Decision, [ICC-01/09-02/11-700-Corr](#), paras. 21-22; *Ruto & Sang* Amendment Decision, [ICC-01/09-01/11-859](#), paras. 31-32.

⁶ See e.g. *Prosecutor v. Muvunyi*, Decision on the Prosecutor’s Motion for Leave to File an Amended Indictment, 23 February 2005, [ICTR-2000-55A-PT](#), paras. 26-27; *Prosecutor v. Turinabo et al.*, Decision on the Prosecution Motion to Amend the Indictment, 17 October 2019, [MICT-18-116-PT](#), paras. 6, 10; *Prosecutor v. Hadžić*, Decision on Prosecution Motion for Leave to Amend the Indictment, 19 July 2011, [IT-04-75-I](#), paras. 6-7; *Prosecutor v. Tolimir*, Written Reasons for Decision on Prosecution Motion to Amend the Second Amended Indictment, 16 December 2009, [IT-05-88/2-PT](#), paras. 19-23.

⁷ *Yekatom & Ngaïssona* Amendment Decision, paras. 19-20. See below, para. 14.

⁸ Article 61(7) of the Statute; *Al Hassan* Amendment Decision, [ICC-01/12-01/18-767-Corr-Red](#), para. 13.

Prosecution was not able to obtain the relevant evidence, with some limited exceptions,⁹ before the Document Containing the Charges (“DCC”) was filed on 29 March 2021.¹⁰

10. The trial in this case is set to commence on 5 April 2022.¹¹ Pursuant to article 61(9) of the Statute, the charges may only be amended before the trial has begun. This means that the whole process of amending the charges must be completed before the commencement of trial, including the Chamber’s authorisation of the amendment.¹² The Prosecution considers that there is sufficient time for this application to be expeditiously resolved before the start of the trial.¹³

a) The requested amendment of the charges enables the effective prosecution of Mr Abd-Al-Rahman without adversely impacting the fairness and expeditiousness of the proceedings and the rights of the accused as well as of victims

11. First, the requested amendment enables the effective prosecution of the case against Mr Abd-Al-Rahman. The Prosecution continued its investigation after the filing of the DCC in order to gather evidence to establish the truth in this case.¹⁴ The determination of the truth is the principal goal of the Court as a whole, and a core function of the Trial Chamber.¹⁵

12. Without amending the charges to reflect the full scope of the victimisation, as established by the evidence, the Trial Chamber will most likely be significantly constrained in exercising its truth-seeking function in this case.¹⁶ Amending the charges will enable the Trial Chamber to enter convictions for murder in relation to all of the victims established by the evidence, which will in any event be presented at trial,¹⁷ and therefore to fully recognise the

⁹ See below, para. 42.

¹⁰ Document Containing the Charges, [ICC-02/05-01/20-325-Anx1-Corr2-Red](#).

¹¹ Status Conference, 8 September 2021, [ICC-02/05-01/20-T-013-ENG](#), p. 77, l. 9-12.

¹² [Yekatom & Ngaiisonga Amendment Decision](#), para. 26; [Ruto & Sang Amendment Appeals Judgment](#), [ICC-01/09-01/11-1123](#), para. 29.

¹³ The Prosecution will seize Trial Chamber I of an application to postpone the start date of the trial should this become necessary.

¹⁴ Article 54(1)(a) of the Statute. See below, paras. 36-39.

¹⁵ Article 69(3) of the Statute.

¹⁶ 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 [Ntaganda Appeals Judgment](#), [ICC-01/04-02/06-2666-Red](#), para. 326. See also [Al Hassan Regulation 55\(2\) Appeals Judgment](#), [ICC-01/12-01/18-1562-Red](#), paras. 92-94.

¹⁷ The evidence relevant to establishing the identities of the additional victims will nonetheless be presented at trial since it is relevant to other aspects of the charges, including the contextual elements of crimes against humanity.

harm to victims and their families both in its article 74 judgment and in the sentence imposed after any conviction.¹⁸

13. Amending the charges to include the additional victims would therefore preserve the right of victims in this case to the truth. It would also ensure that the victims obtain adequate reparations following any conviction, reflecting the harms actually suffered,¹⁹ as well as potentially facilitating their participation in the trial. 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 reparation.²⁰

14. Second, the Prosecution does not seek to add additional charges or to substitute more serious charges. The victims that the Prosecution seeks to add to the existing murder charges were killed in the same factual circumstances, including with respect to the time, place and alleged perpetrators, relevant to the confirmed charges.²¹ The requested amendment would not expand the temporal or geographical scope of the confirmed charges, nor alter the material facts except in relation to the number of persons killed. Therefore, in accordance with article 61(9) of the Statute, a second confirmation hearing would not be required,²² and there would be very limited to no impact on the expeditiousness of the proceedings, nor any prejudice to Mr Abd-Al-Rahman's right to be tried without undue delay.²³

15. In addition, since the Prosecution intends to adduce the evidence establishing the identities of the additional victims at trial in any event, as noted above,²⁴ the requested amendment of the charges will not adversely impact the expeditiousness of the trial. Furthermore, pursuant to article 64 of the Statute, the Trial Chamber has the functions and

¹⁸ See Rule 145(1)(c) of the Rules (when determining the sentence of a convicted person, the Trial Chamber must consider the extent of the damage caused, in particular the harm caused to the victims and their families).

¹⁹ 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 *Lubanga* Reparations Appeals Judgment, [ICC-01/04-01/06-3129](#), para. 118.

²⁰ 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.

²¹ See [Yekatom & Ngaißsona Amendment Decision](#), paras. 19-20.

²² See e.g. *Al Hassan* Decision on Applicable Procedure, [ICC-01/12-01/18-608-Red-tENG](#), para. 51; [Al Hassan Amendment Decision](#), para. 6 and p. 67-70 (where Pre-Trial Chamber I added victims to charges that were already confirmed without requiring a new confirmation hearing).

²³ Article 67(1)(c) of the Statute.

²⁴ See *above*, para. 12, fn. 17.

powers to take any appropriate measures to ensure that the trial is expeditious, in accordance with its duty under article 67(1)(c).

16. In the event the Chamber considers that the requested amendment amounts to adding additional charges or substituting more serious charges, contrary to the Prosecution's position stated above, then a second confirmation hearing would be required, in accordance with article 61(9). Given the limited scope of the requested amendment, the Prosecution respectfully submits that such a process could be conducted in an expedited manner. Written and/or oral submissions in connection with such a process would be confined to the issue of adding victims to the charges as already confirmed, and there would be no need for the Chamber to enter findings regarding matters already decided in the Confirmation Decision.

17. Third, taking into account the limited scope of the amendment request, the Prosecution has provided adequate notice to the Defence and makes this request sufficiently in advance of the commencement of trial such that no prejudice is caused to Mr Abd-Al-Rahman's right to be informed promptly of the charges against him, and to have adequate time for the preparation of his defence.²⁵ The requested amendment does not change the Prosecution's theory of the case nor would it require any material shift in the Defence's strategy.

18. Notice of the Prosecution's intention to seek to include additional victims in relation to the three incidents was provided to Mr Abd-Al-Rahman in the Trial Brief filed on 5 January 2022.²⁶ This supplemented the notice of the Prosecution's case provided throughout the confirmation process. Furthermore, the amendment request is based on evidence disclosed to the Defence on a rolling basis but no later than 5 January 2022, and included on the Prosecution's List of Witnesses and List of Evidence filed on 5 January 2022.²⁷ Additionally, in its request for reconsideration or, alternatively, leave to appeal the Confirmation Decision, the Prosecution informed the Defence of its intention to notify Mr Abd-Al-Rahman of the names of as yet unnamed/unidentified victims if and when sufficient evidence was obtained to establish their names/identities conclusively.²⁸

19. Notice with respect to the additional victims was therefore provided to the Defence at the latest when the Trial Brief was filed on 5 January 2022, three months prior to the

²⁵ Article 67(1)(a) and (b) of the Statute.

²⁶ Trial Brief, [ICC-02/05-01/20-550-Conf-Red-Corr](#), paras. 235, 342, 361, 370, 503 and fn. 804; Annex 11 to the Trial Brief, [ICC-02/05-01/20-550-Conf-Anx11-Corr](#); Annex 17 to the Trial Brief, [ICC-02/05-01/20-550-Conf-Anx17-Red](#); Annex 23 to the Trial Brief, [ICC-02/05-01/20-550-Conf-Anx23-Corr](#).

²⁷ List of Witnesses, [ICC-02/05-01/20-551-Conf-Anx1-Red](#); List of Evidence, [ICC-02/05-01/20-551-Conf-Anx3](#).

²⁸ Reconsideration or Leave to Appeal Request, [ICC-02/05-01/20-466-Red](#), para. 30.

commencement of trial, giving Mr Abd-Al-Rahman adequate time to prepare his defence. As held by the Appeals Chamber, through the disclosure of material and information sufficiently in advance of the commencement of the trial to enable adequate preparation for trial, “the rights of the defence to have adequate time and facilities for the preparation of the trial can be safeguarded even if the investigation continues beyond the confirmation of the charges.”²⁹

b) There are substantial grounds to believe that the additional victims were killed

20. This section outlines the evidence establishing substantial grounds to believe that additional victims were killed, as sought to be added to the particulars of the charges, in relation to the Kodoom/Bindisi, Mukjar, and Deleig criminal incidents.

21. As noted above, all of the evidence relied upon by the Prosecution in this application was disclosed to the Defence by 5 January 2022 and has been made available to the Chamber.³⁰ The Prosecution has also disclosed to the Defence Arabic translations of the witness statements relied on in this application, pursuant to rule 76(3) of the Rules. The Arabic translation of the Trial Brief will be filed on 3 February 2022, in accordance with the order of Trial Chamber I.³¹

i. Kodoom, Bindisi and surrounding areas

22. The Chamber confirmed charges of murder as a crime against humanity and a war crime in relation to Kodoom, Bindisi and surrounding areas (Counts 2 and 3) in relation to the 51 persons/civilians listed in Annex 1 to the Confirmation Decision.³²

23. Evidence obtained by the Prosecution since the DCC was filed, along with evidence already in its possession concerning one victim,³³ now establishes the identities of an additional 12 victims killed during the attack on Kodoom and Bindisi, amounting to a total of 63 persons. The identities of these persons, and the evidence establishing their deaths, are contained in Annex 1 to this application.³⁴

24. In addition to the evidence listed in Annex 1, which is specific to each individual victim, the totality of the evidence, assessed in the overall context, demonstrates that the total number of persons killed during the Kodoom/Bindisi incident was *at least* 63. This evidence, which

²⁹ *Lubanga Appeals Judgment on Disclosure Matters*, [ICC-01/04-01/06-568](#), para. 55. *See also* Article 64(3)(c) of the Statute.

³⁰ The relevant items have been released to the Chamber in E-court.

³¹ Status Conference, 12 November 2021, [ICC-02/05-01/20-T-017-Red-ENG](#), p. 35, l. 3-10.

³² Confirmation Decision, [ICC-02/05-01/20-433-Corr](#), para. 92 and p. 54-55 (paras. 29, 33); [Annex 1 to the Confirmation Decision](#), p. 2.

³³ *See below*, para. 42.

³⁴ The victims sought to be added to the charges are listed under the heading “Additional victims” (no. 52-63). This document was also filed with the Trial Brief. *See* [Annex 11 to the Trial Brief](#).

incorporates evidence that was already in the possession of the Prosecution, is listed in Annex 4 to this application.

25. Based on the evidence described in Annexes 1 and 4, the Prosecution requests the Chamber to amend the particulars of Counts 2 and 3 (murder as a crime against humanity and a war crime), relating to the Kodoom/Bindisi incident, from 51 persons/civilians to at least 63 persons/civilians. The Prosecution also requests the Chamber to include in Annex 1 to the Confirmation Decision the additional victims listed from entries 52 to 63 in Annex 1 to this application.

ii. Mukjar and surrounding areas

26. The Chamber confirmed charges of murder as a crime against humanity and a war crime outside of Mukjar (Counts 17 and 18) in relation to the 49 persons listed in Annex 1 to the Confirmation Decision.³⁵

27. Evidence obtained by the Prosecution since the DCC was filed, along with evidence already in its possession concerning one victim,³⁶ now establishes the identities of an additional 73 persons killed during the Mukjar incident, amounting to a total of 122 persons. The identities of these persons, and the evidence establishing their deaths, are contained in Annex 2 to this application.³⁷

28. In addition to the evidence listed in Annex 2, which is specific to each individual victim, the totality of the evidence, assessed in the overall context, demonstrates that the total number of persons killed during the Mukjar incident was *at least* 122. This evidence, which incorporates evidence that was already in the possession of the Prosecution, is listed in Annex 4 to this application.

29. Based on the evidence described in Annexes 2 and 4, the Prosecution requests the Chamber to amend the particulars of Counts 17 and 18 (murder as a crime against humanity and a war crime), relating to the Mukjar incident, from 49 persons to at least 122 persons. The Prosecution also requests the Chamber to include in Annex 1 to the Confirmation Decision the additional victims listed from entries 50 to 122 in Annex 2 to this application.

³⁵ [Confirmation Decision](#), para. 103 and p. 59-60 (paras. 71, 76); [Annex 1 to the Confirmation Decision](#), p. 3.

³⁶ *See below*, para. 42.

³⁷ The victims sought to be added to the charges are listed under the heading “Additional victims” (no. 50-122). This document was also filed with the Trial Brief. *See* [Annex 17 to the Trial Brief](#).

iii. Deleig and surrounding areas

30. The Chamber confirmed charges of murder as a crime against humanity and a war crime in Deleig and surrounding areas (Counts 27 and 28) in relation to the 34 persons listed in Annex 1 to the Confirmation Decision.³⁸

31. The Prosecution has since obtained evidence establishing that entries 7 and 18 in Annex 1 to the Confirmation Decision in fact relate to a single person (“Jenif”),³⁹ and that the third Fur male detainee struck and killed by Mr Abd-Al-Rahman (entry 7 in Annex 1) was in fact named Musa Youssef. This does not exceed the material facts confirmed by the Chamber in the Confirmation Decision,⁴⁰ since it remains the case that three persons were killed at the time and place and in the circumstances charged. Rather, since this is merely a question of the evidence to prove these facts, the Prosecution has already notified Trial Chamber I and the Defence of these developments, which will be determined at trial.⁴¹ Accordingly, while the name Musa Youssef is included in Annex 3 to this application,⁴² this is only for completeness, and does not imply that any amendment to the charges is required in this particular respect.

32. The evidence obtained by the Prosecution since the DCC was filed now establishes the identities of an additional 104 persons killed during the Deleig incident, amounting to a total of 137 persons. The identities of these persons, and the evidence establishing their deaths, are contained in Annex 3 to this application.⁴³

33. In addition to the evidence listed in Annex 3, which is specific to each individual victim, the totality of the evidence, assessed in the overall context,⁴⁴ demonstrates that the total number of persons killed during the Deleig incident was *at least* 137. This evidence, which incorporates evidence that was already in the possession of the Prosecution, is listed in Annex 4 to this application.

³⁸ [Confirmation Decision](#), para. 112 and p. 65 (para. 112); [Annex 1 to the Confirmation Decision](#), p. 4.

³⁹ The evidence now establishes that the person referred to as Adam Jinet (no. 7) is the same person as Jenif (PDF coordinator in Garsila) (no. 18). See [Annex 1 to the Confirmation Decision](#).

⁴⁰ [Confirmation Decision](#), paras. 109 and p. 64 (para. 109) and p. 67 (para. 126).

⁴¹ [Trial Brief](#), para. 447 and fn. 1675. See [Al Hassan Decision on Applicable Procedure](#), paras. 44-47. See also [Al Hassan Regulation 55\(2\) Appeals Judgment](#), paras. 92-94, 106; *Katanga & Ngudjolo Summary of Charges Decision*, [ICC-01/04-01/07-1547-tENG](#), para. 25.

⁴² See Annex 3, no. 112.

⁴³ The victims sought to be added to the charges are listed under the heading “Additional victims” (no. 34-137). This document was also filed with the Trial Brief. See [Annex 23 to the Trial Brief](#).

⁴⁴ The Chamber confirmed that between 100 and 200 Fur males were arrested and detained outside the Deleig police station on Friday, 5 March 2004, and 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. See [Confirmation Decision](#), paras. 109-110 and p. 63-64 (paras. 100, 106, 110).

34. Based on the evidence described in Annexes 3 and 4, the Prosecution requests the Chamber to amend the particulars of Counts 27 and 28 (murder as a crime against humanity and a war crime), relating to the Deleig incident, from 34 persons to at least 137 persons. The Prosecution also requests the Chamber to include in Annex 1 to the Confirmation Decision the additional victims listed from entries 34 to 137 in Annex 3 to this application.

c) The Prosecution has acted diligently in bringing the request in a timely manner

35. The Prosecution has acted diligently in bringing this application in a timely manner. The evidence relied on to support this application was obtained by the Prosecution after the DCC was filed, with the exception of evidence relating to two victims, as detailed below.⁴⁵ This evidence was not known or available to the Prosecution prior to this date, and/or could not have been collected by the Prosecution until a later stage.⁴⁶ The reasons for this are described in the following sub-sections.

i. Background

36. The Appeals Chamber has held that the Prosecution must be allowed to continue its investigation beyond the confirmation hearing “if this is necessary in order to establish the truth” or if “certain circumstances [exist such that] to rule out further investigation after the confirmation hearing may deprive the Court of significant and relevant evidence”.⁴⁷ Such circumstances may include “situations where the ongoing nature of the conflict results in more compelling evidence becoming available for the first time after the confirmation hearing”.⁴⁸

37. In this case, crucial evidence became available to the Prosecution only after the transition of political power in Sudan in August 2019, and once the Prosecution had established a cooperation relationship with the new authorities representing the Government of Sudan (“GoS”) in February 2021. Previously, between 2007 and 2019, the former GoS was openly hostile to the Prosecution and refused all cooperation.

38. The signing of a Memorandum of Understanding (“MoU”) with the new GoS authorities, on 14 February 2021, allowed the Prosecution to access the territory of Sudan to conduct investigative activities for the first time in 14 years.⁴⁹ Such access was critical to the

⁴⁵ See below, para. 42.

⁴⁶ See [Al Hassan Decision on Applicable Procedure](#), paras. 53-54; [Kenyatta Amendment Decision](#), paras. 36-38.

⁴⁷ [Lubanga Appeals Judgment on Disclosure Matters](#), paras. 52, 54; [Yekatom & Ngaißsona Amendment Decision](#), para. 25; [Kenyatta Amendment Decision](#), paras. 35-36.

⁴⁸ [Lubanga Appeals Judgment on Disclosure Matters](#), para. 54. See also [Kenyatta Amendment Decision](#), para. 39.

⁴⁹ Prosecution Response to Direction of Single Judge, [ICC-02/05-01/20-298](#); Annex A to Prosecution Response to Direction of Single Judge, [ICC-02/05-01/20-298-Conf-Exp-AnxA](#).

investigation since it enabled the Prosecution to i) establish local networks to obtain lead information, and find and contact relevant witnesses, and ii) interview witnesses in Sudan, [REDACTED].⁵⁰ The MoU also enabled the Prosecution to obtain documentary evidence directly from the GoS.⁵¹

39. On 29 March 2021, just five days after the first investigative mission in Sudan began on 24 March 2021, the Prosecution filed the DCC.⁵² Having just gained access to the territory of Sudan, the Prosecution continued to investigate in order to gather evidence essential to establishing the truth in this case. As part of its focused investigation, and given its importance to the affected communities and for the determination of the truth, the Prosecution sought evidence to establish, to the extent possible, the number and identities of the victims of the charged crimes.

40. In the following sub-section, the Prosecution describes the specific circumstances in which the relevant additional evidence was obtained. While access to the territory of Sudan was the principal reason why the Prosecution could only obtain this evidence after the DCC was filed, there are other relevant circumstances in relation to some particular witnesses, such as P-0589. It should also be recalled that, since early 2020, the Prosecution's investigation has been significantly hampered by the COVID-19 pandemic.⁵³ In addition, in October 2021, the Prosecution was forced to suspend all investigative activities in Sudan as a consequence of the security situation that prevailed following the military takeover.⁵⁴ These events had a significant impact on telecommunications in Sudan, [REDACTED], and led to the Prosecution losing its focal points in the relevant government ministries following their sudden departure or replacement.

ii. Specific circumstances in which the additional evidence was obtained

41. The evidence relied on to establish the additional persons killed in relation to the Kodoom/Bindisi, Mukjar and Deleig incidents consists of:

- a. the witness statements/transcripts of interview of 17 witnesses: P-0129 (third statement), P-0589, P-0874, P-0885, P-0903, P-0907, P-0924, P-0931, P-0973, P-

⁵⁰ As detailed in this section, the 17 witnesses relied on in this application [REDACTED].

⁵¹ See e.g. [DAR-OTP-0218-0386](#) (Translation at [DAR-OTP-0219-6910](#)) (an interview of Mr Abd-Al-Rahman conducted by the GoS).

⁵² [Document Containing the Charges](#).

⁵³ See e.g. Prosecution's eighteenth progress report, [ICC-02/05-01/20-404](#), para. 10.

⁵⁴ See Report of the Secretary-General on the Situation in the Sudan and the activities of the United Nations Integrated Transition Assistance Mission in Sudan, [S/2021/1008](#), 3 December 2021, paras. 2-10, 16-19.

0976, P-0980, P-0986, P-0987, P-0990, P-0992, P-0994 and P-1018,⁵⁵ and an investigation report containing information supplementing the statement of P-0919;⁵⁶

- b. a notebook provided by P-0129, [REDACTED], containing the names of 127 persons killed outside of Mukjar;⁵⁷ and
- c. two lists of persons killed during the Deleig incident provided by [REDACTED] P-1018⁵⁸ and P-0999.⁵⁹

42. For some victims, the newly obtained evidence is corroborative of evidence already in the possession of the Prosecution, and the combined evidence is considered sufficient to establish the identities of those victims to the relevant standard. In relation to two of the additional victims, the Prosecution seeks to add their names based on further analysis of evidence that was already in its possession before the DCC was filed.⁶⁰ The Prosecution respectfully asks the Chamber, in the exercise of its discretion, to treat these two victims in the same way as the other victims subject to this application.

43. In relation to 10 of the 17 witnesses, the Prosecution received lead information regarding these witnesses only after the DCC was filed. The Prosecution then contacted these witnesses,

⁵⁵ P-0129, [DAR-OTP-0223-0157-R01](#); P-0589, [DAR-OTP-0223-0005-R01](#); P-0874, [DAR-OTP-0221-0694-R01](#), [DAR-OTP-0219-7129-R01](#), [DAR-OTP-0219-7155-R01](#), [DAR-OTP-0219-7164-R01](#), [DAR-OTP-0219-7191-R01](#), [DAR-OTP-0219-7207-R01](#), [DAR-OTP-0219-7230-R01](#); P-0885, [DAR-OTP-0222-0749-R01](#), [DAR-OTP-0222-0784-R01](#), [DAR-OTP-0222-0832-R01](#), [DAR-OTP-0222-0855-R01](#), [DAR-OTP-0222-0885-R01](#), [DAR-OTP-0222-0877-R01](#), [DAR-OTP-0222-0879-R01](#), [DAR-OTP-0222-0907-R01](#), [DAR-OTP-0222-0926-R01](#), [DAR-OTP-0222-0930-R01](#), [DAR-OTP-0222-0943-R01](#), [DAR-OTP-0222-0969-R01](#), [DAR-OTP-0222-0975-R01](#), [DAR-OTP-0222-0996-R01](#), [DAR-OTP-0222-1019-R01](#), [DAR-OTP-0222-1039-R01](#), [DAR-OTP-0222-1046-R01](#), [DAR-OTP-0222-1066-R01](#), [DAR-OTP-0222-1088-R01](#), [DAR-OTP-0222-1104-R01](#), [DAR-OTP-0222-1107-R01](#), [DAR-OTP-0222-1123-R01](#), [DAR-OTP-0219-8891-R01](#); P-0903, [DAR-OTP-0221-0436-R02](#); P-0907, [DAR-OTP-0220-0668-R02](#); P-0924, [DAR-OTP-0218-0455-R02](#); P-0931, [DAR-OTP-0219-8598-R01](#), [DAR-OTP-0219-8617-R01](#), [DAR-OTP-0219-8645-R01](#), [DAR-OTP-0219-8665-R01](#), [DAR-OTP-0219-8682-R01](#), [DAR-OTP-0219-8702-R01](#), [DAR-OTP-0219-8720-R01](#), [DAR-OTP-0219-8742-R01](#), [DAR-OTP-0219-8758-R01](#), [DAR-OTP-0219-8775-R01](#), [DAR-OTP-0222-0040-R01](#); P-0973, [DAR-OTP-0220-0736-R01](#); P-0976, [DAR-OTP-0222-0526-R01](#); P-0980, [DAR-OTP-0221-0553-R01](#); P-0986, [DAR-OTP-0222-0437-R01](#); P-0987, [DAR-OTP-0221-0416-R01](#); P-0990, [DAR-OTP-0223-0217-R01](#); P-0992, [DAR-OTP-0221-0668-R01](#); P-0994, [DAR-OTP-0222-0055-R01](#); P-1018, [DAR-OTP-0221-1530-R01](#), [DAR-OTP-0221-1535-R01](#), [DAR-OTP-0221-1545-R01](#), [DAR-OTP-0221-1561-R01](#).

⁵⁶ P-0919, Investigation report, [DAR-OTP-0219-5119-R01](#).

⁵⁷ P-0129, Annex 1, [DAR-OTP-0220-0688](#) (Translation at [DAR-OTP-0220-0718](#)).

⁵⁸ [DAR-OTP-0219-9002](#) (Translation at [DAR-OTP-0219-9405](#)); [DAR-OTP-0219-9003](#) (Translation at [DAR-OTP-0219-9407](#)); [DAR-OTP-0219-9004](#) (Translation at [DAR-OTP-0219-9409](#)); [DAR-OTP-0219-9005](#) (Translation at [DAR-OTP-0219-9411](#)).

⁵⁹ [DAR-OTP-0219-6073](#) ([DAR-OTP-0219-7255](#)); [DAR-OTP-0219-6074](#) (Translation at [DAR-OTP-0219-7257](#)); [DAR-OTP-0219-6075](#) (Translation at [DAR-OTP-0219-7259](#)); [DAR-OTP-0219-6076](#) ([DAR-OTP-0219-7261](#)); [DAR-OTP-0219-6077](#) (Translation at [DAR-OTP-0219-7263](#)); [DAR-OTP-0219-6078](#) ([DAR-OTP-0219-7265](#)); [DAR-OTP-0219-6079](#) ([DAR-OTP-0219-7267](#)); [DAR-OTP-0219-6080](#) (Translation at [DAR-OTP-0219-7269](#)); [DAR-OTP-0219-6081](#) (Translation at [DAR-OTP-0219-7271](#)); [DAR-OTP-0219-6083](#) (Translation at [DAR-OTP-0219-7273](#)).

⁶⁰ Annex 1, no. 53 (Issa Ahmed Yahya); Annex 2, no. 64 (Abduh Salih Adam Atrun).

screened them for possible interview, and interviewed them as soon as practicable given logistical, security and all other relevant considerations. The circumstances relating to these ten witnesses are as follows:

- a. The Prosecution received lead information regarding P-0931 in January 2021 and he was screened [REDACTED]. P-0931 then changed his telephone number and the Prosecution lost contact with him, despite several attempts, until new contact details were obtained in [REDACTED] 2021. P-0931 was then interviewed in [REDACTED] from [REDACTED] 2021.⁶¹
- b. The Prosecution received lead information regarding P-0973 in June 2021, he was screened in [REDACTED] 2021, then interviewed in [REDACTED] from [REDACTED] 2021.⁶²
- c. The Prosecution received lead information regarding P-0976 in June 2021, he was screened [REDACTED] 2021, then interviewed in [REDACTED] from [REDACTED] 2021. The interview had to be suspended [REDACTED], and was completed at the next available opportunity, from [REDACTED] 2021.⁶³
- d. The Prosecution received lead information regarding P-0980 in June 2021, he was screened [REDACTED], then interviewed in [REDACTED] from [REDACTED] 2021.⁶⁴
- e. The Prosecution received lead information regarding P-0986 in July 2021, he was screened [REDACTED], then interviewed in [REDACTED] from [REDACTED] 2021.⁶⁵
- f. The Prosecution received lead information regarding P-0990 in May 2021, and made several attempts to contact him on different dates in [REDACTED] 2021. He was successfully contacted and screened in [REDACTED] 2021. [REDACTED]. After suitable arrangements were made, P-0990 was interviewed in [REDACTED] from [REDACTED] 2021.⁶⁶

⁶¹ P-0931, [DAR-OTP-0219-8598-R01](#), [DAR-OTP-0219-8617-R01](#), [DAR-OTP-0219-8645-R01](#), [DAR-OTP-0219-8665-R01](#), [DAR-OTP-0219-8682-R01](#), [DAR-OTP-0219-8702-R01](#), [DAR-OTP-0219-8720-R01](#), [DAR-OTP-0219-8742-R01](#), [DAR-OTP-0219-8758-R01](#), [DAR-OTP-0219-8775-R01](#), [DAR-OTP-0222-0040-R01](#).

⁶² P-0973, [DAR-OTP-0220-0736-R01](#).

⁶³ P-0976, [DAR-OTP-0222-0526-R01](#).

⁶⁴ P-0980, [DAR-OTP-0221-0553-R01](#).

⁶⁵ P-0986, [DAR-OTP-0222-0437-R01](#).

⁶⁶ P-0990, [DAR-OTP-0223-0217-R01](#).

- g. The Prosecution received lead information regarding P-0992 in July 2021, he was screened [REDACTED], then interviewed in [REDACTED] from [REDACTED] 2021.⁶⁷
- h. The Prosecution received lead information regarding P-0987 in July 2021, he was screened [REDACTED], then interviewed in [REDACTED] from [REDACTED] 2021.⁶⁸
- i. The Prosecution received lead information regarding P-0994 in July 2021, he was screened [REDACTED], then interviewed in [REDACTED] from [REDACTED] 2021.⁶⁹
- j. The Prosecution received lead information regarding P-1018 in August 2021, and he was screened [REDACTED]. [REDACTED]. P-1018 was interviewed [REDACTED] at the first opportunity, on [REDACTED] 2021, and he provided a list of persons killed during the Deleig incident at that time.⁷⁰

44. In relation to 6 of the 17 witnesses, the Prosecution received lead information regarding these witnesses before the DCC was filed, but was unable to interview them until afterwards for the reasons detailed below. The circumstances relating to these six witnesses are as follows:

- a. The Prosecution has been in contact with P-0589 since 2016. However, the Prosecution was not permitted to interview him in his country of residence, [REDACTED]. Attempts were made to facilitate P-0589's travel to a third country for interview, [REDACTED], but such travel was ultimately not possible [REDACTED]. Subsequently, [REDACTED], the Prosecution attempted to make arrangements to bring P-0589 to [REDACTED] for interview in [REDACTED], but this had to be postponed due to [REDACTED]. In early 2020, due to the COVID-19 pandemic, the Court's specific regulations relating to international travel meant that only essential missions would be approved. During 2020 and early 2021, the Prosecution focussed its resources on other, higher priority, witnesses. Contact was then re-established with P-0589 in [REDACTED] 2021 and plans were made to interview him in [REDACTED] 2021. However, [REDACTED] delayed

⁶⁷ P-0992, [DAR-OTP-0221-0668-R01](#).

⁶⁸ P-0987, [DAR-OTP-0221-0416-R01](#).

⁶⁹ P-0994, [DAR-OTP-0222-0055-R01](#).

⁷⁰ P-1018, [DAR-OTP-0221-1530-R01](#), [DAR-OTP-0221-1535-R01](#), [DAR-OTP-0221-1545-R01](#), [DAR-OTP-0221-1561-R01](#). See above, para. 41.

the interview until [REDACTED] 2021, when an investigator could next be deployed to [REDACTED].⁷¹

- b. The Prosecution received lead information regarding P-0874 in January 2020. Arrangements were made to meet P-0874 in [REDACTED] 2020. However, P-0874 did not attend the meeting and did not communicate further with the Prosecution. The Prosecution made new efforts to establish telephone contact with P-0874 in [REDACTED] 2021, and was successful in [REDACTED] 2021. [REDACTED]. P-0874 was subsequently interviewed in [REDACTED] on [REDACTED] 2021.⁷²
- c. The Prosecution received lead information regarding P-0885 a few days before he was screened in [REDACTED] 2020. [REDACTED]. After logistical delays and difficulty maintaining contact with the witness, P-0885 was interviewed in [REDACTED] from [REDACTED] 2021.⁷³
- d. The Prosecution received lead information regarding P-0903 in August 2020, and he was screened in [REDACTED] 2020. The Prosecution then lost contact with P-0903 until it managed to obtain new contact details for him in [REDACTED] 2021. The Prosecution re-established contact with P-0903 in [REDACTED] 2021, and he was interviewed in [REDACTED] from [REDACTED] 2021.⁷⁴
- e. The Prosecution received lead information regarding P-0907 in October 2020, and he was screened in [REDACTED] 2020. [REDACTED], P-0907 was interviewed in [REDACTED] from [REDACTED] 2021.⁷⁵

⁷¹ P-0589, [DAR-OTP-0223-0005-R01](#).

⁷² P-0874, [DAR-OTP-0221-0694-R01](#), [DAR-OTP-0219-7129-R01](#), [DAR-OTP-0219-7155-R01](#), [DAR-OTP-0219-7164-R01](#), [DAR-OTP-0219-7191-R01](#), [DAR-OTP-0219-7207-R01](#), [DAR-OTP-0219-7230-R01](#).

⁷³ P-0885, [DAR-OTP-0222-0749-R01](#), [DAR-OTP-0222-0784-R01](#), [DAR-OTP-0222-0832-R01](#), [DAR-OTP-0222-0855-R01](#), [DAR-OTP-0222-0885-R01](#), [DAR-OTP-0222-0877-R01](#), [DAR-OTP-0222-0879-R01](#), [DAR-OTP-0222-0907-R01](#), [DAR-OTP-0222-0926-R01](#), [DAR-OTP-0222-0930-R01](#), [DAR-OTP-0222-0943-R01](#), [DAR-OTP-0222-0969-R01](#), [DAR-OTP-0222-0975-R01](#), [DAR-OTP-0222-0996-R01](#), [DAR-OTP-0222-1019-R01](#), [DAR-OTP-0222-1039-R01](#), [DAR-OTP-0222-1046-R01](#), [DAR-OTP-0222-1066-R01](#), [DAR-OTP-0222-1088-R01](#), [DAR-OTP-0222-1104-R01](#), [DAR-OTP-0222-1107-R01](#), [DAR-OTP-0222-1123-R01](#), [DAR-OTP-0219-8891-R01](#).

⁷⁴ P-0903, [DAR-OTP-0221-0436-R02](#).

⁷⁵ P-0907, [DAR-OTP-0220-0668-R02](#).

- f. P-0924 [REDACTED] with the Prosecution in late December 2020, and he was screened [REDACTED]. An interview was subsequently conducted with P-0924 in [REDACTED] on [REDACTED] 2021, [REDACTED].⁷⁶

45. The last of the 17 witnesses, P-0129, was re-interviewed twice after the DCC was filed.⁷⁷ After P-0129 mentioned that he had a relevant notebook [REDACTED] 2021,⁷⁸ investigators met with P-0129 at the first available opportunity, on [REDACTED] 2021, to collect the notebook and memorialise its collection.⁷⁹ After the Prosecution analysed the notebook, a second re-interview was carried out to obtain a number of clarifications regarding the notebook, and information provided by P-0129 in his prior statements.⁸⁰ This second re-interview commenced in [REDACTED] between [REDACTED] 2021 but, [REDACTED], was suspended and then finalised [REDACTED] at the next opportunity, on [REDACTED] 2021. P-0129's third statement contained substantial new evidence relating to the names of victims of the Mukjar incident, and is therefore relied on to support this application.⁸¹

46. Finally, the Prosecution relies on two further pieces of evidence to support this application: an investigation note pertaining to P-0919, and a list of victims provided by P-0999. P-0919 was interviewed by the Prosecution between [REDACTED] 2021. On [REDACTED] 2021, the Prosecution telephoned P-0919 [REDACTED]. This information was recorded in an investigation note and is relied on by the Prosecution, in combination with P-0919's statement, to establish the death of this victim.⁸²

47. P-0999 was [REDACTED]. P-0999, [REDACTED] was then screened in [REDACTED] 2021, and provided a list of persons killed during the Deleig incident.⁸³ [REDACTED].⁸⁴

48. The Prosecution has endeavoured to provide the Chamber with all of the relevant information necessary to decide this application, and stands ready to provide any further information that the Chamber may require.

⁷⁶ P-0924, [DAR-OTP-0218-0455-R02](#). [REDACTED]. The Prosecution's application to add materials relating to P-0924 after the disclosure deadline of 29 March 2021 was rejected by the Chamber. *See* Decision on varying the time limit for disclosing incriminating evidence, [ICC-02/05-01/20-379](#).

⁷⁷ *See* P-0129, [DAR-OTP-0220-0703-R02](#); P-0129, [DAR-OTP-0223-0157-R01](#).

⁷⁸ P-0129, [DAR-OTP-0220-0703-R02](#) at 0704, para. 4.

⁷⁹ P-0129, [DAR-OTP-0220-0703-R02](#); P-0129, Annex 1, [DAR-OTP-0220-0688](#) (Translation at [DAR-OTP-0220-0718](#)).

⁸⁰ *See* P-0129, [DAR-OTP-0223-0157-R01](#) at 0159, para. 6 and 0178-0186, paras. 113-154.

⁸¹ P-0129, [DAR-OTP-0223-0157-R01](#).

⁸² P-0919, [DAR-OTP-0217-0423-R03](#) at 0429-0430, paras. 28, 31, 33 and 0433, para. 52; P-0919, Investigation report, [DAR-OTP-0219-5119-R01](#).

⁸³ P-0999, Screening note, [DAR-OTP-0219-6069-R02](#). *See above*, para. 41.

⁸⁴ [REDACTED].

IV. CONCLUSION

49. For the above reasons, the requested amendment of the charges strikes an appropriate balance between the effective prosecution of Mr Abd-Al-Rahman and the protection of his rights under the Statute. Amending the charges as requested will enable the Court to discharge its obligation to search for the truth in this case and to preserve the rights of victims, without disrupting the trial. The Prosecution therefore respectfully requests the Chamber to grant this application, and to amend the charges as specified in paragraphs 1 and 2.



Karim A. A. Khan QC
Prosecutor

Dated this 4th day of February 2022

At The Hague, The Netherlands