

**Cour  
Pénale  
Internationale**

**International  
Criminal  
Court**



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No.: **ICC-02/05-01/20**  
Date: **26 February 2025**

**TRIAL CHAMBER I**

**Before:** Judge Joanna Korner, Presiding Judge  
Judge Reine Alapini-Gansou  
Judge Althea Violet Alexis-Windsor

**SITUATION IN DARFUR, SUDAN**

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

**Public  
With Public Annex**

**Public Redacted Version of  
“Second Corrected Version of “Defence Final Brief”, ICC-02/05-01/20-1210-Corr”**

**Source:** Defence for Mr Ali Muhammad Ali Abd-Al-Rahman

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## PART I – INTRODUCTION

1. This is the Final Trial Brief submitted by the Defence of Mr Ali Muhammad Ali Abd-Al-Rahman (“the Defence”, “Mr Abd-Al-Rahman”) before the Honourable Trial Chamber I (“the Chamber”, “the TC”, “TCI”) at the close of his trial.

2. Mr Abd-Al-Rahman has pleaded not guilty to the 31 crimes of which he is accused (“the Charges”) in relation to the events of 2003-2004 in Kodoom, Bindisi, Mukjar and Deleig, in West Darfur, Sudan, and maintains his innocence. He deplores the suffering that was inflicted there at that time, as well as the suffering that the whole population continues to endure in Sudan. He prays for the salvation of the victims and that their families will be able to recover from their grief.

3. Mr Abd-Al-Rahman belongs to the Ta’aisha tribe. He originates from Rahad-El-Berdi, in South Darfur. He joined the Sudanese Armed Forces (SAF) in 1964, at the age of 15, and remained in the SAF until his retirement in the early 1990s. Within the SAF, he worked in the medical unit as a medical assistant (nurse). The highest rank he ever attained was that of *Musaid*, a non-commissioned officer rank. He has never been deployed on a combat operation and has never held a command position. At the relevant time of the charges, Mr Abd-Al-Rahman was aged between 54 and 55. He earned an honest and modest living by selling medicines in a shop located in the Garsila market, Wadi Saleh, which he had opened thanks to the allowance he received when retiring from the SAF. He regularly travelled back and forth between Garsila and Rahad-El-Berdi to visit his family. He was not involved in politics, he was too old to be part of the reserve forces, his life was that of a humble Sudanese citizen.

4. The *Nazir* of Ta'aisha at the time, the late Abd-Al-Rahman Bishara Al Senussi, refused to take part in the counterinsurgency in 2003-2004. Mr Abd-Al-Rahman obeyed the wise decision of the *Nazir* of his tribe. In any case, he was too old to enlist and the Arab tribe forming the bulk of the *Janjaweed* militia in Wadi Saleh, the Salamat, were enemies of the Ta’aisha. In March 2004, he was recruited into the Central Reserve Forces (CRF), a police reserve force, and camped for the duration of his training, which ended in July 2005. He was quickly promoted to the rank of *Musaid*, his highest rank in the SAF, and deployed to his hometown of Rahad-El-Berdi. He remained in the same position until his voluntary surrender to the Court in 2020.

## PART II – ISSUES IMPACTING THE FAIRNESS OF TRIAL PROCEEDINGS

5. The trial of Mr Abd-Al-Rahman should not have taken place. The legal textual foundations were deficient and the legal conditions allowing for a fair trial were not met. The Court should have deferred the proceedings and engaged actively in creating the proper legal foundations conducive to a fair trial. It did the exact opposite: it forced the trial to proceed and

deferred the improvement of its legal foundations. As a result, the trial was not fair, because it could not be so. TCI systematically denied the remedies to ensure a fair trial at its disposal, thereby failing to fulfil its role under Article 64(2) of the Statute. The remedy provided to the Defence was additional time. But time alone was not enough to redress fair trial shortcomings, especially when the security situation in Sudan was deteriorating and preventing access to its territory.

6. In **Annex I**, the Defence provides a list of 15 issues raised at trial but which could not be submitted for final resolution by the Appeals Chamber (“AC”). These are unresolved. The Defence does not relitigate these matters as part of this Final Brief. TCI’s rulings thereon are final until considered by the AC. The cumulative effect of the 15 unresolved issues is more than enough to demonstrate that Mr Abd-Al-Rahman’s fair trial rights were not respected.

7. In addition, there are other issues impacting fairness which could not be addressed at trial or on which the issuance of a final ruling has been postponed to the end of the trial. The Defence hereby makes its final submissions on the requirements under the principle of legality *nullum crimen sine lege* pursuant to Article 22 of the Statute, as a preliminary issue related to the Court’s exercise of jurisdiction (**Chapter 1**), Sudan’s non-cooperation with the Court (**Chapter 2**) and the OTP’s failure to discharge its disclosure obligations with respect to information that is material to the preparation of the Defence, pursuant to Rule 77 of the Rules (**Chapter 3**). Taken individually and cumulatively, the Defence submits that these issues, with the 15 unresolved issues, irremediably compromised the fairness of Mr Abd-Al-Rahman’s trial. As a consequence, he should be acquitted of all counts and released immediately.

### **Chapter 1 – Preliminary Issue on Jurisdiction and Principle of Legality**

8. At Pre-Trial, the Defence challenged the jurisdiction of the Court to try Mr Abd-Al-Rahman pursuant to Article 19(2)(a) of the Statute.<sup>1</sup> PTCII’s ruling<sup>2</sup> denying that motion was appealed. The AC issued its OA8 Judgment on the Defence’s jurisdictional challenge on 1<sup>st</sup> November 2021 (“OA8 Judgment”).<sup>3</sup> In that OA8 Judgment, the AC majority formulated the test to be applied in assessing compliance with the principle of *nullum crimen sine lege* (“the Test”) (**Section 1**). The AC majority issued a preliminary ruling that the Test had been met and deferred a final ruling on the issue until “*a link is drawn with the charges in this case*” (**Section 2**).<sup>4</sup> The time has now come to issue a final assessment on whether the Test has been met. The

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<sup>1</sup> [ICC-02/05-01/20-302-tENG](#).

<sup>2</sup> [ICC-02/05-01/20-391](#).

<sup>3</sup> [ICC-02/05-01/20-503 OA8](#).

<sup>4</sup> [ICC-02/05-01/20-503 OA8](#), para. 91.

Defence submits that the Test is not met. Proceeding should be halted for lack of jurisdiction (Section 3).

### Section 1 – The Applicable Test

9. Article 22 of the Statute provides for the principle of legality: *nullum crimen sine lege*. At paragraph 84 of the OA8 Judgment, the AC underlines the importance of this principle as “a fundamental and non-derogable rule of international law”.<sup>5</sup>

10. The Test formulated by the AC to assess compliance with the Principle of Legality is enounced at paragraph 85 of OA8 Judgment:

[I]n order to extend to an accused the guarantee of legality consistent with human rights norms, the principle of *nullum crimen sine lege* generally requires that a court may exercise jurisdiction only over an individual who could have reasonably expected to face prosecution under national or international law. [...] [C]ourts place particular emphasis on the concepts of “foreseeability” and “accessibility”. As to foreseeability, the European Court of Human Rights uses the standard of “reasonableness” in assessing the foreseeability of prosecution, taking into account factors such as the “flagrantly unlawful nature” of the crimes charged and the circumstances of the accused. As to accessibility, the relevant laws must have been ascertainable, in the sense that the laws were sufficiently clear and accessible to the accused.<sup>6</sup>

11. Each limb of the foreseeability and accessibility test relies on two categories of indicia: objective (*I.*) and subjective indicia (*II.*). These indicia must be weighed on the basis of the standard of reasonableness,<sup>7</sup> i.e. whether the criminal nature of the relevant conduct was reasonably foreseeable and accessible to the Accused at the relevant time, in light of the relevant objective and subjective indicia.

12. These indicia are neither cumulative, nor alternative. They are complementary. This is illustrated by the way other international courts have applied the principle *nullum crimen sine lege*. In Nuremberg, the Defendants challenged the jurisdiction of the International Military Tribunal (“IMT”). The IMT ruling is a perfect illustration of the articulation of objective and subjective indicia of foreseeability and accessibility:

Occupying the positions they did in the Government of Germany, the defendants, or at least some of them must have known of the treaties signed by Germany, outlawing recourse to war for the settlement of international disputes; they must have known that they were acting in defiance of all international law when in complete deliberation they carried out their designs of invasion and aggression. On this view of the case alone, it would appear that the maxim [*nullum crimen sine lege*] has no application to the present facts.<sup>8</sup>

13. The reasoning of the IMT articulates objective indicia, namely the violation of applicable treaties, with subjective indicia, i.e. the positions of the Defendants in the Government of Germany and their participation in the deliberations that led to the commission

<sup>5</sup> [ICC-02/05-01/20-503 OA8](#), para. 84.

<sup>6</sup> [ICC-02/05-01/20-503 OA8](#), para. 85.

<sup>7</sup> [ICC-02/05-01/20-503 OA8](#), para. 85.

<sup>8</sup> [International Military Tribunal \(Nuremberg\), Judgment](#), p. 229.

of the crimes. It is on the basis of these two indicia, that the IMT reasonably concluded that the criteria of *nullum crimen sine lege* were met. The IMT was extremely careful to rely on unlawfulness in International Law that had a sufficient link with Germany and the particular Defendants themselves. When looking for the source of the criminality of a “war of aggression”, the IMT relied on provisions of treaties to which Germany was a State Party.<sup>9</sup> Yet, this alone was not considered enough and had to be complemented by the subjective indicium of the positions of the Defendants in the German government. It is ultimately the combination of both indicia, that reasonably supported the conclusion that the criminality of their conduct was foreseeable and accessible to them. It is precisely this Test that this TC must now apply.

### ***I – Objective Indicia of Relevance to the Test***

14. Objective factors for foreseeability include the “*flagrant unlawful nature*” of the crimes charged and, for accessibility, whether the relevant sources of the unlawfulness were ascertainable, i.e. were sufficiently clear and accessible to the Accused.<sup>10</sup> This includes whether the sources of the criminality were “*applicable to the suspect or accused at the time the conduct took place*”.<sup>11</sup> The mere fact that the Rome Statute entered into force internationally by the relevant time is thus not enough to satisfy the objective limb of the Test. Since Sudan has never been a State Party, it did not apply to Mr Abd-Al-Rahman.<sup>12</sup> The meeting of the Test must be assessed in light of the corpus of Law applicable to him at the material time. This includes Sudanese Law, as in force in 2003-2004, and, potentially, other sources of International Law, including treaties and Customary International Law, insofar as these were applicable in Sudanese Law at the time.

15. The seriousness of the alleged offences is not, in and of itself, enough to satisfy the foreseeability criterion, which will not be met if there are good reasons the Accused may reasonably have been unaware of their criminal nature.<sup>13</sup> What matters is that the Accused must have been able to know that the conduct was criminal without need for reference to any specific provision.<sup>14</sup> The foreseeability test is met when the Accused may have assessed the criminal nature of the conduct himself or, if need be, with the assistance of a lawyer.<sup>15</sup>

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<sup>9</sup> Including eg. Treaty of Versailles, the Kellogg-Briand Pact, and treaties of mutual guarantee, arbitration and non-aggression entered into with Belgium, France, the United Kingdom, Italy, Czechoslovakia, Poland, The Netherlands, Denmark, Luxembourg and Russia and the 1899 and 1907 Hague Conventions. See [IMT \(Nuremberg\), Judgment](#), pp. 216-218.

<sup>10</sup> [ICC-02/05-01/20-503 OA8](#), para. 85.

<sup>11</sup> [ICC-02/05-01/20-503 OA8](#), para. 86.

<sup>12</sup> [ICC-02/05-01/20-503 OA8](#), para. 87.

<sup>13</sup> [Milutinović et al. Decision on Jurisdiction](#), para. 42; [ECtHR, Korbely v. Hungary Judgment](#), paras. 76-94.

<sup>14</sup> [Hadžihasanović and Kubura Jurisdiction Appeal Decision](#), para. 34; [ECCC Duch AJ](#), para. 96.

<sup>15</sup> [ECtHR, Jorgić v. Germany](#), para. 113; [ECtHR, Vasiliauskas v. Lithuania](#), paras. 154, 157.

16. In the preliminary Test applied at paragraphs 88 to 90 of the OA8 Judgment, the AC places weight on two objective indicia. The first is the Agreement of 31 March 2002 between the GoS and the SPLM to Protect Non-Combatants Civilians and Civilian Facilities from Military Attack (“the 2002 Agreement”).<sup>16</sup> The second is the fact that “*the crimes under the Statute were intended to be generally representative of the state of customary international law when the Statute was drafted*” (“the Customary Dimension”).<sup>17</sup> The AC’s reasoning does not exclude reliance on other relevant objective indicia of foreseeability and/or accessibility in addition to these two.

17. Relevant case-law has clarified that the accessibility test can be met by reference to unlawfulness based on Customary International Law,<sup>18</sup> but this finding can only be understood and applied in a way that is consistent with the AC’s finding that the Criminal Law relied upon to prohibit the relevant conduct must have been applicable to the Accused.<sup>19</sup> Prohibition defined under Customary International Law would be enough to meet the accessibility test if it was applicable to the Accused at the relevant time. What matters is whether there was a contemporaneous legal basis for the Accused’s conviction,<sup>20</sup> whatever the source, domestic or international, conventional or customary, of that legal basis, applicable to the Accused at the relevant time.

## ***II – Subjective Indicia of Relevance to the Test***

18. The subjective criteria for foreseeability and accessibility relate to the personal circumstances of the Accused. In the preliminary Test applied at paragraphs 88 to 90 of the OA8 Judgment, the AC refers to three subjective indicia of foreseeability which rely on findings in the Confirmation Decision: (i) “*Mr Abd-Al-Rahman spent a considerable part of his career as a non-commissioned officer in the military*” (“the Military Career”), (ii) he “*was the head of the Janjaweed militia in the Wadi Salih and Mukjar localities*” (“the Head of Militia Status”), and (iii) “*he had command over other deputies of the militia as well as members of the Sudanese Armed Forces*” (“the Position of Command”).<sup>21</sup>

19. Other personal circumstances of defendants that were found relevant in assessing the foreseeability test in prior case law, some of which is relied upon by the AC, include a senior

<sup>16</sup> [DAR-OTP-00005576](#); [ICC-02/05-01/20-503 OA8](#), para. 88.

<sup>17</sup> [ICC-02/05-01/20-503 OA8](#), para. 89.

<sup>18</sup> [Hadžihasanović and Kubura Jurisdiction Appeal Decision](#), paras. 34-35; [ECtHR, Vasiliauskas v. Lithuania](#), para. 154.

<sup>19</sup> [ICC-02/05-01/20-503 OA8](#), para. 86.

<sup>20</sup> [ECtHR, Vasiliauskas v. Lithuania](#), para. 161.

<sup>21</sup> [ICC-02/05-01/20-503 OA8](#), para. 88.

position within the governing authority of his country<sup>22</sup> or the fact that an Accused committed the crimes as a police officer<sup>23</sup> or as a commanding officer within the army.<sup>24</sup>

20. The Confirmation Decision was challenged by the Defence, but leave to appeal was denied.<sup>25</sup> The Head of Militia Status and the Position of Command indicia are matters for trial. The relevance of the Military Career indicium, is also in issue. The AC's assessment based on such indicia thus could only be preliminary, pending a full assessment based on the entire evidence.

## **Section 2 – TC's Duty to Assess Whether the Test is Met Prior to Deliberating on the Merits of the Case**

21. After developing its Test and applying it to the case on the basis of the objective and subjective criteria, the AC stated that it "*recognises that only once a link is drawn with the charges in this case can the question of the legality of the charges be definitely answered*".<sup>26</sup> This full and definitive assessment falls within the primary jurisdiction of the TC. The Defence submits that the Test has not been met. TCI should logically address the Principle of Legality prior to deliberating on the merits of the Case.

## **Section 3 – The Test Is Not Met**

### ***I – Objective Indicia are Not Supported by Evidence and/or are Inconclusive***

22. The two objective indicia relied upon by the AC, i.e. the 2002 Agreement<sup>27</sup> and the Customary Dimension<sup>28</sup> are not supported by the evidence and/or are not conclusive.

23. The OTP had relied on the 2002 Agreement<sup>29</sup> during its cross-examination of **D-0023**.<sup>30</sup> The only question asked to him was whether it reflected an intention by the Parties to abide by their obligations under International Law, including Customary International Law.<sup>31</sup> D-0023 said it did. He was not asked if this intention made International Law or Customary International Law applicable to Sudanese citizens. D-0023 had already answered that question in the

<sup>22</sup> [ECCC Duch AJ](#), para. 280; [ECCC Nuon & Khieu AJ](#), para. 761; [ECtHR, Streletz, Kessler and Krentz v. Germany](#), para. 78.

<sup>23</sup> [ECtHR, Šimšić v. Bosnia-Herzegovina](#), para. 24.

<sup>24</sup> [ECtHR, Kononov v. Latvia](#), para. 235.

<sup>25</sup> [ICC-02/05-01/20-433](#) (confirmation of charges decision); [ICC-02/05-01/20-465](#) (Application for leave to appeal the confirmation decision); [ICC-02/05-01/20-517](#) (Leave to appeal denied).

<sup>26</sup> [ICC-02/05-01/20-503 OA8](#), para. 91.

<sup>27</sup> [DAR-OTP-00005576](#).

<sup>28</sup> [ICC-02/05-01/20-503 OA8](#), para. 89.

<sup>29</sup> [DAR-OTP-00005576](#).

<sup>30</sup> **D-0023**: T-142, p. 63, line 4-p. 64, line 21.

<sup>31</sup> **D-0023**: T-142, p. 63, lines 17-19, p. 64, lines 10-21.

negative.<sup>32</sup> He was corroborated by **D-0016**<sup>33</sup> and **P-0120**.<sup>34</sup> A mere “*intention*” of the Parties to the 2002 Agreement did not amount to actual reform of the Sudanese domestic system. The relevant reforms post-dated the events of 2003-2004.<sup>35</sup>

24. The OTP also did not adduce any evidence in relation to the establishment of the Verification Mission in charge of investigation and reporting specifically relied upon at paragraph 88 of OA8 Judgment. Beyond the declaration of intention made in the 2002 Agreement, there is no evidence that this investigative body was ever in fact established. To the contrary, **D-0023** testified that the special courts on the events in Darfur established by the Sudanese authorities had no jurisdiction to prosecute international crimes.<sup>36</sup>

25. The absence of direct applicability of International Law, including Customary International Law and of definition of international crimes, in the Sudanese domestic system in 2003-2004 removes the second objective indicium relied upon by the AC, i.e. the Customary Dimension.<sup>37</sup> Irrespective of its customary dimension in International Law that predates the 1998 Statute, Customary International Law was not applicable in Sudan in 2003-2004. Objectively, the definition of international crimes was thus not applicable to Mr Abd-Al-Rahman.<sup>38</sup> These offences did not exist in Sudan’s domestic system. The lack of jurisdiction of the Special Criminal Court to prosecute international crimes confirms as much.<sup>39</sup> Even if *arguendo* he had committed all the crimes alleged by the OTP, there was objectively no contemporaneous legal basis of any source for Mr Abd-Al-Rahman to be tried and convicted,<sup>40</sup> whatever its source, domestic or international, conventional or customary.

26. Lest it be argued that the mere existence of international criminalisation, whether conventional or customary, is a sufficient objective indicium to meet the Foreseeability and Accessibility Test, irrespective of its applicability in the Sudanese domestic system, it is uncontroversial that international prohibitions bind States. Sudan was under an obligation to prosecute violations of IHL under the Geneva Conventions and under pre-existing Customary International Law. But any such argument would confuse the international responsibility of

<sup>32</sup> **D-0023**: T-136, p. 39, lines 1-5, p. 40, lines 6-19, p. 45, line 24-p. 46, line 15. See **PART IV – Chapter 2 – Section 2 – I and II** below.

<sup>33</sup> **D-0016**: T-130, p. 47, lines 14-18 (Conf), p. 49, line 11-p. 50, line 10 (Conf); See **PART IV – Chapter 2 – Section 2 – I and II** below.

<sup>34</sup> **P-0120**: T-036, p. 68, line 20-p. 69, line 6. See **PART IV – Chapter 2 – Section 2 – I and II** below.

<sup>35</sup> See **PART IV – Chapter 2 – Section 2 – I and II** below.

<sup>36</sup> See **PART IV – Chapter 2 – Section 2 – I and II** below.

<sup>37</sup> [ICC-02/05-01/20-503 OA8](#), para. 89.

<sup>38</sup> [ICC-02/05-01/20-503 OA8](#), para. 86.

<sup>39</sup> **D-0023**: T-142, p. 66, lines 12-22; T-143, p. 12, line 2-p. 13, line 18; See **PART IV – Chapter 2 – Section 2 – I and II** below.

<sup>40</sup> [ECtHR, Vasilias v. Lithuania](#), para. 161.

States for violations of International Law with the accountability of individual nationals of that State for crimes defined by the law applicable to them. The principle *nullum crimen sine lege* protects individuals, not States. In the OA8 Judgment, the AC specifically excluded the applicability of the Rome Statute crimes to Mr Abd-Al-Rahman because the Statute itself was not in force in Sudan at the relevant time.<sup>41</sup> What is valid for the Statute itself is *a fortiori* valid for the other sources of International Law. The evidence shows that International Law, be it conventional or customary, started to become applicable in Sudan under the 2005 Constitution,<sup>42</sup> not before.

27. It might also be argued that, even in the absence of applicability of international criminalisation in Sudan domestic system, equivalent offences in Sudanese Criminal Law fulfilled the foreseeability and accessibility criteria of the Test. But the evidence would render this conclusion unreasonable.<sup>43</sup> [REDACTED],<sup>44</sup> [REDACTED], and [REDACTED],<sup>45</sup> [REDACTED], testified about amnesties, immunities, the doctrine of military necessity, and the absence of the definition of lawful order until 2007, which, in addition to the absence of specific offences in Sudanese Criminal Law, created as many obstacles to the prosecution of these international crimes in Sudan. **P-0020**<sup>46</sup> and **P-0120**<sup>47</sup> reported the existence of numerous cases of arbitrary arrests, extrajudicial detention and the use of torture and execution without trial against political detainees, without prosecution. Two insider witnesses, [REDACTED]<sup>48</sup> and [REDACTED],<sup>49</sup> testified about the routine resort to torture and extrajudicial executions, with no judicial consequences. The pillaging of villages identified by the authorities as enemy sites was permitted under the legal notion of *Ghanima*.<sup>50</sup> The evidence shows that, in Sudan, there was in essence no prosecution of IHL violations routinely committed as part of normal military operations. In this circumstance, it is simply not reasonably open to the TC to find that the Sudanese criminal code provides a sufficient basis for asserting that prosecution was foreseeable and accessible. No expert evidence has been called to provide for such a finding. On the basis of the evidence, the only conclusion available to the TC is that the prosecution of such offences was neither foreseeable, nor accessible. Furthermore, the indicia of foreseeability

<sup>41</sup> [ICC-02/05-01/20-503 OA8](#), para. 87.

<sup>42</sup> [DAR-OTP-0136-0605](#).

<sup>43</sup> See also **PART IV- Chapter 2- Section 2- II**.

<sup>44</sup> [REDACTED]

<sup>45</sup> [REDACTED]

<sup>46</sup> **P-0020**: T-042, p. 17, lines 11-18, p. 18, line 15-p. 19, line 6, p. 21, line 15-p. 22, line 13.

<sup>47</sup> **P-0120**: T-036, p. 63, lines 14-24.

<sup>48</sup> [REDACTED]

<sup>49</sup> [REDACTED]

<sup>50</sup> **D-0016**: T-131, p. 65, line 18-p. 66, line 11, p. 69, lines 5-10.

and accessibility of prosecution under ordinary criminal offences fall short of constituting indicia of foreseeability and accessibility of prosecution under international crimes. Under Article 22(2) of the Statute, “[the] definition of a crime shall be strictly construed and shall not be extended by analogy”.<sup>51</sup> The possible analogy of international crimes with some crimes under Sudanese domestic law, which is challenged, is of no relevance to the issue of compliance with the Principle of Legality *vis-à-vis* international crimes.

28. Finally, one might submit that, even if he could not know about the criminal nature of the alleged acts, Mr Abd-Al-Rahman could have made enquiries with a lawyer who would have advised him accordingly.<sup>52</sup> This possible indicium is both unrealistic, given the particular circumstances of Mr Abd-Al-Rahman who earned his modest livelihood by selling medication in Garsila, and is futile, given the lack of requisite legal expertise available in Darfur at the time: **P-0120** [REDACTED] testified on the lack of actual awareness about Human Rights or International Law issues [REDACTED] in Sudan before 2003-2004.<sup>53</sup> A Sudanese lawyer would thus have failed to advise him about the existence or applicability of international incriminations. The advice he could provide on his domestic Law in relation to these issues would have been the legality of *Ghanima*,<sup>54</sup> the obligation to obey orders issued by authorized officers, under sentence of death,<sup>55</sup> and immunity for offences committed in the course of military operations.<sup>56</sup> Such advice would have fallen short from passing the Foreseeability and Accessibility Test.

29. Neither of the two objective indicia relied upon in the OA8 Judgment can reasonably support a conclusion that the criminalisation of the alleged conduct was foreseeable and accessible to Mr Abd-Al-Rahman. Even if, *arguendo*, he had committed all crimes alleged by the OTP, there was no contemporaneous legal basis for his prosecution and conviction in Sudan at the relevant time.<sup>57</sup>

## ***II – Subjective Indicia Are Not Supported by Evidence and/or Inconclusive***

### ***A - Mr Abd-Al-Rahman’s Military Career Is Not a Determinative Indicium***

30. Mr Abd-Al-Rahman’s Military Career cannot reasonably lead to the conclusion that the criminal nature of the charges was foreseeable and accessible to him. He served in the SAF

<sup>51</sup> Art. 22(2) of the Rome Statute.

<sup>52</sup> [ECtHR, Jorgić v. Germany Judgment](#), para. 113; [ECtHR, Vasiliauskas v. Lithuania](#), paras. 154, 157.

<sup>53</sup> **P-0120**: T-036, p. 64, lines 8-11.

<sup>54</sup> See **PART IV – Chapter 2 – Section 2 – IV – A** below.

<sup>55</sup> See **PART IV – Chapter 2 – Section 2 – IV – B** below.

<sup>56</sup> See **PART IV – Chapter 2 – Section 2 – IV – C** below.

<sup>57</sup> [ECtHR, Vasiliauskas v. Lithuania](#), para. 161.

Medical Unit until his retirement in the early to middle 1990s.<sup>58</sup> He held the rank of warrant officer, *Musa'id*, which corresponds to the rank of medical assistant within the SAF Medical Unit.<sup>59</sup> There was no IHL training to the Sudanese armed and security forces, especially at lower ranks, until, at the earliest, the second half of the 1990s,<sup>60</sup> after the Accused retired. There is no reasonable chance that Mr Abd-Al-Rahman ever received training on the principles of IHL.

31. Also, his highest rank of warrant officer means that he was never a commanding, much less a senior commanding, officer. It is proof that the other personal circumstances relied upon by other international courts to establish foreseeability and accessibility, such as a senior governing position<sup>61</sup> or commission of crimes as a police officer<sup>62</sup> or as a commanding officer within the army,<sup>63</sup> are not met in his case. After his time in the army, Mr Abd-Al-Rahman worked as a modest pharmacist in Garsila.<sup>64</sup> The first subjective indicium relied upon in the AC's preliminary assessment is not established by the evidence.

***B - Mr Abd-Al-Rahman's Alleged Position as Militia Leader and Commander Is Not Supported by Evidence and Would Be Inconclusive***

32. The OTP's allegation that Mr Abd-Al-Rahman served as a militia leader and had command over deputies of the militia and members of the Sudanese Armed Forces<sup>65</sup> is not supported by evidence.<sup>66</sup> In any event, the Defence submits that these second and third subjective indicia are inconclusive. Taken at its highest, the Prosecution's allegation that Mr Abd-Al-Rahman was an *Agid-Al-Ogada* and commanded JJW militias in Wadi Saleh<sup>67</sup> – which are not accepted<sup>68</sup> – does not reasonably support a conclusion that the Foreseeability and Accessibility criteria are met. The position of *Agid-Al-Ogada* was not a prominent one within the State apparatus, and certainly neither a senior Government nor a commanding position in the SAF.<sup>69</sup> At most, it was a low position of field militia leader placed under the authority of an officer whose rank may be as low as First-Lieutenant.<sup>70</sup> The evidence shows that members of

<sup>58</sup> [OTP Trial Brief](#), para. 2; [ICC-02/05-01/20-504-AnxA](#); item 10.

<sup>59</sup> [REDACTED]

<sup>60</sup> [REDACTED]; See **PART IV – Chapter 2 – Section 2 – III** below.

<sup>61</sup> [ECCC Duch AJ](#), para. 280; [ECCC Nuon & Khieu AJ](#), para. 761; [ECtHR, Streletz, Kessler and Krentz v. Germany](#), para. 78.

<sup>62</sup> [ECtHR, Šimšić v. Bosnia-Herzegovina](#), para. 24.

<sup>63</sup> [ECtHR, Kononov v. Latvia](#), para. 235.

<sup>64</sup> [OTP Trial Brief](#), para. 2; [ICC-02/05-01/20-504-AnxA](#); item 11.

<sup>65</sup> [ICC-02/05-01/20-503 OA8](#), para. 88.

<sup>66</sup> See **PART VI – Chapter 2** below.

<sup>67</sup> [OTP Trial Brief](#), paras. 90-123.

<sup>68</sup> See **PART VI – Chapter 2 - Section 2 -III- C**.

<sup>69</sup> [ECtHR, Kononov v. Latvia](#), para. 235.

<sup>70</sup> See **PART VI – Chapter 2**.

the armed forces only obeyed orders from their superior officer.<sup>71</sup> Even if, *arguendo*, Mr Abd-Al-Rahman was *Agid-Al-Ogada* and/or a militia leader, he had no commanding authority over members of the SAF. The second and third subjective indicia relied upon in the AC's preliminary assessment are not established on a holistic consideration of the evidence.

### ***C – Absence of Other Subjective Indicia***

33. Finally, evidence of other personal circumstances of Mr Abd-Al-Rahman provides no other subjective indicia of Foreseeability and Accessibility. He never occupied any senior position within the GoS,<sup>72</sup> he never served as a police officer<sup>73</sup> or as a commanding officer within the army<sup>74</sup> prior to 2003-2004. There is no evidence whatsoever that he ever studied law or, even, completed any secondary or superior level of education, other than being the recipient of a medical assistant certificate and licence to sell medication.

### ***III – Conclusion***

34. A holistic consideration of the entirety of the evidence, combining objective factors with the personal circumstances of Mr Abd-Al-Rahman, provides no indicia that the Foreseeability and Accessibility Test established by the AC has been met. The international sources of the relevant incriminations were not applicable in Sudan domestic system and to Mr Abd-Al-Rahman and he could have no knowledge thereof. There was no incrimination of the alleged acts committed in the course of military operations instructed by the Sudanese authorities in Sudan domestic law; quite the opposite, there was an obligation to commit these when ordered. The basis of the relevant incriminations was not ascertainable by Mr Abd-Al-Rahman, even with the advice of a Sudanese lawyer. It was not accessible. Criminal accountability for these was consequently not foreseeable. The Test is not met.

35. The prosecution of Mr Abd-Al-Rahman for the crimes with which he is charged is thus in breach of the principle of legality *nullum crimen sine lege* pursuant to Article 22(1) of the Statute. Thus, TCI must recognize the Court's lack of jurisdiction and terminate his trial immediately. No further deliberation under Article 74 is required.

## **Chapter 2 – Sudan's Non-Cooperation with the Court**

<sup>71</sup> [REDACTED]. See **PART IV – Chapter 5– Section 2 – I.**

<sup>72</sup> [International Military Tribunal \(Nuremberg\), Judgment](#), p. 229; [ECCC Duch AJ](#), para. 280; [ECCC Nuon & Khieu AJ](#), para. 761; [ECtHR, Streletz, Kessler and Krentz v. Germany](#), para. 78.

<sup>73</sup> [ECtHR, Šimšić v. Bosnia-Herzegovina](#), para. 24.

<sup>74</sup> [ECtHR, Kononov v. Latvia](#), para. 235.

36. Sudan's non-cooperation with the Court, in particular with the Defence, has been the topic of many exchanges and much litigation throughout the proceedings. These will not be repeated here. They are on record.<sup>75</sup>

37. Sudan bears the primary responsibility for its non-cooperation. However, since the referral of the Situation in Sudan by UNSC Resolution 1593, the Court has failed to take the steps required by the Statute to secure Sudan's cooperation. Since the voluntary surrender of Mr Abd-Al-Rahman in June 2020, PTCII and TCI have failed to take requisite measures within their power and jurisdiction in a timely manner to restore the fairness of the proceedings.

38. Key issues impacting on the fairness of the proceedings as a result of Sudan's cooperation include the following: (i) absence of a special agreement with Sudan authorising the Court to exercise its functions and powers on its territory, as required under Article 4(2) of the Statute; (ii) incrimination of cooperation with the Court under Sudanese law; (iii) the impossibility of protecting witnesses on the territory of Sudan; (iv) Sudan's persistent and systematic denial of all requests for judicial assistance submitted by the Defence; (v) the impossibility of accessing Darfur; (vi) the non-delivery of visas to the Defence, with one single exception; and (vii) [REDACTED].

39. The Defence is aware of the Court's jurisprudence according to which "the investigation and prosecution of most serious crimes of international concern should not be contingent upon a State's choice to cooperate or not cooperate with the Court".<sup>76</sup> This case law has been relied upon *ad nauseam* by the OTP.<sup>77</sup> However, this statement is limited by the requirement to respect fair trial rights. As ruled by the AC in its Judgment OA13 in *Lubanga* ("*Lubanga* OA13"):

Where fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial. Justice could not be done. A fair trial is the only means to do justice. If no fair trial can be held, the object of the judicial process is frustrated and must be stopped.<sup>78</sup>

On the basis of that ruling, TC IV defined the conditions that should lead to the conclusion that the fair trial proceedings are made impossible as a result of State non-cooperation: the request shall be "properly substantiated";<sup>79</sup> the Defence should identify the evidence necessary for the presentation of its case with "sufficient specificity"<sup>80</sup> and demonstrate that the unavailable evidence possesses "an apparent exculpatory value and be of such nature that the defendant

<sup>75</sup> **Annex II** to the Defence's Final Trial Brief.

<sup>76</sup> [Nourain Decision on the request of temporary stay of proceedings](#) para. 100.

<sup>77</sup> [ICC-02/05-01/20-906-Red](#), para. 30.

<sup>78</sup> [Lubanga AJ](#), para. 76.

<sup>79</sup> [Nourain Decision on the request of temporary stay of proceedings](#), para. 90.

<sup>80</sup> [Nourain Decision on the request of temporary stay of proceedings](#), paras. 93, 102.

would be unable to obtain comparable evidence by other reasonably available means”.<sup>81</sup> All these criteria leading to the conclusion that no fair trial is possible as a result of Sudan’s non-cooperation with the Defence are met *ad abundantiam* in the present case.<sup>82</sup>

40. Throughout the proceedings, the Defence has proposed creative remedies and sought the intervention of the relevant Chambers to take the measures at their disposal to compel Sudan to cooperate.<sup>83</sup> All solutions proposed by the Defence have been ignored or denied by both Chambers.

41. With no alternative way forward, the Defence repeatedly requested the delivery of a finding of non-cooperation against Sudan and its referral to the UNSC.<sup>84</sup> TCI belatedly issued a finding of non-cooperation against Sudan pursuant to Article 87(7) of the Statute on 31 March 2023,<sup>85</sup> but refused to refer Sudan to the UNSC on the following ground:

The Chamber acknowledges that Sudan’s failure to comply with its requests for cooperation has negatively impacted the Defence’s ability to prepare Mr Abd-Al- Rahman’s defence in accordance with its chosen line of investigation. However, the Chamber cannot conclude that Sudan’s non-compliance has prevented the Court from exercising its functions and powers under the Statute. [...] Consequently, the Chamber finds that the factual prerequisite of Article 87(7) of the Statute has not been established, and that it cannot exercise its discretion to refer Sudan to the UN Security Council, following a finding of non-compliance.<sup>86</sup>

42. The reasons denying referral to the UNSC were flawed. Once TCI had exercised its discretion and found that Sudan was not cooperating, it no longer had discretion to refer the matter to the UNSC pursuant to Regulation 109(4) of the RoC. TCI did not fulfil its obligations towards the Defence. Sudan, clearly unperturbed by the finding against it, continued to ignore the Defence’s requests for judicial assistance. These remain with no answer.<sup>87</sup> [REDACTED].<sup>88</sup>

43. All requests for finding of non-cooperation and referral of Sudan to the UNSC were denied, as were all applications for leave to appeal.<sup>89</sup> As a result, the AC had no opportunity to rule on any of the seven key issues of non-cooperation mentioned above. These key features of non-cooperation on the fairness of the proceedings remain unresolved. Their impact is irreparable.

<sup>81</sup> [Nourain Decision on the request of temporary stay of proceedings](#), para. 95.

<sup>82</sup> See **PART II – Chapter 2- Section II.**

<sup>83</sup> Before PTC II: [ICC-02/05-01/20-173](#); [ICC-02/05-01/20-174](#); [ICC-02/05-01/20-363-Red](#); Before TC I: [ICC-02/05-01/20-507](#); [ICC-02/05-01/20-532-Red](#); [ICC-02/05-01/20-1048-Conf](#); [ICC-02/05-01/20-1052-Conf-Red](#); [ICC-02/05-01/20-1118-Conf](#).

<sup>84</sup> [ICC-02/05-01/20-263-Red2](#); [ICC-02/05-01/20-557-Red](#); [ICC-02/05-01/20-678-Conf](#); [ICC-02/05-01/20-768-Conf-Red](#); [ICC-02/05-01/20-849-Conf](#).

<sup>85</sup> [ICC-02/05-01/20-913-Red](#).

<sup>86</sup> [ICC-02/05-01/20-913-Red](#), para. 27.

<sup>87</sup> [ICC-02/05-01/20-848-Conf-AnxI](#).

<sup>88</sup> [REDACTED]

<sup>89</sup> [ICC-02/05-01/20-811-Conf](#) (Application for leave to appeal); [ICC-02/05-01/20-820-Red](#) (Leave to appeal denied); [ICC-02/05-01/20-863-Conf](#) (Application for leave to appeal); [ICC-02/05-01/20-875-Conf](#) (Leave to appeal denied).

## Section 1 - Summary of Sudan Cooperation with the Court

44. From 2005 until now, Sudan cooperation with the Court has varied. There are at least four distinguishable phases: from the referral of 2005 until the announcement of the first Warrants of Arrest on 27 February 2007<sup>90</sup> (“Phase 1”), from the first Warrants of Arrest until the resumption of diplomatic relations by early 2021 (“Phase 2”), from that resumption until the outbreak of the civil war in Sudan on 15 April 2023 (“Phase 3”) and since the outbreak of the civil war (“Phase 4”).<sup>91</sup>

45. During Phase 1, the evidence shows that the GoS cooperated with the Court and, in general, manifestly demonstrated goodwill.

46. [REDACTED].<sup>92</sup> [REDACTED].<sup>93</sup> [REDACTED]. [REDACTED]. No special agreement under Article 4(2) of the Statute was entered, nor even negotiated.<sup>94</sup> [REDACTED]. By failing to initiate that negotiation, the Court took “*une responsabilité majeure, historique*”.<sup>95</sup>

47. The OTP did not take advantage of that early period to investigate in Darfur. Investigations in Sudan were limited to holding meetings in Khartoum. No efforts appear to have been made to access the places where the crimes under investigation took place, or to collect first-hand evidence, including exculpatory evidence. From the date of the public announcement of the first Applications for Summonses to Appear against Harun and Mr Abd-Al-Rahman of 27 February 2007<sup>96</sup> and for the rest of Phase 2, there is no longer any evidence of Sudan’s actual or purported cooperation with the Court. The entire evidence proves the opposite. [REDACTED] testified about the genesis of Sudan’s declaration of 26 August 2008 to the United Nations Secretariat, according to which “Sudan has no legal obligation arising from its signature” of the Rome Statute (“2008 Declaration”):<sup>97</sup> he explained that “Sudan did not at all want to cooperate with the Court”.<sup>98</sup> The proceedings against Mr Abd-Al-Rahman started during Phase 2. Towards the end of that phase, the Defence submitted on 9 November and 9 December 2020 its requests for judicial assistance to Sudan (“Defence Requests for Judicial Assistance”).<sup>99</sup> The requested documents have never been received. They are not in evidence.

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<sup>90</sup> [DAR-D31-00000009](#).

<sup>91</sup> **Annexe II:** Summary of Sudan (Non-)Cooperation with the Court.

<sup>92</sup> [REDACTED]

<sup>93</sup> [REDACTED]

<sup>94</sup> [REDACTED]

<sup>95</sup> [ICC-02/05-01/20-231-Red](#), para. 24.

<sup>96</sup> [ICC-02/05-56](#); [DAR-D31-00000009](#).

<sup>97</sup> [United Nations Treaty Collection](#): Chapter XVIII – Penal Matters, 10. Rome Statute of the International Criminal Court, under Sudan.

<sup>98</sup> [REDACTED]

<sup>99</sup> [ICC-02/05-01/20-263-Red2](#); [ICC-02/05-01/20-263-Red2](#).

48. By early 2021, the democratic transition in Sudan led to a progressive resumption of diplomatic relations with the Court. The OTP took advantage of this new situation by concluding a first Memorandum of Understanding with Sudan (“February 2021 MoU”). It was replaced by a document entitled “Agreement on Cooperation between the International Criminal Court and Sudan” signed by the then Registrar of the Court on 10 May 2021 (“Cooperation Agreement”).<sup>100</sup> The Defence has submitted why this document was no more than a non-binding, non-conventional concerted act and did not qualify as a special agreement under Article 4(2) of the Statute. Its submissions have been denied by Trial Chamber I, together with leave to appeal.<sup>101</sup> [REDACTED].<sup>102</sup> The OTP signed another Memorandum of Understanding on 12 August 2021 (“August 2021 MoU”). It is also not on record.

49. Over this Phase 3, [REDACTED].<sup>103</sup> No permanent field presence in Sudan was established though [REDACTED]. The OTP also reported good cooperation from Sudanese authorities,<sup>104</sup> in contrast with the Prosecutor’s periodic presentations to the UNSC for the same period stating the exact opposite.<sup>105</sup> The OTP undertook its first investigative mission in Sudan on 24 March 2021,<sup>106</sup> but never entered Darfur to investigate and collect evidence. On 25 October 2021, a military coup overthrew the civil component of the administration in place since 2019 and all field missions were suspended for months. These resumed over spring 2022. The Defence received its only visas to enter Sudan allowing it to go once on mission to Khartoum only in June 2022. It never received authorisation to access Darfur. All its other visa applications were ignored. The Defence Requests for Judicial Assistance were ignored. As a result, TCI issued its finding of non-cooperation against Sudan on 31 March 2023.<sup>107</sup>

50. About two weeks later, a high intensity civil war broke out in Sudan. It resulted in a total collapse in the functioning of the GoS and a halt in field missions in Sudan. These have not resumed since.<sup>108</sup> [REDACTED]. As a result of this conflict, the Defence has had no chance of conducting investigations in Sudan, even less so of obtaining any protection services for its

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<sup>100</sup> [ICC-02/05-01/20-481-Red.](#)

<sup>101</sup> [ICC-02/05-01/20-481-Red.](#) (First application); [ICC-02/05-01/20-485-Red](#) (Second application); Status Conference: T-018, p. 41, line-p. 47, line 15 (Conf) (Additional submissions); [ICC-02/05-01/20-561-Red](#) (Decision denying applications and submissions); Status Conference: T-020, p. 83, line 25-p. 86, line 25 (Leave to appeal denied).

<sup>102</sup> [ICC-02/05-01/20-893-Conf](#) OA11, para. 47.

<sup>103</sup> See e.g. [ICC-02/05-01/20-496](#), paras. 22-23; [ICC-02/05-01/20-569-Conf-Red](#), para. 18; [ICC-02/05-01/20-619-Conf-Red](#), paras. 24-26; [ICC-02/05-01/20-687-Conf-Red](#), para. 9; [ICC-02/05-01/20-907-Conf-Exp.](#)

<sup>104</sup> [REDACTED]

<sup>105</sup> [34<sup>th</sup> Report of the Prosecutor to the UNSC.](#), paras. 34-41; [35<sup>th</sup> Report of the Prosecutor to the UNSC.](#), paras. 22-37; [36<sup>th</sup> Report of the Prosecutor to the UNSC.](#), paras. 36-53.

<sup>106</sup> [ICC-02/05-01/20-906-Red.](#), para. 15.

<sup>107</sup> [ICC-02/05-01/20-913-Red.](#)

<sup>108</sup> [REDACTED]

witnesses there. It is in this context that the presentation of the Defence Case started on 18 October 2023 and unfolded until its close on 13 September 2024.<sup>109</sup> The Defence Requests for Judicial Assistance remained unanswered. [REDACTED], the GoS eventually sent a *note verbale* dated 23 October 2024 responding to the Defence outstanding requests. In this *note verbale*,<sup>110</sup> [REDACTED]. [REDACTED]<sup>111</sup> is no longer mentioned, confirming just how unfounded it always was, proffered for the sole purpose of providing a clumsy justification for Sudan's non-cooperation.

## Section 2 – Impact on the Fairness of the Proceedings

### *I – Impact on the Prosecution's Investigation*

51. The Defence is not best placed to measure the impact that Sudan's cooperation has had on the OTP's investigations. What matters in the Defence's perspective is how the way Sudan cooperated, or not, with the OTP impacted on its capacity to fulfil its function of establishing the truth pursuant to Article 54(1)(a) of the Statute by investigating incriminating *and* exculpatory evidence alike.

#### *A - Sudan induced the Prosecution of Mr Abd-Al-Rahman*

52. On 29 May 2005, i.e. less than two months after the passing of Resolution 1593 by the UNSC, the Sudanese authorities were prompt in handing over to the OTP purported minutes of a meeting of the Sudanese National Commission of Enquiry dated June 2004 pointing at a "Lieutenant Ali Muhammad Ali, nicknamed *Kushayb*" for the execution of prisoners in Deleig.<sup>112</sup> This was followed by another document purportedly from Sudan's National Commission of Enquiry, pointing again towards a "leader of the *Fursan* militia, Muhammad Ali *Kushayb*".<sup>113</sup> These two documents demonstrate that the GoS reacted to the UNSC referral by immediately inducing the Court to investigate and prosecute Mr Abd-Al-Rahman under the alleged nickname *Ali Kushayb* as an obvious attempt to deflect the OTP's attention from perpetrators with senior positions within its government and/or army. By blindly following this thread handed to them by the GoS, the OTP failed to act independently from the very Government that had ordered the commission of the crimes referred to the Court by the UNSC. Pursuant to Article 42(1) of the Statute, the OTP shall act independently and shall not act on instructions from any external source. By falling for the GoS's transparent inducement to focus its investigation on *Ali Kushayb*, the OTP

<sup>109</sup> [ICC-02/05-01/20-1188-Red.](#)

<sup>110</sup> [ICC-02/05-01/20-1200.](#)

<sup>111</sup> [REDACTED]

<sup>112</sup> [REDACTED]. See **PART III – Chapter 1.**

<sup>113</sup> [DAR-OTP-0036-0348](#) (Arabic); [DAR-OTP-0116-0396](#) (English), at 0408.

did not uphold the standard of independence expected from it. No fair trial is possible if the independence of the Prosecution is not protected, in the first place by the OTP itself.

*B – Sudan’s Repeated Interferences with the Evidence*

53. There is ample proof on record of Sudan’s repeated interferences with the evidence, including acts constituting offences against the administration of the Court under Article 70(1)(c) and (d) of the Rome Statute. These include the arrest, detention and/or disappearance of persons, including OTP witnesses, for the sole reason of their interactions with the Court. Evidence thereof includes notes from OTP investigators,<sup>114</sup> [REDACTED]<sup>115</sup> and direct testimony or statement from **P-0120**,<sup>116</sup> **P-0547**,<sup>117</sup> **P-0712**,<sup>118</sup> **P-0769**,<sup>119</sup> **P-0980**,<sup>120</sup> **P-0986**,<sup>121</sup> **P-0994**<sup>122</sup> and **D-0028**.<sup>123</sup>

54. There may also have been interference with the Court’s confidential communication, especially the monitoring and/or interception of the evidence of witnesses by Audio-Video Link from Sudan and/or of the interviews with potential witnesses held in the course of investigations. [REDACTED] testified about Sudan’s Intelligence Services’ capacity to monitor communications.<sup>124</sup> [REDACTED]<sup>125</sup> [REDACTED].<sup>126</sup> In the case of the OTP, the risk of interference with the evidence, including written evidence, was compounded by the OTP’s non-compliance with the Court’s Information Protection Policy. The OTP’s non-compliance was acknowledged by PTCII and TCI,<sup>127</sup> but all Defence’s submissions thereon were denied with no leave to appeal.<sup>128</sup> Compelling Court officials to perform their duties with the acceptance of the risk that their confidential communication may be captured may constitute an offence against the administration of the Court.

<sup>114</sup> [DAR-OTP-0220-2371-R02](#); [DAR-OTP-0220-2374](#); [DAR-OTP-0220-2376-R01](#); [DAR-OTP-0220-5159](#); [DAR-OTP-00004296-R01](#).

<sup>115</sup> [REDACTED].

<sup>116</sup> **P-0120**: T-037, p. 48, line 7-10.

<sup>117</sup> **P-0547**: T-051, p. 43, line 2-p. 46, line 3.

<sup>118</sup> **P-0712**: T-036, p. 30, line 8-11.

<sup>119</sup> **P-0769**: T-096, p. 62, line 11-p. 63, line 14; T-098, p. 3, line 13-p. 5, line 10; p. 9, lines 14-p. 10, line 2.

<sup>120</sup> **P-0980**: T-044, p. 7, lines 13-19.

<sup>121</sup> **P-0986**: T-065, p. 24, line 12-p. 32, line 4.

<sup>122</sup> **P-0994**: T-084, p. 16, line 20-p. 17, line 24.

<sup>123</sup> **D-0028**: [DAR-D31-00000150](#), para. 32.

<sup>124</sup> [REDACTED]

<sup>125</sup> [REDACTED]

<sup>126</sup> [REDACTED]

<sup>127</sup> PTC II: [ICC-02/05-01/20-402](#), para. 42; TC I: T-017, p. 48, lines 4-23; T-083, p. 91, lines 13-25.

<sup>128</sup> [ICC-02/05-01/20-322](#) (Application); [ICC-02/05-01/20-402](#) (Denial of application); [ICC-02/05-01/20-433](#), paras. 17-18 (Leave to appeal denied); [ICC-02/05-01/20-505-tENG](#) (Application); T-017, p. 47, line 12-p. 48, line 24 (Application denied); [ICC-02/05-01/20-525](#), paras. 15-18 (Leave to appeal denied).

55. Despite having specifically brought some of these cases to the direct attention of the Prosecutor of the Court on at least two occasions,<sup>129</sup> the Defence has not been made aware of any prosecution of those cases. The appearance is that these were accepted and left without consequences, whereas their impact on the fairness of the proceedings against Mr Abd-Al-Rahman is immeasurable. The Defence's repeated submissions on the ongoing criminalisation of cooperation with the Court have all been dismissed without leave to appeal, even when it relied on actual cases of arrest or disappearance of witnesses.<sup>130</sup>

56. The Court's failure to uphold the standards of protection of the integrity of the evidence in this case amounts to a serious breach of fairness of the proceedings. Mr Abd-Al-Rahman's right to a fair trial implies the right to have the evidence against and for him adequately protected from possible interference. When the Court itself fails to comply with its own standards of protection of the integrity of its evidence, it is sufficient to conclude that the proceedings relying on it can no longer be considered demonstrably unadulterated and as fair, without the need to prove that such failures resulted in actual interference. In this case, the evidence proves the Court's numerous failures to protect the integrity of its evidence against Mr Abd-Al-Rahman and the occurrence of actual interference on behalf of the Sudanese authorities. This is more than enough to conclude that fairness was breached.

*C – The Prosecution's Failure to Investigate Exculpatory Evidence*

57. The OTP did not investigate in Darfur, notably in the places where the alleged offences took place: Kodoom, Bindisi, Mukjar and Deleig, or in the town where Mr Abd-Al-Rahman lived at the relevant time of the charges, Garsila, and in the land of his tribe of origin, Rahad-El-Berdi.

58. Instead, the OTP relied, in its investigation, on the Sudanese diaspora who had fled Darfur over the years and are now living elsewhere. This diaspora had fled Sudan as a result *inter alia* of the conflict in Darfur and abuses of a nature similar to those with which Mr Abd-Al-Rahman is charged. The chances of finding exculpatory evidence among such a class of witnesses has inherently always been minimal. The fact that some witnesses were living in refugee structures also increased their vulnerability to the risk of contamination and created the conditions by which there was an unacceptable risk their evidence would reflect a common

<sup>129</sup> [ICC-02/05-01/20-941-Conf-Exp-Anx32](#); Letter to the Prosecutor, 31 August 2022; [ICC-02/05-01/20-977-Conf-Exp-Anx8](#); Letter to the Prosecutor, 20 June 2023.

<sup>130</sup> [ICC-02/05-01/20-485-Red](#) (Application); [ICC-02/05-01/20-561-Red](#) (Application denied); T-020, p. 83, line 25-p. 86, line 25 (Leave to appeal denied); [ICC-02/05-01/20-623-Red](#) (Application for reconsideration); [ICC-02/05-01/20-650-Red](#) (Reconsideration denied).

memory of the events, rather than their own accurate individual memory. The Defence addresses below issues of apparent contamination and forging of evidence.<sup>131</sup>

59. In contrast, the places where witnesses most likely to provide exculpatory evidence in favour of Mr Abd-Al-Rahman live were not visited by the OTP. Not a single OTP investigator went to Garsila to question those who had known Mr Abd-Al-Rahman when he was selling medication in his shop; not a single investigator went to Rahad-El-Berdi to question those belonging to the tribe of Mr Abd-Al-Rahman, who could confirm whether or not he had ever occupied a tribal position, such as *Agid-Al-Ogada*, or was indeed known by the nickname *Ali Kushayb*. In neither of Phases 1 or 3 did the OTP make any effort to go to those very locations where crimes were allegedly committed, or other locations of relevance to the case, to carry out proper and independent investigations into the person whose details had been handed to them by the GoS. That task fell entirely on the Defence with its far inferior resources, and during Phase 4 in which there was the least engagement of the GoS and cooperation with the Court. Unsurprisingly, cooperation with the Court is not high on the list of the GoS's priorities given the existential threat it has been facing from the RSF.

60. The OTP's failures amount to a serious breach of its obligations under Article 54(1)(a) of the Statute and a fatal blow to the fairness of the proceedings. The OTP never complied with its duty to investigate, adequately or at all, exculpatory evidence. It conducted its whole investigation under the blinkered assumption that Mr Abd-Al-Rahman was *Ali Kushayb*, without ever asking itself the question of whether this really was one and the same person. The Senior Trial Attorney himself made this surprisingly candid admission at trial, which was commented as "*a good one*":<sup>132</sup>

MR LAUCCI: Is my learned friend suggesting that the identity of the person indicted was not an important information? MR NICHOLLS: No, it was not, because we knew that Mr. Abd-Al-Rahman was Ali Kushayb at that point and that issue had not been raised.<sup>133</sup>

There could be no better admission that the OTP never considered exercising its duty of investigating exculpatory evidence and going to the place where that evidence may exist to collect it. Its investigation was 100% focused on collecting incriminating evidence, and it was blind to making the most basic enquiry into the identity of the suspect.

## ***II – Impact on Defence Investigation***

61. The impact on Defence investigations was even more radical than on the OTP. The Defence was granted visas for only one mission, in June 2022, and to Khartoum only. It could

<sup>131</sup> See **PART III – Chapter 3**.

<sup>132</sup> **P-0585**: T-102, p. 16, line 2.

<sup>133</sup> **P-0585**: T-102, p. 15, lines 22-25.

never visit Darfur, collect evidence in Kodoom, Bindisi, Mukjar, Deleig, Garsila or Raad-El-Berdi, where the core of its potential witnesses lived. These impediments were a major obstacle in the conduct of its investigation, as acknowledged by the OTP itself.<sup>134</sup>

62. The Defence Requests for Judicial Assistance, including the least ambitious ones limited to the disclosure of a copy of Mr Abd-Al-Rahman's civil and criminal records and of his military file, were never answered. Although basic, their importance was crucial: in a case where the actual identity of Mr Abd-Al-Rahman was at the heart of the litigation, where he is accused of having served as a JJW militia leader and where he was allegedly arrested and investigated in 2006 by Sudanese authorities, these three documents were of utmost importance for the case. Their collection was a condition *sine qua non* to the fairness of the proceedings under TCIV's abovementioned standard:<sup>135</sup> - The civil records would likely have confirmed whether Mr Abd-Al-Rahman was ever known as *Ali Kushayb*; - "*Mr Ali Muhammad Ali Abd-Al-Rahman's full records of service into the police and/or army of the Government of Sudan, including his dates and specific places of incorporation, training, deployment and retirement since his birth, with a particular focus on the period running from 1<sup>st</sup> August 2003 until 31<sup>st</sup> July 2004*" would likely have provided proof that he never served in any military, police or security forces other than the Medical Unit of the Sudanese Armed Forces until early-to-mid 1990s and the CRF, starting from March 2004. It would likely have also brought clarity on the exact date of entry of Mr Abd-Al-Rahman in the CRF in March 2004, which formed the basis of the Defence's intended notice of partial alibi regarding the events in Deleig.<sup>136</sup> Without that documentation, the Defence could not adduce a more precise date than "*around*" March 2004 on the basis of the recollection of [REDACTED],<sup>137</sup> an information that is not specific enough to support his alibi;- Mr Abd-Al-Rahman's criminal record would eventually have proved that the purported 6 November 2006 Note of interview of Mr Abd-Al-Rahman (noting *Ali Kushayb* as an alias)<sup>138</sup> is not authentic, as the Defence contends.<sup>139</sup> Indeed, as clarified by [REDACTED], had Mr Abd-Al-Rahman ever been investigated by the Sudanese authorities, under the nickname *Ali Kushayb* or not, that information would appear in his criminal record.<sup>140</sup> The absence of any

<sup>134</sup> [ICC-02/05-01/20-330](#), para. 9 : "[...] The Prosecution accepts that the Defence may have legitimate reasons to visit Sudan to assist with its investigations. The Prosecution also accepts that the Government of Sudan's cooperation may be important in facilitating these investigations. [...]"

<sup>135</sup> [Nourain Decision on the request of temporary stay of proceedings](#), paras. 93, 95, 102.

<sup>136</sup> [ICC-02/05-01/20-978-Red](#), paras. 15-18.

<sup>137</sup> [REDACTED]: [DAR-D31-00000274](#), para. 17.

<sup>138</sup> [DAR-OTP-0218-0231](#) (Arabic); [DAR-OTP-0219-7007](#) (English Translation).

<sup>139</sup> See **PART III – Chapter 3**.

<sup>140</sup> [REDACTED]: [DAR-D31-00000274](#), para. 18.

mention of the alleged 6 November 2006 investigation would have been proof that he was never investigated.

63. TC I had understood the crucial importance of these documents for the Defence. On at least three occasions, it emphasised that “the interests of a fair trial and the rights of the Accused under Article 67 of the Statute mandate that the Documents [...] be provided to the Defence as soon as possible”.<sup>141</sup> Fairness of the proceedings mandated that *a minima* the three abovementioned documents be provided to the Defence by the GoS.<sup>142</sup> They were not, leading to unfairness of the proceedings.

64. Without access to Sudan, the Defence had the greatest difficulty in contacting its witnesses. It was compelled to drop a number of them, including [REDACTED], who had been identified as the main witness supporting Mr Abd-Al-Rahman’s partial alibi for Deleig in March 2004.<sup>143</sup> The Defence tried to meet [REDACTED].<sup>144</sup> Despite all its efforts to reestablish contact since that date, the Defence never managed to do so. The loss of [REDACTED] was a cause of considerable prejudice for the Defence of Mr Abd-Al-Rahman. It was caused by the impossibility of contacting him and protecting him on the territory of Sudan,<sup>145</sup> as a result of the GoS’s non-cooperation with the Court. The loss of [REDACTED] and other potential witnesses that the Defence never could reach or had to drop was yet another fatal blow to the fairness of the proceedings.

65. Even for those witnesses that the Defence could identify, contact, interact with and call to testify before the Court, this was achieved at the cost of totally anormal and considerable efforts for the relevant witnesses. Instead of being contacted at their place of residence by the Registry, of receiving protection and support from there and of being taken to the place of their appearance, **D-0001**, **D-0002**, **D-0003**, **D-0005**, **D-0008**, **D-0011**, **D-0029**, **D-0032** and **D-0039** [REDACTED]. They did so without support. They had to [REDACTED]. [REDACTED] prior to be taken care of by the Court. The appearance of **D-0028** was prevented by his incapacity to undertake this effort in a timely manner and, later, the loss of contact with him. The Defence had to request the admission of his written statement pursuant to Rule 68(2)(c), which was denied twice prior to being, eventually, granted.<sup>146</sup> These are not normal circumstances for the

<sup>141</sup> [ICC-02/05-01/20-695-Conf-Red](#), para. 13; [ICC-02/05-01/20-806-Red](#), para. 18; [ICC-02/05-01/20-1203](#), para. 6.

<sup>142</sup> [ICC-02/05-01/20-1203](#), para. 6.

<sup>143</sup> [ICC-02/05-01/20-978-Red](#), para. 18(b).

<sup>144</sup> [ICC-02/05-01/20-924-Conf-Exp](#), paras. 7-8.

<sup>145</sup> [ICC-02/05-01/20-753-Conf-Anx1](#).

<sup>146</sup> [ICC-02/05-01/20-1147-Red](#) (First application); [ICC-02/05-01/20-1161-Red](#) (First application denied); [ICC-02/05-01/20-1176-Red](#) (Second application); [ICC-02/05-01/20-1182-Red](#) (Second application denied); [ICC-02/05-01/20-1187-Red](#) (Application for reconsideration); [ICC-02/05-01/20-1190-Red](#) (Reconsideration granted).

appearance of witnesses at trial. None of the OTP witnesses was submitted to such level of hardship: a number of them, including insider witnesses directly involved in the commission of the crimes charged and/or other crimes of similar nature at a much higher level than *Ali Kushayb*, [REDACTED]. This manifest breach of equality of arms in the conditions of appearance of the Defence witnesses comparing to the Prosecution witnesses is yet another breach of Article 67(1) of the Statute and another fatal blow to the fairness of the proceedings.

66. All the requirements set by TCIV for ordering a stay of proceedings as a result of Sudan's non-cooperation with the Defence are met in the present case: the evidence that the Defence was prevented from relying on at trial includes Mr Abd-Al-Rahman's civil status file, his criminal record and his military file, [REDACTED] who was expected to provide evidence of his partial alibi and corroborate [REDACTED] on the crucial issue of his precise date of entry in the CRF in March 2004. No comparable evidence could be obtained: Mr Abd-Al-Rahman's civil status file, criminal record and military file are per definition unique; without entering Sudan, the Defence could not identify another witness who may have adduced the same evidence as [REDACTED]. The best it could find was [REDACTED], but he could not be as specific as [REDACTED] was expected to be. The fact these requirements are met leads to the only possible conclusion that "[i]f no fair trial can be held, the object of the judicial process is frustrated and must be stopped."<sup>147</sup>

### Chapter 3 – Serious Breach of the Prosecution's Disclosure Obligations

67. In addition to the above fatal breaches of fairness, the appearance of [REDACTED] revealed a final, major one, with respect to the non-respect of the OTP's disclosure obligations.

68. [REDACTED]<sup>148</sup> [REDACTED].<sup>149</sup> [REDACTED].<sup>150</sup> [REDACTED] in June 2006, [REDACTED] to a man named *Ali Kushayb* [REDACTED].<sup>151</sup> The man called *Ali Kushayb* was a member of the PDF and looked quite young, around his late 30s.<sup>152</sup> [REDACTED].<sup>153</sup> [REDACTED]. [REDACTED].<sup>154</sup> The OTP did not cross-examine [REDACTED] about that event, much less put to him that he was being untruthful or even mistaken about it.

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<sup>147</sup> [Lubanga Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I](#), para. 76-77.

<sup>148</sup> [REDACTED]

<sup>149</sup> [REDACTED]

<sup>150</sup> [REDACTED]

<sup>151</sup> [REDACTED]

<sup>152</sup> [REDACTED]

<sup>153</sup> [REDACTED]

<sup>154</sup> [REDACTED]

69. The OTP has never disclosed any information to the Defence about [REDACTED]. [REDACTED].<sup>155</sup> The OTP responded that it had no such records.<sup>156</sup>

70. [REDACTED]<sup>157</sup> [REDACTED].<sup>158</sup> [REDACTED]. Yet again, the evidence of [REDACTED], unchallenged in cross-examination, that a meeting with *Ali Kushayb* was, at least, scheduled should have been recorded and be in the OTP's archives.

71. The existence of such a record would have been of crucial importance for the case. It ought to have been disclosed to the Defence, especially so if if the *Ali Kushayb* that the OTP met in June 2006 was a member of the PDF and was in his 30s. Mr Abd-Al-Rahman has never been in the PDF and the Prosecution does not suggest that he was. He was born in 1949<sup>159</sup> and was thus 57 years old in 2006, not in his late 30s. The exculpatory nature of such a record made its conservation and disclosure to the Defence a crucial requirement for the fairness of the trial. No such record was disclosed. According to the Prosecution, no such record exists. The only reasonable conclusion is that, either the OTP failed to keep a record [REDACTED], or that these records were created but disappeared at some point. In either scenario, this amounts to a breach of its disclosure obligations by the OTP, which is so serious, given the exculpatory nature of that piece of evidence, that it cannot be reconciled with any notion of fairness of the proceedings.

72. The Defence submits that the totality of the evidence indicates that a meeting with a person named *Ali Kushayb*, a PDF member in his late 30s in 2006, was scheduled and probably took place with the Prosecution delegation in Khartoum in June 2006, but that no record of that meeting is available. The occurrence of that meeting, or tentative meeting, provides strong evidence that the man called *Ali Kushayb* who was at least due to meet with the OTP was not Mr Abd-Al-Rahman. This evidence is not only proof of an irreparable breach of fairness of the proceedings by the OTP, for not having kept and disclosed a record of that event. It creates extensive doubt surrounding the OTP's allegation that Mr Abd-Al-Rahman is *Ali Kushayb*.<sup>160</sup>

### **PART III – EVIDENTIARY MATTERS**

#### **Chapter 1 - Genesis and development of the link between Mr Abd-Al-Rahman and the nickname *Ali Kushayb***

<sup>155</sup> Email from the Defence to the Prosecution, 10 October 2023 at 12:32.

<sup>156</sup> Email from the Prosecution, 10 October 2023 at 13:54.

<sup>157</sup> [REDACTED]

<sup>158</sup> [REDACTED]

<sup>159</sup> [OTP Trial Brief](#), para. 2; [ICC-02/05-01/20-504-AnxA](#): item 1; [DAR-OTP-0216-0241](#) (Arabic); [DAR-OTP-0216-0773](#) (English translation); [DAR-OTP-0216-0235](#) (Arabic); [DAR-OTP-0216-0765](#) (English translation).

<sup>160</sup> See **PART VI – Chapter 1 - Defence Line 1: Mr Abd-Al-Rahman Is Not *Ali Kushayb***.

73. At the very beginning of his initial appearance before the Court on 15 June 2020, Mr Abd-Al-Rahman stated in unambiguous terms that he was not Ali Kushayb.<sup>161</sup> The Defence's case ever since has been that Mr Abd-Al-Rahman is not *Ali Kushayb*. This aspect forms the subject-matter of the First Defence Line.<sup>162</sup>

74. It is important, however, for the TC to understand how and when the name *Ali Kushayb* came to be so publicly associated with crimes in West Darfur, how and when the name *Ali Kushayb* came to be publicly linked to Mr Abd-Al-Rahman, how reliable the evidence of the above is, and how that link developed up to 27 February 2007, the date on which the OTP first publicised that it had submitted an application to the PTC seeking a summons under Article 58(7) for Mr Abd-Al-Rahman “(also known as **ALI KUSHAYB...**)”.<sup>163</sup>

75. There was extremely limited evidence of a link between Mr Abd-Al-Rahman and the nickname *Ali Kushayb* before the public pronouncements of the OTP. These pronouncements resulted in a tsunami of further claims of a link between the two names.

76. The earliest dated documents in evidence that purport to connect Mr Abd-Al-Rahman with *Ali Kushayb* are DAR-OTP-0134-0116<sup>164</sup> and DAR-OTP-0134-0118<sup>165</sup> submitted through [REDACTED]. They purport to date to sometime in early August 2003. A full analysis of the credibility of this witness is set out below,<sup>166</sup> but suffice it to say his explanation for how he is in possession of these copy documents – not even the originals – is so absurd that it deserves no credence. The documents form an integral part of [REDACTED] testimony. They cannot serve to corroborate it.

77. The next document, chronologically, that even mentions *Ali Kushayb* is DAR-OTP-0020-0945.<sup>167</sup> This report comprises six pages of lists, plus some commentary, with the word “Geneina” written on the first page. It refers to events starting in July 2003, but mentions attacks in December 2003 and even an attack on the village of Kinu “[i]n January”.<sup>168</sup> Logically, the report cannot predate January 2004. This report refers to “Wadi Saleh District Office camps (under command of *Ali Kushayb* in Garsila)”<sup>169</sup> but does not link the name *Ali Kushayb* to Mr Abd-Al-Rahman.

78. Not only is the report undated, it is anonymous. There is no signature, no indication of authorship, no indication of affiliation of the author(s), and no indication of the source(s) of the

<sup>161</sup> T-001, p. 3, lines 19-21.

<sup>162</sup> See **PART VI – Chapter 1** below.

<sup>163</sup> [ICC-02/05-56](#); See also: [Prosecutor Opening Remarks](#).

<sup>164</sup> See English translation: [DAR-OTP-00000116](#).

<sup>165</sup> See English translation: [DAR-OTP-00000117](#).

<sup>166</sup> See full analysis of [REDACTED] credibility in **PART III – Chapter 2**.

<sup>167</sup> See English translation: [DAR-OTP-0153-0679](#).

<sup>168</sup> [DAR-OTP-0153-0679](#), at 0682.

<sup>169</sup> [DAR-OTP-0153-0679](#), at 0681.

author(s) knowledge. As Judge Henderson explained in his written reasons for joining Judge Tarfusser in acquitting Messrs Gbagbo and Blé Goudé at the close of the Prosecution’s case,<sup>170</sup> (reasons “agreed upon by the two judges of the majority”<sup>171</sup>), no probative value can be ascribed to anonymous hearsay evidence, because:

no responsible adjudicator can base factual findings on evidence without having good reasons to accept that the source of the information is sufficiently trustworthy. In the case of anonymous hearsay, this is simply impossible because the source of the information is unknown and can therefore, by definition, not be evaluated.<sup>172</sup>

79. Cross-referencing the Geneina report with a document of the United Nations Commission of Enquiry (“UNCoI”) entitled “*Storage Boxes Inventory*”<sup>173</sup> reveals that the report (described as “6 pages of lists, page one marked Geneina”) was handed over to the UNCoI in Geneva on 10 November 2004 by Leslie Lefkow of Human Rights Watch (“HRW”), together with an assortment of 17 other “copies and handwritten originals”.<sup>174</sup> There is no chain of custody indicated, no hint of where the report came from, or how Ms Lefkow obtained it. Its anonymous and unsourced nature deprives it of any indicia of reliability.

80. The next documents in evidence, chronologically, are both from HRW. DAR-OTP-0003-0099 (“Darfur Destroyed Report”) is dated May 2004. DAR-OTP-0064-0184 is a summary of the Darfur Destroyed Report.<sup>175</sup> Both documents contain the same details of an account from a single person, identified only as “Abdul” who is reported to have said that the Wadi Saleh area was surrounded on 5 March [2004] by GoS soldiers and JJW “commanded by Ali Kwoshib”.<sup>176</sup> The HRW report does not set out the basis of Abdul’s knowledge about the identity of the JJW commander, whether he saw the commander himself, or was told about it, how he knew his name, or whether all of this amounted simply to common knowledge. Further, and while impossible to establish, the TC cannot exclude the possibility that Abdul was the source of the “Geneina” document mentioned above given the HRW nexus, particularly the fact that Leslie Lefkow was one of the authors of the Darfur Destroyed Report.<sup>177</sup> If, as it seems, both documents rely on the same single source, this inevitably has an impact on any analysis of the breadth and depth of the underlying source material relating to the earliest appearance of the name *Kushayb*.

81. The paragraph common to both documents goes on to state “Kwoshib reportedly established a Janjaweed base in Garsila in July 2003 and, after being given 1,500 automatic rifles

<sup>170</sup> *Gbagbo et Blé Goudé*, [Reasons of Judge Geoffrey Henderson](#).

<sup>171</sup> *Gbagbo et Blé Goudé AJ*, para. 323.

<sup>172</sup> *Gbagbo et Blé Goudé*, [Reasons of Judge Geoffrey Henderson](#), para. 43.

<sup>173</sup> [DAR-OTP-0001-0004](#).

<sup>174</sup> [DAR-OTP-0001-0004](#) at 0012.

<sup>175</sup> [DAR-OTP-0003-0099](#).

<sup>176</sup> [DAR-OTP-0003-0099](#) at 0123; [DAR-OTP-0064-0184](#) at 0191.

<sup>177</sup> [DAR-OTP-0003-0099](#), at 0176.

by the army, burned a large area of Wadi Salih.”<sup>178</sup> Although the context of this sentence may indicate that the source of what *Kwoshib* reportedly did is *Abdul*, it is not entirely clear. Whether it be *Abdul* or someone else, the source remains to all intents and purposes anonymous with no indication of how the source knows the details of a base in Garsila, or of 1,500 rifles, or of their provenance. As with the preceding “*Geneina*” document, no link is made to the name of Mr Abd-Al-Rahman. But once again, the anonymous and unsourced nature of these two HRW documents deprive them of any indicia of reliability.

82. Next, DAR-OTP-0063-0399<sup>179</sup> purports to be minutes of meetings between the Sudanese national commission of inquiry and National Council members from the states of Darfur held on different dates in May/June 2004. The minutes of the meeting of relevance to these submissions start at 0407<sup>180</sup> and are dated 8 June 2004. One participant in the meeting, purportedly named as [REDACTED], mentioned that the GoS had called up Arab tribes and had “handed out weapons to them in Garsila” but that no-one from the Zaghawa or Fur tribes would receive a weapon.<sup>181</sup> He goes on to say: “The result of this is that, in Deleig, 127 people were gathered together by Lieutenant<sup>182</sup> ‘*Ali Muhammad ‘Ali, nicknamed ‘Kushayb’*. *He gathered them and took them away. Then he liquidated them outside Deleig. Deleig police station heard about that.*”<sup>183</sup>

83. The OTP did not call [REDACTED] as a witness; his account had never been tested. The basis for his knowledge seems to be at least first-hand hearsay, if not hearsay at multiple removes. His source or sources of information are not mentioned, significantly diminishing the probative value of his words. In any event, on its face, his information is not consistent with Mr Abd-Al-Rahman being *Ali Kushayb*. Mr Abd-Al-Rahman was never a *mulazim* (lieutenant), unlike First Lieutenant Hamdi Sharaf-Al-Din Sid Ahmad (“Hamdi”), he was only ever a *musa’id*, i.e. warrant officer or master sergeant. Of course, he was not even that in 2003-2004 when he was a civilian pharmacist. The real name [REDACTED] provides for *Ali Kushayb* is composed merely of three extraordinarily common Sudanese given names. No surname is given.

84. Finally, the metadata for this document, as provided by the OTP itself, is woeful in terms of showing any real or useful chain of custody. All we know is that it was provided by the GoS

<sup>178</sup> [DAR-OTP-0003-0099](#) at 0123; [DAR-OTP-0064-0184](#) at 0191

<sup>179</sup> See English translation: [DAR-OTP-0116-0549](#).

<sup>180</sup> In the English translation see: [DAR-OTP-0116-0549](#), at 0558.

<sup>181</sup> [REDACTED]

<sup>182</sup> The word in the original, translated as Lieutenant, is *Mulazim*; see the Trial Glossary, page 9.

<sup>183</sup> [REDACTED]

to the OTP's [REDACTED] on 29 May 2005.<sup>184</sup> There is no indication of the source within the GoS, or how the document came to be in the custody of that source. The GoS was desperate to persuade the OTP not to open an investigation into the situation in Darfur but rather to defer to Sudanese national efforts to investigate and prosecute Darfur crimes. The GoS therefore had a clear interest in passing on to the OTP documentation that appeared to evidence its good faith attempts to carry out fact-finding exercises and investigations into the events of Darfur.<sup>185</sup> Whilst not denying that a National Commission of Inquiry was indeed established by the GoS, the Defence submits that it was hardly beyond the capacity of State institutions to fabricate a dozen or so typed pages of meeting minutes solely for the consumption of the OTP. It is submitted, therefore, that the reliability and probative value of DAR-OTP-0063-0399 is zero.

85. The next document, chronologically, is DAR-OTP-0036-0348, the report of the aforementioned National Commission of Inquiry.<sup>186</sup> Although the report is not obviously dated, the Commission was created pursuant to Presidential Directive No. 97 on 8 May 2004,<sup>187</sup> and the report was handed to the UNCoI in January 2005.<sup>188</sup> The report contains one mention of “*the leader of the Fursan armed militia, Muhammad 'Ali Kushayb*”,<sup>189</sup> without linking the nickname to Mr Abd-Al-Rahman.

86. The National Commission's sources of this information come from three individuals: “[REDACTED], *deputy Paramount sheikh Ja'far 'Abd-al-Hakam and [REDACTED]*”.<sup>190</sup> However, the report does not indicate which part(s) or details of the Deleig narrative came from which of the three, or all three. The sources' statements are not attached so it is not possible for the Defence to test any of the accounts. It is not even possible to ascertain if the “statements” were taken by the Commission separately or from all three sources together, as a pooled recollection. One feature that the Defence is able to comment upon, however, is that Ja'far Abd-al-Hakam is a person who was deeply implicated in the crimes of West Darfur. He had every interest in distancing himself from allegations of criminality and to spare no effort from redirecting any potential attention from the Commission on to any useful scapegoat at his disposal. Ja'afar Abd-al-Hakam was not called by the OTP as a witness.<sup>191</sup> The Defence, therefore, have never been in a position to test anything that he may say about Mr Abd-Al-

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<sup>184</sup> [REDACTED]

<sup>185</sup> See **PART II – Chapter 3 – Section 2 – I – A** above.

<sup>186</sup> See English translation: [DAR-OTP-0116-0380](#).

<sup>187</sup> [DAR-OTP-0116-0380](#), at 0396.

<sup>188</sup> [DAR-OTP-0001-0004](#) at 0076.

<sup>189</sup> [DAR-OTP-0116-0380](#) at 0408.

<sup>190</sup> [DAR-OTP-0116-0380](#) at 0408.

<sup>191</sup> [REDACTED].

Rahman, and most importantly, explore his motivations for wishing to deflect allegations of his own wrongdoing onto Mr Abd-Al-Rahman. The Defence had no opportunity to test the reliability, authenticity or relevance of the document, or otherwise comment thereon.

87. In any event, the report of the National Commission of Inquiry makes it clear that, whatever information its sources may have been able to provide about the Deleig crimes, they were not themselves witnesses of the Deleig detainees killings or burials nor did they come across any visible evidence to confirm this, such as the burial site. Consequently, it is submitted that the reliability of anything contained in this report to evidence a link between Mr Abd-Al-Rahman and the nickname *Kushayb* is extremely low, and its probative value is correspondingly practically zero.

88. The next document is DAR-OTP-0107-1474, dated 21 January 2005. From page 6, the report addresses what the authors call “*The first government offensive: August-December 2003*”. A noteworthy detail in this part of the report is the remark that leaders of some larger Arab ethnic groups which had their own *dar* refused to join the government’s cause, and that, with some exceptions, “*the tribe as a group has not participated in the conflict.*” In a footnote, it is indicated that the Ta’aisha were among the Arab tribes that refused to respond to the government’s call.<sup>192</sup> The report goes on to describe attacks on villages around and to the East of Garsila in October 2003 led by a man with the *nom de guerre* of “*Ali Kosheib*”.<sup>193</sup> Apart from a vague reference to “several witnesses”, the source of this information is not indicated,<sup>194</sup> nor is there any detail about the basis of these witnesses’ knowledge. The reader does not know if it is direct, second- or third-hand hearsay evidence. One detail, however, that is particularly informative is the suggestion that “*Ali Kosheib*” is from the Beni Halba tribe. In its bar table motion seeking recognition of the formal submission of this report into evidence, the OTP claimed that the document corroborates evidence that Mr Abd-Al-Rahman was also known as *Ali Kushayb*.<sup>195</sup> Since the TC can be sure that Mr Abd-Al-Rahman is from the Ta’aisha tribe, assertions from any witness or witnesses that *Ali Kosheib* was in fact from the Beni Halba tribe powerfully undermines the corroborative quality of the document. The probative value of the evidence of the accounts of the anonymous witnesses who speak about *Ali Kosheib* is, the Defence submits, practically zero. It is to be further noted that nowhere in the report is it suggested that *Ali Kosheib*’s real name is Abd-Al-Rahman. Indeed, apart from the mention of

<sup>192</sup> [DAR-OTP-0107-1474](#) at 1482. See **PART IV – Chapter 3 - Section 1** and **PART IV – Chapter 5 – Section 2 – II – B – iii** below.

<sup>193</sup> [DAR-OTP-0107-1474](#) at 1484.

<sup>194</sup> [DAR-OTP-0107-1474](#) at 1484.

<sup>195</sup> [ICC-02/05-01/20-860-Conf-Anx](#), row 21.

the Beni Halba tribe, nothing in the way of identifying information about *Ali Kosheib* is contained in the report.

89. The next two documents can be addressed together: DAR-OTP-0013-0119 is an Investigation Overview Report on West Darfur, dated January 2005, prepared by the UNCoI and based on information collected by the West Darfur Team, led by would-be OTP witness P-0001 (who was never called) between November and December 2004;<sup>196</sup> [REDACTED],<sup>197</sup> [REDACTED] contains details of the names of suspected perpetrators of crimes. [REDACTED].<sup>198</sup>

90. It seems clear that the Investigation Overview Report contains the details that underpin the basis for Mr Abd-Al-Rahman's name featuring in the sealed file. The overview report names "*Ali Mohamed Ali Kouchib*" as being responsible for killings in Garsila, Deleig, Tanako, Mukjar, Bindisi and Umkher.<sup>199</sup> It is reported that he was seen "*at crime scene by seven eyewitnesses leading attacks and executing individuals.*" Two other witnesses mention him, but their accounts are hearsay.<sup>200</sup> These nine witnesses are named.<sup>201</sup> Only [REDACTED] appears to have been called by the OTP;<sup>202</sup> the credibility and reliability of his account have been addressed in detail below.<sup>203</sup>

91. The way in which the overview report has been prepared makes it impossible for the reader to know which of the named witnesses were eye-witnesses to the crimes for which "*Ali Mohamed Ali Kouchib*" is allegedly responsible in the charged locations of Deleig, Mukjar and Bindisi, and which are witnesses for Tanako and Umkher, for which Mr Abd-Al-Rahman is not charged. Their statements, or even brief interview notes, have not been disclosed.

92. Whilst there may be some information contained in DAR-OTP-0013-0119 that is *prima facie* consistent with Mr Abd-Al-Rahman, as with DAR-OTP-0063-0399, there is information that shows the opposite. The full name of the suspect provided is composed of three very common Sudanese given names with the surname apparently being "*Kouchib*"; no mention is made of the name Abd-Al-Rahman. No witness has testified that Mr Abd-Al-Rahman was ever nicknamed "*Butcher*". There is, however, evidence from [REDACTED] that, "The people used to call [Harun] the '*butcher of jebel Nuba*'.<sup>204</sup> Mr Abd-Al-Rahman was never a "Major sergeant". It is also said

<sup>196</sup> [DAR-OTP-0013-0119](#) at 0122.

<sup>197</sup> [DAR-OTP-0209-0593](#).

<sup>198</sup> See [DAR-OTP-0209-0593](#), at 0597, 0725-0727, paras. 523-532, 0753-0754, paras. 643-646.

<sup>199</sup> [DAR-OTP-0013-0119](#), at 0179-0180, 0191-0192, 0203, Row 53.

<sup>200</sup> [DAR-OTP-0013-0119](#), at 0179-0180, 0191-0192, 0203, Row 53

<sup>201</sup> [DAR-OTP-0013-0119](#), at 0203, Row 53.

<sup>202</sup> While it is true that the names [REDACTED] feature in the longer name of [REDACTED], it is submitted that the name "[REDACTED]" is so common in Sudan that, without more to distinguish him, it is impossible to safely conclude that he was ever an OTP witness.

<sup>203</sup> See **PART III – Chapter 2**.

<sup>204</sup> [REDACTED]

in the overview report that “[*Ali Mohamed Ali Kouchib*] was appointed by his [Taaicha] tribe and other Arab tribes to be the head of the janjaweed in Ouadi Saleh.”<sup>205</sup> This information is in direct conflict with the testimony of the many witnesses, OTP and Defence alike, who stated that the Ta’aisha tribe did not take part in the conflict in 2003-2004, or the mobilisation of fighters for the GoS’s counterinsurgency,<sup>206</sup> as well as the evidence of the joint expert witness Professor de Waal (**P-1042**),<sup>207</sup> and the HRW briefing paper “Targeting the Fur: Mass Killings in Darfur”.

93. To summarise, the reliability of the information underpinning that which is said about “Ali Mohamed Ali Kouchib” is lacking. The source of the individual aspects of the information is impossible to determine with any degree of precision. Even though seven of the named source witnesses cited in the overview report are described as eye-witnesses, the question to which there is no answer is, “Eye-witnesses to what?” It cannot be the case that each is an eye-witness to every one of the details contained in the identical right-most columns, entitled “Observation” of the three tables in the document,<sup>208</sup> or to all the crimes in Garsila, “Deleij”, Tanako, Mukjar, Bindisi and Umkher. Who saw what? Which eye-witness observation(s), if any, are corroborated? The possibility cannot be discounted that each of the seven eye-witnesses was the sole and uncorroborated witness of one attack or another, or of one detail or another contained in the “Observation” column, with the noticeable exception of [REDACTED] who was an eye-witness of none. We simply do not know. The lack of reliability, or at least the lack of a way of meaningfully assessing reliability, renders this document devoid of probative value. The TC, therefore, is respectfully urged to exclude it from its assessment of the evidence.

94. DAR-OTP-0216-0702 also names *Kushayb*, this time spelled as “*Ali Mohamad Ali Kushib*”,<sup>209</sup> describing him as “*leader of Janjaweed.*” He is one of the [REDACTED] who “*may be suspected to bear responsibility for crimes committed in Darfur.*”<sup>210</sup> [REDACTED].

95. [REDACTED] provides details of the Deleig crimes and the alleged individual responsibility of “*Ali Mohamad Ali Kushib*”. [REDACTED] suggest that the Deleig crimes are “*attributed to him by various credible witnesses.*”<sup>211</sup> However, [REDACTED] do not explain how many witnesses attributed the alleged crimes to him, or explain who they are (even if one would not necessarily expect that names are provided), or even indicate what kind of witnesses they are. These witnesses are anonymous. Strikingly, [REDACTED] baldly assert that the witnesses spoken

<sup>205</sup> [DAR-OTP-0013-0119](#), at 0179-0180, 0191-0192, 0203, Row 53.

<sup>206</sup> See **PART IV – Chapter 3 - Section 1** and **PART IV – Chapter 5 – Section 2 – II – B – iii** below.

<sup>207</sup> **P-1042**: T-028, p. 59, lines 3-11, p. 60, lines 16-18, p. 68, lines 10-18.

<sup>208</sup> [DAR-OTP-0013-0119](#), at 0179-0180, 0191-0192, 0203, Row 53.

<sup>209</sup> [REDACTED].

<sup>210</sup> [REDACTED].

<sup>211</sup> [REDACTED].

to are credible, without permitting the reader to understand the basis upon which that assertion of credibility is made. There is no way of knowing if the witnesses' accounts are based on hearsay, or whether any hearsay is at one, or two, or more removes.

96. [REDACTED], it is stated that “*highly reliable eyewitnesses*” reported that over 120 men, mainly intellectuals and leaders, were killed.<sup>212</sup> No statements or notes of interviews with these “eyewitnesses” have been disclosed. They too are anonymous. Although described as eye-witnesses, without the benefit of sight of statements or interview notes, it is impossible for the Defence to be able to accept this assertion at face value.

97. [REDACTED].<sup>213</sup> [REDACTED],<sup>214</sup> and remains confidential to this day. Nevertheless, its details were evidently leaked. Evidence that this list of 51 suspects found its way into the public domain in Sudan comes from a number of sources. DAR-D31-00000014 is an article from the Sudanese newspaper, Sudan Tribune, dated 18 December 2006, and reports an interview with the former ICC Prosecutor. One of the topics of discussion was “*The list of 51 suspects*”.<sup>215</sup> The journalist asked Mr Ocampo: “You received a sealed envelope from the U.N. Secretary General Kofi Annan containing the list of 51 suspects prepared by the UN Commission of Inquiry on Darfur. This list has been the subject of so much speculation in Sudan. We have a handful of lists circulating around.”<sup>216</sup>

The journalist evidently took it as a given, an uncontested fact, that the sealed list existed and contained the names of 51 suspects. It was also asserted that its contents, in whole or in part, were in the public domain and were being much discussed in Sudan.

98. Irrespective of the Defence's overall position that [REDACTED] is not a credible witness, he corroborated the reality of the existence of the list of 51 suspects and the fact that he, in Sudan, knew about it from (at least) April 2006.<sup>217</sup> He told OTP investigators during his interview between [REDACTED],<sup>218</sup> that, long before his departure from Sudan he knew of the existence of the list of 51 “wanted people”.<sup>219</sup> He believed that the list contained the names of Harun and Abdel Raheem Muhammad Hussein.<sup>220</sup> Although he denied during his testimony knowledge that *Ali Kushayb* was on the list, that was not what he told OTP investigators [REDACTED]: “*Also I learned that Ahmad HARUN and Ali KUSHAYB are wanted ... before ... long time before my departure from Sudan ...*

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<sup>212</sup> [REDACTED].

<sup>213</sup> [REDACTED]

<sup>214</sup> [REDACTED].

<sup>215</sup> [DAR-D31-00000014](#), at 0003-0004.

<sup>216</sup> [DAR-D31-00000014](#), at 0003.

<sup>217</sup> [REDACTED]

<sup>218</sup> [REDACTED]

<sup>219</sup> [REDACTED]

<sup>220</sup> [REDACTED]

*because they were ... on the list of 51 wanted people.*”<sup>221</sup> His suggestion that Counsel “*might have mixed things up*” is belied by his own words in his OTP interview.

99. Finally, DAR-OTP-0153-1614 is an article from the Sudanese newspaper Al-Hayat, dated 8 March 2007, only nine days after the OTP publicised that it had submitted an application to the Pre-Trial Chamber seeking a summons for Mr Abd-Al-Rahman “(also known as **ALI KUSHAYB...**)”.<sup>222</sup> The article is in the form of a question-and-answer interview with Harun, one of the 51 individuals “*may be suspected to bear responsibility for crimes committed in Darfur.*”<sup>223</sup> The journalist asked Harun about “*lists [that] were published of some 51 Sudanese people accused of war crimes in Darfur. You were included on those lists with a number of other senior officials.*”<sup>224</sup> Harun said he knew about this list, “*in an envelope closed with the red wax seal*”, and confirmed that, “*There were a number of leaks concerning the names in the alleged ‘list of 51’, the aim of which was to upset the individuals [concerned]. I had anticipated what would happen...*”<sup>225</sup>

100. It cannot sensibly be denied that the “list of 51” in the sealed file was in the public domain and that it was a matter of much public discussion long before the OTP publicised that it had submitted an application to the Pre-Trial Chamber seeking a summons for Mr Abd-Al-Rahman under Article 58(7). It must have been a hugely newsworthy in Sudan in 2006 which, *inter alia* dramatically injected the name *Kushayb* into the public consciousness.

101. Finally, another HRW report, DAR-OTP-0148-0002, entitled “Entrenching Impunity: Government Responsibility for International Crimes in Darfur”, published in December 2005 also mentions “*Ali Kosheib*”. Once again, his real name is given only as Ali Mohammed Ali. No indication is provided of the name Abd-Al-Rahman. As with the other HRW documents, all of the witnesses relied upon by the authors are anonymous. This, of course, is perfectly understandable and no criticism is made of HRW for not revealing their sources’ identities. Nevertheless, the fact remains that these accounts cannot be tested. The Defence is unable to establish whether or not the accounts are truly of direct eye-witnesses, or based on hearsay at one or more removes, or based on “common knowledge”. Similarly, those witnesses cited in the report who say they could identify “*Ali Kosheib*” because they had pre-existing knowledge of him cannot be tested.<sup>226</sup> For the reasons articulated by Judge Henderson, and agreed upon by the two judges of the majority, the anonymous hearsay evidence upon which HRW’s “Entrenching Impunity” report relies cannot amount to

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<sup>221</sup> [REDACTED]

<sup>222</sup> [ICC-02/05-56](#); See also: [Prosecutor Opening Remarks](#).

<sup>223</sup> [DAR-OTP-0216-0702](#), at 0703, para. 1.

<sup>224</sup> [DAR-OTP-0153-1614](#), at 1617.

<sup>225</sup> [DAR-OTP-0153-1614](#), at 1617.

<sup>226</sup> See eg. [DAR-OTP-0148-0002](#) at 0035.

evidence that supports in any way the OTP's proposition that Mr Abd-Al-Rahman's was also known as "*Ali Kushayb/Kosheib*". The report has no probative value.

102. It is submitted that the OTP's public announcement on 27 February 2007 that it was seeking a summons against Mr Abd-Al-Rahman, said to also be known as *Ali Kushayb*,<sup>227</sup> and PTCI's issuance of a warrant of arrest on 27 April 2007,<sup>228</sup> accompanied by an ICC press release on 2 May 2007<sup>229</sup> (including in Arabic),<sup>230</sup> served to authoritatively establish and anneal the link between the name Ali Muhammad Ali Abd-Al-Rahman and *Ali Kushayb* in the public domain. The insistent repetition by the OTP in the years since 2007 that Ali Muhammad Ali Abd-Al-Rahman is *Ali Kushayb*, even though it is not true and was not checked to be true, has inevitably strengthened the association of the two names. Once the Court had so publicly established that link, conformism and the desire of individual witnesses to appear credible must have created a strong incentive to mould the evidence of all subsequent witnesses, even if only subconsciously. To paraphrase Isabella Blagden, a lie printed often enough becomes a quasi-truth, which transforms through repetition into an article of belief, a dogma.<sup>231</sup>

## Chapter 2: General Submissions of Prosecution Witness Evidence

103. As a preliminary matter, the Defence notes that fifteen so called "insiders", i.e. members or former members of the GoS forces who were on the original list of OTP witnesses did not appear.<sup>232</sup> Their written statements were also not submitted into evidence. The OTP's did not present the evidence it had announced, leading to an overall weakening of its case, in particular with regard to the different GoS forces present in Wadi Salih and Mukjar during the events and the alleged acts and conduct of Mr Abd-Al-Rahman.<sup>233</sup>

104. Full analysis of some witnesses' testimony demonstrates that their credibility is impugned to such extent that the TC cannot rely on them even if other evidence corroborates parts of their testimony.<sup>234</sup> Even a holistic approach to the evidence cannot erase a significant lack of honesty of some witnesses.

<sup>227</sup> [ICC-02/05-56; DAR-D31-00000009](#).

<sup>228</sup> [ICC-02/05-01/07-3-Corr](#)

<sup>229</sup> [Warrants of Arrest for the Minister of State for Humanitarian Affairs of Sudan, and a leader of the Militia/Janjaweed](#).

<sup>230</sup> [Arabic Version of "Warrants of Arrest for the Minister of State for Humanitarian Affairs of Sudan, and a leader of the Militia/Janjaweed"](#).

<sup>231</sup> Isabella Blagden, *The Crown of a Life*, Vol. III (London, 1869), p. 155

<sup>232</sup> See [ICC-02/05-01/20-551-Conf-Anx2-Red](#), [REDACTED].

<sup>233</sup> [ICC-02/05-01/20-550-Conf-Ann6](#) [REDACTED]. See also [ICC-02/05-01/20-551-Conf-Anx2-Red](#), [REDACTED]

<sup>234</sup> [Ngudjolo AJ](#), para. 168.

105. Consequently, as will be discussed in detail below, the Defence submits that, for many witnesses, the TC cannot rely on their testimony in deciding on whether Mr Abd-Al-Rahman is guilty beyond reasonable doubt.

### **Section 1: Insider witnesses**

106. The Defence challenges the credibility and reliability of so called “insider witnesses”: **P-0131, P-0547, P-0643, P-0769, P-0874, P-0878, P-0883, P-0905, P-0913, P-0921, P-0931, P-0935, P-0984, P-0994, P-1021**. Their testimony should be disregarded due to the significant defects affecting their evidence, notably having personal motives to shift blame to any convenient person in order to escape liability for their own crimes, combined with lies, inconsistencies and contradictions.

#### ***I - Kodoom / Bindisi Localities***

107. **P-0131:** [REDACTED].<sup>235</sup> [REDACTED].<sup>236</sup> [REDACTED].<sup>237</sup> [REDACTED]<sup>238</sup> [REDACTED].<sup>239</sup> [REDACTED]<sup>240</sup> [REDACTED];<sup>241</sup> [REDACTED];<sup>242</sup> [REDACTED];<sup>243</sup> [REDACTED];<sup>244</sup> [REDACTED].<sup>245</sup> [REDACTED].<sup>246</sup> [REDACTED],<sup>247</sup> [REDACTED].

108. Furthermore, **P-0131** [REDACTED] and [REDACTED].<sup>248</sup> He left Sudan to [REDACTED] using a fake passport with a false date of birth.<sup>249</sup> P-0131 testified that the story he told [REDACTED], was untrue and that he used the same false story for his claim in front of the [REDACTED].<sup>250</sup> During his interview in [REDACTED], P-0131 testified that he produced a letter indicating that [REDACTED], which he never worked for.<sup>251</sup> He obtained this forged letter from the same friend who helped him to obtain his fake passport.<sup>252</sup> When asked if he had used forged documents in the past, P-0131 stated [REDACTED]<sup>253</sup> P-0131 further lied [REDACTED].<sup>254</sup>

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<sup>235</sup> **P-0131:** [REDACTED]

<sup>236</sup> [REDACTED]

<sup>237</sup> **P-0131:** [REDACTED]

<sup>238</sup> **P-0131:** [REDACTED]

<sup>239</sup> **P-0131:** [REDACTED]

<sup>240</sup> [DAR-OTP-0118-0076](#).

<sup>241</sup> **P-0131:** [REDACTED]

<sup>242</sup> **P-0131:** [REDACTED]

<sup>243</sup> **P-0131:** [REDACTED]

<sup>244</sup> **P-0131:** [REDACTED]

<sup>245</sup> **P-0131:** [REDACTED]

<sup>246</sup> **P-0131:** [REDACTED]

<sup>247</sup> **P-0131:** [REDACTED]

<sup>248</sup> **P-0131:** [REDACTED]

<sup>249</sup> **P-0131:** [REDACTED]

<sup>250</sup> **P-0131:** [REDACTED]

<sup>251</sup> **P-0131:** T-113, p. 21, line 22-p. 22, line 4 (Conf).

<sup>252</sup> **P-0131:** [REDACTED]

<sup>253</sup> **P-0131:** [REDACTED]

<sup>254</sup> **P-0131:** [REDACTED]

109. In addition, **P-0131**'s testimony demonstrates his lack of personal knowledge of Mr Abd-Al-Rahman. He testified that he met a man called *Ali Kushayb* only once, [REDACTED],<sup>255</sup> [REDACTED].<sup>256</sup> [REDACTED],<sup>257</sup> But Mr. Abd-Al-Rahman's real name was not mentioned.<sup>258</sup> When asked how P-0131 got to know *Ali Kushayb*'s real name, he testified that he knew his name based on reports that he saw in [REDACTED], which included his full name and "*(Kushayb)*",<sup>259</sup> like the cover page of ICC documents. P-0131 did not present in Court any copy of these reports nor any details regarding their existence. He further contradicted himself by saying that these alleged reports [REDACTED],<sup>260</sup> [REDACTED].<sup>261</sup> [REDACTED] the 25 April 2003 rebel attack on Al Fasher Military Airport is identified by the OTP as the starting point of the counterinsurgency.<sup>262</sup>

110. **P-0131** then [REDACTED].<sup>263</sup> [REDACTED].<sup>264</sup> [REDACTED].<sup>265</sup> [REDACTED].<sup>266</sup>

111. [REDACTED], [REDACTED],<sup>267</sup> [REDACTED].<sup>268</sup> P-0131 testified that [REDACTED].<sup>269</sup> P-0131 said he [REDACTED],<sup>270</sup> [REDACTED].<sup>271</sup> P-0131 testified [REDACTED]<sup>272</sup> [REDACTED].<sup>273</sup> When asked by the Judges [REDACTED].<sup>274</sup>

112. The story told by **P-0131** appears unbelievable. It is not credible that [REDACTED]. It is also not credible that [REDACTED]. It is finally hardly credible that in 2006, [REDACTED]. When asked about this coincidence, P-0131 responded [REDACTED],<sup>275</sup> without any further explanation. The way P-0131 alleges to have [REDACTED] cannot be believed.

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<sup>255</sup> **P-0131**: [REDACTED]  
<sup>256</sup> **P-0131**: [REDACTED]  
<sup>257</sup> **P-0131**: [REDACTED]  
<sup>258</sup> **P-0131**: [REDACTED]  
<sup>259</sup> **P-0131**: [REDACTED]  
<sup>260</sup> **P-0131**: [REDACTED]  
<sup>261</sup> **P-0131**: [REDACTED]  
<sup>262</sup> [OTP Trial Brief](#), para. 45.  
<sup>263</sup> **P-0131**: [REDACTED]  
<sup>264</sup> **P-0131**: [REDACTED]  
<sup>265</sup> **P-0131**: [REDACTED]  
<sup>266</sup> **P-0131**: [REDACTED]  
<sup>267</sup> **P-0131**: [REDACTED]  
<sup>268</sup> **P-0131**: [REDACTED]  
<sup>269</sup> **P-0131**: [REDACTED]  
<sup>270</sup> **P-0131**: [REDACTED]  
<sup>271</sup> **P-0131**: [REDACTED]  
<sup>272</sup> **P-0131**: [REDACTED]  
<sup>273</sup> **P-0131**: [REDACTED]  
<sup>274</sup> **P-0131**: [REDACTED]  
<sup>275</sup> **P-0131**: [REDACTED]

113. Moreover, **P-0131** described [REDACTED].<sup>276</sup> [REDACTED].<sup>277</sup> [REDACTED]<sup>278</sup> [REDACTED].<sup>279</sup> Here, [REDACTED]. [REDACTED]. [REDACTED]

114. Consequently, **P-0131**'s account surrounding the circumstances of [REDACTED] is unbelievable or, at a minimum, raises extremely serious doubts as to the credibility of his testimony. Therefore, his evidence cannot be relied upon by the Chamber. The Defence contends that P-0131 had a strong motivation [REDACTED] the hope that the ICC would help him to move to [REDACTED].<sup>280</sup> He made up [REDACTED]<sup>281</sup> to try and demonstrate the utility of his testimony to the OTP.<sup>282</sup>

115. **P-0874**: [REDACTED].<sup>283</sup> **P-0874** gave [REDACTED] to the OTP<sup>284</sup> and stated that [REDACTED].<sup>285</sup> When commenting [REDACTED], P-0874 agreed that [REDACTED].<sup>286</sup> To the Judges, P-0874 confirmed that [REDACTED].<sup>287</sup> When presented with [REDACTED],<sup>288</sup> thus raising questions [REDACTED].<sup>289</sup> There are serious doubts about the credibility [REDACTED].

116. Further, the identification procedure that led to the purported recognition of *Ali Kushayb* by **P-0874** was not conducted properly. Indeed, he was only shown a single picture of Mr Abd-Al-Rahman<sup>290</sup> and testified that "*This is Ali's photo. A regular profile photo.*"<sup>291</sup> When asked if "*the Ali that you speak of is Ali Kushayb*", P-0874 responded "*Yes, Ali Kushayb. That is his real photo, as he used to look like when he was with us.*"<sup>292</sup> This is a deeply flawed identification. The OTP should have shown the witness an array of photos, rather than a singular picture.<sup>293</sup> The purported identification has no probative value.

117. **P-0878**: [REDACTED].<sup>294</sup> Throughout his appearance, P-0878 displayed a remarkably strong animosity against Mr Abd-Al-Rahman<sup>295</sup> such that the Defence was compelled to request

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<sup>276</sup> **P-0131**: [REDACTED]

<sup>277</sup> **P-0131**: [REDACTED]

<sup>278</sup> **P-0131**: [REDACTED]

<sup>279</sup> **P-0131**: [REDACTED]

<sup>280</sup> **P-0131**: [REDACTED]

<sup>281</sup> [REDACTED]

<sup>282</sup> **P-0131**: [REDACTED]

<sup>283</sup> **P-0874**: [REDACTED]

<sup>284</sup> [REDACTED]

<sup>285</sup> **P-0874**: [REDACTED]

<sup>286</sup> **P-0874**: [REDACTED]

<sup>287</sup> **P-0874**: [REDACTED]

<sup>288</sup> **P-0874**: [REDACTED]

<sup>289</sup> **P-0874**: [REDACTED]

<sup>290</sup> [REDACTED]

<sup>291</sup> **P-0874**: [REDACTED]

<sup>292</sup> **P-0874**: [REDACTED]

<sup>293</sup> **P-0874**: [REDACTED]

<sup>294</sup> **P-0878**: [REDACTED]

<sup>295</sup> **P-0878**: T-077, p. 49, line 19-p. 50, line 1.

the Trial Chamber to intervene.<sup>296</sup> He was obviously not an impartial witness. During his cross-examination, it was put to the witness that he took an active part in the Kodoom and Bindisi operation. P-0878 testified he [REDACTED].<sup>297</sup> He could not explain why he [REDACTED]. P-0878 contradicted himself by stating that he [REDACTED].<sup>298</sup>

118. **P-0878** acknowledged the presence of [REDACTED].<sup>299</sup> This is consistent with the definition of the JJW<sup>300</sup> and the presence of the PDF therein. According to P-0878, [REDACTED]. He gave contradictory evidence about [REDACTED].<sup>301</sup> [REDACTED].<sup>302</sup> Nevertheless, this does not explain how [REDACTED]. This contradiction casts serious doubts as to the presence, role and authority of *Ali Kushayb* [REDACTED].

119. In addition, **P-0878** gave confusing testimony that, in 2003,<sup>303</sup> he started [REDACTED].<sup>304</sup> [REDACTED],<sup>305</sup> [REDACTED].<sup>306</sup> P-0878 proceeded to [REDACTED].<sup>307</sup> He then testified that he started [REDACTED].<sup>308</sup> P-0878 was however unable to explain why he did not [REDACTED], when the OTP requested him to do so.<sup>309</sup> It is clear that P-0878 was selective in the evidence he was prepared to share. At best, in the absence of [REDACTED] was a fiction.

120. **P-0878** testified that he had been [REDACTED].<sup>310</sup> [REDACTED],<sup>311</sup> [REDACTED],<sup>312</sup> [REDACTED].<sup>313</sup> When confronted with the fact that [REDACTED] P-0878 could not explain his contradictory statements.<sup>314</sup>

121. **P-0878** learned about the ICC warrant of arrest against *Ali Kushayb* in 2007.<sup>315</sup> When it was suggested that when he [REDACTED], he knew that *Ali Kushayb* was the target of an international prosecution and therefore peppered [REDACTED] with references to *Ali Kushayb*

<sup>296</sup> **P-0878**: T-078, p. 3, line 21-p. 5, line 16.

<sup>297</sup> **P-0878**: [REDACTED]

<sup>298</sup> **P-0878**: [REDACTED]

<sup>299</sup> **P-0878** : [REDACTED]; See **PART V – Chapter 1** below.

<sup>300</sup> See **PART IV – Chapter 5 – Section 2 – II – B** below.

<sup>301</sup> **P-0878**: [REDACTED]

<sup>302</sup> **P-0878**: [REDACTED]

<sup>303</sup> **P-0878**: [REDACTED]

<sup>304</sup> **P-0878**: [REDACTED]

<sup>305</sup> **P-0878**: [REDACTED]

<sup>306</sup> **P-0878**: [REDACTED]

<sup>307</sup> **P-0878**: [REDACTED]

<sup>308</sup> **P-0878**: [REDACTED]

<sup>309</sup> **P-0878**: [REDACTED]

<sup>310</sup> **P-0878**: [REDACTED]

<sup>311</sup> **P-0878**: [REDACTED]

<sup>312</sup> **P-0878**: [REDACTED]

<sup>313</sup> **P-0878**: [REDACTED]

<sup>314</sup> **P-0878**: [REDACTED]

<sup>315</sup> **P-0878**: [REDACTED]

in order to deflect attention from himself, P-0878 could only answer that [REDACTED].<sup>316</sup> P-0878 admitted that he was aware that *Ali Kushayb* was wanted by the Court for crimes committed in Kodoom and Bindisi. This casts serious doubts as to the reliability of his [REDACTED]. P-0878 manifestly played a key role in the Bindisi operation and had every incentive to hoist the blame onto another convenient suspect.

122. **P-0921:** [REDACTED].<sup>317</sup> **P-0921** had a personal interest in becoming an OTP witness. He was assisted by duty Counsel during his testimony and was more concerned about the risk of self-incrimination than giving a true testimony. He refused to answer basic questions regarding his identity without receiving guarantees, and tried to minimize his involvement in the crimes of Kodoom and Bindisi as much as he could.<sup>318</sup>

123. When asked if the OTP forwarded him funds to meet OTP investigators [REDACTED], **P-0921** testified he could not remember.<sup>319</sup> During his cross-examination, P-0921 was questioned on records of reimbursements and investigation reports,<sup>320</sup> showing that he received a total of [REDACTED] Euros for cooperating with the OTP in its investigation.<sup>321</sup> He was evasive and wholly lacking in candour, even when being shown receipts bearing his signature.<sup>322</sup> His interest in meeting with the OTP was a purely financial one.<sup>323</sup>

124. On several occasion, **P-0921** lied in incriminating Mr Abd-Al Rahman. His reasons for [REDACTED]..<sup>324</sup> His claims about [REDACTED] were not worthy of belief. He cynically and dishonestly attempted to [REDACTED] to distract the Court from his own criminality, belied by the fact he [REDACTED].<sup>325</sup>

125. **P-0921** should not be believed when he testified that he did not hear about the 2007 ICC warrant of arrest issued against *Ali Kushayb*, nor about Mr Abd-Al-Rahman's arrest and transfer to the ICC custody in June 2020.<sup>326</sup> He must have been aware,<sup>327</sup> and his untruthful denials of awareness speak volumes. His involvement in the crimes of Kodoom and Bindisi is evident and his attempts to misdirect the Court were as clumsy as they were unconvincing.

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<sup>316</sup> **P-0878:** [REDACTED]

<sup>317</sup> **P-0921:** [REDACTED]

<sup>318</sup> **P-0921:** [REDACTED]

<sup>319</sup> **P-0921:** [REDACTED]

<sup>320</sup> *See:* [REDACTED]

<sup>321</sup> **P-0921:** [REDACTED]

<sup>322</sup> **P-0921:** [REDACTED]

<sup>323</sup> **P-0921:** [REDACTED]

<sup>324</sup> **P-0921:** [REDACTED]

<sup>325</sup> **P-0921:** [REDACTED]

<sup>326</sup> **P-0921:** [REDACTED]

<sup>327</sup> **P-0921:** [REDACTED]

126. Moreover, his evidence was inconsistent with that of other witnesses, in particular [REDACTED] and [REDACTED];<sup>328</sup> his testimony should be accorded no weight.

127. **P-1021**: [REDACTED].<sup>329</sup> He too was assisted by duty Counsel. **P-1021** alleges that he knew Mr Abd-Al-Rahman and was introduced to him [REDACTED] at his pharmacy in Garsila<sup>330</sup> P-1021 says he used to refer to him as “*Ali. Just Ali. Nothing else.*”<sup>331</sup>

128. When asked by the Bench to clarify how **P-1021** first knew that Mr Abd-Al-Rahman was nicknamed *Ali Kushayb*, **P-1021** provided a fanciful explanation about [REDACTED].<sup>332</sup> Of course, the OTP did not present any evidence of [REDACTED]. It is not credible that [REDACTED].<sup>333</sup>

129. **P-1021** must inevitably have been influenced by media reports of Mr Abd-Al-Rahman, nicknamed as *Ali Kushayb*, from at least [REDACTED], when he was interviewed by the OTP. He heard about the surrender of Mr Abd-Al-Rahman through Radio Dabanga and TV news bulletins.<sup>334</sup> His purported identification of a man that he identified as “*Ali*” has no evidentiary weight<sup>335</sup>. He should have been shown an array of photographs, not a single photograph.<sup>336</sup> The TC should ignore this identification.

130. In addition, **P-1021**’s explanation regarding his [REDACTED] is wholly unbelievable. His portrayal of himself as [REDACTED] unconvincing and amounts to an untruthful attempt to show the Court that he wanted to distance himself from [REDACTED]. P-1021 testified that [REDACTED].<sup>337</sup> Even if true, this only shows the extent to which he is not an impartial witness.<sup>338</sup>

131. **P-1021** attempted to justify his presence [REDACTED].<sup>339</sup> In fact, he was responsible [REDACTED].<sup>340</sup> His denials of a link between the JJW and the PDF<sup>341</sup> fly in the face of other credible evidence that was heard by the TC.<sup>342</sup>

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<sup>328</sup> See **PART V - Chapter 1.**

<sup>329</sup> **P-1021**: [REDACTED]

<sup>330</sup> **P-1021**: [REDACTED]

<sup>331</sup> **P-1021**: [REDACTED]

<sup>332</sup> **P-1021**: [REDACTED]

<sup>333</sup> See E.g. [REDACTED]

<sup>334</sup> **P-1021**: [REDACTED]

<sup>335</sup> **P-1021**: [REDACTED]

<sup>336</sup> **P-0874**: [REDACTED]

<sup>337</sup> **P-1021**: [REDACTED]

<sup>338</sup> *Tolimir TJ*, para. 37.

<sup>339</sup> **P-1021**: [REDACTED]

<sup>340</sup> **PART IV- Chapter 5- Section 2- II- B.**

<sup>341</sup> **P-1021**: [REDACTED]

<sup>342</sup> See **PART IV- Chapter 5- Section 2- II- B.**

132. Finally, **P-1021** was friend with [REDACTED].<sup>343</sup> They knew each other well, both are from [REDACTED].<sup>344</sup> He was evasive in his evidence about more recent contact with [REDACTED], initially stating that he had not seen him since [REDACTED],<sup>345</sup> before eventually admitting that they spoke [REDACTED].<sup>346</sup>

## ***II - Mukjar Locality***

133. **P-0905**: [REDACTED],<sup>347</sup> testified about the [REDACTED].<sup>348</sup> P-0905 said that he was present [REDACTED].<sup>349</sup> P-0905 was previously interviewed by the OTP in [REDACTED].<sup>350</sup> He was put in contact with the OTP through his relative<sup>351</sup> who was himself [REDACTED]<sup>352</sup> and who advised P-0905 to “be completely focused with” the investigators.<sup>353</sup>

134. Throughout his cross-examination, **P-0905** showed hostility and evasiveness towards the Defence by refusing several times to answer questions such as his place of birth,<sup>354</sup> his last contact with [REDACTED],<sup>355</sup> or with [REDACTED],<sup>356</sup> the existence of [REDACTED] Garsila,<sup>357</sup> the arrest of [REDACTED],<sup>358</sup> and whether or not he saw [REDACTED].<sup>359</sup> He was not a neutral witness interested only in providing a truthful account and willing to be subjected to scrutiny.

135. **P-0905**’s evidence about [REDACTED] is confused and inconsistent. In his Screening Note, he mentioned that [REDACTED], whereas he testified that [REDACTED].<sup>360</sup> [REDACTED].<sup>361</sup> When it was put to him that he [REDACTED], he answered that he had taken an oath to follow instructions.<sup>362</sup> Members of the SAF had an unqualified obligation to follow

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<sup>343</sup> **P-1021**: [REDACTED]

<sup>344</sup> **P-1021**: [REDACTED]

<sup>345</sup> **P-1021**: [REDACTED]

<sup>346</sup> **P-1021**: [REDACTED]

<sup>347</sup> **P-0905**: [REDACTED]

<sup>348</sup> **P-0905**: [REDACTED]

<sup>349</sup> **P-0905**: [REDACTED]

<sup>350</sup> **P-0905**: [REDACTED]

<sup>351</sup> *See* [REDACTED]

<sup>352</sup> **P-0905**: [REDACTED]

<sup>353</sup> **P-0905**: [REDACTED]

<sup>354</sup> **P-0905**: [REDACTED]

<sup>355</sup> **P-0905**: [REDACTED]

<sup>356</sup> **P-0905**: [REDACTED]

<sup>357</sup> **P-0905**: [REDACTED]

<sup>358</sup> **P-0905**: [REDACTED]

<sup>359</sup> **P-0905**: [REDACTED]

<sup>360</sup> **P-0905**: [REDACTED]

<sup>361</sup> **P-0905**: [REDACTED]

<sup>362</sup> **P-0905**: [REDACTED]

orders; the oath to do so did nothing to prevent the commission of crime.<sup>363</sup> When asked whether, [REDACTED]<sup>364</sup> confirming his compliance with the SAF methods.

136. The matter which conclusively demonstrated that his only aim was to incriminate Mr Abd-Al-Rahman as *Ali Kushayb* by any means, even by denying the obvious, revolved around the expression “*Aksah Amsah*”<sup>365</sup> which he claims was an expression used specifically by *Ali Kushayb* [REDACTED],<sup>366</sup> and which he construed as unique to *Ali Kushayb* and the JJW.<sup>367</sup> In cross-examination, **P-0905** dishonestly denied the suggestion that “*Aksah Amsah*” was a common phrase in military parlance.<sup>368</sup> P-0905 was shown a video clip from Sudanese television<sup>369</sup> depicting people in SAF uniforms singing a motivational song containing the phrase “*Aksah Amsah*”.<sup>370</sup> He persevered in his untruthful evidence.<sup>371</sup> P-0905 showed himself to be a liar, albeit an unaccomplished one. He is not a reliable witness of the alleged acts and conducts of Mr Abd-Al-Rahman.

137. **P-0913**: [REDACTED].<sup>372</sup> **P-0913**’s identification of *Ali Kushayb* is neither reliable nor credible. He was unable to provide a clear explanation regarding his personal knowledge of *Ali Kushayb*. His evidence was peppered with answers that veered from the vague to the inconsistent. Information that *Ali Kushayb* had a pharmacy in Garsila was in the public domain since February 2007.<sup>373</sup> When confronted with his inconsistencies, P-0913 resorted to blaming OTP investigators,<sup>374</sup> although his written statement was, naturally enough, read back to him prior to signature. P-0913’s sudden recollection of how he came to know *Ali Kushayb* was clearly designed to convince the TC to believe him,<sup>375</sup> but served only to achieve the opposite.

138. Regarding the events of 17 March 2004 in Mukjar, P-0913 claimed that he was sure it was *Ali Kushayb* [REDACTED].<sup>376</sup> When he was asked why he only spoke of “*Ali*” in his statement and Preparation Log, P-0913 was again swift to blame others,<sup>377</sup> an unconvincing

<sup>363</sup> See **PART IV – Chapter 2 – Section 2 – IV – B** below.

<sup>364</sup> **P-0905**: [REDACTED]

<sup>365</sup> See **PART IV – Chapter 2 – Section 4** below.

<sup>366</sup> **P-0905**: [REDACTED]

<sup>367</sup> **P-0905**: [REDACTED]

<sup>368</sup> **P-0905**: [REDACTED]

<sup>369</sup> DAR-D31-000000001.

<sup>370</sup> **P-0905**: [REDACTED]

<sup>371</sup> **P-0905**: [REDACTED]

<sup>372</sup> **P-0913**: [REDACTED]

<sup>373</sup> [ICC-02/05-56](#), para. 203.

<sup>374</sup> **P-0913**: [REDACTED]

<sup>375</sup> **P-0913**: [REDACTED]

<sup>376</sup> **P-0913**: T-069, p. 62, lines 6-8 (Conf).

<sup>377</sup> **P-0913**: [REDACTED]

attempt to shift responsibility in circumstances where the OTP was in no doubt about the centrality of the identity of *Ali Kushayb*.

139. **P-0931:** [REDACTED].<sup>378</sup> P-0931 testified that he was [REDACTED]<sup>379</sup> and to [REDACTED].<sup>380</sup> **P-0931** was unable to provide a clear timeframe for the first time he saw *Ali Kushayb* in his pharmacy in Garsila.<sup>381</sup> P-0931 testified that *Ali Kushayb* was identified to him by people in the market without being able to explain why he was so worthy of being pointed out.<sup>382</sup> Regarding the alleged March 2004 executions in Mukjar, P-0931 could not even get the year right, requiring the Prosecution to having to rehabilitate his confusion.<sup>383</sup> His recollection of the events must be approached with great caution. **P-0931** admitted supporting the rebellion and having registered himself on a list of opposition volunteers: he is not an impartial witness.<sup>384</sup>

140. **P-0931** was not able to distinguish between what he himself saw and what he inferred from information he received. He repeated three times<sup>385</sup> that [REDACTED],<sup>386</sup> but later admitted that in fact it was just an inference because he had seen some JJW and assumed that *Ali Kushayb* must have been there too.<sup>387</sup> He was too far and “not able to identify [*Ali Kushayb*] very well”.<sup>388</sup> He evidently had a personal *animus* against those responsible for the executions in Mukjar and Deleig and focused that *animus* on the person that conveniently happened to be identified by the OTP as responsible.<sup>389</sup> He declared that he “hate[s] him very much”.<sup>390</sup> His evidence is not reliable.

141. **P-0984:** [REDACTED]<sup>391</sup> and worked in [REDACTED].<sup>392</sup> His personal knowledge of *Ali Kushayb* is hardly credible, as it is based solely on a vague memory of seeing him very briefly in December 2001 in Garsila at the market.<sup>393</sup> The credibility of his account of recognising someone that he had only seen for a few seconds two years before, without having any direct and memorable interaction with him is low. P-0984 assumed that *Ali Kushayb* was

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<sup>378</sup> **P-0931:** [REDACTED]

<sup>379</sup> **P-0931:** [REDACTED]

<sup>380</sup> **P-0931:** [REDACTED]

<sup>381</sup> **P-0931:** T-062, p. 52, lines 16-18.

<sup>382</sup> **P-0931:** T-062, p. 53, lines 15-20.

<sup>383</sup> **P-0931:** T-062, p. 23, lines 9-13.

<sup>384</sup> **P-0931:** T-062, p. 58, lines 1-25.

<sup>385</sup> **P-0931:** [REDACTED]

<sup>386</sup> **P-0931:** [REDACTED]

<sup>387</sup> **P-0931:** T-062, p. 49, lines 6-9.

<sup>388</sup> **P-0931:** T-062, p. 48, lines 12-21.

<sup>389</sup> **P-0931:** [REDACTED]

<sup>390</sup> **P-0931:** T-063, p. 20, line 25.

<sup>391</sup> **P-0984:** [REDACTED]

<sup>392</sup> **P-0984:** [REDACTED]

<sup>393</sup> **P-0984:** [REDACTED]

the direct commander of the JJW, because he allegedly saw him with personal guards.<sup>394</sup> P-0984 never saw *Ali Kushayb* giving an order to anyone.<sup>395</sup> The basis of his knowledge and willingness to make wild assumptions casts doubt on the reliability of his evidence relating to *Ali Kushayb*.

### ***III - Deleig Locality***

142. **P-0643:** [REDACTED],<sup>396</sup> and then [REDACTED].<sup>397</sup> P-0643 was a [REDACTED]<sup>398</sup> [REDACTED].<sup>399</sup> P-0643 testified that he was never “on site” during the events.<sup>400</sup> P-0643 has strong ties with the patently untruthful witness [REDACTED]. P-0643’s evidence is irremediably contaminated by [REDACTED].

143. **P-0643** offered an unreliable account regarding the alleged whereabouts of *Ali Kushayb* after the Deleig events of March 2004. P-0643 also said that “shortly after the attack on Deleig” *Ali Kushayb* had stayed at the [REDACTED].<sup>401</sup> This is not consistent with other evidence about Mr Abd-Al-Rahman’s occupation during that same period.<sup>402</sup>

144. **P-0643** was interviewed by the OTP over five days during which he was specifically asked questions about *Ali Kushayb*. P-0643 stated for the first time,<sup>403</sup> during his testimony, that he [REDACTED].<sup>404</sup> The date of this is wholly unclear,<sup>405</sup> and the story itself defies credibility.<sup>406</sup> It is clear that P-0643 embellished his story with an unverifiable account as additional proof that he knew *Ali Kushayb*.<sup>407</sup> His testimony should be accorded no weight.

145. **P-0883:** P-0883 was a member of [REDACTED].<sup>408</sup> He misrepresented the truth a first time about [REDACTED],<sup>409</sup> before being compelled to admit that [REDACTED].<sup>410</sup>

146. **P-0883’s** basis of knowledge of Mr Abd-Al-Rahman is based, if true, on [REDACTED] [REDACTED] he could tell [REDACTED].<sup>411</sup> This was his only explanation for knowing *Ali*

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<sup>394</sup> **P-0984:** T-066, p. 63, line 6-p. 64, line 15.

<sup>395</sup> **P-0984:** T-067, p. 35, lines 12-14.

<sup>396</sup> **P-0643:** [REDACTED]

<sup>397</sup> **P-0643:** [REDACTED]

<sup>398</sup> **P-0643:** [REDACTED]

<sup>399</sup> **P-0643:** [REDACTED]

<sup>400</sup> **P-0643:** [REDACTED]

<sup>401</sup> **P-0643:** [REDACTED]

<sup>402</sup> [REDACTED]

<sup>403</sup> **P-0643:** [REDACTED]

<sup>404</sup> **P-0643:** [REDACTED]

<sup>405</sup> **P-0643:** [REDACTED]

<sup>406</sup> **P-0643:** [REDACTED]

<sup>407</sup> **P-0643:** [REDACTED]

<sup>408</sup> **P-0883:** [REDACTED]

<sup>409</sup> **P-0883:** [REDACTED]

<sup>410</sup> **P-0883:** [REDACTED]

<sup>411</sup> **P-0883:** [REDACTED]

*Kushayb*'s name.<sup>412</sup> However, there is no evidence of [REDACTED] Mr Abd-Al-Rahman, much less [REDACTED]. Had the Sudanese authorities answered the Defence's long-standing request for Mr Abd-Al-Rahman's complete *état civil*,<sup>413</sup> the Court would have had the means to conduct a verification.

147. When asked about the context and date of his first encounter with *Ali Kushayb*, **P-0883** testified that he first heard his name "sometime [...] in 1986, or maybe 1990",<sup>414</sup> but was only [REDACTED].<sup>415</sup> P-0883 had no credible explanation for remembering the name ten years after having heard it once. **P-0883** was also unable to provide a coherent explanation of the link between Mr Abd-Al-Rahman and his alleged nickname *Ali Kushayb*. P-0883's information creating the link with *Ali Kushayb* is incompatible with the evidence that Mr Abd-Al-Rahman joined the CRF in July 2005<sup>416</sup> as a simple "recruit",<sup>417</sup> which P-0883 admitted to be the lowest possible rank for a soldier,<sup>418</sup> and never went higher than the rank of *Musa'id*.<sup>419</sup>

148. According to **P-0883**, *Ali Kushayb* was elected by the Arabs as their leader because of his leadership qualities,<sup>420</sup> his reputation as a "prominent person" when "fighting the Salamat tribe".<sup>421</sup> But the Salamat was the largest tribal group in Wadi Saleh<sup>422</sup> and among the JJW<sup>423</sup> in 2003-2004. It is not credible *Ali Kushayb* would be chosen, as an enemy combatant, as their leader. It is further not credible that, as a member of the Ta'aisha, a tribe that refused to join in the counterinsurgency,<sup>424</sup> Mr Abd-Al-Rahman would be a JJW leader.

149. **P-0883** denied having any reason, interest or connection that prevented him from talking freely about [REDACTED].<sup>425</sup> However, during his cross-examination, the Defence put to him that [REDACTED],<sup>426</sup> and that even if P-0883 stated that there was no personal relationship

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<sup>412</sup> **P-0883**: [REDACTED]

<sup>413</sup> See **PART II – Chapter 3** above.

<sup>414</sup> **P-0883**: [REDACTED]

<sup>415</sup> **P-0883**: [REDACTED]

<sup>416</sup> [REDACTED]

<sup>417</sup> [REDACTED]

<sup>418</sup> **P-0883**: T-073, p. 49, line 12-p. 50, line 9.

<sup>419</sup> **D-0001**: T-154, p. 57, lines 22-25; **D-0002**: T-156, p. 59, lines 20-22; **D-0003**: T-155, p. 46, lines 18-20; **D-0007**: T-149, p. 28, lines 5-13 (Conf); **D-0008**: T-139, p. 28, lines 2-8 (Conf); p. 63, lines 5-7, p. 84, lines 13-24; **D-0011**: T-138, p. 52, lines 5-9 (Conf); **D-0028**: [DAR-D31-00000150](#), para. 23; **D-0029**, T-157, p. 25, lines 2-11; **D-0032**: T-140, p. 88, lines 17-19 (Conf); T-141, p. 22, lines 5-6; **D-0035**: T-151, p. 24, line 24-p. 25, line 4 (Conf); **D-0039**: T-159, p. 34, lines 10-17, p. 79, lines 20-23.

<sup>420</sup> **P-0883**: T-071, p. 15, lines 6-8, p. 17, lines 9-20.

<sup>421</sup> **P-0883**: T-074, p. 4, line 18-p. 5, line 7.

<sup>422</sup> **P-1042**: T-027, p. 48, lines 17-21; T-028, p. 51, lines 1-4, p. 56, lines 14-18; [DAR-OTP-0220-1623](#), para. 67.

<sup>423</sup> **P-1042**: T-028, p. 52, lines 6-13.

<sup>424</sup> **D-0001**: T-154, p. 40, lines 7-21 (Conf); **D-0002**: T-156, p. 44, line 5-p. 45, line 14; **D-0003**: T-155, p. 50, lines 4-20; **D-0007**: T-149, p. 20, lines 7-23 (Conf); **D-0036**: T-153, p. 48, lines 14-20; **D-0039**: T-159, p. 54, lines 9-17.

<sup>425</sup> **P-0883**: [REDACTED]

<sup>426</sup> **P-0883**: [REDACTED]

[REDACTED],<sup>427</sup> he had a motive to [REDACTED] by blaming the Accused in order to protect [REDACTED].

150. **P-0935:** [REDACTED]<sup>428</sup> [REDACTED].<sup>429</sup> He provided unclear answers when he testified that Ahmad Harun was the director of Military Intelligence and that [REDACTED].<sup>430</sup> **P-0935's** evidence overall is vague and his basis of knowledge was weak, as remarked upon by the TC.<sup>431</sup> His evidence has very limited probative value.

151. **P-0994:** [REDACTED].<sup>432</sup> P-0994 testified that, [REDACTED].<sup>433</sup> P-0994 testified that he did not [REDACTED],<sup>434</sup> and [REDACTED] check on his family.<sup>435</sup>

152. **P-0994** testified that *Ali Kushayb* was a well-known pharmacist, but admitted that he never visited *Ali Kushayb's* pharmacy, nor purchased anything from him.<sup>436</sup> The information he provided is a recitation of information that was publicly known from February 2007.<sup>437</sup> P-0994 had an incomplete and poor recollection of his interactions with *Ali Kushayb*. He finally accepted that his knowledge of *Ali Kushayb* was based on common knowledge and rumours.<sup>438</sup> When asked how he first heard someone referring to *Ali Kushayb* as Abd-Al-Rahman, P-0994 testified that it was also common knowledge and that he had learnt it from people in the street.<sup>439</sup> If that common knowledge dates from after February 2007, there may be some truth to that answer. When the Presiding Judge asked why anybody would be discussing *Ali Kushayb* or Abd-Al-Rahman with him, P-0994 answered that he could not remember and did not pay a lot of attention to what was said about him.<sup>440</sup>

153. **P-0994** also gave confused evidence about his last sighting of *Ali Kushayb*. He initially stated having seen *Ali Kushayb* [REDACTED],<sup>441</sup> but testified that after the events of March 2004, he had never seen *Ali Kushayb* again.<sup>442</sup> His evidence is confused, confusing, vague and of little assistance to the TC.

#### ***IV - No Specific Localities***

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<sup>427</sup> **P-0883:** [REDACTED]

<sup>428</sup> **P-0935:** [REDACTED]

<sup>429</sup> **P-0935:** [REDACTED]

<sup>430</sup> **P-0935:** [REDACTED]

<sup>431</sup> **P-0935:** [REDACTED]

<sup>432</sup> **P-0994:** [REDACTED]

<sup>433</sup> **P-0994:** [REDACTED]

<sup>434</sup> **P-0994:** [REDACTED]

<sup>435</sup> **P-0994:** [REDACTED]

<sup>436</sup> **P-0994:** [REDACTED]

<sup>437</sup> [ICC-02/05-56](#), para. 203.

<sup>438</sup> **P-0994:** [REDACTED]

<sup>439</sup> **P-0994:** [REDACTED]

<sup>440</sup> **P-0994:** [REDACTED]

<sup>441</sup> **P-0994:** [REDACTED]

<sup>442</sup> **P-0994:** [REDACTED]

154. **P-0547** : [REDACTED].<sup>443</sup> He testified about how he [REDACTED].<sup>444</sup> The Defence submits that [REDACTED] should be considered with extreme caution, [REDACTED].<sup>445</sup> Moreover, P-0547 was [REDACTED],<sup>446</sup> [REDACTED].<sup>447</sup>

155. [REDACTED].<sup>448</sup> He agreed that he [REDACTED].<sup>449</sup> It should also be recalled that P-0547 is a witness with knowledge of fabrication of evidence in relation to ICC proceedings, including the present case.<sup>450</sup>

156. **P-0769**: [REDACTED].<sup>451</sup> During his testimony, P-0769 agreed that he was “*a willing and enthusiastic participant working in this terrorist State*” [REDACTED].<sup>452</sup> He showed himself to be a self-serving witness. [REDACTED] “*in order to benefit from it somehow in the future, but not at that point in time.*”<sup>453</sup> P-0769 showed a great determination to become an OTP witness. Firstly, P-0769 testified that he had [REDACTED].<sup>454</sup> Then, [REDACTED] he wanted to get in touch with the ICC.<sup>455</sup> P-0769 testified that he had read that [REDACTED] “[he] too wanted to be a witness.”<sup>456</sup> P-0769 [REDACTED] “If you find protection for me and my family, [REDACTED]”.<sup>457</sup> When confronted with this evidence of bargaining, P-0769 lied and denied having ever said this.<sup>458</sup>

157. **P-0769** had a vested interest in being an ICC witness: [REDACTED].<sup>459</sup> He untruthfully denied the obvious, rendering his credibility as a witness practically zero.

## Section 2: [REDACTED]

158. **P-0651, P-0671, P-0712, P-0718, and P-0935** stated that they had lied [REDACTED]. The mere fact they admitted as much does little to change the fact that their easy ability and willingness to lie [REDACTED] when they consider it in their interests to do so raises serious doubts as to their overall credibility. The Defence could not put the lies in three of the witnesses’

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<sup>443</sup> **P-0547**: [REDACTED]

<sup>444</sup> **P-0547**: [REDACTED]

<sup>445</sup> **P-0547**: [REDACTED]

<sup>446</sup> **P-0547**: [REDACTED]

<sup>447</sup> **P-0547**: [REDACTED]

<sup>448</sup> **P-0547**: [REDACTED]

<sup>449</sup> **P-0547**: [REDACTED]

<sup>450</sup> See PART III – Chapter 3- Section 2.

<sup>451</sup> **P-0769**: [REDACTED]

<sup>452</sup> **P-0769**: [REDACTED]

<sup>453</sup> **P-0769**: [REDACTED]

<sup>454</sup> **P-0769**: [REDACTED]

<sup>455</sup> **P-0769**: [REDACTED]

<sup>456</sup> **P-0769**: [REDACTED]

<sup>457</sup> **P-0769**: [REDACTED]

<sup>458</sup> **P-0769**: [REDACTED]

<sup>459</sup> **P-0769**: [REDACTED]

[REDACTED] or because they had been admitted through Rule 68(2)(b) of the RPE (**P-0756** and **P-0927**).

159. **P-0651**: P-0651 was interviewed by [REDACTED].<sup>460</sup> Six days after [REDACTED], he had his screening interview with the OTP.<sup>461</sup> In less than a week, P-0651 gave two completely different accounts of events in Darfur. [REDACTED] he never mentioned *Ali Kushayb*. In its decision, [REDACTED] evaluated that his written and oral statements were consistent. [REDACTED]<sup>462</sup> on the basis of what he now says are lies.

160. Before the TC, **P-0651** testified that he was at the Deleig Mosque on Friday 5 March 2004<sup>463</sup> where he could see *Ali Kushayb* moving around amongst the prisoners.<sup>464</sup> The Defence submits that reasons for not telling the truth [REDACTED]. [REDACTED].<sup>465</sup> This is also the case for **P-0671**, below, [REDACTED].<sup>466</sup> In the absence of any reasonable explanation the Defence submits that the most likely scenario is that P-0651's [REDACTED] is not untrue, that his account to the ICC is in fact a lie, and that he was not present in Deleig and did not witness what he claims to have seen.

161. **P-0671**: P-0671 testified before the ICC that he saw *Ali Kushayb* at the Deleig Police station on 5 March 2004.<sup>467</sup> [REDACTED]. The only mention of the year 2004 concerns the GoS and JJW attack that took place in his village, [REDACTED].<sup>468</sup> **P-0671** alleged in Court that he lied [REDACTED].<sup>469</sup> Before the TC, P-0671 testified that [REDACTED] [REDACTED].<sup>470</sup> [REDACTED]. Under cross-examination, **P-0671** admitted that he had become a witness before the ICC for the purpose of [REDACTED].<sup>471</sup> He admitted having made the calculation [REDACTED], then he could get it through the ICC.<sup>472</sup> He is a devious and untruthful witness, prepared to recount whatever he considers to be in his interests to recount, to whoever he thinks he can obtain advantage from, with the truth coming a distant second to his own interests. P-0671 also admitted that he linked *Ali Kushayb* with what had

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<sup>460</sup> **P-0651**: [REDACTED]

<sup>461</sup> **P-0651**: T-034, p. 92, line 25-p. 93, line 2.

<sup>462</sup> **P-0651**: [REDACTED]

<sup>463</sup> **P-0651**: T-034, p. 58, lines 19-21, p. 66, lines 16-25; [REDACTED]

<sup>464</sup> **P-0651**: [REDACTED]

<sup>465</sup> **P-0651**: T-034, p. 91, line 3-p. 92, line 24.

<sup>466</sup> **P-0671**: [REDACTED]

<sup>467</sup> **P-0671**: [REDACTED]

<sup>468</sup> **P-0671**: [REDACTED]

<sup>469</sup> **P-0671**: [REDACTED]

<sup>470</sup> **P-0671**: [REDACTED]

<sup>471</sup> **P-0671**: [REDACTED]

<sup>472</sup> **P-0671**: [REDACTED]

happened to [REDACTED] for the only purpose of becoming a witness before the Court.<sup>473</sup> P-0671's evidence is devoid of any credibility.

162. **P-0712:** P-0712 did not mention the alleged executions in Deleig [REDACTED].<sup>474</sup> On the contrary, he specifically evokes a GoS and JJW attack in April 2004, in his village [REDACTED].<sup>475</sup> [REDACTED], P-0712 was [REDACTED].<sup>476</sup> During his cross-examination, the Defence put to the witness that [REDACTED], demonstrates that he did not actually witness the events in Deleig.<sup>477</sup> The witness replied that he did experience these events, but that not all the information [REDACTED] was correct<sup>478</sup> [REDACTED].<sup>479</sup> He provided no explanation for this choice.

163. **P-0712** also stated [REDACTED].<sup>480</sup> In his statement to the OTP, P-0712 indicated that this happened [REDACTED].<sup>481</sup> During his testimony, P-0712 tried to clarify for the first time that [REDACTED].<sup>482</sup> The fact that [REDACTED] raising serious doubt. P-0712's inconsistency on this key event and his admission of previous inaccuracies compromise the overall credibility of his evidence on Deleig. It should be entirely disregarded.

164. **P-0718:** P-0718's age at the time of the charged events remains unclear since he testified that he was [REDACTED],<sup>483</sup> whereas [REDACTED] he indicated that he was born in [REDACTED].<sup>484</sup> In [REDACTED] that he left Sudan in August 2011.<sup>485</sup> However, in [REDACTED], he told the OTP investigator that he left Darfur and Sudan in 2005.<sup>486</sup> In Court, P-0718 testified that he left Darfur for Chad in 2005, then came back to Sudan [REDACTED].<sup>487</sup> He testified that the date of 2011 he gave [REDACTED] was false [REDACTED].<sup>488</sup> He provided no further basis for this weird belief.

165. **P-0718** did not make any mention of the Deleig arrests [REDACTED].<sup>489</sup> P-0718 testified that he did not mention these incidents [REDACTED], because he was solely

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<sup>473</sup> **P-0671:** [REDACTED]

<sup>474</sup> [REDACTED]

<sup>475</sup> [REDACTED]

<sup>476</sup> [REDACTED]

<sup>477</sup> **P-0712:** T-036, p. 40, line 22-p. 41, line 16.

<sup>478</sup> **P-0712:** T-036, p. 40, line 22-p. 41, line 16.

<sup>479</sup> **P-0712:** [REDACTED]

<sup>480</sup> **P-0712:** [REDACTED]

<sup>481</sup> **P-0712:** [REDACTED]

<sup>482</sup> **P-0712:** [REDACTED]

<sup>483</sup> **P-0718:** [REDACTED]

<sup>484</sup> **P-0718:** [REDACTED]

<sup>485</sup> **P-0718:** [REDACTED]

<sup>486</sup> **P-0718:** [REDACTED]

<sup>487</sup> **P-0718:** [REDACTED]

<sup>488</sup> **P-0718:** [REDACTED]

<sup>489</sup> **P-0718:** [REDACTED]

answering questions he was asked, implying that he had not been asked questions to this end.<sup>490</sup> [REDACTED]<sup>491</sup> The Defence contends that P-0718 was thus given the opportunity to recount [REDACTED]. He provides no convincing reason for this omission, casting doubt on the overall reliability of this evidence.

166. **P-0720:** [REDACTED].<sup>492</sup> [REDACTED]<sup>493</sup> [REDACTED].<sup>494</sup> The Defence thus had no opportunity to cross-examine the witness [REDACTED], **P-0720** did not mention the events described in his statement to the OTP [REDACTED].<sup>495</sup> Indeed, the only event mentioned [REDACTED] that falls into the relevant temporal scope of this case is the attack conducted by the JJW and the SAF [REDACTED].<sup>496</sup> In his OTP statement, P-0720 stated that in July-August 2003, he was in Mukjar when the police station was attacked by rebels and that he later saw forces wearing military uniforms arresting people in Mukjar, so he decided to hide at home.<sup>497</sup> Nowhere [REDACTED] does P-0720 mention the events in Mukjar, nor does he evoke the execution of detainees in *Khor Talaba*.<sup>498</sup> There is no reasonable explanation for this omission [REDACTED].<sup>499</sup> The oversight of his alleged experience in Mukjar casts a serious doubt on the overall credibility of his evidence, in particular on Mukjar events.

167. **P-0756:** [REDACTED].<sup>500</sup> Several discrepancies arose [REDACTED]. For example, P-0756 indicated [REDACTED] that their village was completely destroyed,<sup>501</sup> whereas he stated to the OTP that after the attack, around 5pm, he saw his family, [REDACTED] unharmed.<sup>502</sup>

168. The most striking discrepancy between the two accounts deals with **P-0756's** recounting of [REDACTED]. [REDACTED].<sup>503</sup> [REDACTED].<sup>504</sup> [REDACTED].<sup>505</sup> [REDACTED].<sup>506</sup> P-0756 did not mention his alleged [REDACTED]. This is casting a serious doubt as to its veracity. As P-0756's statement was admitted through Rule 68(2)(b), the Defence could not cross-examine him on this point, nor challenge his overall credibility. P-0756 seems to adapt

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<sup>490</sup> **P-0718:** [REDACTED]

<sup>491</sup> **P-0718:** [REDACTED]

<sup>492</sup> **P-0720:** [REDACTED]

<sup>493</sup> **P-0720:** [REDACTED]

<sup>494</sup> **P-0720:** [REDACTED]

<sup>495</sup> **P-0720:** [REDACTED]

<sup>496</sup> **P-0720:** [REDACTED].

<sup>497</sup> **P-0720:** [REDACTED]

<sup>498</sup> **P-0720:** [REDACTED]

<sup>499</sup> **P-0720:** [REDACTED]

<sup>500</sup> **P-0756:** [REDACTED]

<sup>501</sup> **P-0756:** [REDACTED]

<sup>502</sup> **P-0756:** [REDACTED]

<sup>503</sup> **P-0756:** [REDACTED]

<sup>504</sup> **P-0756:** [REDACTED]

<sup>505</sup> **P-0756:** [REDACTED]

<sup>506</sup> **P-0756:** [REDACTED]

his account to serve his immediate interest namely, [REDACTED] and being a valuable witness for the OTP. This casts serious doubts as to the overall reliability of his evidence, which should thus be disregarded in whole.

169. **P-0927:** [REDACTED],<sup>507</sup> [REDACTED].<sup>508</sup> There are numerous inconsistencies in P-0927's various accounts. In his written statement of [REDACTED], he mentioned [REDACTED].<sup>509</sup> In his oral interview with [REDACTED], P-0927 explained instead that [REDACTED].<sup>510</sup> P-0927 provided a third and different version during his interview of [REDACTED] with the OTP. In this statement, P-0927 did not mention any [REDACTED] injury.<sup>511</sup> He even authorised the OTP to take pictures of it.<sup>512</sup> However, the explanation he gave to the OTP for this injury is different than the two versions provided to [REDACTED]. This time, he indicated to the OTP that while fleeing [REDACTED].<sup>513</sup> [REDACTED].<sup>514</sup>

170. **P-0927** told OTP investigators that he was never [REDACTED],<sup>515</sup> [REDACTED].<sup>516</sup> [REDACTED]. P-0927's accounts of the events are riddled with inconsistencies, casting serious doubt on the credibility of his evidence which cannot reasonably be considered by the TC.

171. **P-0935:** P-0935 worked at [REDACTED].<sup>517</sup> P-0935, whose overall credibility is already impugned,<sup>518</sup> [REDACTED].<sup>519</sup> The fact that he has been able to appropriate himself others' story [REDACTED] casts reasonable doubt on the truthfulness of his entire account.

### **Section 3: P-0955 testified for personal interest**

172. **P-0955** is [REDACTED].<sup>520</sup> He was [REDACTED] in December 2003.<sup>521</sup> His overall credibility is massively impugned since his testimony was clearly guided by his personal interests. At the time of his testimony, P-0955 was [REDACTED]<sup>522</sup> and asked for financial support to pay for [REDACTED], which was declined by the OTP.<sup>523</sup> P-0955 initially denied

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<sup>507</sup> **P-0927:** [REDACTED]

<sup>508</sup> **P-0927:** [REDACTED]

<sup>509</sup> **P-0927:** [REDACTED]

<sup>510</sup> **P-0927:** [REDACTED]

<sup>511</sup> **P-0927:** [REDACTED]

<sup>512</sup> **P-0927:** [REDACTED]

<sup>513</sup> **P-0927:** [REDACTED]

<sup>514</sup> **P-0927:** [REDACTED]

<sup>515</sup> **P-0927:** [REDACTED]

<sup>516</sup> **P-0927:** [REDACTED]

<sup>517</sup> **P-0935:** T-090, p. 5, line 18-p. 6, line 11.

<sup>518</sup> See **PART III – Chapter 2.**

<sup>519</sup> **P-0935:** [REDACTED]

<sup>520</sup> **PART V- Chapter 3.**

<sup>521</sup> **P-0955:** [REDACTED]

<sup>522</sup> See Email from OTP on 6 July 2023 at 12:06.

<sup>523</sup> **P-0955:** [REDACTED]

having ever asked the OTP for money.<sup>524</sup> When confronted with his lie, P-0955 explained that someone from the OTP called him and that during the phone call he mentioned that he was [REDACTED] and that they “*said they can help [...] financially*” before coming back to him to recant the offer.<sup>525</sup> P-0955 eventually took advantage of his appearance from the Court's Headquarters in The Hague to [REDACTED].<sup>526</sup> His decision to become a witness before the Court was thus primarily motivated by his own interests, and not by a candid and honest contribution to justice. This raises reasonable doubt as to the genuineness of his evidence, which may have been tailored for the sole purpose of suiting the OTP case, instead of seeking to establish the truth.

#### Section 4: [REDACTED]

173. At least four OTP witnesses are linked with a rebel movement.<sup>527</sup> This constitutes a bias that should be taken into consideration by the TC when assessing the overall credibility of these witnesses. As noted by the ICTY Trial Chamber in the *Tolimir* case: “[t]he testimony of persons involved in a bitter armed conflict is often coloured by experiences and attitudes arising from that conflict. [...] The Chamber is aware of the general tendency of witnesses associated with a party to a conflict to give testimony that supports its perceived interests”.<sup>528</sup> The apparent dedication of these witnesses to the rebel movement is thus a relevant factor that could impugn their objectivity and impact their credibility.

174. [REDACTED].<sup>529</sup> Despite his acquaintance with Lieutenant Hamdi [REDACTED],<sup>530</sup> it transpires from his evidence that he considered himself a “rebel”. [REDACTED] stated that the GoS attack on [REDACTED] resulted in, *inter alia*, the destruction of the village, pillaging, and murder.<sup>531</sup> [REDACTED] was attacked by surprise.<sup>532</sup> There was no defense in the town.<sup>533</sup> As a consequence, he went to the mountains “with a group of young men”, which included six bodyguards armed with Kalashnikovs.<sup>534</sup> [REDACTED] stated that they did not consider themselves rebels and were just trying to defend themselves.<sup>535</sup> [REDACTED], [REDACTED]

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<sup>524</sup> P-0955: [REDACTED]

<sup>525</sup> P-0955: [REDACTED]

<sup>526</sup> See Email from VWU on 28 July 2022 at 16:53.

<sup>527</sup> From at least April 2003 until at least April 2004, the two main rebel groups opposing the GoS Forces in Darfur were the Sudanese Liberation Movement/Army (“SLM/A”) and the Justice and Equality Movement (“JEM”). See [ICC-02/05-01/20-291-AnxA](#), Items 3; 4.

<sup>528</sup> *Tolimir* TJ, para. 37.

<sup>529</sup> P-0013: [DAR-OTP-0088-0129-R03](#), paras. 16-17; 53.

<sup>530</sup> P-0013: [DAR-OTP-0088-0129-R03](#), para. 24.

<sup>531</sup> P-0013: [DAR-OTP-0088-0129-R03](#), paras. 40-44, 46-48.

<sup>532</sup> P-0013: [DAR-OTP-0088-0129-R03](#), para. 32.

<sup>533</sup> P-0013: [DAR-OTP-0088-0129-R03](#), para. 32.

<sup>534</sup> P-0013: [DAR-OTP-0088-0129-R03](#), para. 34.

<sup>535</sup> P-0013: [DAR-OTP-0088-0129-R03](#), para. 34.

the “*Tora Bora*” came to Sindu from Jebel Mara, but were not successful in establishing a base.<sup>536</sup> The evidence establishes the exact opposite.<sup>537</sup> [REDACTED] further stated that sometime in December 2003, on the Wednesday following the Arawala and surroundings attack, 200 “young, strong men” including [REDACTED] and split up into groups.<sup>538</sup> [REDACTED].<sup>539</sup> [REDACTED].<sup>540</sup> The Defence contends that [REDACTED] was [REDACTED] rebel [REDACTED] and that this element should be taken into consideration in the assessment of the credibility of his evidence.

175. [REDACTED] stated that in November 2003, the SAF and the JJW attacked and burned several villages in the Um Jameina area.<sup>541</sup> His family decided to seek refuge [REDACTED],<sup>542</sup> where they remained hidden [REDACTED].<sup>543</sup> [REDACTED] stated that the community leaders [REDACTED],<sup>544</sup> asked for volunteers to be trained to form “*some sort of protection for the people in the mountains from Janjaweed attacks.*”<sup>545</sup> In January 2004,<sup>546</sup> [REDACTED] attempted to join the SLM [REDACTED],<sup>547</sup> but he was not accepted [REDACTED].<sup>548</sup> [REDACTED] was particularly motivated to join the rebellion [REDACTED].<sup>549</sup> His dedication to the rebel cause is a relevant element that questions the objectivity and credibility of his evidence.

176. [REDACTED].<sup>550</sup> He testified that he had “*no knowledge about what a weapon is like or what it’s made of. [He] never got interested in such thing in [his] life*”, never had weapons, nor could distinguish between the different types.<sup>551</sup> Later on, he asserted that he was able to differentiate a Kalashnikov from a JIM, a RPG, a Dushka, an Howin, a Rubai and that he is able to know the number of barrels of heavy machine-guns.<sup>552</sup> When asked how he learned to make such a distinction, [REDACTED] said that he learnt it from the GoS, as whenever they visited the area, in the course of “normal conversations,” they would talk about weapons.<sup>553</sup>

<sup>536</sup> P-0013: [DAR-OTP-0088-0129-R02](#), paras. 56-57, 60.

<sup>537</sup> See PART IV – Chapter 5 – Section 1 below.

<sup>538</sup> P-0013: [DAR-OTP-0088-0129-R03](#), para. 40.

<sup>539</sup> P-0013: [DAR-OTP-0088-0129-R03](#), para. 40.

<sup>540</sup> P-0013: [DAR-OTP-0088-0129-R03](#), para. 40.

<sup>541</sup> P-0584: [DAR-OTP-0200-1540-R02](#), para. 38.

<sup>542</sup> P-0584: [DAR-OTP-0200-1540-R02](#), para. 40.

<sup>543</sup> [REDACTED]

<sup>544</sup> P-0584: [REDACTED]

<sup>545</sup> P-0584: [DAR-OTP-0200-1540-R02](#), para. 65.

<sup>546</sup> P-0584: [DAR-OTP-0200-1540-R02](#), para. 65.

<sup>547</sup> P-0584: [DAR-OTP-0200-1540-R02](#), paras. 66-67.

<sup>548</sup> P-0584: T-092, p. 32, line 24-p. 33, line 1, p. 33, line 14-p. 34, line 5; [DAR-OTP-0200-1540](#), para. 70.

<sup>549</sup> P-0584: [DAR-OTP-0200-1540](#), para. 67.

<sup>550</sup> P-0903: [REDACTED]

<sup>551</sup> P-0903: T-033, p. 9, lines 11-21.

<sup>552</sup> P-0903: T-033, p. 11, lines 16-24.

<sup>553</sup> P-0903: T-033, p. 11, lines 20-24.

This explanation is not credible and the only reason why [REDACTED] had such an extensive knowledge about weapons is because he had been trained, most likely by rebels, on their use. [REDACTED] went to Sindu in March 2004 and pretended that he was not aware that Abd-al-Wahid Al-Nur and his troops were based there.<sup>554</sup> The Defence put to [REDACTED] that he was an active member of the rebellion by 2003,<sup>555</sup> to which the witness answered that he had nothing to do whatsoever with the rebellion, did not support it, nor knew anything about it.<sup>556</sup> This willingness to hide any kind of knowledge about the rebellion undermines the overall credibility of his evidence.

177. There are other major inconsistencies in [REDACTED] evidence. He pretended having computed lists of victims in 2015-2016,<sup>557</sup> but also admitted being illiterate.<sup>558</sup> He testified that he had been instructed in 2004 to go and clean the UNAMID airport<sup>559</sup> and that it is on that occasion that he discovered the dead bodies of those who had been executed in nearby *Khor Talaba*.<sup>560</sup> [REDACTED] testified that “UNAMID came a month or two after the mass killing”,<sup>561</sup> whereas it was established on 31 July 2007.<sup>562</sup> His assertion that he has been instructed to clean the UNAMID airport was thus an invention to explain why he allegedly saw the corpses. [REDACTED] must have heard that corpses were found in a location nearby the place where the UNAMID later on settled its airport and he made that anachronic invention to give more weight to his lie: the truth is that [REDACTED] never saw any corpses and that he has lied to the Court.

178. [REDACTED]<sup>563</sup> He admitted that he had [REDACTED] help the opposition.<sup>564</sup>

### **Chapter 3 – General Submissions on the Assessment of the Prosecution’s Documentary Evidence**

#### **Section 1: Video Recordings**

##### ***I- Video DAR-OTP-0216-0119: The “Surrendering Video”***

179. The OTP suggests that Mr Abd-Al-Rahman's journey to Central African Republic to surrender to the Court, coupled with the fact he introduced himself as *Ali Kushayb* at the

<sup>554</sup> **P-0903**: T-033, p. 20, line 23-p. 21, line 8.

<sup>555</sup> **P-0903**: T-033, p. 76, line 16-p. 77, line 7.

<sup>556</sup> **P-0903**: T-033, p. 77, lines 4-7.

<sup>557</sup> **P-0903**: T-033, p. 17, lines 9-24.

<sup>558</sup> **P-0903**: T-033, p. 20, lines 9-18.

<sup>559</sup> **P-0903**: T-032, p. 54, lines 7-23.

<sup>560</sup> **P-0903**: T-032, p. 53, lines 13-25; T-033, p. 52, lines 2-13.

<sup>561</sup> **P-0903**: T-033, p. 57, lines 16-19.

<sup>562</sup> **P-0903**: T-033, p. 56, lines 1-13.

<sup>563</sup> See **PART III – Chapter 2 – P-0931**.

<sup>564</sup> **P-0931**: [REDACTED]

beginning of a short video<sup>565</sup> (“the Surrendering Video”) sent to the OTP, serves as evidence that he is *Ali Kushayb*.<sup>566</sup>

180. The question of the evidentiary weight that the TC will attach to the video remains open. To that end, it is crucial to remember that the exclusive purpose for which the majority of the Appeals Chamber confirmed the admissibility of the video was the verification of Mr Abd-Al-Rahman's identity for the purpose of his surrender.<sup>567</sup> It is also essential to give proper consideration to the circumstances that prompted Mr Abd-Al-Rahman to make the video and send it to the OTP. Any reasonable analysis of these circumstances will lead to the only appropriate conclusion available to the TC, that is that no evidentiary weight can properly be attached to Mr Abd-Al-Rahman's statement in the video that he is *Ali Kushayb*.

181. The majority of the Appeals Chamber found that confirming the identity of Mr Abd-Al-Rahman did not fall under the scope of a “questioning” under Article 55(2) of the Statute. The Appeals Chamber specified that “*merely establishing the identity of that person does not constitute being “questioned” within the meaning of article 55(2) of the Statute, as that would ordinarily need to take place before the rights under that provision are administered.*”<sup>568</sup> Referring to a ruling by Pre-Trial Chamber III in the *Bemba Case*,<sup>569</sup> the Appeals Chamber concluded that “‘*evidence*’ obtained in the interview could potentially be excluded under article 69(7) of the Statute, i.e. evidence related to matters other than identity”.<sup>570</sup> On the basis of that ruling, the Appeals Chamber confirmed the admissibility of the Surrendering Video for the purpose of ascertaining the identity of Mr Abd-Al-Rahman, but under the caveat that anything that could amount to evidence of his guilt contained in that video should be excluded under Article 69(7) of the Statute as a result of the absence of Article 55(2) Notice. In this Case, where the nickname *Ali Kushayb* is challenged by the Defence and goes to the very heart of the litigation on his guilt or innocence, to such point that it forms the subject matter of the First Defence Line,<sup>571</sup> whether Mr Abd-Al-Rahman ever had the nickname *Ali Kushayb* is inseparably related to evidence of his guilt or innocence for the crimes charged. As such, any information contained in that video cannot be retained and used as evidence that Mr Abd-Al-Rahman ever had this nickname.

<sup>565</sup> [DAR-OTP-0216-0119](#), See also the English translation of the transcript at [DAR-OTP-0220-3015](#).

<sup>566</sup> [OTP Trial Brief](#), paras. 7-11.

<sup>567</sup> [ICC-02/05-01/20-982](#), paras. 4, 84, 89, 91-93, 96.

<sup>568</sup> [ICC-02/05-01/20-982](#), para. 92.

<sup>569</sup> [Bemba Decision on application for interim release](#), para. 45.

<sup>570</sup> [ICC-02/05-01/20-982](#), para. 93.

<sup>571</sup> See **PART VI – Chapter 1** below.

182. The OTP certainly acted negligently by not distinguishing between the identity of Mr Abd-Al-Rahman and the alias *Ali Kushayb*. By doing so, it took for granted and assumed that Mr Abd-Al-Rahman was *Ali Kushayb* in violation of the presumption of innocence he enjoys under Article 66(2) of the Statute.<sup>572</sup> The Senior Trial Attorney candidly admitted so during the trial.<sup>573</sup> Because the alias *Ali Kushayb* is a key element of the accusation, evidence of it could not be collected without prior Article 55(2) notice. The fact that this evidence was volunteered without prior Article 55(2) notice whereas it is directly related to the guilt of Mr Abd-Al-Rahman makes that it cannot be regarded as evidence of the alias and shall be excluded as evidence thereof pursuant to Article 69(7) of the Statute. This is the plain meaning and consequence of the Appeals Chamber's ruling OA12.

183. As raised during oral submissions,<sup>574</sup> the OTP also produced no records of conversations between **P-1049** and [REDACTED].<sup>575</sup> The OTP suggests that this is because no such recordings exist, even though it acknowledged that they should.<sup>576</sup> This is another instance of breach of the OTP's disclosure obligations towards the Defence.<sup>577</sup> The best evidence, therefore, of the communications between P-1049 and [REDACTED] comes from the testimony of P-1048 and P-1049. Their evidence demonstrates that the OTP possessed adequate proof of Mr Abd-Al-Rahman's identity as early as 27 December 2019.<sup>578</sup> However, P-1049 went on to encourage the making and sending of the video,<sup>579</sup> in order to (further) establish Mr Abd-Al-Rahman's identity. P-1049 had chased [REDACTED] on several occasions to provide this evidence.<sup>580</sup> As explained in the OTP's investigation notes,<sup>581</sup> the OTP continued to seek additional proof, ultimately leading to the creation of a video that did not offer new information beyond what was already available. The inability of the Defence to hear for itself exactly what was said between P-1049 and [REDACTED] is problematic. What is likely, however, is that P-1049 made it clear on several occasions that the OTP needed to be convinced that communication had been established with *Ali Kushayb*. Absent that conviction, matters could not move forward in the way Mr Abd-Al-Rahman had evidently hoped.

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<sup>572</sup> See **PART II – Chapter 3**.

<sup>573</sup> **P-0585**: T-102, p. 15, lines 22-25.

<sup>574</sup> Procedural Matters: T-109, p. 66, line 21-p. 67, line 6.

<sup>575</sup> [REDACTED].

<sup>576</sup> T-109, p. 67, lines 15-21.

<sup>577</sup> See **PART II – Chapter 3**.

<sup>578</sup> **P-1049**: T-108, p. 18, line 12-p. 19, line 9, **P-1048**: T-106, p. 53, line 8-p. 54, line 8.

<sup>579</sup> **P-1048**: T-106, p. 53, line 8-p. 54, line 8; **P-1049** : T-108, p. 53, lines 9-23.

<sup>580</sup> **P-1049**: T-108, p. 63 line 9-p. 64, line 17.

<sup>581</sup> [DAR-OTP-0215-7063-R01](#) (dated 7 December 2020); [DAR-OTP-0215-9698-R01](#) (dated 26 February 2021).

184. That requirement of the OTP may have relied on the same candid assumption that was admitted in Court,<sup>582</sup> without being necessarily moved by a Machiavellian intent to trap Mr Abd-Al-Rahman. The OTP was too candid to have such intent by that time. It was established from the evidence of **P-1048**<sup>583</sup> and **P-1049**<sup>584</sup> that the OTP habitually referred to their target as *Ali Kushayb*. P-1049 made it clear that he would have referred to Mr Abd-Al-Rahman as *Ali Kushayb* in his telephone calls and contacts with [REDACTED].<sup>585</sup> P-1048 gave evidence to the same effect, and even confirmed that he sees no reason why P-1049 would have referred to Mr Abd-Al-Rahman as anything other than *Kushayb* when contacting [REDACTED].<sup>586</sup> This significantly increases the likelihood that the intermediary and, by extension Mr Abd-Al-Rahman himself, would have been under the impression – rightly or wrongly – that the OTP expected Mr Abd-Al-Rahman to identify himself as *Ali Kushayb*. But the fact that OTP acted out of candour can have no bearing on Mr Abd-Al-Rahman’s fair trial rights: the video cannot be relied upon as evidence of his alias.

185. Subsequent to the aforementioned unrecorded conversations and the OTP’s encouragement to Mr Abd-Al-Rahman to produce a video as further proof of identification, [REDACTED] himself advised Mr Abd-Al-Rahman, through an unidentified individual, to introduce himself as *Ali Kushayb*.<sup>587</sup> The terms of that advice figures in a recording made by [REDACTED] directed to Abd-Al-Rahman: “... *we need him to...just create material for you...during the day, if he could create recorded material...if you managed to film him for two or three minutes...if he appears in recorded material saying, 'I'm ...' I mean, 'Ali Kushayb,' and so on and so forth...*”.<sup>588</sup> This advice clearly indicates that Mr Abd-Al-Rahman was expected to identify himself as *Ali Kushayb*.

186. The arrest warrant issued against Mr Abd-Al Rahman in April 2007 included both his legal name and what the OTP alleged to be his alias “*Ali Kushayb*”.<sup>589</sup> The nature and content of the arrest warrant was widely covered in the Sudanese media. The TC can safely conclude, therefore, that in December 2019 Mr Abd-Al-Rahman was in no doubt that the OTP considered him to also be known as *Ali Kushayb*.

<sup>582</sup> **P-0585**: T-102, p. 15, lines 22-25.

<sup>583</sup> **P-1048**: T-106, p. 47, line 9-p. 48, line 3.

<sup>584</sup> **P-1049**: T-108, p. 54 line 25-p. 55, line 14.

<sup>585</sup> **P-1048**: T-106, p. 47, line 9-p. 48, line 3.

<sup>586</sup> **P-1048**: T-106, p. 47, lines 15-21.

<sup>587</sup> **P-1049**: T-108, p. 60, lines 19-p. 61, line 10.

<sup>588</sup> [DAR-OTP-00000481](#).

<sup>589</sup> [ICC-02/05-01/20-18](#).

187. The background to the steps taken by Mr Abd-Al-Rahman to surrender himself to the custody of the ICC is also important to consider. The TC can infer that he had a strong desire and interest to establish his innocence of the terrible allegations that had been made against him in the arrest warrant. But there was in addition to this pull factor a significant and concurrent push factor.<sup>590</sup> **P-1049** confirmed that the Sudanese authorities had issued an arrest warrant against Mr Abd-Al-Rahman on 2 December 2019,<sup>591</sup> in his email,<sup>592</sup> **P-1048** writes that “*Kushayb is believed to be hiding or keeping a low profile for fear of being arrested...*”. The Trial Chamber can comfortably infer that his arrest by the Sudanese authorities is something that Mr Abd-Al-Rahman would likely consider undesirable and to be avoided. Being taken into ICC custody would save him from such a fate. He would therefore have had the strongest of incentives to tell the OTP investigators what they wanted to hear, or at least what he believed they wanted to hear, in order to maximise the chances that the OTP would take his overtures of surrender seriously. It is not surprising, in these circumstances, that Mr Abd-Al-Rahman identified himself by the name by which he understood the OTP knew him (albeit incorrectly).

188. In summary, the TC can safely infer that Mr Abd-Al Rahman operated under the belief that both the OTP and the wider public thought him to be *Ali Kushayb*. This is why he referred to himself as such when addressing the OTP in his video. But this should not be taken by the TC as proof that Mr Abd-Al-Rahman was and in fact knew himself to be *Ali Kushayb*.

189. It is important to recall that, at the earliest opportunity at the outset of his initial appearance before the Court on 15 June 2020, Mr Abd-Al Rahman set the record straight and stated that he was not *Ali Kushayb*.<sup>593</sup> By the date of his initial appearance, he was out of immediate danger of being arrested by the Sudanese authorities and could make the true position that he is not *Ali Kushayb* clear. This important context means that the TC should attach no weight to this video evidence as support for the contention that Mr Abd-Al-Rahman is and knows himself to be *Ali Kushayb*.

## ***II- Um-Sory and Teachers’ Videos***

190. The OTP relies on two video clips showing Mr Abd-Al-Rahman speaking in public. These video clips have come to be known as the Um-Sory Video<sup>594</sup> and the Teachers’ Video.<sup>595</sup> English

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<sup>590</sup> [DAR-OTP-0215-2766](#).

<sup>591</sup> **P-1049**: T-108, p. 45, line 23-p. 46, line 23.

<sup>592</sup> [DAR-OTP-00000837-R01](#), at 000003.

<sup>593</sup> Initial Appearance: T-001, p. 3, lines 19-21.

<sup>594</sup> Corrected version of the subtitled video: [DAR-OTP-00012474](#) (Original ERN: [DAR-OTP-00006452](#)).

<sup>595</sup> Subtitled video: [DAR-OTP-00000236](#).

translations of the transcripts of the Um-Sory Video<sup>596</sup> and Teachers' Video<sup>597</sup> have also been formally recognised as submitted.

191. Neither video dates back to 2003-2004. The OTP first disclosed the Um-Sory video to the Defence on 28 March 2023;<sup>598</sup> the metadata indicates a creation date of 29 September 2015. [REDACTED], who was present at the Um-Sory meeting, dated it to sometime between 2013-2015.<sup>599</sup> A slightly shorter version was sent to the OTP by **P-0643** in December 2019.<sup>600</sup>

192. The Teachers' Video appears to date back to 23 January 2020.<sup>601</sup> Indeed, [REDACTED] dated it to sometime after 2017-2018, after the fall of Omar Al-Bashir<sup>602</sup> (although Al-Bashir was in fact ousted in April 2019).

193. Given the evidence of **D-0001**,<sup>603</sup> **D-0003**,<sup>604</sup> **D-0005**,<sup>605</sup> **D-0008**,<sup>606</sup> and **D-0039**,<sup>607</sup> the Defence does not dispute that the speaker in both videos is Mr Abd-Al-Rahman.

194. The probative value of the videos as evidence incriminating Mr Abd-Al-Rahman and supportive of the OTP case is practically zero. In neither video is he introduced, or does he refer to himself, as *Ali Kushayb*. Towards the end of the Teachers' Video, an unidentified speaker in the crowd appears to exclaim, "*Long live, Ali Kushayb!*"<sup>608</sup> The Defence submits, however, that it would be wrong to attach any weight to this. If the video is from January 2020, this would be some 13 years after the issuance of the first (public) ICC warrant for Mr Abd-Al-Rahman's arrest. Defence witness testimony has established that word that Mr Abd-Al-Rahman was being investigated, or was wanted, by the ICC amounted to "big news" in Rahad-Al-Berdi,<sup>609</sup> even if other witnesses state that they only learned that he was wanted around 2020. The Defence submits that from 2007 onwards, depending on the extent to which a person in Darfur had access to the media, the population in Rahad-Al-Berdi increasingly came to hear that Mr Abd-al-Rahman was wanted by the Court. The Defence anticipates that this very much reflects the OTP's position also. But naturally enough, as more people became aware of the Court's interest in Mr Abd-Al-Rahman, the more the community would have become aware of the association between him and the name

<sup>596</sup> DAR-OTP-0001249-R01 (Original ERN: [DAR-OTP-0223-0525-R01](#)).

<sup>597</sup> [DAR-OTP-0220-3199](#).

<sup>598</sup> Original ERN: [DAR-OTP-0202-1377](#).

<sup>599</sup> [REDACTED]

<sup>600</sup> [REDACTED]

<sup>601</sup> See [ICC-02/05-01/20-95](#), [Annex 3](#); See also [DAR-OTP-0219-7105](#).

<sup>602</sup> [REDACTED]

<sup>603</sup> **D-0001**: T-155, p. 20, lines 4-13 (Teacher's Video), p. 24, lines 13-17 (Um-Sory Video).

<sup>604</sup> **D-0003**: T-156, p. 9, lines 14-16 (Um-Sory Video).

<sup>605</sup> **D-0005**: T-158, p. 74, lines 19-21 (Teachers' Video); p. 78, lines 1-3 (Um-Sory Video).

<sup>606</sup> **D-0008**: T-139, p. 83, lines 8-12.

<sup>607</sup> **D-0039**: T-159, p. 90, lines 11-14 (Um-Sory Video).

<sup>608</sup> [DAR-OTP-0220-3199](#), at 3202, line 51.

<sup>609</sup> See e.g. [REDACTED].

by which the Court invariably referred to him. Thus did he become increasingly, albeit involuntarily, linked to the nickname *Ali Kushayb*. That being the case, it is understandable that an excitable member of the crowd during the speech depicted in the Teacher's Video may have wanted to have shown his or her support of Mr Abd-Al-Rahman's robust view of young persons who are disrespectful of or even assault teachers in the town,<sup>610</sup> and to have wished long life to Mr Abd-Al-Rahman using the name with which, by that date, he had become – against his will and as a result of the OTP's actions – closely associated.

195. At first blush, and to the uninitiated reader, the words used by Mr Abd-Al-Rahman in the Teachers' Video are shocking: *"I'd have stabbed and killed any individual who mocked Rehed al-Birdi or denigrated the teacher... I'll grab him like that, tie him up..."*<sup>611</sup> But as virulent as the terminology is, it is important to read and understand it through the prism of his audience. [REDACTED] explained that the words were used out of the encouragement or enthusiasm for the security and stability of teachers.<sup>612</sup> [REDACTED] did not hesitate to bat away any notion that Mr Abd-Al-Rahman's words were surprising to him: *"I do not call this a threat, but this is more of a discipline to the children so they do not be bad with their [...] teachers."*<sup>613</sup> Otherwise *"I, the Bogeyman, will eat you !"*

196. It is submitted that full account should be given to the counterbalancing positive matters touched upon by Mr Abd-Al-Rahman in his speech, emphasising as he does the importance of respect for and importance of teachers and education in society.

197. Similarly, the Um-Sory Video contains violent language,<sup>614</sup> but its probative value as incriminating evidence is very low. This violent language was compellingly and eloquently explained [REDACTED]. When asked what he understood Mr Abd-Al-Rahman to mean when he used the "we'll spray them with blood" phrase,<sup>615</sup> [REDACTED] stated:

[...] He means any tribes, any tribes or any clans that are under the administration of the tribe, they would be under the protection of this tribe.

Q. And if protecting them meant that blood needed to be spilled, would that be acceptable or unacceptable?

A. This is just a way of talking. [...]

It's normal to use such words in the normal speech in the area. It's used -- this kind of speech is used.<sup>616</sup>[...]

Q. And then moving on [...] we heard Mr Abd-Al-Rahman boasting about, you know, using internationally banned weapons that you said simply just wasn't true.[...]

Q. [...] How is an audience going to understand in Darfur that kind of rhetoric?

A. The society knows this, knows this way of talking.

Q. Is [...] it to be taken rhetorically or is it to be taken literally?[...]

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<sup>610</sup> [REDACTED].

<sup>611</sup> [DAR-OTP-0220-3199](#), at 3202, lines 43-47.

<sup>612</sup> [REDACTED].

<sup>613</sup> [REDACTED].

<sup>614</sup> See e.g. [DAR-OTP-00012491-R01](#), at 0005, lines 89-90, at 0006, lines 115-124.

<sup>615</sup> [DAR-OTP-00012491-R01](#), at 0005, line 90.

<sup>616</sup> [REDACTED].

A. This is like a silent boasting, it's [...] he means that this is something that's not in place, it's just mere words that are not correct or not true.<sup>617</sup>

198. Furthermore, the Um-Sory Video provides a unique insight into Mr Abd-Al-Rahman's values and character. His speech is given to a friendly and supportive audience. He is demonstrably unguarded in his choice of words, and still exhorts the crowd to be united and reject racism.<sup>618</sup>

199. In sum, [REDACTED] put Mr Abd-Al-Rahman's words into the context that would be understood by his audience in Darfur:

He -- he said in his speech that nobody is excluded from the unity, and he mentioned all the tribes, the tribes that cannot defend themselves. He mentioned all the tribes. So all the tribes are protected by us and, if there is a danger, we will use the sword to protect ourselves. So if -- so we are all going to be protected by the sword, so he means that there is love and solidarity between the people and there's coexistence between people.<sup>619</sup>

200. The Um-Sory and Teachers' Videos in no way support the OTP's case against Mr Abd-Al-Rahman. To the contrary, he corroborates by his own words the character evidence received from many of the Defence witnesses who told the TC that Mr Abd-Al-Rahman was a respected and respectable man who did not discriminate between the peoples of different tribes and who valued inter-tribal unity.

## Section 2 : Fabrication of Evidence

201. It has been established through the proceedings that evidence tampering has been an issue in relation to documents concerning Darfur. Reasonable doubts have been raised as to the veracity of certain documentary evidence in the Case. Hence, the potentiality of fabricated evidence and how these may influence the course of these proceedings need to be taken into consideration. Two witnesses have provided insights into this process, i.e. **P-0547**<sup>620</sup> and **D-0022** (formerly P-0137).<sup>621</sup>

202. **D-0022** and **P-0547**'s accounts demonstrate that there has been some real issue of evidence fabrication in the Case of Mr Abd-Al-Rahman. There are various active actors who have a vested interest in lying to the OTP and providing false statements. This is another factor that shall be considered by the TC when assessing the entire evidence. Discrepancies between

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<sup>617</sup> [REDACTED].

<sup>618</sup> [DAR-OTP-00012491-R01](#), at 0004, lines 40-41, lines 48-49, lines 82-84, lines 171-174: First of all, there should be no tribalism, regionalism or racism. All of us are so tightly bonded to one another that you'd need a sword to divide us. [...] Everyone is united and acts in a brotherly fashion towards one another. [...] Right, dear brothers, this is why, dear brothers, that's why, to all the people sitting here, I've got this one piece of advice for you: Everyone should be equal. Any clan, like our brother Abakr 'Uthman said earlier, "Any clan that is located here must live ..." [...] All people stand united, and all people have the same round faces, all people: brown, black, anything. Some are darker than me. All of those people are so tightly bonded to one another that you'd need a sword to divide us.

<sup>619</sup> [REDACTED].

<sup>620</sup> **PART III- Chapter 2.**

<sup>621</sup> **D-0022** (former P-0137): [DAR-OTP-0220-2836-R01](#), at 2772, lines 144-157, at 2841, lines 151-152, 2842, lines 181-190; [DAR-OTP-0203-0362](#), at 0363.

a given piece of evidence of a fact and the clear, unchallenged context within which it occurred shall be resolved in favour of the latter.

### Section 3: Facebook Evidence

#### *I - The Prosecution has not Authenticated or Identified the Source of the Facebook Items, Namely the Owners of the Accounts*

203. Authenticating a Facebook account implies linking a social media account to a physical and identifiable person whom can be designated as the account owner and user. “Real accounts” as referred to in the Expert Report correspond to accounts whose online identity match a physical one.<sup>622</sup> This is to be distinguished from the authenticity of the Facebook page screenshots *themselves* which have been formally submitted into evidence. This was clarified when **D-0037** expressed concerns regarding the veracity of the metadata of the screenshots presented to him by the OTP.<sup>623</sup> As rightly put by the Presiding Judge, “*there is no dispute that these [screenshots] are proper downloads from the particular accounts.*”<sup>624</sup> The issue rather lies with the source, the creator, of the Facebook content as illustrated in the screenshots, which has, quite simply, not been identified. Any information emanating from a Facebook profile page needs to be authenticated to be used as evidence because it does not prove that a person appearing on a page owns said-page or authored any of its contents.

204. The OTP has never sought cooperation from Facebook (“Meta”) to attempt to authenticate any of the Facebook accounts allegedly belonging to the sons of Mr Abd-Al-Rahman despite them being publicly available well before the start of the OTP case in April 2022. Absent the social media platform’s direct assistance, findings on the authenticity of a Facebook account are not conclusive.<sup>625</sup> Without such data, one can merely identify signs from openly available material which can *suggest* if the Facebook account is either real or fake.<sup>626</sup> The OTP cannot be exempt from going through the necessary hurdles to obtain authentication, namely, requesting assistance from Facebook’s mother company, Meta.<sup>627</sup> Such due diligence was followed for instance in the *Yekatom & Ngaïssona* case, where Meta provided the OTP with, *inter alia*, confidential messages between Facebook accounts and the IP addresses of physical monitors logging into the specific accounts.<sup>628</sup> The OTP in the *Yekatom & Ngaïssona*

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<sup>622</sup> [DAR-D31-00000320](#), p. 15.

<sup>623</sup> **D-0037**: T-152, p. 67, lines 7-20.

<sup>624</sup> **D-0037**: T-152, p. 90, line 5-p. 91, line 15.

<sup>625</sup> [DAR-D31-00000320](#), p. 15.

<sup>626</sup> [DAR-D31-00000320](#), p. 15.

<sup>627</sup> See previous submissions: **D-0011**: T-138, p. 38, line 22-p. 39, line 4.

<sup>628</sup> See e.g: [Yekatom and Ngaïssona Prosecution’s Seventh Application for Submission of Facebook Evidence from the Bar Table](#) paras. 9-10.

case further made submissions on the basis of the information obtained, underscoring its arguments “as to why, in its view, certain identified individuals were the ‘effective users’ of specified accounts”.<sup>629</sup> The OTP has never even begun to do so in the case at hand.

205. The OTP further abstained from calling any witnesses, who would be able to provide a first-hand authentication of the accounts and, if authenticated, explain why these refer to the name *Kushayb*. The need for authentication of the accounts is reinforced by the fact that *two* accounts were identified by the OTP as belonging to *one* son, Salah. Although the OTP had hoped that the cross-examination of **D-0011** would lead to the authentication of Salah’s Facebook account, the witness testified instead that he was not Facebook friend with Salah and that “[*Salah*] *had enemies and they could create this profile and publish it. [...] [and that] this happens all over Facebook.*”<sup>630</sup>

206. Prior to the start of **D-0037**’s cross-examination, the OTP clearly stated that their intention was “*not at all to ask this expert to draw any conclusions about the attribution of these Facebook accounts.*”<sup>631</sup> Instead, the OTP asked the Defence expert to comment each of the Facebook Items, with the hope of creating a sufficient indicia of reliability for each account.

207. In substance, **D-0037** testified that, when investigating whether a Facebook account is more or less likely to be used by a particular person,<sup>632</sup> the following indicators are examples of what would be generally relevant for his assessment: the contacts/Facebook friends of the investigated account;<sup>633</sup> the language of the Facebook account;<sup>634</sup> the user-inputted information such as the school or place of residence;<sup>635</sup> the photos posted on the account and the identity of the people pictured.<sup>636</sup>

208. After identifying these general indicators, the OTP attempted to compel **D-0037** to apply them to the contentious Facebook accounts.<sup>637</sup> This exercise was truly contradictory in nature: **D-0037** was asked to identify general indicators of authenticity, then to apply these indicators to accounts he had never seen before all whilst *not* being asked to effectively provide the

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<sup>629</sup> [Yekatom And Ngaïssona Decision On The Seventh, Tenth And Seventeenth Prosecution Submission Requests From The Bar Table \(Facebook Evidence\)](#), para. 11.

<sup>630</sup> **D-0011**: T-138, p. 92, lines 3-6.

<sup>631</sup> **D-0037**: T-152, p. 34, lines 11-13.

<sup>632</sup> **D-0037**: T-152, p. 51, lines 8-11.

<sup>633</sup> **D-0037**: T-152, p. 52, lines 17-25.

<sup>634</sup> N.B: the expert mentioned that this indicator is very vague and that he considered other indicators to be better. See **D-0037**: T-152, p. 53, lines 1-6.

<sup>635</sup> **D-0037**: T-152, p. 53, lines 7-12.

<sup>636</sup> **D-0037**: T-152, p. 53, line 13-p. 54, line 7.

<sup>637</sup> **D-0037**: T-152, p. 66, line 15- p. 78, line 16 ; p. 91, line 23-p. 105, line 14.

Chamber with conclusions.<sup>638</sup> The OTP cannot simultaneously elicit general and specific evidence from the expert. The result of this exercise was therefore a rushed and vague evaluation of evidence which the expert expressly mentioned as requiring an actual investigation.<sup>639</sup> In D-0037's own words: "*there are so many factors that you cannot rule out that if I were investigating such a case as part of legal proceedings, I would carry out quite an extensive investigation in order to be able to rule out as many of these factors as possible.*"<sup>640</sup> Where the OTP could have sought more conclusive evidence from D-0037 by providing him with the material in advance, they once more opted out of doing so and contented themselves with a pure commentary of the items. This proves, as previously highlighted, that the only use the OTP found for this expert is an introduction of the Facebook items "through the back door".<sup>641</sup>

209. Not only was the expert lacking background information, time and resources to conduct a more conclusive investigation as to the *likelihood* of the Facebook Items belonging to the sons, but he was also provided with the OTP's own assessment of the links between the contentious accounts.<sup>642</sup> This resulted in a necessary contamination of the Expert's "investigation" in-court as the expert was fed the OTP's theory on the links between the contentious Facebook accounts without ever making these links himself. As **D-0037** was not asked nor ever expected to provide conclusions following his cross-examination, all that is essentially left for the TC's consideration are general indicators that an investigator like D-0037 would take into account when attempting to evaluate if a Facebook account is authentic or not.

210. Consequently, the owners of the contentious Facebook accounts have not been identified by the OTP through any means. As PTC II rightly considered in *Yekatom & Ngaïssona*, "*Facebook entries must be assigned limited weight in the absence of evidence led as to the identity of the person using the account.*"<sup>643</sup> The only reasonable conclusion in the present case is that such evidence has not been presented.

## ***II - The Prejudice of Admitting the Facebook Items Outweighs their Probative Value***

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<sup>638</sup> **D-0037**: T-152, p. 61, lines 11-15: See the Prosecution informing **D-0037** that "that the intention is not to ask you to attempt to attribute that account to any person".

<sup>639</sup> See e.g. **D-0037**: T-152, p. 73, lines 7-15; p. 75, lines 13-20; p. 95, lines 12-14; p. 104, line 25-p. 105, line 3.

<sup>640</sup> **D-0037**: T-152, p. 56, lines 21-24.

<sup>641</sup> **D-0037**: T-152, p. 35, lines 1-3.

<sup>642</sup> **D-0037**: T-152, p. 93, lines 1-8; See also [DAR-OTP-00011313](#).

<sup>643</sup> [Yekatom and Ngaïssona Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona](#), paras. 202, 211.

211. Since the owners of the contentious Facebook accounts cannot be conclusively identified, the Facebook Items' probative value is significantly reduced, if not inexistent. It cannot prove that Mr Abd-Al-Rahman was called *Ali Kushayb* in 2003-2004.<sup>644</sup>

212. Also, the prejudice of the admission of these items is significant. Indeed, the OTP intends to assert that the sons of Mr Abd-Al-Rahman have referred to themselves with the sobriquet "*Kushayb*" for a significant amount of time. In relation to Salah for instance, the OTP has stated that: "*he has used the name "Ali Kushayb" on a Facebook page in 2016.*"<sup>645</sup> It follows that the OTP will then make the point that it is likely that Mr Abd-Al-Rahman is *Ali Kushayb*, as his sons have been using the same nickname on social media platforms in recent years. This argument pertains to a core issue in dispute since the beginning of the proceedings. Therefore, the prejudice of admitting the Facebook items is considerable.

213. No evidence has been adduced which would allow the TC to conclude, beyond reasonable doubt, that the Facebook accounts indeed belong to the sons of Mr Abd-Al-Rahman. The prejudice of the admission of the Facebook Items largely outweighs their marginal probative value. As held in the *Katanga* case, "[i]f the Chamber finds that the prejudice is disproportionate to the probative value of the evidence, it must be excluded."<sup>646</sup> Hence, these documents should not be admitted.

### ***III - In the Alternative, the Facebook Items have no Probative Value***

214. The mention of "*Kushayb*" in the names of two of the Facebook accounts cannot be dated. Similarly, all third-party comments on the Facebook accounts mentioning "*Kushayb*" post-date ICC proceedings against Mr Abd-Al-Rahman, therefore failing to establish a linkage between the two names at the time of the charges that was not the result of the Court's own linkage between the two since February 2007.

215. Two of the contentious accounts allegedly belonging to, respectively, Salah Abd-Al-Rahman and Anwar Abd-Al-Rahman, contain, in their name, the mention of "*Kushayb*." However, the link between the sons and the nickname "*Kushayb*" on the Facebook accounts cannot be temporally established. As concluded by the Expert, name changes on Facebook accounts do not appear as an activity on a Facebook timeline and have a retroactive effect on prior posts.<sup>647</sup> A dated track record of name changes on the contentious accounts *could* exist in

<sup>644</sup> See **D-0037**: T-152, p. 42, line 24-p. 44, line 2 ; See section 2 below.

<sup>645</sup> **D-0011**: T-138, p. 33, line 3 (Conf).

<sup>646</sup> [Katanga Decision on the Bar Table Motion of the Defence of Germain Katanga](#), para. 15.

<sup>647</sup> In sum, the Expert found that (i) changing a Facebook account's name has a retroactive effect on previous posts and activities displayed on this account's timeline and; (ii) when a person changes an account's name on Facebook, this is not announced or displayed on the account's timeline. See: **D-0037**: T-152, p. 18, line 2-p.26, line 5, p. 48,

Meta's records,<sup>648</sup> but yet again, the OTP has not sought assistance to obtain such critical information.

216. In the absence of such evidence, the TC simply cannot be certain that the alleged sons' Facebook accounts contained the mention of "*Kushayb*" prior to the OTP's linkage between Mr Abd-Al-Rahman and *Ali Kushayb* made public for the first time on 27 February 2007.<sup>649</sup> Even if their ownership of the accounts was established - which is far from the case, - it is evident that the sons included mentions of Kushayb to their Facebook names after the linkage, for reasons only known to themselves. A possible reason for such a name change would be the – albeit negative – notoriety that Mr Abd-Al-Rahman acquired posterior to his identification as an ICC suspect and a desire from the sons to benefit from it through social media attention.<sup>650</sup> This is supported by the fact that, seven days after Mr Abd-Al-Rahman's surrender, an update was posted on the Yaser Ali Shabshabuni account indicating that the later was the "son of Kushayb."<sup>651</sup>

217. Out of the six comments which included the mention of "Kushayb", three were posted in 2020,<sup>652</sup> two in 2022<sup>653</sup> and only one in 2019,<sup>654</sup> pre-dating the surrender of Mr Abd-Al-Rahman into ICC custody on 9 June 2020, but not the linkage of his name with *Ali Kushayb* on 27 February 2007.<sup>655</sup> The "*Kushayb*" comment on Salah's alleged Facebook account,<sup>656</sup> whilst it was posted before Mr Abd-Al-Rahman's surrender, is still posterior to the association of Abd-Al-Rahman with the alias "*Ali Kushayb*." The reasons behind this comment are unknown: the only absolute is that it was posted after the two names had already widely been associated.<sup>657</sup>

218. Overall, the OTP has not brought proof beyond reasonable doubt of the authenticity and veracity of the Facebook Items. The Facebook items are not authenticated and the prejudice of their admission outweighs their extremely low probative value. As recalled by TC II in Katanga, "[u]nder no circumstances can the Chamber admit unauthenticated documentary evidence

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line 23-p. 49, line 22; For the procedure followed by the Expert to reach this conclusion see: T-152, p. 15, line 10-p. 26, line 16; p. 48, line 21-p. 49, line 23; [DAR-D31-00000325](#).

<sup>648</sup> **D-0037**: T-152, p. 24, lines 10-16.

<sup>649</sup> [DAR-D31-00000010](#), ICC-OTP-20070227-206-En.

<sup>650</sup> See for eg.: [DAR-OTP-0215-2766](#), [DAR-OTP-0215-2700](#) (ARB), [DAR-OTP-0215-2702](#) (ENG); [DAR-OTP-0138-0305](#).

<sup>651</sup> On the Yaser Ali Shabshabuni account: [DAR-OTP-00006106](#), shown at **D-0037**: T-152, p. 103, lines 8-12.

<sup>652</sup> On the Salah Bush Kushayb account: [DAR-OTP-00005985](#) shown at **D-0037**: T-152, p. 71, lines 3-8; [DAR-OTP-00011310](#), shown at **D-0037**: T-152, p. 69, lines 3-10; On the Anwar Ali Kushayb account: [DAR-OTP-00006007](#), shown at **D-0037**: T-152, p. 76, lines 10-18.

<sup>653</sup> On the Anwar Ali Kushayb account: [DAR-OTP-00006031](#), shown at **D-0037**: T-152, p. 76, lines 19-25; On the Yaser Ali Shabshabuni account: [DAR-OTP-00011312](#), shown at **D-0037**: T-152, p. 102, lines 19-25.

<sup>654</sup> On the Salah' Ali Muhammad' Ali account, [DAR-OTP-00005992](#), shown at **D-0037**: T-152, p. 94, lines 8-12.

<sup>655</sup> [DAR-D31-00000010](#); ICC-02/05-56.

<sup>656</sup> [DAR-OTP-00005992](#), shown at **D-0037**: T-152, p. 94, lines 8-12

<sup>657</sup> See e.g: [DAR-OTP-0138-0305](#).

since, by definition, such evidence has no probative value.”<sup>658</sup> In light of the above, the TC should therefore exclude the Facebook items from evidence, or, *a minima*, disregard these unauthenticated screenshots when asserting if Mr Abd-Al-Rahman was *Ali Kushayb* at the time of the charged events.

#### Section 4: Documents Allegedly Signed by Mr Abd-Al-Rahman

##### *I – The 2006 Interview Note (DAR-OTP-0218-0231)*

219. The 2006 Interview Note (“2006 Interview Note”) is one of 30 handwritten and duplicate typed documents provided to the OTP by the Sudanese Attorney General’s Office; this has come to be known as the Darfur Investigation File. Details of what was provided are found in an OTP Investigation Report of a meeting with the Attorney General’s Office on 11 December 2022.<sup>659</sup>

220. Of the 30 separate documents in the Darfur Investigation File, 6 have been recognised as formally submitted, and relate to the interviews of three individuals: [REDACTED],<sup>660</sup> [REDACTED],<sup>661</sup> and (purportedly) Mr Abd-Al-Rahman.

221. The OTP did not call any witness who attended the interview, or who can even indirectly attest that Mr Abd-Al-Rahman was ever interviewed by the GoS.<sup>662</sup> Most strikingly the OTP chose not to call the purported interviewer, notwithstanding that he is identified in the document as [REDACTED];<sup>663</sup> [REDACTED] confirmed that he was a former colleague of his.<sup>664</sup> The Defence would submit that, since [REDACTED] spoke of him in the present tense, he is presumably still alive and had been available to be called by the OTP.<sup>665</sup>

222. There is no evidence in the 2006 Interview Note that the purported interviewee ever referred to himself as *Ali Kushayb*. In the preface to the Note, it is the interviewer himself who writes the nickname *Kushayb* after the name Ali Muhammad Ali Abd-Al-Rahman. Similarly, in the biographical details that follow, the reader cannot be sure that it is not the interviewer who wrote “*Ali Kushayb*” off his own bat as opposed to transcribing verbatim an answer from the interviewee.

223. The Defence submits that there are serious doubts about the authenticity of the 2006 Interview Note. The mere fact that the document originated from the GoS is, of course, no indicia

<sup>658</sup> [Katanga Decision on the Prosecutor’s Bar Table Motions](#), paras. 21-22.

<sup>659</sup> [DAR-OTP-00000013](#).

<sup>660</sup> [REDACTED]

<sup>661</sup> [REDACTED]

<sup>662</sup> [ICC-02/05-01/20-871-Conf-AnxA](#), p. 60: “[...] the appropriate way of adducing this document as evidence would have been through the calling of a witness who participated in this interview. This would have provided the Chamber and the Parties with the context of this document and provided an opportunity for its authentication (see *Katanga* [ICC-01/04-01/07-2635](#), para. 12). [...]”

<sup>663</sup> [REDACTED]

<sup>664</sup> [REDACTED]

<sup>665</sup> [REDACTED]

of its authenticity. To the contrary, it indicates that the GoS took concrete steps to follow up its initial inducement of the investigation and prosecution of Mr Abd-Al-Rahman.<sup>666</sup>

224. Firstly, the age of the interviewee is recorded as being 40 years old; in 2006, Mr Abd-Al-Rahman was 57 years old, having been born in 1949.<sup>667</sup> Secondly, the 2006 Interview Note is replete with other information that is known to be inconsistent with Mr Abd-Al-Rahman's personal background. For example, on the first page of the Note, the interviewee purports to state that he was an *emir* of the *fursan* and in charge of all the *fursan* "operating under the command of the People's Defence. This was in 1992." However, the OTP does not allege that Mr Abd-Al-Rahman was ever even a member, let alone a leader, of the PDF.

225. Further, the purported interviewee stated that Mukjar police station was attacked [by the rebels] early in the morning on 27 August 2003 and that this resulted in the deaths of 10 or 11 policemen. This is inaccurate. The uncontested fact of the matter is that Mukjar was attacked first on 2 July 2003,<sup>668</sup> and then again on 8 August 2003, from around 4am, the rebels attacked Mukjar military base in the primary school.<sup>669</sup> This attack resulted in deaths on the side of the GoS.<sup>670</sup> Had the purported interviewee genuinely been *Ali Kushayb*, a *fursan* leader involved in armed operations against the rebels in a GoS's sponsored counterinsurgency, he would have had accurate information about the attacks in Mukjar. The fact that he was unable to even provide the right date for the rebel attacks strongly indicates that the 2006 Interview Note is not genuine.

226. There are also striking differences in the form and formatting of the 2006 Interview Note when compared to the notes of [REDACTED] and [REDACTED]. This is indicative of, at the very least, the real possibility that it is a false document fabricated by the GoS for the purpose of its transmission to the OTP, tucked in with a number of other transcripts of interviews, to show that the Sudanese authorities are willing and able genuinely to investigate (and prosecute)<sup>671</sup> crimes in Darfur:

- (i) In writing the preamble to the 2006 Interview Note, whoever the author was has taken great pains to make it clear that the questioning is being undertaken in accordance with the Deputy Minister of Justice. In addition, the preamble introduces the interviewee and the subject matter of the questioning. No such preamble is contained in the notes of interview of either [REDACTED] and [REDACTED];

<sup>666</sup> See **PART II – Chapter 3 – Section 4 – I.**

<sup>667</sup> [ICC-02/05-01/20-504-AnxA](#), item 1.

<sup>668</sup> **P-0012**: T-045, p. 75, line 16-p. 76, line 6; **P-0720**: T-043, p. 37, line 5-p. 38, line 22.

<sup>669</sup> **P-0878**: T-077, p. 53, lines 13-20 (Conf).

<sup>670</sup> **P-0878**: T-077, p. 55, lines 8-13; **P-0012**: T-045, p.76, lines 7-21.

<sup>671</sup> See Art.17(1).

- (ii) The purported interviewer of the 2006 Interview Note appears to have scribbled his initials in the margin on the last page of each day's notes, and has bothered to indicate his name and rank ([REDACTED]) at the end of the first day's interview. There is no name or signature of the interviewers in the notes of interview of either [REDACTED] and [REDACTED];
- (iii) The type of paper used in, and layout of, the 2006 Interview Note is quite different to the paper used in the notes of interview of both [REDACTED] and [REDACTED]. The 2006 Interview Note is written on paper that has ruled margins on both left and right sides. There is no ruled top margin or titled columns. The notes of interview of [REDACTED] has a ruled margin on the left only, but a ruled top margin. The two columns are headed "Investigation Report" and "Signature".

227. But what is even more striking is the comparison of the age of *Ali Kushayb* mentioned in the document with the evaluation of the age of *Ali Kushayb* that [REDACTED] had made 5 months earlier, in June 2006, [REDACTED]: he estimated that the man he saw on that day was in his late 30s.<sup>672</sup> A small discrepancy of one, or two, or even five years, is plausible. But a discrepancy of 17 years is too significant to be capable of being explained away by a lapse of memory. The man [REDACTED] saw on that day in June 2006 was also, like the interviewee in the document and unlike Mr Abd-Al-Rahman, in the PDF. These two similarities thus provide a basis for suggesting that the man seen by [REDACTED] and the man who was purportedly interviewed in November 2006, if such an interview took place, is one and the same person but is not Mr Abd-Al-Rahman.

## ***II – The 2003 Laissez-Passer***

228. The Defence notes that the OTP did not rely on the 2003 *Laissez-passer* ("2003 Laissez-passer") in any of its pre-trial filings – DCC, PCB, PTB – and only submitted it into evidence through witness **P-0922**. P-0922 was unable to read whose signature it was as he could only see a scribble and not letters.<sup>673</sup> It will be recalled that P-0922 testified, in a confused and confusing narrative, that on another document,<sup>674</sup> which was a proof of the food items that were stolen by the JJW, "*Ali Kushayb* put his signature on the list".<sup>675</sup> In cross-examination he accepted that it did not bear any signature.<sup>676</sup> When shown for comparison the November 2006 Interview, P-0922, whom the Defence does not suggest is a handwriting expert, conceded that the signatures look different.<sup>677</sup>

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<sup>672</sup> [REDACTED]

<sup>673</sup> **P-0922**: T-039, p. 66, line 21-p. 67, line 17.

<sup>674</sup> [DAR-OTP-0220-3922-R01](#).

<sup>675</sup> **P-0922**: T-039, p. 21, line 17-p. 22, line 4.

<sup>676</sup> **P-0922**: T-039, p. 67, line 25-p. 68, line 17.

<sup>677</sup> **P-0922**: T-039, p. 67, lines 18-20.

229. **P-0913** also commented on the 2003 *Laissez-passer*.<sup>678</sup> According to him, [REDACTED].<sup>679</sup> The OTP did not call [REDACTED].<sup>680</sup> Instead, the OTP relied on two indirect witnesses: one saying that he is unable to read a signature on the 2003 *Laissez-passer*,<sup>681</sup> the other saying that [REDACTED].<sup>682</sup>

### *III – Handwriting Expert Cannot Authenticate the Signatures on the Documents*

230. Doubts about the November 2006 interview and the 2003 *Laissez-passer* may well have been allayed had the OTP been able to prove to a reasonably high degree of certainty that the signatures were those of Mr Abd-Al-Rahman. However, the OTP has failed to do so. The best evidence of the authenticity of the signatures came from the Defence expert witness, Fiona Marsh.<sup>683</sup>

231. In conducting her analysis, Ms Marsh first compared the two Questioned Signatures (“Questioned Signatures”) with each other to determine whether they were written by the same person.<sup>684</sup> When first asked to compare the two Questioned Signatures, Ms Marsh testified that there was “*literally nothing in common between these two signatures*”.<sup>685</sup> She added that it was clear that they were two different signatures and that there was “*nothing to suggest they were written by the same person*” even if it would not be possible to totally exclude that.<sup>686</sup>

232. Ms Marsh was then asked to compare the signature on the 2006 Interview Note with Mr Abd-Al-Rahman’s more recent and known signatures. In her report and testimony, Ms Marsh considered the result of her examination to be inconclusive.<sup>687</sup> She observed that the Questioned Signature bears a cursory resemblance to the known signatures and offered three alternative possibilities for her findings, without being able to determine which was the most likely:<sup>688</sup> either the similarities are purely coincidental and the Questioned Signature was written by someone other than Mr Abd-Al-Rahman; either the Questioned Signature is a poor copy of Mr Abd-Al-Rahman’s signature by someone familiar with it; or Mr Abd-Al-Rahman wrote the Questioned Signature but

<sup>678</sup> **P-0913**: [DAR-OTP-0215-6802-R02](#).

<sup>679</sup> **P-0913**: [DAR-OTP-0218-0021-R04](#), paras. 129-130.

<sup>680</sup> **P-0913**: [DAR-OTP-0218-0021-R04](#), paras. 126-130.

<sup>681</sup> **P-0922**: T-039, p. 66, line 21-p. 67, line 17.

<sup>682</sup> **P-0913**: [DAR-OTP-0218-0021-R04](#), para. 128.

<sup>683</sup> See [List of Experts before the ICC as of 17 January 2024](#); **D-0027**: T-137, p. 3, line 21-p. 4, line 5.

<sup>684</sup> **D-0027**: T-137, p. 16, line 22-p. 17, line 4; [DAR-D31-00000158](#), at 0003.

<sup>685</sup> **D-0027**: T-137, p. 19, line 6-p. 20, line 3.

<sup>686</sup> **D-0027**: T-137, p. 19, line 6-p. 20, line 13.

<sup>687</sup> **D-0027**: T-137, p. 30, lines 2-24; [DAR-D31-00000158](#), at 0007.

<sup>688</sup> **D-0027**: T-137, p. 30, lines 2-24; [DAR-D31-00000158](#), at 0006-0007.

it lies outside the range of natural variation found in the limited sample of known signatures that she has examined.<sup>689</sup>

233. Ms Marsh was unable to determine with any degree of certainty whether or not Mr Abd-Al-Rahman signed the November 2006 signature with his own hand.<sup>690</sup> It is submitted, therefore, that even if it is not impossible Mr Abd-Al-Rahman signed the 2006 Interview Note, the OTP has fallen far short of proving beyond reasonable doubt that the signature is his. The OTP has failed to prove to even a reasonably high degree of certainty that the signature of the purported interviewee was that of Mr Abd-Al-Rahman; the doubts about the authenticity of the 2006 Interview Note have not been allayed. Consequently, the TC cannot rely on this document as evidence supporting the OTP's case that Mr Abd-Al-Rahman is *Ali Kushayb*.

234. Ms Marsh was also instructed by the Defence to analyse the Questioned Signature on the 2003 *Laissez-passer*.<sup>691</sup> She compared this signature with the Abd-Al-Rahman reference signatures. She noted that there were several obvious significant differences in letter construction and shape between them.<sup>692</sup> Her conclusion was clear: "there is no similarity between [the 2003 *Laissez-passer* signature] and the reference signatures" and that "there is no evidence that the questioned signature on the Laissez-passer document was written by [Mr] Abd-Al-Rahman".<sup>693</sup>

235. The Defence submits that there is reasonable doubt that the Questioned Signatures were written by Mr Abd-Al-Rahman. Neither document is reliable and therefore neither has probative value. Trial Chamber II in *Katanga* recalled that "[u]nder no circumstances can the Chamber admit unauthenticated documentary evidence since, by definition, such evidence has no probative value."<sup>694</sup> If, however, the TC decides to admit the documents, for the reasons set out above, no weight should be attached to them.

## PART IV – GENERAL CONTEXT OF THE ARMED CONFLICT

### Chapter 1 – Darfur's Long History of Ongoing Armed Violence

236. Joint Expert Witness P-1042 summarized Darfur's long history of warfare at the very beginning of the trial. **P-1042** dedicates an entire chapter of his report to "The Organization of Civil Wars in Sudan since 1983"<sup>695</sup> and another section on "Darfur's Early Wars 1987-99".<sup>696</sup> The use of the plural "wars" and the long time-frames suffice to show that warfare has formed

<sup>689</sup> **D-0027**: T-137, p. 30, lines 2-18; [DAR-D31-00000158](#), at 0006-0007.

<sup>690</sup> **D-0027**: T-137, p. 30, lines 2-24; [DAR-D31-00000158](#), at 0007.

<sup>691</sup> **D-0027**: [DAR-D31-00000158](#), at 0004; T-137, p. 14, lines 8-13.

<sup>692</sup> **D-0027**: [DAR-D31-00000158](#), at 0005.

<sup>693</sup> **D-0027**: [DAR-D31-00000158](#), at 0005.

<sup>694</sup> [Katanga Decision on the Prosecutor's Bar Table Motions](#), paras. 21-22.

<sup>695</sup> **P-1042**: [DAR-OTP-0220-1623](#), paras. 75-94.

<sup>696</sup> **P-1042**: [DAR-OTP-0220-1623](#), paras. 103-105.

part of Darfur's history for many decades. Causes are many. Among the internal factors, P-1042 identified the 1994 administrative reform which divided Darfur into three States<sup>697</sup> and weakened the prominent Fur tribe by making it a minority in Northern and Southern Darfur and a short majority in Western Darfur;<sup>698</sup> a collapse in administration and public services; and inter-tribal tensions over land<sup>699</sup> between, on the one hand, tribes enjoying a territory, or *dar*, including the Fur, Masalit<sup>700</sup>, Zaghawa,<sup>701</sup> Southern Rizeigat, Habbaniya, Beni Halba and Ta'aisha,<sup>702</sup> and, on the other hand, those with no *dar*, especially Arab tribes,<sup>703</sup> like the Northern Rizeigat, Mahariya, Awlad Zeid, Awlad Nyba, Beni Halba, Khuzam, Salamat, Gimir, Tama<sup>704</sup> and Nawaiba.<sup>705</sup> The Arab tribes with no *dar* sought to gain lands over the former in order to be granted a *dar* for their population. The ongoing warfare in Darfur described by P-1042 was confirmed by other witnesses.<sup>706</sup>

237. The result of this long history of ongoing warfare is a region where small arms were widespread and in great number.<sup>707</sup> Many males in Darfur have experienced warfare in one way or another. From the early 1990s, "all Sudanese citizens over the age of 16 and resident in the Sudan were required to attend training by the PDF", "although front line combat in the PDF was voluntary, this began to be heavily promoted in the mosques, the education system, and through the media as the duty of all virtuous Muslims".<sup>708</sup> In the years 2003-2004, the PDF was estimated to be around 20,000 active forces and 90,000 reservists for Sudan.<sup>709</sup> Darfur was not short of men with military experience, including from South Sudan, and elsewhere. These were fully-trained candidates for recruitment for both sides of the 2003-2004 conflict. **P-1042** confirmed that, at the beginning of the insurgency, rebel leaders emerged by making contact with tribal leaders, *Ogada*, of the Fur self-defence groups that had been formed at the time of the 1987-1989 war.<sup>710</sup> **D-0036** identified the pre-existing PDF and Border Guards forces as the main component of the counter-insurgency forces.<sup>711</sup> P-1042 further describes the release of

<sup>697</sup> **P-1042**: [DAR-OTP-0220-1623](#), paras. 106-109.

<sup>698</sup> **P-1042**: [DAR-OTP-0220-1623](#), para. 108.

<sup>699</sup> **P-1042**: [DAR-OTP-0220-1623](#), paras. 101-103.

<sup>700</sup> **P-1042**: [DAR-OTP-0220-1623](#), para. 55.

<sup>701</sup> **P-1042**: [DAR-OTP-0220-1623](#), para. 65.

<sup>702</sup> **P-1042**: [DAR-OTP-0220-1623](#), para. 65; T-027, p. 47, line 25-p. 48, line 5.

<sup>703</sup> **P-1042**: [DAR-OTP-0220-1623](#), paras. 66-67; T-027, p. 48, lines 16-21.

<sup>704</sup> [REDACTED]

<sup>705</sup> [REDACTED]

<sup>706</sup> See e.g. **P-0020**: [DAR-OTP-0095-0002-R02](#), paras. 11-33; **D-0036**: [DAR-D31-00000312](#), paras. 45-51.

<sup>707</sup> **D-0036**: [DAR-D31-00000312](#)-0001, para. 46.

<sup>708</sup> **D-0036**: [DAR-OTP-0158-0570](#), p. 18.

<sup>709</sup> **D-0036**: [DAR-OTP-0158-0570](#), p. 22, Box 1, Figure 1.

<sup>710</sup> **P-1042**: [DAR-OTP-0220-1623](#), para. 114.

<sup>711</sup> **D-0036**: [DAR-D31-00000312](#)-0001, para. 9.

convicted criminals from prison to put them in command of militia units.<sup>712</sup> Musa Hilal was one of them.<sup>713</sup>

## Chapter 2 – Human Rights and International Humanitarian Law in Sudan

### Section 1 – Sudan’s Overall Disregard of Human Rights Standards

238. **P-0020** and **P-0120** testified about the general situation regarding the absence of domestic implementation and non-compliance with HR standards in Sudan. [REDACTED]. The Defence’s reliance on their evidence of the HR context in Sudan implies no admission as to the reliability of other aspects of their evidence, in particular in relation to the alleged acts and conducts of Mr Abd-Al-Rahman. Their evidence about this aspect was corroborated by **D-0016** and **D-0023**. [REDACTED] testified about the routine use of torture, arbitrary arrests and extrajudicial executions by the NISS.

239. **P-0020** is [REDACTED]. [REDACTED].<sup>714</sup> There was no compliance with HR under the regime of President Al-Bashir.<sup>715</sup> At least until 2004, P-0020 P-0020 reported the existence of numerous cases of arbitrary arrests, extrajudicial detention, and the use of torture against political detainees.<sup>716</sup> He reports the existence of a common practice of execution without trial,<sup>717</sup> commonly used against any person suspected of being a rebel or supporting the rebellion,<sup>718</sup> of recruiting for the rebellion,<sup>719</sup> of financing the rebellion,<sup>720</sup> of providing intelligence to the rebellion,<sup>721</sup> of hiding members of the rebellion,<sup>722</sup> of providing logistical support, such as the provision of food or cooking for the rebellion,<sup>723</sup> of singing songs to encourage the rebel fighters,<sup>724</sup> or of providing health care to wounded rebels.<sup>725</sup> At no point in his testimony did P-0020 make any distinction between men and women, children or the elderly, as subjects of suspicion.

240. **P-0120** [REDACTED].<sup>726</sup> He confirms Sudan’s non-compliance with HR, in particular fair trial rights, under the rule of President Al-Bashir.<sup>727</sup> He confirmed routine resort to arbitrary

<sup>712</sup> **P-1042**: [DAR-OTP-0220-1623](#), para. 129.

<sup>713</sup> **P-1042**: [DAR-OTP-0220-1623](#), paras. 127-128.

<sup>714</sup> **P-0020**: [REDACTED]

<sup>715</sup> **P-0020**: T-042, p. 17, lines 7-10.

<sup>716</sup> **P-0020**: T-042, p. 17, lines 11-18, p. 18, lines 15-24.

<sup>717</sup> **P-0020**: T-042, p. 18, line 25-p. 19, line 6.

<sup>718</sup> **P-0020**: T-042, p. 19, lines 7-9.

<sup>719</sup> **P-0020**: T-042, p. 19, lines 10-18.

<sup>720</sup> **P-0020**: T-042, p. 19, lines 19-23.

<sup>721</sup> **P-0020**: T-042, p. 19, line 24-p. 20, line 1.

<sup>722</sup> **P-0020**: T-042, p. 20, lines 2-3.

<sup>723</sup> **P-0020**: T-042, p. 20, lines 4-7.

<sup>724</sup> **P-0020**: T-042, p. 20, lines 8-18.

<sup>725</sup> **P-0020**: T-042, p. 20, lines 19-25.

<sup>726</sup> **P-0120**: [REDACTED]

<sup>727</sup> **P-0120**: T-036, p. 62, lines 7-18.

arrests and detention,<sup>728</sup> torture,<sup>729</sup> and extrajudicial executions<sup>730</sup> during the 2003-2004 conflict.<sup>731</sup> According to P-0120, such HR violations were not as common prior to 2003.<sup>732</sup> There was no awareness of HR issues, [REDACTED].<sup>733</sup> These violations became common in 2003. Before that, these practices were circumvented to the national security apparatus in relation to political and economic crimes, including rebellion.<sup>734</sup> According to P-0120, the 2003 deterioration of the HR situation was essentially due to the impact of the declaration of the state of emergency. Even though Sudan had ratified many international instruments governing HR, “*the laws have not been amended to reflect these instruments*”,<sup>735</sup> i.e. these were not implemented within the Sudanese domestic legal system. Although P-0120’s description of the HR situation in Sudan prior to 2003 is less detailed than **P-0020**’s, they essentially confirm each other.

241. P-0120’s remarks regarding the absence of domestic implementation of HR treaties in Sudan’s domestic legal system is confirmed by the expert evidence of **D-0023**. On the basis of his expert analysis of Sudanese Constitution of 1998<sup>736</sup> - which applied in 2003-2004<sup>737</sup> - **D-0023** confirmed that the applicability of international law, be it international treaties, customary international law or the resolutions of the UNSC, in particular Resolution 1593, were all contingent on the domestic implementation of their provisions within the Sudanese domestic legal system, which was missing.<sup>738</sup> These international provisions, in particular those related to HR and IHL, started being implemented within Sudan’s domestic legal system after the 2003-2004 period,<sup>739</sup> in particular by the 2005 Interim National Constitution of the Republic of Sudan<sup>740</sup> and by the 2007 Sudanese Armed Forces Act.<sup>741</sup>

242. **D-0016**, [REDACTED],<sup>742</sup> confirmed **D-0023**’s expert analysis with respect to the domestic implementation of HR treaties in the Charter of Rights in the 2005 Interim

<sup>728</sup> **P-0120**: T-036, p. 63, lines 14-16.

<sup>729</sup> **P-0120**: T-036, p. 63, lines 17-19.

<sup>730</sup> **P-0120**: T-036, p. 63, lines 20-24.

<sup>731</sup> **P-0120**: T-036, p. 64, lines 16-18.

<sup>732</sup> **P-0120**: T-036, p. 65, lines 5-9.

<sup>733</sup> **P-0120**: T-036, p. 64, lines 8-11.

<sup>734</sup> **P-0120**: T-036, p. 65, line 7-p. 66, line 4.

<sup>735</sup> **P-0120**: T-036, p. 68, line 20-p. 69, line 6.

<sup>736</sup> [DAR-OTP-0139-0003](#).

<sup>737</sup> **D-0023**: [DAR-D31-00005970](#), para. 11.

<sup>738</sup> **D-0023**: [DAR-D31-00005970](#), paras. 73-74, 77-78 (Treaties), 83-84 (Customary Law), 85 (UNSC Resolutions), 95-96 (UNSC Resolution 1593); T-136, p. 40, lines 6-14, 22-p. 41, line 3 (Treaties), p. 45, line 24-p. 46, line 10.

<sup>739</sup> **D-0023**: [DAR-D31-00005970](#), paras. 79-82.

<sup>740</sup> [DAR-OTP-0136-0605](#).

<sup>741</sup> [DAR-D31-0003-0074](#).

<sup>742</sup> **D-0016**: [REDACTED]

Constitution<sup>743</sup> and the domestic implementation of customary international law, especially customary IHL,<sup>744</sup> and the definition of international crimes<sup>745</sup> in the 2007 Armed Forces Act. D-0016 further confirmed the practice of extrajudicial executions in Sudan.<sup>746</sup> According to D-0016, Sudan's general non-compliance with HR standards prior to the 2005 and 2007 reforms was exacerbated by the declaration of the state emergency.<sup>747</sup>

243. Other witnesses testified about the routine violation of HR standards in the daily functioning of Sudan's security forces. **P-0547**, [REDACTED], confirmed that the laws regulating [REDACTED] authorized it to arrest and detain people without time limitation and without need to seek approval of a judge.<sup>748</sup> Torture was also largely resorted to, sometimes to death, with no accountability for the perpetrators. He also confirmed that in war, as in Darfur, military intelligence – which was in charge instead of the NISS – “used to detain people, get information from them and sometimes execute them without going back to the justice system.”<sup>749</sup> Outside the war context, the NISS could resort to life-threatening methods.. **P-0547** reported two incidents [REDACTED].<sup>750</sup>

244. **P-0769**, a former [REDACTED], admitted having received a basic training in “interrogation” methods, i.e. the use of electric shocks, sleep deprivation, drenching in cold water, and beating of the soles of the interviewee's feet as options for interrogation..<sup>751</sup> As part of the same basic [REDACTED] training, he also admitted being taught chaos strategies, in particular the targeting and elimination of community leaders.<sup>752</sup>

## **Section 2 – International Humanitarian Law in Sudan**

### ***I – Absence of Domestic Implementation in 2003 Sudanese Law***

245. At the outset, the OTP, who has the burden of proof, did not provide any evidence of the domestic implementation of IHL in the Sudanese domestic legal system. **P-0120's**, **D-0016's** and **D-0023's** evidence to the contrary was not challenged by the OTP.

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<sup>743</sup> **D-0016**: [REDACTED]

<sup>744</sup> **D-0016**: [REDACTED]

<sup>745</sup> **D-0016**: [REDACTED]

<sup>746</sup> **D-0016**: [REDACTED]

<sup>747</sup> **D-0016**: [REDACTED]

<sup>748</sup> **P-0547**: [REDACTED]

<sup>749</sup> **P-0547**: [REDACTED]

<sup>750</sup> **P-0547** : [REDACTED]

<sup>751</sup> **P-0769** : [REDACTED]

<sup>752</sup> **P-0769** : [REDACTED]

246. What **P-0120**,<sup>753</sup> **D-0016**<sup>754</sup> and **D-0023**<sup>755</sup> said about the non-implementation of HR treaties in 2003-2004 also applies to IHL. D-0023 also confirmed that international treaties were not directly applicable in Sudan's domestic system under the Constitution of 1998.<sup>756</sup> The same applied to Customary IHL, which had no existence in Sudan domestic legal system in the absence of a body of national law implementing it.<sup>757</sup> The Prosecution confronted D-0023 with an abstract from Sudanese Regulation of Asylum Act 1974,<sup>758</sup> which provides in its Article 7 a priority to the provisions of treaties regulating asylum in the application of that Act. D-0023 commented it as an interesting exception confined to Asylum Law.<sup>759</sup> The Prosecution adduced no further evidence of direct implementation of other IHL treaties or principles in Sudan domestic law.

247. [REDACTED]. But such petition of principle has no effect on the reality of the non-implementation of IHL into the Sudanese domestic system before 2005. Common Articles 47/48/127/144 to the four Geneva Conventions further require their dissemination and their inclusion in programmes of military instruction. The evidence on record, [REDACTED] is that IHL training did not start before 2000 (See **III**. below).

## ***II – Absence of Definition of International Crimes in 2003 Sudanese Law***

248. **P-0120** was clear that “*the Sudanese Criminal Code does not include war crimes and [crimes] against humanity and mass killings, or genocide*”.<sup>760</sup> The absence of specific provision in Sudanese criminal law was, together with the other impediments of amnesty, immunity, and unwillingness to prosecute, an obstacle to the prosecution of international crimes in Sudan.<sup>761</sup>

249. **D-0023** clarified that the Special Criminal Court on Events in Darfur<sup>762</sup> had no jurisdiction to prosecute international crimes because their definition did not exist in Sudan's domestic legal system at that time.<sup>763</sup> When the Presiding Judge asked if the mention of IHL in that Order was not enough to provide jurisdiction for international crimes, D-0023 clarified that the general reference to IHL fell short of providing a clear legal basis for Sudanese judges to exercise jurisdiction over international crimes, which remained undefined in Sudan domestic

<sup>753</sup> **P-0120**: T-036, p. 68, line 20-p. 69, line 6.

<sup>754</sup> **D-0016**: [REDACTED]

<sup>755</sup> **D-0023**: T-136, p. 46, lines 5-16.

<sup>756</sup> **D-0023**: [DAR-D31-00005970](#), para. 78; T-136, p. 40, lines 5-14, p. 40, line 22-p. 41, line 13.

<sup>757</sup> **D-0023**: [DAR-D31-00005970](#), para. 84; T-136, p. 45, line 24-p. 46, line 16.

<sup>758</sup> [DAR-OTP-00007037](#).

<sup>759</sup> **D-0023**: T-142, p. 45, line 14-p. 47, line 23.

<sup>760</sup> **P-0120**: [REDACTED]

<sup>761</sup> **P-0120**: [REDACTED]

<sup>762</sup> [DAR-OTP-0066-0470](#) (Arabic original), [DAR-OTP-00006622](#) (English partial translation).

<sup>763</sup> **D-0023**: T-143, p. 11, line 5-p. 12, line 13.

system. D-0023 concluded that “*there are a lot of missing practical elements which would enable [the Sudanese judges] to do so*”.<sup>764</sup> D-0023 further observed that the definition of criminal offences was a legislative power, whereas the Special Criminal Court on Events in Darfur was established by an Executive Order, which had no authority to extend jurisdiction to crimes not defined under Sudanese law.<sup>765</sup>

250. [REDACTED] confirmed that the definition of international crimes was incorporated in the 2007 Armed Forces Act, specifically its Articles 153 to 163.<sup>766</sup> Until then, there was no specific provision in Sudanese law and the prosecution of these acts had to rely on generic offences under the Criminal Act.<sup>767</sup> According to [REDACTED], the entry into force of the 2007 Armed Forces Act had a significant impact on raising awareness about the prohibition of these crimes<sup>768</sup> and on their prosecution, by preventing their pardon or amnesty<sup>769</sup> and the excuse of military necessity,<sup>770</sup> which P-0120 had identified as regular impediments to prosecution. [REDACTED] further explained that the introduction of the definition of international crimes in the 2007 Armed Forces Act also clarified the notion of unlawful order, i.e. an order to commit an international crime could no longer be considered lawful and had to be disobeyed, which was not the case before 2007.<sup>771</sup> The Prosecution did not challenge this evidence in cross-examination.

### ***III – Absence of Military Training on International Humanitarian Law***

251. **P-0131** is a former [REDACTED].<sup>772</sup> The Defence’s reliance on his evidence in this limited regard amounts to no admission as to the reliability of other aspects of his evidence. P-0131 testified that the soldiers who participated in the attack on Kodoom and Bindisi had received no training in IHL and were generally uneducated.<sup>773</sup> P-0131 testified about having received some training in IHL himself<sup>774</sup> and about the existence of training which was more or less comprehensive depending on the rank of the trainee,<sup>775</sup> but he provided no indication as to the time frame he was referring to. He mentioned the existence of a booklet that was delivered

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<sup>764</sup> **D-0023**: T-143, p. 12, line 14-p. 13, line 18.

<sup>765</sup> **D-0023**: T-143, p. 13, line 21-p. 14, line 3.

<sup>766</sup> [REDACTED]

<sup>767</sup> [REDACTED]

<sup>768</sup> [REDACTED]

<sup>769</sup> [REDACTED]

<sup>770</sup> [REDACTED]

<sup>771</sup> [REDACTED]

<sup>772</sup> [REDACTED]

<sup>773</sup> **P-0131**: [REDACTED]

<sup>774</sup> **P-0131**: [REDACTED]

<sup>775</sup> **P-0131**: [REDACTED]

to those who had completed their IHL training. P-0131 indicated that attendance of IHL training was mentioned in the trainee's record of graduation which was sent to the deputy head of the relevant training academy and kept for five years prior to being discarded.<sup>776</sup>

252. The information about the delivery of a booklet is a relevant indicator to assess the time period **P-0131** must have been talking about. During his cross-examination, [REDACTED] commented that the booklet on the Law of Armed Conflict dated to 2000.<sup>777</sup> It was the former training curriculum. This booklet indeed provided for three levels of training including a first level of "non-commissioned officers and soldiers."<sup>778</sup> [REDACTED] further clarified that this booklet was delivered to every trainee at military school and military college.<sup>779</sup> The training and booklet in IHL P-0131 was referring must have been from 2000 and started being distributed from that date to military personnel of the relevant ranks upon their completion of military college. Those military or paramilitary personnel trained in Darfur camps were generally uneducated and did not receive such training in IHL..<sup>780</sup> In any event, this significantly postdates Mr Abd-Al-Rahman's employment and training in the SAF.

253. **P-0547** testified that, with the exception of officers sent on mission abroad, neither NISS officers, nor military, nor police officers received any training in IHL.<sup>781</sup>

254. [REDACTED] remembered that the first time he saw any manual for IHL training of Sudanese military personnel was sometime in 1999 or 2000. The manual was older, but [REDACTED] had never come across it<sup>782</sup> [REDACTED].<sup>783</sup> [REDACTED].<sup>784</sup> Around 2004, the manual was updated and widely disseminated within the armed forces, at military colleges, military schools and training centres, to all ranks and categories of military personnel.<sup>785</sup> Then in 2007, training in IHL became compulsory for all military personnel at all ranks under Articles 7(1)(c) and 192(1)(b) of the new Sudanese Armed Forces Act.<sup>786</sup> These provisions had no equivalent in the previous 1986 People's Armed Forces Act.<sup>787</sup> [REDACTED].<sup>788</sup> [REDACTED]. It was not challenged by the Prosecution.

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<sup>776</sup> **P-0131**: [REDACTED]

<sup>777</sup> [DAR-OTP-0107-0638](#) (Arabic); [DAR-OTP-0153-0959](#) (English).

<sup>778</sup> [REDACTED]

<sup>779</sup> [REDACTED]

<sup>780</sup> **P-0131**: [REDACTED]

<sup>781</sup> **P-0547**: [REDACTED]

<sup>782</sup> [REDACTED]

<sup>783</sup> [REDACTED]

<sup>784</sup> [REDACTED]

<sup>785</sup> [REDACTED]

<sup>786</sup> [REDACTED]

<sup>787</sup> [REDACTED]

<sup>788</sup> [REDACTED]

255. As a result, until the early 2000s, the only military personnel who may have received some form of training in IHL were those deployed in combat operations<sup>789</sup> or abroad.<sup>790</sup> Such training remained exceptional and limited to some attendants at military schools or military colleges,<sup>791</sup> essentially officers. On the other hand, most military and paramilitary personnel trained in camps were generally uneducated and received no such training.<sup>792</sup> Mr Abd-Al-Rahman, of course, never deployed abroad. What is now the independent South Sudan was part of Sudan until July 2011.

#### *IV – Positive Obligations to Violate International Humanitarian Law*

##### *A - Ghanima*

256. A first mention of the word “*Ghanima*” was made at paragraph 57 of the written statement of **P-0757**. P-0757, [REDACTED] heard a speech allegedly delivered by Ahmad Harun to soldiers in front of Mukjar Police Station around mid-August 2003. In his speech, Harun declared that all assets and belongings of the Fur people were *Ghanima* for the soldiers, which he understood as meaning more or less their reward.<sup>793</sup>

257. [REDACTED] defined *Ghanima* as everything, including physical properties, vehicles, weapons, anything that can be collected in the camps and places of the enemy.<sup>794</sup> Under Article 53 of the 1986 People’s Armed Forces Act,<sup>795</sup> failure to protect what had been looted was considered an offence.<sup>796</sup> Under Article 151 of the 2007 Armed Forces Act,<sup>797</sup> it is the appropriation of *Ghanima* for private benefit, or *Ghulul*, which became an offence.<sup>798</sup> However, under both acts, *Ghanima*, i.e. pillaging, for the benefit of the armed forces, was considered legal.<sup>799</sup> In the above context of non-implementation of IHL principles, in particular the principles of distinction between combatants and non-combatants and protection of civilians and civilian property, pillaging villages fell under *Ghanima* and may thus be considered legal as long as these villages had been declared positions of the enemy by military commanders with authority.

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<sup>789</sup> [REDACTED]

<sup>790</sup> **P-0547**: [REDACTED]

<sup>791</sup> [REDACTED]

<sup>792</sup> **P-0131**: [REDACTED]

<sup>793</sup> **P-0757**: [DAR-OTP-0211-0003-R02](#), para. 57.

<sup>794</sup> [REDACTED]

<sup>795</sup> [REDACTED]

<sup>796</sup> [REDACTED]

<sup>797</sup> [REDACTED]

<sup>798</sup> [REDACTED]

<sup>799</sup> [REDACTED]

*B – Absence of Definition of Unlawful Order*

258. **P-0120** testified that the PDF and the Border Guards, which he described as forming the core of the Arab militias or JJW,<sup>800</sup> were subject to the 1986 People’s Armed Forces Act.<sup>801</sup> This Act punishes by death “any refusal to obey orders”,<sup>802</sup> but when confronted with this provision during cross-examination, P-0120 refused to make any comment thereon.<sup>803</sup>

259. **P-0883** testified that soldiers were under an obligation to obey orders they received, even when perceived as unlawful<sup>804</sup> or face the death penalty.<sup>805</sup> The Defence’s reliance on his evidence of the obligation to obey orders in the SAF implies no admission as to the reliability of other aspects of his evidence. According to P-0883, “*If the order is unlawful, the soldier must obey. But he can complain to a higher entity*”<sup>806</sup> and “*it is possible to make a complaint later on, but the order has to be executed immediately*”.<sup>807</sup> This formed part of the regular military training provided to SAF soldiers that P-0883 also received.<sup>808</sup>

260. **P-0954**, [REDACTED],<sup>809</sup> provided evidence about the obligation to obey orders and the way it was implemented in PDF field operations, even against those in the position of *Emir*, i.e. *Mujahideen* or *Janjaweed*<sup>810</sup> leaders placed under the command of the head of operations of the PDF.<sup>811</sup> “*It is not the practice for the Emir to refuse an assignment or to not perform in the battlefield according to the plan. If it occurs, which I never heard about it, it will be considered disobedience for orders and the consequence of such acts will be either prosecuted in the battlefield or executed. Morale of the troops needs to be maintained high.*”<sup>812</sup> P-0954’s written statement was admitted into evidence pursuant to Rule 68(2)(c). There was thus no opportunity to ask him to explain in court what he meant by “prosecuted in the battlefield”. It seems unlikely that this allowed for appearance before a military court and the protection of fair trial rights, though it may be an instance of prosecution performed by a field leader, as described by **P-0020**.<sup>813</sup> The other option, “or executed” leaves no room for doubt. Just like suspected rebels, members of the PDF, even those bearing the title of *Emir*, may thus face

<sup>800</sup> **P-0120**: T-036, p. 54, line 21-p. 55, line 14.

<sup>801</sup> **P-0120**: T-037, p. 75, lines 20-23.

<sup>802</sup> [DAR-OTP-00006136](#), Article 48(c).

<sup>803</sup> **P-0120**: T-037, p. 75, line 24-p. 75, line 6.

<sup>804</sup> **P-0883**: T-073, p. 19, lines 7-17.

<sup>805</sup> **P-0883**: T-073, p. 15, line 15-p. 16, line 2.

<sup>806</sup> **P-0883**: T-073, p. 15, lines 22-23.

<sup>807</sup> **P-0883**: T-073, p. 19, lines 10-11.

<sup>808</sup> **P-0883**: T-073, p. 16, lines 8-13.

<sup>809</sup> **P-0954**: [DAR-OTP-0221-0571-R01](#), paras. 11-13.

<sup>810</sup> See **P-0954**: [DAR-OTP-0221-0571-R01](#), para. 24-25.

<sup>811</sup> **P-0954**: [DAR-OTP-0221-0571-R01](#), para. 26.

<sup>812</sup> **P-0954**: [DAR-OTP-0221-0571-R01](#), para. 43.

<sup>813</sup> **P-0020**: T-042, p. 21, line 15-p. 22, line 13.

execution in the event they disobey orders during operations. P-0954 makes no distinction between unlawful and lawful orders.

261. [REDACTED] testified that the first definition of “lawful order” was *directly* introduced in Article 3 of the 2007 Armed Forces Act.<sup>814</sup> With that new definition, an order to commit a violation of IHL criminalised under Articles 153 to 163 of the 2007 Armed Forces Act became unlawful.<sup>815</sup> Under the previous 1986 Act, a mention of “lawful order” did exist,<sup>816</sup> but was not defined..<sup>817</sup> In the absence of a definition in the 1986 Act, “lawful order” had to be understood as an order issued by an officer with authority<sup>818</sup> to perform a duty “in accordance with the Armed Forces Act, as well as other laws or acts and the Constitution,”<sup>819</sup> which did not define international crimes until 2007. The only other provision of the 1986 Act that may provide an understanding of what a lawful order is was the text of the oath of allegiance provided in Article 28, made by members of the SAF upon their appointment. It did not apply to other police or paramilitary forces. It refers to the notion of an order “that is not offensive unto God”.<sup>820</sup> It left the burden of determining whether an order was lawful or not, as “offensive unto God” or not, to each individual.<sup>821</sup> They may benefit from the advice of a military legal adviser in that assessment if available, although military legal advisers did not accompany the troops in operations to potentially provide such advice.<sup>822</sup> [REDACTED] those disobeying orders risked the death penalty under Article 48(c) of the 1986 Armed Forces Act.<sup>823</sup>

### *C – Impact of the Doctrine of Military Necessity*

262. The confusing situation that prevailed in relation to the definition of unlawful order was made even more complex as a result of the possible application of the doctrine of military necessity. [REDACTED] is the only witness who mentioned that notion, based on his direct experience as Head of Sudan Military Justice.<sup>824</sup> [REDACTED] confirmed that it was used as a pretext for violating IHL.<sup>825</sup> Under the 1986 People’s Armed Forces Act, and in the absence of definitions of international crimes, the doctrine of military necessity did not prevent justification of violations of IHL. According to [REDACTED], one of the goals of introducing

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<sup>814</sup> [REDACTED]

<sup>815</sup> [REDACTED]

<sup>816</sup> [DAR-OTP-00006136](#), Article 60.

<sup>817</sup> [REDACTED]

<sup>818</sup> [REDACTED]

<sup>819</sup> [REDACTED]

<sup>820</sup> [REDACTED]

<sup>821</sup> [REDACTED]

<sup>822</sup> [REDACTED]

<sup>823</sup> [REDACTED]

<sup>824</sup> [REDACTED]

<sup>825</sup> [REDACTED]

a definition of international crimes in the 2007 Armed Forces Act was to reduce the impact of that doctrine [REDACTED].<sup>826</sup> Reliance on this factor to justify violations of IHL makes the assessment of obligations and lawfulness of orders by uneducated, untrained, unsensitised members of the armed forces and security forces even more difficult, if not impossible. Even assuming that a private would perceive the unlawful nature of an order, he would have had no means of assessing whether it was justified by military necessity.

### Section 3 – Deceptive Reliance on Islam

263. The logic of relying on the wording “offensive unto God” as a criterion for the definition of unlawful order also applied to all aspects and principles of IHL which, in the absence of domestic implementation, were enshrined in the principles of Islam and *Shari’a* law. Such reliance was deceptive. The principles of IHL and the principles of Islam are not the same. The evidence on record mentions two notable incompatibilities between IHL and reliance on Islamic Law: the practice of *Hiraba* (**I**) and the *Allahu Akbar* approach to warfare (**II**).

#### *I – The practice of Hiraba*

264. **P-0547** defined *Al-Hiraba* as an Islamic concept coming from *Shari’a* Law and enshrined in the Sudanese Constitution.<sup>827</sup> He did not indicate the provision of the Constitution. P-0547 specified that the application of *Hiraba* was limited to paramilitary forces though, because it was forbidden for the armed forces to use it.<sup>828</sup> P-0547 mentioned an example of Harun resorting to *Hiraba* to encourage paramilitary forces in South Kordofan, which led to the commission of atrocities.<sup>829</sup>

265. **P-0131** testified that, [REDACTED],<sup>830</sup> he heard a speech delivered by Harun to the SAF soldiers present there<sup>831</sup> where Harun allegedly said was that “the money or assets of the Fur are a booty to you”.<sup>832</sup> P-0131 commented that these words constituted *Hiraba*, but that Harun did not use that word because the audience was not uneducated and would not have understood.<sup>833</sup> According to P-0131, as a representative of the Government of Sudan, Harun thus invited SAF soldiers to resort to *Hiraba* against the Fur population of Darfur. According to [REDACTED], *Hiraba* constitutes the offence of armed robbery under Article 167 of the 1991 Sudanese Criminal Act.<sup>834</sup> Unlike P-0547, [REDACTED] made no distinction between

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<sup>826</sup> [REDACTED]

<sup>827</sup> [REDACTED]

<sup>828</sup> [REDACTED]

<sup>829</sup> [REDACTED]

<sup>830</sup> [REDACTED]

<sup>831</sup> [REDACTED]

<sup>832</sup> [REDACTED]

<sup>833</sup> [REDACTED]

<sup>834</sup> DAR-OTP-0021-0296: Sudan Criminal Act, 1991, Article 167; [REDACTED].

*Hiraba* committed by SAF soldiers or performed by paramilitary militia. In both cases, *Hiraba* was a criminal offence according to D-0016 [REDACTED].

266. Whatever its legality **P-0547** and **P-0131** testified that a representative of the Government of Sudan, Harun, resorted to *Hiraba* and invited paramilitary troops or the SAF to engage in it. Their evidence is relevant to assess the capacity of Sudanese uneducated soldiers or militiamen with no training in IHL to perceive and understand the unlawfulness of *Hiraba* and all acts underlying it or the order to commit it in the context of an attack launched upon instruction from Sudanese authorities, especially if, as alleged by P-0547, *Hiraba* is permitted under the *Shari'a* Law.

## ***II – The Allahu Akbar Approach to Warfare***

267. Several witnesses testified hearing that the perpetrators of the crimes described in the charges were singing or shouting “Allahu Akbar” while committing these or in close relation to their commission. **P-0877** testified that, on 2 March 2004, he heard soldiers returning from the execution sites close to Mukjar in vehicles and singing “Allahu Akbar” around the prison building [REDACTED].<sup>835</sup> **P-0878** testified that he allegedly heard *Ali Kushayb* shouting “Allah Akbar, Allah Akbar, Wipe out and sweep away, Amsah Aksah!” [REDACTED].<sup>836</sup> Similarly, P-0878 testified having heard *Ali Kushayb* forces shouting “Allah Akbar, Allah Akbar” while burning villages.<sup>837</sup> **P-0984** also testified having heard the JJW shouting “Allah Akbar” as greetings to Ahmad Harun visiting them in Mukjar in August 2003 to invite them to kill the Fur and taking their assets as booty.<sup>838</sup>

268. [REDACTED] clarified that the expression “Allahu Akbar” was one of the usual chants sung, together with “Aksah Amsah” and “Mayenoom”, to boost the morale of soldiers and to awaken them as regards their combat and non-combat duties.<sup>839</sup> The general meaning of “Allahu Akbar” is “God is great”.<sup>840</sup> [REDACTED] regretted that this expression was commonly understood as meaning that the military operations in the course of which it was used were pleasing God, whereas it should actually be understood as nothing more than a slogan.<sup>841</sup>

<sup>835</sup> **P-0877**: T-054, p. 21, line 23-p. 22, line 15.

<sup>836</sup> **P-0878**: [REDACTED]

<sup>837</sup> **P-0878**: [REDACTED]

<sup>838</sup> **P-0984**: T-066, p. 40, line 12-p. 41, line 19.

<sup>839</sup> [REDACTED]

<sup>840</sup> [REDACTED]

<sup>841</sup> [REDACTED]

269. “Allahu Akbar”, “God is great” conveys the message that those using it believe they are pleasing God,<sup>842</sup> even when, as reported by **P-0877**, **P-0878** and **P-0984**, they use it while committing crimes. The association of this Islamic phrase with the commission of crimes is a clear indicator of the deceptive nature of the reference to Islam as an equivalent to IHL. It is proof that [REDACTED]’s suggestion that the wording “offensive unto God” inserted in the oath made by members of the SAF stood for the definition of the crimes corresponding to serious violations of IHL to prevent their commission or serve as a criteria of unlawful orders under the 1986 People’s Armed Forces Act<sup>843</sup> was nothing more than an aspirational expression of faith that the system of justice in Sudan can work. Until 2007, faith that a mere reference to Islam and the will of God may replace IHL principles was purely aspirational but deceptive.

#### Section 4 – The “Aksah Amsah” Motto

270. **P-0131** testified about hearing Harun using the expression, meaning “wipe out and sweep away” during the speech he allegedly delivered [REDACTED] in the course of which Harun also invited SAF soldiers to resort to *Hiraba*.<sup>844</sup> **P-0547** provided an historic context to the expression “Aksah Amsah”, which started being used according to him in 1979 in South Sudan and meant “kill without taking into account any other thing”. **P-0547** added that this expression had a frightening impact on civilians.<sup>845</sup> **P-0769** also testified having heard Harun using that expression after 2010.<sup>846</sup> According to **P-0769**, “Aksah” meant “attack and advance” and “Amsah” meant “fight [...] and don’t leave anything behind”.<sup>847</sup>

271. **P-0905** testified that he allegedly heard *Ali Kushayb* using the expression “Aksah Amsah” in a speech to his men delivered in December 2003 in Arawala.<sup>848</sup> According to **P-0905**, “Aksah” meant “kill” and “Amsah” meant “burn out”.<sup>849</sup> He also mentioned Harun pronouncing it, without specifying the context.<sup>850</sup> In cross-examination, **P-0905** was asked whether “Aksah Amsah” was not rather a common phrase used in military circles. His answer was: “No. No. Not in military missions. [REDACTED].”<sup>851</sup> He added that this phrase was unique to *Ali Kushayb* and the JJW.<sup>852</sup> Even after being shown a video clip from Sudanese

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<sup>842</sup> [REDACTED]

<sup>843</sup> [REDACTED]

<sup>844</sup> **P-0131**: T-112, p. 19, lines 8-13; T-113, p. 26, line 23-p. 27, line 3.

<sup>845</sup> **P-0547**: [REDACTED]

<sup>846</sup> **P-0769**: [REDACTED]

<sup>847</sup> **P-0769**: [REDACTED]

<sup>848</sup> **P-0905**: [REDACTED]

<sup>849</sup> **P-0905**: [REDACTED]

<sup>850</sup> **P-0905**: [REDACTED]

<sup>851</sup> **P-0905**: [REDACTED]

<sup>852</sup> **P-0905**: [REDACTED]

television<sup>853</sup> displaying people in SAF uniforms, which he identified as the people in charge of motivational speech,<sup>854</sup> singing it and being asked by the Presiding Judge why the motivational speakers would use that phrase allegedly confined to *Ali Kushayb* and the *Janjaweed* in 2013, P-0905 persisted in his denial: “This phrase was never a common phrase [REDACTED]. It’s something that was said by Ali Kushayb. [...]”.<sup>855</sup> His persistence on this point was a clear indication of his determination to incriminate *Ali Kushayb* by all means, even by denying the obvious.

272. The Prosecution cross-examined [REDACTED] on the meaning of “Aksah Amsah”. [REDACTED] explained that it is an expression used to boost the morale of soldiers, so that they can fight, which fell into the category of victory chants or chants for morale.<sup>856</sup> He added that this expression can in no way be understood as an order to violate the rights of civilians.<sup>857</sup> The Prosecution did not challenge this definition and meaning of the wording “Aksah Amsah”. The definitions of the expression proposed by **P-0547**, **P-0769** and **P-0905** are likely gross exaggerations. In re-examination, [REDACTED] added that “Aksah Amsah” was, together with “Allahu Akbar” and “Mayenoom”, a usual chant sung to boost the morale of soldiers and to awaken them as regards their combat and non-combat duties.<sup>858</sup> The non-challenged explanation of the expression “Aksah Amsah” provided [REDACTED] and the video clip from Sudanese television<sup>859</sup> show that its alleged use by *Ali Kushayb*<sup>860</sup> does not support the Prosecution’s demonstration of his criminal intent. Even if *Ali Kushayb* had used the expression, he would have done no more than employ a regular motto used by the SAF, which in no way could be understood as an instigation to commit crimes.<sup>861</sup>

### Section 5 – The Impact of the Declaration of a State of Emergency

273. The overall situation of non-compliance with HR and IHL in Sudan was made even worse as a result of the declaration of a state of emergency in Darfur over the period 2003-2004. According to **P-0020**, Sudan has actually been under a state of emergency without real interruption since Al-Bashir’s *coup* in 1989.<sup>862</sup> The consequence was a deprivation of fair trial rights. P-0020 summarized it in extremely clear and in unambiguous terms:

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<sup>853</sup> [DAR-D31-00000001](#).

<sup>854</sup> **P-0905**: [REDACTED]

<sup>855</sup> **P-0905**: [REDACTED]

<sup>856</sup> [REDACTED]

<sup>857</sup> [REDACTED]

<sup>858</sup> [REDACTED]

<sup>859</sup> DAR-D31-000000001: Video from Sudanese TV Channel, 15 April 2013.

<sup>860</sup> [OTP Trial Brief](#), paras. 290, 323.

<sup>861</sup> See **PART V- Chapter 1**.

<sup>862</sup> **P-0020**: T-042, p. 21, lines 6-11.

A: The state of emergency deprives people of their natural rights when it comes to justice. So people would not be submitted to a fair trial. Trials would be done summarily. And the power of trial would be given to people other than the judge, maybe a military leader or a field leader. They would be able to form the trial that they want. And these trials are not reviewed, I have to mention this as well.

Q: And would that imply the power to sentence someone to death?

A: Yes.

Q: Would that also imply the possibility of arresting people and detaining them on the basis of a suspicion that they may be members or supporters of the rebellion?

A: Yes.

Q: [...] Does that mean that, basically, any person suspected of being a member of the rebellion or of supporting it could be arrested, detained, and executed – I don't want to say sentenced to death – executed without appearing before a judge over that period?

A: In Darfur, yes, that was possible.

Q: And you say – you said that this was even facilitated, in a way, by the declaration of the state of emergency, right?

A: Yes.”<sup>863</sup>

274. It is corroborated, at least in part, by **P-0012** and **P-0120**. Although P-0012 [REDACTED] he witnessed that “in 2003, the Government announced that the normal laws did not apply anymore, and the police refused to take any complaints”.<sup>864</sup> P-0120 confirmed the declaration of a state of emergency in Sudan in 2002-2004.<sup>865</sup> Besides expressing his opinion that a declaration of a state of emergency should not result in a deprivation of most fundamental rights, like the right to life,<sup>866</sup> he nevertheless confirmed that “the state of emergency really impacted the respect of human rights and it led to many violations, including the execution, the burning, the killing, the raping.”<sup>867</sup>

275. **D-0023** confirmed that, starting from August 1991, the GoS issued declarations of state of emergency which were renewed regularly.<sup>868</sup> **D-0016** clarified that the state of emergency in Sudan was governed by an Emergency Act of 1997.<sup>869</sup> The emergency regime under this law was activated in 2003-2004.<sup>870</sup> In addition, Darfur was declared a war region.<sup>871</sup> The impact of a declaration of state of emergency is the suspension of the bill of rights,<sup>872</sup> whereas a declaration of war has an impact on the level of mobilisation of armed forces.<sup>873</sup> Another impact of a declaration of state of emergency is that all police and security forces, including the PDF, PPF, Border Guards and CRF became part of the armed forces for the purpose of the application the Armed Forces Act.<sup>874</sup>

<sup>863</sup> **P-0020**: T-042, p. 21, line 15-p. 22, line 13.

<sup>864</sup> **P-0012**: [DAR-OTP-0119-0503-R01](#), para. 26.

<sup>865</sup> **P-0120**: T-036, p. 67, lines 11-13.

<sup>866</sup> **P-0120**: T-036, p. 68, lines 9-13; T-037, p. 18, line 22-p. 19, line 2.

<sup>867</sup> **P-0120**: T-037, p. 18, lines 22-23.

<sup>868</sup> **D-0023**: [DAR-D31-00000134](#), para. 76.

<sup>869</sup> **D-0016**: [REDACTED]

<sup>870</sup> **D-0016**: [REDACTED]

<sup>871</sup> **D-0016**: [REDACTED]

<sup>872</sup> **D-0016**: [REDACTED]

<sup>873</sup> **D-0016**: [REDACTED]

<sup>874</sup> **D-0016**: [REDACTED]

## Chapter 3 – Darfur Tribal Structures

### Section 1 - Overview of Darfur Tribal Fabric

276. **P-1042** provided a comprehensive overview of the Darfur tribal fabric. His Report provides a solid basis for its understanding.<sup>875</sup> The Fur tribe is not the only tribe implanted and living in Darfur. They remain the largest ethnic group, with about 27% of the total population of Darfur.<sup>876</sup> According to estimates, there are between thirty and ninety ethnic groups or tribes in Darfur.<sup>877</sup> Although that dichotomy is described by **P-1042** as largely artificial and subjective, some of these are described as “African” tribes commonly known as “Zurga”, meaning “black”, literally “blue”, while others are considered “Arab”.<sup>878</sup> Fur, Masalit and Zaghawa, the three major tribes of Darfur, are all three considered “Non-Arab” or “African” tribes.<sup>879</sup> The tribes which are perceived as Arab tribes comprise a total of about 35% of the population.<sup>880</sup> The Arab tribes are divided between *Abbala*, or camel herders, in the North of Darfur and *Baggara*, or cattle herders, towards the South. Some Arab tribes, like the Rizeigat and Beni Halba include both *Abbala* and *Baggara* branches with separate tribal authorities.<sup>881</sup>

277. Another major dichotomy distinguishing Darfur tribes relates to the possession, or not, of a land, called *Dar*. The Fur, Masalit<sup>882</sup> and Zaghawa<sup>883</sup> have a *Dar*. Among the Arabs, the Southern Rizeigat, Habbaniya, Beni Halba and Ta’aisha tribes also have their own *Dar*.<sup>884</sup> None of these extend to the Wadi Saleh and Mukjar areas.<sup>885</sup> Other Arab tribes, in particular the Beni Mansour, Hutiya, Misiriya, Ta’alba, Tarjam,<sup>886</sup> Northern Rizeigat and Salamat<sup>887</sup> do not have a *Dar* of their own and thus must live under the authority and administration of another tribe.<sup>888</sup> This was a cause of tensions, with these Arab tribes trying to conquer lands over the other tribes in order to obtain a *dar*. In 2003-2004, the Northern Rizeigat thus became the back-bone of the JJW,<sup>889</sup> in order to profit from the counter-insurgency to conquer new lands.

<sup>875</sup> **P-1042**: [DAR-OTP-0220-1623](#).

<sup>876</sup> **P-1042**: [DAR-OTP-0220-1623](#), para. 37.

<sup>877</sup> **P-1042**: [DAR-OTP-0220-1623](#), para. 39.

<sup>878</sup> **P-1042**: [DAR-OTP-0220-1623](#), para. 40.

<sup>879</sup> **P-1042**: [DAR-OTP-0220-1623](#), para. 49.

<sup>880</sup> **P-1042**: [DAR-OTP-0220-1623](#), para. 40.

<sup>881</sup> **P-1042**: [DAR-OTP-0220-1623](#), para. 42.

<sup>882</sup> **P-1042**: [DAR-OTP-0220-1623](#), para. 55.

<sup>883</sup> **P-1042**: [DAR-OTP-0220-1623](#), para. 65.

<sup>884</sup> **P-1042**: [DAR-OTP-0220-1623](#), para. 65; T-027, p. 47, line 25-p. 48, line 5.

<sup>885</sup> **P-1042**: T-028, p. 32, line 25-p. 33, line 20.

<sup>886</sup> **P-1042**: [DAR-OTP-0220-1623](#), para. 65; T-027, p. 47, line 25-p. 48, line 15.

<sup>887</sup> **P-1042**: [DAR-OTP-0220-1623](#), paras. 66-67; T-027, p. 48, lines 17-21.

<sup>888</sup> **P-1042**: T-028, p. 79, lines 22-25.

<sup>889</sup> **P-1042**: T-028, p. 58, lines 20-22.

278. The Salamat tribe was the main Arab group in the Wadi Saleh and Mukjar areas.<sup>890</sup> The fact that the Salamat tribe had no recognised *dar* has been a long-standing source of tensions with other tribes in the Wadi Saleh and Mukjar areas, in particular the Fur,<sup>891</sup> but also the neighbouring Ta'aisha to the South.<sup>892</sup> [REDACTED] shone light on the nature of the tensions that the Salamat's absence of *dar* caused in the territory of the Ta'aisha: these include refusal to recognize the authority of the tribal administration of the Ta'aisha and to pay the taxes.<sup>893</sup> These tensions were exacerbated by the 1994 land reform.<sup>894</sup> In 2003-2004 in the Wadi Saleh and Mukjar areas and as a result of these unresolved tensions, it is thus the Salamat who provided the bulk of the JJW in the hope of taking over from the Fur more land that would support their claim for a *dar* and a *nazir* of their own<sup>895</sup> and liberate them from their submission to the Fur *Shartay*'s authority, which they did not accept.<sup>896</sup>

## Section 2 - Tribal Positions Defined

279. **P-1042**'s Report provides a comprehensive description and definition of the tribal administration and positions.<sup>897</sup> The various tribes in Darfur were headed by persons bearing various titles, depending on their tribe.

### *I – Fur Tribal Administration and Titles*

280. The Fur tribe was historically headed by *Sultans*, who appointed governors for each Fur territory. This historical tribal structure was replaced and simplified under the British administration in the early 20<sup>th</sup> Century. The result is a three-tier administration: (i) paramount-chiefs, named *shartay*, *magdum* or *dimangawi* in the Fur tribe, exercise jurisdiction over the full tribal territory or *dar*; (ii) the *umdahs* serve as local administrative heads and tax collectors, and, (iii) at the level of each village, *sheikhs*.<sup>898</sup>

281. In 2003-2004, the *Sultan* of the Fur was Hussein Ayoub Ali Dinar. According to **P-0020**, his power was purely traditional and symbolic,<sup>899</sup> but he was still considered to have precedence over the Fur *Shartays* in the tribal hierarchy.<sup>900</sup> In 2003-2004, *Sultan* Hussein Ayoub Ali Dinar did not take a position and expressed no views about the rebellion, either

<sup>890</sup> **P-1042**: [DAR-OTP-0220-1623](#), para. 67; T-027, p. 48, lines 17-21; T-028, p. 51, lines 1-4; T-028, p. 56, lines 14-18.

<sup>891</sup> **P-1042**: [DAR-OTP-0220-1623](#), para. 67; T-027, p. 64, lines 7-19; T-028, p. 62, lines 6-11, 18-20.

<sup>892</sup> **P-1042**: T-028, p. 50, lines 9-24.

<sup>893</sup> [REDACTED].

<sup>894</sup> **P-1042**: T-028, p. 79, lines 2-17.

<sup>895</sup> **P-1042**: T-028, p. 52, lines 6-13; p. 59, lines 18-22; p. 62, line 18-p. 63, line 2.

<sup>896</sup> **P-1042**: T-028, p. 79, line 22-p. 80, line 11.

<sup>897</sup> **P-1042**: [DAR-OTP-0220-1623](#), paras. 54-62.

<sup>898</sup> **P-1042**: [DAR-OTP-0220-1623](#), paras. 56-57.

<sup>899</sup> **P-0020**: T. 042, p. 14, lines 14-21.

<sup>900</sup> **P-0020**: T. 042, p. 14, line 24-p. 15, line 3.

supporting it or rejecting it to support the Government of Sudan.<sup>901</sup> *Sultan* Hussein Ayoub Ali Dinar passed away after that period.<sup>902</sup> This title and traditional authority thus still exist nowadays.

282. **P-1042** opined that the involvement of each member of the Fur administration, like *Umdas* and *Sheikhs*, in the rebellion varied among individuals.<sup>903</sup> He had no specific information to provide on the positioning of each individual.<sup>904</sup> In Wadi Saleh and Mukjar, the Fur *Shartay* over the 2003-2004 period was Omar Ahmad Zarouq.<sup>905</sup>

## ***II – Arab Tribal Administration and Titles***

283. In Darfur, the administration of Arab tribes essentially mirrors the Fur administration, a major difference being between Arab tribes possessing a *dar* and the others. There are some variations in the tribal titles as well. In Arab tribes with a *dar*, like the Southern Rizeigat, Habbaniya and Ta'aisha tribes, the paramount chief is called *nazir*.<sup>906</sup> Arab tribes with no *dar*, including the Northern Rizeigat, Mahariya, Awlad Zeid, Awlad Nyba, Khuzam, Salamat, Gimir, Tama,<sup>907</sup> Nawaiba<sup>908</sup>, Beni Mansour, Hutiya, Misiriya, Ta'alba, Tarjam<sup>909</sup> and Salamat tribes<sup>910</sup>, have no paramount chief and remain under the authority of the paramount chief of the local tribe where they are settled.<sup>911</sup> **P-0643** testified that some of these Arab tribes with no *dar* have created the position of *emir* to be the head of their tribal administration, overseeing more than one *umdah*.<sup>912</sup> Unlike a *nazir*, the *emir* is appointed by *umdahs*.<sup>913</sup> Under the *nazir* or *emir*, Arab tribes keep the lower titles of *umdahs* and *sheikhs*, with the same essential functions.<sup>914</sup> An Arab tribe with no *dar* may thus have *umdahs*, which would sit in the tribal council headed by the paramount chief of the tribe to which the *dar* belongs.

284. In Wadi Saleh and Mukjar, the principal Arab tribe, the Salamat,<sup>915</sup> were awarded their first *umdah* in 1974. They had up to three *umdahs* in Wadi Saleh and six in Southern Darfur,

<sup>901</sup> **P-0020**: T. 042, p. 15, line 24-p. 16, line 2.

<sup>902</sup> **P-0020**: T. 042, p. 16, lines 9-12.

<sup>903</sup> **P-1042**: T-028, p. 40, lines 9-16.

<sup>904</sup> **P-1042**: T-028, p. 41, lines 12-20.

<sup>905</sup> **P-0720**: [DAR-OTP-0210-0291-R02](#), para. 31; **P-0913**: [DAR-OTP-0218-0021-R02](#), para. 116; **P-0916**: [DAR-OTP-0224-0023-R01](#), para. 24.

<sup>906</sup> **P-1042**: [DAR-OTP-0220-1623](#), paras. 56-57.

<sup>907</sup> **P-0643**: [REDACTED]

<sup>908</sup> **P-0643**: [REDACTED]

<sup>909</sup> **P-1042**: [DAR-OTP-0220-1623](#), para. 65; T-027, p. 47, line 25-p. 48, line 5.

<sup>910</sup> **P-1042**: [DAR-OTP-0220-1623](#), paras. 66-67; T-027, p. 48, lines 17-21.

<sup>911</sup> **P-1042**: [DAR-OTP-0220-1623](#), para. 65.

<sup>912</sup> **P-0643**: T-058, p. 6, line 21-p. 7, line 18 (Conf); p. 9, lines 22-24 (Conf).

<sup>913</sup> **P-0643**: T-058, p. 10, lines 1-4 (Conf).

<sup>914</sup> **P-1042**: [DAR-OTP-0220-1623](#), para. 56.

<sup>915</sup> **P-1042**: [DAR-OTP-0220-1623](#), para. 67; T-027, p. 48, lines 17-21; T-028, p. 51, lines 1-4; p. 56, lines 14-18.

but were always denied a *nazir* because they had no *dar*.<sup>916</sup> The *umdahs* of the Arab tribes with no *dar* in Wadi Saleh, namely the Northern Rizeigat, Mahariya, Awlad Zeid, Awlad Nyba, Khuzam, Gimir, Tama, Nawaiba, Bani Mansour, Hutiya, Misiriya, Ta'alba, Tarjam and Salamat tribes, went together and appointed at some point before 2003 Emir Hessine Sayyid Al Helu, of the Nawaiba tribe settled around Garsila and Um Kher.<sup>917</sup> Emir Hessine Sayyid Al Helu was appointed “*Emir* of all Arab tribes” for Wadi Saleh.<sup>918</sup> This title was unique.<sup>919</sup> He lived in Garsila and had authority over all Arab tribes with no *dar* living in Wadi Saleh.<sup>920</sup> This excluded the Ta'aisha tribe, which had its own *nazir* in Rahad-Al-Berdi.<sup>921</sup> **P-0643** described the central role played by the Emir Hessine Sayyid Al Helu in the mobilization, distribution of weapons and conduct of operations of Arab tribes militia from his house in Garsila.<sup>922</sup> **P-0643** referred to the house of *Emir* Hessine Sayyid Al Helu as the operation room of Arab tribes.<sup>923</sup> Emir Hessine Sayyid Al Helu was the highest representative of the Arab tribes of Wadi Saleh at a Conference of all Arab tribes in Darfur held in Kass in August 2002, which **P-0643** and **P-0020** consider as the starting point of the mobilisation and arming of Arab militias.<sup>924</sup>

### III – “*Agid*” and “*Agid-Al-Ogada*”

285. The definition of the term “*Agid-al-Ogada*” provided by the OTP in its Trial Brief is its literal translation as “Colonel of Colonels”,<sup>925</sup> without further explanation as to the origin, nature, authority and functions attached to that position. The evidence has largely filled this gap and provides a definition of the words “*Agid*” and “*Agid-Al-Ogada*”, as well as an understanding of their roles and attributes. **P-1042** explains that the title *Agid*, plural *Ogada*, meaning “Commander”, is initially a Fur tribal title, but that they also exist in Arab tribes with the same definition.<sup>926</sup>

286. According to **P-1042**, the function of *Agid* was initially one of war leader, often exercised by a *sheikh* or by the *shartay*, in the Fur tribe, or *nazir* in Arab tribes. It was not retained in the administrative reform imposed by the British.<sup>927</sup> **P-0720** further explained that

<sup>916</sup> **P-1042**: [DAR-OTP-0220-1623](#), para. 67.

<sup>917</sup> **P-0643**: T-058, p. 11, line 21-p. 13, line 5 (Conf).

<sup>918</sup> [OTP Trial Brief](#), para. 29; **P-0041**: [DAR-OTP-0206-0033-R02](#), para. 25; **P-0129**: [DAR-OTP-0128-0128-R04](#), para. 24; **P-0585**: T-099, p. 49, line 14; **P-0643**: T-058, p. 10, lines 17-23 (Conf).

<sup>919</sup> **P-0643**: T-058, p. 11, lines 13-15 (Conf).

<sup>920</sup> **P-0643**: T-058, p. 13, lines 2-5 (Conf), p. 14, lines 17-25 (Conf).

<sup>921</sup> **P-0643**: T-058, p. 12, line 21-p. 13, line 1 (Conf).

<sup>922</sup> **P-0643**: T-058, p. 9, lines 14-20 (Conf), p. 13, lines 6-12 (Conf), p. 19, line 17-p. 20, line 4 (Conf).

<sup>923</sup> **P-0643**: T-058, p. 14, lines 17-25 (Conf); p. 17, line 25-p. 18, line 1 (Conf).

<sup>924</sup> **P-0643**: T-058, p. 13, line 13-p. 14, line 14 (Conf); **P-0020**: [DAR-OTP-0095-0002-R02](#), para. 29.

<sup>925</sup> [OTP Trial Brief](#), para. 96.

<sup>926</sup> **P-1042**: [DAR-OTP-0220-1623](#), para. 61; **P-0907**: T-095, p. 61, lines 6-10.

<sup>927</sup> **P-1042**: [DAR-OTP-0220-1623](#), para. 61; T-027, p. 61, lines 1-11 (Conf).

the title *Agid* survived that reform as a customary function in charge of organizing collective activities, such as traditional work parties and mobilizing young men to pursue and reclaim stolen livestock during *Fazaa*.<sup>928</sup> All formal military and police functions were assigned to officers of the Government.<sup>929</sup> **P-0907** confirms the existence of *Agids* in the traditional Fur tribal structure.<sup>930</sup> The Fur word for *Agid* is *Warneg*.<sup>931</sup> His function was essentially to blow the horn or the whistle in case of fire, to convey important news within the community and to direct people towards specific tasks.<sup>932</sup> *Agids* were chosen by the community and earned no salary.<sup>933</sup> They were below *sheikhs*, at the very bottom of the tribal hierarchy.<sup>934</sup> In Arab tribes, the positions of *Agid* and *sheikh* were often functionally the same.<sup>935</sup>

287. **P-1042** explains that the *Agid-Al-Ogada* is the coordinator of low-level *Agids*. *Agid* and *Agid-Al-Ogada* are functional posts, not defined by law, with authority derived from the invocation of tradition combined with demands of immediate circumstances and the abilities of the individual chosen.<sup>936</sup> The position of *Agid* / *Agid-Al-Ogada* returned in a more informal manner with the outbreaks of violence in the 1980s and 1990s.<sup>937</sup>

288. One crucial question was whether the coordination entrusted to the *Agid-Al-Ogada* could extend to *Agids* from different tribes or was limited to *Agids* of the same tribe. Although the etymology of the word provided by **P-1042**<sup>938</sup> seemed to support the second answer, with authority of the *Agid-Al-Ogada* limited to the *Agids* of his tribe only, this still needed to be confirmed. **D-0023** was asked about the existence or absence of inter-tribal coordination structures in Sudan. The only two structures **D-0023** could identify were the customary arbitration process called *Judiyya*<sup>939</sup> and some inter-tribal codification initiatives in relation to the determination of compensation for damages,<sup>940</sup> nothing else. **D-0023** had never heard about and was not familiar with another instance of inter-tribal coordination through the so-called *Agid-Al-Ogada*.<sup>941</sup> Within the specific context of the Ta'aisha tribe, the limitation of the authority of the *Agid-Al-Ogada* on the *Agids* of the Ta'aisha tribe was also confirmed by the

<sup>928</sup> **P-0720**: T-043, p. 9, lines 20-21; p. 20, line 3-p. 21, line 19.

<sup>929</sup> **P-1042**: T-027, p. 61, lines 10-11.

<sup>930</sup> **P-0907**: T-095, p. 58, lines 1-10.

<sup>931</sup> **P-0907**: T-095, p. 58, line 25-p. 59, line 1.

<sup>932</sup> **P-0907**: T-095, p. 58, line 7-p. 59, line 3.

<sup>933</sup> **P-0907**: T-095, p. 60, line 24-p. 61, line 10.

<sup>934</sup> **P-0907**: T-095, p. 63, lines 2-4.

<sup>935</sup> **P-1042**: [DAR-OTP-0220-1623](#), para. 61.

<sup>936</sup> **P-1042**: [DAR-OTP-0220-1623](#), para. 61.

<sup>937</sup> **P-1042**: T-027, p. 61, lines 12-20; T-028, p. 37, line 24-p. 38, line 3.

<sup>938</sup> **P-1042**: [DAR-OTP-0220-1623](#), para. 61.

<sup>939</sup> **D-0023**: [DAR-D31-00000134](#), paras. 67-68.

<sup>940</sup> **D-0023**: [DAR-D31-00000134](#), paras. 70-72.

<sup>941</sup> **D-0023**: T-134, p. 38, lines 1-8.

various Defence witnesses from that tribe, [REDACTED].<sup>942</sup> [REDACTED] stated that the Fur tribe had its own *Agid-Al-Ogada* in the Ta'aisha *dar*,<sup>943</sup> thus confirming that the authority of the Ta'aisha *Agid-Al-Ogada* was limited to the *Agids* of the Ta'aisha tribe and did not even extend to non-Ta'aisha *Agids* within the *dar*. P-1042, D-0023 and, for the Ta'aisha tribe, [REDACTED] together demonstrate that the authority of the *Agid-Al-Ogada* is limited to the coordination of the *Agids* of his tribe and does not extend beyond.

289. During the 2003-2004 period, the titles of *Agid* and *Agid-al-Ogada* emerged from the self-defence of Fur villages or communities,<sup>944</sup> whose leaders with former military experience were referred to as *Agids*<sup>945</sup> and were called upon to join the SLA.<sup>946</sup> P-0129 referred to Abdul-Haziz Al-Hera as being the Fur *Agid-Al-Ogada* in Wadi Saleh in 2003.<sup>947</sup> He was responsible to the Fur *shartay*.<sup>948</sup>

290. On the Arab side in 2003-2004, the evidence mentions many *Agid-Al-Ogada*. Besides, allegedly, *Ali Kushayb*, P-0012 and P-0877 testified that Al-Dayf Samih was the *Agid-Al-Ogada* for Mukjar.<sup>949</sup> According to P-0012, Hamuda Hamdan was the *Agid-al-Ogada* for Bindisi.<sup>950</sup> P-0585 refers to an *Aqid-al-Ogada* of the Nawayiba tribe in Mindo.<sup>951</sup> Their multiplicity mirrors the multiplicity of the Arab tribes present in Wadi Saleh and Mukjar, none of which had a *dar*.<sup>952</sup> It is also consistent with the evidence that the title and authority of *Agid-Al-Ogada* is limited to the tribe to which he belongs.<sup>953</sup> The *Agid-Al-Ogada*'s authority extends over the *Agids* of his tribe only, it is not a function of inter-tribal coordination like “*Emir* of all Arab tribes” for Wadi Saleh held by the *Emir* Hessine Sayyid Al Helu.<sup>954</sup>

291. According to P-1042, the title “*Agid-Al-Ogada*” was equivalent to the title of “*emir*” in Arab tribes. However, P-1042 had a different definition of “*emir*” to that provided by P-0643 by reference to *Emir* Hessine Sayyid Al Helu in relation to Arab tribes with no *dar*.<sup>955</sup> P-1042 described the “*emir*” as being a military title, more senior than an *Agid*, appointed by the

<sup>942</sup> [REDACTED]. See PART IV – Chapter 3 – Section 2-IV below.

<sup>943</sup> [REDACTED].

<sup>944</sup> P-1042: T-027, p. 61, line 21-p. 62, line 1.

<sup>945</sup> P-1042: T-028, p. 40, lines 5-7.

<sup>946</sup> P-1042: T-028, p. 40, lines 1-4.

<sup>947</sup> P-0129: T-076, p. 21, lines 11-21; p. 23, lines 14-17.

<sup>948</sup> P-0129: T-076, p. 21, lines 21-23; p. 23, line 21-p. 24, line 3.

<sup>949</sup> P-0012: T-046, p. 18, line 21-p. 19, line 1 (Conf); P-0877: T-053, p. 70, lines 10-23.

<sup>950</sup> P-0012: T-045, p. 65, line 15-p. 67, line 2 (Conf).

<sup>951</sup> P-0585: T-102, p. 26, line 8-p. 27, line 3.

<sup>952</sup> P-0643: [REDACTED]

<sup>953</sup> P-1042: [DAR-OTP-0220-1623](#), para. 61.

<sup>954</sup> [OTP Trial Brief](#), para. 29; P-0041: [DAR-OTP-0206-0033-R03](#), para. 25; P-0129: [DAR-OTP-0128-0128-R04](#), para. 24; P-0585: T-099, p. 49, line 14; P-0643: [REDACTED]

<sup>955</sup> PART IV- Chapter 3- Section 2- II.

Government instead of the community.<sup>956</sup> To a certain extent, **P-0012** corroborates that definition of the “*emir*” and the parallel made with the title “*Agid-Al-Ogada*”, by relating it to the so-called *Fursan*, which he defines as a sub-group of *Mujahideen*,<sup>957</sup> i.e. PDF forces.

292. In its Trial Brief, the OTP confusingly retains both definitions of the word “*Emir*”: at paragraph 29, the Prosecution first describes the “*Emir*” as the equivalent of a *Nazir* and a head of other Arab tribes leaders serving as the liaison with the Government, by opposition to *Agids* described as “*military leaders in Arab tribes*”; and then, in the same paragraph, the Prosecution shifts to a definition of the “*Emir*” as the equivalent of the *Agid-Al-Ogada* and the head of all *Agids*, who would lead the JJW during armed conflict.<sup>958</sup> Under the first definition, the “*Emir of all Arab Tribes*” was *Emir* Hessine Sayyid Al Helu,<sup>959</sup> not Mr Abd-Al-Rahman, nor the person named *Ali Kushayb*. This overall confusion around the definition of the word “*Emir*” was therefore crucial and required clarification.

293. **P-0643** testified that “*emir*” had at least three different meanings, including (i) the position created by *umdahs* of Arab tribes with no *dar* he had already mentioned, (ii) the son of the sultan and (iii) a title used in the PDF at the time of the 2003-2004 mobilization to designate the leader of a group of about two-hundred fighters, or *mujahideen*.<sup>960</sup> This third definition of the *emir* essentially corroborates the earlier definition by P-1042 and **P-0012**: under that definition, the *Emir* is indeed a military title and is appointed by the Government, i.e. the PDF hierarchy, and not the tribe.<sup>961</sup> It is also corroborated by the very detailed description of the PDF structure provided by [REDACTED], according to which the *Emir* is the title used in the PDF to designate the leader of a group of *Mujahideen* under the command of a military Head of PDF Operations.<sup>962</sup>

294. **P-0643** insisted that the titles of “*emir*” and *Agid-Al-Ogada* were different: according to him, the *Agid-Al-Ogada* could be neither the *emir* of Arab tribes, like *Emir* Hessine Sayyid Al Helu, which was a civilian position, nor the PDF *emir*, who belonged to the PDF nomenclature.<sup>963</sup> It was actually “*Ali Kushayb*”.<sup>964</sup> The difference that P-0643 makes is in contradiction with the functions that he admits *Emir* Hessine Sayyid Al Helu was performing

<sup>956</sup> **P-1042**: T-028, p. 57, line 6-p. 58, line 5.

<sup>957</sup> **P-0012**: [DAR-OTP-0119-0503-R01](#), para. 28; See below **PART IV – Chapter 5 – Section 2 – II – B – (v)**

<sup>958</sup> [OTP Trial Brief](#), para. 29.

<sup>959</sup> [OTP Trial Brief](#), para. 29; **P-0041**: [DAR-OTP-0206-0033-R02](#), para. 25; **P-0129**: [DAR-OTP-0128-0130](#), para. 24; **P-0585**: T-099, p. 49, line 14; **P-0643**: [REDACTED]

<sup>960</sup> **P-0643**: [REDACTED]

<sup>961</sup> **P-0643**: [REDACTED]

<sup>962</sup> [REDACTED].

<sup>963</sup> **P-0643**: [REDACTED]

<sup>964</sup> **P-0643**: [REDACTED]

in relation to the mobilization, arming and operations of the Arab militias in Wadi Saleh from his house in Garsila..<sup>965</sup> But the main reason why it seems unlikely that *Emir* Hessine Sayyid Al Helu was also *Agid-Al-Ogada* in Wadi Saleh in 2003-2004 is that he was designated as “*Emir of all Arab tribes*”, at least those with no *dar*, for Wadi Saleh,<sup>966</sup> whereas the function and authority of the *Agid-Al-Ogada* remains limited to the coordination of the *Agids* of one and the same tribe. **P-0954** also explained the difference between the PDF *Emir* and the *Agids*: while the *Emir* led the PDF *Mujahideen*, the *Agid* was in charge of the security of a village.<sup>967</sup> **P-0954**’s definition applies by extension to the *Agid-Al-Ogada*, i.e. the leader of lower *Agids* in charge of the security of a wider community. Although the two positions and titles did not exclude each other according to **P-0954**, these were two different titles corresponding to two different contexts.

295. In light of **P-0643**’s answers and leaving aside the sultan’s son, it seems that there were at least two different definitions of the word “*emir*” in use at the time, corresponding to two different positions: the first was the “*Emir of all Arab Tribes*” and was held by *Emir* Hessine Sayyid Al Helu; and the second corresponded to a title used in the PDF to designate leaders of a group of *Mujahideen*.<sup>968</sup> None was equivalent to the position of *Agid-Al-Ogada*, which is a tribal title for the person in charge of leading the *Agids* of the tribe. As envisaged by **P-0954**,<sup>969</sup> **P-1042** clarified that the position may match, when the government appoints as “*Emir*” someone already fulfilling the function of *Agid-Al-Ogada* within his tribe.<sup>970</sup> But outside this specific coincidental scenario, the two titles describe different positions. For a same person to hold both titles, he would have to be the *Agid-Al-Ogada* of his tribe and be appointed as “*Emir*” within the PDF.

296. On the basis of the entirety of the evidence, it appears that the *Agid-Al-Ogada* in the 2003-2004 Darfur context remained a tribal title of a person in charge of coordinating the *Agids* within a tribe. *Agid-Al-Ogada* existed in Fur and Arab tribes alike. They were usually chosen within the tribe for their past military experience. Although their profile made them good candidates for joining the leadership of the warring parties, their title did not follow them and did not form part of the SLA or Government military or paramilitary hierarchies.<sup>971</sup> Unlike the

<sup>965</sup> **P-0643**: T-056, p. 21, line 24-p. 22, line 4 (Conf); T-059, p. 39, lines 15-17 (Conf).

<sup>966</sup> **P-0643**: T-058, p. 9, lines 14-20 (Conf); p. 13, lines 6-12 (Conf); p. 14, lines 17-25 (Conf); p. 17, line 22-p. 18, line 1 (Conf); p. 19, line 17-p. 20, line 4 (Conf).

<sup>967</sup> **P-0954**: [DAR-OTP-0221-0571-R01](#), para. 25.

<sup>968</sup> **P-0643**: T-058, p. 77, line 21-p. 78, line 4 (Conf).

<sup>969</sup> **P-0954**: [DAR-OTP-0221-0571-R01](#), para. 25.

<sup>970</sup> **P-1042**: T-028, p. 58, lines 2-5.

<sup>971</sup> **P-1042**: [DAR-OTP-0220-1623](#), para. 61.

function of “*Emir of all Arab Tribes*” held by *Emir* Hessine Sayyid Al Helu, the function of *Agid-Al-Ogada* was not a function of coordination between people from different tribes. Unlike the function of *Emir* within the PDF, the function of *Agid-Al-Ogada* was not a PDF position. The authority of the *Agid-Al-Ogada* was limited to people, the *Agids*, of his tribe. This definition is consistent with the evidence on record describing the function of *Agid-Al-Ogada* within the Ta’aisha tribe.

#### ***IV – Ta’aisha Administration in 2003-2004***

297. As agreed between the Prosecution and the Defence, Mr Abd-al-Rahman belongs to the Ta’aisha tribe.<sup>972</sup> The Ta’aisha tribe is an Arab tribe<sup>973</sup> which has its own *dar*<sup>974</sup> in South Darfur, in the region of Rahad-El-Berdi.<sup>975</sup> Mr Abd-Al-Rahman’s personal identification card records that he was born there.<sup>976</sup> [REDACTED] are all members of the Ta’aisha tribe. [REDACTED]. They all provide first-hand and direct evidence of the structure and administration of their tribe. During their appearance before the Court, the Prosecution did not challenge them on the information they had provided regarding the structure of the Ta’aisha administration. The information they provide corroborates the evidence in relation to the general structure of Arab tribes in Darfur.<sup>977</sup>

298. The Ta’aisha are not the only population in their *dar*. Other populations include Fur, Masalit, Tama, Borgo, Zaghawa and Sara.<sup>978</sup> The Fur community of Rahad-El-Berdi is particularly numerous and ancient.<sup>979</sup> These include natives, born in the *dar*, and others who came and settled there, in particular to escape conflict.<sup>980</sup> Among these settlers, some date back the events of 2003-2004 in neighbouring Western Darfur.<sup>981</sup>

299. The highest authority of the Ta’aisha tribe is the *Nazir*, considered as the *Sultan* of the Ta’aisha.<sup>982</sup> In 2003-2004 and until his passing around 2020-2021,<sup>983</sup> the Ta’aisha *Nazir* was the late Abd-Al-Rahman Bishara Al-Senussi.<sup>984</sup> The *Nazir* is elected by the tribal council, comprising the *umdahs* and *sheikhs*, and the outcome of this election is then endorsed by the

<sup>972</sup> [ICC-02/05-01/20-504-AnxA](#): Agreed Fact No. 4; [OTP Trial Brief](#), para. 2.

<sup>973</sup> [ICC-02/05-01/20-504-AnxA](#): Agreed Fact No. 5; [OTP Trial Brief](#), para. 2.

<sup>974</sup> **P-1042**: [DAR-OTP-0220-1623](#), para. 65.

<sup>975</sup> **P-1042**: T-028, p. 45, lines 13-16; [REDACTED].

<sup>976</sup> [ICC-02/05-01/20-504-AnxA](#): Agreed Fact No. 7; [OTP Trial Brief](#), para. 2.

<sup>977</sup> See **PART IV – Chapter 3 – Section 2 - II and III** above.

<sup>978</sup> [REDACTED].

<sup>979</sup> [REDACTED].

<sup>980</sup> [REDACTED].

<sup>981</sup> [REDACTED].

<sup>982</sup> [REDACTED].

<sup>983</sup> [REDACTED]

<sup>984</sup> [REDACTED].

Governor of the State, the *Wali*, who officially appoints the elected candidate.<sup>985</sup> The Ta'aisha *Nazir* has authority on all tribes living in the *dar* of the Ta'aisha and on members of the Ta'aisha tribe living abroad, or on the territory of other tribes.<sup>986</sup> In locations where a significant number of Ta'aisha live, the Ta'aisha *Nazir* would appoint an agent to represent him.<sup>987</sup> There was no agent of the Ta'aisha *Nazir*,<sup>988</sup> no *Agid-Al-Ogada* of the Ta'aisha in Garsila in 2003-2004.<sup>989</sup>

300. Beyond the *Nazir*, the Ta'aisha have *umdahs* and *sheikhs*.<sup>990</sup> Each *umdah* heads a certain clan within the Ta'aisha tribe.<sup>991</sup> The *umdahs* sit in the Tribal Council headed by the *Nazir*. The Fur tribe also has an *umdah* and *sheikhs* in Rahad-El-Berdi.<sup>992</sup> The Fur *umdah* represents them in the Ta'aisha tribal council.<sup>993</sup> The Salamat also have an *umdah* in the tribal council.<sup>994</sup>

301. The Ta'aisha tribe has *Agids*<sup>995</sup> and *Agid-Al-Ogada*.<sup>996</sup> The *Agids* are appointed by the *umdahs*.<sup>997</sup> There is only one *Agid-Al-Ogada*<sup>998</sup> and one deputy<sup>999</sup> for the Ta'aisha tribe, in charge of coordinating the work of the *Agids*. The *Agid-Al-Ogada* is appointed by the *Agids* of the tribe.<sup>1000</sup> He is not appointed by a representative of the Government, it is a purely tribal matter.<sup>1001</sup> His authority is limited to the *dar* of the Ta'aisha.<sup>1002</sup> The *Agid-Al-Ogada* of the Ta'aisha in 2003-2004 was [REDACTED].<sup>1003</sup> He had served in the Sudanese Armed Forces from 1965 until 1984, including on missions in Egypt and Lebanon.<sup>1004</sup> The deputy *Agid-Al-Ogada* was Manzoul Daoud El Madhi.<sup>1005</sup> The Fur tribe also has *Agids* and one *Agid-Al-Ogada* in Rahad-El-Berdi: his name is Daoud Sadiq.<sup>1006</sup> Mr Abd-Al-Rahman has never been an *Agid*, nor *Agid-Al-Ogada* of the Ta'aisha tribe.<sup>1007</sup> He could not have been so in 2003-2004, as this

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<sup>985</sup> [REDACTED].

<sup>986</sup> [REDACTED].

<sup>987</sup> [REDACTED].

<sup>988</sup> [REDACTED].

<sup>989</sup> [REDACTED].

<sup>990</sup> [REDACTED].

<sup>991</sup> [REDACTED].

<sup>992</sup> [REDACTED].

<sup>993</sup> [REDACTED].

<sup>994</sup> [REDACTED].

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<sup>998</sup> [REDACTED].

<sup>999</sup> [REDACTED].

<sup>1000</sup> [REDACTED].

<sup>1001</sup> [REDACTED].

<sup>1002</sup> [REDACTED].

<sup>1003</sup> [REDACTED].

<sup>1004</sup> [REDACTED].

<sup>1005</sup> [REDACTED].

<sup>1006</sup> [REDACTED].

<sup>1007</sup> [REDACTED].

would have required him to live in the *dar* of the Ta'aisha<sup>1008</sup> and he was outside, in Garsila. [REDACTED] referred to Mr Abd-Al-Rahman as fulfilling a function as "Overseer" or *Musha'arif*,<sup>1009</sup> but that was after his return to Rahad-El-Berdi as *Musaid* in the CRF around 2012-2013.<sup>1010</sup> There is no evidence suggesting that Mr Abd-Al-Rahman might have fulfilled the function of Overseer, whatever that is, in 2003-2004.

#### Chapter 4 – Darfur Political Structures

302. In 2003-2004, Darfur was divided into three States: North, South and West Darfur. The political structure of West Darfur included, at State level, a State Governor, or *Wali*, located in Al Geneina and, at locality level, a Commissioner, or *Mutamid*. In 2003-2004, the Governor of Western Darfur was Suleiman Abdullah Adam.<sup>1011</sup> Each State had a Security Committee attached to it. The Governor chaired the State Security Committee. Other members included the State head of the National Intelligence and Security Services, the head of police, as well as the Commissioners of localities of the State.<sup>1012</sup> The decisions of the Security Committee of the State were taken by the Wali and handed down to the Commissioners.<sup>1013</sup> In July 2003, the State Security Committee issued a decision to "Mobilise the *Mujahidin*" through the local Commissioners and local PDF Coordinators.<sup>1014</sup> According to [REDACTED], the idea of relying on Arab tribal structures in that process originated from the NISS.<sup>1015</sup> This was done while issuing reports that would not incriminate the NISS or any other security forces within the country.<sup>1016</sup>

303. The Commissioner of Garsila, for Wadi Saleh locality, was Ja'afar Abd-Al-Hakam ("Abd-Al-Hakam").<sup>1017</sup> As of August 2003, Mukjar was detached from Wadi Saleh and a new position of Commissioner for Mukjar locality was created: the first incumbent was Abdullah Al-Tayyib Muhammad Torshein ("Torshein").<sup>1018</sup> The Commissioners normally reported to the Governor of the State, but Abd-Al-Hakam was the direct superior of Torshein.<sup>1019</sup> Abd-Al-

<sup>1008</sup> [REDACTED].

<sup>1009</sup> [REDACTED].

<sup>1010</sup> [REDACTED].

<sup>1011</sup> [OTP Trial Brief](#), para. 27.

<sup>1012</sup> **P-0547**: T-052, p. 62, line 1-p. 63, line 4; p. 72, lines 4-7.

<sup>1013</sup> **P-0643**: T-056, p. 15, lines 1-4.

<sup>1014</sup> [OTP Trial Brief](#), para. 60; [DAR-OTP-0219-3573](#), at 3582; **P-1021**: T-081, p. 94, lines 4-23.

<sup>1015</sup> [REDACTED]

<sup>1016</sup> [REDACTED]

<sup>1017</sup> **P-0581**: [DAR-OTP-0216-0560-R02](#), para. 24; **P-0643**: T-056, p. 11, lines 9-17 (Conf); **P-0675**: [DAR-OTP-0206-0173-R02](#), para. 101; **P-0712**: T-036, p. 28, line 15-p. 29, line 12; **P-0736**: T-035, p. 33, line 20-p. 34, line 25; **P-0874**: [DAR-OTP-00000225](#), p. 2; **P-0878**: T-077, p. 50, lines 8-9; **P-0984**: T-066, p. 60, lines 18-20; **P-0129**: T-076, p. 18, lines 15-22.

<sup>1018</sup> [OTP Trial Brief](#), para. 27.

<sup>1019</sup> **P-0675**: [DAR-OTP-0206-0173-R02](#), para. 101.

Hakam was from the Fur tribe, and originally from Deleig.<sup>1020</sup> He was the most senior civil authority in the region of Garsila in 2003<sup>1021</sup> until his appointment as Minister of Health for West Darfur State in Al Geneina in the last quarter of 2003.<sup>1022</sup> Abd-Al-Hakam's office was located in the middle of the eastern part of town in Garsila, not far from the marketplace.<sup>1023</sup>

304. As Commissioner of Garsila, Abd-Al-Hakam was the Chair of its local Security Committee.<sup>1024</sup> According to [REDACTED], it is the local Security Committee who selected the persons who would be arrested and eliminated on account of their suspected sympathy for the rebellion.<sup>1025</sup> According to [REDACTED], they would select these targets based on information provided by Military Intelligence.<sup>1026</sup>

305. Abd-Al-Hakam also chaired the local Mobilisation Committee in Garsila.<sup>1027</sup> [REDACTED] described the Mobilisation Committee as a circumstantial, non-standing, committee,<sup>1028</sup> regrouping about one hundred people,<sup>1029</sup> including politicians, farmers, civil society, *Agids* and traders,<sup>1030</sup> who distribute themselves in sub-committees for the distribution of routine work.<sup>1031</sup> As its name suggests, the function of the Mobilisation Committee was mobilisation.<sup>1032</sup> According to [REDACTED], the decision of the State Security Committee dated 2 August 2003 about a mobilisation plan for Mukjar and Garsila<sup>1033</sup> was executed by establishing a mobilisation committee for Wadi Saleh..<sup>1034</sup>

306. The Prosecution alleges that Mr Abd-Al-Rahman chaired a sub-committee of the Garsila Mobilisation Committee called the *Mujahideen* Sub-Committee.<sup>1035</sup> According to the OTP, this *Mujahideen* Sub-Committee was in charge of recruiting and arming the JJW in the Wadi Saleh locality.<sup>1036</sup> [REDACTED]. The functions he describes, i.e. "mobilising the Mujahideen, organising them and preparing them for the war" are perfectly redundant with the functions of the Mobilisation Committee. No other witness, no other evidence was adduced of the existence

<sup>1020</sup> **P-0617:** [DAR-OTP-0202-1496-R02](#), para. 42.

<sup>1021</sup> **P-0736:** T-035, p. 33, line 20-p. 34, line 1, See also **P-0712:** T-036, p. 28, line 15-p. 29, line 12.

<sup>1022</sup> **P-0643:** T-058, p. 5, lines 7-16 (Conf).

<sup>1023</sup> **P-0883:** T-072, p. 15, lines 7-20.

<sup>1024</sup> **P-0883:** T-072, p. 15, lines 7-9.

<sup>1025</sup> [REDACTED]

<sup>1026</sup> [REDACTED]

<sup>1027</sup> [REDACTED]

<sup>1028</sup> [REDACTED]

<sup>1029</sup> [REDACTED]

<sup>1030</sup> [REDACTED]

<sup>1031</sup> [REDACTED]

<sup>1032</sup> [REDACTED]

<sup>1033</sup> [DAR-OTP-0219-8825](#), at 8833.

<sup>1034</sup> [REDACTED]

<sup>1035</sup> [OTP Trial Brief](#), paras. 87, 112.

<sup>1036</sup> [OTP Trial Brief](#), para. 87, footnote 384.

of any such *Mujahideen* Sub-Committee. [REDACTED] testified that the Mukjar Security Committee headed by Torshein<sup>1037</sup> had no *Mujahideen* sub-committee in place in 2003-2004.<sup>1038</sup> According to [REDACTED], the mobilization of *Mujahideen* was the job of the PDF Coordinator,<sup>1039</sup> not of a sub-committee of the Security Committee. This was corroborated by **D-0036**,<sup>1040</sup> whom the Prosecution did not challenge on that specific aspect in cross-examination. [REDACTED] clarified that what was called the Mobilisation Committees in the common language actually corresponded to the Reserve Service Committees provided under the 1982 Reserve Service Act<sup>1041</sup> and formed part of the administrative structure of the Reserve Forces.<sup>1042</sup> [REDACTED] also highlighted that the maximum age for serving in the reserve was 50 years old.<sup>1043</sup> Mr. Abd-Al-Rahman, who was 54 years old in 2003 had thus passed the age limit for serving in the reserve and thus could not sit on, much less chair one of its committees or sub-committees. The Prosecution did not challenge [REDACTED] on that aspect in cross-examination. [REDACTED], D-0036 and [REDACTED] all contradict the evidence of [REDACTED] about the existence of a *Mujahideen* Sub-Committee in Garsila and Mr Abd-Al-Rahman chairing it. More than reasonable doubt exists on the veracity of [REDACTED]'s uncorroborated, unsupported evidence on this point.

## Chapter 5 – Protagonists of the Armed Conflict

### Section 1 - On the Rebel Side

307. The Sudanese Liberation Movement/Army (“SLM/A”) actively recruited among the Fur population.<sup>1044</sup> **P-0756** remembered the visit of two SLM/A leaders in his village, [REDACTED], in 2003, who convened a meeting to recruit male volunteers within their ranks. P-0756 attended that meeting. The two SLM/A leaders explained that the SLM/A was created to defend Fur people and alluded to the existence of a “*plan*” to defend Fur villages.<sup>1045</sup> Sometimes, recruitment to the rebellion was done through Fur tribal leaders: **P-0584** mentioned a meeting of community leaders in January 2004, where they asked for volunteers, which was followed by the departure of about 30 volunteers to Sindu for training.<sup>1046</sup> **P-0617** reported similar interactions with the rebellion: one is a meeting [REDACTED] where Fur tribal leaders,

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<sup>1037</sup>[REDACTED]

<sup>1038</sup> [REDACTED]

<sup>1039</sup> [REDACTED]

<sup>1040</sup> D-0036: T-153, p. 53, line 22-p. 54, line 7.

<sup>1041</sup> [DAR-D31-00000236](#), Article 10.

<sup>1042</sup> [REDACTED]

<sup>1043</sup> [REDACTED]

<sup>1044</sup> [OTP Trial Brief](#), para. 42.

<sup>1045</sup> **P-0756**: [DAR-OTP-0211-0039-R02](#), para. 22.

<sup>1046</sup> **P-0584**: [DAR-OTP-0200-1540-R02](#), paras. 65-66.

including all *sheikhs* and *umdahs* and notables discussed the option of joining the rebellion in Sindu to seek its protection;<sup>1047</sup> the other is a meeting between [REDACTED], *umdah* Jiddo Khamis<sup>1048</sup> and an SLM/A rebel called Musa Ibrahim, when they agreed on the protection of villages by the rebellion.<sup>1049</sup> **P-0736** also reported the visit of a man from Sindu to his village, [REDACTED], to advise on the protection that the rebellion located there could offer.<sup>1050</sup> According to **P-1042**, the Fur population became more and more receptive to the appeals of the SLM/A over time.<sup>1051</sup>

308. The SLM/A rebellion did not wear uniform and did not distinguish from the rest of the Fur population.<sup>1052</sup> **P-0584** testified that most of the SLM/A wore no uniform or insignia and that the only way of differentiating them from the rest of the population was when they were carrying weapons.<sup>1053</sup> **P-0547** confirmed that the rebellion did not wear a particular uniform and wore plain clothes.<sup>1054</sup> Rebels also lived under the same roof as civilians.<sup>1055</sup> The only distinctive sign that **P-0736** could detect when a member of the rebellion from Sindu visited his village was that he was carrying a Kalashnikov.<sup>1056</sup> As a result, **P-0877** testified that nobody, except the rebels themselves, knew who the rebels were and what their objectives were.<sup>1057</sup> According to **P-1042**, this led to a situation where the GoS did not make a distinction between the village defence militias and the villagers themselves, suspecting the whole community of supporting the rebellion.<sup>1058</sup>

309. The evidence shows that the Fur tribe paid 60 million Sudanese pounds to the rebel armed groups after the conference that took place in Nertiti in March 2003.<sup>1059</sup> The information about this payment to the rebellion was reported to [REDACTED],<sup>1060</sup> [REDACTED].<sup>1061</sup> [REDACTED].<sup>1062</sup> That contribution of 60 million Sudanese Pounds paid to the SLM/A by the Fur tribe was meant to compensate for their losses in weapons and men.<sup>1063</sup> The SLM/A was

<sup>1047</sup> **P-0617**: [DAR-OTP-0202-1496-R02](#), para. 66.

<sup>1048</sup> **P-0617**: [DAR-OTP-0202-1496-R02](#), para. 21.

<sup>1049</sup> **P-0617**: [DAR-OTP-0202-1496-R02](#), para. 67.

<sup>1050</sup> **P-0736**: [DAR-OTP-0210-0248-R02](#), para. 92; [REDACTED]

<sup>1051</sup> **P-1042**: T-029, p. 10, lines 6-12.

<sup>1052</sup> **P-0916**: [DAR-OTP-0224-0023-R01](#), para. 49.

<sup>1053</sup> **P-0584**: T-092, p. 34, lines 10-21.

<sup>1054</sup> **P-0547**: [REDACTED]

<sup>1055</sup> **P-0547**: [REDACTED]

<sup>1056</sup> **P-0736**: [DAR-OTP-0210-0248-R02](#), para. 92; [REDACTED]

<sup>1057</sup> **P-0877**: [REDACTED]

<sup>1058</sup> **P-1042**: T-029, p. 10, line 25-p. 11, line 5.

<sup>1059</sup> [REDACTED]

<sup>1060</sup> [REDACTED]

<sup>1061</sup> **P-0020**: T-042, p. 14, line 14-p. 15, line 3; **P-0643**: [REDACTED]

<sup>1062</sup> **P-0020**: [DAR-OTP-0095-0002-R02](#), paras. 42-49; **P-0643**: [REDACTED]

<sup>1063</sup> [REDACTED]

expected to dismantle after receiving that money,<sup>1064</sup> but they did not and carried on the rebellion.<sup>1065</sup> The payment of that compensation of 60 million Sudanese Pounds to the SLM/A came in March 2003, just before the resumption of military action by the SLM/A, which resulted in the attack on Al Fasher military airport. It had the hallmarks of a significant financial contribution to the rebellion paid by the Fur tribes, and must have appeared as much to the GoS.

## Section 2 - On the Government Side

### *I – Sudanese Armed Forces*

310. The 87<sup>th</sup> Infantry Brigade of the Sudanese Armed Forces (“SAF”) fell under the 21<sup>st</sup> Infantry Division of Zalingei and was the one stationed in Garsila.<sup>1066</sup> It oversaw three Battalions,<sup>1067</sup> of a total of approximately 1,200 men.<sup>1068</sup> The Garsila Brigade was under the command of Major Muhammad Musa Adam Khatir Bakhit (“Major Bakhit”).<sup>1069</sup> Major Bakhit belonged to the Zaghawa tribe.<sup>1070</sup> The Garsila Brigade oversaw Companies in Mukjar, Bindisi and Deleig.<sup>1071</sup> All these localities, as well as Kodoom, were thus placed under the authority of Major Bakhit.<sup>1072</sup>

311. The SAF included a Military Intelligence branch.<sup>1073</sup> The Head of the SAF Military Intelligence Office in Garsila was First Lieutenant<sup>1074</sup> Hamdi Sharaf-Al-Din Sid Ahmad (“Hamdi”).<sup>1075</sup> Hamdi was described as “an Arab from Khartoum”,<sup>1076</sup> with no more specific information as to his tribal affiliation. Hamdi reported through Major Bakhit to the Military Intelligence Unit in Zalingei.<sup>1077</sup>

### *II – The Janjaweed militias*

312. Fighting on the side of the GoS were militiamen, who came as support forces for the SAF. These militiamen have received many names: *Fursan*, *Mujahideen*, *Murahileen*, but were most often described and labelled as *Janjaweed*,<sup>1078</sup> etymologically devils on horses.<sup>1079</sup>

<sup>1064</sup> [REDACTED]

<sup>1065</sup> [REDACTED]

<sup>1066</sup> **P-0883**: T-072, p. 55, lines 18-20, p. 56, lines 5-7.

<sup>1067</sup> **P-0883**: T-072, p. 56, lines 3-7.

<sup>1068</sup> **P-0883**: T-072, p. 54, line 6-p. 55, line 3.

<sup>1069</sup> [OTP Trial Brief](#), para. 34; **P-0883**: [REDACTED]

<sup>1070</sup> [REDACTED]

<sup>1071</sup> [OTP Trial Brief](#), para. 34 (also mentioning Arawala, but not supported by evidence); **P-0883**: T-072, p. 56, lines 11-17.

<sup>1072</sup> [OTP Trial Brief](#), para. 34; **P-0883**: T-072, p. 58, lines 12-16.

<sup>1073</sup> [OTP Trial Brief](#), para. 33.

<sup>1074</sup> **P-0883**: [REDACTED] **P-0905**: T-085, p. 33, lines 10-11.

<sup>1075</sup> [OTP Trial Brief](#), para. 34 (identifies Hamdi as a Lieutenant, but the evidence P-0883 shows that he was First-Lieutenant: **P-0883**: [REDACTED])

<sup>1076</sup> **P-0883**: [REDACTED]

<sup>1077</sup> **P-0883**: [REDACTED]

<sup>1078</sup> [OTP Trial Brief](#), para. 40, footnote 182.

<sup>1079</sup> **D-0036**: [DAR-D31-00000312](#), para. 11; [DAR-OTP-0209-0593](#), at 0624, para. 100.

*A – Prosecution’s Deliberate Failure to Define JJW as a Blurring Strategy*

313. The OTP accuses Mr Abd-Al-Rahman of having committed crimes in his alleged role as a JJW militia leader, but does not define what the JJW militia were. The only elements of definition provided in the OTP’s Trial Brief are that these were men fighting in the armed conflict on the side of the GoS; that they were “co-opted” – without further explanation on the modalities of that co-opting – by the Government of Sudan to help its forces against the rebellion; that “*certain Militia/JJW members were integrated into the GoS Forces, including the PDF, and received funding, weapons and military training*”; and that “*the GoS Forces and Militia/JJW conducted joint military operations against rebel bases and areas perceived as rebel strongholds, including Sindu, Kodoom, Bindisi, Arawala, Mukjar and Deleig*”.<sup>1080</sup> According to that description, all men not belonging to the official forces of the Government of Sudan, but fighting along these against the rebellion would qualify as a JJW, but without any beginning of explanation as to how and why non-military, non-police, normal citizens of Sudan would suddenly get mobilized, equipped, trained, paid and structured to undertake the perilous task of fighting against a well-armed, well-structured and powerful rebellion. The Prosecution cautiously abstains from taking a clear position as to what the JJW are and keeps navigating in troubled waters, with no definition that would have compelled it to fulfil the burden of proving that Mr Abd-Al-Rahman fell in that category. The Prosecution is asking the Trial Chamber to find Mr Abd-Al-Rahman guilty of crimes he allegedly committed in his capacity as JJW leader, without knowing what the JJW were and how he, the pharmacist of Garsila,<sup>1081</sup> could have been placed in position of leadership over them between at least August 2003 and at least April 2004, prior to becoming again a modest *Musaid* within the Central Reserve Forces (“CRF”).<sup>1082</sup> By doing so, the Prosecution failed to fulfil its duties in terms of establishment of the truth by extending its investigation to cover all facts and evidence relevant to the Case, pursuant to Article 54(1)(a) of the Statute.

314. Adding to this confusion, the Prosecution’s Trial Brief also provides some conflicting information about who the JJW were: as an alternative to this wholly informal group of militiamen, the Prosecution also suggests that “the troops of the PDF that carried out operations [...] during the relevant period, were the Militia/JJW”.<sup>1083</sup> Should this alternative definition of

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<sup>1080</sup> [OTP Trial Brief](#), para. 40.

<sup>1081</sup> [ICC-02/05-01/20-504-AnxA](#), item 11; [OTP Trial Brief](#), para. 2.

<sup>1082</sup> [ICC-02/05-01/20-504-AnxA](#), item 13 ; [OTP Trial Brief](#), para. 2.

<sup>1083</sup> [OTP Trial Brief](#), para. 38.

the JJW as being one and the same thing as the Popular Defence Forces (“PDF”) be the truth, the immediate and unavoidable consequence would be that Mr Abd-Al-Rahman cannot be guilty and shall be immediately acquitted, since the Prosecution never alleged, even less so proved that Mr Abd-Al-Rahman was part of the PDF at any time in his life. This would also defeat the *Agid-Al-Ogada* leadership theory, since the PDF is a well-structured paramilitary force with a clear leadership defined by law where no such title exists.<sup>1084</sup>

315. Although the Defence does not bear the burden of proof, a significant part of its efforts consisted in bringing clarity to the definition and exact nature of the JJW, in order to assist the TC in its essential determination as to whether Mr Abd-Al-Rahman could have been, at any time in his life, their leader for the Wadi Saleh and Mukjar localities. The Defence submits that the evidence on record can only support a negative response. This negative response calls into question the evidence on record that Mr Abd-Al-Rahman, with no such capacity as JJW leader, was present in Kodoom, Bindisi, Mukjar and Deleig and did perform the acts and conducts described in the charges. The evidence of his presence and role there cannot be reconciled with the evidence of the fact that he could not have been there in a position of JJW leader. A holistic consideration of the entire evidence in the case will thus necessarily fail to pass the threshold of proof beyond reasonable doubt of his guilt, pursuant to Article 66(3) of the Statute.

#### *B – Janjaweed Defined*

316. In its 2005 Report on Darfur to the United Nations Secretary-General, the United Nations Commission of Inquiry (“UNCOI”) sought to categorize the various groups of people commonly designated as JJW in relation to 2003-2004 events in Darfur.<sup>1085</sup> The UNCOI identifies the following three categories of JJW:

- (i) Militias which are only loosely affiliated with the Government of Sudan and which have received weapons and other supplies from the State. These militias are thought to operate primarily under a tribal management structure, but can undertake attacks at the request of the Government or on their own initiative (“1<sup>st</sup> Category”).<sup>1086</sup> The UNCOI also labels that 1<sup>st</sup> Category as “Tribal Militias”.<sup>1087</sup>
- (ii) Militias organized in paramilitary structures and in parallel to regular forces, including groups known as “*the Strike Force*”, the “*Mujahideen*” or the “*Fursan*”. They are headed by officers in the regular army or by senior tribal leaders, and operate within a defined command structure (“2<sup>nd</sup> Category”);<sup>1088</sup> and

<sup>1084</sup> **D-0036**: T-153, p. 34, line 18-p. 35, line 6; **P-0643**: T-058, p. 21, lines 5-17 (Conf); p. 34, lines 9-23 (Conf); **P-0883**: T-071, p. 60, line 22-p. 61, line 5; T-073, p. 34, lines 19-24.

<sup>1085</sup> [DAR-OTP-0209-0593](#), at 0624-0626, paras. 103-110.

<sup>1086</sup> [DAR-OTP-0209-0593](#), at 0625, para. 106, footnote 30.

<sup>1087</sup> [DAR-OTP-0209-0593](#), at 0625, para. 106, footnote 30.

<sup>1088</sup> [DAR-OTP-0209-0593](#), at 0626, para. 107.

- (iii) Members of the PDF and Border Intelligence, also known as “Border Guards” (“3<sup>rd</sup> Category”).<sup>1089</sup>

317. This categorization shall not be construed with excessive rigidity as: (i) it essentially relies on the perception of victims and other witnesses of events,<sup>1090</sup> who may thus lack a sufficient basis of knowledge to differentiate between the three categories; (ii) whenever the UNCOI had the opportunity to enquire further on specific alleged leaders of JJW identified by victims and witnesses, they eventually turned to be members of the PDF,<sup>1091</sup> i.e. falling all within the third Category. The three categories were thus nested within each other.

318. **D-0036** essentially confirmed the accuracy of the UNCOI’s classification,<sup>1092</sup> with the only caveat that there may have been a fourth category of foreign fighters, essentially coming from Chad (“4<sup>th</sup> Category”).<sup>1093</sup> This 4<sup>th</sup> Category is also mentioned in the UNCOI Report.<sup>1094</sup>

319. **D-0036** included in the 1<sup>st</sup> Category the self-defence militia existing since the 1980s-1990s amongst many communities, including the Fur, and indicated that both sides of the conflict in 2003-2004 recruited from these militia.<sup>1095</sup> **D-0036** also commented that not all Arab tribes accepted to join in the 2003-2004 counter-insurgency through their tribal militia.<sup>1096</sup> He gave examples of the Misseriya and Southern Rizeigat tribes, which did not join.<sup>1097</sup> **D-0036** was shown a relevant abstract from Julie Flint’s paper “Beyond Janjaweed: Understanding the Militias of Darfur” published by the Small Arms Survey in 2009 indicating that “the Arab tribes with dars – Beni Hussein of North Darfur – and the Bagarra of South Darfur – the Southern Rizeigat, Habbaniya, Beni Halba and Ta’aisha – all attempted to remain neutral and most of their tribal leaders refused to participate in the counter-insurgency”.<sup>1098</sup> **D-0036** agreed with that quote from Julie Flint’s paper.<sup>1099</sup> This neutral position of the Ta’aisha tribe refusing to join in the counter-insurgency is also confirmed by **P-0020**, **P-0535**, **P-1042**, **D-0001**, **D-0002**, **D-0003**, **D-0007** and **D-0039**.<sup>1100</sup>

<sup>1089</sup> [DAR-OTP-0209-0593](#), at 0625, para. 108.

<sup>1090</sup> [DAR-OTP-0209-0593](#), at 0624, para. 103, at 0626, para. 110.

<sup>1091</sup> [DAR-OTP-0209-0593](#), at 0624-0625, para. 104.

<sup>1092</sup> **D-0036**: T-153, p. 53, lines 8-9.

<sup>1093</sup> **D-0036**: T-153, p. 53, lines 2-5.

<sup>1094</sup> [DAR-OTP-0209-0593](#), at 0624, para. 102.

<sup>1095</sup> **D-0036**: T-153, p. 46, lines 15-25.

<sup>1096</sup> **D-0036**: T-153, p. 48, line 7.

<sup>1097</sup> **D-0036**: T-153, p. 48, lines 3-6.

<sup>1098</sup> [DAR-D31-0004-0031](#), at 0053-0054; **D-0036**: T-153, p. 48, lines 8-16.

<sup>1099</sup> **D-0036**: T-153, p. 48, line 19.

<sup>1100</sup> **P-0020**: T-042, p. 26, lines 3-5 (Conf); **P-0585**: T-099, p. 62, lines 1-3; **P-1042**: [DAR-OTP-0220-1623](#), para. 141; **D-0001**: T-154, p. 40, lines 2-21 (Conf); **D-0002**: T-156, p. 44, line 5-p. 45, line 14; **D-0003**: T-155, p. 50, lines 4-20; **D-0007**: T-149, p. 21, lines 1-20 (Conf); **D-0039**: T-159, p. 54, lines 9-21.

320. With respect to UNCOI's 3<sup>rd</sup> Category, **D-0036** commented that the coordination between the various security forces, including the SAF, the PDF and the Civil Defence, was done through the local Security Committees of each locality, in which a civilian PDF coordinator was sitting.<sup>1101</sup> Further information on the role of PDF coordinators in Security Committees is provided in D-0036's "*A Paramilitary Revolution: The Popular Defence Forces*", where he writes: "*The PDF is structured around a hierarchy of joint military and civilian coordinating committees, with local and state committees reporting to the national coordination council. These joint committees are formed of civilian PDF coordinators and military SAF officers, and are represented at the state security committees alongside police, military and security commanders.*"<sup>1102</sup> The presence of civilian PDF coordinators in local Security Committees was already mentioned in the UNCOI's Report.<sup>1103</sup>

321. The categorization proposed in the UNCOI's Report and **D-0036**'s evidence is largely corroborated by the evidence on record. With a very few exceptions, all witnesses identify the so-called JJW as falling in one or the other four categories identified by the UNCOI and **D-0036**. Some of them identify the so-called JJW as a mix between two or more of these categories. **P-0119** for instance equates the so-called JJW to a mix of PDF,<sup>1104</sup> Border Guards,<sup>1105</sup> and Arab militias, with no possible distinction between them.<sup>1106</sup> **P-0769** interpreted the reference to "semi-regular forces" in the "National Security Council's 2004 Plan for Ending the Rebellion in the States of Darfur"<sup>1107</sup> as referring to on the one hand, the PDF and, on the other hand, the Border Guard.<sup>1108</sup> Similarly, **P-0883** described the so-called JJW as mix of PDF, who were considered as part of the *Fursan*,<sup>1109</sup> and of Border Guards.<sup>1110</sup> **P-0905** also equated the so-called JJW as a mix of PDF<sup>1111</sup> and Border Guards.<sup>1112</sup>

322. The only witness who partially diverged from this categorization of the so-called JJW into the four abovementioned categories is **P-0547**, who described them as a combination of

<sup>1101</sup> **D-0036**: T-153, p. 51, line 23-p. 52, line 8; [DAR-D31-00000312](#), para. 16.

<sup>1102</sup> [DAR-OTP-0158-0570](#), at 0582.

<sup>1103</sup> [DAR-OTP-0209-0593](#), para. 109.

<sup>1104</sup> **P-0119**: [DAR-OTP-0124-0196-R03](#), para. 14.

<sup>1105</sup> **P-0119**: [DAR-OTP-0124-0196-R03](#), para. 101.

<sup>1106</sup> **P-0119**: [DAR-OTP-0124-0196-R03](#), para. 71.

<sup>1107</sup> [DAR-OTP-0215-4648](#), at 4651.

<sup>1108</sup> **P-0769**: T-097, p. 65, lines 7-14 (Conf).

<sup>1109</sup> **P-0883**: T-072, p. 25, lines 14-16.

<sup>1110</sup> **P-0883**: T-074, p. 38, lines 11-12.

<sup>1111</sup> **P-0905**: T-085, p. 66, line 21-p. 67, line 17 (Conf).

<sup>1112</sup> **P-0905**: T-085, p. 72, lines 9-17 (Conf).

Border Guards and Central Reserve Forces (“CRF”), thus adding a potential fifth category, the CRF.<sup>1113</sup>

*(i) Popular Defence Forces*

323. The PDF (also known as “*Al-Difa’ Al-Sha’bi*”) was created pursuant to the People’s Defence Act of 1989.<sup>1114</sup> According to Article 5 of this Act, the aims of the PDF are “*to train personnel for civil and military defence activities, to raise security awareness levels and to instil the military spirit, traditions and discipline needed for them to support the People’s Armed Forces and the other government forces as required.*”<sup>1115</sup> Its functions include “(a) to support the People’s Armed Forces and all other government forces as necessary; (b) to participate in the Nation’s defence and to assist in dealing with civil disasters and catastrophes; (c) any other functions entrusted to them by the Commander-in-Chief himself or as recommended by the Council.”<sup>1116</sup> The PDF was comprised of two parts, a civilian coordinating body responsible for, in particular, the mobilisation of civilians into the PDF, and a military body, responsible for leading operations, training and various other duties.<sup>1117</sup> At the locality level, the civilian branch was led by a civilian PDF coordinator normally appointed by the Commissioner or *mu’atamid*,<sup>1118</sup> and the military branch by a PDF Commander, who was usually an officer in the army. This dichotomy and structure was confirmed by **D-0036** and **P-0883**. D-0036 relies on specific article 7.3 of the 1989 Popular Defence Act<sup>1119</sup> to explain that local PDF Commanders, in opposition to civil Coordinators, were appointed by the PDF Council from regular forces to serve under the National PDF Commander.<sup>1120</sup> P-0883 identifies the PDF Coordinator in Garsila as a Fur civilian named Jenif and the PDF Commander in Nyala as a lieutenant-colonel named Al-Hirika, but contends, without further explanation, that there was no PDF Commander in Garsila.<sup>1121</sup> [REDACTED] actually clarified that the PDF Commander in Garsila was First-Lieutenant Hamdi,<sup>1122</sup> [REDACTED].<sup>1123</sup>

324. Most witnesses equate the so-called JJW to PDF. **P-0040** even uses the expression “*Janjaweed Difa Shabi*”, thus merging the word JJW with *Al-Difa’ Al-Sha’bi*, the other name

<sup>1113</sup> **P-0547**: T-051, p. 27, lines 8-14 (Conf).

<sup>1114</sup> See generally [DAR-OTP-0116-0889](#).

<sup>1115</sup> [DAR-OTP-0116-0889](#), Art. 5.

<sup>1116</sup> [DAR-OTP-0116-0889](#), Art. 6.

<sup>1117</sup> [OTP Trial Brief](#), para. 35.

<sup>1118</sup> **P-0883**: T-073, p. 38, lines 17-21.

<sup>1119</sup> [DAR-OTP-0116-0889](#), Article 7.3.

<sup>1120</sup> **D-0036**: T-153, p. 34, line 19-p. 35, line 6.

<sup>1121</sup> **P-0883**: T-073, p. 34, lines 16-24.

<sup>1122</sup> [REDACTED]

<sup>1123</sup> [REDACTED]

of the PDF<sup>1124</sup> and stated that the GoS was referring to the JJW in Beida as PDF<sup>1125</sup> and that they wore the same uniforms.<sup>1126</sup> **P-0096** corroborated P-0040's evidence on this point, by using the words JJW and PDF interchangeably.<sup>1127</sup> **P-0129** stated that that the so-called JJW and the PDF used to work together<sup>1128</sup> and wore the same green camouflage uniform.<sup>1129</sup> **P-0547** testified that, starting from 2002, the PDF started recruiting people from the Arab tribes to use them to resolve the security crisis in Darfur.<sup>1130</sup> **P-0736** stated that the PDF and the so-called JJW shared the same camp in the South of Garsila and that the villagers did not distinguish between the two anymore<sup>1131</sup>. **D-0017** also mentioned that the PDF were, together with the Border Guards, the military component of the 2003-2004 counter-insurgency.<sup>1132</sup> **D-0026** also provided evidence of the recruitment of Arab militias, their arming, the distribution of uniform and military ID Card and their enlistment in the counter-insurgency campaign by the Government of Sudan,<sup>1133</sup> as well rumours that these were *Mujahideen*, whom he thought were Islamic fundamentalists,<sup>1134</sup> but were actually describing the PDF, as clarified by D-0036.

325. **D-0017** [REDACTED] provides full details as to their condition of recruitment, service and remuneration. D-0017 specified that the selection and recruitment of the JJW in the PDF were entrusted to the local PDF Coordinators,<sup>1135</sup> who worked in coordination with tribal leaders, *Umdahs* and *Sheikhs*.<sup>1136</sup> For example, a PDF coordinator issued letters to newly recruited *Janjaweed*, to register with the local military commander, allowing them to receive allowances,<sup>1137</sup> such as compensation in case of death in operation.<sup>1138</sup> Starting 2004, some of the lands confiscated from the population were awarded to JJW.<sup>1139</sup> [REDACTED].<sup>1140</sup>

326. **P-0954** clarified that the PDF Forces were composed of *Emirs* and *Mujahideen* fighters who were civilians<sup>1141</sup> and reported directly to the PDF Commander in Nyala, Lieutenant-

<sup>1124</sup> **P-0040**: [DAR-OTP-0094-0165-R02](#), para. 35.

<sup>1125</sup> **P-0040**: [DAR-OTP-0094-0165-R02](#), para. 36.

<sup>1126</sup> **P-0040**: [DAR-OTP-0094-0165-R02](#), para. 40.

<sup>1127</sup> **P-0096**: [DAR-OTP-0113-0138-R02](#), paras. 9, 101.

<sup>1128</sup> **P-0129**: [DAR-OTP-0128-0128-R04](#), para. 107.

<sup>1129</sup> **P-0129**: [DAR-OTP-0223-0157-R02](#), para. 19.

<sup>1130</sup> **P-0547**: [REDACTED]

<sup>1131</sup> **P-0736**: [DAR-OTP-0210-0248-R02](#), para. 82.

<sup>1132</sup> **D-0035**: [DAR-D31-00000274](#), para. 29.

<sup>1133</sup> **D-0026**: [DAR-OTP-0109-0111-R01](#), para. 45.

<sup>1134</sup> **D-0026**: [DAR-OTP-0109-0111-R01](#), para. 56.

<sup>1135</sup> **D-0017**: [DAR-D31-00000146](#), para. 23.

<sup>1136</sup> **D-0017**: [DAR-D31-00000146](#), para. 24.

<sup>1137</sup> **D-0017**: [DAR-D31-00000146](#), paras. 25, 32.

<sup>1138</sup> **D-0017**: [DAR-D31-00000146](#), paras. 26, 32.

<sup>1139</sup> **D-0017**: [DAR-D31-00000146](#), paras. 27, 32.

<sup>1140</sup> **D-0017**: [DAR-D31-00000146](#), para. 27.

<sup>1141</sup> **P-0954**: [DAR-OTP-0221-0571-R01](#), para. 19.

Colonel Abu Al Ghassim Ali Hariga Hamed.<sup>1142</sup> The PDF Commander in Nyala served as the head of all PDF offices in Wadi Saleh, including Mukjar and Garsila.<sup>1143</sup> P-0954 essentially corroborates the description of the compensation system applied to PDF members,<sup>1144</sup> as described by **D-0017**, but submits that the PDF members received salaries,<sup>1145</sup> instead of allowances.

327. During the attack on Bindisi, **P-0007** stated that the JJW attacking his village wore PDF uniforms.<sup>1146</sup> **P-0720** stated that he saw the man he identified as the Commander of the JJW in Mukjar, Sameh,<sup>1147</sup> wearing the PDF camouflage uniform.<sup>1148</sup> **P-0757** corroborated that the JJW were wearing a similar green and dark-coloured camouflage uniform in Mukjar.<sup>1149</sup> **P-0919** corroborated that the JJW were wearing the same uniform as the PDF in Mukjar.<sup>1150</sup> **P-0878** testified that he heard in Mukjar in August 2003 a speech delivered by Ali Karti, described as the Commander of the PDF for the whole Sudan,<sup>1151</sup> equating the JJW and their leaders as members of the PDF.<sup>1152</sup> **P-0984** testified that all JJW in Mukjar, including their higher Commander Sameh,<sup>1153</sup> were trained and registered with the PDF.<sup>1154</sup> **P-0671** testified that the JJW [REDACTED] wore a uniform<sup>1155</sup>, which he identified as the uniform of the PDF.<sup>1156</sup>

328. There are other witnesses who may not entirely corroborate that the JJW were members of the PDF, but their evidence is often unclear or contradictory, with a non-reliable basis of knowledge. **P-0008**, a villager from Mukjar with no military experience, reported having gathered information – i.e. from unspecified and anonymous sources – according to which the JJW would be a mix of people who had not completed the PDF training, but were provided with PDF uniforms, and another non-organized group of people carrying their own weapons and no uniforms.<sup>1157</sup> **P-0012** equated the so-called *Janjaweed* to *Fursan* and said that they were not members of the PDF,<sup>1158</sup> but P-0012 has no military background and no reliable basis of

<sup>1142</sup> **P-0954**: [DAR-OTP-0221-0571-R01](#), paras. 23-24, 26, 39-40.

<sup>1143</sup> **P-0954**: [DAR-OTP-0221-0571-R01](#), para. 27.

<sup>1144</sup> **P-0954**: [DAR-OTP-0221-0571-R01](#), para. 37.

<sup>1145</sup> **P-0954**: [DAR-OTP-0221-0571-R01](#), para. 42.

<sup>1146</sup> **P-0007**: T-089, p. 32, lines 2-19.

<sup>1147</sup> **P-0720**: [DAR-OTP-0210-0291-R02](#), paras. 72-73.

<sup>1148</sup> **P-0720**: [DAR-OTP-0210-0291](#), para. 75.

<sup>1149</sup> **P-0757**: [DAR-OTP-0211-0003-R02](#), para. 26.

<sup>1150</sup> **P-0919**: [DAR-OTP-0217-0423](#), para. 79.

<sup>1151</sup> **P-0878**: T-077, p. 63, lines 19-20.

<sup>1152</sup> **P-0878**: T-078, p. 11, line 18-p. 12, line 13.

<sup>1153</sup> **P-0984**: T-067, p. 26, line 21-p. 27, line 4.

<sup>1154</sup> **P-0984**: T-067, p. 24, lines 12-15.

<sup>1155</sup> **P-0671**: T-099, p.17, l.16 – p.18, l.1; [DAR-OTP-0206-0105-R02](#), para. 36.

<sup>1156</sup> **P-0671**: T-099, p.18, l.9-22; [DAR-D31-00000007-0002](#).

<sup>1157</sup> **P-0008**: [DAR-OTP-0088-0085-R02](#), para. 18.

<sup>1158</sup> **P-0012**: [DAR-OTP-0119-0503-R01](#), para. 39.

knowledge to assert so. P-0012 also admitted that at least some *Fursan* were trained as PDF, had uniforms and were directly supported by the Government,<sup>1159</sup> just like normal PDF. At the same time, he identifies the PDF Coordinator Hassaballah as one of the JJW leaders present during the attack on Bindisi.<sup>1160</sup> **P-0131** describes the JJW as just “*a number of people who ride horses and also carry arms who burn the Fur villages*”,<sup>1161</sup> and who were incorporated into the police after the attack on Bindisi,<sup>1162</sup> without connection with the PDF. P-0131’s blunt denial is just one more inconsistency of his.<sup>1163</sup>

329. There is ample evidence identifying key actors of the case involved in the commission of the crimes in Kodoom, Bindisi, Mukjar and/or Deleig as leaders of the PDF.

330. Abd-Al-Rahman Dawud Hammudah (“Hassaballah”) is described by **P-0643** as a member of the PDF who replaced the PDF Coordinator Jenif after his assassination, allegedly in Deleig in March 2004,<sup>1164</sup> but was already in charge and was the one commanding *de facto* the PDF troops in all operations in Bindisi, Sindu, Mukjar and Deleig.<sup>1165</sup> **P-0012**, **P-0878**, **P-0931** and **P-1021** also identify Hassaballah as the PDF Coordinator in Garsila,<sup>1166</sup> whereas **P-0905** first described Hassaballah as Jenif’s deputy,<sup>1167</sup> prior to replacing him as PDF Coordinator.<sup>1168</sup> **P-1021** acknowledges the presence of Hassaballah in Bindisi, but not in a position of command.<sup>1169</sup> This discrepancy with other witnesses may find its explanation in the [REDACTED].<sup>1170</sup>

331. [REDACTED] “Solonga”[REDACTED] is identified by **P0041**, **P-0720**, **P0877** and **P-0878** as the PDF Coordinator in Mukjar.<sup>1171</sup> According to **P-0986**, he performed in that function already before the 2003-2004 war.<sup>1172</sup> [REDACTED] even provided the more specific timeframe of 1996 until 2016.<sup>1173</sup> **P-0922** and **P-0984** also corroborate and further specified

<sup>1159</sup> **P-0012**: [DAR-OTP-0119-0503-R01](#), paras. 28-29.

<sup>1160</sup> **P-0012**: [DAR-OTP-0119-0503-R01](#), para. 78.

<sup>1161</sup> **P-0131**: [REDACTED]

<sup>1162</sup> **P-0131**: [REDACTED]

<sup>1163</sup> See **PART III – Chapter 2**.

<sup>1164</sup> **P-0643**: T-056, p. 53, line 25-p. 54, line 3 (Conf); p. 88, lines 17-22 (Conf); P-0643: T-058, p. 22, lines 2-3 (Conf); p. 35, lines 21-25 (Conf).

<sup>1165</sup> **P-0643**: T-058, p. 36, line 1-p. 37, line 23 (Conf).

<sup>1166</sup> **P-0012**: [DAR-OTP-0119-0503-R01](#), para. 78; **P-0878**: T-078, p. 19, lines 1-4 (Conf); **P-0931**: T-062, p. 14, line 9-p. 15, line 3; **P-1021**: T-081, p. 71, lines 21-23 (Conf).

<sup>1167</sup> **P-0905**: T-085, p. 38, lines 14-16 (Conf).

<sup>1168</sup> **P-0905**: T-086, p. 40, line 4 (Conf); p. 46, lines 20-22.

<sup>1169</sup> **P-1021**: [REDACTED]

<sup>1170</sup> **P-1021**: [REDACTED]

<sup>1171</sup> **P-0041**: [DAR-OTP-0206-0033-R03](#), para. 21; **P-0720**: T-043, p. 39, line 11-p. 40, line 20; **P-0877**: T-054, p. 12, lines 2-5 [REDACTED]; **P-0878**: T-077, p. 58, line 22-p. 59, line 2.

<sup>1172</sup> **P-0986**: [DAR-OTP-0222-0437-R01](#), para. 103.

<sup>1173</sup> [REDACTED]

that they saw him in that capacity distributing money, ammunitions and uniforms to the JJW.<sup>1174</sup> [REDACTED] referred to the mobilization of PDF recruits as the most important duty of a PDF Coordinator.<sup>1175</sup> **P-0129** also referred to a “lieutenant-colonel from the Janjaweed” known by the name of [REDACTED], who was in charge for all the regions South of Mukjar.<sup>1176</sup>

332. Besides the abovementioned key actors, **P-0643** testified that Hamdi, in addition to leading the Military Intelligence Unit in Garsila, was tasked with leading the PDF in the acting highest capacity as PDF Commander for Garsila.<sup>1177</sup> As PDF Commander, Hamdi was in charge of the distribution of weapons and outfits to the PDF recruits.<sup>1178</sup> **P-0883**, [REDACTED], tried to pretend that there was no PDF Commander in Garsila,<sup>1179</sup> but nevertheless admitted that Hamdi had been tasked and was in charge of the operation in Deleig,<sup>1180</sup> just like a PDF Commander would have been. **P-0883** further admitted that it is Hamdi who appointed Hassaballah to replace Jenif as the PDF Coordinator for Garsila, with the authorization of Commissioner Jaafar Abd-Al-Hakam.<sup>1181</sup>

333. Some witnesses have finally alluded to the person named *Ali Kushayb* being a member of the PDF.<sup>1182</sup> But the Prosecution never even alleged that the so-called *Ali Kushayb* or Mr. Abd-Al-Rahman ever belonged to the PDF. The brief biography the Prosecution provides for Mr. Abd-Al-Rahman only mentions that he served in the SAF Medical Unit until in the early 1990s, then opened a pharmacy in Garsila, prior to joining the CRF in July 2005,<sup>1183</sup> without passing by the PDF. The Prosecution and the Defence agreed on the same biography.<sup>1184</sup> The evidence that *Ali Kushayb* would have served in the PDF thus does not form part of the Prosecution’s case and, if considered and believed, can only lead to the conclusion that he and Mr. Abd-Al-Rahman are two different persons, as submitted by the Defence. The only other option would be that the relevant witnesses are mistaken or did not tell the truth about Mr. Abd-Al-Rahman. [REDACTED] testified that he met a person known by the name *Ali Kushayb* and

<sup>1174</sup> **P-0922**: [DAR-OTP-0222-0312-R01](#), para. 79; **P-0984**: T-066, p. 44, line 12-p. 46, line 6.

<sup>1175</sup> [REDACTED]

<sup>1176</sup> **P-0129**: T-076, p. 40, lines 7-11.

<sup>1177</sup> **P-0643**: T-056, p. 45, lines 17-18 (Conf); T-058, p. 21, lines 5-17 (Conf); p. 34, lines 9-23 (Conf).

<sup>1178</sup> **P-0643**: T-058, p. 34, line 24-p. 35, line 4 (Conf); p. 63, lines 3-6 (Conf); p. 87, lines 8-11 (Conf).

<sup>1179</sup> **P-0883**: T-073, p. 34, lines 19-24.

<sup>1180</sup> **P-0883**: T-074, p. 49, line 21-p. 50, line 17.

<sup>1181</sup> **P-0883**: T-072, p. 64, line 14-p. 65, line 3; T-073, p. 38, lines 11-p. 39, line 9.

<sup>1182</sup> **P-0020**: [DAR-OTP-0095-0002-R02](#), para. 63; **P-0119**: [DAR-OTP-0124-0196-R03](#), para. 121; **P-0547**: T-052, p. 8, line 21-p. 9, line 24 (Conf); **P-0585**: T-102, p. 29, line 20-p. 30, line 20; **P-0671**: T-099, p. 18, line 23-p. 19, line 13, p. 11, line 18-p. 12, line 5; **P-0769**: T-097, p. 36, line 23-p. 37, line 11 (Conf); **P-0878**: T-077, p. 64, lines 14-23; T-078, p. 8, lines 5-21; **P-0883**: T-071, p. 40, lines 12-15, p. 61, lines 6-8; **P-0903**: T-033, p. 62, lines 13-25.

<sup>1183</sup> [OTP Trial Brief](#), para. 2.

<sup>1184</sup> [ICC-02/05-01/20-504-AnxA](#), items 10-11, 13.

belonging to the PDF [REDACTED],<sup>1185</sup> but he did not identify that person as being Mr. Abd-Al-Rahman and testified that the person named *Ali Kushayb* was substantially younger.<sup>1186</sup> [REDACTED]'s evidence, which was not challenged by the Prosecution in his cross-examination, thus supports the contention that the PDF Officer *Ali Kushayb* [REDACTED] and Mr Abd-Al-Rahman are two different persons. In any case, it is uncontested that Mr Abd-Al-Rahman never served in the PDF in his life.

(ii) *Border Guards*

334. As an alternative to the PDF, the Border Intelligence or Border Guards is also referred to by many witnesses as being the so-called JJW. According to **P-0119**, at the time [REDACTED] –February-March 2007 -, all militia members in Darfur became members of the Border Guards, which he referred to as the “Border Intelligence Unit”, founded by Musal Hilal and another person nicknamed Abu Kamasha.<sup>1187</sup> **P-0120** testified that the Border Guards, initially called “Border Intelligence”, encompassed the Arab militias, that it was a codification of these militias by the GoS<sup>1188</sup> and that they were all essentially JJW.<sup>1189</sup> **P-0905** equated the JJW to a mix of PDF<sup>1190</sup> and Border Guards.<sup>1191</sup> According to **P-1042**'s Report, the Border Guards, or Border Intelligence Brigade, of Musa Hilal formed the biggest proxy on which the Government of Sudan could rely for mobilizing paramilitary forces.<sup>1192</sup> It was built up as the first, largest, and most feared JJW group.<sup>1193</sup> For non-Arab populations, the word JJW primarily referred to Hilal's Border Guards militia and their brethren.<sup>1194</sup> **D-0035**, [REDACTED], also mentioned that the Border Guards were, together with the PDF, the military component of the 2003-2004 counter-insurgency commonly referred as the so-called JJW.<sup>1195</sup>

335. According to **D-0017**, the Border Guards and the Popular Police Forces (“PPF”) were one and the same<sup>1196</sup> and were, with the PDF, recruiting the JJW.<sup>1197</sup> The same modalities of recruitment, equipping, registration by the local military commander, compensation in case of death in service, and allowance of land plots confiscated to the population applied to both the

<sup>1185</sup> [REDACTED].

<sup>1186</sup> [REDACTED].

<sup>1187</sup> **P-0119**: [DAR-OTP-0124-0196-R03](#), para. 102.

<sup>1188</sup> **P-0120**: T-036, p. 54, line 21-p. 55, line 14.

<sup>1189</sup> **P-0120**: T-036, p. 55, line 14.

<sup>1190</sup> **P-0905**: T-085, p. 66, line 21-p. 67, line 17 (Conf).

<sup>1191</sup> **P-0905**: T-085, p. 72, lines 9-17 (Conf).

<sup>1192</sup> **P-1042**: [DAR-OTP-0220-1623](#), para. 126.

<sup>1193</sup> **P-1042**: T-027, p. 80, line 16-p. 81, line 1.

<sup>1194</sup> **P-1042**: [DAR-OTP-0220-1623](#), para. 130.

<sup>1195</sup> **D-0035**: [DAR-D31-00000274](#), paras. 28-29.

<sup>1196</sup> **D-0017**: [DAR-D31-00000146](#), para. 31.

<sup>1197</sup> **D-0017**: [DAR-D31-00000146](#), paras. 20, 32.

PDF and PPF components of the JJW,<sup>1198</sup> with the only difference that, unlike the PDF who received an allowance, the PPF were paid monthly salaries, comparable to those paid in the regular police.<sup>1199</sup>

(iii) *Tribal Militias*

336. Irrespective of their recruitment through the PDF or Border Guards, the witnesses described the JJW as militiamen from various Arab tribes. According to **P-1042**, the Northern Rizeigat formed the back-bone of the JJW,<sup>1200</sup> but the majority of the JJW in Wadi Saleh came from the Salamat tribe.<sup>1201</sup> **P-0585** mentioned the Nawabiya, i.e. the tribe of the “Emir for all Arab Tribes” in Wadi Saleh,<sup>1202</sup> Misseriya, Khozam, and Tarjam tribes.<sup>1203</sup> **D-0026** remembered JJW from the Rizeigat and Tama tribes.<sup>1204</sup> **P-0041** equated the JJW to Arab Militias<sup>1205</sup> and added that they had a form of cooperation with the PDF.<sup>1206</sup>

337. In Bindisi, **P-0012** equated the JJW to *Fursan* and said that their leader was *Agid-Al-Ogada* Hamuda Hamdan.<sup>1207</sup> The use of the *Agid-Al-Ogada* tribal title is an indication that the JJW **P-0012** is referring to as *Fursan* fall into UNCOI’s 1<sup>st</sup> Category of tribal militias. **P-0012** also testified that at least some *Fursan* were trained as PDF, had uniforms, and were directly supported by the Government,<sup>1208</sup> just like the PDF.

338. There is ample evidence identifying key actors of the Case involved in the commission of the crimes in Kodoom, Bindisi, Mukjar and/or Deleig as leaders of tribal militias. **P-0877** identified *Sheikh* Al-Dayf Al-Samih (“Sameh”) as the *Agid-Al-Ogada* for the JJW in Mukjar.<sup>1209</sup> The position of Sameh as *Agid-Al-Ogada* for Mukjar is corroborated by **P-0012**, **P-1021**, and **D-0026**.<sup>1210</sup> **P-0877** testified that Sameh was from the Beni Halba tribe,<sup>1211</sup> whilst **P-0984** and **P-0986** specified that he belonged to the Misseriya tribe.<sup>1212</sup> **P-0129** described Sameh as the JJW Commander in Mukjar<sup>1213</sup> and Bindisi.<sup>1214</sup> **P-0922** also referred to Sameh as the

<sup>1198</sup> **D-0017**: [DAR-D31-00000146](#), para. 32.

<sup>1199</sup> **D-0017**: [DAR-D31-00000146](#), para. 29.

<sup>1200</sup> **P-1042**: T-028, p. 58, lines 19-23.

<sup>1201</sup> **P-1042**: T-028, p. 52, lines 3-13; p. 59, lines 18-22; p. 62, line 18-p. 63, line 2; p. 79, line 22-p. 80, line 11.

<sup>1202</sup> **P-0643**: T-058, p. 10, lines 17-23 (Conf); **P-0129**: [DAR-OTP-0128-0128-R04](#), para. 24.

<sup>1203</sup> **P-0585**: T-099, p. 62, lines 1-3.

<sup>1204</sup> **D-0026**: [DAR-OTP-0109-0111-R01](#), para. 45.

<sup>1205</sup> **P-0041**: [DAR-OTP-0206-0033-R02](#) (0039): “The JJW / Arab Militias”.

<sup>1206</sup> **P-0041**: [DAR-OTP-0206-0033-R02](#), para. 22.

<sup>1207</sup> **P-0012**: T-045, p. 65, line 15-p. 67, line 2 (Conf).

<sup>1208</sup> **P-0012**: [DAR-OTP-0119-0503-R01](#), para. 29.

<sup>1209</sup> **P-0877**: T-053, p.70, line 1-p. 71, line 2.

<sup>1210</sup> **P-0012**: T-046, p. 18, line 21-p. 22, line 1 (Conf); **P-1021**: T-080, p. 31, line 25 (Conf); **D-0026**: [DAR-OTP-0109-0111-R01](#), para. 23.

<sup>1211</sup> **P-0877**: T-053, p. 70, lines 19-23.

<sup>1212</sup> **P-0984**: T-066, p. 15, lines 6-10; **P-0986**: [DAR-OTP-0222-0437-R01](#), para. 99.

<sup>1213</sup> **P-0129**: T-076, p. 34, line 10.

<sup>1214</sup> **P-0129**: [DAR-OTP-0223-0157-R02](#), para. 24.

Commander of the JJW.<sup>1215</sup> **P-0581** and **P-0921** respectively confirmed that Sameh was a JJW Commander<sup>1216</sup> and leader in Mukjar.<sup>1217</sup> According to **P-0720**, Sameh used to wear a PDF camouflage uniform.<sup>1218</sup>

339. **P-1021** identified Muhamad Adam Bonjouse (“Bonjouse”) as another *Agid-Al-Ogada* for the JJW.<sup>1219</sup> Whereas according to **P-0643**, Bonjouse belonged to the Mahariya Arab tribe,<sup>1220</sup> **P-0883** identified him as the leader of the Rizeigat tribe, which he described as the largest group participating in the attack on Tanako.<sup>1221</sup> This is in contradiction with other evidence on record which described Bonjouse as a subordinate of *Ali Kushayb*,<sup>1222</sup> nevertheless confirming that the tribal leader Bonjouse was a JJW leader.

340. **P-0131** identified Dawd Dahab’ Abduh as the “*Emir* of the *Mujahideen*” and/or “*Emir* of the *Fursan*” and specified that he was an *Agid* <sup>1223</sup> and took part in the destruction of Bindisi.<sup>1224</sup> [REDACTED] confirmed the presence of Dawd Dahab’ Abduh in the convoy that led the attack on Bindisi and identified him as an *Umdah*.<sup>1225</sup>

341. Abdul Rahim Ahmad (“Shakrutallah”), is identified by **P-0040** as a 3-stars Major (*Raid*) within the SAF<sup>1226</sup> and the General Leader of all JJW for West-Darfur.<sup>1227</sup> **P-0040** described the interaction between Shakrutallah and the *Sheikhs* and *Umdahs* of the Arab tribes in relation to the recruitment, equipping and training of what he described as *Difa Shabi*.<sup>1228</sup> **P-0020** also corroborated that Shakrutallah was one of the main members of the counterinsurgency in West Darfur.<sup>1229</sup> **P-0120** added that Shakrutallah was promoted from Major to Lieutenant-Colonel during the events surrounding 2003<sup>1230</sup> and opined that Shakrutallah was also affiliated to the Border Guards.<sup>1231</sup> **P-0008** further described Shakrutallah as being an *Agid* and the Chief of Operations in Western Darfur.<sup>1232</sup> **P-0921** also lists Shakrutallah among the JJW commanders

<sup>1215</sup> **P-0922**: T-039, p. 28, lines 23-25.

<sup>1216</sup> **P-0581**: [DAR-OTP-0219-2365](#), lines 331-337.

<sup>1217</sup> **P-0921**: T-110, p. 33, lines 4-5 (Conf).

<sup>1218</sup> **P-0720**: [DAR-OTP-0210-0291-R02](#), para. 75.

<sup>1219</sup> **P-1021**: T-080, p. 32, line 1 (Conf).

<sup>1220</sup> **P-0643**: T-059, p. 10, line 24-p. 11, line 2 (Conf).

<sup>1221</sup> **P-0883**: T-071, p. 41, lines 1-7.

<sup>1222</sup> **P-0012**: [DAR-OTP-0119-0503-R01](#), para. 33; **P-0643**: T-056, p. 24, lines 4-7 (Conf); **P-0883**: T-074, p. 59, lines 15-20 (Conf).

<sup>1223</sup> **P-0131**: T-112, p. 32, lines 20-25 (Conf).

<sup>1224</sup> **P-0131**: T-113, p. 5, lines 8-13 (Conf).

<sup>1225</sup> [REDACTED]

<sup>1226</sup> **P-0040**: [DAR-OTP-0094-0165-R02](#), para. 36.

<sup>1227</sup> **P-0040**: [DAR-OTP-0094-0165-R02](#), para. 38.

<sup>1228</sup> **P-0040**: [DAR-OTP-0094-0165-R02](#), para. 36..

<sup>1229</sup> **P-0020**: T-042, p. 9, lines 8-14 (Conf).

<sup>1230</sup> **P-0120**: T-037, p. 53, line 15-p. 54, line 1 (Conf).

<sup>1231</sup> **P-0120**: [DAR-OTP-0124-0816-R02](#), paras. 43-45; **P-0120**: T-036, p. 54, lines 4-15; T-037, p. 54, lines 7-9 (Conf).

<sup>1232</sup> **P-0008**: [DAR-OTP-0008-0058-R02](#), para. 36.

present in Mukjar.<sup>1233</sup> P-0921's description of Shakrutallah as a junior commander and one of *Ali Kushayb's* subordinates does not withstand the comparison with the above evidence of his high rank provided by P-0008, P-0040 and P-0120.

342. Other JJW leaders are also characterized by their position as leaders in their tribes. For example, **P-0119** stated having met Musa Hilal several times and described him as the JJW leader well known in all Darfur and a "paramount leader" of the Mahamid tribe, a branch of the Northern Rizeigat.<sup>1234</sup> **P-0120**, **P-0769** and **P-1042** confirmed that Musa Hilal was a tribal leader of the Mahamid tribe.<sup>1235</sup> **P-0547** is more specific and described Musa Hilal as the son of the Mahamid *Nazir*<sup>1236</sup> who became *Nazir* himself.<sup>1237</sup> P-0547 identified Musa Hilal as a JJW leader of reference for Western Darfur in October 2003.<sup>1238</sup> **D-0026** also remembered Musa Hilal as being identified as the then leader of the JJW.<sup>1239</sup> According to **P-0736**, Musa Hilal and his men were already active and attacking villages in the area of West-Darfur since the year 2000.<sup>1240</sup> P-1042 further confirms that Musa Hilal played a prominent role in the 2003-2004 counter-insurgency in various areas, including Western Darfur.<sup>1241</sup>

(iv) "The Strike Force", the "Mujahideen", the "Murahineen" or the "Fursan"

343. No evidence exists as to the presence or role played by the "Strike Force" mentioned in UNCOI's 2<sup>nd</sup> Category of JJW.

344. The alternative wordings of *Fursan*, *Mujahideen*, and *Murahileen* used by some witnesses do not appear to form a separate category of the JJW that would be distinct from the PDF, Border Guards and/or tribal militias. **D-0036** was specifically requested to explain the differences, if any, between these words. The term *Mujahideen*, meaning fighters of the Holy War, was broadly used to designate PDF volunteers.<sup>1242</sup> The word *Murahileen* initially described the defensive guards protecting the cattle of Baggara tribes during seasonal migration towards grazing grounds in Bahr-El-Ghazal.<sup>1243</sup> However, the *Murahileen* were subsequently integrated within the PDF in 1989<sup>1244</sup> and became a sub-group thereof connected to the Baggara

<sup>1233</sup>**P-0921**: T-110, p. 33, lines 4-5 (Conf).

<sup>1234</sup> **P-0119**: [DAR-OTP-0124-0196-R03](#), paras. 89, 91.

<sup>1235</sup>**P-0120**: T-037, p. 34, line 13-p. 35, line 11 (Conf); **P-0769**: T-097, p. 51, lines 1-6 (Conf); **P-1042**: T-027, p. 80, lines 11-12.

<sup>1236</sup> **P-0547**: T-051, p. 94, lines 4-8 (Conf).

<sup>1237</sup>**P-0547**: T-052, p. 3, lines 15-16 (Conf); p. 4, line 19 (Conf); p. 30, lines 8-12 (Conf).

<sup>1238</sup> **P-0547**: T-052, p. 29, line 18-p. 30, line 13 (Conf).

<sup>1239</sup> **D-0026**: [DAR-OTP-0109-0111-R01](#), para. 52.

<sup>1240</sup> **P-0736**: [DAR-OTP-0210-0248-R02](#), para. 18.

<sup>1241</sup> **P-1042**: T-029, p. 20, lines 7-20.

<sup>1242</sup> **D-0036**: [DAR-D31-00000312](#), para. 11.

<sup>1243</sup> **D-0036**: T-153, p. 17, line 15-p. 18, line 3; p. 18, lines 8-18; p. 21, lines 12-17.

<sup>1244</sup> **D-0036**: [DAR-D31-0004-0031](#), at 0082, para. 9; T-153, p. 24, lines 9-13.

tribes, i.e. the PDF from the Baggara tribes.<sup>1245</sup> The word *Fursan*, meaning “knight” or “cavalryman”, is also related to the Baggara seasonal transhumant tribes, particularly the Beni Halba tribe.<sup>1246</sup> *Fursan* were distinguished for having fought in the oil fields war in South Sudan in the 1980s and were thereafter integrated within the PDF, like the *Murahileen*.<sup>1247</sup> D-0036’s definitions are essentially corroborated by the evidence of other witnesses.

345. **P-0012** explained that the *Fursan* are a specific group of *Mujahideen*, also referred to as JJW.<sup>1248</sup> P-0012 distinguishes between the *Fursan* active in West Darfur only, from those of South Darfur, who are sent to South Sudan.<sup>1249</sup> P-0012 specifies that the *Fursan* are recruited into “a reserve force” and are organized on the basis of the tribal positions of *Agid* and *Agid-Al-Ogada*,<sup>1250</sup> thus merging elements of UNCOI’s 1<sup>st</sup> (tribal position), 2<sup>nd</sup> (“*Mujahideen*”, “*Fursan*”) and 3<sup>rd</sup> (reserve force, just like PDF) Categories.

346. **P-0643** testified that the so-called *Mujahideen* were actually volunteers within the PDF.<sup>1251</sup> **P-0954** clarified that the PDF Forces were composed of *Emirs* and *Mujahideen* fighters who were civilians<sup>1252</sup> and reported directly to the PDF Commander in Nyala.<sup>1253</sup> **P-0547**, [REDACTED], also confirmed that the word *Mujahideen* referred to a person working for the PDF.<sup>1254</sup>

347. **P-0131** identified Dawd Dahab’ Abduh as the “Emir of the *Mujahideen*” and/or “Emir of the *Fursan*” and specifies that he was an *Agid*<sup>1255</sup> who took part in the destruction of Bindisi.<sup>1256</sup> [REDACTED] confirmed the presence of Dawd Dahab’ Abduh during the attack on Bindisi and identified him as an *Umdah*.<sup>1257</sup> In both cases, the position of leadership in the *Mujahideen* and/or the *Fursan* is thus clearly related to a position as tribal leader.

348. **D-0026** remembered from his diary entries that the PDF in For Baranga were commonly referred to as *Fursan*.<sup>1258</sup> D-0026 also remembered rumours that the *Mujahideen*, whom he thought were Islamic fundamentalists, but were actually PDF fighters in the Sudanese context,

<sup>1245</sup> **D-0036**: T-153, p. 21, lines 9-17.

<sup>1246</sup> **D-0036**: [DAR-D31-0004-0031](#), p. 16; [DAR-D31-00000312](#), para. 11.

<sup>1247</sup> **D-0036**: [DAR-D31-00000312](#), para. 11; T-153, p. 21, lines 18-23; p. 22, line 11-p. 23, line 4.

<sup>1248</sup> **P-0012**: T-045, p. 65, lines 4-10.

<sup>1249</sup> **P-0012**: [DAR-OTP-0119-0503-R01](#), para. 28.

<sup>1250</sup> **P-0012**: [DAR-OTP-0119-0503-R01](#), para. 28.

<sup>1251</sup> **P-0643**: T-058, p. 20, lines 12-14 (Conf)..

<sup>1252</sup> **P-0954**: [DAR-OTP-0221-0571-R01](#), para. 19.

<sup>1253</sup> **P-0954**: [DAR-OTP-0221-0571-R01](#), paras. 23-24, 26, 39-40.

<sup>1254</sup> **P-0547**: T-052, p. 73, lines 5-13 (Conf).

<sup>1255</sup> **P-0131**: T-112, p. 32, lines 20-25 (Conf)..

<sup>1256</sup> **P-0131**: T-113, p. 5, lines 9-13 (Conf).

<sup>1257</sup> [REDACTED]

<sup>1258</sup> **D-0026**: [DAR-D31-00000279](#), para. 33; T-147, p. 49, lines 2-10.

were involved in the events in Darfur.<sup>1259</sup> D-0026 provided further evidence regarding the recruitment of Arab militias, their arming, the distribution of uniform and military ID Cards, and their enlistment in the counter-insurgency campaign by the Government of Sudan, thereby supporting their PDF affiliation.<sup>1260</sup>

(vi) *Conclusion on the Definition of the So-Called “Janjaweed”*

349. When compared to the Four Categories identified in 2005 by the UNCOI,<sup>1261</sup> the evidence in the case actually demonstrates that the JJW in 2003-2004 were composed of an aggregation of three different groups: (i) the PDF, (ii) the Border Guards and (iii) Tribal Militias. These three categories sometimes overlapped, that is, a person may be a member of a tribal militia and belong to the PDF or Border Guards at the same time. The other categories of persons and armed groups identified by the UNCOI, i.e. foreign fighters<sup>1262</sup> and those falling under UNCOI’s 2<sup>nd</sup> Category of *Fursan*, *Mujahideen*, and *Murahileen*<sup>1263</sup>, were actually sub-categories of PDF, Border Guards and/or Tribal Militias. The Defence therefore submits that the JJW were either PDF, members of the Border Guards, and/or members of the Tribal Militias.

### Section 3 - Self-Defence Groups

350. The final category of protagonists of the armed conflict revealed by the evidence were village self-defence groups. Although the primary aim of these groups was to defend the population of each village, without taking part in the wider insurgency/counter-insurgency dynamic in Darfur, these groups most often fought on the side of the rebellion. When providing the figure of about 6,000-7,000 full-time regular SLM/A fighters,<sup>1264</sup> P-1042 added that this figure did not include defence militia numbers, which were estimated as considerably higher.<sup>1265</sup> This implies that these groups took up arms against the GoS. According to P-1042, it was specifically individuals with past military experience from the outbreaks of violence in the 1980s and 1990s who served as leaders of these village self-defence groups with the informal title of *Agids*.<sup>1266</sup> They were largely called upon to join in the SLA.<sup>1267</sup> [REDACTED] confirmed the interaction between the rebellion in Sindu and village defence forces in Kiskildo.<sup>1268</sup>

<sup>1259</sup> D-0026: [DAR-OTP-0109-0111-R01](#), para. 56.

<sup>1260</sup> D-0026: [DAR-D31-00000279](#), paras. 26, 33-34.

<sup>1261</sup> [DAR-OTP-0209-0593](#), at 0624-0626, paras. 102-110.

<sup>1262</sup> [DAR-OTP-0209-0593](#), at 0264, para. 102.

<sup>1263</sup> [DAR-OTP-0209-0593](#), at 0625, para. 107.

<sup>1264</sup> P-1042: [DAR-OTP-0220-1623](#), para. 122.

<sup>1265</sup> P-1042: T-029, p. 9, lines 18-23.

<sup>1266</sup> P-1042: T-028, p. 40, lines 1-7.

<sup>1267</sup> P-1042: T-028, p. 40, lines 1-4.

<sup>1268</sup> [REDACTED]

351. **P-0026** stated that the organization of self-defence militias served to defend Fur militias against the JJW from 2000. The Fur Defence militias were organized in units called *Agada* commanded by *Agids*. Their existence was well known.<sup>1269</sup> **P-0120** confirmed the presence of self-defence groups to defend Fur villages.<sup>1270</sup>

352. **P-0720** described with some details the functioning of *Fazaa*, i.e. a local custom operation to help villagers retrieve stolen cattle, which transformed into the setting up of self-defence forces in the east of Mukjar to defend against attacks by the JJW and GoS forces.<sup>1271</sup> **P-0756** described the basic military training, including on the use of weapons, received in [REDACTED] by young males to protect their villages and specified that he saw a total of ten to eleven weapons, Kalshnikovs, and GIM automatic rifles in his village.<sup>1272</sup> **P-0718** mentioned the existence of a self-defence group led by the *umdah* of Deleig, Ahmad Ismail.<sup>1273</sup> **P-0029** mentioned a JJW attack on Gogoma, in the area of Kodoom, in April-May 2003 which, he alleged, was repelled by a group of 40 men [REDACTED] armed with one single Kalashnikov.<sup>1274</sup>

## PART V – FACTUAL ELEMENTS UNDERLYING THE CHARGES

353. The legal elements of War Crimes and Crimes Against Humanity have not been proved beyond reasonable doubt by the OTP. No sufficient evidence has been adduced to support the allegations of the Accused's coordination with the GoS, or his authority or influence over GoS members and the JJW militias. The OTP has not adduced sufficient evidence of the nexus between the acts of *Ali Kushayb* and the armed conflict. The OTP did not prove beyond reasonable doubt how and in what capacity *Ali Kushayb* could have actively supported the GoS war effort. It has not been proved beyond reasonable doubt that the acts of *Ali Kushayb* were carried out in conjunction with the armed conflict, nor that *Ali Kushayb* was a member of the armed forces, or was a *de facto* authority representing the GoS and supporting the war.<sup>1275</sup> Specifically, the OTP has failed to prove beyond reasonable doubt that *Ali Kushayb* must have known that his conduct in 2003 and 2004 was part of a widespread or systematic attack. There is no sufficient evidence to support the allegation that he had a role in the broader criminal campaign of the GoS. It is submitted that the TC cannot reasonably conclude that his conduct was targeted at what he considered to be a civilian population.

<sup>1269</sup> **P-0026**: [DAR-OTP-0095-0151-R02](#), para. 127.

<sup>1270</sup> **P-0120**: [DAR-OTP-0124-0816-R02](#), para. 22; T-036, p. 49, lines 9-16; p. 56, line 18-p. 57, line 11; T-037, p. 23, line 12-p. 24, line 6.

<sup>1271</sup> **P-0720**: T-043, p. 9, lines 16-21; p. 20, line 16-p. 21, line 19.

<sup>1272</sup> **P-0756**: [DAR-OTP-0211-0039-R02](#), para. 20.

<sup>1273</sup> **P-0718**: [DAR-OTP-0209-2004-R02](#), paras. 35-38.

<sup>1274</sup> **P-0029**: T-030, p. 90, line 5-p. 91, line 21.

<sup>1275</sup> [Akayesu AJ](#), para. 640.

Even if the alleged criminal acts were considered as proved, it has not been established that *Ali Kushayb* acted “with knowledge” of attacks against the civilian population. At the highest, he was implementing orders in a counterinsurgency against a powerful rebellion which did not distinguish itself from the population.

354. The Kodoom and Bindisi attack occurred 6 months before the operations in Mukjar and Deleig. It is submitted that the evidence of the circumstances of the crimes does not permit the inference that *Ali Kushayb* understood that any of his actions took place in the context of a widespread or systematic attack against the civilian population. The TC cannot infer that *Ali Kushayb* acts were conducted with the requisite *mens rea*. Similarly, the consequences of the crimes cannot support the conclusion that *Ali Kushayb* must have known that he participated in any attack directed against a civilian population.

355. The evidence does not prove that *Ali Kushayb* ever subscribed to or had knowledge of any common criminal plan. In all the circumstances, knowledge that his act(s) formed part of any attack against the civilian population has not been proved.<sup>1276</sup>

## **Chapter 1 – 15-16 August 2003 Attacks on Kodoom and Bindisi**

### **Section 1 – Context of the Events**

356. The forces that attacked Kodoom and Bindisi in 2003 departed from Mukjar.<sup>1277</sup> GoS Mobile Forces, including the CRF, were headed by Colonel Himeidan.<sup>1278</sup> Kodoom and Bindisi fell under the authority of SAF Major Khatir Bakhit, Commander of the Garsila Brigade.<sup>1279</sup> **P-1021** stated that he was [REDACTED] present during attacks in Kodoom and Bindisi.<sup>1280</sup> The *Mujahideen* -PDF- had a base between Garsila and Mukjar in August 2003.<sup>1281</sup> The evidence shows that Sameh was a commander of the JJW forces<sup>1282</sup> that conducted the attacks in Kodoom and Bindisi.<sup>1283</sup> Bonjouse, the *Agid -Al- Ogada* of Rizeigat tribe,<sup>1284</sup> and Hassaballah, PDF Coordinator of Garsila, participated as “JJW leaders” during the attacks against Kodoom and Bindisi.<sup>1285</sup>

### ***I – Rebel Attacks on Bindisi and Mukjar***

<sup>1276</sup> [Katanga, TJ](#), para. 1125.

<sup>1277</sup> **P-0878**: [REDACTED]

<sup>1278</sup> **P-0878**: [REDACTED] **P-0643**: [REDACTED]

<sup>1279</sup> **P-0883**: T-072, p. 58, lines 12-16.

<sup>1280</sup> **P-1021**: [REDACTED]

<sup>1281</sup> **P-0643**: T-056, p. 29, lines 6-17 (Conf).

<sup>1282</sup> See e.g. **P-0984**: T-067, p. 24, l. 10-15: PDF also known at the time as Fursan or Mujahideen; See **PART IV – Chapter 5 – Section 2 – II – B** above.

<sup>1283</sup> **P-0129**: [DAR-OTP-0223-0157-R02](#), para. 24; T-076, p. 34, lines 7-11; **P-0883**: T-072, p. 13, line 22-p. 14, line 16; **P-0878**: T-078, p. 9, lines 18- 23; **P-1021**: T-080, p. 31, line 11-p. 32, line 3 (Conf).

<sup>1284</sup> **P-1021**: T-080, p. 31, line 11-p. 32, line 3 (Conf); **P-0883**: T-071, p. 41, lines 1-4.

<sup>1285</sup> **P-0878**: T-078, p. 17, line 22-p. 20, line 9 (Conf).

357. The events in Kodoom and Bindisi and surrounding areas happened in the context of several rebel attacks that shocked Bindisi and Mukjar.<sup>1286</sup> **P-0120** estimated that there was an average of one rebel attack every two weeks or once a month in Darfur from at least 2003-2004.<sup>1287</sup> **P-0769** mentioned [REDACTED] indicating rebel presence in Garsila, Mukjar, and Bindisi.<sup>1288</sup> **P-0769** also affirmed that in the second half of 2003, Bindisi was attacked because [REDACTED] Fur armed forces led by Abd-Al-Wahid Nur were posted there.<sup>1289</sup> On 2 July 2003, Mukjar police station was attacked<sup>1290</sup> and on 15 July 2003, rebels attacked Bindisi.<sup>1291</sup> On the 1<sup>st</sup> of August 2003, the SLM attacked the Zakat office in Bindisi and the local government quarter.<sup>1292</sup> **P-0878** testified that after this attack, there was absolutely no guarantee that the rebels would not attack again.<sup>1293</sup> Finally, on 8 August 2003, the rebels attacked Mukjar Military base in the Primary school and the attack lasted a couple of hours from 4 am.<sup>1294</sup> This attack resulted in deaths on the side of the GoS.<sup>1295</sup>

358. **P-0816** stated that before the alleged attack in Bindisi in 2003, the SLA, armed with Kalashnikovs, attacked the police station located in Daguina in North of Bindisi.<sup>1296</sup> **P-0877** also testified the rebels affiliated with the SLA attacked Mukjar three times: the first attack in the first week of July 2003, the second in the first week of August 2003, and the third in February 2004.<sup>1297</sup> **P-0087** testified that the attack on Kodoom and surrounding areas was “[an] incident where the area was held by rebels when the government forces attacked.”<sup>1298</sup>

## *II – Meetings in Mukjar*

359. The planned operation that the OTP contends in Kodoom and Bindisi and surrounding areas,<sup>1299</sup> is allegedly the fruit of a “series of meetings” of GoS Forces and JJW.<sup>1300</sup>

<sup>1286</sup> **P-0883**: T-071, p. 58, lines 5-21; **P-0921**: T-110, p. 19, line 21-p. 21, line 2 (Conf); T-111, p.20, line 21-p. 21, line 22 (Conf); [DAR-OTP-0153-0686](#) [English]: *Acts of Rebel Aggression Against the Towns Villages and Camps of Darfur*.

<sup>1287</sup> **P-0120**: [REDACTED]

<sup>1288</sup> **P-0769**: [REDACTED]

<sup>1289</sup> **P-0769**: [REDACTED]

<sup>1290</sup> **P-0012**: T-045, p. 75, line 17-p. 76, line 6; **P-0720**: T-043, p. 37, line 5-p. 38, line 22.

<sup>1291</sup> **P-0012**: T-046, p. 39, lines 9-13.

<sup>1292</sup> **P-0878**: T-077, p. 47, line 18-p. 48, line 16.

<sup>1293</sup> **P-0878**: T-079, p. 15, line 24-p. 17, line 22.

<sup>1294</sup> **P-0878**: T-077, p. 53, lines 12-24.

<sup>1295</sup> **P-0878**: T-077, p. 55, lines 4-19; **P-0012**: T-045, p. 76, lines 7-16.

<sup>1296</sup> **P-0816**: [DAR-OTP-0214-0734](#), para. 22.

<sup>1297</sup> **P-0877**: T-054, p. 76, lines 7-23.

<sup>1298</sup> **P-0087**: [DAR-OTP-0133-0573-R02](#), para. 157.

<sup>1299</sup>

[OTP Trial Brief](#), para. 218.

<sup>1300</sup>

[OTP Trial Brief](#), para. 215.

*A – First meeting (22 July 2003, Mukjar Security Committee)*

360. In its Trial Brief, the OTP announced that **P-1021** would testify about the first meeting where *Ali Kushayb* allegedly declared his intentions of “hitting hard everybody”<sup>1301</sup> during a Security Committee meeting held in Mukjar.<sup>1302</sup> This did not materialize.

361. [REDACTED]<sup>1303</sup> [REDACTED].<sup>1304</sup> [REDACTED]<sup>1305</sup> [REDACTED]<sup>1306</sup> [REDACTED],<sup>1307</sup> [REDACTED].<sup>1308</sup> [REDACTED]. [REDACTED]<sup>1309</sup> [REDACTED]<sup>1310</sup> [REDACTED].<sup>1311</sup> [REDACTED]

362. **P-0984**, [REDACTED], [REDACTED]. **P-0643** testified that CRF Commander Himeidan considered that his forces - the CRF - were saved during the rebel attack thanks to the support of *Ali Kushayb*.<sup>1312</sup> This makes it even more questionable that those sitting in the Committee, including Himeidan himself,<sup>1313</sup> were ungrateful to *Ali Kushayb*’s presence in Mukjar.

363. [REDACTED].<sup>1314</sup> [REDACTED]<sup>1315</sup> [REDACTED].<sup>1316</sup> [REDACTED].<sup>1317</sup> The OTP failed to elicit [REDACTED] that *Ali Kushayb* had stated his intention to “hit hard everybody”, as announced in its Trial Brief. [REDACTED].<sup>1318</sup> There is therefore no sufficient evidence to conclude that this Security Committee meeting took place and/or led to a planned operation on Kodoom and Bindisi with the involvement of a JJW leader known as *Ali Kushayb*. [REDACTED] what was discussed at that meeting of 22 July was the protection of Mukjar, not the attack on Bindisi.

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<sup>1301</sup>

[OTP Trial Brief](#), para. 217.

<sup>1302</sup>

[OTP Trial Brief](#), para. 217.

<sup>1303</sup> **P-1021**: [REDACTED]

<sup>1304</sup> **P-1021**: [REDACTED]

<sup>1305</sup> **P-1021**: [REDACTED]

<sup>1306</sup> **P-1021**: [REDACTED]

<sup>1307</sup> **P-1021**: [REDACTED]

<sup>1308</sup> **P-1021**: [REDACTED]

<sup>1309</sup> **P-1021**: [REDACTED]

<sup>1310</sup> **P-1021**: [REDACTED]

<sup>1311</sup> **P-1021**: [REDACTED]

<sup>1312</sup> **P-0643**: [REDACTED]

<sup>1313</sup> **P-1021**: [REDACTED]

<sup>1314</sup> **P-1021**: [REDACTED]

<sup>1315</sup> **P-1021**: [REDACTED]

<sup>1316</sup> **P-1021**: [REDACTED]

<sup>1317</sup> **P-1021**: [REDACTED]

<sup>1318</sup> **PART III- Chapter 2, P-1021.**

*B – Second meeting (9 August 2003, Mukjar Municipality Building)*

364. According to the OTP, a second meeting was convened immediately after another rebel attack on Mukjar targeting the military garrison this time, in early August 2003.<sup>1319</sup> On the 9<sup>th</sup> of August, one day after the rebel attack, **P-0878** saw in the morning a helicopter that landed in Mukjar carrying a delegation from Khartoum.<sup>1320</sup> This delegation comprised of Harun, Ali Karti, who was the Commander of the PDF on the federal level, and Major Suleiman Abdullah, the governor of West Darfur. Three other members of the armed forces also formed part of their delegation.<sup>1321</sup> According to P-0878, the delegation met with Commissioner Torshein, CRF Commander Himeidan, and the person called *Ali Kushayb*.<sup>1322</sup> [REDACTED]<sup>1323</sup> They convened in a “meeting room” in the municipality building.<sup>1324</sup> P-0878 didn’t attend the meeting, neither did any other witness. There is thus no evidence of what was said at that meeting.<sup>1325</sup>

365. After this “private meeting”, the attendees allegedly went outside the Mukjar municipality building.<sup>1326</sup> Harun and Ali Karti made speeches addressing the JJW. Harun said to the JJW “*you have supported the government [...] so you are now considered governmental forces*”.<sup>1327</sup> Ali Karti similarly announced “*you are now considered a part of the PDF*”. In his speech, the JJW were promised weapons, wages, and training.<sup>1328</sup> Harun gave the JJW uniforms and 10,000 dinars.<sup>1329</sup> **P-0878** testified that the “*commander of the Janjaweed [Ali Kushayb]*” also addressed the gathered crowd,<sup>1330</sup> In cross-examination, P-0878 denied that *Ali Kushayb* took the floor on behalf of the delegation<sup>1331</sup> and admitted that *Ali Kushayb* “*can’t speak on behalf of the government*”.<sup>1332</sup> He altered his account by saying that *Ali Kushayb* instead took the floor to speak on behalf of the JJW to say that they are at the disposal of the GoS.<sup>1333</sup>

<sup>1319</sup>

[OTP Trial Brief](#), para. 216.

<sup>1320</sup> **P-0878**: T-077, p. 63, lines 13-14.

<sup>1321</sup> **P-0878**: T-077, p. 63, lines 17-25; T-078, p. 11, lines 14-17.

<sup>1322</sup> **P-0878**: T-077, p. 64, lines 21-22.

<sup>1323</sup> **P-0878**: [REDACTED]

<sup>1324</sup> **P-0878**: T-078, p. 8, lines 10-11.

<sup>1325</sup>

[OTP Trial Brief](#), paras. 129, 216.

<sup>1326</sup> **P-0878**: T-077, p. 65, lines 4-5.

<sup>1327</sup> **P-0878**: T-077, p. 65, line 13.

<sup>1328</sup> **P-0878**: T-078, p. 12, lines 1-3.

<sup>1329</sup> **P-0878**: T-077, p. 65, lines 10-19.

<sup>1330</sup> **P-0878**: T-077, p. 65, lines 8-9.

<sup>1331</sup> **P-0878**: [REDACTED]

<sup>1332</sup> **P-0878**: [REDACTED]

<sup>1333</sup> **P-0878**: [REDACTED]

366. **P-0643**'s testimony about this meeting is entirely based on what **P-0878** told him.<sup>1334</sup> **P-0878** provided **P-0643** with information about Harun's visit more than a week after the visit took place at the latter's home in [REDACTED].<sup>1335</sup> It is essential to take into account that **P-0878** displayed very strong personal bias against Mr Abd-Al-Rahman.<sup>1336</sup> The Court should be wary of accepting **P-0878**'s and **P-0643**'s accounts at face value.

367. **P-0012** [REDACTED].<sup>1337</sup> On many aspects, **P-0012**'s evidence contradict **P-0878**'s.<sup>1338</sup> Most crucially, **P-0012** testified that the "population of the town" were congregating outside the Municipality building, because the "Executive Director" of the locality - Khatir Khedher - "had gone around to summon people to meet the Minister".<sup>1339</sup>

368. This is in contradiction with **P-0878**'s account of fact, [REDACTED], "everyone else were from the JJW".<sup>1340</sup> **P-0878** asserted that from the Mukjar local government, only the executive director, Khatir Khedher and two other municipality employees were there.<sup>1341</sup> **P-0878** did not mention **P-0012** even though he is likely to have easily spotted him in the premises of the Mukjar locality building [REDACTED]. It sparks some curiosity as to why **P-0878** did not name **P-0012** as attending the meeting, especially that **P-0012** was standing "very close by" and only about "15 to 20 meters away from Harun".<sup>1342</sup> **P-0012** informed the OTP that **P-0878** was present in the meeting.<sup>1343</sup> This major discrepancy weakens the reliability of **P-0878**'s and **P-0012**'s account and raises reasonable grounds as to a possible contamination between the two, who [REDACTED] had motive to protect each other [REDACTED].

369. **P-0984** also testified on Harun's visit in Mukjar.<sup>1344</sup> **P-0984** was the [REDACTED]<sup>1345</sup> He testified that multiple JJW "leaders" were present, such as Sameh, Musa Jalombo, Garang,<sup>1346</sup> as well as [REDACTED],<sup>1347</sup> but he made no mention of *Ali Kushayb*'s presence in this meeting. **P-0984** testified that Sameh was standing next to Harun during his speech and addressed him appealing "*Mr Minister, we need weapons, ammunition*" to which Harun

<sup>1334</sup> **P-0643**: [REDACTED] See discussion on **P-0643** in **PART III – Chapter 2 – Section 1** above.

<sup>1335</sup> **P-0643**: [REDACTED]

<sup>1336</sup> **PART III - Chapter 2- P-0878.**

<sup>1337</sup> **P-0012**: [DAR-OTP-0119-0503-R01](#), para. 8.

<sup>1338</sup> Including (i) the date of the rebel attack on Mukjar: 7<sup>th</sup> August, instead of 8<sup>th</sup>; (ii) The delegation's presence at Mukjar Police Station: **P-0012**: [DAR-OTP-0119-0503](#), para. 62.

<sup>1339</sup> **P-0012**: [DAR-OTP-0119-0503-R01](#), para. 63.

<sup>1340</sup> **P-0878**: T-078, p. 9, lines 3-5; p. 12, lines 1-5.

<sup>1341</sup> **P-0878**: T-078, p. 10, lines 7-9.

<sup>1342</sup> **P-0012**: [DAR-OTP-0119-0503-R01](#), para. 65.

<sup>1343</sup> **P-0012**: [DAR-OTP-0136-0009-R01](#), para. 5.

<sup>1344</sup> **P-0984**: T-066, p. 40, line 5-p. 41, line 5.

<sup>1345</sup> **P-0984**: [REDACTED]

<sup>1346</sup> **P-0984**: T-066, p. 40, line 18-p. 42, line 21, p. 46, lines 9-23; T-067, p. 26, lines 18-25.

<sup>1347</sup> **P-0984**: T-066, p. 43, lines 2-19.

answered by promising “*I will send you weapons, ammunition, and all necessary military equipment*”.<sup>1348</sup> The evidence of P-0984 is irreconcilable with the above evidence of **P-0878**, **P-0012** and **P-0643**. The role that *Ali Kushayb* allegedly played in this meeting according to P-0878, P-0012 and P-0643 was actually played by Sameh, the local PDF Commander in Mukjar and not by *Ali Kushayb*, according to P-0984.

370. **P-1021**, makes no mention at all of a “meeting” convened with Harun on that day. He simply testified that Harun visited Mukjar after the rebel attack to deliver “salaries” to *Ali Kushayb*.<sup>1349</sup>

371. P-0188 was announced to testify about this meeting, but did not appear in court.

372. The major discrepancy between, on the one hand, **P-0878**, **P-0643** and **P-0012**, who had full opportunity to contaminate each other, and, on the other hand, **P-0984** and **P-1021** casts reasonable doubt as to whether the second meeting in Mukjar where the attack Kodoom and Bindisi was allegedly organized was attended by *Ali Kushayb*. The role of JJW leader at that meeting was fulfilled by Sameh, without any addition of *Ali Kushayb* who had no authority.

### ***III – Distribution of Weapons***

373. Insider witnesses’ accounts of the distribution of weapons used in course of the events in Kodoom and Bindisi are manifestly inconsistent and contradictory. **P-0643** testified that [REDACTED].<sup>1350</sup> According to P-0643, [REDACTED].<sup>1351</sup> P-0643 [REDACTED].<sup>1352</sup> P-0643 testified that [REDACTED].<sup>1353</sup> [REDACTED].

374. **P-0643** feigned ignorance of the [REDACTED] role in arming the *Mujahideen*<sup>1354</sup> to downplay [REDACTED].<sup>1355</sup> To begin with, he testified that [REDACTED].<sup>1356</sup> Subsequently, he testified that [REDACTED] was unaware that the *Mujahideen* became armed. He also testified that [REDACTED] was dismayed when they learned of the armament, because it was done on “tribal” basis.<sup>1357</sup> P-0643 insisted that he does not know who authorized the weapons to be distributed to *Ali Kushayb* in Garsila.<sup>1358</sup>

375. The contention [REDACTED] was unaware that the JJW or *Mujahideen* were receiving arms is not only unreasonable, but also contradicted by **P-0012**. P-0012 testified that

<sup>1348</sup> **P-0984**: T-066, p. 43, lines 2-10; T-067, p. 28, lines 3-14.

<sup>1349</sup> **P-1021**: [REDACTED]

<sup>1350</sup> **P-0643**: T-056, p. 29, lines 6-21; p. 30, lines 20-21.

<sup>1351</sup> **P-0643**: T-056, p. 31, lines 17-22. See **PART IV – Chapter 4**.

<sup>1352</sup> **P-0643**: T-056, p. 30, lines 14-16;

<sup>1353</sup> **P-0643**: T-056, p. 34, lines 5-12.

<sup>1354</sup> See e.g. **P-0643**: T-056, p. 35, line 5.

<sup>1355</sup> See **PART III – Chapter 2- P-0643**.

<sup>1356</sup> **P-0643**: T-056, p. 30, line 19 (Conf).

<sup>1357</sup> **P-0643**: T-056, p. 35, line 8 (Conf).

<sup>1358</sup> **P-0643**: T-056, p. 35, line 20 (Conf), p. 36, lines 1-3 (Conf).

[REDACTED] was in charge of the weapons and their distribution to the JJW in Garsila.<sup>1359</sup> P-0012 testified that he [REDACTED].<sup>1360</sup> P-0012 even saw Jaafar Abd-Al-Hakam himself [REDACTED].<sup>1361</sup> P-0012 did not mention the presence of a man called *Ali Kushayb* during the weapons distribution.<sup>1362</sup>

376. **P-0921** testified that during the attacks in Kodoom, *Ali Kushayb* [REDACTED].<sup>1363</sup> P-0921 testified he called [REDACTED].<sup>1364</sup> Initially, the witness testified that what he [REDACTED].<sup>1365</sup> When questioned about the reasons why [REDACTED], the witness changed his account, stating that his testimony was that he [REDACTED].<sup>1366</sup>

377. **P-0874**, [REDACTED],<sup>1367</sup> testified that *Ali Kushayb*'s forces received weapons “*after they had burned Bindisi and other villages*”.<sup>1368</sup> The witness specified that the weapons were brought from Khartoum [REDACTED], before being distributed to the JJW.<sup>1369</sup> The weapon delivery process included [REDACTED].<sup>1370</sup> P-0874 specified that the weapons delivered were Kalashnikovs<sup>1371</sup> and that [REDACTED].<sup>1372</sup> This is yet another scenario of the distribution of weapons to the JJW: not before, not during, but after the operation in Bindisi.

378. The abovementioned testimonies provide at least three different contradicting versions of the source and moment of the distribution of weapons and ammunition for the attacks. These testimonies show only the lack of reliability and probative value of the evidence on *Ali Kushayb* role in collecting weapons and distributing them to the *agids*.

#### ***IV - Preparation of the Attack***

379. The OTP alleges that Mr Abd Al Rahman and Harun communicated about “*the Bindisi operation shortly before it began*”.<sup>1373</sup> This allegation is based on a letter<sup>1374</sup> [REDACTED].<sup>1375</sup> The first letter is titled “*Destroying Bindisi Locality*”<sup>1376</sup> and is addressed from Harun to *Ali*

<sup>1359</sup> **P-0012**: [DAR-OTP-0119-0503-R01](#), para. 50.

<sup>1360</sup> **P-0012**: [DAR-OTP-0119-0503-R01](#), para. 50.

<sup>1361</sup> **P-0012**: [DAR-OTP-0119-0503-R01](#), para. 53.

<sup>1362</sup> **P-0012**: [DAR-OTP-0119-0503-R01](#), para. 50.

<sup>1363</sup> **P-0921**: [REDACTED]

<sup>1364</sup> **P-0921**: [REDACTED]

<sup>1365</sup> **P-0921**: [REDACTED]

<sup>1366</sup> **P-0921**: [REDACTED]

<sup>1367</sup> See P-0874's background at [DAR-OTP-00000219](#).

<sup>1368</sup> **P-0874**: [REDACTED]

<sup>1369</sup> **P-0874**: [REDACTED]

<sup>1370</sup> **P-0874**: [REDACTED]

<sup>1371</sup> **P-0874**: [REDACTED]

<sup>1372</sup> **P-0874**: [REDACTED]

<sup>1373</sup> [OTP Trial Brief](#), para. 220.

<sup>1374</sup> [REDACTED]

<sup>1375</sup> [REDACTED]

<sup>1376</sup> **P-0131**: T-112, p. 30, lines 6-9.

*Kushayb*.<sup>1377</sup> The second letter is alleged to be *Ali Kushayb*'s response and bears the same title.<sup>1378</sup> The Defence recalls its arguments on the dubious credibility [REDACTED].<sup>1379</sup> [REDACTED].<sup>1380</sup> [REDACTED].<sup>1381</sup> [REDACTED]

380. Throughout his testimony, [REDACTED].<sup>1382</sup> [REDACTED].<sup>1383</sup>

381. [REDACTED]. [REDACTED].<sup>1384</sup> This assertion is simply impossible because the attacks in Bindisi took place two months later in August 2003 [REDACTED].<sup>1385</sup>

382. Initially, **P-0131** claimed [REDACTED].<sup>1386</sup> However, during cross-examination, the witness was presented with his previous statements given to the OTP, in which he mentioned seeing the report [REDACTED].<sup>1387</sup> This inconsistency, coupled with his evasive responses when confronted with these contradictions,<sup>1388</sup> calls into question the credibility and reliability of his entire testimony. His inability to provide a straightforward answer about whether he [REDACTED] further undermines his account.<sup>1389</sup> P-0131 testified that [REDACTED].<sup>1390</sup> However, when he was asked about how he obtained this information, P-0131 replied that [REDACTED].<sup>1391</sup> He initially stated that he learned of [REDACTED] responses were still vague and evasive.<sup>1392</sup>

383. Further credibility concerns arise from **P-0131**'s contradictory statements about [REDACTED].<sup>1393</sup> [REDACTED].<sup>1394</sup> [REDACTED] calling into question the integrity of his testimony. Neither his testimony [REDACTED] support any conclusion that *Ali Kushayb* and [REDACTED].<sup>1395</sup> [REDACTED], which is undermined by numerous inconsistencies.

384. Further, in an attempt to prove that *Ali Kushayb* was involved in implementing a planned operation in Kodoom and Bindisi, there is a confusing story about [REDACTED], which was

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<sup>1377</sup> **P-0131**: [REDACTED]

<sup>1378</sup> **P-0131**: [REDACTED]

<sup>1379</sup> See **PART III - Chapter 3**.

<sup>1380</sup> See P-0131's short CV at [DAR-OTP-00001092](#).

<sup>1381</sup> See **PART III - Chapter 3**.

<sup>1382</sup> **P-0131**: [REDACTED]

<sup>1383</sup> **P-0131**: [REDACTED]

<sup>1384</sup> **P-0131**: [REDACTED]

<sup>1385</sup> **P-0131**: [REDACTED]

<sup>1386</sup> **P-0131**: [REDACTED]

<sup>1387</sup> **P-0131**: [REDACTED]

<sup>1388</sup> **P-0131**: [REDACTED]

<sup>1389</sup> **P-0131**: [REDACTED]

<sup>1390</sup> **P-0131**: [REDACTED]

<sup>1391</sup> **P-0131**: [REDACTED]

<sup>1392</sup> **P-0131**: [REDACTED]

<sup>1393</sup> **P-0131**: [REDACTED]

<sup>1394</sup> **P-0131**: [REDACTED]

<sup>1395</sup> [OTP Trial Brief](#), para. 221.

never tendered by the OTP.<sup>1396</sup> This [REDACTED].<sup>1397</sup> The three witnesses who alleged the existence [REDACTED] blame *Ali Kushayb* out of fear of self-incrimination.

385. **P-0878** testified that [REDACTED].<sup>1398</sup> [REDACTED].<sup>1399</sup> [REDACTED],<sup>1400</sup> [REDACTED].<sup>1401</sup> These were [REDACTED].<sup>1402</sup> There is no mention of *Ali Kushayb* being present. Himeidan then allegedly gave P-0878 [REDACTED].<sup>1403</sup> According to P-0878, this [REDACTED].<sup>1404</sup> P-0878 testified he [REDACTED].<sup>1405</sup> However, later in his testimony, P-0878 testified he did not [REDACTED].<sup>1406</sup> In fact, [REDACTED].<sup>1407</sup> P-0878 was an active participant in the criminal events around Mukjar, Nyerli, Tiro, Kodoom, and Bindisi.<sup>1408</sup> His narrative of the events was nothing else than an attempt to conceal his own involvement and distract the TC [REDACTED] fitting the OTP's theory on *Ali Kushayb*.

386. **P-0921's** [REDACTED]. [REDACTED]. P-0921 testified that on 15 August 2003, [REDACTED].<sup>1409</sup> [REDACTED].<sup>1410</sup> P-0921 testified *Ali Kushayb* [REDACTED].<sup>1411</sup> He does not mention [REDACTED]. In P-0921's account, it is *Ali Kushayb* who [REDACTED].<sup>1412</sup>

387. **P-0921** then testified that it was Himeidan who [REDACTED].<sup>1413</sup> P-0878 does not mention [REDACTED].<sup>1414</sup> The contradictory evidence [REDACTED] cast doubt on the overall credibility of their story. **P-0007** testified that [REDACTED].<sup>1415</sup> [REDACTED] P-0921 [REDACTED] out of fear of self-incrimination. As the OTP correctly describes, P-0921 "participated in the operation to attack Kodoom and Bindisi."<sup>1416</sup>

388. **P-1021** testified he was [REDACTED] but there are major inconsistencies with the evidence of [REDACTED]. P-1021 first testified that the rebels attacked the CRF and the police

<sup>1396</sup> [OTP Trial Brief](#), para. 218-222.

<sup>1397</sup> [OTP Trial Brief](#), para. 218.

<sup>1398</sup> **P-0878**: [REDACTED]

<sup>1399</sup> **P-0878**: [REDACTED]

<sup>1400</sup> **P-0878**: [REDACTED]

<sup>1401</sup> **P-0878**: [REDACTED]

<sup>1402</sup> **P-0878**: [REDACTED]

<sup>1403</sup> **P-0878**: [REDACTED]

<sup>1404</sup> **P-0878**: [REDACTED]

<sup>1405</sup> **P-0878**: [REDACTED]

<sup>1406</sup> **P-0878**: [REDACTED]

<sup>1407</sup> **P-0878**: [REDACTED]

<sup>1408</sup> **P-0878**: [REDACTED]

<sup>1409</sup> **P-0921**: [REDACTED]

<sup>1410</sup> **P-0921**: [REDACTED]

<sup>1411</sup> **P-0921**: [REDACTED]

<sup>1412</sup> **P-0878**: [REDACTED]

<sup>1413</sup> **P-0921**: [REDACTED]

<sup>1414</sup> **P-0878**: [REDACTED]

<sup>1415</sup> **P-0007**: [REDACTED]

<sup>1416</sup> [OTP Trial Brief](#), para. 219.

in Mukjar on 22 July 2003 and took over the locality in the end.<sup>1417</sup> P-1021 testified that four days after the rebel attack in Mukjar, *Ali Kushayb*, Bonjouse and Sameh returned to Mukjar<sup>1418</sup> where they met with Torshein, [REDACTED].<sup>1419</sup> P-1021 later testified this took place one or two days after 21 July 2003,<sup>1420</sup> however, the confusion regarding the dates of the alleged events was not cleared. Further, P-1021 testified that Torshein [REDACTED].<sup>1421</sup> According to P-1021 [REDACTED]<sup>1422</sup>, <sup>1423</sup> which is not supported by [REDACTED] evidence.<sup>1424</sup>

389. P-1021 also testified that he saw [REDACTED]<sup>1425</sup> for the purpose of [REDACTED].<sup>1426</sup> Besides the discrepancy [REDACTED] contrary to [REDACTED].<sup>1427</sup> P-1021 attempted to justify [REDACTED].<sup>1428</sup> As much as P-1021 would like to deny a link between the JJW, which he testified was a force of around 500 to 600 men,<sup>1429</sup> and the PDF<sup>1430</sup> due to fear of self-incrimination, [REDACTED] required his presence in the alleged events. [REDACTED] he was fully involved in the criminal events.<sup>1431</sup>

390. The evidence demonstrates [REDACTED] fear of self-incrimination. TCI is left with no means of [REDACTED] as proof beyond a reasonable doubt of Mr Abd-Al-Rahman's guilt and has no choice but to reject them accordingly. It is clear from [REDACTED] an interest in blaming anyone else [REDACTED]. [REDACTED].

## Section 2 – Road Trip from Mukjar to Bindisi

391. There are a lot of inconsistencies between the various witnesses of that road trip. According to [REDACTED], *Ali Kushayb* joined the trip some 3 kilometres away from Mukjar police station,<sup>1432</sup> [REDACTED],<sup>1433</sup> and was riding a horse.<sup>1434</sup> According to [REDACTED], *Ali Kushayb*, Sameh, Shukurtallah, [REDACTED] departed the CRF base in Mukjar<sup>1435</sup> in two

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<sup>1417</sup> **P-1021:** [REDACTED]

<sup>1418</sup> **P-1021:** [REDACTED]

<sup>1419</sup> **P-1021:** [REDACTED]

<sup>1420</sup> **P-1021:** [REDACTED]

<sup>1421</sup> **P-1021:** [REDACTED]

<sup>1422</sup> **P-1021:** [REDACTED]

<sup>1423</sup> **P-1021:** [REDACTED].

<sup>1424</sup> **P-0878:** [REDACTED]

<sup>1425</sup> **P-1021:** [REDACTED]

<sup>1426</sup> **P-1021:** [REDACTED]

<sup>1427</sup> **P-0878:** [REDACTED]

<sup>1428</sup> **P-1021:** [REDACTED]

<sup>1429</sup> **P-1021:** [REDACTED]

<sup>1430</sup> **P-1021:** [REDACTED]

<sup>1431</sup> [REDACTED]

<sup>1432</sup> [REDACTED]

<sup>1433</sup> [REDACTED]

<sup>1434</sup> [REDACTED]

<sup>1435</sup> [REDACTED]

vehicles.<sup>1436</sup> [REDACTED].<sup>1437</sup> Finally, for [REDACTED], *Ali Kushayb* and he departed together from Mukjar in only one vehicle<sup>1438</sup> [REDACTED],<sup>1439</sup> and [REDACTED].<sup>1440</sup> [REDACTED].

392. According to [REDACTED], the convoy departed from Mukjar on 15 August 2003 at about 2.00 p.m.<sup>1441</sup> The departure time was 11.00 a.m. according to [REDACTED]<sup>1442</sup> and sometime before 9.30 a.m. according to [REDACTED].<sup>1443</sup> The number of JJW also varies significantly from 500 to 600 according to [REDACTED],<sup>1444</sup> to 1,000 according to [REDACTED],<sup>1445</sup> and up to 10,000 according to [REDACTED].<sup>1446</sup> [REDACTED] testified having witnessed the attack on Nyerli, which had already started when [REDACTED] arrived.<sup>1447</sup> According to [REDACTED], the village was already burnt when he arrived, allegedly with *Ali Kushayb*,<sup>1448</sup> and he saw no corpses<sup>1449</sup> during the attack in Nyerli,<sup>1450</sup> in Tiro,<sup>1451</sup> in Kodoom,<sup>1452</sup> nor in Bindisi.<sup>1453</sup>

393. [REDACTED] testified that *Ali Kushayb* was communicating with the JJW leaders Sameh and Bonjouse, who were ahead of him, on a Thuraya phone.<sup>1454</sup> However, [REDACTED] do not mention the use of such phone during the attack. [REDACTED] said he used a phone [REDACTED]<sup>1455</sup>

394. There is also no consistency about the itinerary. According to [REDACTED], the forces divided after Nyerli in three groups: one headed by Shukurtallah went to Tiro; another headed by Sameh went to Bergei and Dargola; and the third headed by *Ali Kushayb* went to Kodoom.<sup>1456</sup> According to [REDACTED], the whole group went from Nyerli to Tiro.<sup>1457</sup> They

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<sup>1436</sup> [REDACTED]

<sup>1437</sup> [REDACTED]

<sup>1438</sup> [REDACTED]

<sup>1439</sup> [REDACTED]

<sup>1440</sup> [REDACTED]

<sup>1441</sup> [REDACTED]

<sup>1442</sup> [REDACTED]

<sup>1443</sup> [REDACTED]

<sup>1444</sup> [REDACTED]

<sup>1445</sup> [REDACTED]

<sup>1446</sup> [REDACTED]

<sup>1447</sup> [REDACTED]

<sup>1448</sup> [REDACTED]

<sup>1449</sup> [REDACTED]

<sup>1450</sup> [REDACTED]

<sup>1451</sup> [REDACTED]

<sup>1452</sup> [REDACTED]

<sup>1453</sup> [REDACTED]

<sup>1454</sup> [REDACTED]

<sup>1455</sup> [REDACTED]

<sup>1456</sup> [REDACTED]

<sup>1457</sup> [REDACTED]

arrived in Tiro by 10 or 11 a.m., with the Fursan ahead of them, according to [REDACTED],<sup>1458</sup> which conflicts with the time of departure from Mukjar,<sup>1459</sup> and at 12.30 or 1.00 p.m. according to [REDACTED].<sup>1460</sup>

395. [REDACTED]. The Defence recalls that [REDACTED].<sup>1461</sup> [REDACTED]

***I - The Attack on Kodoom***

***I - The Attack on Kodoom***

396. [REDACTED], the inconsistencies between their narratives carry on. It should also be noted that [REDACTED],<sup>1462</sup> and [REDACTED].<sup>1463</sup>

397. The convoy arrived in Kodoom at around 2.00 p.m. according to [REDACTED]<sup>1464</sup> and around 4.00 p.m. according to [REDACTED].<sup>1465</sup> [REDACTED] does not specify a time, but testified that Kodoom was already burnt down when they arrived,<sup>1466</sup> that he did not see any people, except an old blind man<sup>1467</sup> and two wounded JJW,<sup>1468</sup> and that from there they reached Seder at 5.00 p.m.<sup>1469</sup> According to [REDACTED], *Ali Kushayb* did not leave his car in Kodoom.<sup>1470</sup> [REDACTED] specified not seeing *Ali Kushayb* where they arrived in Kodoom Derliwa, but only near the mosque in Kodoom Ronga Tass,<sup>1471</sup> [REDACTED]. Further, [REDACTED] specified that the vehicles [REDACTED] did not enter Kodoom, but stayed some 200-250 metres away since Kodoom was already on fire,<sup>1472</sup> and observed for 10 to 20 minutes prior to departing again.<sup>1473</sup> Kodoom is where *Ali Kushayb* allegedly asked [REDACTED],<sup>1474</sup> [REDACTED].<sup>1475</sup> It is not plausible that all this took place in no more than 10 to 20 minutes [REDACTED].

398. [REDACTED] evidence of the road trip stops in Kodoom, as he allegedly separated from *Ali Kushayb*'s forces [REDACTED].<sup>1476</sup> [REDACTED] then attempted to escape liability

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<sup>1458</sup> [REDACTED]

<sup>1459</sup> [REDACTED]

<sup>1460</sup> [REDACTED]

<sup>1461</sup> [REDACTED]

<sup>1462</sup> [REDACTED]

<sup>1463</sup> [REDACTED]

<sup>1464</sup> [REDACTED]

<sup>1465</sup> [REDACTED]

<sup>1466</sup> [REDACTED]

<sup>1467</sup> [REDACTED]

<sup>1468</sup> [REDACTED]

<sup>1469</sup> [REDACTED]

<sup>1470</sup> [REDACTED]

<sup>1471</sup> [REDACTED]

<sup>1472</sup> [REDACTED]

<sup>1473</sup> [REDACTED]

<sup>1474</sup> [REDACTED]

<sup>1475</sup> [REDACTED]

<sup>1476</sup> [REDACTED]

for the attacks by then pretending to have warned the population that the JJW were attacking,<sup>1477</sup> however, quite the opposite, [REDACTED] stated that [REDACTED] told them not to worry and that the attackers were only passing through the village.<sup>1478</sup> The OTP acknowledged concern with [REDACTED].<sup>1479</sup>

399. [REDACTED] account is also contradicted by **P-0029**'s evidence, who saw [REDACTED],<sup>1480</sup> [REDACTED].<sup>1481</sup> [REDACTED].<sup>1482</sup> In fact, the last time [REDACTED]<sup>1483</sup> and [REDACTED] is still in contact "every now and then" with [REDACTED].<sup>1484</sup> The witnesses' accounts undoubtedly demonstrate a collusion between the two. [REDACTED] also contradicts [REDACTED] by testifying that he saw *Ali Kushayb* getting on a horse in Kodoom and mobilising his men with a whistle,<sup>1485</sup> whereas [REDACTED] said that *Ali Kushayb* did not leave his car.<sup>1486</sup> Finally, according to **P-0918**, it is Sameh who entered Kodoom to deliver his orders to the JJW to attack the village.<sup>1487</sup>

400. Two other inhabitants of Kodoom, **P-0932** and **P-0986**, testified about the presence of *Ali Kushayb*. **P-0932** stated that when the attack started, he fled west with his wife and children.<sup>1488</sup> **P-0932** then testified that he saw *Ali Kushayb* arrive at the mill in Kodoom,<sup>1489</sup> which was located [REDACTED].<sup>1490</sup> It is clear that **P-0932** was not able to see anyone arrive at the mill, let alone identify them. His testimony is also not credible because he testified the attack in Kodoom took place at 8.00 a.m.,<sup>1491</sup> whereas all other witnesses are clear that the convoy arrived in the afternoon.

401. **P-0986**'s testimony about seeing *Ali Kushayb* in Kodoom is also not credible and should be disregarded. He had only met the man he identifies as Mr Abd-Al-Rahman or *Ali Kushayb* once in his pharmacy in 2001.<sup>1492</sup> He is the only witness mentioning the name "*Ali Kushayb*" written on a banner in front of the pharmacy.<sup>1493</sup> He also describes a man significantly younger,

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<sup>1477</sup> [REDACTED]

<sup>1478</sup> [REDACTED]

<sup>1479</sup> [REDACTED]

<sup>1480</sup> [REDACTED]

<sup>1481</sup> [REDACTED]

<sup>1482</sup> [REDACTED]

<sup>1483</sup> [REDACTED]

<sup>1484</sup> [REDACTED]

<sup>1485</sup> [REDACTED]

<sup>1486</sup> [REDACTED]

<sup>1487</sup> **P-0918**: [DAR-OTP-0218-0120-R04](#), paras. 28-30.

<sup>1488</sup> **P-0932**: [DAR-OTP-0222-0602](#), paras. 38-39, 43; **P-0932**: T-068, p. 29, lines 2-7.

<sup>1489</sup> **P-0932**: [REDACTED]

<sup>1490</sup> **P-0932**: [REDACTED]

<sup>1491</sup> **P-0932**: [DAR-OTP-0222-0602](#), paras. 38, 43; **P-0932**: [REDACTED]

<sup>1492</sup> **P-0986**: [DAR-OTP-0222-0437](#), para. 24.

<sup>1493</sup> **P-0986**: [DAR-OTP-0222-0437](#), para. 26.

in his 30s or 40s.<sup>1494</sup> Further, P-0986 was [REDACTED], to such a point his family left him behind,<sup>1495</sup> he was lying on his stomach pretending he was dead, and had no direct view of the man he calls *Ali Kushayb*.<sup>1496</sup> [REDACTED].<sup>1497</sup> [REDACTED].<sup>1498</sup> The Defence put to the witness that he had [REDACTED] and not in Kodoom on 15 August 2003, which he actually fled from [REDACTED].<sup>1499</sup> It is not credible that P-0986 could have identified *Ali Kushayb* under the circumstances of the alleged events.

## ***II - The Attack on Bindisi***

402. According to [REDACTED], after the alleged events in Kodoom took place, *Ali Kushayb* and his forces, along with [REDACTED] headed to Bindisi.<sup>1500</sup> When they did arrive to the Bindisi market around 5:30/6PM, where the reserves of the Zakat were,<sup>1501</sup> [REDACTED] affirmed the Zakat office was attacked and testified that papers and documents that were in the office were ripped off and scattered in the office yard.<sup>1502</sup>

403. [REDACTED] contradict each other on the events that took place over the following night. [REDACTED] testified that *Ali Kushayb* and his men camped in Bindisi,<sup>1503</sup> whereas according to [REDACTED] they camped 1 to 1.5 kilometre away North of Bindisi.<sup>1504</sup> [REDACTED] mentions two gatherings of JJW leaders called by *Ali Kushayb* blowing a whistle: one at 10.30 p.m.,<sup>1505</sup> the other at 4.30-5.30 a.m.<sup>1506</sup> [REDACTED] mentions no such meetings. [REDACTED] also mentions an event with a JJW leader called [REDACTED], who expressed his opposition to *Ali Kushayb* by telling him that they had done unforgivable actions and asked to go back to Garsila.<sup>1507</sup> *Ali Kushayb* allegedly responded that any “colonel” who would refuse to continue the operation should go back to his family.<sup>1508</sup> No threat of death was proffered. Yet, [REDACTED]. The alleged incident with [REDACTED] suggests that, on the contrary, [REDACTED].<sup>1509</sup> This account of their departure is a convenient narrative that absolves them of liability for crimes committed in Bindisi on that second day.

<sup>1494</sup> P-0986: [DAR-OTP-0222-0437](#), para. 28.

<sup>1495</sup> P-0986: [DAR-OTP-0222-0437](#), para 37.

<sup>1496</sup> P-0986: [DAR-OTP-0222-0437](#), paras. 39, 47.

<sup>1497</sup> P-0986: [DAR-OTP-0222-0437](#), paras. 49-50.

<sup>1498</sup> P-0986: T-065, p. 59, line 20-p. 61, line 3.

<sup>1499</sup> P-0986: T-065, p. 61, lines 5-9.

<sup>1500</sup> [REDACTED]

<sup>1501</sup> [REDACTED]

<sup>1502</sup> [REDACTED]

<sup>1503</sup> [REDACTED]

<sup>1504</sup> [REDACTED]

<sup>1505</sup> [REDACTED]

<sup>1506</sup> [REDACTED]

<sup>1507</sup> [REDACTED]

<sup>1508</sup> [REDACTED]

<sup>1509</sup> [REDACTED]

404. The OTP failed to call other witnesses to testify upon the conduct of the man they call *Ali Kushayb* during the attack, and specifically, if any orders were given. [REDACTED], the OTP can only rely on other witnesses that do not recount a detailed narrative. In addition, there are witnesses who mentioned other actors as leading the alleged attack in Bindisi. **P-0007** testified that [REDACTED] was the commander of the SAF leading the operation on Bindisi.<sup>1510</sup> [REDACTED] testified that he did not see any crimes committed in Bindisi in 2003, but only heard about them.<sup>1511</sup> Most importantly, he testified that *Ali Kushayb* was not in Bindisi during the 2003 alleged attack because he was with [REDACTED] in Mukjar, and Sameh was actually the one who led the attack in Bindisi.<sup>1512</sup>

405. **P-0011** testified she saw *Ali Kushayb* in Bindisi in his vehicle, a white camouflaged Land Cruiser with a red stripe on it.<sup>1513</sup> But in her previous statement of [REDACTED] to the OTP, P-0011 had stated that *Ali Kushayb* was riding a horse during the alleged events, not traveling by car.<sup>1514</sup> P-0011 testified that when *Ali Kushayb* got out of the vehicle, he did not say anything, but the group close to him asked people to move around with a microphone.<sup>1515</sup> According to P-0011, the JJW did not loot that day and only shot to instil fear.<sup>1516</sup> When asked how she recognised the person in the vehicle as being *Ali Kushayb*, P-0011 answered that she knew him personally through [REDACTED].<sup>1517</sup> P-0011's evidence regarding her alleged relationship with [REDACTED],<sup>1518</sup> which serves as the basis for P-0011 to identify him as *Ali Kushayb*, raises serious credibility questions. This significant inconsistency, combined with the fact that she testified, unlike other witnesses, that the attack started at 5 or 6 p.m. and there were aircraft flying over the village,<sup>1519</sup> is due to Bindisi being attacked twice.<sup>1520</sup> These inconsistencies make that P-0011's evidence is of limited assistance to the TC in its determination on the events in Bindisi.

406. **P-0012** testified that, on 16 August 2003, he saw *Ali Kushayb*, who he had first met in 2000 at his pharmacy in Garsila,<sup>1521</sup> on horseback in front of people in Old Bindisi.<sup>1522</sup> But P-

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<sup>1510</sup> **P-0007**: T-089, p. 33, line 23-p. 34, line 17.

<sup>1511</sup> [REDACTED]

<sup>1512</sup> [REDACTED]

<sup>1513</sup> **P-0011**: [REDACTED]

<sup>1514</sup> **P-0011**: [REDACTED]

<sup>1515</sup> **P-0011**: [REDACTED]

<sup>1516</sup> **P-0011**: [REDACTED]

<sup>1517</sup> **P-0011**: [REDACTED]

<sup>1518</sup> **P-0011**: [REDACTED]

<sup>1519</sup> **P-0011**: [REDACTED]

<sup>1520</sup> **P-0011**: [REDACTED]

<sup>1521</sup> **P-0012**: T-045, p. 84, lines 14-19.

<sup>1522</sup> **P-0012**: [DAR-OTP-0119-0503](#), para. 84.

0012 was totally confusing as to the circumstances and distance from where he had allegedly seen *Ali Kushayb* that day: less than 50 meters away from a garden;<sup>1523</sup> 100 metres away;<sup>1524</sup> and, finally, based on the scale of a map of Bindisi admitted into evidence,<sup>1525</sup> at least 350 metres away. This inconsistency makes his evidence about seeing *Ali Kushayb* in Bindisi unreliable. P-0012 was actually hiding in bushes during the attack.<sup>1526</sup>

407. **P-0874** testified that he did not see *Ali Kushayb* during the entire road trip, until he reached Bindisi.<sup>1527</sup> P-0874 testified that on the night before the attacks - on the 14<sup>th</sup> - one group of JJW forces had already mobilized and left Mukjar, while a second group departed on the 15<sup>th</sup>.<sup>1528</sup> He did not see *Ali Kushayb* leaving Mukjar with either group.<sup>1529</sup> P-0874 testified that on 15 August 2003, a CRF convoy, [REDACTED], followed the militia forces burning the villages after receiving complaints from victims.<sup>1530</sup> [REDACTED] went from Mukjar to Jogoma, to Kodoom, to Dorgola, to Merly, and finally to North Bindisi.<sup>1531</sup> P-0874 stated that he only saw *Ali Kushayb* in Bindisi,<sup>1532</sup> with Hamuda Hamdan and Sameh, after the alleged events had taken place.<sup>1533</sup> Further, P-0874 gave the OTP a notebook,<sup>1534</sup> which, he testified, contained contemporaneous notes on the 2003 events in the Kodoom and Bindisi area,<sup>1535</sup> including a list of leaders who participated in the operation in Bindisi, but the list did not include *Ali Kushayb*.<sup>1536</sup> The name appeared on a different page, but was not connected with anything else written on that page, suggesting that it had been added subsequently.<sup>1537</sup> P-0874 did not mention *Ali Kushayb* as being involved when his contemporaneous notes were taken.<sup>1538</sup> [REDACTED], P-0874 was also an active participant in the road trip and attacks, [REDACTED].<sup>1539</sup> The subsequent addition of the character *Ali Kushayb* in his contemporaneous notebook most likely aimed at deflecting accountability for the crimes committed during that attack on the person accused by the ICC.

<sup>1523</sup> **P-0012:** [DAR-OTP-0119-0503](#), para. 86.

<sup>1524</sup> **P-0012:** T-046, p. 56, line 2-p. 60, line 5.

<sup>1525</sup> [DAR-OTP-0220-4698](#).

<sup>1526</sup> **P-0012:** T-046, p. 56, line 2-p. 60, line 5.

<sup>1527</sup> **P-0874:** [REDACTED]

<sup>1528</sup> **P-0874:** [REDACTED]

<sup>1529</sup> **P-0874:** [REDACTED]

<sup>1530</sup> See trip mapped out: [DAR-OTP-00000232](#) ; **P-0874:** [REDACTED]

<sup>1531</sup> **P-0874:** [REDACTED]

<sup>1532</sup> **P-0874:** [REDACTED]

<sup>1533</sup> **P-0874:** [REDACTED]

<sup>1534</sup> **P-0874:** [DAR-OTP-00000167-R01](#)

<sup>1535</sup> **P-0874:** [REDACTED]

<sup>1536</sup> **P-0874:** [REDACTED]

<sup>1537</sup> **P-0874:** [REDACTED]

<sup>1538</sup> **P-0874:** [REDACTED]

<sup>1539</sup> **P-0874:** [DAR-OTP-00000221](#), para. 4; **P-0874:** [REDACTED]

408. **P-0913** initially stated that he saw *Ali Kushayb* wearing a *lapsa* and giving orders during the attack in Bindisi on 15 August 2003,<sup>1540</sup> then changed his account in his Preparation Log by saying that he had not seen *Ali Kushayb*, nor his convoy in Bindisi because he was fleeing the town.<sup>1541</sup> In examination-in-chief, P-0913 testified that he saw *Ali Kushayb* with his own eyes,<sup>1542</sup> but reversed his account during cross-examination by admitting that he had not seen the alleged attack, nor *Ali Kushayb*.<sup>1543</sup> No evidentiary weight can be attached to such witness.

409. Finally, **P-1073**, testified that on the morning of the alleged attack on Bindisi, she was hiding in a millet field with crops higher than her when she saw the JJW going towards the village.<sup>1544</sup> She describes *Ali Kushayb* and his people in green coloured vehicles with the back open,<sup>1545</sup> which corresponds to none of the vehicles described by the other witnesses, in particular [REDACTED]. P-1073 did not know and could not recognize *Ali Kushayb*, it was her mother who allegedly told her who he was,<sup>1546</sup> but P-1073 had no clue as to how her mother knew him.<sup>1547</sup> Further, P-1073 asserted that *Ali Kushayb* had a scar in the center of his forehead “right where he would prostate in prayer”,<sup>1548</sup> which Mr Abd-Al-Rahman has not.<sup>1549</sup> If the man P-1073 saw had such scar, the only reasonable conclusion is that it was someone other than Mr Abd-Al-Rahman.

### ***III – Conclusion on the Presence of Ali Kushayb during the Attacks on Kodoom and Bindisi***

410. On the basis of the evidence, the Defence submits that the operation on Kodoom and Bindisi took place under the overall authority of Himeidan.<sup>1550</sup> [REDACTED]<sup>1551</sup> took active part in the attacks.<sup>1552</sup> The operation took place with the authorisation of Abd-Al-Hakam.<sup>1553</sup> The perpetrators were led by various PDF or JJW leaders, including [REDACTED], Sameh, Bonjouse, Dawd Dahab, Hassaballah and various *Umdahs* who had joined the PDF.<sup>1554</sup> Sameh was described as “the leader of the JJW coming from Mukjar and other places”,<sup>1555</sup> an

<sup>1540</sup> **P-0913**: [DAR-OTP-0215-6802-R02](#), 6804.

<sup>1541</sup> **P-0913**: [DAR-OTP-00000022-R01](#), para.16.

<sup>1542</sup> **P-0913**: T-069, p. 20, lines 8-12.

<sup>1543</sup> **P-0913**: T-069, p. 36, lines 18-24.

<sup>1544</sup> **P-1073**: T-103, p. 9, lines 5-25, p. 29, line 25-p. 30, line 21.

<sup>1545</sup> **P-1073**: T-103, p. 10, line 11-p. 11, line 1.

<sup>1546</sup> **P-1073**: T-103, p. 10, line 17-p. 11, line 1, p. 31, lines 5-11.

<sup>1547</sup> **P-1073**: T-103, p. 28, lines 4-20.

<sup>1548</sup> **P-1073**: T-103, p. 31, lines 12-24.

<sup>1549</sup> See **PART VI – Chapter 1**.

<sup>1550</sup> [REDACTED]

<sup>1551</sup> [REDACTED]

<sup>1552</sup> [REDACTED]

<sup>1553</sup> [REDACTED]

<sup>1554</sup> [REDACTED]

<sup>1555</sup> [REDACTED]

enthusiastic leader<sup>1556</sup> who had “*his presence, [and] reputation*”.<sup>1557</sup> [REDACTED] testified that “*Sameh [was] always in the lead*”.<sup>1558</sup> This multitude of actors casts doubt on the ultimate authority of *Ali Kushayb* as the highest commander on the ground. The addition of another person named *Ali Kushayb*, who had no authority supported by evidence,<sup>1559</sup> makes absolutely no sense and is casting confusion on the narrative of the alleged operation.

### **Section 3 – Individual Criminal Responsibility**

411. The submissions in this sub-section are without prejudice to the main Defence’s submission that Mr Abd-Al-Rahman is not *Ali Kushayb*.<sup>1560</sup> The OTP did not establish that *Ali Kushayb* exercised influence over the physical perpetrators – whether through persuasion or conduct – sufficient to constitute inducement under Article 25(3)(b). For each count, the charged mode of responsibility is inducement; however, the TC has indicated that ordering, also under Article 25(3)(b), may be considered, pending factual and legal determinations.<sup>1561</sup> Consequently, the Defence will address both modes of liability below.

412. The OTP did not prove that 1) the accused possessed authority 2) he ordered or instructed a certain conduct 3) the crime instructed had been carried out or the ordered conduct had taken place and had led to the crimes.

#### ***I – Attack against the Civilian Population (Count 1)***

413. The factual occurrence of the events in Kodoom and Bindisi is not contested by the Defence. The Defence position is that Mr Abd-Al-Rahman did not participate in that attack because he was not *Ali Kushayb*,<sup>1562</sup> he was not a JJW member, even less so a JJW leader, and had no authority to lead the attack,<sup>1563</sup> but simply worked as a pharmacist in Garsila. Mr Abd-Al-Rahman played no role in that operation. He was not even present.

#### ***II – Murder (Counts 2 and 3)***

414. The Defence contends that the OTP did not provide proof beyond reasonable doubt of the death of the 63 victims mentioned in Annex 11 to its Trial Brief and that Mr Abd-Al-Rahman did not order, nor induce, nor commit any murder in Kodoom and Bindisi.

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<sup>1556</sup> [REDACTED]

<sup>1557</sup> [REDACTED]

<sup>1558</sup> [REDACTED]

<sup>1559</sup> See PART VI – Chapter 2- Section 1.

<sup>1560</sup> See PART VI – Chapter 1.

<sup>1561</sup> As a consequence of [ICC-02/05-01/20-634](#), para. 25.

<sup>1562</sup> See PART VI – Chapter 1.

<sup>1563</sup> See PART VI – Chapter 2 – Section 1- IV.

*A – The List of 63 Victims is Not Substantiated*

415. The PTC confirmed the charges and annexed to its Decision a list of 51 persons killed in Kodoom and Bindisi, and surrounding areas,<sup>1564</sup> as opposed to the 63 victims listed by the OTP.<sup>1565</sup> Mr Abd-Al-Rahman has been charged for the murder of 51 persons and should not be in jeopardy of conviction for additional ones without the charges being amended.<sup>1566</sup> The TC should therefore only examine the charge of murder as read to Mr Abd-Al-Rahman at the opening of his trial.<sup>1567</sup> In the alternative, the TC should make individual findings supported by evidence for each of the 12 additional persons.<sup>1568</sup>

416. In its Annex 11, the OTP relied on **P-0114**, **P-0589**, **P-0717**, **P-0834**, **P-0868**, and **P-0991** to substantiate the killing of 15 persons,<sup>1569</sup> but none of them were called. The OTP relied on **P-0874** to substantiate the killing of two persons,<sup>1570</sup> but P-0874 did not provide evidence on that aspect. The OTP relied on **P-0816** to substantiate the killing of seven persons.<sup>1571</sup> The OTP sought and obtained the admission of P-0816's statement into evidence pursuant to Rule 68(2)(b), with the consequence that he could not be cross-examined on the subject.<sup>1572</sup> The OTP relied on **P-0085** to substantiate the killing of one person.<sup>1573</sup> His statement was admitted into evidence pursuant to Rule 68(2)(c), with the consequence that P-0085 could not be cross-examined. The OTP further relied on several witnesses with no basis of knowledge and/or who provide hearsay evidence to substantiate the killing of at least 15 persons.<sup>1574</sup> Also, the identity of several alleged deceased is sustained by only one reference to witnesses whose credibility had been impugned to such an extent that it would require corroboration.<sup>1575</sup> With the non-appearance of P-0589, P-0717, and P-0834, 15 names listed in Annex 11 were then submitted into evidence through the Bar Table.<sup>1576</sup> Among these 15 names listed, two are corroborated by P-0816, who could not be cross-examined.<sup>1577</sup> Finally, one name listed is corroborated by **P-**

<sup>1564</sup> [ICC-02/05-01/20-433](#), Annex 1-Corr.

<sup>1565</sup> [OTP Trial Brief](#), Annex 11.

<sup>1566</sup> *Contra* [ICC-02/05-01/20-626](#), paras. 25-26.

<sup>1567</sup> Opening Statements: T-026, p. 4, line 21-p. 5, line 4.

<sup>1568</sup> [ICC-02/05-01/20-626](#), para. 23.

<sup>1569</sup> See [OTP Trial Brief](#), Annex 11: #6; # 8; #12; #14; #15; #20; #33; #41; #44; #48; #55; #56; #57; #61; #62.

<sup>1570</sup> See [OTP Trial Brief](#), Annex 11: #60; # 63.

<sup>1571</sup> See [OTP Trial Brief](#), Annex 11: #18; #23; #26; #34; #35; #45; #50.

<sup>1572</sup> [ICC-02/05-01/20-589-Red](#), paras. 17-19.

<sup>1573</sup> See [OTP Trial Brief](#), Annex 11: #37.

<sup>1574</sup> See [OTP Trial Brief](#), Annex 11: #1; #4; #9; #10; #11; #13; #16; #22; #24; #28; #30; #37; #43; #51; #53.

<sup>1575</sup> See [OTP Trial Brief](#), Annex 11: P-0015 is the only witness to support the killing of #16; #22; #24; #30; #46; P-0874 is the only witness to support the killing of #58; #59; #60; #63; P-0878 is the only witness to support the killing of #1; #3; #4; #9; #10; #11; #13.

<sup>1576</sup> [DAR-OTP-00000697](#).

<sup>1577</sup> [DAR-OTP-00000697](#): #6; #10.

**0913**, whose evidence on the sighting of *Ali Kushayb* and the alleged attack was unreliable.<sup>1578</sup> His low credibility cannot be increased by the list from the Bar Table. Therefore, the evidence used to support the alleged death of the people listed in Annex 11 is insufficient to link beyond a reasonable doubt their alleged deaths to the charged localities.

*B – Mr Abd-Al-Rahman Did Not Order, Nor Induce, Nor Commit the Killings*

417. The eyewitnesses allegedly present during the killings of the persons listed in Annex 11 were not able to demonstrate that *Ali Kushayb* ordered or induced anyone to kill those listed.

418. [REDACTED]<sup>1579</sup> [REDACTED].<sup>1580</sup> He was in a difficult physical position when allegedly seeing *Ali Kushayb*, and he had only seen *Ali Kushayb* once before in Garsila.<sup>1581</sup> P-0986 laid on the ground on his stomach and from time to time, he would look out the corner of his eye to see what was happening.<sup>1582</sup> P-0986 testified that at some point, *Ali Kushayb* told an “Arab” they would eventually kill all those villagers that year.<sup>1583</sup> It is not credible that P-0986 could have identified *Ali Kushayb* in the first place under the circumstances. Even though his testimony is not reliable, the words he heard *Ali Kushayb* supposedly say cannot be considered an order either. P-0986’s evidence is also irreconcilable with the evidence of [REDACTED], who specified that *Ali Kushayb* did not step out of his car in Kodoom,<sup>1584</sup> and of [REDACTED], who specified that the vehicles [REDACTED] did not enter Kodoom but stayed some 200-250 metres away, observing for 10 to 20 minutes prior to departing again.<sup>1585</sup> [REDACTED], did not report P-0986’s [REDACTED]. There is thus more than reasonable doubt as to the reliability of his evidence.

419. Further, the insiders who were present with *Ali Kushayb* during the alleged events, [REDACTED] are the only eyewitnesses regarding the role played by *Ali Kushayb*. [REDACTED] does not mention *Ali Kushayb* giving any orders to kill. [REDACTED] testified that in Nyerli and Kodoom, *Ali Kushayb* was allegedly telling his forces to kill,<sup>1586</sup> without using a megaphone or amplifier amidst all the noise,<sup>1587</sup> only highlighting the impracticality of giving such alleged orders, from 200-250 metres outside Kodoom.<sup>1588</sup> Without providing any

<sup>1578</sup> [DAR-OTP-00000697](#): #11; See also **P-0913**: [DAR-OTP-0218-0021-R04](#), paras. 50, 53; **P-0913**: T-069, p. 36, lines 18-24.

<sup>1579</sup> **P-0986**: [DAR-OTP-0222-0437-R01](#), para. 35.

<sup>1580</sup> **P-0986**: [DAR-OTP-0222-0437-R01](#), para. 37.

<sup>1581</sup> **P-0986**: [DAR-OTP-0222-0437-R01](#), para. 24; T-065, p. 7, lines 5-16; T-066, p. 18, lines 19-24.

<sup>1582</sup> **P-0986**: [DAR-OTP-0222-0437-R01](#), para. 47.

<sup>1583</sup> **P-0986**: T-066, p. 25, line 24-p. 26, line 7; [DAR-OTP-0222-0437-R01](#), paras. 53-55.

<sup>1584</sup> [REDACTED]

<sup>1585</sup> [REDACTED]

<sup>1586</sup> [REDACTED]

<sup>1587</sup> [REDACTED]

<sup>1588</sup> [REDACTED]

details, [REDACTED] testified that, in Kodoom, he heard *Ali Kushayb* giving instructions on the phone to Sameh and Bonjouse to kill anyone they see.<sup>1589</sup> However, [REDACTED] also denied seeing any dead bodies<sup>1590</sup> during the alleged events in Nyerli,<sup>1591</sup> Tiro,<sup>1592</sup> Kodoom,<sup>1593</sup> and Bindisi.<sup>1594</sup> As mentioned above, [REDACTED] played a key role in the attacks on Kodoom and Bindisi, and Sameh and Bonjouse were prominent JJW leaders themselves.<sup>1595</sup> Other than their numerous discrepancies, the Trial Chamber has no means to assess the reliability of their evidence. They manifestly tried to avoid liability by deflecting it on someone else. Their evidence should thus be disregarded.

### ***III - Pillaging, Destruction of Property and Forcible Transfer (Counts 4,5 and 10)***

420. In its Trial Brief, the OTP affirmed that **P-0874** identified a JJW commander in Kodoom by the name Abdullah Rabak, who was pillaging the villagers' cattle and told him the JJW would not stop until they "scorched the town".<sup>1596</sup> P-0874 testified that Rabak was a leader of the Tama tribe<sup>1597</sup> and "*a senior agid of some villages surrounding Bindisi*".<sup>1598</sup> The OTP did not attempt to clarify how this man is affiliated with *Ali Kushayb* or how he could have been influenced by *Ali Kushayb*. [REDACTED] testified that Rabak [REDACTED] received orders specifically from Uthman Mohamad Taha,<sup>1599</sup> vice-president of Sudan at the time, and as described by the witness as one of the main symbols of the Islamist Regime.<sup>1600</sup> Finally, P-0874 provided the OTP with a notebook in which he took notes contemporaneous to the attacks, his notes include a list of JJW leaders who participated in the attacks in Bindisi.<sup>1601</sup> The name of *Ali Kushayb* does not feature in this list.<sup>1602</sup> **P-0012** also identified Rabak among those who attacked Bindisi on the 16<sup>th</sup>.<sup>1603</sup> According to witness **P-0085**, who witnessed JJW torching houses in Bindisi,<sup>1604</sup> Rabak "*represented the Tama Janjaweed*".<sup>1605</sup>

<sup>1589</sup> [REDACTED]

<sup>1590</sup> [REDACTED]

<sup>1591</sup> [REDACTED]

<sup>1592</sup> [REDACTED]

<sup>1593</sup> [REDACTED]

<sup>1594</sup> [REDACTED]

<sup>1595</sup> [REDACTED]

<sup>1596</sup> [OTP Trial Brief](#), paras. 257, 270.

<sup>1597</sup> **P-0012**: [DAR-OTP-0119-0503-R01](#), para. 84.

<sup>1598</sup> **P-0874**: T-082, p. 24, lines 22-23 (Conf).

<sup>1599</sup> **P-0874**: T-083, p. 47, lines 8-p. 48, line 2 (Conf).

<sup>1600</sup> **P-0874**: T-083, p. 47, lines 16-17 (Conf).

<sup>1601</sup> **P-0874**: [DAR-OTP-0221-0700-R03](#); T-083, p. 24, lines 4-17 (Conf).

<sup>1602</sup> **P-0874**: T-083, p. 25, lines 5-9 (Conf).

<sup>1603</sup> **P-0012**: [DAR-OTP-0119-0503-R01](#), para. 84.

<sup>1604</sup> **P-0085**: [DAR-OTP-0110-0054-R02](#), para. 28.

<sup>1605</sup> **P-0085**: [DAR-OTP-0110-0054-R02](#), para. 34.

421. The evidence shows the presence and active role of many JJW leaders. **P-0085** recognized Garang, another JJW from the Tama tribe, during the attack on Bindisi.<sup>1606</sup> Rabak had mobilized people from nearby villages, while Garang had done the same in other areas. Both were armed with Kalashnikovs or JIMs during the attack.<sup>1607</sup>

422. In Bindisi, **P-0874** testified that he saw the JJW heading to southern Bindisi to loot and that they moved the items from the South to Daguina on the backs of the horses and the donkeys.<sup>1608</sup> The JJW assembled in Daguina with the booty collected near the market, where JJW leaders examined the looted items.<sup>1609</sup> Notably, P-0874 refers to these items as *ghanima*.<sup>1610</sup> In the opinion of the witness, the JJW were impossible to control as “*it was a force lacking regularity and credentials, unaffiliated with any official entity, so much so that no one would be able to control them, not Ali Kushayb and not anyone else*”.<sup>1611</sup>

423. [REDACTED] testified that, in Bindisi, when some JJW were looting the market, *Ali Kushayb* was in the car, he could see them “*but he did not prevent anyone or say no to anyone. Anyone who would take anything would take it for himself*.”<sup>1612</sup> *Ali Kushayb* did not participate himself in the conduct. The OTP never proved that *Ali Kushayb*—assuming he was even present, which is disputed—had the capacity to intervene [REDACTED] testified that the villages were already burned upon their arrival. [REDACTED] could not answer if houses were looted in Bindisi, because according to him it was dark and he had no visibility.<sup>1613</sup>

424. Multiple groups of JJW participated in the attacks against Kodoom and Bindisi. This is evident from the OTP witnesses’ quantification of the attackers.<sup>1614</sup> It is obvious from the evidence that groups of JJW were going around looting and pillaging, however, the link to *Ali Kushayb* is not made.

425. **P-0015** left Bindisi following the attacks and stayed [REDACTED] until at least February 2004.<sup>1615</sup> P-0015 stated that upon her return to Bindisi, she found the hospital looted and the veterinary clinic destroyed.<sup>1616</sup> It is impossible to ascertain during the time she was away from Bindisi who pillaged the hospital and when, not to mention, this is the only witness

<sup>1606</sup> **P-0085**: [DAR-OTP-0110-0054-R02](#), para. 34.

<sup>1607</sup> **P-0085**: [DAR-OTP-0110-0054-R02](#), para. 34.

<sup>1608</sup> **P-0874**: T-082, p. 34, lines 10- 13 (Conf).

<sup>1609</sup> **P-0874**: T-082, p. 33, line 17-p. 34, line 7 (Conf).

<sup>1610</sup> **P-0874**: T-082, p. 31, lines 13-18 (Conf). See **PART IV – Chapter 2 – Section 2 – IV – A.**

<sup>1611</sup> **P-0874**: T-082, p. 15, lines 11-15 (Conf).

<sup>1612</sup> [REDACTED]

<sup>1613</sup> [REDACTED]

<sup>1614</sup> [REDACTED]

<sup>1615</sup> **P-0015**: [DAR-OTP-0088-0187-R04](#), paras. 13, 90.

<sup>1616</sup> **P-0015**: [DAR-OTP-0088-0187-R04](#), para. 92.

who testified about the hospital and the veterinary clinic.<sup>1617</sup> Similarly, **P-0007**, who left Bindisi on 15 August 2003 and returned [REDACTED], found the mosque and some Islamic books destroyed but did not witness the destruction firsthand.<sup>1618</sup> The time lapse between the attack and his return weakens the reliability of his testimony, as the OTP provided no further evidence linking the mosque's destruction to the 15-16 August 2003 attack.

426. In its Trial Brief, the OTP alleges that the *Zakat* Office in Bindisi was looted by JJW,<sup>1619</sup> but this specific incident is not mentioned in the Decision Confirming the Charges<sup>1620</sup> and thus falls outside the scope of the charges. The Trial Chamber should give it no consideration in its deliberation. Should the Trial Chamber nevertheless consider it necessary to examine the evidence regarding the alleged looting of the *Zakat* Office, the Defence points out that [REDACTED] testified that, on the 1<sup>st</sup> of August 2003, the SLM attacked several municipal structures in Bindisi, including the *Zakat* office.<sup>1621</sup> Right after this rebel attack, [REDACTED] went to the *Zakat* Office and found that the finance office had been destroyed.<sup>1622</sup> [REDACTED] left Bindisi a few days after, on the 5<sup>th</sup> August 2003, to Mukjar and did not return to Bindisi until the 15<sup>th</sup> of August 2003.<sup>1623</sup> Again, it was not clarified if the “scattered documents” [REDACTED] testified about from inside the vehicle he was in,<sup>1624</sup> were a result of the JJW attack on the day or the previous destruction the office suffered following the rebel attack earlier that month.<sup>1625</sup> These gaps controvert the witness's credibility.

427. The evidence does not establish beyond reasonable doubt that Mr Abd-Al-Rahman ordered the pillaging or destruction of Kodoom and Bindisi. Consequently, Mr Abd-Al-Rahman cannot be held responsible for displacing Kodoom and Bindisi residents or possessing the intent necessary to permanently prevent the Fur from returning to their villages.

#### ***IV – Other Inhumane Acts, Outrages upon Dignity, Rapes (Counts 6-9)***

428. Counts 6-9 of the DCC all charge Mr Abd-Al-Rahman with crimes allegedly committed in Bindisi and surrounding areas between 15 and 16 August 2003.

<sup>1617</sup> See e.g. [REDACTED] evidence that there is no hospital in Bindisi: [REDACTED]

<sup>1618</sup> **P-0007**: [DAR-OTP-0088-0060-R02](#), para. 41.

<sup>1619</sup> [OTP Trial Brief](#), para. 265.

<sup>1620</sup> [Abd-Al-Rahman Confirmation Decision](#), para. 36.

<sup>1621</sup> [REDACTED]

<sup>1622</sup> **P-0878**: T-077, p. 48, lines 6-10.

<sup>1623</sup> **P-0878**: T-077, p. 51, lines 15- 19 (Conf).

<sup>1624</sup> **P-0878**: T-078, p. 59, lines 16-22 (Conf).

<sup>1625</sup> **P-0878**: T-078, p. 59, lines 16-22 (Conf).

429. It will be recalled that these four counts were the subject of a defence written motion for acquittal at the close of the OTP case,<sup>1626</sup> followed by oral argument on 17 and 18 April 2023.<sup>1627</sup> The TC delivered its ruling on 19 April 2023, declining to enter a judgment of acquittal on any of the impugned counts.<sup>1628</sup> The Defence refers to its legal submissions on the elements of the charges and the way these should be assessed contained in that application.

430. **P-0986** is the only witness who testified to an order allegedly given by *Ali Kushayb* that he be tortured in Kodoom.<sup>1629</sup> The reasons for which P-0986's testimony about seeing *Ali Kushayb* in Kodoom is not credible have been summarised above. His basis of recognition of *Ali Kushayb* is not credible<sup>1630</sup> and is in contradiction with all witnesses who described Mr Abd-Al-Rahman's pharmacy in Garsila;<sup>1631</sup> [REDACTED];<sup>1632</sup> he had no direct view on the man he calls *Ali Kushayb*;<sup>1633</sup> and his evidence of *Ali Kushayb* conduct on Kodoom is irreconcilable with [REDACTED]. It shall be disregarded.

431. There is also no evidence that Mr Abd-Al-Rahman ever directly ordered – as a person in a position of authority – or induced – as a person in a position to exert influence – anyone specifically to rob, strip or rape any of the 13 Fur women and girls referred to in counts 8 and 9 in the DCC. There is no evidence whatsoever that he directly ordered or induced anyone to rob, or strip, or rape any person in Kodoom or Bindisi.

432. The OTP heavily relies on **P-0015** to illustrate the manner in which the rapes took place in Bindisi.<sup>1634</sup> P-0015's evidence, between her screening note, witness statement, preparation log, and corrections and clarifications document, present multiple contradictions. The TC even reminded the witness to clarify when she actually saw something herself from when she was told about it.<sup>1635</sup> P-0015 first testified she did not tell the OTP about the rapes that occurred on 16 August 2003 because it was taboo to speak about the subject.<sup>1636</sup> However, P-0015 was unable to clarify why she was prepared to tell the OTP, after her initial interview in April 2005, about the rapes she alleged occurred on her way to Mukjar four days after the alleged attack in

<sup>1626</sup> See [ICC-02/05-01/20-903-Red](#); [ICC-02/05-01/20-910-Red](#); [ICC-02/05-01/20-911-Conf](#).

<sup>1627</sup> Hearings on the Motion for Acquittal: T-114; T-115.

<sup>1628</sup> Status Conference: T-116; p. 11, lines 5-6.

<sup>1629</sup> **P-0986**: T-065, p. 47, line 11-p. 51, line 11.

<sup>1630</sup> **P-0986**: [DAR-OTP-0222-0437-R01](#), para. 24.

<sup>1631</sup> **P-0986**: [DAR-OTP-0222-0437-R01](#), paras. 25-26.

<sup>1632</sup> **P-0986**: [DAR-OTP-0222-0437-R01](#), para 37.

<sup>1633</sup> **P-0986**: [DAR-OTP-0222-0437-R01](#), para. 47.

<sup>1634</sup>

[OTP Trial Brief](#), paras. 284, 298.

<sup>1635</sup> **P-0015**: T-093, p. 34, line 12-p. 36, line 10.

<sup>1636</sup> **P-0015**: T-093, p. 52, line 21-p. 53, line 17.

Bindisi, but not the alleged rapes that occurred in Bindisi on 16 August 2003.<sup>1637</sup> The Defence put to the witness that she did not witness the rapes that happened on 16 August 2003.<sup>1638</sup>

433. P-0015 further testified that the rapes of two girls, [REDACTED], who are actually [REDACTED], happened in a field and that “*everybody saw it, including children.*”<sup>1639</sup> P-0015 added during her testimony that “*when the women got raped, they were raped right in front of me*” and that children were even forced to watch the rapes.<sup>1640</sup> This directly contradicts with P-1073’s evidence who testified that she and [REDACTED], who were hiding in bushes for two to three hours,<sup>1641</sup> were then raped in separate deserted huts and there were no eye-witnesses to the rapes.<sup>1642</sup> The clear contradiction demonstrates how the TC cannot adduce any reliable evidence from P-0015.

434. Even if the TC concludes that Mr Abd-Al-Rahman used terms such as “cut the straw and eat it raw” or “*aksah amsah*” during operations against the villages of Nyerli, Tiro, and Kodoom before arriving in Bindisi on 15 and 16 August 2003, it is submitted that this is not enough to establish beyond reasonable doubt that the instructions given or influence exerted were to commit the offences charged in Counts 6-9. The Defence refers to its earlier discussion of the expression “*aksah amsah*”.<sup>1643</sup> The position advanced by the OTP during the litigation relating to the Defence’s motion for judgment of acquittal is that an order or inducement specifically to rape should be read into the phrases “cut the straw and eat it raw” and “*aksah amsah*”. However, no reliable evidence has been adduced to support such an interpretation. No JJW foot-soldier has been called to assist the Court in understanding that such words were commonly appreciated to amount to an exhortation to commit a crime, even less so to rape. Quite the opposite, [REDACTED] testified that this expression can in no way be understood as an order to violate the rights of civilians.<sup>1644</sup> The position of the OTP is thus not supported by the evidence.

435. No doubt, the OTP will seek to persuade the TC that the fact women and girls were raped in villages attacked prior to Bindisi is evidence that the attackers considered that they had

<sup>1637</sup> P-0015: T-093, p. 54, line 11-p. 55, line 18.

<sup>1638</sup> P-0015: T-093, p. 55, line 20-p. 56, line 8.

<sup>1639</sup> P-0015: [DAR-OTP-0088-0187](#)

, para. 41; P-0015: [REDACTED]

<sup>1640</sup> P-0015: T-093, p. 45, line 25-p. 46, line 10.

<sup>1641</sup>

P-1073: [REDACTED].

<sup>1642</sup>

P-1073: [REDACTED].

<sup>1643</sup> See PART IV – Chapter 2 – Section 4.

<sup>1644</sup>

[REDACTED]

a license specifically to rape. That, however, would be to wrongly equate correlation with causation. It is too simplistic for the OTP to argue that rape was an “*integral part of the attack on Kodoom and Bindisi and surrounding areas.*”<sup>1645</sup> The fact that rapes were committed is insufficient proof that *Ali Kushayb* specifically ordered or induced that they be committed.

436. Crucially, proof that rapes were committed in other villages in the hours prior to the arrival of the attackers in Bindisi is quite different to proof that Mr Abd-Al-Rahman knew that rapes had been committed earlier. [REDACTED], for example, testified that he learned well after the event that “*three to four women*” were raped in Nyerli.<sup>1646</sup> [REDACTED] did not see any rape himself in the three villages of Kodoom, but was informed of rapes after the event by inhabitants of the villages.<sup>1647</sup> If the OTP relies on [REDACTED], and he was unaware of rapes of women in Nyerli ahead of the attack on Bindisi, the OTP cannot realistically deny the possibility that *Ali Kushayb* was similarly unaware. If the OTP has not proved beyond reasonable doubt that Mr Abd-Al-Rahman knew that rapes had been committed prior to the arrival in Bindisi, there is no proof that he was at least aware that rapes *will* be committed in the ordinary course of events once the attack on Bindisi started.

437. The OTP may try to rely also on the evidence of [REDACTED], who memorably described the chasing of women and men in Tiro, the next village after Nyerli to be attacked, like a dog chasing a rabbit, or any wild animal chasing its prey,<sup>1648</sup> and then again in Kodoom.<sup>1649</sup> The OTP may rely on this evidence to support the inference it urges that the women were being chased in order to be raped. But this is not what [REDACTED] said. He stated that the JJW were chasing people “and shooting them”.<sup>1650</sup> He did not see women being raped after being chased. There is thus no basis to suggest that Mr Abd-Al-Rahman either saw or must have known that women were being raped. The OTP may also try to rely on the evidence of [REDACTED] that he overheard a fighter named [REDACTED] on the evening between the first and second days of the Bindisi attack, speaking with members of his group about “*the acts they committed against women in daytime of that same day. And he was speaking of his perception of women in those villages and how it came about that they were aggressed and raped.*”<sup>1651</sup> Strikingly, however, the OTP failed to ask the obvious follow-up questions in order

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<sup>1645</sup>

[ICC-02/05-01/20-910-Red](#), para. 7

<sup>1646</sup> [REDACTED]

<sup>1647</sup> [REDACTED]

<sup>1648</sup> [REDACTED]

<sup>1649</sup> [REDACTED]

<sup>1650</sup> [REDACTED]

<sup>1651</sup> [REDACTED]

to ascertain beyond doubt that *Ali Kushayb* also heard the words of [REDACTED]. No evidence was adduced about when in the night this conversation was overheard, whether *Ali Kushayb* was allegedly on his camp-bed at the time, or still awake as opposed to sleeping, or any one of a myriad of factors that provides clarity about whether he even came to be in possession of information that rapes had occurred that day. The words of [REDACTED] are not alleged to have been spoken in the course of a conversation with *Ali Kushayb*; [REDACTED] gave no evidence that *Ali Kushayb* ever spoke about or commented on [REDACTED] information, or in any way demonstrated that he heard the information upon which the OTP places such reliance. In the absence of evidence, any conclusion that *Ali Kushayb* must have overheard [REDACTED] words would be based on pure speculation.

438. Finally, in dismissing the Defence motion for judgment of acquittal, the TC relied on evidence of Mr Abd-Al-Rahman's attendance at a meeting at which Minister Harun spoke<sup>1652</sup> and threatened, according to the OTP, Fur civilians that they would be raped.<sup>1653</sup> This evidence also comes from [REDACTED]. He stated that, following a speech he made publicly in Mukjar on 9 August 2003, Harun was asked by a local man named [REDACTED] to stop the looting of the houses and property of the citizens.<sup>1654</sup> [REDACTED] stated "[Harun] *said that if you don't give back the property you will be looted, you will be killed, you will be raped.*"<sup>1655</sup> This was the very first time [REDACTED] gave these dramatic details of Harun's response. Harun's alleged words threatening *inter alia* rape coupled with *Ali Kushayb*'s alleged presence would have been of great consequence in terms of fixing *Ali Kushayb* with advance notice of the possibility of rape being used in Kodoom and Bindisi. Yet the evidence of the use of these words is built on the most insubstantial of foundations. It is submitted that the TC cannot be satisfied beyond reasonable doubt that Harun ever said such words in public, even less so in *Ali Kushayb* presence.

439. In conclusion, there is no evidence to prove that Mr Abd-Al-Rahman directly ordered or induced their commission. And there is no sufficient evidence that he was at least aware that the charged rapes would be committed in the ordinary course of events.

#### ***V – Persecution (Count 11)***

440. The Defence refers to its general discussion regarding Counts 11, 21 and 31. Mr Abd-Al-Rahman did not intend any discrimination against the Fur. Therefore, the special intent requirement is not met for the crime of persecution as charged in this case.<sup>1656</sup>

<sup>1652</sup> Status Conference: T-116, p. 11, line 2.

<sup>1653</sup> Status Conference: T-116, p. 6, lines 22-24.

<sup>1654</sup> [REDACTED]

<sup>1655</sup> [REDACTED]

<sup>1656</sup> See **PART V- Chapter 4 - Persecution.**

## Chapter 2 – Arrests, Detention and Executions in Mukjar (late February – early March 2004)

### Section 1 - Context to the Mukjar Events

#### *I – Mukjar Locality in 2003-2004 - Military, Administrative and Political Structure*

##### *A- Local authorities*

441. From July 2003 to early 2004, the highest Sudanese official responsible for the military, administrative and political decisions taken in relation to Mukjar was Torshein.<sup>1657</sup> Torshein was the Commissioner (*Mutamid*)<sup>1658</sup> and the highest authority of the Mukjar locality.<sup>1659</sup> **P-1021** recalled that Torshein arrived from Khartoum on 21 July 2003 by helicopter in Mukjar town, accompanied by GoS officials who “*handed him [Torshein] over the control of the locality.*”<sup>1660</sup> Torshein received his orders from Abd-Al-Hakam directly,<sup>1661</sup> but also from Harun.<sup>1662</sup> Torshein would also report to the *Wali* (‘governor’), who then reported to the President of the Republic.<sup>1663</sup>

##### *B - Mobile Forces (SAF, CRF, PPF, Police and PDF)*

442. The evidence establishes that the security in Mukjar town in late 2003-early 2004 rested in the hands of a joint force, which included police and military forces. More specifically, the SAF, the CRF, the PPF, the Police and the PDF were acting in conjunction, overseen by Torshein

<sup>1657</sup> For Abd-Al-Hakam *see inter alia*: **P-0643**: T-056, p. 11, lines 9-17 (Conf); T-058, p. 5, line 7-p. 6, line 5 (Conf); **P-0581**: [DAR-OTP-0216-0560-R01](#), para. 24; **P-0675**: [DAR-OTP-0206-0173-R02](#), para. 101; **P-0712**: T-036, p. 28, line 15-p.29, line 12; **P-0736**: T-035, p. 33, line 20-p. 34, line 1; **P-0874**: [DAR-OTP-00000225](#), p. 2; **P-0878**: T-077, p. 50, lines 8-9; **P-0984**: T-066, p. 60, lines 18-20; **P-0129**: T-076, p. 18, lines 15-22. For Torshein *see inter alia*: **P-0020**: [DAR-OTP-0095-0002-R02](#), para. 109; T-042, p. 43, line 21-p. 44, line 5; **P-0877**: p. 83, line 13-p. 84, line 3; p. 84, lines 4-22; **P-0643**: T-056, p. 11, lines 18-21 (Conf); **P-0874**: [DAR-OTP-00000225](#), p. 2; **P-0581**: [DAR-OTP-0216-0560-R01](#), para. 24; **P-0675**: [DAR-OTP-0206-0173-R02](#), para. 12; **P-0916**: [DAR-OTP-0224-0023-R01](#), para. 84; **P-0932**: [DAR-OTP-0222-0602-R02](#), para. 59; **P-0029**: T-030, p. 34, lines 10-13 (Conf); **P-0903**: T-033, p. 3, line 21-p. 4, line 1; **P-0129**: T-076, p. 39, lines 17-21; **P-0878**: T-077, p. 52, lines 17-19 (Conf); T-079, p. 41, lines 14-22 (Conf); **P-0041**: [DAR-OTP-0206-0033-R02](#), para. 16.

<sup>1658</sup> *See eg*: **P-0020**: [DAR-OTP-0095-0002-R02](#), para. 109; T-042, p. 43, line 21-p. 44, line 5; **P-0877**: T-055, p. 33, line 2-p. 34, line 22 (Conf); p. 83, line 13-p. 84, line 3; p. 84, lines 4-22; **P-0643**: T-056, p. 11, lines 18-21 (Conf); **P-0874**: [DAR-OTP-00000225](#), p. 2; **P-0581**: [DAR-OTP-0216-0560-R01](#), para. 24; **P-0675**: [DAR-OTP-0206-0173-R02](#), para. 12; **P-0916**: [DAR-OTP-0224-0023-R01](#), para. 84; **P-0932**: [DAR-OTP-0222-0602-R02](#), para. 59; **P-0029**: T-030, p. 34, lines 10-13 (Conf); **P-0903**: T-033, p. 3, line 21-p. 4, line 1; **P-0129**: T-076, p. 39, lines 17-21; **P-0878**: T-077, p. 52, lines 17-19 (Conf); T-079, p. 41, lines 17-18 (Conf); **P-0041**: [DAR-OTP-0206-0033-R02](#), para.16.

<sup>1659</sup> **P-0984**: T-067, p. 57, lines 8-11, p. 58, lines 22-24 (Conf); **P-0877**: T-055, p. 33, line 2-p. 34, line 22; p. 84, lines 4-22 (Conf); *See also for eg*: **P-0816** describing Torshein as a “*warrior and the commander of the military or the Central Reserve Police in Mukjar*” at [DAR-OTP-0214-0721-R02](#), para. 45; **P-0903** testifying that Torshein was the “*highest authority in Mukjar*” at T-033, p. 49, lines 9-11.

<sup>1660</sup> **P-1021**: T-080, p. 30, lines 5-15 (Conf).

<sup>1661</sup> **P-0675**: [DAR-OTP-0206-0173-R02](#), para. 101.

<sup>1662</sup> **P-0877**: T-055, p. 85, lines 6-14.

<sup>1663</sup> **P-0877**: T-055, p. 84, line 23-p.85, line 1; *See also* **P-0720**: [DAR-OTP-0210-0291-R02](#), para. 27.

and led by Himeidan, who was replaced by Mustafa Ahmad Al-Tayyib (“Al-Tayyib”) in early 2004.<sup>1664</sup>

443. Himeidan is a key figure within the organisation of the Mukjar locality as the leader of the joint military and police forces in 2003. He was largely identified as the highest commander of the Mobile Forces (*Najra*) in Mukjar,<sup>1665</sup> and the Head of the CRF,<sup>1666</sup> which formed part of the Mobile Forces, making him “*in charge of the forces in Mukjar in 2003.*”<sup>1667</sup> Himeidan was also named as the commander of the SAF forces present in Mukjar, which, in essence, refers to the Mobile Forces.<sup>1668</sup> In Mukjar specifically, the police forces encompassed within this joint force included the “*civil police, the fire department, as well as the officers on compulsory service*”, which represented around 550 personnel.<sup>1669</sup> The headquarters of the Mobile Forces were located in the Mukjar primary school, South of Mukjar town.<sup>1670</sup> Himeidan had a central role in the military hierarchy of Mukjar town in 2003, but in early 2004, he left to the Mara mountains.<sup>1671</sup> With Himeidan’s departure, the rest of the Mobile Forces, which included the CRF, fell under the command of a man called “Grintia” and were based in the Mukjar Police Station.<sup>1672</sup> The Defence submits that “Grintia” can only correspond to Al-Tayyib, who was in charge at the Mukjar police Station from early-2004. Indeed, **P-0877** testified that the leader of the CRF was Al-Tayyib, who arrived in Mukjar in January 2004, replacing Himeidan in this role.<sup>1673</sup> Al-Tayyib was identified by numerous other witnesses as the leader of the CRF and police forces in Mukjar starting early 2004.<sup>1674</sup> Much like Himeidan before him, Al-Tayyib was essentially “*the commander of Mukjar.*”<sup>1675</sup>

(i) *Central Reserve Forces (‘CRF’)*

444. Himeidan and subsequently Al-Tayyib were the leaders of the CRF in their capacity as Heads of the Mobile Forces. The CRF were also present, alongside the PPF, PDF and National

<sup>1664</sup> See inter alia: **P-0877**: T-054, p. 6, lines 5-13; **P-0913**: [DAR-OTP-0218-0021-R04](#), para. 79; **P-0990**: T-040, p. 29, line 19-p.30, line 1.

<sup>1665</sup> N.B that “Mobile Forces” are also referred to as “Joint Forces” See eg: **P-0984**: T-067, p. 51, lines 18-20 (Conf); See **P-0984**: T-067, p. 26, lines 7-16.

<sup>1666</sup> See inter alia: **P-0643**: T-056, p. 38, lines 13-15 (Conf), p. 40, lines 9-13. (Conf); **P-0874**: [DAR-OTP-00000225](#).

<sup>1667</sup> **P-0874**: [DAR-OTP-00000225](#), p. 2.

<sup>1668</sup> **P-0922**: [DAR-OTP-0222-0312-R01](#), para. 53.

<sup>1669</sup> **P-0878**: T-077, p. 52, lines 20-25 (Conf).

<sup>1670</sup> See eg. **P-0878**: T-077, p. 53, lines 1-4 (Conf); **P-0892**, [DAR-OTP-0217-0384-R02](#), para 43; **P-0916**: [DAR-OTP-0224-0023-R01](#), para. 16.

<sup>1671</sup> **P-0984**: T-067, p. 49, line 14-p. 51, line 5 (Conf).

<sup>1672</sup> **P-0984**: T-067, p. 50 line 24-p. 51, line 23 (Conf); See also: **P-0720**: [DAR-OTP-0210-0291-R02](#), para. 79.

<sup>1673</sup> **P-0877**: T-054, p. 6, lines 5-13.

<sup>1674</sup> See eg: **P-0913**: [DAR-OTP-0218-0021-R04](#), para. 79; **P-0990**: T-040, p. 29, lines 19-23.

<sup>1675</sup> **P-0990**: T-040, p. 29, line 21-p. 30, line 1.

Police, at the checkpoints in the entrance of Mukjar in February – March 2004.<sup>1676</sup> The Mukjar Police Station was controlled and overseen *inter alia* by the CRF,<sup>1677</sup> with Al-Tayyib being the one in charge. John Koj ('Koj'), a CRF Master Sergeant,<sup>1678</sup> was identified by OTP witnesses as the individual responsible for the detainees at the Mukjar Police Station and received orders from Al-Tayyib.<sup>1679</sup>

*(ii) Popular Police Force (PPF) and National Police Force*

445. An overwhelming majority of Prosecution witnesses testify to the presence of the PPF in Mukjar in late 2003-early 2004.<sup>1680</sup> **P-0913** is however the sole [REDACTED] who testified on the structure and role of this force. His evidence clearly highlights a GoS objective to [REDACTED]<sup>1681</sup> Indeed, P-0913 recounted that in August 2003, he heard from the elderly in Mukjar that young Fur men were instructed to report to the Police Station to obtain police training by Torshein.<sup>1682</sup> **P-0984** testified that the decision to enrol Fur males into the PPF was made by Himeidan and Torshein, who indicated that they had to either join or go to prison.<sup>1683</sup> P-0913 started his [REDACTED] training in [REDACTED] and graduated [REDACTED], out of the initial 700 that trained.<sup>1684</sup> Whilst P-0913 stated that he joined [REDACTED] "out of fear" he also indicated that [REDACTED], and did not provide evidence of [REDACTED].<sup>1685</sup> Enrolment in the PPF - whilst highly encouraged to disprove any rebel affiliation - remained voluntary. During the months of [REDACTED], P-0913 was transferred to [REDACTED].<sup>1686</sup> He was subsequently stationed in Mukjar, at the Police Station.<sup>1687</sup> The PPF had an office in the Mukjar Locality Building,<sup>1688</sup> and PPF members received a regular salary.<sup>1689</sup> This was corroborated by **D-0017**.<sup>1690</sup> The PPF wore the same uniform as the National Police of a dark blue colour.<sup>1691</sup> **P-0892** corroborated P-0913 and stated that most of the PPF members were

<sup>1676</sup> See eg: **P-0877**: T-053, p. 81, line 25-p.82, line 18; T-054, p. 5, line 14-p. 6, line 7; **P-0720**: [DAR-OTP-0210-0291-R02](#), para. 78.

<sup>1677</sup> See eg **P-0720**: [DAR-OTP-0210-0291-R02](#), para. 79.

<sup>1678</sup> **P-0913**: [DAR-OTP-0218-0021-R04](#), para. 111.

<sup>1679</sup> **P-0129**: [DAR-OTP-0128-0128-R04](#), para. 69; **P-0990**: T-040, p. 30, lines 2-4; p. 50, line 24-p. 51, line 1; p.66, lines 9-12.

<sup>1680</sup> See eg: **P-0903**: T-032, p. 22, line 16-p. 23, line 11; **P-0984**: T-066, p. 65, line 4-p.66, line 23 (Conf); **P-0757**: [DAR-OTP-0211-0003-R02](#), para. 75.

<sup>1681</sup> **P-0913**: [REDACTED]

<sup>1682</sup> **P-0913**: [DAR-OTP-0218-0021-R04](#), para. 62; See also **P-0984**: T-066, p. 59, lines 13-23.

<sup>1683</sup> **P-0984**: T-066, p. 59, lines 13-23.

<sup>1684</sup> **P-0913**: [DAR-OTP-0218-0021-R04](#), paras. 14, 63.

<sup>1685</sup> **P-0913**: [DAR-OTP-0218-0021-R04](#), para. 63; T-069, p. 50, line 24-p. 51, line 1 (Conf).

<sup>1686</sup> **P-0913**: [DAR-OTP-0218-0021-R04](#), para. 14.

<sup>1687</sup> **P-0913**: [DAR-OTP-0218-0021-R04](#), para. 14.

<sup>1688</sup> **P-0720**: [DAR-OTP-0210-0291-R02](#), para. 69.

<sup>1689</sup> **P-0913**: [DAR-OTP-0218-0021-R04](#), para. 133.

<sup>1690</sup> **D-0017**: [DAR-D31-00000146-0001](#), para. 29.

<sup>1691</sup> See eg: **P-0892**: [DAR-OTP-0217-0384-R02](#), paras. 44,49.

residents of Mukjar and were trained by the National Police.<sup>1692</sup> **P-0020**, [REDACTED], stated that, from January 2003, the Head of all the PPF in Sudan was Harun.<sup>1693</sup> By March 2004, Members of the PPF, the National Police, and the PDF were in charge of manning the checkpoints at the north and west entrances of the town.<sup>1694</sup>

(iii) *Popular Defence Force (PDF) in Mukjar*

446. The Defence refers to its earlier discussion on the PDF.<sup>1695</sup> There was a large PDF and PPF presence in Mukjar in late 2003-beginning of 2004, shortly before the charged events. In February 2004, the PDF established camps around the town.<sup>1696</sup> **P-0916** stated that the Police and PDF members were instructed by the Military intelligence and controlled the checkpoints that surrounded Mukjar in 2003 and 2004.<sup>1697</sup>

447. Sameh was the leader of the PDF in Mukjar, as well as *Agid-Al-Ogada* of the area.<sup>1698</sup> Sameh was often seen in Mukjar in 2003 and had his camp near Mukjar Police Station.<sup>1699</sup> Sameh was also seen wearing the PDF camouflage uniform in late 2003.<sup>1700</sup> **P-0984** visited Sameh's camp in the south of town<sup>1701</sup> multiple times in 2003-2004 and never saw *Ali Kushayb* there.<sup>1702</sup> **P-0892** specified that the PDF base subsequently moved close to the Mukjar primary school.<sup>1703</sup> The presence of Sameh at the Mukjar primary school was corroborated by **P-0029** who [REDACTED] twice at this school around the beginning of 2004.<sup>1704</sup> **P-0581**, who was [REDACTED], testified that he did not see *Ali Kushayb* there and that the latter did not come to the school.<sup>1705</sup>

448. As previously contended, individuals identified as belonging to the JJW were integrated *inter alia*, into the PDF.<sup>1706</sup> This was also the case in Mukjar in 2003, with the presence of between 4,000 and 5,000 PDF members.<sup>1707</sup> **P-0129** is the sole witness who testified that Sameh

<sup>1692</sup> **P-0892**: [DAR-OTP-0217-0384-R02](#), para. 49.

<sup>1693</sup> **P-0020**: [DAR-OTP-0214-0534-R02](#), para. 72.

<sup>1694</sup> **P-0984**: T-066, p.65, lines 13-p.66, line 6 (Conf); **P-0757**: [DAR-OTP-0211-0003-R02](#), para. 75; **P-0916**: [DAR-OTP-0224-0023-R01](#), para. 74; **P-0922**: [DAR-OTP-0222-0312-R01](#), para. 85; **P-0903**: T-032, p. 22, line 16-p. 23, line 11.

<sup>1695</sup> See **PART IV - Chapter 5 – Section 2 – II - B – (i)**.

<sup>1696</sup> **P-0008**: [DAR-OTP-0088-0085-R02](#), para. 46.

<sup>1697</sup> **P-0916**: [DAR-OTP-0224-0023-R01](#), para. 74.

<sup>1698</sup> **P-0012**: T-046, p. 18, line 21-p. 22, line 1; **P-0877**: T-053, p. 70, line 1-p. 71, line 2; **P-1021**: T-080, p. 31, line 25 (Conf); **P-0129**: T-076, p. 34, line 10; **P-0581**: [DAR-OTP-0219-2365](#), at 2375, lines 331-337; **D-0026**: [DAR-OTP-0109-0111-R01](#), para. 23.

<sup>1699</sup> **P-0757**: [DAR-OTP-0211-0003-R02](#), para. 70.

<sup>1700</sup> **P-0720**: [DAR-OTP-0210-0291-R02](#), para. 75.

<sup>1701</sup> See also **P-0720**: [DAR-OTP-0210-0291-R02](#), para. 72.

<sup>1702</sup> **P-0984**: T-067, p. 39, lines 11-13.

<sup>1703</sup> **P-0892**: [DAR-OTP-0217-0384-R02](#), para. 46.

<sup>1704</sup> **P-0029**: [REDACTED]

<sup>1705</sup> **P-0581**: T-064, p. 52, lines 4-9.

<sup>1706</sup> See **PART IV - Chapter 5 – Section 2 – II - B – (i)**.

<sup>1707</sup> **P-0892**: [DAR-OTP-0217-0384-R02](#), para. 47.

was the commander of the JJW and *not* the PDF Commander in Mukjar.<sup>1708</sup> However, the rest of the evidence demonstrates that PDF members were JJW. Consequently, witnesses identifying Sameh as a JJW leader effectively also identify him as a PDF leader. As testified by **P-0984**, all the JJW in the area were trained and registered with the PDF.<sup>1709</sup>

449. [REDACTED]<sup>1710</sup> and [REDACTED]<sup>1711</sup> were PDF Coordinators in the Mukjar locality. [REDACTED] was present in Mukjar from around September 2003<sup>1712</sup> until at least the end 2004. [REDACTED] saw him overseeing a salary distribution to the PDF.<sup>1713</sup> [REDACTED] testified that the role of PDF coordinator is assumed by a civilian,<sup>1714</sup> and that in this role in Mukjar, he was responsible for the mobilisation of “the *Mujahideen*” at the request of the GoS.<sup>1715</sup> [REDACTED] testified that he recruited around 300 men in total during 2003 and 2004 for the PDF or SAF in Mukjar from the Fur, Zaghawa and different Arab tribes.<sup>1716</sup> But that figure is likely to be another underestimation of his actual role.<sup>1717</sup> The evidence also shows that PDF members were controlled by the military intelligence branch of the SAF. **P-0643** testified that Hamdi,<sup>1718</sup> Head of the SAF military intelligence in Garsila, was leading the PDF.<sup>1719</sup> The PDF were “*part of the military chain of command*” and wore the same khaki camouflage uniform as the SAF.<sup>1720</sup>

450. The abovementioned evidence sheds light on the well organised, coherent structure of the security apparatus in Mukjar in 2003-2004, in which Mr Abd-Al-Rahman/ *Ali Kushayb* is entirely absent.<sup>1721</sup>

### ***III. Preparatory Meetings and the Sindu Operation***

#### ***A - GoS meeting in Mukjar in Early 2004 and the Absence of Ali Kushayb***

451. The OTP initially announced that **P-0041**’s evidence established that a large meeting took place in March 2004 with the JJW, *Ali Kushayb*, Harun, Abd-Al-Hakam and Torshein all

<sup>1708</sup> **P-0129** : T-076, p. 34, lines 7-11.

<sup>1709</sup> **P-0984**: T-067, p. 24, lines 12-13.

<sup>1710</sup> **P-0874**: [DAR-OTP-00000225](#), p. 1; **P-0892**: [DAR-OTP-0217-0384-R02](#), para. 45; **P-0984**: T-066, p. 43, lines 15-16; **P-0041**: [DAR-OTP-0206-0033-R02](#), para. 21; [REDACTED]

<sup>1711</sup> **P-0892**: [DAR-OTP-0217-0384-R02](#), para. 45.

<sup>1712</sup> See: P-1021: T-080, p. 24, line 1-p. 26, line 25 (Conf).

<sup>1713</sup> **P-0892**: [DAR-OTP-0217-0384-R02](#), para. 48.

<sup>1714</sup> [REDACTED]

<sup>1715</sup> [REDACTED]

<sup>1716</sup> [REDACTED]

<sup>1717</sup> [REDACTED]

<sup>1718</sup> **P-0883**: T-072, p. 17, line 25-p. 18, line 1; **P-0905**: T-085, p. 33, line 11.

<sup>1719</sup> **P-0643**: [REDACTED]; See also: **P-0892**: [DAR-OTP-0217-0384-R02](#), para. 45.

<sup>1720</sup> **P-0041**: [DAR-OTP-0206-0033-R02](#), para. 21.

<sup>1721</sup> See **PART VI- Chapter 2- Part 1- IV**.

in attendance.<sup>1722</sup> P-0041 gave two statements to the OTP: one dated [REDACTED]<sup>1723</sup> and the other one dated [REDACTED].<sup>1724</sup> P-0041's statements were both admitted under Rule 68(2)(b), leaving his evidence untested. In [REDACTED], P-0041 stated that he heard that a Minister was also present at this meeting in Mukjar although he had not seen him.<sup>1725</sup> In his [REDACTED] interview, he stated that he saw, sometime between the end of 2003 and the beginning of 2004, a big meeting with two helicopters: one carried soldiers, the second one carried Harun, whom he saw walking towards 3 CRF cars full of CRF members.<sup>1726</sup> The fact that **P-0041** recalled with more precision the individuals present at this meeting thirteen years after the event rather than two years after the alleged meeting took place casts doubts on the veracity of his account. This demonstrates P-0041's willingness to cater to the OTP's needs by providing them with evidence he did not personally witness. The [REDACTED] statement cannot be preferred over the [REDACTED] one, especially in the absence of P-0041's appearance or corroboration. The rest of the evidence shows that – if a meeting happened early 2004 with Harun and other GoS officials in order to prepare the Sindu attack - *Ali Kushayb* was not present in Mukjar at this time.

452. **P-0913** stated in [REDACTED] that on 1<sup>st</sup> February 2004, the day of his PPF training graduation which took place in Mukjar, Torshein<sup>1727</sup> and Harun<sup>1728</sup> came and gave a speech addressed to JJW.<sup>1729</sup> Whilst P-0913 initially stated that *Ali Kushayb* was present,<sup>1730</sup> he later testified that he was not and rather arrived on the 17 March 2004.<sup>1731</sup> P-0913's evidence on the alleged content of Harun's speech given on 1<sup>st</sup> February is not corroborated.

453. **P-0984** testified that, after a first visit in August 2003 – that does not mention *Ali Kushayb*'s presence - he saw Harun arriving Mukjar for the second time by helicopter in the end of 2003-start of 2004,<sup>1732</sup> and meeting with Abd-Al-Hakam and Torshein.<sup>1733</sup> According to

<sup>1722</sup> **P-0041**: [DAR-OTP-0096-0002-R01](#), para. 7; T-026, p. 52 lines 12-16, See also **P-0041**: [DAR-OTP-0206-0033-R03](#), paras. 43-45; [DAR-OTP-0096-0009](#) to [DAR-OTP-0096-0012](#), P-0041 took four pictures of this alleged gathering which do not show the presence of either Harun or Mr. Abd-Al-Rahman.

<sup>1723</sup> **P-0041**: [DAR-OTP-0096-0002](#).

<sup>1724</sup> **P-0041**: [DAR-OTP-0206-0033](#).

<sup>1725</sup> **P-0041**: [DAR-OTP-0096-0002-R01](#), para. 7.

<sup>1726</sup> **P-0041**: [DAR-OTP-0206-0033](#), paras. 43-44, 81.

<sup>1727</sup> Torshein allegedly addressed a shorter speech to the JJW stating that “all rebels around Sindu have to surrender otherwise air force and ground force will be used to defeat them”.

<sup>1728</sup> Harun allegedly told the JJW that “they can take all belongings of the Fur and consider them as a war prize” and that “he wanted them to demolish the whole area [...] not even a single tree should be standing there and he asked them to completely wipe out the whole area”: **P-0913**: [DAR-OTP-0218-0021-R04](#), para. 72 ; T-069, p. 54, lines 2-17 (Conf).

<sup>1729</sup> **P-0913**: [DAR-OTP-0218-0021-R04](#), paras 69-71.

<sup>1730</sup> **P-0913**: [DAR-OTP-0222-5107](#) at 5108.

<sup>1731</sup> **P-0913**: [DAR-OTP-00000022-R01](#), para .6; T-069, p. 41, lines 9-22.

<sup>1732</sup> **P-0984** was unable to provide a date with certainty: **P-0984**: T-066, p. 60, lines 3-5.

<sup>1733</sup> **P-0984**: T-066, p. 60, lines 1-20.

P-0984, *Ali Kushayb* was not present at this meeting and came to Mukjar about two months after.<sup>1734</sup> Similarly, **P-0877** [REDACTED], that Ahmad Harun had come to Mukjar in January 2004 for a meeting with [REDACTED], Ali Karti, Ali Sharif and others.<sup>1735</sup> [REDACTED] warned P-0877 to move elsewhere as the GoS was “*extending a helping hand to the Janjaweed to quench the rebellion*”.<sup>1736</sup> His evidence does not mention the presence of *Ali Kushayb*.

454. **P-0012** stated that weapons were delivered by planes and helicopters at the Mukjar Police Station between October 2003 and February 2004, with a peak in January.<sup>1737</sup> The recipients of these distributions were Sameh and “a representative of the Central Reservists” who collected “uniforms and other items from the PDF coordinator called Al-Sadiq [...] to further distribute to his men”.<sup>1738</sup> P-0012 also saw from September 2003 until February 2004, distribution of money taking place at the end of each month, for the “*Fursan*”, the *Aqids* and their horses.<sup>1739</sup> Sameh received the money from a Central Reservist and distributed to the *Aqids* and *Fursan*.<sup>1740</sup> P-0012 makes no mention of *Ali Kushayb* in connection with these operations.

455. The evidence shows that *Ali Kushayb* was not in Mukjar in around early 2004 for the purpose of any meeting with Harun and others to prepare the attack against the rebels in Sindu.

### *B - The Sindu Operation*

#### *(i) Weapon and Military Equipment Distribution at the Garsila Base*

456. In 2003, [REDACTED].<sup>1741</sup> According to him, the operation on Sindu started in December 2003 and lasted until the beginning of 2004.<sup>1742</sup> It departed from Garsila and headed to Sindu, making several stops on the way<sup>1743</sup> including in Arawala where intelligence reports indicated the presence of rebel armed groups.<sup>1744</sup> [REDACTED] also confirmed having heard that there was “a front” headed by Abd Al Wahid Nur, a rebel leader, in Sindu.<sup>1745</sup>

457. Slightly before the Sindu convoy departed, [REDACTED] testified that he heard Hamdi - who was the highest commander of the Military Intelligence present at the Garsila base in 2003 - and, according to **P-0643**, [REDACTED]-<sup>1746</sup> reading a signal<sup>1747</sup> coming from Taha,

<sup>1734</sup> **P-0984**, T-066, p. 60, lines 21-24.

<sup>1735</sup> **P-0877**: T-053, p. 79, line 6-p. 80, line 9.

<sup>1736</sup> **P-0877**: T-053, p. 80, line 1-4.

<sup>1737</sup> **P-0012**: [DAR-OTP-0119-0503](#), para. 59.

<sup>1738</sup> **P-0012**: [DAR-OTP-0119-0503](#), para. 60.

<sup>1739</sup> **P-0012**: [DAR-OTP-0119-0503](#), para. 61.

<sup>1740</sup> **P-0012**: [DAR-OTP-0119-0503](#), para. 61.

<sup>1741</sup> [REDACTED]

<sup>1742</sup> [REDACTED]

<sup>1743</sup> [REDACTED]

<sup>1744</sup> [REDACTED]

<sup>1745</sup> [REDACTED]

<sup>1746</sup> **P-0643**: T-056, p. 45, lines 17-18 (Conf); T-058, p. 21, lines 5-17; p. 34, lines 9-23.

<sup>1747</sup> “A wireless communication” See [REDACTED]

about a distribution of weapons and uniforms directly to “*Ali Abd-Al-Rahman Kushayb*.”<sup>1748</sup> [REDACTED] acknowledged that the signal was “the most important thing” during a military operation.<sup>1749</sup> Nevertheless, despite a screening interview with the OTP that lasted for 2.5 hours, [REDACTED] failed to mention any signal coming from Taha or *Ali Kushayb* as being the recipient of weapons or their distribution to the JJW.<sup>1750</sup> In this screening interview [REDACTED] gave an alternative account regarding the way the JJW got their weapons. Instead of an organized and supervised distribution that took place at the Garsila military base, [REDACTED] told the OTP investigators that around the time of the delivery, he was on duty when he encountered a very large group of JJW riding on horses and camels in Arawala.<sup>1751</sup> The group surrounded them, “*fired hundreds of shots and disarmed them by taking all their weapons and ammunitions*”.<sup>1752</sup> However, [REDACTED] testified that this never happened.<sup>1753</sup> The omission during his long screening interview casts a severe doubt on [REDACTED] reliability regarding this topic, especially as his evidence on this point is unique and contradicted by [REDACTED]. The Defence refers to its general discussion on [REDACTED] absence of credibility.<sup>1754</sup> It is thus unlikely that military equipment, including ammunition, were ever destined for a person called *Ali Kushayb*.

458. There are two different, contradictory versions of the weapons distribution scene. According to [REDACTED], *Ali Kushayb* was present and the distribution of weapons was completed in two days<sup>1755</sup> in February 2004.<sup>1756</sup> [REDACTED] testified that the weapons were distributed by Abd-Al-Munim,<sup>1757</sup> who was a subordinate of Hamdi in Military Intelligence,<sup>1758</sup> that it carried on over a month, slightly before the Sindu convoy departed<sup>1759</sup> and that *Ali Kushayb* was not present.<sup>1760</sup> The TC is left with no means of choosing between these two contradictory versions, none of which is proven beyond reasonable doubt.

*(ii) GoS Delegation coming to the Garsila SAF Base*

459. [REDACTED] testimonies also differ regarding the timeframe of the delegation visit. According to [REDACTED], a delegation from Khartoum arrived on the last day of the

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<sup>1748</sup> [REDACTED]

<sup>1749</sup> [REDACTED]

<sup>1750</sup> [REDACTED]

<sup>1751</sup> [REDACTED]

<sup>1752</sup> [REDACTED]

<sup>1753</sup> [REDACTED]

<sup>1754</sup> [REDACTED]

<sup>1755</sup> [REDACTED]

<sup>1756</sup> [REDACTED]

<sup>1757</sup> [REDACTED]

<sup>1758</sup> [REDACTED]

<sup>1759</sup> [REDACTED]

<sup>1760</sup> [REDACTED]

weapons distribution in February 2004.<sup>1761</sup> It included Harun and they arrived by helicopter.<sup>1762</sup> [REDACTED] testified *a contrario* that it was only about a month after the delivery that a delegation from Khartoum visited the Garsila base.<sup>1763</sup> It included “*three senior officers, a major, a lieutenant-colonel, and a colonel*” and other people in plain clothes who arrived by helicopter.<sup>1764</sup> Contrary to [REDACTED] never testified that Harun was among the delegation.  
 460. [REDACTED] testified that *Ali Kushayb* was present during the visit of the delegation,<sup>1765</sup> whereas [REDACTED] testified that it is only one or two days after the arrival of the delegation, that he allegedly saw *Ali Kushayb* coming to the Garsila base and holding “numerous” meetings in the officers’ mess with the Commander of the base and the Intelligence Commander.<sup>1766</sup> [REDACTED] added that he saw Harun with boxes which were distributed to the Commander of the police, the Commander of the barracks,<sup>1767</sup> the leader of the internal security forces, Hamdi,<sup>1768</sup> and *Ali Kushayb*.<sup>1769</sup> [REDACTED] testified that he was nearby the Commander of the barracks when he opened the box and saw that it contained a large amount of money.<sup>1770</sup> During his cross-examination, it became apparent that [REDACTED] did not know what the boxes contained, but rather inferred it as he declared that the Commander “*opened the boxes but quickly closed them, so that we don't know what was inside but at the end of the day we were able to tell that money was inside*”.<sup>1771</sup> [REDACTED] did not mention a distribution of money by the delegation from Khartoum visiting the Garsila base. Therefore, the TC is left with no means of determining which of the two versions, [REDACTED] it should believe. No conclusion can be reached beyond reasonable doubt on such basis.

*(iii) The military convoy and orders to attack*

461. [REDACTED] evidence on the composition of the convoy to Sindu is contradicted by **P-0012**. According to [REDACTED], there were only 33 soldiers from the SAF,<sup>1772</sup> whereas P-0012 describes 300 of them.<sup>1773</sup> [REDACTED] mentioned only 13 PDF,<sup>1774</sup> while P-0012 mentioned none, but referred to CRF instead.<sup>1775</sup> According to [REDACTED], the officer

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<sup>1761</sup> [REDACTED]

<sup>1762</sup> [REDACTED]

<sup>1763</sup> This is the only delegation visit mentioned by [REDACTED]

<sup>1764</sup> [REDACTED]

<sup>1765</sup> [REDACTED]

<sup>1766</sup> [REDACTED]

<sup>1767</sup> Most likely corresponds to Major Bakhit, See [REDACTED]

<sup>1768</sup> Most likely corresponds to Lieutenant Hamdi Sharaf Al-Din, See [REDACTED]

<sup>1769</sup> [REDACTED]

<sup>1770</sup> [REDACTED]

<sup>1771</sup> [REDACTED]

<sup>1772</sup> [REDACTED]

<sup>1773</sup> **P-0012**: [DAR-OTP-0119-0503](#), para. 93.

<sup>1774</sup> [REDACTED]

<sup>1775</sup> **P-0012**: [DAR-OTP-0119-0503](#), para. 93.

commanding the CRF, who must have been Himeidan or Al-Tayyib, had expressly refused to join the convoy.<sup>1776</sup>

462. [REDACTED] appeared unable to remember the name of the Major who led the convoy.<sup>1777</sup> It is fair to say that such a huge time lapse in between the events and [REDACTED] testimony could have an impact on his recollection. However, it is hard to believe that – about twenty years after the events – [REDACTED] was able to remember all the names of people with him in the convoy<sup>1778</sup> and the precise number of ammunitions received by each JJW,<sup>1779</sup> but not the name of the SAF officer in charge of this convoy.<sup>1780</sup> [REDACTED] testified that the operation was placed under the leadership of an officer called [REDACTED], who was a warrant officer according to him,<sup>1781</sup> but a colonel according to **P-0012**.<sup>1782</sup> [REDACTED] also mentions that the operation commander was Qasim Adam Daoud,<sup>1783</sup> who was second in command in Garsila.<sup>1784</sup> Evidence on record further shows that the PDF was commanded by Hamdi.<sup>1785</sup> In any case, the structure described by [REDACTED], partially corroborated by P-0012 and completed by the evidence on record, leaves no place for another commander by the name of *Ali Kushayb*. Yet, [REDACTED] and P-0012 mention his presence, without explaining his role or basis of authority.

463. During the course of his testimony, [REDACTED] portrayed an exaggerated tendency to name *Ali Kushayb* as the ultimate authority in charge of the Sindu convoy. Indeed, according to [REDACTED], on their way to Sindu, the convoy made several stops gathering more and more JJW until it reached more than 7,000 individuals in Dembow Kabdy.<sup>1786</sup> In Arawala, [REDACTED] heard *Ali Kushayb* giving a speech to the crowd, addressing the JJW, using the phrase “*Aksah Amsah*”.<sup>1787</sup> [REDACTED] evidence on this matter has been shown not to be credible.<sup>1788</sup>

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<sup>1776</sup> [REDACTED]

<sup>1777</sup> [REDACTED]

<sup>1778</sup> [REDACTED]

<sup>1779</sup> [REDACTED]

<sup>1780</sup> [REDACTED]. See discussion [REDACTED].

<sup>1781</sup> **P-0935**: T-090, p. 32, lines 13-22.

<sup>1782</sup> **P-0012**: [DAR-OTP-0119-0503](#), para. 93.

<sup>1783</sup> [REDACTED]

<sup>1784</sup> [REDACTED]

<sup>1785</sup> **P-0643**: T-056, p. 45, lines 14-18 (Conf); T-058, p. 21, lines 10-17, p. 34, line 9-p. 35, line 18 (Conf); See also: **P-0892**: [DAR-OTP-0217-0384-R02](#), para. 45

<sup>1786</sup> [REDACTED]

<sup>1787</sup> [REDACTED]. See **PART IV – Chapter 2 – Section 4**.

<sup>1788</sup> [REDACTED]

464. According to **P-0012**, it took five days for the convoy leaving from Mukjar to Sindu to come back to Mukjar.<sup>1789</sup> He stated that “[w]hen Kushayb and his fighters returned to Mukjar on the fifth day after they had set off for Sindu, all the 6,000 fighters came into the town and began to loot the town again”.<sup>1790</sup> Once more, this directly contradicts [REDACTED] testimony that no JJW returned to Mukjar saying that “they were not with us after Sindu” and that “[o]nly the ones in the Land Cruisers” came back to Mukjar.<sup>1791</sup> This massive discrepancy between the two witnesses combined with the pattern of inconsistencies of P-0012’s account regarding the headcount and composition of the convoy raises a serious doubt on the credibility of P-0012’s presence in Mukjar when the convoy left for and came back from Sindu. Therefore, his evidence on the matter should be disregarded.

465. In total, the Trial Chamber is left with two equally not credible testimonies regarding the convoy to Sindu. The Prosecution’s allegations are not supported by the evidence.

## **Section 2 - Crimes committed in Mukjar and Alleged Role of Ali Kushayb**

### ***I - Arrests and Detention in February-March 2004***

#### ***A - Arrests of 122 Fur Males in the Mukjar Area***

##### ***(i) Arrests at checkpoints***

466. In late February and early March 2004, the GoS forces set up checkpoints in the northern, eastern, and western entrances of Mukjar town.<sup>1792</sup> These checkpoints were under the control of the PPF,<sup>1793</sup> the Police,<sup>1794</sup> and the PDF,<sup>1795</sup> all of them being part of the Mobile Forces.<sup>1796</sup> Haroun Bashir, member of the National Police,<sup>1797</sup> was in charge of a checkpoint in the town.<sup>1798</sup>

<sup>1789</sup> **P-0012**: [DAR-OTP-0119-0503](#), para. 96; See also [REDACTED]

<sup>1790</sup> **P-0012**: [DAR-OTP-0119-0503](#), para. 96.

<sup>1791</sup> [REDACTED]

<sup>1792</sup> **P-0129**: [DAR-OTP-0223-0157-R02](#), para. 35; **P-0984**: T-066, p.65, line 17- p.66, line 6 (Conf); **P-0720**: [DAR-OTP-0210-0291-R02](#), paras. 89-91; **P-0757**: [DAR-OTP-0211-0003-R02](#), paras. 51; 75; **P-0916**: [DAR-OTP-0224-0023-R01](#), para. 74; **P-0922**: [DAR-OTP-0222-0312-R01](#), para. 85.

<sup>1793</sup> See e.g. **P-0675**: [DAR-OTP-0206-0173-R02](#), paras. 86-87; **P-0720**: [DAR-OTP-0210-0291](#), paras. 91-93; **P-0892**: [DAR-OTP-0217-0384-R02](#), para. 41; **P-0903**: T-032, p.22, line 16-p.23, line 11.

<sup>1794</sup> See e.g. **P-0919**: T-060, p. 14, lines 17-25; T-061, p.4, line 8-p.5, line 21; **P-0922**: [DAR-OTP-0222-0312-R01](#), para. 85; **P-0990**: T-040, p. 26, line 15-p. 27, line 15.

<sup>1795</sup> See: **P-0008**, [DAR-OTP-0088-0085-R02](#), para. 46; **P-0129**: [DAR-OTP-0128-0128-R04](#), para. 39; T-076, p. 34, lines 15-23; **P-0903**: T-033, p. 42, line 17-p. 43, line 1; **P-0916**: [DAR-OTP-0224-0023-R01](#), para. 74; **P-0922**: [DAR-OTP-0222-0312-R01](#), para. 85: Says “Janjaweed” which refers to PDF; **P-0990**: T-040, p. 26, line 15-p. 27, line 15.

<sup>1796</sup> See: **P-0984**: T-067, p. 41, line 25-p. 42, line 13.

<sup>1797</sup> **P-0892**: [DAR-OTP-0217-0384-R02](#), para. 44.

<sup>1798</sup> **P-0919**: T-060, p. 14, lines 17-25; **P-0919**: T-061, p. 19-p. 5, line 9.

467. **P-0675**, stated that he recognised two PPF members, Sheikh Khalid ('Khalid') and Abakar Korain ('Korin'), at the checkpoints at the North East entrance of the town.<sup>1799</sup> **P-0675** specified that Khalid was the PPF Commander in charge at this location.<sup>1800</sup> **P-0903** also identified Korin and Hassan Mohammed Jumaa aka Carter ("Carter"),<sup>1801</sup> as individuals giving instructions for arrests at the Mukjar checkpoints.<sup>1802</sup>

468. The evidence shows that children, including young boys, women, elderly, and injured people were not arrested.<sup>1803</sup> The Mobile forces were looking for potential fighters and seeking to arrest "*any arriving [from the Sindu area] fit male who appeared between 18 to 60 years old*" i.e in age of combatting or aiding the rebels.<sup>1804</sup> As confirmed by **P-0547**, rebels did not wear a particular uniform and instead wore plain clothes,<sup>1805</sup> and also lived under the same roof as civilians.<sup>1806</sup> **P-0675** testified that those arresting people were separating men and older boys from women and children, and then checking them for marks of weapon bearing at shoulders.<sup>1807</sup> This was corroborated by **P-0990**.<sup>1808</sup> **P-0129** explained further that Fur PDF members were stationed at checkpoints in order to recognise individuals whose names were on a list.<sup>1809</sup> This is corroborated by **P-0922**,<sup>1810</sup> who stated that "those manning the checkpoints had lists containing the names of prominent figures like *Umdahs*, *Sheikhs*, rebel leaders and people who were influential in their villages and were suspected of having led or supported the rebels".<sup>1811</sup> **P-0922** was told about these lists from people "who had been detained and released as their names were not on the lists."<sup>1812</sup> This further corresponds to **P-0769**'s evidence, who indicated that the local Security Committee would select the persons who would be arrested and eliminated on account for their suspected affiliation to the rebellion.<sup>1813</sup> **P-0547** indicated

<sup>1799</sup> **P-0675**: [DAR-OTP-0206-0173-R02](#), paras. 85-87; See Map at [DAR-OTP-0206-0227](#): **P-0675** indicated the location of the checkpoint.

<sup>1800</sup> **P-0675**: [DAR-OTP-0206-0173](#), para. 86.

<sup>1801</sup> Carter was a PPF Coordinator in Mukjar: See: T-053, p. 81, line 24-p. 82, line 19; T-054, p. 4, lines 17-20; T-055, p. 54, lines 13-22 (Conf); p. 55, line 6-p. 56, line 11; **P-0892**: [DAR-OTP-0217-0384-R02](#), para. 49.

<sup>1802</sup> **P-0903**: T-032, p. 22, line 16-p. 23, line 11.

<sup>1803</sup> **P-0903**: T-032, p. 24, lines 1-2; **P-0675**: [DAR-OTP-0206-0173](#), para. 85; **P-0990**: T-040, p. 26, line 15-p. 27, line 2; **P-0922**: [DAR-OTP-0222-0312-R01](#), para. 85; **P-0919**: T-060, p.14, lines 17-25; T-061, p.4, line 8-p.5, line 21; **P-0877**: T-053, p. 82, lines 1-4.

<sup>1804</sup> **P-0922**: [DAR-OTP-0222-0312-R01](#), para. 85.

<sup>1805</sup> **P-0547**: T-052, p. 66, lines 10-11 (Conf), p. 66, line 24-p. 67, line 1 (Conf).

<sup>1806</sup> **P-0547**: T-052, p. 67, lines 2-3 (Conf).

<sup>1807</sup> **P-0675**: [DAR-OTP-0206-0173-R02](#), para. 85.

<sup>1808</sup> **P-0990**: T-040, p. 27, line 19-p. 28, line 9.

<sup>1809</sup> **P-0129**: T-076, p. 34, lines 15-20.

<sup>1810</sup> **P-0922**: [DAR-OTP-0222-0312-R01](#), para. 12.

<sup>1811</sup> **P-0922**: [DAR-OTP-0224-0023-R01](#), para. 76.

<sup>1812</sup> **P-0922**: [DAR-OTP-0224-0023-R01](#), para. 76.

<sup>1813</sup> **P-0769**: T-098, p. 61, lines 12-25 (Conf). For Jaafar Abd-Al-Hakam was the Chair of the local Security Committee in Garsila See: **P-0883**: T-072, p. 15, lines 7-9.

further that targets were selected based on information [REDACTED].<sup>1814</sup> It results from the evidence that the people arrested at Mukjar checkpoints fell in two categories: (i) listed individuals suspected of supporting the rebellion and namely targeted by the local Security Council, which *Ali Kushayb* was not part of; and (ii) suspected rebel combatants or supporters fleeing the Sindu area. Witnesses **P-0129**, **P-0675**, **P-0877**, **P-0903**, **P-0919** and **P-0990** testified that they were arrested at checkpoints in Mukjar.

469. **P-0129** was arrested by PPF members, including Carter, whom he identifies as a PDF Commander in Mukjar.<sup>1815</sup> **P-0877** testified that he had been arrested a first time by the same Carter<sup>1816</sup> and a second time by CRF members.<sup>1817</sup> **P-0675** testified that he was arrested by soldiers in full military uniforms<sup>1818</sup> at a checkpoint under a PPF Commander by the name of *Sheikh Khalid*.<sup>1819</sup> He also recognized another Fur PPF member by the name of Abakar Korin.<sup>1820</sup> **P-0903** testified that he had been arrested by the same Carter mentioned by P-0129 and P-0675 and the same Korin mentioned by P-0675.<sup>1821</sup> **P-0990** was also arrested by *inter alia* Carter and PPF forces<sup>1822</sup> and **P-0919** was arrested by a certain Haroun Bashir, member of the Police/PPF.<sup>1823</sup>

470. None of the witnesses have placed Mr Abd-Al-Rahman/ *Ali Kushayb* at the location of their arrests nor have they identified him as the commander or head of any of the forces in charge at checkpoints.

*(ii) Arrest of Fur community leaders*

471. The Defence recalls that **P-1042** opined that the involvement of each member of the Fur administration, like *Umdahs* and *Sheikhs*, in organising the rebellion varied among individuals.<sup>1824</sup> As already stated, *Umdahs*, *Sheikhs* and people who were influential in their villages were suspected of having led or supported the rebels.”<sup>1825</sup> There is also evidence on record that preeminent members of the Fur administration, like the Fur *Shartay*, Omar Ahmed

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<sup>1814</sup> **P-0547**: [REDACTED]

<sup>1815</sup> See: **P-0129** mentions being arrested by “PDF” members Tollein and Ishag Mosco: [DAR-OTP-0223-0157-R02](#), para. 37; T-076, p.33, line 25-p.34, line 20: N.B. Whilst P-0129 mentions PDF forces as the main forces operating at checkpoints, it appears that the witness is mistaken as the bulk of the evidence identifies rather the PPF forces.

<sup>1816</sup> **P-0877**: T-053, p. 81, line 24-p. 82, line 8. See also section Structure.

<sup>1817</sup> **P-0877**: T-054, p. 5, line 14-p. 6, line 7.

<sup>1818</sup> **P-0675**: [DAR-OTP-0206-0173-R02](#), paras. 85-86.

<sup>1819</sup> **P-0675**: [DAR-OTP-0206-0173-R02](#), para. 86.

<sup>1820</sup> **P-0675**: [DAR-OTP-0206-0173-R02](#), paras. 86-87.

<sup>1821</sup> **P-0903**: T-032, p. 23, lines 11-25; T-033, p. 42, lines 17-22.

<sup>1822</sup> **P-0990**: T-040, p. 27, lines 4-p. 28, line 2.

<sup>1823</sup> **P-0919**: T-060, p. 14, lines 17-25.

<sup>1824</sup> **P-1042**: T-028, p. 40, lines 9-16.

<sup>1825</sup> **P-0922**: [DAR-OTP-0224-0023-R01](#), para. 76.

Zarruq (“*Shartay Zarruq*”),<sup>1826</sup> who held the highest tribal position in the Fur tribe in Mukjar and was *Umdah* Yahya’s brother,<sup>1827</sup> and the Fur *Agid-Al-Ogada* Abdul-Haziz Al-Hera<sup>1828</sup> were not targeted by the arrests. *Umdah* Yahya’s son, Nadir, present in Mukjar in early 2004, was also not arrested.<sup>1829</sup> **P-0720** explained that *Shartay Zarruq* was not arrested due in part to his old age, and potentially due to the fact that he did not move outside Mukjar much, contrary to *Umdah* Yahya.<sup>1830</sup> **P-0041** provides the same explanation.<sup>1831</sup> Far from being targeted, *Shartay Zarruq* actually negotiated the release of some detainees according to **P-0756**<sup>1832</sup> and reported the discovery of dead bodies from Mukjar executions to the authorities according to **P-0913**.<sup>1833</sup> **P-0916** testified that two sons of *Shartay Zarruq* were arrested after having expressed their sympathy for the rebellion, but that they were simply transferred and detained in Nyala and were not executed.<sup>1834</sup> The fact that *Shartay Zarruq*, his two sons who had expressed sympathy for the rebellion, *Umdah* Yahya’s son Nadir and the Fur *Agid-Al-Ogada* were not arrested goes against OTP’s contention that Fur males, especially community leaders,<sup>1835</sup> were specifically targeted by the GoS forces because of their leadership position. *Umdah Issa Harun Nour* (*‘Umdah Nour’*) and *Umdah Adam Husayn Abdelm Mahmoud* (aka *Doori*) (*‘Umdah Doori’*)

472. The OTP has failed to bring any first-hand evidence regarding the alleged arrests of *Umdah Nour* or *Umdah Doori*, but has only adduced hearsay evidence from two witnesses without adequate information as to their source.<sup>1836</sup> Therefore, in the absence of clear evidence thereof, the TC cannot reasonably conclude beyond reasonable doubt that *Umdah Issa Harun Nour* (*‘Umdah Nour’*) or *Umdah Adam Husayn Abdelm Mahmoud* (aka *Doori*) (*‘Umdah Doori’*) were arrested and taken into custody or that their arrest was due to their position as Fur community leaders.

*Umdah Yahya Ahmad Zarruq* (“*Umdah Yahya*”)

<sup>1826</sup> **P-0041**: [DAR-OTP-0206-0033-R02](#), para. 15; **P-0720**: T-043, p. 46, line 9-p. 47, line 1.

<sup>1827</sup> **P-0720**: [DAR-OTP-0210-0291-R02](#), para. 31.

<sup>1828</sup> Abdul-Haziz Al-Hera further resumed in his functions as the Fur *Agid-Al-Ogada* after the events. **P-0129**: T-076, p. 24, lines 6-10.

<sup>1829</sup> **P-0041**: [DAR-OTP-0206-0033-R02](#), para. 15; **P-0720**: T-043, p. 46, line 9-p. 47, line 1.

<sup>1830</sup> **P-0720**: T-043, p. 46, line 9-p. 47, line 1.

<sup>1831</sup> **P-0041**: [DAR-OTP-0206-0033-R02](#), para. 15.

<sup>1832</sup> **P-0756**: [DAR-OTP-0211-0039-R02](#), para. 53.

<sup>1833</sup> **P-0913**: [DAR-OTP-0218-0021-R04](#), para. 116.

<sup>1834</sup> **P-0916**: [DAR-OTP-0224-0023-R01](#), para. 24.

<sup>1835</sup> [OTP Trial Brief](#), para. 345.

<sup>1836</sup> See for *Umdah Nour*: **P-0008**: [DAR-OTP-0088-0085-R02](#), para. 46; **P-0892**: [DAR-OTP-0217-0384-R02](#), para. 64; 68: stated that he heard that *Umdah Nour* was arrested by the PPF and PDF forces; See for *Umdah Doori*: **P-0008**: [DAR-OTP-0088-0085-R02](#), para. 46.

473. *Umdah* Yahya was the *Umdah* of Sindu,<sup>1837</sup> the main rebel stronghold of West Darfur in early 2004.<sup>1838</sup> He was an influential tribal member, with a personal bodyguard who carried weapons like Kalashnikovs.<sup>1839</sup> Despite his local influence, the evidence shows that *Umdah* Yahya never discouraged villagers of his area to join the rebellion.<sup>1840</sup> There may have been specific reasons to arrest *Umdah* Yayha due to his potential role with the rebellion. The circumstantial evidence does not support the Prosecution's theory that his arrest was to particularly target Fur community leaders such as *Umdahs* and *Sheikhs*.

474. **P-0720** allegedly witnessed *Umdah* Yayha's second arrest,<sup>1841</sup> which he stated occurred "around the second month of 2004."<sup>1842</sup> According to **P-0720**, *Umdah* Yahya was arrested together with his son Nadir, the latter being subsequently released.<sup>1843</sup> **P-0720** identified Carter as the leader of the northern checkpoint responsible for *Umdah* Yahya's arrest.<sup>1844</sup> **P-0756** saw *Umdah* Yahya being brought to Mukjar Police Station by three officers wearing camouflage uniforms in March 2004.<sup>1845</sup> **P-0720's** and **P-0756's** accounts of *Umdah* Yahya's arrest are contradicted by **P-0913**, according to whom, *Umdah* Yahya was arrested by CRF Lieutenant-Colonel Al-Tayyib directly at the Mukjar Police Station,<sup>1846</sup> and by **P-0041**, according to whom, *Umdah* Yahya was never arrested in Mukjar, but died in Abirla.<sup>1847</sup>

475. The above accounts of *Umdah* Yayha's arrest unequivocally contradict the Prosecution's case that the latter was arrested by *Ali Kushayb* himself.<sup>1848</sup> To support this contention, the OTP initially relied on **P-0012**.<sup>1849</sup> However, **P-0012** corrected his statement to indicate that in reality, he never saw *Ali Kushayb* conducting arrests in Mukjar town.<sup>1850</sup> The Prosecution's initial allegation that *Umdah* Yayha's was arrested by *Ali Kushayb* himself is thus not supported by evidence. The Prosecution's allegation that Mr Abd-Al-Rahman personally

<sup>1837</sup> Tendy and Dimbi were also under the territory of *Umdah* Yahya Ahmad Zarrouq: **P-0720**: [DAR-OTP-0210-0291-R02](#), para. 32.

<sup>1838</sup> **P-0720**: T-043, p. 43, lines 10-13; p. 45, lines 6-13; **P-0720**: [DAR-OTP-0210-0291-R02](#), para. 32; **P-0028**, [DAR-OTP-0094-0423-R01](#), paras. 65, 69; **P-0617**: [DAR-OTP-0202-1496-R02](#), para. 22; **P-0757**: [DAR-OTP-0211-0003-R02](#), para. 75; **P-0756**: [DAR-OTP-0211-0039-R02](#), para. 71.

<sup>1839</sup> **P-0581**: T-064, p. 36, lines 1-23.

<sup>1840</sup> **P-0720**: T-043, p.43, lines 10-13.

<sup>1841</sup> N.B: Some evidence establishes that *Umdah* Yayha was previously arrested in Mukjar around August-September 2003, outside the scope of the charges. His arrest in February 2004 would therefore be his second arrest: See e.g: **P-0581**: [DAR-OTP-0216-0560-R02](#), paras 34-35; **P-0581**: T-064, p.33, lines 2-10; **P-0720**: [DAR-OTP-0210-0291-R02](#), paras. 60-64.

<sup>1842</sup> **P-0720**: [DAR-OTP-0210-0291-R02](#), paras. 91-94, para. 97.

<sup>1843</sup> **P-0720**: T-043, p. 46, lines 9-13.

<sup>1844</sup> **P-0720**: [DAR-OTP-0210-0291-R02](#), paras. 93-94.

<sup>1845</sup> **P-0756**: [DAR-OTP-0211-0039-R02](#), para. 71.

<sup>1846</sup> **P-0913**: [DAR-OTP-0218-0021-R04](#), para. 91.

<sup>1847</sup> **P-0041**: [DAR-OTP-0206-0033-R02](#), para. 15.

<sup>1848</sup> [OTP Trial Brief](#), para. 385.

<sup>1849</sup> [OTP Trial Brief](#), para. 385.

<sup>1850</sup> **P-0012**: [DAR-OTP-0220-4710](#), para. 27.

arrested leaders of the Fur community is also not supported by the evidence.

*(iii) Houses to house arrests and arrests outside of Mukjar*

476. Indirect witnesses present in the town in late 2003-early 2004 have testified that GoS forces, and more specifically police forces, including the PPF, as well as military intelligence members searched houses for males in age of combatting.<sup>1851</sup> House arrests were not conducted on a large scale in Mukjar, as the large majority of arrests occurred at checkpoints situated at the entrance of the town. This is largely due to the fact that the aim of such arrests was to identify and detain potential combatants arriving from rebel strongholds in Sindu and surrounding areas. The evidence does not provide any clear reason for these arrests other than a search for rebels and/or men in age of combatting.<sup>1852</sup> In addition, no evidence points to *Ali Kushayb* as a participant in these arrests.

*(iv) Arrests at other locations*

477. **P-0932** is the only witness who was not arrested at a checkpoint in Mukjar, but rather on 19 February 2004 in Bindisi market and subsequently taken on 20 February 2004 to the Mukjar Police Station by CRF forces.<sup>1853</sup> There is no allegation that *Ali Kushayb* formed part of the CRF at the time, nor is there any evidence on record that he was present in Bindisi on those dates. P-0932 does not mention him.

478. The OTP announced that “*P-0105 and P-0720 saw Mr. Abd-Al-Rahman arresting people.*”<sup>1854</sup> **P-0105** was not called. **P-0720** had no reasonable basis for identification of the man referred to as *Ali Kushayb*, other than hearsay from [REDACTED]; but there is no information as to a clear basis of [REDACTED] for knowing *Ali Kushayb*.<sup>1855</sup> No reasonable conclusion can be drawn on the basis of such evidence, aside from the fact that this allegation of the Prosecution is further unsubstantiated. The OTP alleges *in fine* that Mr Abd-Al-Rahman instructed the Head of Police in Mukjar with the following: “[*a*]ny man coming down from SINDU, he has to be [...] kept [...] [*a*]nd if this does not happen [...] you are going to bear responsibility.”<sup>1856</sup> This contention is solely based on the evidence of **P-0905**, who is not a credible and reliable witness.<sup>1857</sup> P-0905 further does not explain how *Ali Kushayb* obtained the

<sup>1851</sup> See e.g. **P-0008**: [DAR-OTP-0088-0085-R02](#), para. 46; **P-1074**: [DAR-OTP-0224-0441-R02](#), para. 47; **P-0913**: T-069, p. 50, lines 5-6 (Conf); **P-0720**: [DAR-OTP-0210-0291-R02](#), para. 95; **P-0916**: [DAR-OTP-0224-0023-R01](#), paras. 74, 76.

<sup>1852</sup> See e.g. **P-1074** mentions that arresting forces were looking for “Tora Bora”: [DAR-OTP-0224-0441-R02](#), para. 47; **P-0913** testified that “officers for the intelligence were searching males between the ages of 30 and 35”: T-069, p. 50, lines 5-6 (Conf).

<sup>1853</sup> **P-0932**: [DAR-OTP-0222-0602-R02](#), paras. 81-82; 94-96.

<sup>1854</sup> [OTP Trial Brief](#), para. 386.

<sup>1855</sup> **P-0720**: [DAR-OTP-0210-0291-R02](#), paras. 103-105; **P-0720**, T-043, p. 10, lines 8-12.

<sup>1856</sup> [OTP Trial Brief](#), para. 386.

<sup>1857</sup> See **PART III- Chapter 2- P-0905**.

authority to impose this order on the Head of the Police in Mukjar. His power to arrest and detain individuals is not corroborated by any other witnesses, including ones who worked at the Mukjar police station and could have witnessed the scene [REDACTED]. In the absence of other witnesses of this event and of evidence of *Ali Kushayb*'s position of authority over the Head of Police in Mukjar, P-0905's unique account cannot be conclusively relied upon as proof *Ali Kushayb*'s role in the arrests in Mukjar. It is also contradicted by the evidence adduced through all other witnesses of the arrests.

479. In conclusion, the evidence on record has shown that the arrests in Mukjar were conducted by the PPF, PDF, CRF and Military Intelligence, which Carter led. At the relevant time, these forces fell under the Mobile Forces, under the ultimate authority of Himeidan or Al-Tayyib. There is no evidence and it is not even alleged that *Ali Kushayb* belonged to these forces, nor is there any reliable evidence that he played a role in these arrests.

*(v) The arrests were not conducted against the Fur population of Mukjar*

480. Lastly, additional evidence shows that the arrests were not indiscriminate, but rather based on actual suspicion of rebel affiliation. **P-0008**, **P-0012**, **P-0028**, **P-0029**, **P-0584**, **P-0720**, and **P-0922** were present and living in Mukjar at the time of the events, all of them being male, Fur, in age of combating.<sup>1858</sup> **P-0028** and **P-0922** were able to move freely in public spaces without being arrested during the charged period.<sup>1859</sup> Some of these witnesses went so far as to interact with individuals who might allegedly be responsible for the arrests in Mukjar,<sup>1860</sup> among them Torshein.<sup>1861</sup> **P-0029** [REDACTED] with both Sameh and Himeidan.<sup>1862</sup> Witnesses **P-0041**, **P-0905**, **P-0913**, **P-0984** are all [REDACTED].<sup>1863</sup> The majority of the Police and PPF forces in Mukjar were comprised of individuals of Fur ethnicity.

481. The evidence further shows that preeminent members of the Fur tribe administration, in the first place *Shartay Zarruq*, were not targeted at all, whereas there were good reasons to suspect those arrested, like *Umdah Yahya*, *Shartay Zarruq*'s brother, of supporting the rebellion. This conclusion is difficult to reconcile with the Prosecution's case that the arrests

<sup>1858</sup> **P-0008**: [DAR-OTP-0088-0085-R02](#), at 0085; **P-0012**: [DAR-OTP-0119-0503-R01](#), at 0503, para. 35; **P-0028**: [DAR-OTP-0094-0423-R01](#), at 0423; **P-0029**: [REDACTED]p. 47, lines 6-11; T-031, p. 47, lines 13-23; **P-0584**: [DAR-OTP-0200-1540-R02](#), at 1540; **P-0720**: [DAR-OTP-0210-0291-R02](#), at 0291; **P-0922**: [DAR-OTP-0220-2864-R01](#), at 2864.

<sup>1859</sup> **P-0028**: [DAR-OTP-0094-0423-R01](#), paras. 55, 58; **P-0922**: [DAR-OTP-0220-2864-R01](#), para. 45.

<sup>1860</sup> **P-0028**: [DAR-OTP-0094-0423-R01](#), paras. 66; **P-0029**: [REDACTED]**P-0008**: [DAR-OTP-0008-8058](#), para. 48.

<sup>1861</sup> **P-0008**: [DAR-OTP-0008-8058](#), para. 48.

<sup>1862</sup> **P-0029**: [REDACTED]

<sup>1863</sup> **P-0041**: [DAR-OTP-0206-0033-R02](#), at 0033; para. 17; **P-0905**: [DAR-OTP-0215-5256-R02](#), at 5258; **P-0913**: [DAR-OTP-0215-6802-R02](#), at 6804; **P-0984**: [DAR-OTP-0222-0602-R02](#), paras. 11, 94-100.

campaign led in Mukjar in 2003-2004 specifically targeted Fur community leaders.

*B - Detention at the Mukjar Police Station*

482. **P-0129, P-0675, P-0877, P-0903, P-0919, P-0932, and P-0990** ('Mukjar Detained Witnesses') were all allegedly detained at the Mukjar Police Station in February-March 2004. Insider witnesses **P-0029, P-0913, P-0931, P-0905, and P-0984** stated that they worked at the Mukjar Police Station or passed through it during the events. Evidently, these witnesses' first-hand evidence, if credible, should be preferred over any hearsay evidence emanating from other witnesses.

*(i) Arrival of the detainees and placement in the cells*

483. The period of arrival and length of the detention of the Mukjar Detained Witnesses at Mukjar police station significantly varies from one day to more than 40 days, while other detainees were released immediately after their arrest.<sup>1864</sup> The evidence suggests that none of the Mukjar Detained Witnesses were arrested in the same group and brought to the Mukjar Police Station simultaneously.<sup>1865</sup>

*(ii) Control over the detainees*

484. The Mukjar Police Station was directed by "Al-Tayyib", in charge as the Commander

<sup>1864</sup> **P-0129** was allegedly detained twice: first on a Tuesday in February 2004 and the second time approximately a month after, in March 2004 for seventeen days before being released in April 2004 according to his own estimation; **P-0129**: [DAR-OTP-0128-0128-R02](#), para. 68, [DAR-OTP-0223-0157-R02](#), para. 12; **P-0675**, [DAR-OTP-0206-0173-R02](#), paras. 92-93: **P-0675** stated that he was detained sometime in February 2004, the day after the Tendy attack for four days only, before being recognised by *Umdah* Suleiman as being a student and not a rebel and therefore released; **P-0877**: T-053, p. 83, lines 8-20 (Conf); T-054, p. 5, lines 11-13, p. 6, lines 18-20; T-055, p. 52, lines 20-22; **P-0877** was first detained for one day from 28 February 2004 until 29 February 2004, when he was released through an order coming from *Sheikh* Muhammad Torjok Ateem ('*Sheikh* Torjok') and rearrested and brought back to the Mukjar Police Station on 29 February 2004, where he was detained until 3 March 2004; **P-0903**: T-032, p. 27, lines 4-6: **P-0903** was detained from approximately end of March 2004, on a Monday for "a really long time" without providing further details regarding the date of his release; **P-0919**: T-061, p. 8, lines 11-14; T-060, p. 44, lines 10-20 (Conf), p. 52, lines 18-22 (Conf); **P-0919** provides no timeframe on his two detentions, but indicates that he was first detained for two nights and three days and then rearrested by the CRF after the executions and detained again before being released in 2003 or 2004; **P-0932**: [DAR-OTP-0222-0602-R02](#), paras. 81, 92, 94-97, 100, 111-113: **P-0932** arrived at Mukjar Police Station on or around 20 February 2004 (as inferred from his evidence) and remained in detention for 27 days, before being released with the help of *Sheikh* Torjok; **P-0990**: T-040, p. 36, lines 8-21: **P-0990** was detained at the Mukjar Police Station from 18 February 2004 until 16 March 2004, for a total of 29 days.

<sup>1865</sup> **P-0990**: T-040, p. 25, line 24-p. 26, line 10: **P-0990** arrived on 18 February 2004; **P-0932**: **P-0932**: [DAR-OTP-0222-0602-R02](#), paras. 81, 82, 97: he arrived most likely on 20 February 2004; **P-0129**: **P-0129**: [DAR-OTP-0128-0128-R04](#), paras 34, 39, 49: he arrived on a Tuesday, most likely in February 2004; **P-0903**: **P-0903**: T-032, p. 10, lines 12-22, p. 21, lines 5-15: **P-0903** arrived on or around 26-27 March 2004 -032, p. 10, lines 12-22, p. 21, lines 5-15; **P-0877**: T-053, p. 81, lines 7-23, T-054, p. 5, lines 11-17: **P-0877** was first arrested and detained for two days on 28 February 2004, only to be re-arrested and detained again on 29 February 2004; **P-0919**: T-061, p. 4, lines 8-11, T-060, p. 52, lines 18-22 (Conf): **P-0919** was unable to provide a date for his first arrest prior to the executions, but stated that it occurred on a morning and that he was released after a second arrest in 2003-2004; **P-0675**: [DAR-OTP-0206-0173-R02](#), paras 66, 80, 82, 84: **P-0675** also failed to date his arrival at Mukjar Police Station with precision, but stated that it occurred sometime in February 2004, after an attack on Tendy.

of the Mobile Forces.<sup>1866</sup> **P-0913** [REDACTED].<sup>1867</sup> Upon his arrival at Mukjar Police Station on 18 February 2004,<sup>1868</sup> **P-0990** witnessed Al-Tayyib giving the following order to a CRF Master Sergeant named John Koj (“Koj”).<sup>1869</sup> *“Come and put on record these citizens’ names and count their number. Afterwards, put them inside the prison until we get a report about them, after which we would release them.”*<sup>1870</sup> **P-0990** further saw and heard Al-Tayyib instructing Koj to open the cell door and windows during his detention.<sup>1871</sup> **P-0990** emphasized further that *“Ali Kushayb cannot of course give orders to another soldier. He can only give orders to the people who work with him. John Koj works with Mustafa Ahmed Al-Tayyib, so he does not belong to the Kushayb group.”*<sup>1872</sup> The lack of authority of a man with no actual position within the army or police like *Ali Kushayb* is corroborated by other evidence on record.<sup>1873</sup>

485. Following their arrest, witnesses testified that they were taken to the Mukjar police station by the Mobile forces of the Police,<sup>1874</sup> the CRF,<sup>1875</sup> and largely by the PPF.<sup>1876</sup> Upon arrival, they were registered and put in cells and in the veranda. **P-0919** testified that Carter registered his name before placing him in a cell.<sup>1877</sup> **P-0877** corroborated this and testified that his name was also written down by Carter upon arrival, although *“there were many people who were writing down the names in different ways”*.<sup>1878</sup> **P-0990**’s name was registered by Koj.<sup>1879</sup> **P-0675** did not state the name or describe individual(s) who registered his name and village of origin. **P-0129** mentions that when he first arrived at the Mukjar Police Station, he was put *“inside the veranda straight away.”*<sup>1880</sup> However, **P-0129** also noted that on the second day of his detention, *“the prison authorities came to count us and they wrote down our names.”*<sup>1881</sup> **P-0903** and **P-0932** do not mention any type of registration upon arrival.

486. The Defence does not challenge the OTP’s submission in relation to the registration of

<sup>1866</sup> **P-0720**: [DAR-OTP-0210-0291-R02](#), para. 79; **P-0990**: T-040, p. 29, lines 19-23.

<sup>1867</sup> **P-0913**: [REDACTED]

<sup>1868</sup> **P-0990**: T-040, p. 36, lines 8-12.

<sup>1869</sup> **P-0913**, [DAR-OTP-0218-0021-R04](#), para. 111.

<sup>1870</sup> **P-0990**: T-040, p. 29, lines 2-18.

<sup>1871</sup> **P-0990**: T-040: p. 50, line 24-p. 51, line 3.

<sup>1872</sup> **P-0990**, T-040, p. 30, lines 2-4, p. 50, line 24-p. 51, line 3; p. 65, line 22-p. 66, lines 12.

<sup>1873</sup> **D-0016**: T-130, p. 83, lines 8-9; p. 86, lines 12-14.

<sup>1874</sup> **P-0919**: T-061, p. 4, line 14-p. 5, line 9.

<sup>1875</sup> **P-0932**: T-068, p. 36, lines 1-21; [DAR-OTP-0222-0602-R02](#), para. 85, paras. 94-96.

<sup>1876</sup> **P-0129**, [DAR-OTP-0128-0128-R04](#), para. 39: **P-0129** mentions the PDF, but appears mistaken as the members he identify clearly belong to the PPF; **P-0675**: [DAR-OTP-0206-0173-R02](#), paras. 86-88; **P-0877**: T-053, p. 82, line 19; **P-0903**: T-032, p. 26, line 25-p. 27, line 5; **P-0990**: T-040, p. 29, lines 3-5.

<sup>1877</sup> **P-0919**: T-060, p. 15, line 5-24, T-061, p. 4, line 25-p. 5, line 9.

<sup>1878</sup> **P-0877**: T-055, p. 54, lines 13-22 (Conf).

<sup>1879</sup> **P-0990**, T-040, p. 29, lines 3-9.

<sup>1880</sup> **P-0129**: T-076, p. 35, lines 11-12; See also [DAR-OTP-0223-0157-R02](#), paras. 41-43.

<sup>1881</sup> **P-0129**: [DAR-OTP-0128-0128-R04](#), para. 44.

the detainees suspected as being rebels.<sup>1882</sup> The arrest of the Mukjar detained witnesses and other detainees was initially based on a list<sup>1883</sup> prepared by the local security Council<sup>1884</sup> on the basis of information [REDACTED].<sup>1885</sup> *Ali Kushayb* played no part in this continued registration process and placement in detention, which was handled by the PPF and CRF forces through Carter and Koj.

487. Multiple witnesses and other detainees of the Mukjar police station were released at varying periods of time between February and April 2004. **P-0675** for instance, was released after four days of detention after being recognised by [REDACTED].<sup>1886</sup> **P-0675** contends that prior to this recognition, *Sheikh Torjok*, *Sheikh Khalid* and *Umdah Suleiman* had accused him of being a rebel.<sup>1887</sup> *Sheikh Torjok* is a recurring figure in the release of the detainees held at Mukjar Police Station.<sup>1888</sup> *Ali Kushayb* had no say in the release of the detainees of Mukjar Police Station, just like he had no say, power or influence on who was arrested.

*(iii) Description of the cells and conditions of detention*

488. There were two holding cells at Mukjar Police Station:<sup>1889</sup> one with a door with metal bars leading to towards an open veranda ('cell 1');<sup>1890</sup> and the second one which had a door that led to the first cell ('cell 2').<sup>1891</sup> **P-0932** underlined that the door could be locked from the outside, not with chains but with locks.<sup>1892</sup> The Mukjar Detained Witnesses provided slightly differing estimates of the number people present in the cells upon their arrival.<sup>1893</sup> The evidence further shows that the number of individuals detained fluctuated considerably during the

<sup>1882</sup> [OTP Trial Brief](#), para. 350.

<sup>1883</sup> See **P-0129**: T-076, p. 34, lines 15-20; **P-0916**: [DAR-OTP-0224-0023-R01](#), para. 76.

<sup>1884</sup> **P-0769**: T-098, p. 61, lines 12-25 (Conf).

<sup>1885</sup> **P-0547**: [REDACTED]

<sup>1886</sup> **P-0675**: [DAR-OTP-0206-0173-R02](#), paras. 93-95.

<sup>1887</sup> **P-0675**: [DAR-OTP-0206-0173-R02](#), para. 93.

<sup>1888</sup> **P-0877**: T-053, p. 83, lines 8-20 (Conf), T-054, p. 5, lines 11-13, p. 6, lines 18-20, p. 22, line 19-p. 23, line 5: **P-0877** was released twice upon the orders of this *Sheikh Torjok*: once on 29 February 2004 and the second time on 3 March 2004, See; **P-0932**: [DAR-OTP-0222-0602-R02](#), paras. 111-113: **P-0932** was also released with the help of *Sheikh Torjok*; **P-0129**: [DAR-OTP-0128-0128-R04](#), para. 71: **P-0129** further stated that his own release and that of 43 detainees was also organised by this same *Sheikh*.

<sup>1889</sup> **P-0919**: T-061, p. 8, line 15-p. 10, line 19; **P-0990**: [DAR-OTP-0223-0232-R01](#).

<sup>1890</sup> **P-0129**: [DAR-OTP-0128-0128-R04](#), para. 40; **P-0932**: T-068, p. 37, lines 5-22; **P-0877**: [DAR-OTP-0219-0490](#).

<sup>1891</sup> **P-0877**: T-053, p. 87, lines 3-4 (Conf); The Witnesses provided sketches of the cells which establishes that there were two cells, one of which was accessible only through the first: See **P-0129**: [DAR-OTP-0219-7084](#); **P-0990**: [DAR-OTP-0223-0232-R01](#); **P-0877**: [DAR-OTP-0219-0490](#).

<sup>1892</sup> **P-0932**: T-068, p. 37, line 10-p. 38, line 5.

<sup>1893</sup> 100 men according to **P-0675**, See **P-0675**: [DAR-OTP-0206-0173-R02](#), para. 91; 94 men according to **P-0877**, See T-053, p. 82, line 18-p. 83, line 1; 81 detainees according to **P-0990**, See **P-0990**: T-040, p. 32, lines 19-20; more than a hundred people, maybe 200 according to **P-0903**, See **P-0903**: T-032, p. 29, lines 5-14; 101 people detained according to **P-0129**, See [DAR-OTP-0128-0128-R04](#), para. 44; around 200 detainees according to **P-0919**, See T-060, p. 63, line 24-p.64, line 2; 150 detainees according to **P-0932**, See [DAR-OTP-0222-0602-R02](#), para. 98.

duration of their detention.<sup>1894</sup>

489. The conditions in the cells at the Mukjar Police Station were extreme.<sup>1895</sup> As **P-0919** put it: “[the detainees] *were sitting upon each other. If you find a place to stretch your leg, that would be too much.*”<sup>1896</sup> The detainees also experienced a lack of sleep.<sup>1897</sup> **P-0932** testified that because of the lack of light in cell 1, “*only those who were close to the door could be seen.*”<sup>1898</sup> This was corroborated by **P-0919** who testified it was not possible to distinguish day from night or persons unless the door was opened.<sup>1899</sup> **P-0990** testified that “*there was no light, even to see each other. At night, we weren’t able to see each other up until the morning.*”<sup>1900</sup> There was no electric source of light in the cell.<sup>1901</sup>

490. **P-0129, P-0877, P-0903, P-0919, P-0932** and **P-0990** all testified that they have been detained in the same cell as *Umdah Yahya, Umdah Nour* and *Umdah Doori*.<sup>1902</sup> **P-0675** did not mention the *Umdahs*, but stated that he was detained in the same cell as **P-0129**.<sup>1903</sup> Witnesses **P-0877, P-0932, P-0903, and P-0990**, further contend that they were held next to the door in cell 1 which leads to the open veranda.<sup>1904</sup> Without entering into a discussion as to the probability that all these witnesses precisely sat next to each other, it appears that many of the Mukjar Detained Witnesses stated that they were placed close to the door, the only place which would allow a partial view towards the outside of the cell.<sup>1905</sup> If **P-0877** and **P-0932** were both sitting close to the door as contended,<sup>1906</sup> they would have most likely seen each other,

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<sup>1894</sup>

**P-0675:** [DAR-OTP-0206-0173-R02](#), para. 91: P-0675 stated that over the course of his four days of detention, the number of prisoners in his cell “more than doubled” ; **P-0877:** T-055, p. 60, line 18-p. 62, line 19: P-0877 testified that on 29 February 2004, it was completely full and more detainees got pushed deeper into the cell, line 18-p. 62, line 19 ; **P-0932:** T-068, p. 41, line 22-p. 42, line 9: P-0932 testified that a new batch of detainees arrived, they were put on top of each other -068, p. 41, line 22-p. 42, line 9.

<sup>1895</sup> See for eg: **P-0903**, T-032, p. 29, lines 5-p. 30, line 7; **P-0877**, T-053, p. 84, line 14-p. 85, line 12, T-055, p. 59, line 15-p. 60, line 6; p. 63, line 15-p. 64, line 7; **P-0919:** T-060, p. 16, lines 19-22; **P-0990:** T-040, p. 35, line 3-p. 36, line 4; **P-0932:** [DAR-OTP-0222-0602-R02](#), para. 110; **P-0129:** [DAR-OTP-0128-0128-R04](#), para. 69.

<sup>1896</sup> **P-0919:** T-060, p. 17, lines 2-4.

<sup>1897</sup> **P-0877:** T-054, p. 65, lines 7-10; **P-0919:** T-060, p. 17, lines 1-12, T-061, p. 11, lines 1-2; **P-0990:** T-040, p. 35, lines 3-10; **P-0932:** T-068, p. 44, lines 10-12.

<sup>1898</sup> **P-0932:** T-068, p. 42, line 17-p. 43, line 3.

<sup>1899</sup> **P-0919:** T-061, p. 14, line 8-p. 15, line 4.

<sup>1900</sup> **P-0990:** T-040, p. 34, lines 20-23.

<sup>1901</sup> **P-0932:** T-068, p. 37, lines 8-9.

<sup>1902</sup> **P-0129:** [DAR-OTP-0128-0128-R04](#), paras. 46-47; T-076, p. 43, lines 8-11; **P-0877:** T-054, p. 39, lines 4-6; **P-0903:** T-032, p. 30, lines 8-23; **P-0919:** T-060, p. 16, lines 4-10; P-0919 also indicated that he sat close to *Umdah Yahya*, See T-060, p. 19, lines 6-8; **P-0932,** [DAR-OTP-0222-0602-R02](#), para. 107; **P-0990:** T-040, p. 37, lines 9-15, [DAR-OTP-0224-0544](#).

<sup>1903</sup> **P-0675:** [DAR-OTP-0206-0173-R02](#), para. 95.

<sup>1904</sup> **P-0877:** T-055, p. 72, lines 9-16 (Conf); **P-0932:** T-068, p. 42, line 24-p. 43, line 13; **P-0903:** T-032, p. 48, lines 9-11; **P-0990:** T-040, p. 35, line 18-p. 37, line 4.

<sup>1905</sup> **P-0932:** [DAR-OTP-0220-5720](#), para. 17; T-068, p. 37, lines 13-19; **P-0990:** T-040, p. 33, lines 13-18; **P-0129:** [DAR-OTP-0223-0157-R02](#), para. 47.

<sup>1906</sup> **P-0877:** T-055, p. 72, lines 9-16 (Conf); **P-0990:** T-040, p. 35, line 7-p. 37, line 4.

especially since the area near the door of the cell had the most light.<sup>1907</sup> P-0877 actually testified that he saw P-0932 at Mukjar police station, although he did not remember in which cell P-0932 was kept.<sup>1908</sup> P-0932 testified however that he did not see P-0877 during his detention, whereas they must have been sitting, according to their own testimony, next to each other.<sup>1909</sup> 491. As explored above, **P-0129**, **P-0675**,<sup>1910</sup> **P-0932**, **P-0877**, **P-0903**, **P-0990**, **P-0919** were all allegedly in the same cell as the *Umdahs* (incl. *Umdah Yayha*, *Umdah Nour*, *Umdah Doori*). The evidence clearly establishes that there were two cells, with around 100 detainees in each of them.<sup>1911</sup> Evidently, the Mukjar Detained Witnesses attempted to reinforce the credibility and reliability of their testimonies by contending that they were all detained in the same cell as the *Umdahs* and that they were positioned close to the door, allowing them to see outside of the cell. But the probability that these seven witnesses were all detained within the same cell as the *Umdahs* is of 1 on  $2^7$ , i.e. 1 on 128. This leads to reasonable doubt, precisely 127 chances out of 128, that this cannot be true. There are also serious doubts on the credibility of both **P-0990** and **P-0877** who claimed to have written down the names of their fellow cellmates and other pertinent information during their detention in cell 1.

492. **P-0990** testified that he recorded the names and villages of origin of the men present in his cell on the soles of both of his feet, thanks to a pen he had hidden prior to his arrest and detention.<sup>1912</sup> He further testified that he wrote down this information first on the skin of the sole of his right foot, and then moved to his left foot when he ran out of space.<sup>1913</sup> After he finished the writing process, P-0990 then put his shoes on.<sup>1914</sup> P-0990 had difficulties reading and could only write the verses of the Koran.<sup>1915</sup> P-0990's account is clearly implausible: it would be impossible to write this amount of information on ones feet (i.e the names of towns of detainees with their village of origin), especially when one's writing skills are not prolific. Furthermore, P-0990 specified that he only wrote on his feet at night out of fear of being seen,<sup>1916</sup> whilst also testifying that "*there was no light, even to be able to see each other. At*

<sup>1907</sup> **P-0932**: T-068, p. 42, line 17-p. 43, line 3; **P-0919**: T-061, p. 14, line 8-p. 15, line 4.

<sup>1908</sup> **P-0877**: T-054, p. 53, line 18-p. 54, line 5.

<sup>1909</sup> **P-0932**: T-068, p. 52, lines 11-12 (Conf).

<sup>1910</sup> N.B: **P-0675** does not state that he was in the same cell as the *Umdahs*, but it can be inferred from his statement that he was in the same cell as **P-0129**, who himself claims he was with the community leaders. See **P-0675**: [DAR-OTP-0206-0173-R02](#), para. 95.

<sup>1911</sup> **P-0919**: T-061, p. 8, line 15-p. 10, line 18; **P-0990**: [DAR-OTP-0223-0232-R01](#).

<sup>1912</sup> **P-0990**: T-040, p. 38, lines 4-17.

<sup>1913</sup> **P-0990**: T-041, p. 7, line 25-p. 8, line 2 (Conf).

<sup>1914</sup> **P-0990**: T-040, p. 38, line 11.

<sup>1915</sup> **P-0990**: T-041, p. 13, line 6-p. 14, line 6 (Conf).

<sup>1916</sup> **P-0990**: T-041, p. 43, lines 20-21.

*night we weren't able to see each other until the morning.*"<sup>1917</sup> P-0990 contends further that he transferred the information written on his feet after he was released from prison on 16 March 2004, when he went to the locality and found paper.<sup>1918</sup> The ink could not have reasonably withstood P-0990's 29-day detention in a hot, cramped and unsanitary cell. As underlined by **P-0129**, after about a week of detention "*peoples skin peeled off*".<sup>1919</sup> In this context, it is simply impossible that P-0990's notetaking on his own skin would have remained legible for him to transfer its contents after his release. The only reasonable conclusion is that P-0990 fabricated this story about writing names on his feet and misled the Court. His evidence should thus be disregarded by the TC.

493. **P-0877** also recounted a similar notetaking story and contended that, on the night of 29 February 2004, he started writing the names of the detainees in his cell on his "*very long dress*" with a Bic pen he had in his pocket.<sup>1920</sup> P-0877 was unable to provide the Court with the original garment on which he allegedly wrote the name of the detainees.<sup>1921</sup> The unavailability of this key piece of evidence, when read in conjunction with the conditions of the cell which would have made it extremely difficult to write all the detainees' name down on a piece of clothing, renders P-0877's account entirely implausible. The credibility of P-0877 is further tainted by **P-0919** who recalls seeing P-0877 in cell 1<sup>1922</sup> wearing "*arragi*", which is "*shorter than a jellabiya*", and loose trousers.<sup>1923</sup> This does not correspond to the image of the "*sweater*" that P-0877 recognised as similar to what he wore in the cell and wrote the names of the detainees on.<sup>1924</sup> Like P-0990's, P-0877's account is not credible, especially since his testimony presents other significant credibility issues.

494. **P-0932** – who was detained in the same cell as **P-0877** and **P-0990** – testified that he never noticed the other detainees in his cell asking each other their names or their village of origin.<sup>1925</sup> He also did not see any detainees writing while in the cell.<sup>1926</sup>

495. As established above, the detention conditions at Mukjar Police Station were extremely difficult. CRF members were in charge of the care of the detainees, with Koj being a key member entrusted with such duties. **P-0990** testified for instance that, on occasions, Koj would

<sup>1917</sup> **P-0990**: T-040, p. 34, lines 20-23.

<sup>1918</sup> **P-0990**: T-041, p. 6, line 4-p. 7, line 3.

<sup>1919</sup> **P-0129**: [DAR-OTP-0222-0602-R02](#), para. 111; See also T-076, p. 38, lines 3-4 (Conf).

<sup>1920</sup> **P-0877**: T-053, p. 86, lines 6-10 (Conf); p. 86, line 24-p.87, line 8 (Conf); T-055, p. 52, line 20-p. 53, line 21 (Conf).

<sup>1921</sup> **P-0877**: T-055, p. 52, lines 2-14 (Conf).

<sup>1922</sup> **P-0919**: T-060, p. 63, lines 12-23 (Conf).

<sup>1923</sup> **P-0919**: T-060, p. 64, line 6-p. 65, line 7 (Conf).

<sup>1924</sup> See **P-0877**: [DAR-OTP-0224-0164](#).

<sup>1925</sup> **P-0932**: T-068, p. 38, lines 17-20.

<sup>1926</sup> **P-0932**: T-068, p. 38, lines 21-22.

open the door to cell 1 and take some detainees out to use the restrooms.<sup>1927</sup> **P-0990** testified that Koj was “*in charge of the prison*”.<sup>1928</sup> **P-0129** stated that “*the people in charge of providing us with food and guarding us were from the Central Reserve forces (CRF). John and Younis are 2 of the 3 CRF soldiers that used to bring us water and take us to the toilet*”.<sup>1929</sup> **P-0877** also attested to the presence of John Koj as a guard of the cell who addressed the detainees.<sup>1930</sup> 496. *Ali Kushayb* played no role in the detention and care of the detainees, nor did he have power of authority over the ones who did, namely Koj, a CRF officer, and Al-Tayyib, the Head of the Mukjar Police Station. Consequently, no role can be inputted to him for either the placement in detention of the individuals, nor the subsequent conditions of their detention. Ultimately, the highest authority active at the Mukjar Police Station was Al-Tayyib, who was also the Head of the Mobile Forces.

*(iv) Interrogations and mistreatments prior to the alleged arrival of Ali Kushayb*

497. **P-0877** is the only Mukjar Detained Witness who claims that he was questioned on 29 February 2004 by CRF intelligence branch members at the Mukjar Police Station.<sup>1931</sup> His evidence makes no mention of mistreatment, nor of the presence or involvement of *Ali Kushayb*. **P-0129**, who was detained twice at Mukjar Police Station, recalled that “*we [the detainees] were not interrogated during my first arrest*”,<sup>1932</sup> which most likely occurred in February 2004.<sup>1933</sup> None of the other Mukjar Detained Witnesses mention being interrogated or questioned during their detention at the Police Station. According to the OTP, groups of detainees were taken out of the cell by Militia/JJW and GoS Forces and accused of being rebels and “*some were beaten with water hoses or sticks and verbally abused*.”<sup>1934</sup> **P-0675** indeed stated that the detainees were taken out by groups of six or seven, accused by GoS soldiers, not JJW, of being rebels [REDACTED].<sup>1935</sup> **P-0675** is the only Mukjar Detained Witness who mentions [REDACTED] leaving his evidence uncorroborated. As his statement was admitted under Rule 68(2)(b), he could not be cross-examined.

498. **P-0903** testified that during his detention in Mukjar sometime near the end of March 2004, all the prisoners, including him, were beaten by unnamed perpetrators wearing military

<sup>1927</sup> **P-0990**: T-040, p. 34, lines 17-18.

<sup>1928</sup> **P-0990**: T-040, p. 30, lines 2-4.

<sup>1929</sup> **P-0129**: [DAR-OTP-0128-0128-R04](#), para. 69.

<sup>1930</sup> **P-0877**: T-053, p. 85, line 23-p. 86, line 5.

<sup>1931</sup> **P-0877**: T-053, p. 81, lines 7-15, p. 81, line 23-p. 82, line 4, p. 83, line 16-p. 84, line 6 (Conf).

<sup>1932</sup> **P-0129**: [DAR-OTP-0223-0157-R02](#), para. 40.

<sup>1933</sup> **P-0129**: [DAR-OTP-0128-0128-R04](#), para. 34.

<sup>1934</sup> [OTP Trial Brief](#), para. 353.

<sup>1935</sup> **P-0675**: [DAR-OTP-0206-0173-R02](#), para. 92.

and police uniforms.<sup>1936</sup> P-0903 alleges *inter alia* that during his detention, [REDACTED].<sup>1937</sup> The only other witness who mentions incidents of the use of [REDACTED] is **P-0986**, who was not detained at the Mukjar Police Station and who merely recounts hearsay evidence from **P-0922** on an event falling outside of the temporal and geographical scope of the Mukjar charges.<sup>1938</sup> Consequently, P-0903's evidence on the use of [REDACTED] is entirely uncorroborated, reinforcing the probability that he was not detained at the Mukjar Police Station during the timeframe of the charges and/or that he made up that story.<sup>1939</sup> His evidence on this point and his entire testimony on his alleged detention should thus be disregarded by the TC.

499. **P-0919** testified that during his detention, in March-April 2004, men who introduced themselves as CRF members came into the cell and used [REDACTED].<sup>1940</sup> P-0919 contended that [REDACTED].<sup>1941</sup> **P-0932** also testified that he and other detainees in his cell were beaten by "*Al-Sayeed and two other soldiers from the CRF*", yet failed to mention any use [REDACTED].<sup>1942</sup> P-0932 further testified that there was no electric source of light in cell 1, the same one that P-0919 was allegedly detained in.<sup>1943</sup> P-0919's credibility is necessarily affected by the lack of corroboration and P-0932's contradictory evidence. His evidence should be therefore disregarded.

500. Whilst the above evidence suggests that a number of GoS forces including CRF members may have committed mistreatments against the detainees of Mukjar Police Station, it remains that there is no evidence that these mistreatments were perpetrated by *Ali Kushayb* or men he allegedly had authority over.

## ***II - Mistreatments at the Mukjar Police Station Committed in the Presence of Ali Kushayb***

### ***A - Contamination of evidence***

501. There is an appearance of corroboration of accounts of several witnesses of the events that took place at the Mukjar Police Station in early 2004. An essential factor to take into account in this case is the phenomenon of collective memory of witnesses living close to each

<sup>1936</sup> **P-0903**: T-032, p. 35, lines 8-21.

<sup>1937</sup> **P-0903**: T-032, p. 34, lines 5-17.

<sup>1938</sup> **P-0986** testified that he heard from **P-0922** that two of P-0986's "brothers" who had been arrested on 10 September 2003 had [REDACTED] during P-0922's detention period. P-0922 testified that he was not detained at Mukjar Police Station but rather at the Mukjar Girls and Boys schools in 2003. This entire events is thus out of scope. See **P-0986**: [DAR-OTP-0222-0437-R01](#), paras. 82, 88-90; T-066: p. 10, line 16-p. 13, line 10; **P-0922**: [DAR-OTP-0222-0312-R01](#), paras. 39, 51, 84.

<sup>1939</sup> See Defence case that P-0903 was not detained during the scope of the charges: **P-0903**: T-033, p. 77, lines 8-10.

<sup>1940</sup> **P-0919**: T-060, p. 29, line 8-p. 32, line 5.

<sup>1941</sup> **P-0919**: T-061, p. 24, lines 5-10.

<sup>1942</sup> **P-0932**: [DAR-OTP-0222-0602-R02](#), para. 98.

<sup>1943</sup> **P-0932**: T-068, p. 37, lines 8-9.

other for many years after the events and before giving their evidence. The possibility that they shared the same stories for years is not a speculation, but rather, a reinforced presumption in this case. The Defence recalls that the investigations in this case were primarily conducted almost twenty years after the events in Darfur where the OTP never came to investigate on sites.<sup>1944</sup> **P-0129, P-0720, P-0877, P-0892, P-0903, P-0913, P-0919, P-0932** and **P-0990**<sup>1945</sup> gave their statements to the OTP after the public announcement by the Court of a request for issuance of a Warrant of Arrest against Mr Abd-Al-Rahman in relation to, *inter alia*, the Mukjar events.<sup>1946</sup> This fact must be considered by the TC when assessing the weight that should be attributed to their evidence.

502. **P-0877**'s evidence regarding his detention at the Mukjar police station contains discrepancies with previous accounts he gave to [REDACTED].<sup>1947</sup> **P-0877** indicated [REDACTED] that while he was detained, *Ali Kushayb* entered the cell and Harun was present cheering *Ali Kushayb*.<sup>1948</sup> Contrarily, **P-0877** testified in court that Harun had flown away by helicopter the day before people were killed in Mukjar.<sup>1949</sup> When confronted with this discrepancy, **P-0877** responded that [REDACTED] made mistakes, did not understand, or had mixed the two days.<sup>1950</sup>

503. **P-0877** appears to be at the centre of several accounts. Indeed, as testified by **P-0932, P-0892** and **P-0919**, **P-0877** was [REDACTED] when they all gave their in-court testimony.<sup>1951</sup> Given his position, **P-0877** had the opportunity to talk about detention at the Mukjar police station with several Prosecution witnesses. **P-0892** testified that they spoke to each other about it.<sup>1952</sup> **P-0903** and **P-0877** have known each other "for a long time", which leaves the door open for further witness contamination.<sup>1953</sup> **P-0877** and **P-0932** were allegedly detained around the same time and met frequently after the events. It can thus not be ruled out that they discussed the alleged events. Furthermore, **P-0932** admitted having spoken to **P-0913** who stated that "everyone knew that [he] was detained at Mukjar police station".<sup>1954</sup> **P-0932** testified that

<sup>1944</sup> See **PART II – Chapter 2 – Section 2 – II**.

<sup>1945</sup> See **PART VI- Chapter 1**.

<sup>1946</sup> See generally, [Darfur Prosecutor's Application under Article 58\(7\)](#).

<sup>1947</sup> See [DAR-OTP-0219-4112](#).

<sup>1948</sup> [DAR-OTP-0219-4112](#), at 4114.

<sup>1949</sup> **P-0877**: [REDACTED]

<sup>1950</sup> **P-0877**: [REDACTED]

<sup>1951</sup> **P-0932**: T-068, p. 51, lines 10-14 (Conf); **P-0892**: T-048, p. 17, lines 12-13 (Conf); **P-0919**: T-060, p. 60, lines 2-4 (Conf).

<sup>1952</sup> **P-0892**: T-048, p. 17, line 11-p. 18, line 3 (Conf).

<sup>1953</sup> **P-0903**: T-032, p. 25, lines 13-24 (Conf).

<sup>1954</sup> **P-0932**: T-068, p. 49, lines 13-19 (Conf).

“people speak a lot about Kushayb.”<sup>1955</sup> Furthermore, **P-0877** facilitated the connection between the OTP and **P-0919**.<sup>1956</sup> In Court, there was an attempt to conceal their relationship. When asked about his interactions with P-0877, P-0919 gave contradictory answers. At first, P-0919 testified that he had not met with P-0877 since 2005 and did not have his telephone number.<sup>1957</sup> When it was pointed out to him that the OTP had indicated that P-0877 sent them photos of P-0919’s ID documents, P-0919 first responded that this was not correct.<sup>1958</sup> During his cross-examination, P-0919 changed his account, testifying that he used to meet P-0877 – without giving any timeframe – in the market, where they would sit and eat together, but stated that he never discussed the ICC investigations.<sup>1959</sup> Even if P-0919 testified that he had not been in touch recently with P-0877, nor discussed the proceedings against Mr Abd Al Rahman,<sup>1960</sup> his lack of transparency shows a will to deny any link with P-0877 in order for the TC to presumably give more weight to his evidence.

504. **P-0919** also attempted to conceal his knowledge of **P-0029**. In his Screening Note, it is indicated that his contact was provided to the OTP by P-0029.<sup>1961</sup> When pointed out during his cross-examination, P-0919 responded that he did not know him.<sup>1962</sup> P-0919 added that the only person who took his number and shared it with the OTP investigator was named [REDACTED], who does not correspond to any known Prosecution witnesses.<sup>1963</sup>

505. During his testimony, **P-0990** confirmed knowing **P-0892** “very well”.<sup>1964</sup> P-0990 further testified that in order to be selected by the OTP, P-0892 coached him to “really remember the dates and the events”.<sup>1965</sup> P-0990 testified that he “actually learned things by heart” and that, when he made it clear to the OTP that he knew these things, they responded, “Well, you’re good to appear in court”.<sup>1966</sup>

506. The fact that all these witnesses testified about mistreatment allegedly perpetrated by *Ali Kushayb* directly cannot be a coincidence. It casts a massive doubt on the overarching credibility and reliability of their respective testimonies.

<sup>1955</sup> **P-0932**: T-068, p. 49, lines 22-24 (Conf).

<sup>1956</sup> **P-0919**: [DAR-OTP-0215-8491-R01](#), at 8494.

<sup>1957</sup> **P-0919**: T-060, p. 60, line 7-p. 61, line 5 (Conf).

<sup>1958</sup> **P-0919**: T-060, p. 61, lines 6-9 (Conf).

<sup>1959</sup> **P-0919**: T-060, p. 61, lines 10-14 (Conf).

<sup>1960</sup> **P-0919**: T-060, p. 62, line 25-p. 63, line 5 (Conf).

<sup>1961</sup> **P-0919**: [DAR-OTP-0215-8491-R01](#), at 8492.

<sup>1962</sup> **P-0919**: T-060, p. 53, line 25-p. 57, line 14 (Conf).

<sup>1963</sup> **P-0919**: T-060, p. 57, lines 10-14 (Conf).

<sup>1964</sup> **P-0990**: T-041, p. 15, lines 5-15 (Conf).

<sup>1965</sup> **P-0990**: T-041, p. 4, lines 14-15 (Conf).

<sup>1966</sup> **P-0990**: T-041, p. 5, lines 2-4 (Conf).

*B – Insufficient Identification of Ali Kushayb*

507. Most of the witnesses who gave evidence on the allegation of mistreatments of detainees committed by *Ali Kushayb* did not have any or sufficient prior knowledge of him, thus considerably impugning their ability to identify him beyond reasonable doubt.

508. **P-0919**'s testimony about *Ali Kushayb*'s alleged visit to Mukjar police station and beating of prisoners relies solely on words allegedly spoken by the latter.<sup>1967</sup> He had never seen him before.<sup>1968</sup> He further admitted not having focused on him.<sup>1969</sup> During the first day of his detention, P-0919 was in the inner part of the cell.<sup>1970</sup> On day two of his detention, P-0919 was on the outer part of the cell and, as it was dark, it was difficult for him to distinguish individuals.<sup>1971</sup> It is in this context, on the second day of his detention, that P-0919 allegedly saw *Ali Kushayb* – a man he had never seen before – enter the cell and beat detainees, leading them all to look down, including P-0919.<sup>1972</sup> Therefore, the only physical description he could provide of him was that he was black and slim,<sup>1973</sup> which, he agreed, could correspond to a vast majority of men in Darfur.<sup>1974</sup> P-0919 further makes a horrific description of detainees being scalped<sup>1975</sup> and having their ears cut.<sup>1976</sup> None of the other detainees allegedly present during the events and who testified at trial make mention of this. His evidence is thus not credible and shall be disregarded.

509. **P-0892** also had no basis of knowledge of the identity of the man he describes as *Ali Kushayb*, other than anonymous hearsay.<sup>1977</sup> During his appearance, he testified having seen *Ali Kushayb* for the first time giving orders at the Mukjar police station<sup>1978</sup> from a distance of about 175 metres.<sup>1979</sup> With no proper basis of knowledge and from such distance, his evidence cannot be reliable.

510. **P-0029** testified, without providing a timeframe, that the first time he heard about *Ali Kushayb* is when he needed medicine and someone from Garsila recommended him buying them from *Ali Kushayb*'s pharmacy, which he subsequently did.<sup>1980</sup> He did not explain how and

<sup>1967</sup> **P-0919**: T-060, p. 17, lines 13-22, T-061, p. 17, lines 4-25, p. 26, lines 17-21 (Conf).

<sup>1968</sup> **P-0919**: T-061, p. 32, lines 5-9 (Conf).

<sup>1969</sup> **P-0919**: T-061, p. 15, lines 16-19.

<sup>1970</sup> **P-0919**: T-061, p. 26, lines 17-21 (Conf).

<sup>1971</sup> **P-0919**: T-061, p. 26, lines 17-21 (Conf).

<sup>1972</sup> **P-0919**: T-061, p. 16, line 17-p. 17, line 3.

<sup>1973</sup> **P-0919**: T-061, p. 15, lines 10-19.

<sup>1974</sup> **P-0919**: T-061, p. 15, lines 13-15.

<sup>1975</sup> **P-0919**: T-060, p. 20, lines 14-18.

<sup>1976</sup> **P-0919**: T-060, p. 21, lines 16-p. 22, line 2 (Conf).

<sup>1977</sup> **P-0892**: [DAR-OTP-0217-0384-R02](#), para. 53; T-048, p. 70, lines 17-25.

<sup>1978</sup> **P-0892**: [DAR-OTP-0217-0384-R02](#), paras. 53-55; T-048, p. 55, line 4-p. 57, line 3.

<sup>1979</sup> [DAR-OTP-0224-0652](#); **P-0892**: T-048, p. 56, lines 6-9.

<sup>1980</sup> **P-0029**: T-031, p. 78, lines 6-10.

why he could remember this insignificant event. P-0029 then testified that he recognised the pharmacist whom he had seen only once<sup>1981</sup> from a distance between his stand in the courtroom and the entrance of the ICC Headquarters building,<sup>1982</sup> i.e. a distance impossible to evaluate but notably long. Similar to P-0029, **P-0932**'s only basis of identification of *Ali Kushayb* is an alleged visit at his pharmacy in 2000.<sup>1983</sup> [REDACTED].<sup>1984</sup> Although P-0932 alleges that his co-detainees took pity on him and let him sit near the door, he also testified that there was not enough light in the cells to see properly.<sup>1985</sup> In these conditions, the only reasonable conclusion to draw is that his physical state, and his conditions of detention, affected his identification of *Ali Kushayb*, which basis was already weak, to such an extent that his evidence should be deemed unreliable and consequently disregarded.

511. **P-0720** did not have any prior knowledge of *Ali Kushayb* and got to know who he was because one of his friends pointed him out at the eastern checkpoint of Mukjar just before running away.<sup>1986</sup> On the next day, P-0720 testified that he saw *Ali Kushayb*, entering the police station "200, 300 metres" away.<sup>1987</sup> He further testified that he never approached the Mukjar police station closer than one kilometre.<sup>1988</sup> Irrespective of his absence of a solid basis of recognition, his evidence lacks credibility.

512. The same applies to **P-0903**, who allegedly recognised *Ali Kushayb* from a distance of 1 to 1.5 kilometres during the attack on Tendy<sup>1989</sup> on the basis of crossing him once, years prior, at the Garsila market.<sup>1990</sup> P-0903 testified that during his detention in Mukjar in 2004, *Ali Kushayb* had no role in the mistreatments that he endured as *Ali Kushayb* did not come inside the detention room.<sup>1991</sup> The only instance he mentions is *Ali Kushayb* hitting *Umdah Yahya* with an axe when he was taken out of the cell.<sup>1992</sup>

513. **P-0913** was inconsistent on his basis of knowledge of *Ali Kushayb*: he initially stated he did not know him before the attack on Bindisi,<sup>1993</sup> then stated that he knew him years before from the pharmacy,<sup>1994</sup> then blamed the Prosecution investigators for not having correctly

<sup>1981</sup> **P-0029**: T-030, p. 36, lines 17-21, p. 38, lines 19-22 (Conf).

<sup>1982</sup> **P-0029**: T-030, p. 36, line 22-p.38, line 13 (Conf); T-031, p. 26, line 21-p. 27, line 2.

<sup>1983</sup> **P-0932**: [DAR-OTP-0222-0602-R02](#), paras. 24-25; T-068, p. 13, line 12-p. 15, line 25.

<sup>1984</sup> **P-0932**: T-068, p. 43, line 22-p. 44, line 15.

<sup>1985</sup> **P-0932**: T-068, p. 42, line 17-p. 43, line 17.

<sup>1986</sup> **P-0720**: T-043, p. 47, line 23-p. 48, line 11; [DAR-OTP-0210-0291-R02](#), paras. 103-105.

<sup>1987</sup> **P-0720**: T-043, p. 49, line 24-p. 50, line 17; [DAR-OTP-0210-0291-R02](#), para. 106.

<sup>1988</sup> **P-0720**: T-043, p. 38, lines 16-17.

<sup>1989</sup> **P-0903**: T-033, p. 38, lines 5-9.

<sup>1990</sup> **P-0903**: T-032, p. 13, lines 3-25.

<sup>1991</sup> **P-0903**: T-033, p. 73, lines 8-11.

<sup>1992</sup> **P-0903**: T-032, p. 46, lines 3-20.

<sup>1993</sup> **P-0913**: [DAR-OTP-0215-6802-R02](#), at 6804.

<sup>1994</sup> **P-0913**: [DAR-OTP-00000022](#), para. 5.

transcribed his evidence about the alleged presence of *Ali Kushayb* at a PPF graduation ceremony on 1<sup>st</sup> February 2004.<sup>1995</sup> These variations make him unbelievable.<sup>1996</sup> **P-0913** further stated that on Wednesday 26 March 2004, around 04:00 pm<sup>1997</sup> while he was in Mukjar Police station [REDACTED], his colleague [REDACTED] told P-0913 that he heard *Ali Kushayb* asking Lieutenant Colonel Mustapha Ahmed Al Tayeb “to collect the prisoners as he wanted to transfer them to Garsila”.<sup>1998</sup> P-0913 testified that he asked a friend to take over his post so he could move “between a building and a dark spot” to see “what was happening”.<sup>1999</sup> From his hiding place, P-0913 allegedly saw *Ali Kushayb* hitting *Umdah Yahya* with his axe. *Umdah Yahya* did not fall on the ground and was loaded in a CRF truck by some JJW.<sup>2000</sup> As previously demonstrated, P-0913’s identification of *Ali Kushayb* is fatally flawed.<sup>2001</sup> Moreover, P-0913 admitted that his [REDACTED],<sup>2002</sup> as he was the [REDACTED]<sup>2003</sup> and as Al-Tayib made it clear that the police station doors must be guarded for security reasons.<sup>2004</sup> His evidence about *Ali Kushayb* hitting *Umdah Yahya*<sup>2005</sup> should therefore be disregarded. He failed to mention it during his 90 minutes screening interview, while the investigators had insisted on their interest for evidence related to *Ali Kushayb*.<sup>2006</sup> P-0913 once again blamed the investigator for this alleged, but highly unlikely omission.<sup>2007</sup>

514. **P-0990** also founded his basis for *Ali Kushayb*’s identification on the pharmacy,<sup>2008</sup> but also testified that Koj announced *Ali Kushayb*’s arrival.<sup>2009</sup> He allegedly immediately made the link with the person he had briefly seen in 1999 at his pharmacy. The recollection of that unmemorable interaction is not credible and manifestly aimed at linking *Ali Kushayb* to Mr Abd-Al-Rahman on the basis of information in the public domain.<sup>2010</sup> P-0990 stated that *Ali Kushayb* hit *Umda Issa Nour* inside the cell. He also stated that *Ali Kushayb* accused P-0990 of [REDACTED].<sup>2011</sup> However, P-0990 is, together with P-0129 and P-0919, one of the only

<sup>1995</sup> **P-0913**: [DAR-OTP-0218-0021-R04](#), paras. 70-71; [DAR-OTP-0222-5107](#) at 5108; [DAR-OTP-00000022](#), para. 6.

<sup>1996</sup> See discussion on P-0913 in **PART III – Chapter 3 – Section 1** above.

<sup>1997</sup> **P-0913**: [DAR-OTP-0219-8101](#).

<sup>1998</sup> **P-0913**: [DAR-OTP-0218-0021-R04](#), para. 98.

<sup>1999</sup> **P-0913**: [REDACTED]

<sup>2000</sup> **P-0913**: [DAR-OTP-0218-0021-R04](#), para. 106; [REDACTED]

<sup>2001</sup> **PART VI- Chapter 1.**

<sup>2002</sup> **P-0913**: [REDACTED]

<sup>2003</sup> **P-0913**: [REDACTED]

<sup>2004</sup> **P-0913**: [REDACTED]

<sup>2005</sup> **P-0913**: [DAR-OTP-0218-0021-R04](#), para. 106; [REDACTED]

<sup>2006</sup> **P-0913**: T-070, p. 17, lines 7-19.

<sup>2007</sup> **P-0913**: T-070, p. 18, line 17-p. 19, line 8.

<sup>2008</sup> **P-0990**: T-041, p. 20, lines 6-18.

<sup>2009</sup> **P-0990**: T-041, p. 34, lines 1-7.

<sup>2010</sup> See generally, [Darfur Prosecutor’s Application under Article 58\(7\)](#).

<sup>2011</sup> **P-0990**: T-040, p. 51, line 22- p.52, line 4.

witnesses mentioning that *Ali Kushayb* entered the cell to beat people. Quite the opposite, P-0903 affirmed that *Ali Kushayb* did not come inside the detention room.<sup>2012</sup> Their evidence is also irreconcilable with all the other witnesses' evidence about the fact that the cell were crowded to such a point, that no one could possibly enter it.

515. Finally, **P-0129** gave three statements to the Prosecution: one in [REDACTED]; [REDACTED]. All are posterior to the public announcement of the applications for warrant of arrest against Mr Abd-Al-Rahman in February 2007.<sup>2013</sup> P-0129 had no basis of knowledge of *Ali Kushayb*. Like **P-0919**, he alleged that *Ali Kushayb* had introduced himself to the detainees prior to beating them.<sup>2014</sup> P-0129 was detained on two occasions: once before the execution in March 2004, the second time in late March-April 2004. P-0129 was confused and varied his story as to when he saw *Ali Kushayb*. In his 2007 statement he did not specify if that happened during his first or second detention.<sup>2015</sup> In his third statement of 2021, he made no mention of *Ali Kushayb* during his second detention.<sup>2016</sup> In Court, P-0129 first said that he saw *Ali Kushayb* in the course of his second detention,<sup>2017</sup> then varied his testimony by saying that he actually saw *Ali Kushayb* during both his detentions,<sup>2018</sup> thereby contradicting his third statement. P-0129 also mentions that *Ali Kushayb* was accompanied by Sameh and Hamdi,<sup>2019</sup> which no other witness, including P-0919, mentioned. P-0129 further stated that *Ali Kushayb* told the detainees that he was authorized to take the properties of the Fur by Harun,<sup>2020</sup> whereas, according to **P-0919**, this information came from the CRF guards of the detention centre.<sup>2021</sup>

516. The TC is thus left with three different versions according to which *Ali Kushayb* would have entered the cells to beat the detainees: **P-0990**, **P-0919** and **P-0129**. The three versions contradict each other: *Ali Kushayb* beat *Umdah Nour* according to P-0990, scalped detainees and cut their ears according to P-0919 and was with Hamdi and Al-Dayf Samih according to P-0129. This inconsistent evidence from these three witnesses is further contradicted by other witnesses, like **P-0903** and **P-0913**. The inconsistencies in the evidence prevent any finding beyond reasonable doubt that Mr Abd-Al-Rahman ever visited the Mukjar detention facility and/or mistreated prisoners there.

<sup>2012</sup> **P-0903**: T-033, p. 73, lines 8-11.

<sup>2013</sup> See generally, [Darfur Prosecutor's Application under Article 58\(7\)](#).

<sup>2014</sup> **P-0129**: [DAR-OTP-0128-0128-R04](#), paras. 46-47.

<sup>2015</sup> **P-0129**: [DAR-OTP-0128-0128-R04](#), paras. 46-47.

<sup>2016</sup> **P-0129**: [DAR-OTP-0223-0157-R02](#), para. 12.

<sup>2017</sup> **P-0129**: T-076, p. 42, line 1-p. 43, line 7. See also [DAR-OTP-0223-0157-R02](#), paras. 54-55.

<sup>2018</sup> **P-0129**: T-076, p. 53, lines 12-21; p. 62, lines 1-9.

<sup>2019</sup> **P-0129**: [DAR-OTP-0128-0128-R04](#), paras. 46-47.

<sup>2020</sup> **P-0129**: [DAR-OTP-0128-0128-R04](#), para. 47.

<sup>2021</sup> **P-0919**: T-060, p. 29, lines 7-22.

### ***III - Transfer of Detainees and Executions***

#### ***A – Discrepancies in the Evidence Regarding the Loading of Detainees***

517. There is a general confusion about the circumstances surrounding the allegation on loading 122 detainees, such as *inter alia* the number of cars transporting the detainees, the number of detainees taken out and amount of return trips.<sup>2022</sup> It is therefore impossible to determine the number of detainees who were effectively transferred to execution sites as well as who decided on their transfer.

518. Firstly, there are a myriad of discrepancies between the witnesses on the process of calling the detainees out of their cell to be loaded onto trucks. Several witnesses testified that the detainees were called out by name from a list, but all mention different individuals.<sup>2023</sup> For instance, whilst **P-0913** could not be sure of who between *Ali Kushayb*, *Al-Tayyib* or *Torshein* ordered the guard to open the prison door, he contended that once the doors opened, “*Adel Bade started to call out names from the blue booklet*”.<sup>2024</sup> Conversely, **P-0932** and **P-0129** testified that the detainees were instead chosen randomly.<sup>2025</sup> **P-0129** further contradicted his own account by subsequently declaring that *Ali Kushayb* called the “*Umdahs* and the notable people out” by name.<sup>2026</sup> **P-0905**, who stood next to the detainees,<sup>2027</sup> did not mention any calling of names and instead noted that the Second in Command of the SLM<sup>2028</sup> pointed out some prisoners and *Ali Kushayb* told them that they needed to be taken to *Zalingei* or *Garsila* prisons to be “investigated” as they were suspected of being “*Tora Bora*”.<sup>2029</sup>

519. Secondly, multiple witnesses provided a precise count of the detainees taken out of cells. Despite the timelapse, the confusion possibly created by the stressful situation they were in and/or the violence of the event they testified having witnessed, they confidently affirm that they were able to provide the TC with an accurate number. **P-0984**, a driver being at the scene, stated that there were 20 detainees taken out for execution.<sup>2030</sup> **P-0913** being present at the scene

<sup>2022</sup> **Annex III**: Discrepancies between Prosecution witnesses regarding the loading of detainees.

<sup>2023</sup> **Annex III**, Column 2; **P-0990** testified that John Koj called out the names: **P-0990**: T-040, p. 62, lines 4-7; **P-0913** testified that Abdel Bade called out names: **P-0913**: [DAR-OTP-0218-0021-R04](#), paras. 103-104; **P-0919** testified that *Ali Kushayb* called out the names of the *Umdahs*: **P-0919**: T-060, p. 34, line 13-p. 35, line 6.

<sup>2024</sup> **P-0913**: [DAR-OTP-0218-0021-R04](#), paras. 103-104.

<sup>2025</sup> **P-0932**: T-068, p. 42, lines 10-16; **P-0129**: [DAR-OTP-0128-0128-R04](#), para. 118.

<sup>2026</sup> **P-0129**: [DAR-OTP-0223-0157-R02](#), paras. 65-66.

<sup>2027</sup> **P-0905**: T-086, p. 15, line 8-p. 17, line 5 (Conf); See also **P-0905**: [DAR-OTP-00000258](#).

<sup>2028</sup> **P-0905** did not know the Second in Command of the SLM’s name but indicated that he had surrendered in *Sindu*. **P-0905**: T-086, p. 5, line 21-p. 6, line 4 (Conf).

<sup>2029</sup> **P-0905**: T-086, p. 20, lines 10-22, (Conf) p. 22, lines 1-2 (Conf); T-088, p. 62, lines 1-22 (Conf); p. 73, line 4-8 (Conf).

<sup>2030</sup> **P-0984**: T-067, pp.6, 49, 62, 67 (Conf).

counted 39 prisoners taken out of the Police station<sup>2031</sup> and put in two CRF trucks.<sup>2032</sup> This number was confirmed by **P-0922**, but “based on common knowledge”.<sup>2033</sup> **P-0029** testified that he saw around 45 men being taken away: 21 in a first car and 18 in a second one.<sup>2034</sup> **P-0012** witnessed 52 people being taken away in one vehicle from the police station.<sup>2035</sup> This number is corroborated by the first statement dated 2007 of **P-0129** who heard an order from an Intelligence Officer saying to take “only 52 prisoners”.<sup>2036</sup> However, years later, in his second written statement, P-0129 declared that he heard the number of 97 people.<sup>2037</sup> **P-0990** testified ultimately that “they put 80 people in three vehicle”.<sup>2038</sup> According to **P-0919**, there were around 100 detainees loaded in several cruisers cars.<sup>2039</sup> The fact that witnesses talking about the very same event gave such different figures, ranging from single to quintuple is casting inevitably a reasonable doubt on the credibility and the reliability of their accounts.

520. Thirdly, the evidence also differs regarding the number of the remaining detainees in the cells.<sup>2040</sup> In particular, **P-0990**’s evidence is irreconcilable with **P-0877**’s evidence on at least three points. First, P-0877 testified that he was not taken away and remained in the cell until his release on the following day,<sup>2041</sup> which would mean that P-0990 was not left alone as he contends.<sup>2042</sup> Second, P-0877 also testified that the reason why P-0990 was not loaded was because he was hit on his leg,<sup>2043</sup> which P-0990 failed to mention. Third, P-0877 did not mention the presence of John Koj<sup>2044</sup> during the transfer of the detainees, whereas P-0990 did so. Instead, P-0877 allegedly recognised *Ali Kushayb*, Torshein, Al-Tayyib, Al-Dayf Sameh and Assadiq Ahmed Osman as being present.<sup>2045</sup> P-0990 is further contradicted by **P-0903** who was not loaded and remained in prison with other people.<sup>2046</sup>

521. Fourthly, multiple witnesses disagreed with the number of cars into which they were

<sup>2031</sup> P-0913: T-069, p.15, lines 11-12 (Conf).

<sup>2032</sup> P-0913: [DAR-OTP-0218-0021-R02](#), para. 107.

<sup>2033</sup> P-0922: [DAR-OTP-0222-0312-R01](#), paras. 12, 89-90.

<sup>2034</sup> P-0029: T-030, p. 38, lines 24-25 (Conf).

<sup>2035</sup> P-0012: [DAR-OTP-0119-0503](#), para. 100.

<sup>2036</sup> P-0129: [DAR-OTP-0128-0128-R04](#), para. 52.

<sup>2037</sup> P-0129: [DAR-OTP-0223-0157](#), para. 72.

<sup>2038</sup> P-0990: T-040, p. 63, line 4.

<sup>2039</sup> P-0919: [DAR-OTP-0217-0423](#), para. 52.

<sup>2040</sup> **Annex III**, Column 4; **P-0905**: T-086, p. 21, lines 16-24 (Conf); P-0905 testified that no detainees remained; **P-0990**: T-040, p. 62, lines 3-18: P-0990 testified that Koj told him he would remain in the cell and that he was the only one who stayed;; **P-0903**: T-033, p. 50, lines 1-8: P-0903 was not loaded himself and remained in the cell.

<sup>2041</sup> **P-0877**: T-054, p. 22, line 19-p. 23, line 5; T-055, p. 72, lines 9-16 (Conf).

<sup>2042</sup> **P-0990**: T-040, p. 62, lines 3-18.

<sup>2043</sup> **P-0877**: T-054, p. 16, lines 3-15.

<sup>2044</sup> **P-0877** knew John Koj and could identify him: **P-0877**: T-054, p. 11, lines 1-6.

<sup>2045</sup> **P-0877**: T-054, p. 11, line 24-p. 12, line 18.

<sup>2046</sup> **P-0903**: T-033, p. 50, lines 1-8.

loaded.<sup>2047</sup> **P-0919** is the only witness who testified to having been blindfolded before being loaded,<sup>2048</sup> and he gave no reason as to why he, particularly, would have been blindfolded, nor indicated whether other prisoners were blindfolded as well – raising doubt on the reliability of his evidence.

522. Fifthly, there is an unclear and inconsistent chronology, on the number of travels made with detainees from the Police Station to the execution sites.<sup>2049</sup> **P-0932**, stated that there were three processes of collecting detainees on three different days and specified that *Ali Kushayb* was present for the three collections, and that he wore the same clothes and used the same car.<sup>2050</sup> **P-0913** allegedly saw a convoy arriving, composed of two CRF trucks and five Cruisers at the Mukjar Police Station.<sup>2051</sup> The forces that came to collect the detainees took some of them away in the morning, brought them back to the prison, and then loaded them again in the afternoon and headed North.<sup>2052</sup> No other witness mention that this first loading came back to the Police Station with detainees. This directly contradicts **P-0905** who stated that there were no back and forth trips between the prison and the “execution site” and that they only made one trip with detainees loaded into cars.<sup>2053</sup>

523. The numerous discrepancies in key details between the witnesses who were supposed to corroborate each other’s evidence on the exact same event pointed out above prevent the possibility to draw conclusions beyond reasonable doubt.

*B - Ali Kushayb Did Not and Could Not Have Ordered the Loading of Detainees*

524. Sameh, Hamdi and his subordinate Sergeant Abd-Al-Mun’im Abu Lahab were present and participated in the loading of detainees, as well as Commissioner Torshein.<sup>2054</sup> **P-0913** also

<sup>2047</sup> **Annex III**, Column 5; **P-0913**: [DAR-OTP-0218-0021-R04](#), para. 107, T-070 p. 13, line 25-p. 14, line 2 (Conf): **P-0913** initially stated that 39 prisoners were loaded in **two trucks**; but then stated that they were put in **seven vehicles**; **P-0922**: [DAR-OTP-0220-2864-R01](#), para. 33: **P-0922** stated that he saw **three loaded vehicles**; **P-0129**: [DAR-OTP-0128-0128-R04](#), paras. 51-52; [DAR-OTP-0223-0157-R02](#), paras. 61-62, 69-71: **P-0129** saw **four Land Cruisers** on which detainees were loaded but indicated that there were more than four Cruisers overall ; **P-0919**: T-060, p. 36, line 12-p. 37, line 18 (Conf); T-061, p. 27, line 18-p. 29, line 8 (Conf): **P-0919** testified that there were **five Cruisers**; **P-0905**: T-086, p. 23, lines 16-18 (Conf): **P-0905** testified that six vehicles were loaded;; **P-0984**: T-067, p. 3, lines 23-24 (See [DAR-OTP-0225-0057-R01](#)) (Conf), p. 6, lines 4-25 (Conf), p. 7, line 15-21 (Conf), p. 62, line 15-16 (Conf), See also: **P-0984**: T-067, p. 62, line 13-p. 68, line 2 (Conf): **P-0984** testified that **only one car** – the fifth of a seven car convoy that departed the Mukjar Police was loaded with detainees.

<sup>2048</sup> **P-0919**: T-060, p. 36, line 12-p. 37, line 18 (Conf); T-061, p. 27, line 18-p. 29, line 8 (Conf).

<sup>2049</sup> **Annex III**; **P-0932**: [DAR-OTP-0222-0602-R02](#), paras. 101-106: **P-0932** indicated that there were **three collections** of detainees; **P-0931**: T-062, p. 32, lines 21-23. See also: T-062, p. 34, lines 1-24: **P-0931** testified that during the execution of the first group of detainees, an unspecified number of vehicles **left twice** to pick up others.

<sup>2050</sup> **P-0932**: [DAR-OTP-0222-0602-R02](#), paras. 101-106.

<sup>2051</sup> **P-0913**: [DAR-OTP-0205-0120-R03](#), para. 100.

<sup>2052</sup> **P-0913**: T-070, p. 13, line 21-p. 14, line 2 (Conf).

<sup>2053</sup> **P-0905**: T-088, p. 73, lines 9-15 (Conf).

<sup>2054</sup> [OTP Trial Brief](#), para. 363.

confirmed that Al-Tayyib was on duty the day the detainees were extracted from the Mukjar Police Station.<sup>2055</sup> **P-0129** added that the Commander of the CRF – whose name is not mentioned, but is likely to have also been Al-Tayyib, replacing Himeidan - was also present along with Hassan Jooma, a PDF Commander, Al-Sadiq Bashar, from the PDF and **P-1021**, [REDACTED].<sup>2056</sup> **P-0931** was present at the Mukjar Police Station because [REDACTED].<sup>2057</sup> **P-0931** testified that Commander Al Jilli was of a higher rank than Hamdi and that he was the one giving orders, including to *Ali Kushayb*.<sup>2058</sup> The fact that high ranked officials, including the Commissioner of the Locality, the Head of the Police and SAF, PDF and CRF commanders were all present leaves no room for the alleged authority of *Ali Kushayb*. The OTP has failed to provide clear and consistent evidence that *Ali Kushayb* had any authority on the JJW.<sup>2059</sup> He had even less authority over the SAF the police, the PDF or the CRF, especially their highest ranking local officers. He obviously had no authority over Commissioner Torshein. It appears therefore really unlikely that a person who was not in any official hierarchy and had no credible basis of authority could have ordered anything at the Mukjar police station on this specific day.

525. Moreover, the evidence tends to show that the convoy transporting the detainees did not leave the Mukjar Police with the purpose of executing them. The motive of the transfer of detainees was entirely different. Indeed, **P-0903** testified that while he saw Torshein and *Ali Kushayb* at the police station during the loading of the detainees, he heard them saying “[t]hese prisoners are to be taken to Garsila”.<sup>2060</sup> **P-0984** heard *Ali Kushayb* telling Torshein and the “Commander of the Joint Forces”<sup>2061</sup>, which corresponds to the description of Al-Tayyib, that: “[w]e have to take them [the 20 prisoners] to the prison of Zalingei.”<sup>2062</sup> It is only when he was released that **P-0903** heard that the people taken away from the Police Station “were not brought to Garsila, but they were killed”.<sup>2063</sup> **P-0905** corroborates this point when he testified that *Ali Kushayb* “didn’t say anything about the killing” but instead that he talked to the Head of the police and told him that the prisoners will be “handed over and investigated either in Zalingei or in Garsila”.<sup>2064</sup> No evidence is suggesting that this had been nothing else than bluff on their

<sup>2055</sup> **P-0913**: T-070, p. 14, lines 8-10 (Conf).

<sup>2056</sup> **P-0129**: [DAR-OTP-0223-0157-R02](#), paras. 62-63.

<sup>2057</sup> **P-0931**: [REDACTED]

<sup>2058</sup> **P-0931**: T-063, p. 8, line 14-p. 9, line 8, p. 14, line 14-p. 15, line 6 (Conf).

<sup>2059</sup> See **PART VI – Chapter 2- Section 1- IV**.

<sup>2060</sup> **P-0903**: T-032, p. 40, lines 21-23.

<sup>2061</sup> Corresponds to Al-Tayyib.

<sup>2062</sup> **P-0984**: T-067, p. 4, lines 11-17 (Conf), p. 55, line 23-p. 56, line 2 (Conf), p. 58, lines 12-21 (Conf); T-066, p. 74, lines 6-12 (Conf).

<sup>2063</sup> **P-0903**: T-033, p. 50, lines 17-21.

<sup>2064</sup> **P-0905**: T-088, p. 62, lines 8-20 (Conf).

behalf. Their alleged position of authority, which was genuine in the case of Torshein and Al-Tayyib, makes that they had no reason for such bluff. They did what they wanted.

526. Consequently, it appears that an alternative scenario arises from the OTP's evidence and that *Ali Kushayb*, if at all present - which is further challenged - was not in a position to order the loading of the detainees into trucks and send them to be executed. The subsequent unloading of the prisoners at the execution site suggests that the person with authority was Commander Al Jilli.

*C - Discrepancies in the Evidence Regarding the Convoy and the Execution Sites*

527. **P-0931** testified that around 4pm, while he was [REDACTED], the latter ordered him [REDACTED] to speak with *Ali Kushayb* who formed allegedly part of [REDACTED].<sup>2065</sup> **P-0931** saw two other cars belonging to the CRF<sup>2066</sup> stopping with people inside.<sup>2067</sup> **P-0931** testified that he was parked facing Garsila and was able to see the vehicles unloading the prisoners near the creek from the same distance as the one separating him to the Judges in the courtroom during his testimony.<sup>2068</sup> **P-0931** saw Muqqadam Idriss and two members of the PDF under the commandment of Hassaballah beating the prisoners while *Ali Kushayb* was allegedly standing next to them.<sup>2069</sup> **P-0129** added that Hamdi, Sameh and Torshein were also present at the first execution site.<sup>2070</sup> **P-0903** indicated that Torshein did not leave with the convoy.<sup>2071</sup> There were so many person with high and clear authority – Torshein, Al Jilli, Hamdi, Sameh – that it is impossible to understand how *Ali Kushayb*, had he been even there at all, could have decided anything. **P-0931** provides evidence that halting the convoy to unload the prisoners at execution site was the initiative of Al Jilli, who had authority,<sup>2072</sup> not *Ali Kushayb*.

*The first execution site*

528. **P-0905** testified that once the vehicles were loaded with all of the detainees,<sup>2073</sup> the convoy left in the direction of Garsila, before stopping at a first execution site located around ten minutes away.<sup>2074</sup> According to **P-0905**, all the detainees (around 100 detainees) in the

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<sup>2065</sup> **P-0931**: [REDACTED]

<sup>2066</sup> **P-0931**: [REDACTED]

<sup>2067</sup> **P-0931**: T-062, p. 32, lines 16-18.

<sup>2068</sup> **P-0931**: T-063, p. 18, lines 5-12.

<sup>2069</sup> **P-0931**: T-062, p. 33, lines 2-9.

<sup>2070</sup> **P-0129**: [DAR-OTP-0223-0157-R02](#), para. 80.

<sup>2071</sup> **P-0903**, T-032, p. 49, line 21-p. 50, line 6.

<sup>2072</sup> **P-0931**: T-063, p. 14, line 14 to p.15, line 6 (Conf); See also: **P-0931**: T-063, p. 8, line 14-p. 9, line 8.

<sup>2073</sup> **P-0905**: T-086, p. 22, lines 8-18 (Conf); p. 23, lines 16-21 (Conf).

<sup>2074</sup> **P-0905**: T-086, p. 24, line 23-p. 24, line 6 (Conf); [DAR-OTP-00000259](#), marked as “1 First execution location”.

vehicles were killed at this unnamed *Khor*,<sup>2075</sup> [REDACTED].<sup>2076</sup> P-0905 is the only witness who mentions [REDACTED]. As argued above, P-0905 demonstrated his willingness to incriminate Mr Abd-Al-Rahman by all means, including denying the obvious, necessarily affecting his credibility.<sup>2077</sup> His evidence should thus be disregarded.

529. Other witnesses provided differing accounts regarding the execution sites.<sup>2078</sup> Multiple witnesses refer to the “first execution site” by different names. **P-0129**, [REDACTED], stated that the convoy left the Police Station in the direction of Garsila, before stopping at a *Khor* named Burongbanyi.<sup>2079</sup> Conversely, **P-0903**, **P-0720**, **P-0867**, and **P-0877**, heard from various sources that the detainees had been taken to *Khor* Talaba, and executed.<sup>2080</sup> Nevertheless, none of them are direct witnesses of the execution. According to **P-0029**, the vehicles left in the direction of Garsila, but stopped at *Khor* Sinnang.<sup>2081</sup> **P-0913**, asserted that the detainees of Mukjar Police Station were executed at *Khor* Abu Jokhan, near CRF buildings.<sup>2082</sup>

530. On the number of victims allegedly killed at the first site, **P-0905** mentioned more than 100 individuals executed at once, at the first *Khor*.<sup>2083</sup> **P-0129** testified that out of the 97 people in total that were ordered to get out of detention,<sup>2084</sup> only the detainees from the first vehicle of the convoy were unloaded at this first site.<sup>2085</sup> **P-0984** further testified seeing a group of around 20 detainees lined up at the execution site.<sup>2086</sup> **P-0931** – who [REDACTED]n – along with **P-0919** – [REDACTED]– were unable to estimate at all the number of detainees shot at the execution site.<sup>2087</sup> Although these five witnesses were supposedly at the same site, their evidence on the number of alleged victims at the first site is substantially different, casting doubt on their reliability and credibility. The absence of additional evidence especially of any

<sup>2075</sup> **P-0905**: T-086, p. 23, lines 19-21 (Conf); p. 25, line 23-p. 26, line 2 (Conf); p. 27, lines 22-25 (Conf).

<sup>2076</sup> **P-0905**: T-086, p. 28, lines 1-3 (Conf); p. 29, line 23-p. 30, line 1 (Conf).

<sup>2077</sup> See discussion on **P-0905** in **PART III – Chapter 2 – Section 1** above.

<sup>2078</sup> **Annex IV** : Discrepancies Regarding the Mukjar Executions.

<sup>2079</sup> **P-0129**: T-075, p. 59, lines 18-23 (Conf).

<sup>2080</sup> **P-0720**: [DAR-OTP-0210-0291-R02](#), para. 109; **P-0867**: [DAR-OTP-0217-0173-R02](#), paras. 84-85, para. 89; **P-0877**: T-054, p. 22, line 20-p. 23, line 5; **P-0903**: T-032, p. 27, lines 2-13, p. 45, lines 18-23, p. 53, lines 2-12.

<sup>2081</sup> **P-0029**: T-030, p. 41, lines 19-22 (Conf).

<sup>2082</sup> **P-0913**: T-069, p. 15, line 25-p. 16, line 9; See also: [DAR-OTP-00000022](#), para. 8; **P-0905** and **P-0931** did not provide further information regarding the name of the site but **P-0905**, **P-0931** or **P-0984** located it approximately at the same site, See **P-0905**: [DAR-OTP-00000259](#); **P-0931**: [DAR-OTP-0224-0881](#); **P-0984**: [DAR-OTP-0225-0056-R01](#).

<sup>2083</sup> **P-0905**: T-086, p. 23, lines 19-21 (Conf), p. 25, line 23-p. 26, line 2 (Conf), p. 27, lines 22-25 (Conf).

<sup>2084</sup> **P-0129**: T-075, p. 58, lines 21-25, p. 59, line 1 (Conf).

<sup>2085</sup> **P-0129**: [DAR-OTP-0128-0128-R04](#), paras. 51, 53; [DAR-OTP-0223-0157-R02](#), paras. 75-77;

<sup>2086</sup> **P-0984**: T-067, p. 7, line 8-11 (Conf), p. 9, line 6-p. 10, line 1 (Conf).

<sup>2087</sup> **P-0931**: T-062, p. 33, lines 12-25, p. 34, lines 21-24; **P-0919**: T-060, p. 36, line 12-p. 37, line 18 (Conf); **P-0919** indicates that he “only [saw] dead bodies” around him after the executions but did not provide a specific number: See T-061, p. 27, line 18-p. 29, line 8 (Conf); T-060, p. 40, lines 4-5 (Conf).

forensic report prevents the TC from establishing - beyond reasonable doubt - the exact circumstances in which these individuals were killed.

*The second and third execution sites*

531. The Prosecution alleged that a second execution site was located between Nyerli and Eastern Juguma.<sup>2088</sup> **P-0129** testified that after the first execution, [REDACTED].<sup>2089</sup> According to him, [REDACTED].<sup>2090</sup> **P-0129** testified that [REDACTED].<sup>2091</sup>

532. [REDACTED]. Although multiple witnesses refer to [REDACTED], their basis of knowledge appears to be [REDACTED] and their accounts are flawed by inconsistencies regarding the site where [REDACTED]. Indeed, if **P-0903** testified that [REDACTED] that took place at *Khor Talaba*,<sup>2092</sup> **P-0913** recalled that [REDACTED].<sup>2093</sup> Conversely, **P-0029** testified that [REDACTED] execution that took place at *Khor Sinnang*.<sup>2094</sup> Consistently with [REDACTED] that took place in Nyerli, but inconsistently with the entire evidence, he stated that all the detainees were executed at that site, disregarding the first one.<sup>2095</sup> This information sharing tends more to contamination of testimonies than to corroboration and appears therefore globally unreliable.

533. Moreover, [REDACTED] account directly contradicts [REDACTED], since [REDACTED] did not mention that the convoy split on the way to Garsila.<sup>2096</sup> In fact, [REDACTED] even asserted that all the vehicles that initially departed from Mukjar police station were still together at the second execution site, adding that “no one would have moved unless the convoy would start moving”.<sup>2097</sup> Therefore, [REDACTED]. The fact that Nyerli was not mentioned by [REDACTED] as an execution site is therefore in contradiction with [REDACTED] evidence.<sup>2098</sup>

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<sup>2088</sup> [OTP Trial Brief](#), para. 366.

<sup>2089</sup> **P-0129**: [REDACTED]

<sup>2090</sup> **P-0129**: [DAR-OTP-0128-0128-R04](#), paras. 55-56; [DAR-OTP-0223-0157-R02](#), para. 87.

<sup>2091</sup> **P-0129**, [DAR-OTP-0128-0128-R04](#), paras. 57-59.

<sup>2092</sup> **P-0903**: [REDACTED]

<sup>2093</sup> **P-0913**: [DAR-OTP-0218-0021-R04](#), para. 123.

<sup>2094</sup> **P-0029**: [REDACTED]

<sup>2095</sup> **P-0675**: [DAR-OTP-0206-0173-R02](#), paras. 122-123.

<sup>2096</sup> [REDACTED]

<sup>2097</sup> [REDACTED]

<sup>2098</sup> See [REDACTED]: [DAR-OTP-00000259-R01](#), marked as “Second execution location” which does not correspond to Nyerli.

534. Among the insider witnesses present in the convoy, neither **P-0931**<sup>2099</sup> nor **P-0984**<sup>2100</sup> provided evidence of a second or third execution site. [REDACTED],<sup>2101</sup> the convoy continued its road before stopping at another *Khor*, east of the road to Garsila.<sup>2102</sup> This is where the last detainees – a *Sheikh*, the five children and the two brothers – were allegedly unloaded and killed.<sup>2103</sup> According to his evidence, this was the last stop of the convoy before it [REDACTED] returned to Garsila.<sup>2104</sup> [REDACTED] testifying on the alleged killing of the *Sheikh*, the 5 children aged around 10 years old<sup>2105</sup> and the 2 brothers. According to [REDACTED], they were shot at by Muqqadam Idriss, First Sergeant in the SAF.<sup>2106</sup> The entire evidence about the arrests in Mukjar has shown that only male adult or young adult in age of combatting were arrested, not children. On the basis of that evidence, [REDACTED] cannot, once again,<sup>2107</sup> be true.

535. Hence, the OTP failed to provide a coherent narrative of the executions of the detainees taken out of the Mukjar police station. The numerous discrepancies, as well as the sole and highly contested evidence of [REDACTED], cast an undeniable doubt on the Prosecution case.

*D - The Prosecution's List of 122 Victims is not sufficiently substantiated*

536. The OTP did not sufficiently substantiate the evidence regarding the killing of 122 Fur males at Mukjar execution sites.<sup>2108</sup> Whilst there is no requirement that the body of a victim be recovered in order to prove death beyond reasonable doubt, the fact that the OTP could not reach the execution sites to conduct proper investigations<sup>2109</sup> resulted in the evidence on this fact to be solely based on circumstantial evidence presented at trial. Moreover, the reliability of the evidence identifying these victims can be reasonably challenged. For instance, upon his discovery of the bodies one month after the executions, [REDACTED] indicated that the corpses he saw were washed away by rain and rotten and that “[they] *couldn't identify any of them.*”<sup>2110</sup> His basis of knowledge for his identification of the victims of executions<sup>2111</sup> is thus unreliable,

<sup>2099</sup> **P-0931** testified that after the shooting at the [first] execution site ended, the convoy went to Mara, before his commander ordered him [REDACTED]: **P-0931**: T-062, p. 38, lines 5-8, 20-25.

<sup>2100</sup> **P-0984** testified that after driving past the execution site, they carried on driving towards Garsila: **P-0984**: T-067, p. 15, lines 7-11 (Conf).

<sup>2101</sup> **P-0905**: [REDACTED]

<sup>2102</sup> **P-0905**: [REDACTED]

<sup>2103</sup> **P-0905**: [REDACTED]

<sup>2104</sup> **P-0905**: [REDACTED]

<sup>2105</sup> **P-0905**: [REDACTED]

<sup>2106</sup> **P-0905**: [REDACTED]

<sup>2107</sup> See **PART III – Chapter 2 – Section 1- P-0905**.

<sup>2108</sup> [OTP Trial Brief, Annex 17.](#)

<sup>2109</sup> See **PART II – Chapter 2 - Section 2**.

<sup>2110</sup> **P-0903**: T-032, p. 55, line 12-p. 56, line 8.

<sup>2111</sup> **P-0903**: T-032, p. 56, lines 9-13.

as is the one of the other witnesses having allegedly seen the bodies a significant amount of time after the executions took place.

537. The PTC confirmed the charges and annexed to its Decision a list of 49 persons killed in Mukjar,<sup>2112</sup> as opposed to the “*at least 122 victims*” listed by the Prosecution.<sup>2113</sup> The Defence contests the addition of 73 names of persons allegedly killed in Mukjar. Mr Abd-Al-Rahman has been charged for the murder of 49 persons and should not be held responsible for additional ones without his charges being amended, contrary to the PTC’s reasoning. Whilst the Defence agrees with the PTC that it was properly notified of the additional 73 persons alleged to have been killed in Mukjar, it submits that the PTC erred in law when it found that the addition of such persons as victims of murder does not constitute an amendment of the charges.<sup>2114</sup> The TC should therefore only examine the charge of the murder as read to Mr Abd-Al-Rahman at the opening of his trial.<sup>2115</sup> Otherwise, the TC should make an individual finding based on evidence for each of the 73 additional persons that they effectively “*fell victim to the relevant crime*” [murder].<sup>2116</sup>

538. **P-0884** and **P-0992** were ultimately not called. Yet the document in which they allegedly listed the names of those who were executed was submitted into evidence through the Bar Table.<sup>2117</sup> Their list only indicates that the named individuals had been “*called out of the cell and loaded onto a vehicle*”.<sup>2118</sup> Also, among the seven names listed, five are not corroborated by any other sources<sup>2119</sup> and the two remaining ones are corroborated by **P-0028** and **P-0041**, both R68(2)(b) witnesses.<sup>2120</sup> Thus, the Defence never had the opportunity to cross-examine them, test their accounts and their basis of knowledge, as required under Article 67(1)(e) of the Statute. **P-0041** further provided a List of victims that includes names of people killed around Mukjar, which is solely based on third-hand evidence.<sup>2121</sup> Several names are sustained by only one reference to witnesses whose credibility had been impugned to such an extent that it would

<sup>2112</sup> [ICC-02/05-01/20-433-Conf-Anx1](#), p. 3.

<sup>2113</sup> [OTP Trial Brief, Annex 17](#).

<sup>2114</sup> [ICC-02/05-01/20-626](#), paras. 25-26.

<sup>2115</sup> Opening Statements: T-026, p. 7, lines 2-9.

<sup>2116</sup> [ICC-02/05-01/20-626](#), para. 23.

<sup>2117</sup> [DAR-OTP-00000696](#).

<sup>2118</sup> [DAR-OTP-00000696](#).

<sup>2119</sup> [DAR-OTP-00000696](#). See Rows #1; #3; #4; #5; #6.

<sup>2120</sup> Namely **P-0028** and **P-0041**.

<sup>2121</sup> **P-0041**: [DAR-OTP-0206-0033-R03](#), para. 14: “[T]he lists of victims that I copied from someone that I knew from the refugee camp called [REDACTED] (See Annex 4). [REDACTED] went to Mukjar and met someone, [REDACTED] who had made lists of those who died during the 2003-2004 events. [REDACTED] copied the lists made by [REDACTED] and I copied them from [REDACTED].” See also **P-0041**: [DAR-OTP-0221-0935](#).

require corroboration.<sup>2122</sup> Therefore, the probative value of the evidence used to support the death of the 122 people listed is insufficient to constitute proof beyond reasonable doubt of their execution. It is not only the identity of the victims which is not proved, it is also their number: as mentioned above, the number of detainees taken out from the cells and loaded on vehicles departing to the execution site varies from 20<sup>2123</sup> to around 100,<sup>2124</sup> without ever reaching the figure of 122 persons allegedly executed. This would imply that some of these were taken to execution from a different place, but there is no evidence of that on record. The figure of 122 persons executed is thus the subject of more than reasonable doubt.

*E - Ali Kushayb Did Not and Could Not Have Ordered the Executions*

539. [REDACTED]<sup>2125</sup> and that he never saw *Ali Kushayb* again.<sup>2126</sup> His only basis of knowledge to affirm that *Ali Kushayb* – a man he had no prior knowledge of –<sup>2127</sup> was present in the convoy is founded on the fact that he thought that he recognised *Ali Kushayb*'s voice because he came twice in the police cell few days before and P-0919 heard him talking.<sup>2128</sup> Identifying someone P-0919 did not know on the sole sound of his voice is unconvincing and unreliable. Furthermore, **P-0129**'s poor prior knowledge of *Ali Kushayb*, which is mostly based on hearsay evidence,<sup>2129</sup> is also insufficient to conclude beyond reasonable doubt that his recognition is reliable enough.

540. Two of the insiders present clearly testified that they were not able to hear *Ali Kushayb* ordering the execution of the detainees. **P-0931** did not hear if *Ali Kushayb* said something because there was "some distance" between him and the creek where the prisoners were unloaded,<sup>2130</sup> that he estimated was the same distance than the one separating him to the Judges during his testimony in court.<sup>2131</sup> P-0931 could not watch what happened after the first group of prisoners were executed because [REDACTED]<sup>2132</sup> and could not see clearly.<sup>2133</sup> **P-0984** arrived ten minutes after the other cars of the convoy and could see the detainees outside of the

<sup>2122</sup> See [OTP Trial Brief, Annex 17](#): **P-0129** is the only witness to support the killing of #2; #7; #8; #10; #11; #14; #34; #54; #56; #59; #65; #66; #69; #71; #73; #74; #76; #78; #79; #95; #96; #99; #101; #103-105; #107; #108; #110; #111; #114; #116; #118; **P-0877** is the only witness to support the killing of #75; **P-0903** is the only witness to support the killing of #83; [REDACTED] is the only witness to support the killing of #19; #42-49.

<sup>2123</sup> **P-0984**: [REDACTED]

<sup>2124</sup> **P-0905**: [REDACTED]

<sup>2125</sup> **P-0919**: T-060, p. 36, line 12-p. 37, line 18 (Conf); T-061, p. 27, line 18-p. 29, line 8 (Conf).

<sup>2126</sup> **P-0919**: T-061, p. 29, lines 9-12 (Conf); p. 30, lines 17-19 (Conf).

<sup>2127</sup> **P-0919**: T-061, p. 32, lines 5-9 (Conf).

<sup>2128</sup> See **P-0919**: T-060, p. 36, line 19-23 (Conf); p. 38, lines 7-11 (Conf); T-061, p. 32, lines 20-24 (Conf).

<sup>2129</sup> **P-0129**: [DAR-OTP-0128-0128-R04](#), para. 27.

<sup>2130</sup> **P-0931**: T-062, p. 38, line 1-4.

<sup>2131</sup> **P-0931**: T-063, p. 18, lines 5-12.

<sup>2132</sup> **P-0931**: T-062, p. 32, lines 21-23 (Conf); p. 37, lines 23-24.

<sup>2133</sup> **P-0931**: T-062, p. 33, line 20; p. 34, lines 10-11.

vehicles being lined up.<sup>2134</sup> He saw soldiers in military uniforms beating and shooting at them.<sup>2135</sup> Like P-0931, P-0984 was so afraid that he allegedly “*lost awareness of [his] environment*”.<sup>2136</sup> Thus, his evidence regarding the executions is not reliable.

541. The clear inability of these witnesses to provide reliable evidence regarding the role of *Ali Kushayb* in the executions leaves [REDACTED] as the only direct eyewitness. [REDACTED] cannot be relied upon, even less so to establish a fact which of which he is the only alleged witness.<sup>2137</sup> Another authority – Commander Al Jilli – was there, stopped the convoy which was supposed to carry on to Garsila, and ordered the unloading of prisoners at execution site(s). He was the highest authority in charge. The fact that the executions were ordered by anyone else, even more so *Ali Kushayb* with no established authority, is subject to reasonable doubt.

#### **IV - Persecution**

##### *A - There was no Persecution of the “group” on Ethnic, Political or Gender Grounds*

542. The perpetrators of the charged crimes did not target the individuals by reason of their group identity, but rather because they belonged to or supported the rebellion and thus constituted the enemy-fighter of GoS forces.<sup>2138</sup> Furthermore, the perpetrators did not commit the underlying acts with intent to discriminate the targeted individuals because of their ethnicity, political affiliation or gender.<sup>2139</sup> The Defence therefore submits that these acts do not constitute persecution on the grounds alleged by the Prosecution.<sup>2140</sup>

543. The evidence establishes that the main rebel forces, the SLM/JEM, were comprised of members of the Fur ethnicity and other African tribes, such as the Massalit and the Zaghawa.<sup>2141</sup> The Mukjar area was predominately Fur, with 66% of the 1,800 households of Mukjar town being of that ethnicity.<sup>2142</sup> The evidence further suggests that the Mukjar arrests aimed at detaining individuals fleeing from nearby Sindu – a known rebel stronghold – and that they were based on lists established by the local security Council<sup>2143</sup> on the basis of information

<sup>2134</sup> **P-0984**: T-067, p. 9, lines 9-15 (Conf); p. 68, line 4-p. 69, line 17 (Conf).

<sup>2135</sup> **P-0984**: T-067, p. 9, lines 14-21 (Conf); p. 12, line 21-p. 13, line 7 (Conf); p. 68, lines 21-23 (Conf); p. 70, lines 18-22 (Conf); p. 71, lines 22-23 (Conf).

<sup>2136</sup> **P-0984**: T-067, p. 71, lines 18-23 (Conf), p. 72, line 21-p. 73, line 3 (Conf), p. 86, lines 11-21 (Conf).

<sup>2137</sup> See discussion on **P-0905** in **PART III – Chapter 2 – Section 1** above.

<sup>2138</sup> See Elements of Crimes on Article 7(1)(h), para. 2.

<sup>2139</sup> See *Al Hassan TJ*, para. 1212; *Ongwen TJ*, para. 2739.

<sup>2140</sup> See also **PART V – Chapter 4 - PERSECUTION**.

<sup>2141</sup> See **P-0087**: [DAR-OTP-0133-0573-R02](#), para. 14; **P-0116**: [DAR-OTP-0127-0318-R01](#), para. 73; [DAR-OTP-0209-0593](#), at 0615, para. 62.

<sup>2142</sup> [OTP Trial Brief](#) paras. 179, 336 (See footnote 1112 referencing [DAR-OTP-0145-0237](#), at 0317).

<sup>2143</sup> **P-0769**: T-098, p. 61, lines 12-25 (Conf).

collected [REDACTED]<sup>2144</sup> and provided to *inter alia* the Fur PPF members manning the checkpoints. Multiple Fur males in age of combatting and residing in Mukjar were not arrested, including some OTP witnesses.<sup>2145</sup> From the available evidence, between 100-200 individuals were detained following arrests mainly conducted at checkpoints, which obviously cannot represent all – or even the majority – of Fur males in the area. Fur males further joined and remained in the GoS forces during the charged crimes,<sup>2146</sup> and Fur individuals such as Abd-Al-Hakam held high-ranking positions. Moreover, preeminent Fur tribal leaders in the Mukjar area were not arrested. *Sheikh* Torjok of the Fur tribe single-handedly organised the release of at least 46 detainees of Mukjar Police Station, including some witnesses, by providing assurances that they “*would be of good behaviour*”.<sup>2147</sup> **P-0675** was himself released after only a few days in detention, when he was identified as a student and not as a rebel member.<sup>2148</sup> **P-0905** even recounted that the Second in Command of the SLM who had surrendered in Sindu pointed out suspects of the rebellion for investigation amidst the detainees of Mukjar Police Station.<sup>2149</sup> As clearly found by the UNCOI, the “*intent of the attackers was not to destroy an ethnic group as such, or part of the group*” but instead to arrest and neutralise men considered to be rebels and prevent the latter from getting support from the local population.<sup>2150</sup>

544. Evidently, Fur males in age of combatting were perceived as rebels. The perpetrators intended to arrest and detain rebels, which happened to be in majority Fur men – not vice-versa.

*B - None of the Language Allegedly Used by Ali Kushayb or the Perpetrators of the Underlining Conduct Demonstrates a Specific Discriminatory Intent*

545. **P-0129** and **P-0919** are the only two Mukjar witnesses who testified that detainees were beaten at the Mukjar police station whilst being called “*slaves*” (“*Abid*”).<sup>2151</sup> Both witnesses present significant credibility issues. Whilst **P-0129** initially clarified that the term “*Abid*” indeed meant “*slave*”, he subsequently testified that he did not know what this word meant.<sup>2152</sup>

<sup>2144</sup> **P-0547**: [REDACTED]

<sup>2145</sup> See **P-0008**: [DAR-OTP-0088-0085-R02](#); **P-0012**: [DAR-OTP-0119-0503-R01](#); **P-0028**: [DAR-OTP-0094-0423-R01](#); **P-0720**: [DAR-OTP-0210-0291-R02](#).

<sup>2146</sup> See e.g. **P-0041**: [DAR-OTP-0206-0033-R02](#), paras. 30-31, 38; **P-0905**: T-085, p. 65, lines 8-18; p. 9, line 4-p. 11, line 3 (Conf); **P-0913**: [DAR-OTP-0215-6802-R02](#), at 6804; [DAR-OTP-0218-0021-R04](#), paras. 15-17, 131; **P-0984**: T-066, p. 36, line 17-p. 37, line 1(Conf); See section on arrests.

<sup>2147</sup> *Sheikh* Torjok organised the release of **P-0877** (twice), **P-0932** and **P-0129** as well as 43 other detainees: **P-0129**: [DAR-OTP-0128-0128-R04](#), para. 71. See also **P-0877**: T-053, p. 83, lines 8-20 (Conf); T-054, p. 5, lines 11-13; p. 6, lines 18-20; p. 22, line 19-p. 23, line 5; **P-0932**: [DAR-OTP-0222-0602-R02](#), paras. 111-113.

<sup>2148</sup> **P-0675**: [DAR-OTP-0206-0173-R02](#), para. 95.

<sup>2149</sup> **P-0905**: T-086, p. 20, lines 10-22 (Conf); p. 22, lines 1-2 (Conf); T-088, p. 62, lines 1-20 (Conf).

<sup>2150</sup> [DAR-OTP-0209-0593](#), at 0723, para. 514.

<sup>2151</sup> **P-0129**: T-075, p. 55, line 22-p. 56, line 9; p. 56, lines 16-22; **P-0919**: T-060, p. 19, lines 16-21.

<sup>2152</sup> **P-0129**: [DAR-OTP-00000084](#), para. 29; T-075, p. 56, lines 16-20.

This raises doubt as to the reliability of his evidence. P-0919 also indicated that he did not know what “*Abid*” meant and that he only ever heard this term during his detention.<sup>2153</sup> He testified further that he also did not know what “*Tora Bora*” meant and that he heard it for the first time in 2003-2004.<sup>2154</sup> This is thoroughly unconvincing especially with regards to “*Abid*” which is a common word in Arabic vocabulary.<sup>2155</sup> Furthermore, P-0919 cannot have reasonably remembered words devoid of meaning to him many years after the fact.<sup>2156</sup>

546. **P-0129** is the only witness who alleges that the perpetrators of the underlying conduct used the word “*magus*”, meaning idol or fire worshippers,<sup>2157</sup> and “*nujus*” meaning dirty or impure,<sup>2158</sup> when referring to the detainees during mistreatments.<sup>2159</sup> Six other OTP witnesses were detained at Mukjar police station in February/March 2004,<sup>2160</sup> and none testified to the use of these terms by the perpetrators. This further enshrines P-0129’s unreliability, and echoes his confusion on the timeline of his two subsequent detentions. It is indeed quite plausible that P-0129 heard these terms during his second detention, which falls outside of the scope of the charges. In light of both **P-0919** and P-0129’s unreliability, both of their testimonies on discriminatory language should be disregarded by the TC.

547. In any event, the language used during the underlying conduct – albeit violent – is not *specifically* discriminatory in nature. This is particularly the case for the term “*Tora Bora*”/ “*Toro Boro*”,<sup>2161</sup> which the evidence clearly establishes as simply referring to rebels.<sup>2162</sup> **P-0905** recounted the etymology of this commonly used term and testified that “*Toro means slim, Boro means fat*” and it referred to an area located in Jebel Marra where the rebels “*established their movements*”.<sup>2163</sup> Rebel members even used these terms to refer to themselves.<sup>2164</sup> Referring to detainees arrested at checkpoints for suspected rebel affiliation with this term does not demonstrate a particularly discriminatory intent towards the group *because* they were Fur, had specific political belief or were men. The same rationale is applicable to the term “*criminals*”

<sup>2153</sup> **P-0919**: T-060, p. 19, lines 16-23, T-061, p. 21, line 6-p. 22, line 9.

<sup>2154</sup> **P-0919**: T-060, p. 19, lines 16-23, T-061, p. 21, line 6-p. 22, line 9.

<sup>2155</sup> The same applies to P-0129 who also testified that he did not know the definition of “*Abid*”: **P-0129**: T-075, p. 56, lines 16-22.

<sup>2156</sup> **P-0919**: T-061, p. 21, line 23-p. 22, line 9.

<sup>2157</sup> Updated Trial Glossary, p. 21.

<sup>2158</sup> **P-0129**: T-075, p. 56, lines 8-15.

<sup>2159</sup> **P-0129**: [DAR-OTP-0128-0128-R04](#), para. 47; [DAR-OTP-0223-0157-R02](#), paras. 55-56; T-075, p. 56, lines 8-15.

<sup>2160</sup> P-0675, P-0877, P-0903, P-0919, P-0932, and P-0990; See Section On Detention.

<sup>2161</sup> See [OTP Trial Brief](#), para. 198.

<sup>2162</sup> See e.g. **P-0581**: [DAR-OTP-0216-0560-R02](#), para. 53 [The statement submitted into evidence has been heavily redacted]; **P-0913**: [DAR-OTP-00000022](#), para. 9; **P-0922**: [DAR-OTP-0222-0312-R01](#), para. 40.

<sup>2163</sup> **P-0905**: T-086, p. 82, line 14-p. 83, line 6 (Conf).

<sup>2164</sup> **P-0905**: T-086, p. 82, line 14-p. 83, line 10 (Conf).

which solely reflects the perpetrators' belief at the time that the detained individuals were part of the insurgency.<sup>2165</sup> The OTP also used the fact that the Militia/JJW allegedly said “*we are going to fuck you*” to the detainees during the transportation to the execution site as proof of a specific discriminatory intent.<sup>2166</sup> This violent expression inserts itself into a wider aggressive context of detention, but once more, fails to prove that the group was targeted because of their ethnicity, their political beliefs or their gender.

548. Inferring the *mens rea* of the perpetrators from the violent language used will not be sufficient to indicate that they also intended to discriminate them on the ground of ethnic, political or gender. As demonstrated above, the evidence fails to support, beyond reasonable doubt, that Fur men in Mukjar were persecuted on ethnic, political and gender grounds<sup>2167</sup> in Mukjar during the charged events. None of the evidence adduced further goes to proof of a specific discriminatory intent in the perpetrators or *Ali Kushayb*'s alleged conduct during the commission of the underlying offences.

#### ***V - Factual and Legal Conclusions***

549. In the light of all the above, the only reasonable conclusion that should be made is that the evidence does not support beyond a reasonable doubt that Mr. Abd-Al-Rahman: (i) Participated in the arrest and detention of Fur males in Mukjar: the evidence clearly demonstrates that the arrests at the Mukjar checkpoints were conducted in the absence of Mr. Abd-Al-Rahman by forces, including the PPF, PDF, CRF and Military Intelligence, to which he did not belong and over which he had no authority. No reliable evidence supports that he played any role nor had any knowledge that the arrests conducted would lead to the conditions of detention described by the detained witnesses. Mr. Abd-Al-Rahman also had no role in the selection of those arrested; (ii) Physically mistreated and verbally abused the detainees at the Police Station and during their transportation: the evidence used to support these allegations is coming from a group of witnesses which appear to be linked and have contaminated each other. They could not provide a reliable identification of Mr. Abd-Al-Rahman. Their evidence of Mr. Abd-Al-Rahman's involvement in mistreatment is inconsistent and contradictory. Also, numerous discrepancies arose from the accounts on the circumstances surrounding the transportation of detainees, and ; (iii) Took part in their execution: the evidence is flawed with major inconsistencies casting a massive doubt on the credibility of the evidence and does not support the alleged role played by Mr. Abd-Al-Rahman, whereas there is clear evidence on

<sup>2165</sup> See references to the term “criminals” as derogatory: [OTP Trial Brief](#), para. 198.

<sup>2166</sup> [OTP Trial Brief](#), para. 198.

<sup>2167</sup> See **PART V- Chapter 4 - Persecution**.

record that these were ordered by Commander al-Jilli<sup>2168</sup> and perpetrated by men in military uniform<sup>2169</sup> in the presence of PDF Commander Hamdi and Sameh and Commissioner Torshein.<sup>2170</sup>

550. The factual and legal requirements of the crime of torture as a War Crime are not fulfilled as the Prosecution did not demonstrate any specific purpose as part of the motivation of the conduct.<sup>2171</sup> The requirement of the crime of torture as a Crime against Humanity established by the Article 7(2)(e) is not fulfilled either since no evidence supports that the Mukjar detainees were “*in the custody or under the control of*” Mr Abd-Al-Rahman.

551. The factual and legal requirements of the crime of persecution as a Crime against Humanity are not fulfilled as the Prosecution failed to establish that the group identified as “*Fur males perceived as supporting or associated with the rebel armed groups*” was targeted on ethnic, political and gender grounds.<sup>2172</sup> No evidence supports that Mr Abd-Al-Rahman or any perpetrators under his authority had a specific intent to discriminate against the targeted persons on the aforementioned grounds.

### **Section 3 - Individual Criminal Responsibility**

552. The Defence submits that Mr Abd-Al-Rahman is not the individual identified by the nickname *Ali Kushayb*. The evidence further does not support that Mr Abd-Al-Rahman had *de jure* and/or *de facto* a position of authority and/or influence over Militia/JJW or that he cooperated with GoS members. He was never an *Agid Al Ogada*, a position which, in any event, does not indicate a hierarchical rank within an organized group.

#### *Direct perpetration and Co-perpetration under Article 25(3)(a)*

553. Should the Chamber find that the Prosecution proved beyond reasonable doubt that Mr Abd-Al-Rahman was *Ali Kushayb*, it remains that the Prosecution did not provide sufficient, credible or reliable evidence to support that *Ali Kushayb* directly committed or co-perpetrated the crimes in Mukjar. The evidence does not support that *Ali Kushayb* exerted authority by issuing orders and instructions to Militia/JJW leaders, or to members of the GoS Forces (SAF, PDF, CRF) which were implemented. *Ali Kushayb* did not head the Mujahideen Committee, a subcommittee of the Security Committee, nor did he cooperate with these Committees. The Defence qualifies these structures as being part of the GoS *apparatus* at the locality level, in which *Ali Kushayb* was entirely absent.

<sup>2168</sup> P-0931: T-062, p. 31, line 22-p. 32, line 19.

<sup>2169</sup> P-0984: T-067, p. 70, line 20-p. 71 line 7 (Conf).

<sup>2170</sup> P-0129: [DAR-OTP-0223-0157-R02](#), para. 80.

<sup>2171</sup> [Ongwen TJ](#), para. 2705.

<sup>2172</sup> As required by Elements of the Crimes, Article 7(1)(h), para. 3.

554. The OTP further failed to prove that *Ali Kushayb* essentially contributed to the Mukjar Common Plan which— if established - did not target the whole civilian population of Mukjar. *Ali Kushayb* did not have any control or influence over the acts pertaining to the arrest, detention, mistreatment, transfer and execution of the detainees in Mukjar in February-March 2004. The Security Committee, in which *Ali Kushayb* did not sit, was in charge of identifying the individuals to be arrested and detained for their rebel affiliation. The Mukjar GoS *apparatus* was in control of the detainees of the Mukjar Police Station and the subsequent crimes. The evidence shows that the detainees were always under the direct control of Al-Tayyib. The decisions to arrest, detain and transfer the detainees were not taken by *Ali Kushayb*.

555. Furthermore, *Ali Kushayb* did not cooperate with the GoS structures at the locality level, nor did he conclude or form part of an agreement to commit crimes in furtherance of a Common Plan with a group consisting of members of the Militia/JJW and GoS Forces to target civilians in Mukjar. *Ali Kushayb*'s cooperation with GoS authorities is not sufficiently substantiated as he was not present at preparatory meetings in early 2004, nor did he coordinate his actions to fulfil the objectives of the alleged Common Plan. His alleged essential contribution to the execution of the Mukjar Common Plan through the commission of the crimes at the Mukjar Police Station is based on flawed, unreliable and non-credible evidence.

556. Consequently, the evidence is insufficient to assess any role that *Ali Kushayb* may have played in the execution of a Mukjar Common Plan and the causality of the crimes committed in furtherance of this Plan.

*Inducing under Article 25(3)(b)*

557. The OTP did not prove that Mr Abd-Al-Rahman exerted a strong influence over the physical perpetrators, either through strong reasoning, persuasion or conduct prompting the commission of the offence that would qualify as inducement pursuant to Article 25(3)(b) of the charged crimes (Counts 12-21). The OTP further failed to demonstrate that: (i) Mr Abd-Al-Rahman exerted influence over another person to either commit or attempt a crime; and that (ii) he was aware that the crimes will be committed in the ordinary course of events as a consequence of the realisation of his acts or omissions.<sup>2173</sup>

558. At no time during the charged events did *Ali Kushayb*'s acts or conduct had any causal link to the fate of detainees of Mukjar Police Station. The physical perpetrators were already determined to commit the crimes.<sup>2174</sup> Local leaders such as: Torshein, Al Tayyib, and Al-Jilli

<sup>2173</sup> [Ntaganda Confirmation Decision](#), para. 153.

<sup>2174</sup> See [Al Hassan Decision on the Issuance of a Warrant for Arrest](#), para. 185.

exercised control over the physical perpetrators of the crimes through a hierarchical structure. Any form of further encouragement or moral support cannot qualify as inducing the crime.<sup>2175</sup>

#### *Ordering under Article 25(3)(b)*

559. The OTP did not prove that *Ali Kushayb* ordered the crimes of murder as a Crime against Humanity and a War Crime (Counts 17-18) or attempted murder as a Crime against Humanity and as a War Crime pursuant (Counts 19-20). The entire evidence demonstrates that *Ali Kushayb* did not have a position of authority *vis-à-vis* the physical perpetrators. He was not in charge of the detainees and nor did he have the capacity to issue orders to others either at the Police Station, or at the execution sites.

### **Chapter 3 – Arrests, Detention and Executions in Deleig (5-7 March 2004)**

560. The OTP dropped witnesses that were allegedly insiders or victims of the Deleig events.<sup>2176</sup> Most of the OTP witnesses who testified were indirect witnesses.<sup>2177</sup> Others, such as **P-0585, P-0651, P-0671, P-0697, P-0712, P-0736** or **P-0994** witnessed the events partially or from such a distance as to substantially reduce the reliability of their evidence. The OTP did not call a single witness who testified that he received an order directly from Mr Abd-Al-Rahman or *Ali Kushayb* to commit a crime or which led to the commission of a crime. Moreover, the only insider witness claiming to be present during the Deleig events is the discredited [REDACTED] who distanced himself from the crimes and sought to portray himself as a mere by-stander. [REDACTED] was not even sure about seeing *Ali Kushayb* in Deleig.<sup>2178</sup> [REDACTED] identifies several other alleged JJW leaders who had full and established authority to issue the orders that he claims *Ali Kushayb* gave, rendering the presence of *Ali Kushayb* redundant: Muqqadam Idris, Abu Lahab and Hassaballah.<sup>2179</sup>

561. The OTP's evidence consists of accounts that in many respects are inconsistent with each other and that each tells a different story of what happened in Deleig on 5-7 March 2004. A holistic consideration of the entire evidence leads to the conclusion that the witnesses did not witness the same events. Significant doubt persists about the sequence of events and, above all, about the alleged involvement of Mr Abd-Al-Rahman in the commission of the charged crimes.

### **Section 1 - Shortcomings of Prosecution Evidence on Deleig**

<sup>2175</sup> See [Orić TJ](#), para. 271.

<sup>2176</sup> **P-0885** [REDACTED], **P-0987**, [REDACTED], and **P-0924**, an alleged victim of the Deleig events. See ICC-02/05-01/20-685-Conf-Anx2, pp. 32-33.

<sup>2177</sup> See eg. P-0013, P-0617, P-0643, P-0671, P-0725, P-0726, P-0769, P-0850, P-0883, P-0931, P-0935.

<sup>2178</sup> [REDACTED]

<sup>2179</sup> [REDACTED]

**I - P-0585**

562. **P-0585** gave the preposterous story of a bus trip he allegedly made with a stop in Deleig, in front of the police station at the precise time when the detainees were lying down on the square.<sup>2180</sup> The JJW proudly told P-0585 that they were *Tora Bora* who were about to be executed,<sup>2181</sup> even though they could see that P-0585 was a Fur himself.<sup>2182</sup> P-0585's story about his bus trip is absurd and not credible. The region was at war. There is evidence of the use of landmines on roads.<sup>2183</sup> P-0585 accepted that the roads were blocked,<sup>2184</sup> especially so in and around localities, such as Deleig, where military operations were being conducted.<sup>2185</sup> It is not plausible that a commercial bus would have undertaken a trip such as the one described by P-0585 under these circumstances. It is even less credible that P-0585 would have undertaken such a trip, having to pay substantial bribes to JJW and at the risk of being himself suspected of being a rebel and of being arrested. P-0585 made no mention of this journey, or of his alleged interaction with *Ali Kushayb* [REDACTED].<sup>2186</sup> P-0585's account is unworthy of belief and should be disregarded.

**II - P-0726**

563. **P-0726's** basis of knowledge regarding the events at the Deleig police station, including the transfer of detainees and their execution, is based entirely on hearsay evidence, from what he was allegedly told by P-0907.<sup>2187</sup> During cross-examination, P-0726 first testified that he was still in contact with P-0907, but later stated that he had not talked to him since he left Sudan [REDACTED]. P-0726 finally admitted that he talked to P-0907 two months before his testimony i.e. around April 2022.<sup>2188</sup> P-0726's lack of candour in admitting his recent interactions with P-0907 in any case casts strong doubt as to the truthfulness and reliability of his testimony. No weight should be attached to P-0726's hearsay testimony, which is nothing more than an echo of P-0907's evidence.

**III - P-0907**

564. **P-0907** testified that he knew *Ali Kushayb*, also nicknamed "Doctor Ali", from before the Deleig events, as he first met him in 2002 at his pharmacy in Garsila<sup>2189</sup> and used to meet

<sup>2180</sup> **P-0585**: T-100, p. 15, line 5-p. 16, line 2.

<sup>2181</sup> **P-0585**: T-100, p. 15, line 23-p. 16, line 16; T-101, p. 53, lines 4-17.

<sup>2182</sup> **P-0585**: T-101, p. 53, lines 10-12.

<sup>2183</sup> **P-0931**: T-062, p. 22, line 23-p. 23, line 8.

<sup>2184</sup> **P-0585**: T-100, p. 29, lines 7-8; T-101, p. 60, lines 8-10.

<sup>2185</sup> **P-0585**: T-099, p. 46, line 7-p. 47, line 23.

<sup>2186</sup> **P-0585**: T-102, p. 8, lines 9-14; p. 10, line 16-p. 11, line 9 (Conf); [DAR-OTP-00000020](#) (Original), [DAR-OTP-00000046](#) (English partial translation).

<sup>2187</sup> **P-0726**: [DAR-OTP-0210-0346-R04](#), paras. 71-72.

<sup>2188</sup> **P-0726**: T-053, p. 57, line 17-p. 58, line 16 (Conf).

<sup>2189</sup> **P-0907**: T-094, p. 27, lines 7-14; T-095, p. 54, lines 11-16, p. 56, lines 1-14, p. 61, line 25.

*Ali Kushayb* at the market<sup>2190</sup> or greet him on the way to a restaurant near *Ali Kushayb's* pharmacy.<sup>2191</sup> According to P-0907, he and relatives were arrested from his house by the JJW and brought to the Deleig police station on 5 March 2004.<sup>2192</sup> Upon arrival, he saw the person known to him as *Ali Kushayb* stepping on people's backs - including P-0907's. P-0907 also testified that he saw that the JJW released some people while he and others were lying on the ground.<sup>2193</sup> He also added that the JJW came and called persons that they knew or selected the people "*who owned money*" and were releasing them "*hoping to negotiate*" and get money out of them.<sup>2194</sup> P-0907 was unable to provide any explanation as to why he did not identify himself to his alleged acquaintance *Ali Kushayb*, with whom he testified he was in good terms, to get released. The objective irrationality of his behaviour throws into serious doubt the truth of P-0907's entire testimony.

### III - P-0980

565. **P-0980's** evidence of the death of *Umdah* Yahya in Deleig is inconsistent with the OTP case and other evidence of his death in Mukjar, days before the events in Deleig.<sup>2195</sup> P-0980 testified that on 6 March 2004, *Umdah* Yahya was detained at the Deleig police station alongside *Umdah* Adam Adam and *Umdah* Jiddo Khamis.<sup>2196</sup> P-0980 then stated that around 8 a.m., the three *Umdahs* left the police station escorted by "*soldiers*", "*boarded on a Land Cruiser*" and were taken away towards the South of Deleig.<sup>2197</sup> When asked if he had a good look at *Umdah* Yahya, and could recognise him because he knew him from before, P-0980 responded in the affirmative.<sup>2198</sup> When it was pointed out that the OTP's case is that *Umdah* Yahya was detained in Mukjar and executed shortly thereafter, and that he therefore could not have been detained and executed in Deleig, P-0980 had no explanation to provide.<sup>2199</sup> P-0980 is mistaken at best, lying at worst. The OTP's effort to rehabilitate P-0980 by suggesting that there may have been two *Umdah* Yahyas, one of whom was detained in Mukjar, and the other in Deleig, is preposterous. No evidence of a second *Umdah* Yahya is on record.<sup>2200</sup> P-0980's testimony about his presence during the Deleig events and what he witnessed there is

<sup>2190</sup> **P-0907:** T-095, p. 54, lines 15-16.

<sup>2191</sup> **P-0907:** T-095, p. 55, lines 17-20.

<sup>2192</sup> **P-0907:** T-094, p. 31, line 1-p. 32, line 14.

<sup>2193</sup> **P-0907:** T-094, p. 39, line 23-p. 40, line 6.

<sup>2194</sup> **P-0907:** T-094, p. 39, line 23-p. 40, line 6.

<sup>2195</sup> [OTP Trial Brief](#), para. 361. See *inter alia* evidence of P-0581, P-0877, P-0913, P-0922.

<sup>2196</sup> **P-0980:** T-044, p. 42, line 17-p. 43, line 12; [DAR-OTP-0221-0553-R03](#), para. 32.

<sup>2197</sup> **P-0980:** [DAR-OTP-0221-0553-R03](#), para. 32; T-044, p. 42, line 17-p. 43, line 12.

<sup>2198</sup> **P-0980:** T-044, p. 43, lines 13-15.

<sup>2199</sup> **P-0980:** T-044, p. 43, lines 16-19, p. 44, lines 8-12.

<sup>2200</sup> **P-0980:** T-044, p. 44, lines 8-12.

fundamentally lacking in reliability and credibility. This substantially impacts on the credibility of the remainder of his account.

#### **IV - P-0994**

566. **P-0994** was particularly evasive in answering the Defence’s questions and repeatedly took cover – more than 25 times – during cross-examination behind assertions that he could not remember events he was asked about.<sup>2201</sup> P-0994 even started his testimony via AVL with notes, until this was noticed and the notes were taken away from him on the instruction of the TC.<sup>2202</sup> P-0994 stated that his school friend [REDACTED] had been detained and executed during the Deleig events [REDACTED].<sup>2203</sup> However, evidence shows that this is not true.<sup>2204</sup>[REDACTED].<sup>2205</sup> [REDACTED]. This further confirms that P-0994 is not reliable and that his evidence should be disregarded.

567. **P-0994** also asserted that the police [REDACTED] were powerless and without any authority, but then asserted that [REDACTED].<sup>2206</sup> **P-0980** directly contradicted him by stating that amongst the “important people” at the police station on 5 March 2004 there was “Jumaa”, the police chief of Deleig, [REDACTED].<sup>2207</sup> P-0994 also testified that he never heard about Adam Ismail, *Umdah* of Deleig, releasing detainees and that he did not remember if Al-Sadiq Harun, a teacher in Deleig, was also involved in the release of detainees.<sup>2208</sup> **P-0712**, **P-0718** and **P-0907** all stated that both men came to the Deleig police station between 5 and 9 March 2004 to release detainees.<sup>2209</sup>

568. [REDACTED].<sup>2210</sup> [REDACTED].<sup>2211</sup> [REDACTED],<sup>2212</sup> [REDACTED].<sup>2213</sup> [REDACTED].<sup>2214</sup> [REDACTED].

<sup>2201</sup> **P-0994**: T-084, p. 20, line 25 (Conf), p. 24, lines 9-20 (Conf), p. 27, line 7-p. 28, line 13 (Conf), p. 30, lines 5-6 (Conf), p. 35, lines 4-5 (Conf), p. 36, lines 15-20 (Conf), p. 36, line 23-p. 37, line 3 (Conf), p. 37 line 24-p. 38, line 6 (Conf), p. 40, line 3, p. 41, line 21-p. 42, line 1, p. 42, line 22, p. 45, lines 7-8, p. 45 lines 16-19 (Conf), p. 48, line 20 (Conf), p. 53, lines 9-10 (Conf), p. 56, lines 12-13 (Conf), p. 57, lines 22-23 (Conf), p. 71, line 25 (Conf), p. 72, line 4 (Conf), p. 78, lines 9-10 (Conf), p. 82, lines 4-5 (Conf), p. 82, lines 12-14 (Conf).

<sup>2202</sup> **P-0994**: T-084, p. 21, line 23-p. 23, line 20 (Conf).

<sup>2203</sup> [REDACTED].

<sup>2204</sup> [REDACTED]

<sup>2205</sup> [REDACTED].

<sup>2206</sup> **P-0994**: T-084, p. 57, line 2-p. 58, line 6 (Conf), p. 58, line 17-p. 61, line 9 (Conf); [DAR-OTP-0222-0055-R01](#), para. 52.

<sup>2207</sup> **P-0980**: [DAR-OTP-0221-0553-R01](#), para. 28.

<sup>2208</sup> **P-0994**: T-084, p. 70, line 17-p. 72, line 4 (Conf).

<sup>2209</sup> **P-0712**: [DAR-OTP-0209-1884-R04](#), paras. 40-41; **P-0718**: [DAR-OTP-0209-2004-R02](#), para. 75; **P-0907**: T-094, p. 39, line 23-p. 40, line 6.

<sup>2210</sup> [REDACTED]

<sup>2211</sup> [REDACTED].

<sup>2212</sup> [REDACTED].

<sup>2213</sup> [REDACTED].

<sup>2214</sup> [REDACTED].

### ***V - The Insiders Triangle***

569. The only insider evidence of the Deleig events is that of **P-0883**, [REDACTED] and **P-0935**. Of these, P-0883 and P-0935 were not even present at the scene of the events. These three men are not independent witnesses, unconnected to each other: [REDACTED] is a friend of P-0935 and was his colleague [REDACTED].<sup>2215</sup> [REDACTED] was also a colleague of P-0883 [REDACTED].<sup>2216</sup> Similarly, P-0935 and P-0883 were colleagues [REDACTED].<sup>2217</sup> P-0883's denials about knowing [REDACTED] and P-0935<sup>2218</sup> are not credible. He cannot have told the truth. For his part, when asked in cross-examination if he had discussed about Mr Abd-Al-Rahman with [REDACTED] P-0935 evaded the question no fewer than four times and did not provide any answer at all.<sup>2219</sup>

### ***VI - Deleig Intelligence Report***

570. The OTP alleges that the evidence of *Ali Kushayb*'s involvement in the Deleig crimes is corroborated by written intelligence reports. The only evidence presented regarding these alleged intelligence reports is contained in the testimonies of **P-0883** and **P-0935**. No actual intelligence report, or copy thereof, related to the Deleig events has been produced in evidence nor shown to a witness for comment. The only information comes from P-0883 and P-0935.<sup>2220</sup> [REDACTED].<sup>2221</sup> The OTP's evidence about the Deleig events therefore cannot be corroborated by the alleged content of these nebulous reports. The circumstances surrounding the writing and rewriting of the reports are particularly confusing. If this report ever existed, its alleged rewriting reported by **P-0883** and **P-0935** would support the Defence's theory that Mr Abd-Al-Rahman is nothing more than a "scapegoat",<sup>2222</sup> "a pound of flesh" sacrificed by the GoS to bear the blame for crimes committed by others and distract the Court from the real perpetrators.<sup>2223</sup> The alleged intelligence report was written by a staff member known [REDACTED] as Aboubakar Garin ("Garin")<sup>2224</sup> and [REDACTED] by the name of Abubakar Abdullah Muhammad Bakhit,<sup>2225</sup> who was not present during the Deleig events

<sup>2215</sup> ICC-02/05-01/20-685-Conf-Anx2, pp. 34-35, 41.

<sup>2216</sup> ICC-02/05-01/20-685-Conf-Anx2, pp. 34-35.

<sup>2217</sup> **P-0883**: T-071, p. 7, lines 1-8 (Conf); **P-0935**: T-090, p. 5, lines 1-17 (Conf).

<sup>2218</sup> **P-0883**: T-073, p. 27, lines 7-13 (Conf).

<sup>2219</sup> **P-0935**: T-090, p. 94, line 12-p. 95, line 11 (Conf).

<sup>2220</sup> **P-0935**: T-090, p. 5, lines 12-24 (Conf), p. 6, lines 5-11 (Conf).

<sup>2221</sup> [REDACTED].

<sup>2222</sup> See: [DAR-D31-00000352](#).

<sup>2223</sup> See **PART II – Chapter 2 – Section 2 – I – A** above. .

<sup>2224</sup> [REDACTED].

<sup>2225</sup> [REDACTED].

(“Abubakar”).<sup>2226</sup> No information was adduced about the sources of Abubakar’s information, or whether any sources are second - or even third hand. [REDACTED].

*A. Delegation Present in Garsila*

571. [REDACTED] provided inconsistent narratives of a delegation of high-ranking officers who arrived in Garsila to follow the operations in Deleig. According to [REDACTED], this high-ranking delegation from Khartoum was composed of Harun, Hussein, Lieutenant General Abbas Arabi and Brigadier General Kamal.<sup>2227</sup> [REDACTED] does not mention Harun or Hussein, Lieutenant General Abbas Arabi or Brigadier General Kamal as being present in Garsila at the time of the Deleig events. According to [REDACTED], people from Al Fasher came to investigate “what was happening in Wadi Salih”.<sup>2228</sup> Amongst them were the Commander of the 6<sup>th</sup> Division Major General Muhammad Fa’iz and its force, the head of the PDF forces, whose name [REDACTED] does not remember, and the head of the intelligence services Brigadier General Muhammad Khamis.<sup>2229</sup> These individuals have not been mentioned by [REDACTED] when describing the delegation. [REDACTED] testified that they arrived when the weapons were distributed, and they stayed for about a week.<sup>2230</sup> Meanwhile, [REDACTED] responded that one or two days later, people arrived in the Garsila camp, where they stayed for two days.<sup>2231</sup> The discrepancies between [REDACTED] and [REDACTED] accounts regarding the composition of the delegation of high-ranking officers present in Garsila are preventing from drawing any conclusion from their evidence.

*B - Discovery of the Report and Request to Bring its Author*

572. [REDACTED] and [REDACTED] both described a scene at the Garsila base mess involving the report allegedly written by Abubakar. Both testified that the reading of the report triggered strong reactions among the high-ranking officers of the delegation. [REDACTED] mentions three people reading the report. Initially, [REDACTED] brought it to Major Bakhit, who subsequently gave it to Brigadier Muhammad Khamis and General Muhammad Fa’iz, who asked for the author of the report, Abubakar, to be brought to Garsila.<sup>2232</sup> According to [REDACTED], Major Bakhit and General Fa’iz were upset while reading the report, while Brigadier Muhammad Khamis considered that “*these are normal things happen in any war*”.<sup>2233</sup>

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<sup>2226</sup> [REDACTED].

<sup>2227</sup> [REDACTED]

<sup>2228</sup> [REDACTED]

<sup>2229</sup> [REDACTED].

<sup>2230</sup> [REDACTED]

<sup>2231</sup> [REDACTED]

<sup>2232</sup> [REDACTED].

<sup>2233</sup> [REDACTED]

An order was issued for Abubakar to be brought and he arrived around half an hour later.<sup>2234</sup> On the other hand, [REDACTED] mentions [REDACTED] giving the report to the director of security Harun, who asked who the author of the report was because it was putting them “*in trouble*” and demanded that Abubakar be brought to Garsila.<sup>2235</sup> [REDACTED] eventually agreed that the report was presented by [REDACTED] to the head of Sudanese Military Intelligence – without providing his name.<sup>2236</sup> As [REDACTED] testified, the head of the Sudanese Military Intelligence is Khamis – whom [REDACTED] has never heard of.<sup>2237</sup>

*C - Arrival of the Author of the Deleig Report and Scene in the Mess*

573. [REDACTED] testified that Major Bakhit took Abubakar aside at his arrival inside the Garsila base and they had a private discussion that no one witnessed.<sup>2238</sup> The three high-ranking officers asked [REDACTED] to provide them with all the documents related to Abubakar, on the alleged motive of seeing if the handwriting of the report matched that of his previous reports.<sup>2239</sup> When leaving for Al Fasher they took the report with them along with those Abubakar had previously written.<sup>2240</sup> [REDACTED] could not say why Major General Fa’iz took the original report away with him,<sup>2241</sup> but agreed later on that General Fa’iz took the only version of the report, so that it is no longer available.<sup>2242</sup> [REDACTED] added that, after Major General Fa’iz’s departure, Major Bakhit sat with Abubakar in a quiet area and ordered him to rewrite his report. Major Bakhit kept that other copy.<sup>2243</sup> According to [REDACTED], when Abubakar arrived, he was brought before [REDACTED] and confirmed that it was he who wrote the report.<sup>2244</sup> [REDACTED] first testified that [REDACTED] asked him to write on a paper to compare the handwriting before subsequently asserting that the “intelligence chief” asked him to re-write certain parts of the report.<sup>2245</sup> This was again under the alleged pretext of comparing the writings,<sup>2246</sup> which makes no sense since Abubakar had confirmed being the author of the report.<sup>2247</sup> [REDACTED] further described the scene – without specifying his basis of knowledge or detail - as “the first person” writing and the “second person” sitting beside

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<sup>2234</sup> [REDACTED]

<sup>2235</sup> [REDACTED]

<sup>2236</sup> [REDACTED] .

<sup>2237</sup> [REDACTED] .

<sup>2238</sup> [REDACTED]

<sup>2239</sup> [REDACTED]

<sup>2240</sup> [REDACTED]

<sup>2241</sup> [REDACTED]

<sup>2242</sup> [REDACTED]

<sup>2243</sup> [REDACTED]

<sup>2244</sup> [REDACTED]

<sup>2245</sup> [REDACTED]

<sup>2246</sup> [REDACTED]

<sup>2247</sup> [REDACTED]

him holding another paper.<sup>2248</sup> [REDACTED] testified that when he was looking, [REDACTED] was not sure what Abubakar was writing and did not hear what was said<sup>2249</sup> but that he spoke about it with both Abubakar and [REDACTED] afterwards.<sup>2250</sup> [REDACTED] also testified that he learned, after the delegation left, and through exchanges in the intelligence office, that Abubakar “*wrote a report against Ali Kushayb regarding his actions in Deleig. [...] This report was false because they committed an illegal crime*”.<sup>2251</sup>

574. The evidence provided by [REDACTED] and [REDACTED] regarding the intelligence report, one version of which would allegedly prove the allegations about *Ali Kushayb's* involvement in the Deleig events, should be entirely disregarded. The OTP has presented two witnesses who have allegedly witnessed the same event but have provided different and inconsistent narratives, ultimately contradicting themselves. It is the Defence submission that both witnesses are unreliable and their accounts confused, unclear and lacking probative value.<sup>2252</sup> If any weight was given to their evidence, this would only amount to the conclusion that the content of Abubakar's intelligence report was altered in order to avoid putting the three high-ranking officers supervising the Deleig operations into trouble.<sup>2253</sup> This would also amount to another instance of fabrication of evidence.<sup>2254</sup>

## Section 2 – Context to the Deleig Events - Persons of Interest

575. On the SAF side, the Deleig locality fell under the authority of Major Bakhit, the Commander of the SAF Garsila Brigade.<sup>2255</sup> The head of military intelligence in Garsila was Hamdi.<sup>2256</sup> Hamdi's deputy was Abdullah Ali Kortukila [REDACTED] in 2003-2004.<sup>2257</sup> Major Bakhit was in charge of weapons storage at the Garsila base but this was directly supervised by Hamdi.<sup>2258</sup> **P-0935** testified, regarding the organisation of the Deleig operation, that Bakhit was the top commander and that military instructions emanated from him.<sup>2259</sup> There was also a private working in intelligence called Abd-Al-Mun'im Abu Lahab (“Abu-Lahab”) and another member of military intelligence, Hamad Abd-Al-Banat or Garin.<sup>2260</sup> Major Hareika was in

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<sup>2248</sup> [REDACTED]

<sup>2249</sup> [REDACTED]

<sup>2250</sup> [REDACTED]

<sup>2251</sup> [REDACTED]

<sup>2252</sup> See **PART III – Chapter 2.**

<sup>2253</sup> [REDACTED]

<sup>2254</sup> See **PART III – Chapter 3 – Section 2** above.

<sup>2255</sup> **P-0883**: T-072, p. 58, lines 12-16; **P-0935**: T-090, p. 6, line 18-p. 7, line 1.

<sup>2256</sup> **P-0935**: T-090, p. 7, lines 2-7.

<sup>2257</sup> **P-0935**: T-090, p. 7, lines 8-21.

<sup>2258</sup> **P-0935**: T-090, p. 24, lines 5-15.

<sup>2259</sup> **P-0935**: T-090, p. 80, lines 4-21.

<sup>2260</sup> **P-0935**: T-090, p. 8, lines 15-25.

charge of the Garsila and Zalingei SAF troops.<sup>2261</sup> The Border Guards were also present in Deleig in 2003-2004.<sup>2262</sup> The civilian coordinator of the PDF was Hassaballah. He was stationed in Garsila.<sup>2263</sup> According to **P-0883**, he may even have been of a higher rank than the PDF commander,<sup>2264</sup> i.e. Hamdi. Before Hassaballah, Jenif occupied the role of Coordinator.<sup>2265</sup> [REDACTED] first stated that Hamdi appointed Hassaballah to the position of PDF Commander in Garsila.<sup>2266</sup> According to [REDACTED], Hassaballah was the “right person for the job”, as all the people within the PDF were Arabs.<sup>2267</sup>

### **Section 3 – Crimes Committed in Deleig and Alleged Role of *Ali Kushayb***

#### ***I - Arrests and Detention on 5 March 2004***

576. The OTP resorts to a catch-all reference to the “Militia/Janjaweed and GoS Forces”.<sup>2268</sup> Insufficient information has been provided to the Chamber about who the Deleig “Militia/Janjaweed” were including their number, identities, their military training, any clear distinctive signs such as clothing and uniforms, and the chain of command. No clear evidence has been adduced of the alleged link between Mr Abd-Al-Rahman/*Ali Kushayb* and the alleged perpetrators of the crimes in Deleig. The OTP alleges that Mr Abd-Al-Rahman/*Ali Kushayb* was leader of the perpetrators without providing adequate detail about how he exercised this alleged leadership, nor the nature or source of his authority.

577. **P-0119** stated that **P-0643** told him that Harun, ordered the killing of the detainees[REDACTED].<sup>2269</sup> P-0119 stated that according to P-0643, Abd-Al Hakam wanted to kill people who had connections with the opposition.<sup>2270</sup> P-0119 stated that Abd-Al Hakam got the approval of Al-Bashir to arrest and execute people with the opposition.<sup>2271</sup> The Defence also notes that P-0119 gave evidence that contradicted the OTP case by stating that the Deleig operation lasted six days.<sup>2272</sup> The 29 witnesses that provided evidence about the Deleig events

<sup>2261</sup> **P-0935**: T-090, p. 34, lines 1-9.

<sup>2262</sup> **P-0883**: T-073, p. 54, line 23-p. 55, line 21.

<sup>2263</sup> **P-0883**: T-071, p. 32, line 23-p. 33, line 5 (Conf), p. 40, lines 18-23, p. 60, line 10-p. 61, line 5.

<sup>2264</sup> **P-0883**: T-071, p. 60, line 10-p. 61, line 5.

<sup>2265</sup> **P-0883**: T-071, p. 61, lines 9-13.

<sup>2266</sup> [REDACTED]

<sup>2267</sup> [REDACTED]

<sup>2268</sup> *OTP Trial Brief*, see eg: paras. 418, 427, 431, 436, 444.

<sup>2269</sup> **P-0119**: [DAR-OTP-0124-0196-R03](#), para. 112.

<sup>2270</sup> **P-0119**: [DAR-OTP-0124-0196-R03](#), para. 107.

<sup>2271</sup> **P-0119**: [DAR-OTP-0124-0196-R03](#), para. 107.

<sup>2272</sup> **P-0119**: [DAR-OTP-0124-0196-R03](#), paras. 108-110.

have given vague and inconsistent description of the alleged perpetrators of crimes at different locations.<sup>2273</sup>

578. In fact, the perpetrators have almost always been described by the witnesses for one date, 5 March 2004, rather than by location or criminal event. The OTP has failed to provide precision about who exactly the perpetrators were for each charge and how each was linked to *Ali Kushayb*. Instead, the OTP appears to have simply presumed that it was the same group of perpetrators throughout the day – from early morning until late afternoon – for the search and arrest operation, during the events at Deleig police station, and at the execution sites, and that these individuals were invariably linked to *Ali Kushayb*. However, the evidence points to a varied group of men acting at different times throughout the day, and with no clear idea as to their affiliation.

579. Out of the 29 witnesses, only a very few provide physical descriptions of the perpetrators, which varies between accounts.<sup>2274</sup> Regarding the descriptions of *Ali Kushayb*, the witnesses gave varying descriptions of what he was wearing and sometimes of the objects he

<sup>2273</sup> *Inter alia*, **P-0584**: [DAR-OTP-0200-1540-R02](#), para. 90, “soldiers from the army and Janjaweed”, para. 92, “the soldiers”, para. 102 “the Policemen”; **P-0585**: T-100, p. 12, lines 16-25: “Janjaweed”; **P-0617**: [DAR-OTP-0202-1496-R02](#), para. 79: “the attackers (GoS and [Janjaweed])”; **P-0651**: T-034, p. 14, lines 13-25, p. 60, lines 1-6, “the Janjaweed”; **P-0671**: [DAR-OTP-0206-0105-R02](#), para. 41: “Although there were some Janjaweed that were standing near the prisoners, the majority were soldiers”; **P-0697**: [DAR-OTP-0209-0155-R03](#), paras. 51-54: “both soldiers and Janjaweed”; **P-0718**: [DAR-OTP-0209-2004-R02](#), paras. 53-54: “[T]he Janjaweed [...] Arab militias”; **P-0725**: [DAR-OTP-0210-0122-R02](#), para. 71: “the Janjaweed”; **P-0726**: [DAR-OTP-0210-0346-R03](#), para. 63, “the Janjaweed and Government Soldiers”; **P-0850**: [DAR-OTP-0216-0002-R04](#), paras. 58-59: “military vehicles and Janjaweed”; **P-0883**: T-071, p. 67, line 12-p. 68, line 22 (Conf); T-072, p. 7, lines 9-14 (Conf): “the soldiers”; **P-0905**: T-086, p. 56, lines 12-22 (Conf) “[...] soldiers and Janjaweed [...] PDF members”; **P-0907**: T-094, p. 29, lines 16-17: “the Janjaweed came on horsebacks and camelbacks. The government forces came on vehicles”; p. 50, line 5; **P-0931**: T-062, p. 51, lines 7-14, “Hassaballah, along with his men”; T-062, p. 49, lines 6-9, “Janjaweed”; **P-0935**: T-090, p. 83, line 6-p. 84, line 7: “the SAF and the Janjaweed”; **P-0955**: T-064, p. 8, lines 23-25: “there were soldiers [...] there were people from the army, people from the police”; **P-0973**: [DAR-OTP-0220-0736-R01](#), para. 49, “one of the military said to some Janjaweed”; **P-0980**: T-043, p. 77, lines 16-24, “militia members”; **P-0994**: T-084, p. 52, line 9-p. 53, line 4 “the Janjaweed” (Conf).

<sup>2274</sup> **P-0584**: [DAR-OTP-0200-1540-R02](#), para. 91, the Janjaweed wore “clothing different to the army”; **P-0651**: [DAR-OTP-0205-0015-R02](#), paras. 26, 43-44: described the JJW as wearing full and partial camouflage military uniform and some had turbans covering their heads and parts of their faces; **P-0671**: T-099, p. 17, line 20-p. 18, line 7; [DAR-OTP-0206-0105-R02](#), paras. 26-27, 36: recalled seeing soldiers wearing a full green camouflage military uniform, identified as belonging to the PDF; [DAR-OTP-0206-0105-R02](#), para. 40: soldiers were in full uniforms while the Janjaweed wore partial military uniforms and turbans; **P-0712**: [DAR-OTP-0209-1884-R04](#), para. 29: described some wearing green-coloured partial or full camouflage uniform, whilst others were wearing traditional *Jalabiya* or civilian clothes and turbans on their heads; **P-0718**: [DAR-OTP-0209-2004-R02](#), para. 58: the Janjaweed wore various types of police and military clothing mixed with traditional Arab dress and turbans with face scarves.; **P-0725**: [DAR-OTP-0210-0122-R02](#), para. 41: some JJW wore solid green color while others multiple colors in a camouflage pattern with beige as the main color; **P-0736**: [DAR-OTP-0210-0248-R02](#), para. 62: P-0736 saw five Janjaweed armed with Kalashnikovs wearing green-patterned camouflage military shirts and trousers with turbans on their heads; **P-0907**: T-094, p. 30, lines 8-15: there was “the asakir” or the military personnel, who were wearing their uniform, or khaki, and the Janjaweed wearing regular clothes and had the scarves wrapped around their heads; **P-0980**: [DAR-OTP-0221-0553-R03](#), para. 19: military men were wearing military uniforms – khaki - while the militia men were wearing a mix of civilian clothes - turban and caps - and military clothes.

may have carried on 5 March 2004. **P-0584** described *Ali Kushayb* wearing a *labsa* of a colour described as “*tea with milk*”.<sup>2275</sup> **P-0651** saw him wearing a green military beret with a green military uniform, carrying a 50-60 cm long ceremonial military baton and in a Land Cruiser with a red flag.<sup>2276</sup> **P-0671** identified *Ali Kushayb*’s uniform as similar to the PDF’s and as being the only person wearing a hat.<sup>2277</sup> **P-0697** saw *Ali Kushayb* wearing a camouflage outfit and sitting in the passenger seat of a Land Cruiser with a red stripe.<sup>2278</sup> **P-0907** testified that *Ali Kushayb* wore green camouflage, but it was not a uniform.<sup>2279</sup> On the other hand, **P-0726** stated that *Ali Kushayb* wore a plain green military uniform and had a stick in his hand.<sup>2280</sup> **P-0955** gave hearsay evidence from his mother that *Ali Kushayb* wore a plain long-sleeved green uniform with clean boots but nothing on his head.<sup>2281</sup> **P-0994** stated that *Ali Kushayb* was wearing either a shirt and trousers or a *labsa* – but could not recall the colour –, that his head was not covered, and he was holding a metal axe used as a sort of walking stick.<sup>2282</sup>

580. The insider witnesses do not provide better information to fill the substantial lacunas in the OTP’s case. **P-0883**, who was not present in Deleig [REDACTED]<sup>2283</sup> and specified that Maigari was present but that he fled during the executions to Garsila.<sup>2284</sup> No other witnesses can corroborate P-0883’s account, not even **P-0905**, [REDACTED]<sup>2285</sup> Muqqadam Idriss<sup>2286</sup> the first sergeant, *Ali Kushayb*, Abu Lahab, and Hassaballah.<sup>2287</sup> [REDACTED]<sup>2288</sup>

581. The Defence may further address this aspect in its oral arguments, if necessary.

#### *A - Search and Arrest Operation*

##### *(i) Those conducting the search and arrest operation in Deleig on 5 March 2004*

582. **P-0883** testified that *Ali Kushayb* did not participate in the Deleig arrests [REDACTED].<sup>2289</sup> This is corroborated by **P-0905**, [REDACTED].<sup>2290</sup>

<sup>2275</sup> [DAR-OTP-00000419](#), para. 31.

<sup>2276</sup> **P-0651**: [DAR-OTP-0205-0015-R02](#), paras. 26, 48; T-034, p. 11, line 24-p. 12, line 1.

<sup>2277</sup> **P-0671**: T-099, p. 19, lines 10-13; [DAR-D31-00000007](#), at 0002; [DAR-OTP-0206-0105-R02](#), paras. 28-29, 36, 43, 59; [DAR-OTP-0219-8157](#), at 8159.

<sup>2278</sup> **P-0697**: [DAR-OTP-0209-0155-R03](#), paras. 53, 55.

<sup>2279</sup> **P-0907**: T-096, p. 20, line 25-p. 21, line 11.

<sup>2280</sup> **P-0726**: [DAR-OTP-0210-0346-R03](#), para. 76.

<sup>2281</sup> **P-0955**: [DAR-OTP-0220-0620-R02](#), paras. 35, 38.

<sup>2282</sup> **P-0994**: [DAR-OTP-0222-0055-R01](#), para. 47.

<sup>2283</sup> **P-0883**: [REDACTED].

<sup>2284</sup> **P-0883**: T-074, p. 53, line 5-p. 55, line 22 (Conf); T-071, p. 75, line 15-p. 76, line 13 (Conf).

<sup>2285</sup> **P-0905**: [REDACTED]

<sup>2286</sup> Former witness **P-0885** who has been dropped by the OTP.

<sup>2287</sup> **P-0905**: T-086, p. 56, line 12-25 (Conf).

<sup>2288</sup> **P-0905**: [REDACTED]

<sup>2289</sup> **P-0883**: [REDACTED].

<sup>2290</sup> **P-0905**: [REDACTED]

583. According to **P-0883**, all operations in Deleig were under the command of Hamdi.<sup>2291</sup> Hamdi, Abd-Al-Mun'im and Musaddiq Hassan Mansur were in charge of the military operation to search for and arrest the suspects who were then detained at the police station.<sup>2292</sup> Hamdi went to Deleig along with “*the forces of Deleig and the police*”, surrounded the area and arrested some suspects, [REDACTED] who operated in that area and whom he was also commanding, to be investigated.<sup>2293</sup> According to P-0883, *Ali Kushayb* only arrived after the detainees were arrested and detained.<sup>2294</sup> On the other hand, **P-0584** testified that “Sadig Dirwa” was present, that he carried a rope in his hand, and described him as the JJW leader who “*conducted the arrest campaign in Deleig*”.<sup>2295</sup> In both cases, those involved in the search and arrest operation were under the authority of persons other than *Ali Kushayb*.

584. The OTP has also failed to prove that, on or about 5 March 2004, *Ali Kushayb* arrested Jenif, the precedent PDF coordinator of Garsila, in Deleig.<sup>2296</sup> Four witnesses who were supposed to testify about his arrest were dropped by the OTP.<sup>2297</sup> Only two witnesses testified having seen Jenif arriving on 5 March 2004 at the Deleig police station, but they give contradictory accounts. **P-0994**[REDACTED],<sup>2298</sup> while **P-0907**[REDACTED].<sup>2299</sup> **P-0643** gave hearsay evidence of having later learned [REDACTED] that he was arrested a day *before* the arrest of a large group of detainees on Friday 5 March 2004<sup>2300</sup> and held in a cell in the Deleig police station.<sup>2301</sup> **P-0905** testified that he saw Jenif on 5 March 2004 in the detention room in Deleig, but did not say anything about an arrest conducted by *Ali Kushayb*.

585. According to the OTP, *Umdah* Adam Kindiri was arrested in Deleig on or about 5 March 2004 and was detained, along with *Umdah* Jiddo Khamis, *Sheikh* Ismail Abdulaziz, *Umdah* Mohamed Suleiman, and Hassan Adam Musa, at the Deleig police station until about 7 March 2004.<sup>2302</sup> **P-0883** once again gave a contradictory account when he testified that *Umdah* Kindiri and other men were amongst the first group killed on 5 March.<sup>2303</sup> **P-0955**, [REDACTED], stated that *Ali Kushayb* was present during the arrest of his father in their house in Deleig

<sup>2291</sup> **P-0883**: T-074, p. 49, line 10-p. 50, line 6, p. 52, lines 13-16.

<sup>2292</sup> **P-0883**: T-071, p. 76, line 15-p. 78, line 24 (Conf); T-074, p. 49, line 17-p. 50, line 6.

<sup>2293</sup> **P-0883**: T-074, p. 49, line 17-p. 50, line 6; T-071, p. 76, line 15-p. 78, line 24 (Conf).

<sup>2294</sup> **P-0883**: T-071, p. 76, line 15-p. 78, line 24 (Conf).

<sup>2295</sup> **P-0584**: T-092, p. 38, lines 10-12.

<sup>2296</sup> [OTP Trial Brief](#), para. 425.

<sup>2297</sup> P-0714, P-0924, P-0987, P-1018; [OTP Trial Brief](#), para. 425, fn. 1453.

<sup>2298</sup> **P-0994**: [REDACTED].

<sup>2299</sup> **P-0907**: [REDACTED].

<sup>2300</sup> **P-0643**: T-056, p. 88, lines 10-14 (Conf).

<sup>2301</sup> **P-0643**: T-056, p. 88, lines 8-14 (Conf).

<sup>2302</sup> [OTP Trial Brief](#), para. 425.

<sup>2303</sup> **P-0883**: T-074, p. 53, line 5-p. 55, line 22 (Conf).

between 9 and 10 a.m. on that day, and ordered his men to tie his father and take him to the vehicle for the police station.<sup>2304</sup> However, P-0955's knowledge of the name *Ali Kushayb* only comes from two pieces of hearsay evidence[REDACTED]<sup>2305</sup> and [REDACTED] **P-0643**, who said to P-0955 that *Ali Kushayb* had a house in Garsila.<sup>2306</sup> Even if P-0955 saw the arrest [REDACTED] by soldiers led by someone wearing a military uniform and using a black stick, his hearsay evidence does not support beyond reasonable doubt that that man was named *Ali Kushayb*. P-0955 testified that he learned from various people that [REDACTED] was detained with *Umdah Jiddo Khamis* inside the Deleig police station.<sup>2307</sup> According to P-0955, this information came from **P-0980**[REDACTED].<sup>2308</sup> However, P-0980 testified[REDACTED].<sup>2309</sup> The Defence refers to its earlier discussion of P-0955's absence of credibility.<sup>2310</sup> P-0883, P-0955 and P-0980 thus provide different stories about the arrest and detention of *Umdah Adam Kindiri* and *Umdah Jiddo Khamis*, thus casting reasonable doubt on their respective account.

586. **P-0651** provided anonymous hearsay evidence according to which *Ali Kushayb*'s men were patrolling Deleig and arresting adult males.<sup>2311</sup> His hearsay evidence is still weakened by the rest of his evidence, according to which he nevertheless went out to the market and the mosque,<sup>2312</sup> despite the alleged risk and advice to stay home.

587. **P-0671** stated that *Ali Kushayb* arrested [REDACTED] in Deleig on 5 March 2004.<sup>2313</sup> P-0671 stated that two soldiers, wearing full green military uniform, picked up [REDACTED] by the legs and shoulders then carried them to the rear of a first vehicle and threw them in the back.<sup>2314</sup> However, P-0671's basis of knowledge of the name "*Ali Kushayb*" is vague as it comes from his recollection of hearing a soldier addressing a person outside of his house by that name.<sup>2315</sup> He explained that when he was at the doorstep of the house, he heard the soldier calling "*Your Honour Ali Kushayb*".<sup>2316</sup> However, he testified that when the alleged forces of *Ali Kushayb* were there, the witness was not close enough to identify them.<sup>2317</sup> This is casting reasonable doubt as to whether he could hear what they were saying. In any case, he just heard

<sup>2304</sup> **P-0955**: [REDACTED] 9; [OTP Trial Brief](#), para. 432.

<sup>2305</sup> **P-0955**: T-064, p. 10, lines 11-12; [DAR-OTP-0220-0620-R02](#), para. 38.

<sup>2306</sup> **P-0955**: [DAR-OTP-0220-0620-R02](#), para. 53.

<sup>2307</sup> **P-0955**: [DAR-OTP-0220-0620-R02](#), para. 47.

<sup>2308</sup> **P-0955**: [DAR-OTP-0220-0620-R02](#), para. 47.

<sup>2309</sup> **P-0980**: [REDACTED].

<sup>2310</sup> See discussion on **P-0955** in **PART III – Chapter 2 – Section 3** above.

<sup>2311</sup> **P-0651**: [DAR-OTP-0205-0015-R02](#), para. 41.

<sup>2312</sup> **P-0651**: [DAR-OTP-0205-0015-R02](#), paras. 41-43.

<sup>2313</sup> **P-0671**: T-099, p. 14, lines 2-4; [DAR-OTP-0206-0105-R02](#), paras. 30-31.

<sup>2314</sup> **P-0671**: [DAR-OTP-0206-0105-R02](#), paras. 26-27, 33, 36; T-099, p. 17, line 20-p. 18, line 1.

<sup>2315</sup> **P-0671**: T-099, p. 14, line 9-p. 16, line 25; [DAR-OTP-0206-0105-R02](#), paras. 32, 36-37.

<sup>2316</sup> **P-0671**: T-099, p. 14, line 9-p. 16, line 25; [DAR-OTP-0206-0105-R02](#), paras. 32, 36-37.

<sup>2317</sup> **P-0671**: T-098, p. 83, lines 15-25.

the name, but did not see to whom the soldier was talking and thus cannot testify that the so-called *Ali Kushayb*, whom he did not see, was Mr Abd-Al-Rahman.

588. The rest of the Prosecution evidence is vague on the alleged involvement of *Ali Kushayb* in the arrest operation in Deleig on 5 March 2004. Witnesses only mentioned JJW and/or soldiers searching and entering houses in Deleig to arrest people.<sup>2318</sup> **P-0973** mentions JJW coming to his shelter and arresting some men.<sup>2319</sup> **P-0718** testified that JJW arrested him in[REDACTED].<sup>2320</sup> However, P-0718 subsequently testified that [REDACTED] did not exist in 2004 and that he was arrested in the street in Deleig near the school.<sup>2321</sup> **P-0736** also stated that the focus of the JJW during the house searches was to find out where Sindu villagers could be found.<sup>2322</sup> P-0736, who was in the house of[REDACTED], saw five JJW armed with Kalashnikovs entering the house, who were looking for firearms in the house.<sup>2323</sup> P-0736 clarified that the so-called JJW could as well be PDF members, as no one could distinguish between the two any longer.<sup>2324</sup>

589. **P-0935** testified that people were arrested in and from the outskirts of Deleig[REDACTED].<sup>2325</sup> According to **P-0905**[REDACTED].<sup>2326</sup>

*(ii) Verbal abuse during the arrests*

590. While some OTP witnesses mentioned the use of derogatory terms during the arrests in Deleig, their accounts remain isolated. **P-0850**, who was hiding in [REDACTED] home in Deleig during the arrests, heard someone, without being able to identify whom, using words similar to “*kill the slaves*” and “*fuck the Fur*”.<sup>2327</sup> During his testimony, P-0850 said that he did not mention *Ali Kushayb* saying these words, but “*folks with him*”.<sup>2328</sup> **P-0718** also testified that he had been called by JJW *abid* and *himar*, meaning slave and donkey, during his transportation after his arrest.<sup>2329</sup> **P-0584** stated that on Friday 5 March 2004, Deleig started to be surrounded by the Army and JJW and all the men who came in Deleig from outside were arrested.<sup>2330</sup> He

<sup>2318</sup> **P-0907**: T-094, p. 30, line 8-p. 31, line 17; T-096, p. 15, lines 14-18; **P-0955**: [DAR-OTP-0220-0620-R02](#), para. 33; **P-0726**: [DAR-OTP-0210-0346-R04](#), paras. 63-64; T-053, p. 16, lines 8-25; **P-0980**: [DAR-OTP-0221-0553-R03](#), paras. 19-21; T-044, p. 27, lines 1-8.

<sup>2319</sup> **P-0973**: [DAR-OTP-0220-0736-R01](#), para. 26.

<sup>2320</sup> **P-0718**: [DAR-OTP-0209-2004-R02](#), paras. 57-59.

<sup>2321</sup> **P-0718**: T-049, p. 61, line 19-p. 63, line 20.

<sup>2322</sup> **P-0736**: T-035, p. 75, line 1-p. 76, line 3.

<sup>2323</sup> **P-0736**: [DAR-OTP-0210-0248-R02](#), paras. 62, 65.

<sup>2324</sup> **P-0736**: [DAR-OTP-0210-0248-R02](#), para. 82.

<sup>2325</sup> **P-0935**: T-090, p. 46, lines 14-24.

<sup>2326</sup> **P-0905**: [REDACTED].

<sup>2327</sup> **P-0850**: [DAR-OTP-0216-0002-R04](#), paras. 65, 67.

<sup>2328</sup> **P-0850**: T-044, p. 64, line 17-p. 65, line 1.

<sup>2329</sup> **P-0718**: [DAR-OTP-0209-2004-R02](#), para. 60.

<sup>2330</sup> **P-0584**: [DAR-OTP-0200-1540-R02](#), para. 90.

stated having been called “*Torra Bora*” because the soldiers saw injuries to his leg.<sup>2331</sup> The various derogatory terms allegedly used during the arrests vary between these three witnesses. None of their account corroborate each other. The Defence refers to its earlier discussion on the use of such terms, their meaning and absence of inference to be drawn therefrom.<sup>2332</sup>

*B - Detention Near or Inside Deleig Police Station*

591. Many OTP witnesses on the use of derogatory terms and mistreatments at the Deleig police station on 5 March 2004 were dropped.<sup>2333</sup> **P-0994** stated that [REDACTED] at the Police Station just after 7 a.m. and saw *Ali Kushayb* and the JJW immediately arresting people, walking them to the police station and beating them on the way.<sup>2334</sup> This testimony is highly unreliable as it is directly contradicted by **P-0883** and **P-0905**, who do not place *Ali Kushayb* in Deleig during the search and arrest operation,<sup>2335</sup> and testified that he arrived in Deleig before around 1 p.m..<sup>2336</sup> **P-0907** testified that there was around 600 to 700 men in the square in front of the police station.<sup>2337</sup> He added that [REDACTED] on the vehicle, between 400-500 detainees were left behind.<sup>2338</sup> This is contradicted by **P-0905**, **P-0994**, **P-0671** and **P-0980** who gave significantly lower figures.<sup>2339</sup> **P-0994**’s account also contradicts **P-0980**’s. **P-0980** testified that before being told to lie down on the ground, the detainees were made to stand for two hours<sup>2340</sup> and that the person who gave the order for the detainees to lie down was *Ali Kushayb*.<sup>2341</sup> **P-0994** testified that, upon arrival at the police station, the detainees were immediately told to lie down and not allowed to stand.<sup>2342</sup> **P-0980** first testified that he knew that all detainees were Fur because he knew a lot of them, but not every single one of the detainees.<sup>2343</sup> Even after having been challenged on this point during cross-examination, **P-**

<sup>2331</sup> **P-0584**: [DAR-OTP-0200-1540-R02](#), para. 92.

<sup>2332</sup> See **PART V – Chapter 2 – Section 2 – IV – B** above.

<sup>2333</sup> See ICC-02/05-01/20-685-Conf-Anx2. **P-0027** [REDACTED], **P-0060** [REDACTED], **P-0092** [REDACTED], **P-0106**, **P-0591**, **P-0714**, **P-0879**, **P-0924**[REDACTED], **P-0987** [REDACTED]. [OTP Trial Brief](#), paras. 435-440.

<sup>2334</sup> **P-0994**: [DAR-OTP-0222-0055-R01](#), para. 36.

<sup>2335</sup> **P-0883**: T-071, p. 77, line 15-p. 78, line 24 (Conf).

<sup>2336</sup> **P-0905**: T-086, p. 43, lines 1-8; *Contra* [OTP Trial Brief](#), para. 436.

<sup>2337</sup> **P-0907**: T-094, p. 35, lines 2-3; T-096, p. 18, line 18.

<sup>2338</sup> **P-0907**: T-096, p. 38, lines 1-7 (Conf).

<sup>2339</sup> **P-0905**: T-086, p. 50, line 14 (Conf); p. 52, lines 1-4 (Conf); **P-0994**: [DAR-OTP-0222-0055-R01](#), para. 37: the Janjaweed rounded up and brought to the police station around 200-300 displaced people; **P-0671**: [DAR-OTP-0206-0105-R02](#), paras. 40, 42: he saw a large number of prisoners, near one hundred in total; [DAR-OTP-0219-1696](#), at 1698; **P-0980**: [DAR-OTP-0221-0553-R03](#), para. 21: there were approximately 130 to 140 civilians gathered in front of the police station.

<sup>2340</sup> **P-0980**: T-044, p. 52, lines 5-14, p. 54, lines 16-20.

<sup>2341</sup> **P-0980**: T-044, p. 50, line 18-p. 51, line 7.

<sup>2342</sup> **P-0994**: T-084, p. 56, lines 1-9 (Conf); [DAR-OTP-0222-0055-R01](#), para. 37.

<sup>2343</sup> **P-0980**: T-044, p. 28, line 17-p. 29, line 1.

0980 stated that he knew all of them, as well as their origin, and confirmed they were Fur.<sup>2344</sup> **P-0994** on the other hand stated that the detained persons were only males, mainly young, and predominantly Fur but also from the Zaghawa and Masalit tribes.<sup>2345</sup>

*(i) Alleged Direct Murders inside the Deleig Police Courtyard by Ali Kushayb*

592. Mr Abd-Al-Rahman is charged with the murder of three Fur male detainees, namely Jenif, *Sheikh* Motor and Musa Youssef.<sup>2346</sup> However, evidence has only been adduced for two murders. The witnesses on the killing of the third individual – Musa Youssef – have either been dropped, or the relevant portions of their testimonies were excluded from evidence.<sup>2347</sup> There is no evidence before the TC supporting the allegation that *Ali Kushayb* murdered Musa Youssef.<sup>2348</sup> **P-0980** mentioned Adam Moussa Youssef, but stated that he was allegedly killed at a different time.<sup>2349</sup>

*Adam Abd-Al-Rahman, nickname Jenif*

593. The OTP charges Mr Abd-Al-Rahman with the direct perpetration of murder on Jenif.<sup>2350</sup> **P-0905**[REDACTED], he saw that Jenif was the only one there.<sup>2351</sup> **P-0905** testified that he heard Hassaballah saying to *Ali Kushayb* that Jenif had taken the weapons and ammunition and given them to the *Tora Bora* in Arawala.<sup>2352</sup> He then heard *Ali Kushayb* accusing Jenif of having stolen weapons.<sup>2353</sup> **P-0905** testified that he heard *Ali Kushayb* ordering an unnamed First Sergeant to take Jenif out of the detention room, and saw – from two meters away – *Ali Kushayb* hitting Jenif three times on the head with his axe.<sup>2354</sup> **P-0905** further testified that he heard *Ali Kushayb* ordering the First Sergeant to “lift [Jenif] and throw him outside” where he died 10 minutes later.<sup>2355</sup> The reasons for disregarding **P-0905**’s evidence have already been stated.<sup>2356</sup>

594. **P-0907**<sup>2357</sup> and **P-0994**<sup>2358</sup> testified that *Ali Kushayb* allegedly hit Jenif outside the police station, not inside. **P-0931** testified that Jenif was killed in Deleig, that he did not know

<sup>2344</sup> **P-0980**: T-044, p. 29, lines 2-6.

<sup>2345</sup> **P-0994**: [DAR-OTP-0222-0055-R01](#), para. 40.

<sup>2346</sup> [Abd-Al-Rahman Confirmation Decision](#), p. 64, para. 109, p. 67, para. 126.

<sup>2347</sup> P-0973, P-0924. See [OTP Trial Brief](#), para. 446.

<sup>2348</sup> [OTP Trial Brief](#), paras. 446-447.

<sup>2349</sup> **P-0980**: [DAR-OTP-0221-0553-R03](#), para. 24.

<sup>2350</sup> [OTP Trial Brief](#), para. 445.

<sup>2351</sup> **P-0905**: T-086, p. 46, lines 3-10 (Conf).

<sup>2352</sup> **P-0905**: T-086, p. 46, lines 2-19 (Conf).

<sup>2353</sup> **P-0905**: T-086, p. 46, line 7-p. 47, line 14 (Conf).

<sup>2354</sup> **P-0905**: T-086, p. 47, line 15-p. 48, line 14 (Conf).

<sup>2355</sup> **P-0905**: T-086, p. 47 (Conf), lines 23-25, p. 49, lines 1-6 (Conf).

<sup>2356</sup> See discussion on **P-0905** in **PART III – Chapter 2 – I** above.

<sup>2357</sup> **P-0907**: T-094, p. 34, lines 20-23, p. 35 line 19-p. 37, line 2; T-096, p. 25, line 1-p. 26, line 23.

<sup>2358</sup> **P-0994**: T-084, p. 61, line 17-p. 63, line 13 (Conf); [DAR-OTP-0222-0055-R01](#), para. 48; [DAR-OTP-0219-4826-R01](#), at 4828.

how but that “[p]robably Hassaballah, along with his men, killed him”.<sup>2359</sup> P-0931 also added that it is Hassaballah who took Jenif’s role after his death.<sup>2360</sup> P-0736 provided anonymous and confused hearsay evidence about Jenif’s death: he mentioned a rumor that *Ali Kushayb* would have beaten Jenif with his gun and killed him.<sup>2361</sup> He added that, after the disappearance of Jenif around 2003, *Ali Kushayb* started controlling the PDF.<sup>2362</sup> Nonetheless, the Prosecution never suggested that *Ali Kushayb* was ever a member, let alone a leading member, of the PDF. Furthermore, evidence has been adduced that Hassaballah was present at the Deleig police station and was the one who replaced Jenif as PDF coordinator.<sup>2363</sup> P-0736 is not only echoing a mere rumour, his evidence is inconsistent with the rest of the evidence and the Prosecution’s case.

595. P-0643 testified about the alleged killing of Jenif by *Ali Kushayb*.<sup>2364</sup> He then had to admit that he actually was not there, but heard about the incident from various, all anonymous, sources.<sup>2365</sup> P-0643 assumed that the perpetrator was *Ali Kushayb* only based on the fact that he knew *Ali Kushayb* owned an axe.<sup>2366</sup> He belatedly tried to strengthen his evidence by mentioning the children of Jenif as the alleged sources of his information<sup>2367</sup> and was unable to explain why in his 2017 interviews and 2021 statement, he never mentioned the involvement of *Ali Kushayb* in Jenif’s death.<sup>2368</sup> Yet another narrative of Jenif’s death is provided by P-0883, according to whom Jenif was executed together with *Umdah Kindiri*, *Umdah Jiddo Khamis*, *Umdah Mohamed Suleiman Abdulshafa*, *Sheikh Dikobi* and *Hassan Adam Musa*.<sup>2369</sup> Other witnesses were expected to testify about Jenif’s death but were ultimately dropped by the Prosecution.<sup>2370</sup>

*Sheikh Adam Adam Abd-Al-Rahman nicknamed Motor*

<sup>2359</sup> P-0931: T-062, p. 51, lines 7-14.

<sup>2360</sup> P-0931: T-062, p. 51, lines 15-16.

<sup>2361</sup> P-0736: [DAR-OTP-0210-0248-R02](#), para. 83.

<sup>2362</sup> P-0736: [DAR-OTP-0210-0248-R02](#), para. 83.

<sup>2363</sup> P-0994: [DAR-OTP-0222-0055-R01](#), paras. 69, 71; P-0643: T-056, p. 88, lines 17-22 (Conf); T-058, p. 35, lines 5-25 (Conf).

<sup>2364</sup> P-0643: T-056, p. 88, lines 8-14 (Conf).

<sup>2365</sup> P-0643: T-058, p. 22, line 20-p. 23, line 10 (Conf).

<sup>2366</sup> P-0643: T-058, p. 22, line 20-p. 23, line 15 (Conf).

<sup>2367</sup> P-0643: T-058, p. 22, line 20-p. 25, line 6 (Conf).

<sup>2368</sup> P-0643: T-058, p. 22, line 20-p. 23, line 10 (Conf).

<sup>2369</sup> P-0883: T-074, p. 53, line 5-p. 55, line 22 (Conf).

<sup>2370</sup> [OTP Trial Brief](#), para. 445, fns. 1539-1541: P-0879: [DAR-OTP-0217-0033-R02](#), paras. 76, 78 (Jenif’s body was thrown among others who were lying on the ground then loaded onto a vehicle); P-0027: [DAR-OTP-0216-0738-R02](#), para. 16 (Jenif’s dead body was loaded onto a vehicle); P-0924: [DAR-OTP-0218-0455-R02](#), para. 76 (Jenif’s body was left lying in the yard until early the next morning); P-0895: [DAR-OTP-0215-7164-R02](#), para. 63: Jenif’s dead body was left lying on the ground).

596. **P-0924** has been dropped by the Prosecution. **P-0584** and **P-0907** testified about the alleged killing of *Sheikh Motor* by *Ali Kushayb*. However, **P-0584** had no basis of knowledge to identify *Ali Kushayb*. He had never seen him and his name was allegedly provided to him by another person whose basis of knowledge is not specified.<sup>2371</sup> Moreover, **P-0584** stated that *Sheikh Motor* was hit when they were lying on the floor, but testified in Court that they were already loaded onto the vehicles when *Sheikh Motor* was hit.<sup>2372</sup> The inconsistencies in **P-0584**'s evidence make it unreliable, thus leaving the Trial Chamber with **P-0907**'s evidence as the only remaining account of *Sheikh Motor*'s death. The evidence of **P-0907** cannot be relied upon either. He testified that [REDACTED]<sup>2373</sup> [REDACTED].<sup>2374</sup> **P-0907** provided no explanation [REDACTED]. His evidence of what happened at Deleig police station is thus not credible and should also be disregarded, leaving the Trial Chamber with no reliable evidence of the circumstances of the death of *Sheikh Motor*.

597. All witnesses mentioning the use of an axe by *Ali Kushayb*, i.e. **P-0584**, **P-0643**, **P-0905**, **P-0907** and **P-0994** are further contradicted by the witnesses of *Ali Kushayb*'s alleged beating of prisoners, who mentioned that he used a stick.

(ii) *Alleged Beatings of Detainees by Ali Kushayb*

598. **P-0671** testified that he heard *Ali Kushayb* ordering to beat prisoners and saw him walking amongst their rows and striking prisoners with his black stick or kicking them.<sup>2375</sup> Nonetheless, **P-0671** had no solid basis of knowledge of *Ali Kushayb*, whom he had allegedly seen only three or four times at the Deleig market.<sup>2376</sup> According to his evidence, he saw and heard the man he identifies as *Ali Kushayb* from the distance of half a football pitch.<sup>2377</sup> With such a poor basis of identification, **P-0671**'s evidence is unreliable. **P-0718** has a similarly poor basis of identification. He testified that *Ali Kushayb* allegedly beat prisoners,<sup>2378</sup> however, because of his fear during his detention at the Deleig police station, he “*did not pay attention to know if this was Ali Kushayb or not*”.<sup>2379</sup> **P-0718** did not know *Ali Kushayb* at that time and his purported recognition of *Ali Kushayb* is *post-facto*.<sup>2380</sup>

<sup>2371</sup> **P-0584**: [DAR-OTP-0200-1540-R02](#), paras. 108-109.

<sup>2372</sup> **P-0584**: T-092, p. 62, line 23-p. 63, line 14 (Conf).

<sup>2373</sup> **P-0907**: T-095, p. 54, line 6-p. 55, line 11.

<sup>2374</sup> **P-0907**: T-095, p. 56, line 1-p. 57, line 8.

<sup>2375</sup> **P-0671**: [DAR-OTP-0206-0105-R02](#), para. 44.

<sup>2376</sup> **P-0671**: [DAR-OTP-0206-0105-R02](#), para. 59; T-099, p. 19, lines 18-22.

<sup>2377</sup> **P-0671**: [DAR-OTP-0206-0105-R02](#), para. 41.

<sup>2378</sup> **P-0718**: T-049, p. 16, lines 5-7; p. 73, lines 5-8.

<sup>2379</sup> **P-0718**: T-049, p. 26, lines 12-13.

<sup>2380</sup> **P-0718**: [DAR-OTP-0209-2004-R02](#), para. 78; T-049, p. 26, lines 3-13, p. 68, lines 17-19.

599. **P-0907** testified that, while being detained and laying on the ground, he saw *Ali Kushayb* stepping on the detainees' heads, including his own, with his shoes for 15 minutes.<sup>2381</sup> **P-0905** testified that when he arrived in Deleig he saw the prisoners lying face down surrounded by JJW.<sup>2382</sup> **P-0905** testified that he saw *Ali Kushayb* walking around them and talking to them,<sup>2383</sup> but did not mention him beating detainees, other than Jenif. As previously stated, **P-0905** and **P-0907**'s evidence is unreliable.

600. **P-0980** contradicted himself during his appearance by saying first that he saw *Ali Kushayb* hitting a prisoner with a rifle's buttstock,<sup>2384</sup> and then varying his version of the story to say that he used a stick.<sup>2385</sup> His evidence is thus unreliable.

601. The Defence notes that the witnesses who testified about the mistreatment of prisoners by *Ali Kushayb* mentioned the use of a stick<sup>2386</sup> or a small staff.<sup>2387</sup> None, aside from **P-0907** who alternatively mentions an axe and a stick,<sup>2388</sup> mentioned the use of an axe. This is yet another discrepancy with the evidence of **P-0905**, **P-0907**, **P-0994**, **P-0643** and **P-0584** about the murder of Jenif and *Sheikh Motor*. Not a single witness reconciled the two version by explaining that *Ali Kushayb* was equipped with both an axe and a stick.

## ***II - Transfer of Detainees and Executions***

### ***A - Loading of Detainees***

602. Few witnesses testified that *Ali Kushayb* issued orders at the Deleig police station to load the detainees onto vehicles. Amongst them are witnesses who had no prior knowledge of *Ali Kushayb* before the Deleig events. **P-0584**, who had never seen *Ali Kushayb* before,<sup>2389</sup> testified that while he was lying on the ground,<sup>2390</sup> he heard two persons dressed in civilian clothes, one of them allegedly being *Ali Kushayb* – who was behind him –, giving orders to the soldiers to take the detainees away and put them into trucks.<sup>2391</sup> During cross-examination, **P-**

<sup>2381</sup> **P-0718**: T-094, p.34, line 8-p. 35, line 25; T-095, p. 52, lines 5-9; T-096, p. 17, lines 4-17, p. 22, lines 4-24, p. 31, lines 16-25, p. 36, lines 12-15.

<sup>2382</sup> **P-0905**: T-086, p. 44, line 11-p. 45, line 13 (Conf).

<sup>2383</sup> **P-0905**: T-086, p. 45, lines 4-24 (Conf).

<sup>2384</sup> **P-0980**: [DAR-OTP-0221-0553-R03](#), para. 24.

<sup>2385</sup> **P-0980**: T-043, p. 88, line 17-p. 89, line 11.

<sup>2386</sup> **P-0671**: [DAR-OTP-0206-0105-R02](#), para. 44; **P-0907**: T-095, p. 35, lines 13-14; **P-0980**: T-043, p. 88, line 17-p. 89, line 11.

<sup>2387</sup> **P-0718**: T-049, p. 16, lines 5-7; p. 73, lines 5-8.

<sup>2388</sup> **P-0907**: T-094, p. 36, line 23-p. 37, line 12; p. 38, line 25-p. 39, line 16; T-095, p. 35, lines 13-14.

<sup>2389</sup> **P-0584**: [DAR-OTP-0200-1540-R02](#), paras. 109, 111.

<sup>2390</sup> **P-0584**: T-092, p. 45, line 4-p. 46, line 13.

<sup>2391</sup> **P-0584**: T-092, p. 16, line 20-p. 17, line 9; p. 67, line 22-p. 68, line 4 (Conf); [DAR-OTP-0200-1540-R02](#), para. 108.

0584 contradicted himself by asserting that only one person, *Ali Kushayb*, gave the order for the detainees to be taken to the execution site.<sup>2392</sup>

603. **P-0980** did not know *Ali Kushayb* but identified him because “*his men called on him with his name*”.<sup>2393</sup> However, P-0980 also testified being forced to lay face down<sup>2394</sup> and was forbidden to look around at the risk of being beaten.<sup>2395</sup> Thus, there is no way he could see the person referred to as *Ali Kushayb*. Also, he testified that he saw *Ali Kushayb* before 7 a.m.,<sup>2396</sup> which contradicts **P-0905** according to whom *Ali Kushayb* only arrived at Deleig after 1 p.m.<sup>2397</sup> In addition, P-0980 claimed to be the only one left in the square lying on the ground after all of the detainees were taken away in Land Cruisers from the Deleig police station.<sup>2398</sup> This account is directly contradicted by P-0905’s testimony.<sup>2399</sup>

604. **P-0726**’s identification of *Ali Kushayb* is exclusively relying on what **P-0907** told him.<sup>2400</sup> It has no proper evidentiary value. The reasons for disregarding P-0907’s evidence of the events in Deleig have been addressed above.

605. The Defence has already indicated why **P-0883**, **P-0905** and **P-0994** should not be relied upon. According to **P-0643**, Hamdi arrived in Deleig with *Ali Kushayb*. As the senior officer and PDF Commander, Hamdi became in charge of the police station.<sup>2401</sup> Under Hamdi’s authority, the prisoners were taken out from the cells and made to lay face down in the open area, prior to being loaded on vehicles.<sup>2402</sup> **P-0907** testified that *Ali Kushayb* ordered his men to take the detainees to Garsila after they were loaded into the vehicles.<sup>2403</sup> P-0907 also testified that at the execution site, after the killers had shot all of the prisoners, they mentioned the time and that they should spend some time before returning because “*they received instructions to drive for two hours*”.<sup>2404</sup> One can infer that the perpetrators of the executions thus did not follow the instructions they were allegedly given i.e. to transport the detainees to Garsila. Moreover, P-0907’s testimony shows that the direct perpetrators seem to have tried to conceal this fact. By

<sup>2392</sup> **P-0584**: T-092, p. 67, line 22-p. 68, line 4 (Conf); [DAR-OTP-0200-1540-R02](#), para. 108.

<sup>2393</sup> **P-0980**: [DAR-OTP-0221-0553-R03](#), para. 24; T-044, p. 55, lines 11-17.

<sup>2394</sup> **P-0980**: T-044, p. 29, line 12-p. 30, line 18.

<sup>2395</sup> **P-0980**: T-044, p. 30, lines 3-18.

<sup>2396</sup> **P-0980**: T-044, p. 51, lines 5-10.

<sup>2397</sup> **P-0905**: T-086, p. 39, line 17-p. 40, line 4 (Conf); p. 43, lines 1-8 (Conf).

<sup>2398</sup> **P-0980**: [DAR-OTP-0221-0553-R03](#), para. 29.

<sup>2399</sup> **P-0905**: T-086, p. 52, lines 1-4 (Conf).

<sup>2400</sup> **P-0726**: [DAR-OTP-0210-0346-R04](#), para. 71.

<sup>2401</sup> **P-0643**: T-056, p. 92, line 3-p. 93, line 6 (Conf).

<sup>2402</sup> **P-0643**: T-056, p. 92, line 1-p. 93, line 11 (Conf).

<sup>2403</sup> **P-0907**: T-094, p. 37, lines 2-4, p. 40, line 16-p. 41, line 24; T-096, p. 36, lines 12-18; p. 47, lines 6-9.

<sup>2404</sup> **P-0907**: T-094, p. 51, line 21-p. 52, line 2 (Conf).

extension, a reasonable inference from the evidence is that the perpetrators wished to conceal the fact that they carried out the executions on their own initiative and off their own bat.

606. It is therefore submitted that the OTP has not demonstrated beyond reasonable doubt that *Ali Kushayb* gave the order to load the detainees onto the vehicles. If, however, the TC concludes that *Ali Kushayb* did give orders, it cannot be excluded that the order was for the detainees to be taken to Garsila, not to be taken to one or more execution sites to be killed. No evidence of any probative value has been adduced about *Ali Kushayb* giving an order at the Deleig police station that the detainees were to be executed. Moreover, **P-0643**'s evidence asserting that Hamdi was in charge<sup>2405</sup> logically suggests that he, not *Ali Kushayb*, ordered the loading of the detainees onto the vehicles. Hamdi was the officer in charge. Unlike Mr Abd-Al-Rahman /*Ali Kushayb*, Hamdi had a clear authority *de jure* and *de facto* on the events. If an order was given to take the prisoners away to the execution sites, the only reasonable conclusion is that it came from Hamdi.

#### *B - Departure to the Execution Sites*

607. Regarding 5 March 2004, the evidence is related to the transport of detainees from the Deleig police station to sites to the north-west and south of Deleig. The OTP did not call any evidence to support that detainees were taken to the other sites mentioned in its Trial Brief.<sup>2406</sup> The Prosecution did not establish a consistent narrative regarding the various groups of detainees transported from the Deleig police station on 5 March 2004. Either there was only one group of detainees taken to one execution site or there were in fact between two and four different groups of detainees transported from Deleig police station to multiple sites; it is unclear.<sup>2407</sup> Several witnesses who were detained outside Deleig police station reported having been transported to – or having seen others being transported to – locations outside of Deleig on 5 March 2004. However, the witnesses' accounts differ dramatically in terms of the number of groups of detainees that were transported to different execution sites, how many times this process was repeated, and the presence or otherwise the absence of *Ali Kushayb* at the execution sites.

<sup>2405</sup> **P-0643**: T-056, p. 92, line 3-p. 93, line 6 (Conf).

<sup>2406</sup> See [OTP Trial Brief](#), para. 464. P-0092, who speaks about the executions near Douro – to the West of Deleig – was dropped by the OTP. See also paras. 465-466. P-0060 and P-0924, both of whom speak about the execution site near Andi – to the East of Deleig – have also been dropped.

<sup>2407</sup> For Fere and Koska/Ordo See **P-0994**: [DAR-OTP-0222-0055-R01](#), para. 56; For Koska See **P-0907**: T-094, p.46 line 2-p. 47, line 12 (Conf); For Northwest and South of Deleig See **P-0651**: [DAR-OTP-0205-0015-R02](#), para. 51; In the direction of Arawala See **P-0584**: [DAR-OTP-0200-1540-R02](#), para. 112.

608. According to **P-0905**, all the Deleig detainees in the courtyard were transported all at once in one single trip of 13 vehicles and executed at a single site to the north-west of Deleig.<sup>2408</sup> **P-0905** [REDACTED]<sup>2409</sup> but the reasons for disregarding his evidence have been stated above. **P-0905**'s evidence is contradicted by the evidence of various other OTP witnesses, all of whom stated that the detainees were loaded onto numerous vehicles and transported several times to several execution sites, as reflected in **Annex V**.

609. The analysis of the evidence points to so many discrepancies between the various versions of the witnesses on the number of: detainees loaded onto vehicles; transportation events; vehicles per transportation events and locations. This leaves the TC with no means of determining which one, if any, corresponds to the truth. No conclusion can thus be drawn beyond reasonable doubt.

610. **P-0651** stated that he observed what was happening at the police station from the mosque as it is slightly elevated in comparison to its surroundings.<sup>2410</sup> The mosque was likely the Ansar-Al Sunna mosque,<sup>2411</sup> some 200 meters away from the police station.<sup>2412</sup> Throughout the entire time the detainees were loaded onto the vehicles, *Ali Kushayb*'s vehicle remained outside of Deleig police station and it only left the police station once all the detainees had been taken away.<sup>2413</sup> At no point during **P-0651**'s narrative of events does he state that *Ali Kushayb* accompanied any of the convoys to the execution sites.<sup>2414</sup>

*(i) Witnesses who Place Mr Abd-Al-Rahman/Ali Kushayb at a Specific Execution Site: Northwest of Deleig*

611. As a preliminary matter, the Defence submits that the PTC identified Mr Abd-Al Rahman being present at only one execution site Northwest of Deleig and described it in the facts and circumstances of the crimes related to Deleig,<sup>2415</sup> while stating in the disposition of the Confirmation Decision that he was present in other locations too without giving further details on these locations and circumstances of his alleged presence.<sup>2416</sup> The Defence contends that this contradiction prejudices Mr Abd-Al-Rahman. The TC should decide in favor of the accused person and consider that his presence was identified by the PTC at only one execution

<sup>2408</sup> **P-0905**: T-086, p. 50, line 12-p. 53, line 24 (Conf); See also: [DAR-OTP-00000261-R01](#); [DAR-OTP-00000262-R01](#).

<sup>2409</sup> **P-0905**: [REDACTED]

<sup>2410</sup> **P-0651**: T-034, p. 68, line 22-p. 69, line 2; [DAR-OTP-0205-0015-R02](#), para. 46.

<sup>2411</sup> See **P-0651**: [DAR-OTP-0205-0015-R02](#), para. 43; See also [DAR-OTP-0220-4730](#).

<sup>2412</sup> **P-0651**: T-034, p. 68, line 24-p. 69, line 1; [DAR-OTP-0205-0015-R02](#), para. 46.

<sup>2413</sup> **P-0651**: [DAR-OTP-0205-0015-R02](#), para. 53.

<sup>2414</sup> See generally **P-0651**: [DAR-OTP-0205-0015-R02](#).

<sup>2415</sup> [Abd-Al-Rahman Confirmation Decision](#), para. 110.

<sup>2416</sup> [Abd-Al-Rahman Confirmation Decision](#), para. 124, i).

site. Any other allegation on his presence to other execution sites should be disregarded by the TC. The Defence has however analysed below the evidence on his alleged presence in other execution sites in the event the TC concludes otherwise.

612. Out of the 29 witnesses called by the Prosecution in relation to Deleig, only two – **P-0905** and **P-0883** – [REDACTED] both not credible witnesses, [REDACTED]. P-0905 [REDACTED]. As discussed above,<sup>2417</sup> the probative value of the second-hand – and possibly even third-hand – evidence from P-0883 is nugatory as it is based on a so-called intelligence report whose very existence is doubtful, and on information from military officer Maigari who only observed a part of the events because he ran away.

613. **P-0905**, testified [REDACTED] *Ali Kushayb*, Muqqadam Idriss, Abu Lahab, Hassaballah, SAF soldiers, and some JJW.<sup>2418</sup>

614. **P-0883** has limited indirect knowledge of the executions at *Khor Soja* at best.<sup>2419</sup> His evidence has practically no probative value as it was based on hearsay[REDACTED].<sup>2420</sup> [REDACTED] The Defence refers to its submissions about the lack of reliability and probative value of the alleged Deleig Intelligence Report,<sup>2421</sup> but it is worth reiterating here that the Intelligence Report has never been produced and the Parties have never been able to scrutinize its actual contents. P-0883's evidence seems to be that the *Umdahs* were executed together with the large group of detainees on 5 March 2004.<sup>2422</sup> However, according to other Prosecution witnesses<sup>2423</sup> and to the Prosecution's own case, the *Umdahs* were said to have been executed on 6 or 7 March 2004,<sup>2424</sup> their bodies later being found near Fere.<sup>2425</sup>

615. No probative value should be attached to the evidence of **P-0905** and **P-0883** in relation to the Deleig executions.

*(ii) Witnesses who Place Ali Kushayb at an Unspecified Execution Site*

616. The only remaining evidence which could possibly link *Ali Kushayb* to the execution sites comes from **P-0119** and **P-0994**. But their evidence is vague and unconvincing as both

<sup>2417</sup> See discussion on **P0883** in **PART III – Chapter 2 – Section 1** and **PART V – Chapter 3 – Section 1 – VI** above.

<sup>2418</sup> **P-0905**: T-086, p. 56, lines 12-22 (Conf).

<sup>2419</sup> **P-0883**: T-071, p. 68, lines 1-25 (Conf); T-074, p. 53, line 5-p. 55, line 21 (Conf); p. 75, line 9-p. 76, line 8 (Conf).

<sup>2420</sup> **P-0883**: [REDACTED].

<sup>2421</sup> See **PART V – Chapter 3 – Section 1 – VI** above.

<sup>2422</sup> **P-0883**: [REDACTED].

<sup>2423</sup> See e.g. **P-0980**: [DAR-OTP-0221-0553-R03](#), para. 32: “On Saturday 6 March [...] I saw the same Umdas [...] taken away towards South of Deleig”; **P-0725**: [DAR-OTP-0210-0122-R02](#), para. 95: “The Umdas were held until Sunday evening”.

<sup>2424</sup> [OTP Trial Brief](#), paras. 473-474.

<sup>2425</sup> [OTP Trial Brief](#), para. 487.

failed to give any detail about which execution site or sites at which *Ali Kushayb* was present. P-0119 stated that he met five alleged survivors – none of whom are witnesses called by the Prosecution – of the Deleig killings,<sup>2426</sup> who told him that *Ali Kushayb* and Hamdi “*pulled the triggers at the executions*”. Only two of these alleged survivors are even named by the witness.<sup>2427</sup> Their individual accounts have never been tested. P-0119’s hearsay evidence should be accorded no weight by the Chamber. The Defence simply notes that, like in every other instance in this case, *Ali Kushayb* is never mentioned alone, but is always accompanied, one way or the other, by one or more persons with actual, clearly established authority, who would have been in a perfect position to commit what *Ali Kushayb* is charged with. Not a single crime in this case has been committed by *Ali Kushayb* acting on his own according to the evidence. Similarly, the low-quality hearsay evidence provided by P-0994 comes from “people chatting about it in the street”<sup>2428</sup> and fails to specify which execution site *Ali Kushayb* allegedly went to with detainees.<sup>2429</sup> No reasonable finding can be reached on the basis of that evidence.

*(iii) Witnesses who do not Mention Ali Kushayb at any Execution Site*

617. Various witnesses provided evidence which indicates the absence of *Ali Kushayb* at the execution sites identified by the OTP. **P-0907**, [REDACTED] , [REDACTED] ,<sup>2430</sup> does not place *Ali Kushayb* at all at that execution site, merely stating that “*there were six guards, as well as the driver*”[REDACTED] .<sup>2431</sup> In fact, P-0907 only ever places *Ali Kushayb* at the Deleig police station on 5 March 2004. **P-0736**, an eyewitness of the events,<sup>2432</sup> who frequently saw Mr Abd-Al-Rahman outside of his pharmacy in Garsila,<sup>2433</sup> stated that, at some point during the afternoon,<sup>2434</sup> he saw a vehicle coming back to Deleig from the “southerly direction” and that the only persons on the vehicle were “some JJW”.<sup>2435</sup> He did not mention *Ali Kushayb*.. This is corroborated by **P-0584**,<sup>2436</sup>[REDACTED] .<sup>2437</sup>

618. The evidence presented about the execution sites to the south of Deleig near Koska does not place *Ali Kushayb* there at all. There is no evidence placing *Ali Kushayb* at the sites to the west of Deleig near Douro or to the east of Deleig in the area of Andi. All the witnesses who

<sup>2426</sup> **P-0119** [REDACTED]

<sup>2427</sup> **P-0119**: [DAR-OTP-0124-0196-R03](#), paras. 117-118.

<sup>2428</sup> **P-0994**: T-084, p. 85, lines 19-20 (Conf).

<sup>2429</sup> **P-0994**: [DAR-OTP-0222-0055-R01](#), paras. 61-62.

<sup>2430</sup> P-0907 [REDACTED] **P-0907**: [REDACTED]

<sup>2431</sup> **P-0907**: T-094, p. 46, line 1 (Conf).

<sup>2432</sup> **P-0736**: [DAR-OTP-0210-0248-R02](#), paras. 57, 76.

<sup>2433</sup> **P-0736**: T-035, p. 46, lines 14-18; [DAR-OTP-0210-0248-R02](#), para. 45.

<sup>2434</sup> **P-0736**: [DAR-OTP-0210-0248-R02](#), para. 76.

<sup>2435</sup> **P-0736**: [DAR-OTP-0210-0248-R02](#), para. 76.

<sup>2436</sup> **P-0584**: [REDACTED].

<sup>2437</sup> [REDACTED] See **P-0584**: [DAR-OTP-0200-1540-R02](#), para. 112. See also [DAR-OTP-0220-4777](#).

were due to provide evidence about these sites have been dropped by the OTP.<sup>2438</sup> There is in short no reliable evidence to substantiate the allegation that *Ali Kushayb* was present at “one or more” locations outside of Deleig.<sup>2439</sup>

619. No reasonable trier of fact can conclude that *Ali Kushayb* supervised or issued orders to JJW on 5 March 2004 to kill detainees, or that he was even present at one or more sites outside of Deleig. The only person with authority, command and control was Hamdi.<sup>2440</sup>

### *C - Executions*

620. The OTP presents no evidence relating to the alleged acts and conduct of *Ali Kushayb* at the sites in question, with the exception of the site to the north-west of Deleig. For the site to the south of Deleig, the OTP has only presented the evidence of witnesses who either were not present at the killings themselves, have produced accounts which are internally contradictory, or whose accounts are inconsistent with each other. Similarly, the OTP does not rely on a single witness to explain how the alleged executions to the east and west of Deleig took place.

#### *(i) Site to the Northwest of Deleig*

621. To prove its allegations that executions occurred at a site to the north-west of Deleig, the OTP relies on a single witness [REDACTED] [REDACTED].<sup>2441</sup> His evidence is uncorroborated and not reliable.<sup>2442</sup>

#### *(ii) Site(s) to the South of Deleig*

622. Regarding the execution site(s) to the south of Deleig, only two witnesses [REDACTED] – **P-0584** and **P-0907** – were called. Both of their accounts are of poor quality, for differing reasons. P-0584, [REDACTED] .<sup>2443</sup><sup>2444</sup><sup>2445</sup> <sup>2446</sup>

623. **P-0907**, [REDACTED] , provided an account which is internally contradictory. [REDACTED] .<sup>2447</sup> [REDACTED] .<sup>2448</sup> [REDACTED] .<sup>2449</sup> These are not contradictions about peripheral matters, they go to the very heart of his testimony. Other reasons

<sup>2438</sup> See [OTP Trial Brief](#), paras. 465-466. P-0060 and P-0924, both of whom speak about the execution site near Andi – to the East of Deleig – have been dropped. See also [OTP Trial Brief](#), para. 464. P-0092, who speaks about the executions near Douro – to the West of Deleig – was dropped by the OTP.

<sup>2439</sup> [OTP Trial Brief](#), paras. 52-53.

<sup>2440</sup> **P-0643**: T-056, p. 92, line 3-p. 93, line 6 (Conf); **P-0883**: T-074, p. 49, line 10-p. 50, line 6, p. 52, lines 13-16 (Conf).

<sup>2441</sup> [REDACTED]

<sup>2442</sup> **PART III – Chapter 2 – P-0905.**

<sup>2443</sup> **P-0584**: [REDACTED].

<sup>2444</sup> **P-0584**: [REDACTED] .

<sup>2445</sup> **P-0584**: [REDACTED] .

<sup>2446</sup> **P-0584**: [REDACTED] .

<sup>2447</sup> **P-0907**: [REDACTED]

<sup>2448</sup> **P-0907**: [REDACTED]

<sup>2449</sup> **P-0907**: [REDACTED].

for not believing P-0907 have already been stated above. Even the most generous interpretation of his testimony does not permit of a conclusion that he is in any way a reliable witness.

624. The narratives of the witnesses also differ in relation to how the executions were carried out. **P-0907**[REDACTED],<sup>2450</sup> while **P-0726** claims[REDACTED].<sup>2451</sup> P-0726's evidence is corroborated by **P-0725** who was also told about the events by P-0907.<sup>2452</sup> But P-0725 and P-0726 are doing no more than echoing their common source: P-0907. Further, **P-0850** claimed[REDACTED],<sup>2453</sup> that the detainees had their hands tied and were blindfolded before being shot.<sup>2454</sup> However, other witnesses, [REDACTED] make no mention of this.

*(iii) Execution Site near Douro to the West of Deleig*

625. The OTP presented no evidence outlining how the executions near Douro to the west of Deleig unfolded. The OTP dropped the sole witness on the alleged events near Douro.<sup>2455</sup> The only remaining witness is **P-0617**, who gave vague written evidence based on anonymous hearsay.<sup>2456</sup>

*(iv) Execution Site near Andi to the East of Deleig*

626. The OTP did not bring a single witness to testify about how the alleged executions near Andi – East of Deleig - occurred. In its Trial Brief, the OTP claimed that both **P-0060** and **P-0924**, would substantiate the claim that executions occurred at a site near Andi<sup>2457</sup> but both of these witnesses were dropped by the OTP. **P-0617** and **P-0129**, both of whom were said by the OTP to be able to corroborate the narratives of P-0060 and P-0924,<sup>2458</sup> do not even mention Andi in their statements. Only two other witnesses, who were later called by the OTP, referenced Andi in their evidence: **P-0119** and **P-0994**. However their accounts do not shed any further light on the executions. P-0994 simply states that dead bodies were discovered in the direction of Andi. The basis of his knowledge of this is unknown.<sup>2459</sup> No sufficient information has been adduced that the bodies discovered near Andi are those of the detainees from Deleig police station. P-0119 does not even name Andi, rather he simply states the detainees were taken towards the Northeast of Deleig and were killed behind the cover of a mountain.<sup>2460</sup> One cannot

<sup>2450</sup> **P-0907**: [REDACTED].

<sup>2451</sup> **P-0726**: [REDACTED].

<sup>2452</sup> **P-0725**: [DAR-OTP-0210-0122-R02](#), para. 86.

<sup>2453</sup> **P-0850**: [REDACTED]

<sup>2454</sup> **P-0850**: [DAR-OTP-0216-0002-R04](#), para. 72.

<sup>2455</sup> See [OTP Trial Brief](#), para. 464; P-0092.

<sup>2456</sup> **P-0617**: [DAR-OTP-0202-1496-R02](#), para. 84.

<sup>2457</sup> [OTP Trial Brief](#), paras. 465-466.

<sup>2458</sup> [OTP Trial Brief](#), fn. 1600.

<sup>2459</sup> **P-0994**: [DAR-OTP-0222-0055-R01](#), para. 61.

<sup>2460</sup> **P-0119**: [DAR-OTP-0124-0196-R03](#), para. 109.

even definitively conclude that the events he refers to occurred near Andi. The basis of his knowledge is also unidentified.<sup>2461</sup>

627. As it stands, the OTP evidence does not allow for any definitive conclusion regarding the unfolding of these alleged executions. The vagueness and second-hand nature of most of the evidence raises more questions than it answers, including the identity of the direct perpetrators, precisely how the events came about, and how long they lasted. All these questions either remain unanswered or are answered based on accounts of extremely low probative value. It is submitted, therefore, that the Prosecution evidence is of such poor quality that the Chamber cannot reach proper conclusions to the exacting criminal standard of beyond reasonable doubt regarding the alleged role of *Ali Kushayb* in those events.

### ***III - Transfer of Detainees from Garsila to Deleig***

628. The OTP attempted to fix Mr. Abd-Al-Rahman with a significant contributing role in the alleged arrests in Garsila and the subsequent killings that took place on 7 March 2004. The only witness who provided evidence at trial on the alleged role played by *Ali Kushayb* in the arrest of *Umdah* Mohamed Suleiman “Dirbo”, *Sheikh* Ismail Abdulaziz “Dikobi”, Hassan Adam Musa, *Umdah* Adam Kindiri, *Umdah* Jiddo Khamis and Jenif prior to 5 March 2004 is **P-0883**. Other witnesses foreseen to testify about these serious charges did not appear in Court.<sup>2462</sup> As a result, the only evidence available about the alleged arrests, transportation and killing of the six aforementioned males is P-0883’s. His account, however, is unreliable, confused and lacking probative value and is not worthy of belief.<sup>2463</sup>

*(i) The arrests of Umdah Mohamed Suleiman/Dirbo, the Umdah of Tanako, Hassan Adam Musa, Sheikh Ismail Abdulaziz Dikobi, Umdah Adam Kindiri, Umdah Jiddo Khamis and Jenif*

629. **P-0883** testified that, [REDACTED], the *Umdah* of Tanako, Mohamed Suleiman, was considered a rebel and imprisoned in Garsila.<sup>2464</sup> [REDACTED].<sup>2465</sup> [REDACTED].<sup>2466</sup> [REDACTED].<sup>2467</sup> [REDACTED]<sup>2468</sup> [REDACTED].<sup>2469</sup> [REDACTED].<sup>2470</sup>

<sup>2461</sup> **P-0119**: [DAR-OTP-0124-0196-R03](#), para. 109.

<sup>2462</sup> See e.g. P-0092; P-0926.

<sup>2463</sup> See **PART III – Chapter 2 – P-0883**.

<sup>2464</sup> **P-0883**: [REDACTED].

<sup>2465</sup> **P-0883**: [REDACTED].

<sup>2466</sup> **P-0883**: [REDACTED].

<sup>2467</sup> **P-0883**: [REDACTED].

<sup>2468</sup> **P-0883**: [REDACTED].

<sup>2469</sup> **P-0883**: [REDACTED].

<sup>2470</sup> **P-0883**: [REDACTED].

[REDACTED]<sup>2471</sup> and that Major Bakhit and Lieutenant Hamdi allowed people to be detained [REDACTED].<sup>2472</sup>

630. **P-0883**'s evidence suggests that *Umdah* Adam Kindiri and *Umdah* Jiddo Khamis were brought to the Police Station by the *mu'atamid* – Abd-Al-Hakam.<sup>2473</sup> *Umdah* Kindiri, *Umdah* Khamis, and Jenif were subsequently released based on Bakhit's orders while *Umdah* Suleiman, *Sheikh* Ismail, and Hassan Adam Musa were still detained at the base.<sup>2474</sup> Contrary to what is alleged in the OTP PTB,<sup>2475</sup> **P-0883** did not know how *Ali Kushayb* reacted when he learned that *Umdah* Kindiri, *Umdah* Jiddo Khamis, and Jenif had been released.<sup>2476</sup> **P-0883** further testified that on 7 March 2004, *Ali Kushayb* took the three detainees, *Umdah* Suleiman, *Sheikh* Ismail, and Hassan Adam Musa, with him to Zalingei.<sup>2477</sup> The convoy was led from Garsila to Deleig and Soja on the same day.<sup>2478</sup> *Ali Kushayb* asserted having had the authorisation of Commander Bhakit<sup>2479</sup> and had to show a document with their names [REDACTED].<sup>2480</sup> *Ali Kushayb* thus had once again no authority to claim their custody by himself. *Ali Kushayb* followed Hamdi's convoy which was going to Kaylik, on the same route to Deleig, as Hamdi had information regarding Abd-Al-Wahid "the commander of the rebels".<sup>2481</sup> **P-0883**'s evidence is contradicted by **P-0994** and **P-0725**, according to whom Umdas were detained at Deleig Police Station on Saturday and Sunday – 6 and 7 March –<sup>2482</sup> and *Umdah* Suleiman Abdulshafa, *Sheikh* Ismail Dikobi, and Adam Musa were already in detention in Deleig on 5 March 2004.<sup>2483</sup> In light thereof, **P-0883** should not be considered a reliable witness. Any role played by *Ali Kushayb* in the arrest and/or transfer of these persons to Deleig is subject to reasonable doubt.

#### ***IV -Transportation and Killing of Detainees outside Deleig on 7 March 2004***

631. The document containing the charges alleges that, on Sunday 7 March 2004, "Mr. Abd-Al-Rahman, together with elements of the Militia/Janjaweed and GoS Forces, was present in a convoy carrying five prisoners (four Fur community leaders – three Umdahs and one Sheikh –

<sup>2471</sup> **P-0883**: [REDACTED] .

<sup>2472</sup> **P-0883**: [REDACTED] .

<sup>2473</sup> **P-0883**: T-071, p. 61, line 23-p. 62, line 25; p. 50, lines 22-24 (Conf).

<sup>2474</sup> **P-0883**: T-071, p. 63, line 5-p. 64, line 5.

<sup>2475</sup> [OTP Trial Brief](#), para. 420.

<sup>2476</sup> **P-0883**: T-072, p. 5, line 13-p. 6, line 5 (Conf).

<sup>2477</sup> **P-0883**: T-071, p. 64, line 25-p. 67, line 12; T-072, p. 6, line 6-p. 7, line 7 (Conf); p. 49, lines 19-23.

<sup>2478</sup> **P-0883**: T-074, p. 53, lines 4-14 (Conf).

<sup>2479</sup> **P-0883**: T-071, p. 64, line 25-p. 67, line 11; T-072, p. 6, line 6-p. 7, line 7 (Conf).

<sup>2480</sup> **P-0883**: T-071, p. 67, lines 5-11 (Conf).

<sup>2481</sup> **P-0883**: T-071, p. 66, line 14-p. 67, line 4 (Conf).

<sup>2482</sup> **P-0725**: [DAR-OTP-0210-0122-R02](#), para. 94

<sup>2483</sup> **P-0994**: [DAR-OTP-0222-0055-R03](#), paras. 79-80; [OTP Trial Brief](#), para. 473.

and another civilian) in Deleig”.<sup>2484</sup> The Militia/JJW and GoS Forces drove the prisoners outside of Deleig and killed them.<sup>2485</sup> It should be underscored that Mr Abd-Al-Rahman is not charged with having participated directly in their killing but rather to have “made an essential contribution to the Deleig Common Plan and the charged crime”.

632. The evidence presented by the Prosecution is vague, mostly based on anonymous hearsay, and is inconsistent as between witnesses. **P-0013** heard, without specifying the source or timeframe, that three *Umdahs* – “Adam Husayn, Umda of Masa”, “Adam Deges, Umda of Forgo”, and “Jido Abd-al-Kamil, Umda of Gaba” – were arrested in Deleig while praying in the mosque and killed near a neighbouring mountain.<sup>2486</sup> **P-0607** vaguely stated that he heard – without explaining his source – that *Umdah* “Adam Hussein from Massa”, *Umdah* “Jedo Khamis from Gaba”, *Umdah* “Adam Adam Kindiri from Forgo”, *Sheikh* “Ismail from Massa”, and *Sheikh* “Zakayira from Gaba” were killed in Deleig.<sup>2487</sup> **P-0712** stated that around 7-8 March 2004, he heard from neighbours that Jeddo, Kindiri, and Mohammed Jeneig, had been arrested and executed.<sup>2488</sup> **P-0850**, stated that his aunt told him that she learned – again, with no source stated – that, a Saturday after the arrests in 2004, several *Umdahs* had been arrested including *Umdah* Kindiri from Forgo and Kaskeidi and *Umdah* Adam from Gaba.<sup>2489</sup> **P-0850** added that people later found out that these *Umdahs* had been executed in the Jebel Bela area.<sup>2490</sup> **P-0725** stated, without providing a specific timeframe, that *Umdah* “Adam Kinderi” of Forgo, *Umdah* “JIDO” of Gaba, and the *Umdah* of “Zamaybaya (phon)” were being detained at Deleig Police Station until “Sunday evening”.<sup>2491</sup> He also added that he was in the market in Deleig when he saw the three *Umdahs* in the back of a beige camouflaged Land Cruiser<sup>2492</sup> being driven on the road that leads towards Zalingei in the opposite direction to Garsila.<sup>2493</sup> **P-0585** testified that, while in Deleig on 7 March 2004, a tailor named Abdul Jabar who had a shop in the Deleig market,<sup>2494</sup> told him that the people he had seen in the back of a car were *Umdah* Jiddo, *Umdah* Kindiri, *Umdah* Muhammad Suleiman, Dikobi who had been previously detained at the Police Station and that they were possibly being taken to the Zalingei prison.<sup>2495</sup>

<sup>2484</sup> [Abd-Al-Rahman Confirmation Decision](#), para. 111.

<sup>2485</sup> [Abd-Al-Rahman Confirmation Decision](#), para. 111.

<sup>2486</sup> **P-0013**: [DAR-OTP-0088-0129-R02](#), para. 63.

<sup>2487</sup> **P-0607**: [DAR-OTP-0203-0164-R02](#), para. 63.

<sup>2488</sup> **P-0712**: [DAR-OTP-0209-1884-R04](#), para. 47.

<sup>2489</sup> **P-0850**: [DAR-OTP-0216-0002-R04](#), para. 73.

<sup>2490</sup> **P-0850**: [DAR-OTP-0216-0002-R04](#), para. 73.

<sup>2491</sup> **P-0725**: [DAR-OTP-0210-0122-R02](#), paras. 94-95.

<sup>2492</sup> **P-0725**: [DAR-OTP-0210-0122-R02](#), para. 95.

<sup>2493</sup> **P-0725**: [DAR-OTP-0210-0122-R02](#), para. 95.

<sup>2494</sup> **P-0585**: T-100, p. 27, lines 9-12 (Conf).

<sup>2495</sup> **P-0585**: T-100, p. 26, line 13-p. 27, line 2.

The source of Abdul Jabar's knowledge is unknown. P-0585 did not provide more detail except that they had turbans covering their faces so it was difficult to tell who was on the back of this car.<sup>2496</sup> **P-0643** testified that Muhammad Suleiman and *Sheikh* Isma'il were taken from Garsila, from the military intelligence in "command of the army" of Garsila. Then they were brought to Deleig and, together with the rest of the *Umdahs*, taken in a different direction to the others. They were brought 7 or 8 kilometers to the north-west of Deleig and were executed there.<sup>2497</sup> P-0643 added that he heard from people imprisoned with them who were left behind in jail that *Ali Kushayb* took them from the Intelligence Office in Garsila.<sup>2498</sup> When asked if P-0643 spoke directly with persons present during the Deleig incident, he responded that he talked with a lot of people, but the person who told him about the killing of the *Umdahs* was Adam Wat Furi, a well-known driver who was present in Deleig and who saw their corpses.<sup>2499</sup>

633. **P-0994** did not know the identities of all the detainees held in the cell since 5 March 2004; the only persons he recognised were Kindiri, Badreddine, and Jenif.<sup>2500</sup> **P-0973** provided a contradictory timeline as he stated that *Umdah* Jiddo Khamis told him on 5 March 2004 that he had been brought into the cell two days before with *Umdah* Adam Adam Kindiri.<sup>2501</sup> This would imply that they were arrested on Wednesday 3 March. No corroborating evidence has been presented to support this theory. In fact, P-0955 even testified that they had been arrested on Friday 5 March 2004. P-0994 further stated that, on his way to work, at around 7:00 a.m. on Sunday 7 March 2004, he allegedly saw a [Land] Cruiser vehicle parked near the market with 6 detainees in the back together with *Ali Kushayb* and his driver Hussein.<sup>2502</sup> The detainees on the back of the Cruiser were Jiddo Khamis Abdul Karim the *Umdah* of Gaba, Mohamad Suleiman aka Dirbo the *Umdah* of Tanako, Adam Adam Deguis Ahmed aka Kindiri the *Umdah* of Forgo, Ismail Abdul Aziz the *Sheikh* from the western neighbourhood in Garsila, Hassan Adam Musa, and Sherif Mohammedin.<sup>2503</sup> P-0994 assumed that Kindiri was taken from the Deleig Police Station while the others were taken from the Deleig army base.<sup>2504</sup> P-0994 stated that he allegedly heard *Ali Kushayb* instructing Ahmed Tijani to take the detainees to the bus stop queue travelling to Nyala.<sup>2505</sup> P-0994 did not know what happened next.<sup>2506</sup> P-0994 also

<sup>2496</sup> **P-0585**: T-100, p. 26, lines 3-12.

<sup>2497</sup> **P-0643**: T-056, p. 90, lines 3-16.

<sup>2498</sup> **P-0643**: T-056, p. 90, lines 13-22.

<sup>2499</sup> **P-0643**: T-056, p. 91, lines 10-15.

<sup>2500</sup> **P-0994**: [DAR-OTP-0222-0055-R01](#), para. 49.

<sup>2501</sup> **P-0973**: [DAR-OTP-0220-0736-R01](#), paras. 25, 38.

<sup>2502</sup> **P-0994**: [DAR-OTP-0222-0055-R01](#), para. 79.

<sup>2503</sup> **P-0994**: [DAR-OTP-0222-0055-R01](#), para. 80.

<sup>2504</sup> **P-0994**: [DAR-OTP-0222-0055-R01](#), para. 84.

<sup>2505</sup> **P-0994**: [DAR-OTP-0222-0055-R01](#), para. 82.

<sup>2506</sup> **P-0994**: [DAR-OTP-0222-0055-R01](#), para. 82.

stated that he heard one of his colleagues named Salah Ismail aka Mohammed Ismail intervening and trying to persuade *Ali Kushayb* to release Sherif Mohammedin who was his uncle from the Zaghawa tribe and was innocent of being a rebel.<sup>2507</sup> *Ali Kushayb* allegedly agreed to release him and told Sherif Mohammedin to alight from the vehicle.<sup>2508</sup> P-0994 stated that two days later, he heard from general talk on the street that the five detainees had been driven in the direction of Fere and had been executed - without knowing the exact location.<sup>2509</sup>

634. **P-0883** testified, during his examination-in-chief, that *Ali Kushayb* gave orders to the soldiers in *Khor Soja* in Deleig on 7 March 2004,<sup>2510</sup> hit detainees, and that his soldiers shot them including the three detainees from Garsila and the *Umdahs* of Arawala and Forgo.<sup>2511</sup> P-0883 was not there. According to him, Kindiri, Jiddo Khamis, Abdulshafa, Jenif, Dikobi and Hassan Musa were amongst the first group killed on 5 March 2004.<sup>2512</sup> P-0883's evidence directly contradicts not only the Prosecution case, but also the evidence provided by other witnesses according to whom Jenif was killed on 5 March 2004 with the first batch of detainees and not alongside *Umdah* Adam Adam Kindiri, *Umdah* Jiddo Khamis, *Umdah* Mohamed Suleiman Abdulshafa, *Sheikh* Dikobi and Hassan Adam Musa who were supposedly executed two days later on 7 March 2004.

635. The OTP has been unable to bring evidence supporting its allegation that "detainees [were] taken out of the Deleig police station by Abd-Al-Rahman and/or his men".<sup>2513</sup> Evidence even states that it was the militia personnel who handed over the *Umdahs* to the military personnel of the pick-up truck.<sup>2514</sup> Moreover, the entirety of paragraphs 475-478 of the PTB has not been proven.

636. Therefore, there is no evidence, other than **P-0883's** who cannot be trusted, of the involvement of *Ali Kushayb* in the executions that allegedly took place on 7 March 2004. Witnesses who testified about that event did not link it to him. **P-0994** allegedly saw *Ali Kushayb* with them on 7 March, but he says that *Ali Kushayb* released one of them and P-0994 does not know what he did with the others, other than ordering their transfer to Nyala.

<sup>2507</sup> **P-0994**: [DAR-OTP-0222-0055-R01](#), para. 81.

<sup>2508</sup> **P-0994**: [DAR-OTP-0222-0055-R01](#), para. 81.

<sup>2509</sup> **P-0994**: [DAR-OTP-0222-0055-R01](#), para. 83.

<sup>2510</sup> **P-0883**: T-072, p. 49, lines 19-23.

<sup>2511</sup> **P-0883**: T-071, p. 67, line 12-p. 68, line 22 (Conf); T-072, p. 7, lines 9-14 (Conf). P-0883 : T-074, p.53, 1.5-p.55, 1.22 (Conf) ; T-072, p.6, lines.9-14.

<sup>2512</sup> **P-0883**: T-074, p. 53, line 5-p. 55, line 21 (Conf).

<sup>2513</sup> [OTP Trial Brief](#), p. 169.

<sup>2514</sup> **P-0980**: [DAR-OTP-0221-0553-R03](#), para. 32.

### V - *The discovery of bodies*

637. Although the Prosecution asserts that numerous corpses were discovered outside of Deleig from about 5 March 2004,<sup>2515</sup> it has adduced no forensic evidence to positively identify the bodies it alleges were discovered at the relevant sites to link them with the charged crimes, and in turn, with Mr Abd-Al-Rahman/*Ali Kushayb*. No link has been established beyond reasonable doubt between the persons allegedly detained at Deleig Police Station, Mr Abd-Al-Rahman/*Ali Kushayb*, and the bodies discovered at various locations outside of Deleig.

*Koska; Tolda Mountain; Andi; Dabari, Ordo, and Tege Mountains; Fere*

638. **P-0584** found [REDACTED] alongside 40 other bodies at Koska and was able to identify him through his clothes.<sup>2516</sup> He heard an individual calling for help in Fur whom he later identified as *Mulenqwe*<sup>2517</sup> who had been shot in his stomach and that he helped him return to Deleig and dropped him off at his house where his family was.<sup>2518</sup> On the other hand, **P-0725**<sup>2519</sup> and **P-0726**<sup>2520</sup> mentioned seeing *Mulenqwe* at a mosque in Deleig on the evening of the executions, that he had sustained a gunshot wound to the eye, and that he eventually died there from his injuries. Neither P-0725 nor P-0726 mention P-0584 accompanying *Mulenqwe*. **P-0907** testified, without being clear about the source of his knowledge, that *Mulenqwe* crawled to Deleig, without mentioning P-0584 at all.<sup>2521</sup> **P-0736** and **P-0994** simply heard from general talk amongst anonymous villagers that many dead bodies were found near Koska, without any further specifications regarding the victims or the perpetrators.<sup>2522</sup> The evidence provided by P-0736 and P-0994 does not allow for a conclusion beyond reasonable doubt that the bodies discovered near Koska are indeed those of the detainees at Deleig Police Station nor that the perpetrators were linked to Mr Abd-Al-Rahman/*Ali Kushayb*.

639. Two witnesses reference finding bodies near Tolda Mountain. **P-0651**, outlined that he discovered 40 bodies near Tolda mountain and recognised two bodies as being persons from Deleig Police Station.<sup>2523</sup> It is highly unlikely that P-0651 was able to accurately identify them [REDACTED] at the time of the events<sup>2524</sup> and only saw the prisoners lying face down at the

<sup>2515</sup> [OTP Trial Briefhttps://jwp.icc.int/lw/?objectId=0902ebd1801f86ed](https://www.otp-trial-brief.com/otp-trial-brief-https://jwp.icc.int/lw/?objectId=0902ebd1801f86ed), paras. 467-472.

<sup>2516</sup> **P-0584**: [DAR-OTP-0200-1540-R02](#), para. 123.

<sup>2517</sup> **P-0584**: [DAR-OTP-0200-1540-R02](#), paras. 121-122.

<sup>2518</sup> **P-0584**: [DAR-OTP-0200-1540-R02](#), paras. 122, 124.

<sup>2519</sup> **P-0725**: [DAR-OTP-0210-0122-R02](#), para. 79.

<sup>2520</sup> **P-0726**: [DAR-OTP-0210-0346-R04](#), paras. 73-74.

<sup>2521</sup> **P-0907**: T-094, p. 53, lines 22-24 (Conf).

<sup>2522</sup> **P-0736**: [DAR-OTP-0210-0248-R02](#), para. 79; **P-0994**: [DAR-OTP-0222-0055-R01](#), para. 61.

<sup>2523</sup> **P-0651**: [DAR-OTP-0205-0015-R02](#), paras. 56-60.

<sup>2524</sup> **P-0651**: [DAR-OTP-0205-0015-R02](#), para. 41.

Deleig police station from about 200 meters.<sup>2525</sup> P-0651's ability to subsequently identify and link the discovered bodies is even more unlikely. **P-0671** outlined that he recognized the bodies of his father and brother,<sup>2526</sup> alongside 20 to 40 adult male bodies, in a *khore* near Tolda Mountain.<sup>2527</sup> P-0671 is not a credible witness<sup>2528</sup> who stated that [REDACTED] bodies were discovered together with the body of *Sheikh* Ismael,<sup>2529</sup> whereas P-0994 indicated that *Sheikh* Ismael was taken to Fere with various *Umdahs*.<sup>2530</sup>

640. **P-0994** is the only OTP witnesses who referenced the discovery of bodies near Andi. However, he only heard "from other people" that bodies were found in the direction of Andi.<sup>2531</sup> Given that it lacks details regarding the identity of the perpetrators or the victims and that the evidentiary basis of his account is anonymous hearsay, P-0994's account cannot allow one to draw any conclusions or create a link and should thus be disregarded. Given that the region was at war, mass graves were arguably a common occurrence. Thus, the discovery of these corpses cannot be relied upon as evidence in this instance.

641. **P-0736** heard, from general talk among unidentified villagers, that many dead bodies were found somewhere near the Ordo, Koska, and Tege mountains as well as to the west of Wadi called Dabari.<sup>2532</sup> However, here too, given the insufficient evidentiary basis, P-0736's account should not be used to draw any conclusions or to infer any link between the discovered bodies and the detainees at Deleig Police Station. Comparably, there is no evidence that these corpses are connected to the charged events.

642. Several witnesses referenced the discovery of bodies in Fere – however, only one witness, **P-0697**, presented a first-hand account thereof. He stated that a few days after 5 March 2004, he discovered 13-15 dead bodies in a *khore* near Fere.<sup>2533</sup> Notably, P-0697 simply assumed that because of their number, the bodies may have been the ones arrested, although he did not recognize anyone.<sup>2534</sup> The remaining witnesses who mentioned bodies discovered near Fere have based this information on hearsay.<sup>2535</sup> Some witnesses have mentioned in particular the

<sup>2525</sup> **P-0651**: [DAR-OTP-0205-0015-R02](#), paras. 46-47, 49; T-034, p. 69, line 24-p. 70, line 1.

<sup>2526</sup> **P-0671**: [DAR-OTP-0206-0105-R02](#), para. 53.

<sup>2527</sup> **P-0671**: [DAR-OTP-0206-0105-R02](#), paras. 52-53; T-098, p.74, line 11-p. 75, line 10; [DAR-OTP-00000463](#).

<sup>2528</sup> See PART III – Chapter 2 – Section 1 on P-0671's evidence.

<sup>2529</sup> **P-0671**: [DAR-OTP-0206-0105-R02](#), para. 57.

<sup>2530</sup> **P-0994**: [DAR-OTP-0222-0055-R01](#), paras. 80-83.

<sup>2531</sup> **P-0994**: [DAR-OTP-0222-0055-R01](#), para. 61.

<sup>2532</sup> **P-0736**: [DAR-OTP-0210-0248-R02](#), para. 79.

<sup>2533</sup> **P-0697**: [DAR-OTP-0209-0155-R03](#), para. 60.

<sup>2534</sup> **P-0697**: [DAR-OTP-0209-0155-R03](#), para. 61.

<sup>2535</sup> **P-0671**: [DAR-OTP-0206-0105-R02](#), para. 57: on the day following 5 March 2004, he heard from an unidentified source that bodies had been found to the north-west of Deleig in a riverbed before the village of Fere; **P-0651**: [DAR-OTP-0205-0015-R02](#), para. 60: around 6 March 2004, villagers found bodies in Fere; **P-0718**:

presence of the *Umdahs* in Fere. However, all of them provided indirect knowledge, mostly from anonymous hearsay. None of these witnesses actually saw the corpses. **P-0850** stated that “people later found” out that these *Umdahs* had been executed in the Jebel Bela area.<sup>2536</sup> **P-0850**’s aunt also told him that she heard about prisoners taken from Deleig and found executed near Fere village.<sup>2537</sup> **P-0725** stated that two or three days later after witnessing the *Umdahs* in the market in Deleig, he was told – without providing more detail – that all three *Umdahs* had been found in a *Wadi* in Fere.<sup>2538</sup> **P-0907** testified that he heard from “people” that the *Umdahs*, *Umdah* Kindiri and Jenif included, in the car were supposed to go to Garsila, but were found killed close to Fere village.<sup>2539</sup> **P-0973** stated that the corpses of *Umdah* Jiddo Khamis, *Umdah* Adam Kindiri, and *Umdah* Suleiman-Dikobi were found in Fere.<sup>2540</sup>

643. **P-0119** stated that women collecting firewood around Deleig found 135 bodies on an unspecified date and at an unspecified location.<sup>2541</sup>

644. The PTC confirmed the charges and annexed to its Decision a list of 34 persons killed in Deleig,<sup>2542</sup> as opposed to the 137 victims listed by the Prosecution.<sup>2543</sup> Considering the alleged physical proximity to the crimes, Mr Abd-Al-Rahman has been charged for the murder of 34 persons and should not be held responsible for additional ones without the charges being amended contrary to the PTC’s reasoning.<sup>2544</sup> The TC should therefore only examine the charge of murder as read to Mr Abd-Al-Rahman at the opening of his trial.<sup>2545</sup> In the alternative, the TC should make individual findings supported by evidence for each of the 103 additional victims.<sup>2546</sup>

645. The evidence suggests that the entire “Deleig operation” was placed under the authority of Hamdi,<sup>2547</sup> who served in Military Intelligence and as PDF Commander. A delegation of three high-ranking officers had specifically come to supervise it from the Garsila operation

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[DAR-OTP-0209-2004-R02](#), para. 89: heard from an unidentified source that the bodies of his cousins alongside many other corpses had been found in a dried up stream adjacent to Fere.

<sup>2536</sup> **P-0850**: [DAR-OTP-0216-0002-R04](#), para. 73.

<sup>2537</sup> **P-0850**: [DAR-OTP-0216-0002-R04](#), para. 73.

<sup>2538</sup> **P-0725**: [DAR-OTP-0210-0122-R02](#), para. 96.

<sup>2539</sup> **P-0907**: T-094, p. 59, line 17-p. 60, line 17.

<sup>2540</sup> **P-0973**: [DAR-OTP-0220-0736-R01](#), paras. 41-42.

<sup>2541</sup> **P-0119**: [DAR-OTP-0124-0196-R03](#), para. 116.

<sup>2542</sup> ICC-02/05-01/20-433-Conf-Anx1, p. 4.

<sup>2543</sup> OTP Trial Brief, Annex 23.

<sup>2544</sup> *Contra* [ICC-02/05-01/20-626](#), paras. 25-26.

<sup>2545</sup> Opening Statements: T-026, p. 7, lines 2-9.

<sup>2546</sup> [ICC-02/05-01/20-626](#), para. 23.

<sup>2547</sup> **P-0883**: T-074, p. 49, line 10-p. 50, line 6; p. 52, lines 13-16.

room.<sup>2548</sup> The arrests were conducted by PDF members, identified as JJW,<sup>2549</sup> under the authority of Hamdi<sup>2550</sup> and led by a certain Sadig Dirwa.<sup>2551</sup> Members of the local police also participated.<sup>2552</sup> Those arrested were taken to Deleig police station, where they were forced to lay face down on the floor and were mistreated. Subsequently, some were taken on vehicles to execution sites, where they were shot. Although some witnesses testify about the presence of *Ali Kushayb* on that day, Hamdi, Muqqadam Idriss, Military Intelligence Officer Abu Lahab, PDF Coordinator Hassaballah, SAF soldiers and JJW are also mentioned.<sup>2553</sup> Hamdi, Abu Lahab and Hassaballah had clear authority to give orders and conduct operations, unlike *Ali Kushayb*, whose basis of authority has not been established.<sup>2554</sup>

### **VI - Persecution**

646. Mr Abd-Al-Rahman is charged for persecution as a crime against humanity “on political, ethnic and gender grounds, concerning Fur males perceived as belonging to, or being associated with, or supporting rebel armed groups in Deleig and surrounding areas, between 5 and 7 March 2004”.<sup>2555</sup> The Defence submits that the OTP mischaracterized the elements of the crime of Persecution by deducting its existence “as a result of the acts charged in Counts 22-30”. The Prosecution misinterprets the facts. Detainees at the Police station happened to be all males, some or all from the Fur tribe. Fur men in Deleig were not targeted and arrested because of the perpetrators’ perception of them as rebel or rebel sympathisers. Otherwise, [REDACTED], and [REDACTED], all Fur men and present in Deleig on 5 March 2004, would have been arrested and detained as well. [REDACTED]. Also, if Fur men were targeted because they were all assimilated as being rebel or rebel sympathisers, there would not have been any releases.<sup>2556</sup> The evidence does not allow either to make the conclusion that their release was an exception. They were numerous.

647. The evidence shows that the target for the perpetrators, during the arrests and the subsequent detentions, was only to arrest the people suspected of being rebels or rebel

<sup>2548</sup> **P-0883**: T-071, p. 70, lines 3-13 (Conf); p. 72, line 21-p. 73, line 11 (Conf).

<sup>2549</sup> **P-0718**: [DAR-OTP-0209-2004-R02](#), paras. 58-59; T-049, p. 62, line 11-p. 63, line 20; **P-0736**: [DAR-OTP-0210-0248-R02](#), paras. 62, 65; **P-0907**: T-094, p. 30, line 8-p. 31, line 17; T-096, p. 15, lines 14-18; **P-0955**: [DAR-OTP-0220-0620-R02](#), para. 33; **P-0726**: [DAR-OTP-0210-0346-R04](#), paras. 63-64; T-053, p. 16, lines 8-25; **P-0973**: [DAR-OTP-0220-0736-R01](#), para. 26; **P-0980**: [DAR-OTP-0221-0553-R03](#), paras. 19-21; T-044, p. 27, lines 1-8.

<sup>2550</sup> **P-0643**: T-056, p. 92, line 3-p. 93, line 6 (Conf).

<sup>2551</sup> **P-0584**: T-092, p. 38, lines 8-12.

<sup>2552</sup> **P-0935**: T-090, p. 46, lines 14-24.

<sup>2553</sup> **P-0905**: T-086, p. 56, lines 12-22 (Conf).

<sup>2554</sup> See **PART VI – Chapter 2- Section 1- IV**.

<sup>2555</sup> [Abd-Al-Rahman Confirmation Decision](#), p. 70.

<sup>2556</sup> **P-0994**: [DAR-OTP-0222-0055-R01](#), paras. 57, 79-81; T-084, p.57, lines 3-23 (Conf); **P-0718**: T-049, p. 15, line 21-p. 16, line 18; p. 20, lines 17-p. 24, line 15; [DAR-OTP-0209-2004-R02](#), para. 70.

sympathisers. The targeted group was the insurgents clearly identified. Therefore, the crimes committed on the detainees were not motivated by the real or perceived ethnicity, the political affiliation or their gender role.

648. Only [REDACTED] mentioned having heard *Ali Kushayb* calling the detainees “criminals” and “slaves” in the Deleig courtyard on 5 March 2004.<sup>2557</sup> However, none of the witnesses who were allegedly in/around the Deleig police station courtyard corroborate [REDACTED] evidence. In addition, the Defence emphasises the weak identification from [REDACTED] of *Ali Kushayb* coming post-facto and from hearsay. Had these words have been told, they would fall short from proving the OTP’s Persecution theory anyway. Therefore, [REDACTED]’s evidence lacks of probative value and is not sufficient to deduce a discriminatory intent based on verbal abuse.

649. Prosecution evidence shows that persons were not arrested because they were men and Fur *per se*. **P-0585**, [REDACTED], allegedly travelled through Deleig by bus on Friday – 5 March 2024 – at about 1-2 p.m.<sup>2558</sup>, and passed several checkpoints without him and other Fur passengers being arrested.<sup>2559</sup> If he were to be believed, P-0585 alleges that he saw the list of names and that JJW were asking passengers their names and the villages they were coming from.<sup>2560</sup> P-0585 testified that he was not the only Fur passenger on the bus.<sup>2561</sup> P-0585 stated that during this period of time, movement from the villages to the city was difficult because one could be suspected of being a rebel.<sup>2562</sup> He explained that, at check points, the bus passengers were only searched, inspected and asked specific questions about their names and where they came from.<sup>2563</sup> When asked if P-0585 and the other Fur passengers were specifically questioned, P-0585 testified that they did not insist much with them as the JJW could be more stringent with people from some areas and not with people from other areas during their search/inspection.<sup>2564</sup> This tends to indicate that the targets for arrest were persons suspected of being rebels, not Fur - or Fur males, specifically - *per se*.

650. **P-0607**, [REDACTED], stated that the JJW conducted house to house searches and arrested “the civilians” - without explaining further the characteristics of civilians and his

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<sup>2557</sup> [REDACTED].

<sup>2558</sup> **P-0585**: T-101, p. 47, lines 4-20, p. 56, line 21-p. 57, line 8; T-100, p. 18, lines 11-22; T-101, p. 51, lines 14-17.

<sup>2559</sup> **P-0585**: T-101, p. 50, line 9-p. 51, line 5.

<sup>2560</sup> **P-0585**: T-101, p. 39, line 15-p. 40, line 7.

<sup>2561</sup> **P-0585**: T-101, p. 48, lines 10-13.

<sup>2562</sup> **P-0585**: T-101, p. 48, line 18-p. 49, line 1.

<sup>2563</sup> **P-0585**: T-101, p. 49, lines 2-5.

<sup>2564</sup> **P-0585**: T-101, p. 49, line 22-p. 50, line 7.

source of knowledge - that were not from Deleig on 5 March 2004.<sup>2565</sup> According to **P-0725**, [REDACTED], as Friday prayers finished, the people leaving the mosque in Deleig were checked by the JJW to see if they were locals or were from somewhere else.<sup>2566</sup> **P-0726** stated that after “*all of the young men who were not from Deleig had been arrested and taken away*” the checkpoints were lifted and the risk of being arrested was reduced.<sup>2567</sup> **P-0736** talked with three Fur men who had just been released because they were from Deleig and not from villages that the JJW were looking for.<sup>2568</sup> This is also confirmed by **P-0712**, who was told by a man named Hassan that the *Umdahs* and some *Sheikhs* from Deleig were ordered to identify those who had been arrested one by one in front of the Police Station.<sup>2569</sup> If they confirmed that a person was from Deleig, the person would be released.<sup>2570</sup> **P-0973**, [REDACTED], stated that on 7 March 2004 at the Deleig police station, the military asked the JJW if P-0973 and Adam Ali were from Deleig so they can be released; if not they should be taken prisoners.<sup>2571</sup> This shows that the criteria driving the JJW search was not the Fur men who were automatically associated to the rebellion, but simply the people who were not from Deleig, but from other localities considered suspicious.

651. **P-0617** stated that on the way in a bus, the truck was stopped by two vehicles, and subsequently “Mussadak and persons whose faces were covered”, checked the identity of the passengers.<sup>2572</sup> **P-0617** stated that he thought those who were hiding their faces were originally from Sindu and knew who the rebels were.<sup>2573</sup> **P-0883** testified that the “operation in Deleig” consisted in searching for and arresting the suspects who were known to the Intelligence officers.<sup>2574</sup>

652. By early March 2004, “more than 16,000 internally displaced persons” had fled from surrounding villages and sought refuge in Deleig.<sup>2575</sup> The Prosecution relies on a few witnesses who claim that “there was no armed rebel presence in Deleig”.<sup>2576</sup> However, with such a substantial influx of persons arriving over a period of months, no witness could possibly reasonably assert that there were no rebels amongst the displaced arriving in Deleig. **P-0712**

<sup>2565</sup> **P-0607**: [DAR-OTP-0203-0164-R02](#), para. 43.

<sup>2566</sup> **P-0725**: [DAR-OTP-0210-0122](#), para. 72.

<sup>2567</sup> **P-0726**: [DAR-OTP-0210-0346-R04](#), para. 67.

<sup>2568</sup> **P-0736**: [DAR-OTP-0210-0248](#), para. 72.

<sup>2569</sup> **P-0712**: [DAR-OTP-0209-1892](#), para. 41.

<sup>2570</sup> **P-0712**: [DAR-OTP-0209-1892](#), para. 43.

<sup>2571</sup> **P-0973**: [DAR-OTP-0220-0736-R01](#), para. 49.

<sup>2572</sup> **P-0617**: [DAR-OTP-0202-1496](#), para. 92.

<sup>2573</sup> **P-0617**: [DAR-OTP-0202-1496](#), para. 92.

<sup>2574</sup> **P-0883**: T-074, p. 49, line 22-p. 50, line 5.

<sup>2575</sup> [OTP Trial Brief](#), p. 147, para. 405, citing [DAR-OTP-0162-0042](#) at 0074; [DAR-OTP-0145-0237](#) at 0273.

<sup>2576</sup> [OTP Trial Brief](#), para. 441.

testified that he did not know the “characteristics of the rebels”.<sup>2577</sup> **P-0584**, who arrived in Deleig at the beginning of March 2004,[REDACTED] .<sup>2578</sup> The reason P-0584 did not ultimately undergo this training was his age; it was not his lack of desire to do so.<sup>2579</sup> **P-0617**, a farmer[REDACTED] , also stated that, in February 2004 and days before his arrival in Deleig, he was part of a group of villagers that was under rebel protection after a decision was taken to “go to Sindu to be protected by the rebels who were armed”.<sup>2580</sup> P-0617 further explained his multiple interactions, in Kiskildo, with these rebel groups as well as the involvement of other villagers and community leaders – “*Sheiks* and *Umdahs* and ‘notables’” – in this decision.<sup>2581</sup> Notably, P-0617 mentioned a meeting that took place between *Umdah* Jiddo and a rebel named Musa Ibrahim.<sup>2582</sup> P-0617 stated that during that period of time, February 2004, he had been made aware that the rebel leader Abdel Wahid Al Nour and his men had travelled “through Deleig” to Zarey.<sup>2583</sup> It is also noteworthy that witness **P-0060**, who was dropped by the Prosecution, was intended to testify that members of the rebel armed groups “may have accompanied civilians who were displaced to Deleig”.<sup>2584</sup>

653. It is clear from the evidence that the men were arrested in Deleig through precise criteria of being rebel and not randomly based on ethnic, political affiliation or gender grounds.

### ***VII. Factual Conclusion***

654. In light of the absence of evidence or the lack of sufficiently reliable and/or credible evidence, the Defence submits that no reasonable trier of fact can make the conclusion, beyond a reasonable doubt, that Mr Abd-Al-Rahman:

- (i) Arrested and/or ordered the arrest of Fur males in Garsila and transported them to Deleig;
- (ii) Ordered, was present during, and participated in the search and arrest operation in Deleig;
- (iii) Killed three Fur males by striking them to the head with a stick or axe-like object; Mistreated, hit or verbally abused detainees;
- (iv) Ordered, was present during, and supervised the loading of detainees onto vehicles;

<sup>2577</sup> **P-0712**: T-036, p. 25, lines 5-11.

<sup>2578</sup> **P-0584**: [DAR-OTP-0200-1540-R02](#), paras. 65, 70; T-092, p. 32, line 24-p. 33, line 1, p. 33, line 14-p. 34, line 5.

<sup>2579</sup> **P-0584**: T-092, p. 32, line 24-p. 33, line 1; p. 33, line 14-p.34, line 5; [DAR-OTP-0200-1540-R02](#), paras. 66, 70.

<sup>2580</sup> **P-0617**: [DAR-OTP-0202-1496-R02](#), paras. 66-68.

<sup>2581</sup> **P-0617**: [DAR-OTP-0202-1496-R02](#), paras. 66-68.

<sup>2582</sup> **P-0617**: [DAR-OTP-0202-1496-R02](#), paras. 66-67.

<sup>2583</sup> **P-0617**: [DAR-OTP-0202-1496-R02](#), para. 70.

<sup>2584</sup> [OTP Trial Brief](#), para. 441, fn. 1533.

- (v) Ordered the “Militia/JJW” and/or GoS Forces to unload and shoot and kill detained Fur males at one location outside of Deleig or was even present at one or more of the locations outside of Deleig where detainees were transported and then killed.

655. The factual and legal requirements of the crime of torture as a war crime are not fulfilled (Count 23). The OTP did not demonstrate any specific purpose as part of the motivation of the conduct.<sup>2585</sup> The crime of persecution (Count 31) is also not established.<sup>2585</sup> The factual and legal requirements of the crime of persecution as a crime against humanity are not fulfilled (Count 31). The Prosecution failed to establish that the group identified as “Fur males perceived as supporting or associated with the rebel armed groups” was targeted on ethnic, political and gender grounds.<sup>2586</sup> No evidence supports that *Ali Kushayb* or any perpetrators under his authority had a specific intent to discriminate against the targeted persons on the aforementioned grounds.

#### **Section 4: Individual Criminal Responsibility**

##### ***I - Direct perpetration and Co-perpetration under Article 25(3)(a)***

656. Should the Chamber find that the Prosecution proved beyond reasonable doubt that Mr Abd-Al-Rahman was *Ali Kushayb*, it remains that the Prosecution did not provide sufficient, credible or reliable evidence to support that *Ali Kushayb* directly committed or co-perpetrated the crimes in Deleig.

657. The evidence does not support that *Ali Kushayb* exerted authority by issuing orders and instructions to Militia/JJW leaders, or to members of the GoS Forces (SAF, PDF, CRF), which were implemented. The Defence qualifies these structures as being part of the GoS *apparatus* at the locality level, from which *Ali Kushayb* was entirely absent.<sup>2587</sup>

658. The OTP further failed to prove that *Ali Kushayb* essentially contributed to the Deleig Common Plan which – if established – did not target the whole civilian population of Deleig.<sup>2588</sup> *Ali Kushayb* did not have any control or influence over the acts pertaining to the arrest, detention, mistreatment, transfer and execution of the detainees in Deleig in March 2004. The Security Committee, in which *Ali Kushayb* did not sit, was in charge of identifying the individuals to be arrested and detained for their rebel affiliation. The Deleig GoS *apparatus* was in control of the detainees of the Deleig police station and the subsequent crimes. The evidence shows that the detainees were always under the direct control of

<sup>2585</sup> See **PART V – Chapter 3 – IV** above and **PART V – Chapter 4** below.

<sup>2586</sup> **PART V- PERSECUTION.**

<sup>2587</sup> See **PART IV – Chapter 5 – Section 2 – B; Section 2, II; Section 3, I-II.**

<sup>2588</sup> The evidence clearly shows that the target of the arrests and subsequent detentions was not aimed against the whole civilian Fur population of Deleig. Instead, they were directed against rebels or potential rebels.

Sergeant Juma Hassan Fadhali.<sup>2589</sup> The decisions to arrest, detain and transfer the detainees were not taken by *Ali Kushayb*.

659. Furthermore, *Ali Kushayb* did not cooperate with the GoS structures at the locality level,<sup>2590</sup> nor did he conclude or form part of an agreement to commit crimes<sup>2591</sup> in furtherance of a Common Plan with a group consisting of members of the Militia/JJW and GoS Forces to target civilians in Deleig. *Ali Kushayb*'s cooperation with GoS authorities is not sufficiently substantiated as he was not present at preparatory meetings, nor did he coordinate his actions to fulfil the objectives of the alleged Common Plan. His alleged essential contribution to the execution of the Deleig Common Plan through the commission of the crimes at the Deleig police station is based on flawed, unreliable and non-credible evidence.

660. Consequently, the evidence is insufficient to assess the exact role that *Ali Kushayb* could have played in the execution of a Deleig Common Plan and the causality of the crimes committed in furtherance of this Plan.

## ***II - Inducing under Article 25(3)(b)***

661. The OTP did not prove that Mr Abd-Al-Rahman exerted a "strong influence" over the physical perpetrators, either through strong reasoning, persuasion or conduct prompting the commission of the offence that would qualify as inducement pursuant to Article 25(3)(b) of the charged crimes (Counts 22-31). The OTP further failed to demonstrate that: (i) Mr Abd-Al-Rahman exerted influence over another person to either commit or attempt a crime; and that (ii) he was aware that the crimes will be committed in the ordinary course of events as a consequence of the realisation of his acts or omissions.<sup>2592</sup>

662. At no time during the charged events did *Ali Kushayb*'s acts or conduct had any causal link to the fate of detainees of Deleig police station. The physical perpetrators were already determined to commit the crimes.<sup>2593</sup> Local leaders such as: Major Muhammad Khatir Bakhit, Hamdi Sharaf-Al-Din, Abd-Al-Rahman Hassaballah Dawud, Juma Hassan Fadhali exercised control over the physical perpetrators of the crimes through a hierarchical structure. Any form of further encouragement or moral support cannot qualify as inducing the crime.<sup>2594</sup>

<sup>2589</sup> See also **P-0643**: T-056, p. 91, line 22-p. 92, line 6 (Conf); T-059, p. 23, line 19-p. 25, line 4 (Conf); **P-0935**: T-090, p. 46, lines 16-24.

<sup>2590</sup> See **PART IV – Chapter 4**.

<sup>2591</sup> The crimes of torture and persecution were not established and therefore cannot be part of any common plan. See Section 3, I.

<sup>2592</sup> [Ntaganda Confirmation Decision](#), para. 153.

<sup>2593</sup> See [Al Hassan Decision on the Issuance of a Warrant for Arrest](#), para. 185.

<sup>2594</sup> See [Orić TJ](#) para. 271.

### ***III - Ordering under Article 25(3)(b)***

663. The OTP did not prove that *Ali Kushayb* ordered the crimes of murder as a crime against humanity and a war crime (Counts 26-27) or attempted murder as a crime against humanity and as a war crime pursuant (Counts 29-30). The entire evidence demonstrates that *Ali Kushayb* did not have a position of authority *vis-à-vis* the physical perpetrators. He was not in charge of the detainees and nor did he have the capacity to issue orders to others either at the police station, or at the execution sites.

### **Chapter 4 - Persecution**

664. Mr Abd-Al-Rahman is accused under the nickname *Ali Kushayb* of two counts of gender persecution intersecting with other grounds as a Crime against Humanity in Mukjar (Count 21) and Deleig (Count 31). The PTC confirmed the charges considering that the victims' Fur male ethnicity, combined with the "socially constructed gender role presuming males to be rebels," underpinned the perpetrators' perception of them as rebels, associated to rebels or rebel sympathisers.<sup>2595</sup> The OTP's novel construction of gender persecution is misaligned with the realities at the time of the events,<sup>2596</sup> arguing that Fur males were targeted based on "their presumed role in society as a current or potential future rebel fighters".<sup>2597</sup>

665. The Defence maintains, as detailed elsewhere in this brief, that insufficient evidence exists to support the claim of a persecution campaign in Kodoom and Bindisi, Mukjar and Deleig in 2003 and 2004, in which *Ali Kushayb* knowingly and intentionally participated.<sup>2598</sup>

666. To hold Mr Abd-Al-Rahman criminally responsible for gender persecution the TC needs to establish, whether the perpetrators' selection and detention of male victims were driven by discriminatory motives related to their perceived gender role as rebels. Furthermore, it needs to be established that such conduct constituted at the time it took place, a crime within the jurisdiction of the Court. In the present case, both questions should be answered negatively. The PTC's confirmation of the charges lacks specific findings to the objective factors relevant to the discriminatory grounds alleged and the subjective perceptions of both the perpetrator and victim.<sup>2599</sup>

<sup>2595</sup> [Abd-Al-Rahman Confirmation Decision](#), paras. 68-70, 80, 106.

<sup>2596</sup> GAULD, K, "[How is the crime against humanity of gender persecution being litigated before the International Criminal Court, and what are its implications?](#)", *Melbourne Journal of International Law*, pp. 19-21.

<sup>2597</sup> [OTP Trial Brief](#), paras. 181, 182: The OTP considers that "multiple intersecting discriminatory grounds best describe and fully capture all aspects of the discriminatory targeting in reference to the alleged persecution in Mukjar and Deleig."

<sup>2598</sup> See the relevant parts of Mukjar, Deleig and Kodoom and Bindinsi related to the underlying acts of persecution.

<sup>2599</sup> See [Ntaganda TJ](#), para. 1009.

***I - The Perceived Social Construct of Men as Rebels in this Case is not a Ground for Discrimination***

667. Under Article 7(2)(g) of the Statute, persecution is defined as “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectively.” Article 7(3) clarifies that “gender” is referring to the two sexes, male and female, within the context of society. The term “gender” can be understood as it does not indicate any meaning different from the above’,<sup>2600</sup> but can also be understood as gender affiliation or identity.<sup>2601</sup> The Defence submits that ICC provisions should be interpreted according to their ordinary meaning, guided by the principle of legality.<sup>2602</sup>

668. The Defence acknowledges the ICC's ability to interpret “gender” with reference to international HR instruments.<sup>2603</sup> The Defence warns nevertheless against any interpretation of the law going beyond Article 22(2) of the Statute and the principle of the strict interpretation of International Criminal Law.<sup>2604</sup> It is allowed to impart (new) meaning to existing law, however importing new external standards into International Criminal Law is not permitted.<sup>2605</sup>

669. The draft treaty on “Prevention and Punishment of Crimes against Humanity” mirrors the crime of gender persecution at the ICC,<sup>2606</sup> with no reference to the wordings of Article 7(3) to the definition of gender referring to the “context of society”.

670. International consensus on the definition of gender is lacking. The OTP’s policy paper, which is not part of the ICC Statute, defines “gender” in terms of biological characteristics and societal roles.<sup>2607</sup> The *Al Hassan* judgment referenced “particular roles, expectations, and conduct” associated with gender.<sup>2608</sup> The Defence asserts that the “perceived social construct of men as rebels” in this case is not a ground for discrimination under article 7(2)(g) of the Statute. In addition, it could not reasonably have been foreseen as a basis for discrimination within Sudan’s patriarchal society at the time<sup>2609</sup> where men assumed roles in security and combat, while women attended to civic or matrimonial roles.<sup>2610</sup>

<sup>2600</sup> [Burundi Decision on Investigation](#), p. 63, See footnote 332.

<sup>2601</sup> [Onqwen Sentence](#), para. 174.

<sup>2602</sup> [Katanga TJ](#), para. 45.

<sup>2603</sup> [Lubanga AJ](#), para. 36.

<sup>2604</sup> [Katanga TJ](#), para. 45.

<sup>2605</sup> [Katanga TJ](#), para. 52.

<sup>2606</sup> [Draft Articles on Prevention and Punishment of Crimes Against Humanity](#), Article 2(1)(h).

<sup>2607</sup> [Policy of the Crime of Gender Persecution](#), paras. 4, 42.

<sup>2608</sup> [Al Hassan TJ](#), para. 1566.

<sup>2609</sup> **P-1042: DAR-OTP-0220-1623**, para. 52.

<sup>2610</sup> **P-1042: T-027**, p. 52, line 15-p. 53, line 3.

671. The principle of legality safeguards against retroactive application of the law.<sup>2611</sup> The Defence recalls its arguments on the application of *nullum crimen sine lege*.<sup>2612</sup> As a matter of fact, “an offence must be clearly defined in law. This condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts’ interpretation of it, what acts and omissions will make him liable”.<sup>2613</sup>

672. Thus, the TC must assess whether the conduct at the time of the charged crimes was reasonably foreseeable as a criminal conduct. If there is an ambiguity, the interpretation shall be in favour of the accused person (*in dubio pro reo*).

673. The perpetrator's identification of the targeted group is a critical element. The group must simply be recognizable, which can be based on neutral criteria like geographic location or place of residence, rather than necessarily on discriminatory grounds such as race, ethnicity, or gender.<sup>2614</sup> The OTP considers the identity of the targeted group as being Fur males from Mukjar and Deleig which have the following characteristics: Fur (ethnic); Male (sex/ identity); from Mukjar and Deleig (geographic) combined with “the socially constructed gender role presuming males to be rebels” (social role of men as fighters). It can be noted that the OTP does not include the criteria of the age group of the perceived rebels as an identifying factor for the targeted group being potential rebels who may have been presumably of fighting age. The OTP seems to utilise combined definitions of gender (sex, identity/ expression) with the reason to discriminate (social role attached to the gender). According to that construction, any male Fur from Mukjar or Deleig would be presumed as rebel and targeted.

674. Evidence presented at trial does not substantiate the OTP’s theory of gender-based targeting. In the present case, violence was directed against men identified as rebels in Mukjar and Deleig without a gender-based motive. The target was identified as potential rebels, not as males fulfilling a socially constructed role.<sup>2615</sup> It is a fact that the male gender is the one who is predominantly involved in warfare as was the case in Darfur in 2003-2004 and remains the case today.<sup>2616</sup> This perception is a realistic understanding of power dynamics of the Sudanese patriarchal society.

<sup>2611</sup> See Article 9(3) of the Statute on the consistence of the Elements of the Crimes and the Statute.

<sup>2612</sup> See **PART II- Chapter 1**.

<sup>2613</sup> [ECtHR, Kokkinakis v. Greece Judgement](#), para. 52; See eg. [Katanga AJ and Dissenting Opinion](#), para. 33, footnote 50.

<sup>2614</sup> See [Al Hassan TJ](#), para. 1206, footnote 3966.

<sup>2615</sup> See relevant parts on Arrests and Detentions in Mukjar & Deleig: The evidence shows that Fur males were offered the possibility of joining the armed forces, especially in the PPF, and were thus not targeted. Also, some preeminent members of the Fur tribe were not targeted or released such as some detainees who expressed sympathy for the rebellion. See also [DAR-OTP-0209-0593](#), para. 514: In particular by analogy the conclusion from the UNCOI report on the target not being ethnic.

<sup>2616</sup> **P-1042: [DAR-OTP-0220-1623](#)**, paras. 50, 52.

675. Moreover, the OTP failed to explain how a male member of a group can discriminate against other men, taking into account their identical role in the same patriarchal society, their perceived identity as rebels for the enemy side, i.e. members of their own “group”. During the examination in chief, no questions were asked to a single witness, who came to testify about their possible perception, on the reasons of the criminal conducts of the perpetrators due to the socially constructed gender role as men being perceived as potential rebels in Sudan.

676. The socio-political context in Darfur in 2003 and 2004 combined with the lack of evidence submitted at trial on any acts of violence based on the gender role of men rendered the tasks of the OTP more than hazardous to prove the ground of gender persecutions. As a result, the OTP’s decision to intersect charges with additional grounds and acts appears aimed at introducing new standards of gender persecution that would have been unforeseeable to the accused at the time of the events.

## ***II - Public Speeches - The OTP Failed to Demonstrate the Special Intent Requirement***

677. In support of the assertion of the intent to discriminate predominantly Fur males, the OTP makes reference to various public speeches allegedly made by *Ali Kushayb* and other GoS Officials which – it claims – are indicative of discriminatory intent.<sup>2617</sup> However, *Ali Kushayb* either was not the one delivering the speeches in question, or was not even present during their deliverance. In addition, the evidence is often unreliable or mentions statements without derogatory meaning.

678. The OTP alleges that *Ali Kushayb* received a signal from Vice President Taha authorising him to kill members of the Fur tribe.<sup>2618</sup> [REDACTED].<sup>2619</sup> [REDACTED].

679. The OTP further contends that, according to [REDACTED], Harun authorised *Ali Kushayb* to treat “any Fur village” as a rebel village.<sup>2620</sup> However, the only mention [REDACTED] makes of an interaction between Harun and *Ali Kushayb* is an exchange that is said to have occurred in Mukjar in August 2003, where Harun allegedly met with “[*Ali Kushayb*’s] forces” and “thanked the Mujahidin”.<sup>2621</sup> Here too, no explicit mention is made of a direct interaction between *Ali Kushayb* and Harun. *Ali Kushayb* is not even alleged to have served in the PDF to which the *Mujahideen* belonged.<sup>2622</sup> The OTP has therefore not presented

<sup>2617</sup> [OTP Trial Brief](#), paras. 184-188.

<sup>2618</sup> [OTP Trial Brief](#), para. 184.

<sup>2619</sup> [REDACTED]. See also, discussion on Mukjar – Sindu Operation.

<sup>2620</sup> [OTP Trial Brief](#), para. 184.

<sup>2621</sup> [REDACTED].

<sup>2622</sup> See **PART IV – Chapter 5 – Section 2 – II – B – (i) and (v)** above.

any evidence substantiating its allegation that *Ali Kushayb* received instructions from GoS officials to target the Fur people.

680. The OTP makes reference to numerous speeches made by GoS officials in the absence of *Ali Kushayb* between 2003 and 2004. It refers to a speech made by Minister Hussein and Harun in Mukjar towards the end of August 2003, to a statement made by Torshein in November 2003, and to a speech made by Harun between February and March of 2004.<sup>2623</sup> According to [REDACTED] *Ali Kushayb* also was not present during these speeches<sup>2624</sup> and it is unclear how statements made by individuals other than *Ali Kushayb* can be indicative of his intent.

681. The OTP further makes reference to a speech made by Harun in Mukjar in the beginning of August 2003 during which *Ali Kushayb* was allegedly present.<sup>2625</sup> Harun is said to have expressed that “the children of the Fur had become rebels”, and thus, all their possessions “had become booty (*ghanima*) for the *Mujahideen*.”<sup>2626</sup> **P-0012**, the sole witness cited by the OTP to substantiate *Ali Kushayb*’s presence, makes no indication that *Ali Kushayb* endorsed Harun’s statements, nor that he engaged in any positive act indicating his support. [REDACTED] also makes no mention thereof.<sup>2627</sup>

682. The OTP further alleges that *Ali Kushayb* delivered a speech in Garsila in early 2003 where he is said to have expressed his intent to target members of the Fur tribe.<sup>2628</sup> **P-0843** who was supposed to confirm such a speech did not appear in court.

683. [REDACTED] further addresses a speech allegedly made in Mukjar in August 2003 by *Ali Kushayb* during which he addressed a crowd of JJW.<sup>2629</sup> Aside from the fact that the statements have no terms of discrimination, the Defence recalls its conclusion outlining the contradictions in [REDACTED]’s testimony about this event.<sup>2630</sup> The evidence suggests that [REDACTED] is involved in the attack on Bindisi. [REDACTED]’s evidence is thus unreliable and should be disregarded by the Chamber.

684. [REDACTED] testified about another speech allegedly given by *Ali Kushayb* in Arawala in December of 2003, during which he claims to have heard him using the phrase “*Aksah Amsah*” – wipe out and sweep away – to “his men”.<sup>2631</sup> [REDACTED] makes further reference to another speech allegedly made by *Ali Kushayb* in Dembo Kabde between the end

<sup>2623</sup> [OTP Trial Brief](#), para. 187-187.

<sup>2624</sup> [REDACTED].

<sup>2625</sup> [OTP Trial Brief](#), para. 185.

<sup>2626</sup> [OTP Trial Brief](#), para. 185.

<sup>2627</sup> [REDACTED].

<sup>2628</sup> [OTP Trial Brief](#), para. 188.

<sup>2629</sup> [REDACTED].

<sup>2630</sup> [REDACTED] See, discussion on meetings in Kodoom- Bindisi. [REDACTED]

<sup>2631</sup> [REDACTED]

of 2003 and the beginning of 2004, where he is said to have made similar statements.<sup>2632</sup> As regards both of these instances, the Defence recalls its conclusion on this motto and its lack of significance as a call for the perpetration of crimes.<sup>2633</sup>

685. As the adduced evidence does not substantiate the OTP allegations and does not speak to Mr Abd-Al-Rahman/*Ali Kushayb*'s behaviour,<sup>2634</sup> but rather, to that of his superiors, the Defence submits that the aforementioned speeches and statements do not establish the required intent for the crime of persecution on ethnic and political grounds beyond a reasonable doubt.

## **PART VI - THE PROSECUTION HAS NOT REBUTTED THE DEFENCE LINES**

### **Chapter 1 – Defence Line 1: Mr Abd-Al-Rahman Is Not *Ali Kushayb***

686. The verification of the identity of a suspect should be the bottom line of any investigation. It was not in the case of the Prosecution's investigation of the case against Mr Abd-Al-Rahman. In the immediate aftermath of the passing of UNSC Resolution 1593 referring the *Situation in Darfur, Sudan* to the Court, on 29 May 2005, the Sudanese authorities volunteered a first investigation thread to the Prosecution pointing at "Lieutenant Ali Muhammad Ali, nicknamed *Kushayb*" in relation to executions in Deleig.<sup>2635</sup>

687. From that early stage already, the use of this strange series of three extremely common first names followed by a mysterious nickname should have called for some verifications on behalf of the Prosecution. Who was that Lieutenant? Could we get a copy of his full *état civil* so that we can ascertain his identity? Can we get a copy of his military file, so that we can know exactly his force, rank, position, function and authority at the relevant time? Can we get a copy from his criminal records, like investigators do all over the world at the start of every investigation? Once informed of where the guy was from, can we go to his place and start our investigation on him? Nothing such was done, ever. The Defence had to ask for these basic documents at the start of the Case and never received these.<sup>2636</sup> The Prosecution made no use of Sudan's willingness to look cooperative until the announcement of the first Summons to Appear of February 2007 or after the overturn of President Al Bashir in 2019 to go to Rahad-Al-Berdi and investigate on the identity of its suspect.<sup>2637</sup> There is not a single evidence on record of efforts made by the Prosecution to establish or verify the identity of Mr Abd-Al-Rahman.

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<sup>2632</sup> [REDACTED].

<sup>2633</sup> **PART IV- Chapter 2- Section 4.**

<sup>2634</sup> [Onqwen TJ](#), para. 2739. See also, [Popović AJ](#), para. 713: "[T]he Appeals Chamber observes that when considering whether an accused has the required intent for the crime of persecution, trial chambers are allowed to consider 'the general attitude of the alleged perpetrator as demonstrated by his behaviour'".

<sup>2635</sup> [DAR-OTP-0116-0549](#), at 0560-0561. See **PART II – Chapter 2 – Section 2 – I -A** and **PART III – Chapter 1** above.

<sup>2636</sup> See **PART II – Chapter 2 – Section 2 – II** above.

<sup>2637</sup> See **PART II – Chapter 2 – Section 1** and **PART II – Chapter 2 – Section 2 – I - C**.

688. The OTP simply assumed that Mr Abd-Al-Rahman was *Ali Kushayb*, in flagrant violation of his presumption of innocence under Article 66(2) of the Statute and in violation of its mandate of establishing the truth by extending its investigation to cover all facts and evidence of relevance to the Case and investigate incriminating and exonerating circumstances equally, pursuant to Article 54(1)(a) of the Statute. The OTP candidly conceded so at trial.<sup>2638</sup>

689. Sudan's non-cooperation prevented the Defence from getting hold of the abovementioned key documents of relevance for establishing the identity of Mr Abd-Al-Rahman and prevented it from entering its territory and reaching Rahad-Al-Berdi for its investigation.<sup>2639</sup> The Chamber denied all solutions that the Defence proposed to circumvent that difficulty.

690. Throughout the proceedings, the Defence suggested creative remedies and sought the intervention of the relevant Chambers to take measures within their jurisdiction and powers to compel Sudan to cooperate.<sup>2640</sup> All solutions proposed by the Defence were ignored or denied by the Chamber. The Chamber belatedly issued a finding of non-cooperation against Sudan on 31 March 2023, but refused to refer it to the UNSC on the ground that Sudan kept cooperating with the Registry and the Prosecution.<sup>2641</sup> These rulings left the Defence with no solution. As a result of the Prosecution's violation of its investigative mandate and Mr Abd-Al-Rahman's presumption of innocence under Articles 54(1)(a) and 66(1) of the Statute and of the Trial Chamber's failure to intervene in a timely manner and preserve the fairness of the proceedings under its Article 64(2), documents and evidence of key relevance to establish the identity of Mr Abd-Al-Rahman and that he is not and has never been *Ali Kushayb* could not be obtained, with the result that "the interests of a fair trial and the rights of the Accused under Article 67 of the Statute" were irreparably frustrated.<sup>2642</sup> As mentioned above, such a violation of his fair trial rights are enough to acquit Mr Abd-Al-Rahman of all charges.<sup>2643</sup>

691. Acquitting Mr Abd-Al-Rahman on the ground that his trial was not fair because he was prevented from presenting evidence that he is not *Ali Kushayb* is not enough to do him justice. In this Chapter, the Defence will also demonstrate that the evidence on record falls short of providing proof beyond reasonable doubt that he is *Ali Kushayb*. The Defence is seeking a

<sup>2638</sup> **P-0585**: T-102, p. 15, lines 22-25.

<sup>2639</sup> See **PART II – Chapter 2 – Section 2 – II** above.

<sup>2640</sup> [ICC-02/05-01/20-507](#); [ICC-02/05-01/20-532-Red](#); ICC-02/05-01/20-1048-Conf; ICC-02/05-01/20-1052-Conf-Exp.

<sup>2641</sup> [ICC-02/05-01/20-913-Red](#), para. 27.

<sup>2642</sup> [ICC-02/05-01/20-695-Red](#), para. 13; [ICC-02/05-01/20-806-Red](#), para. 18; ICC-02/05-01/20-1203, para. 6

<sup>2643</sup> See **PART II – Chapter 2 – Section 2** above.

positive finding from the Chamber that the evidence does not establish beyond reasonable doubt that Mr Abd-Al-Rahman is *Ali Kushayb*.

### **Section 1 – The Prosecution Failed to Prove the Alias**

692. The purported agreed facts on the basis of which the Prosecution aims at proving the alias simply do not exist. Mr Abd-Al-Rahman has not agreed being *Ali Kushayb*. The elements of Mr Abd-Al-Rahman's biography agreed upon do not suggest, even less support that he had that nickname.<sup>2644</sup> At paragraph 5 of its Trial Brief refers to the alleged *procès-verbal* of November 2006<sup>2645</sup> as an agreed fact. This is abusive: the Prosecution was perfectly aware of the Defence's strong challenge to the authenticity of that document. It is fully addressed above.<sup>2646</sup> There is thus simply no fact agreed upon between the Prosecution and the Defence suggesting that Mr Abd-Al-Rahman was *Ali Kushayb*.

693. The Defence refers to its above submissions in relation to the Surrendering Video<sup>2647</sup> and the fact that it cannot be relied upon as evidence of the nickname pursuant to the Appeals Chamber OA12 ruling.

694. Mr Abd-Al-Rahman's position of authority is also challenged.<sup>2648</sup> This is a circular argument that is made by the Prosecution. The Prosecution's allegation is that Mr Abd-Al-Rahman was a JJW leader known as *Ali Kushayb*. In its submission, the alias goes with the authority: Mr Abd-Al-Rahman was allegedly known as *Ali Kushayb* because he was a JJW leader. The Prosecution is not alleging that Mr Abd-Al-Rahman was a JJW leader because he was also known as *Ali Kushayb*. It was technically possible for Mr Abd-Al-Rahman to bear the nickname *Ali Kushayb* without being a JJW leader. The evidence on record shows that *Kushayb* is not so rare of a nickname in Sudan,<sup>2649</sup> but there is no evidence that all those bearing it are JJW leaders. The challenged position of authority of Mr Abd-Al-Rahman does not support that he was also known as *Ali Kushayb*.

### ***I – Witness Evidence***

695. The Prosecution has called thirteen witnesses who purport to make a link between Mr Abd-Al-Rahman and *Ali Kushayb* without any significant basis of personal knowledge,<sup>2650</sup> three witness

<sup>2644</sup> [ICC-02/05-01/20-504-AnxA](#).

<sup>2645</sup> See generally [DAR-OTP-0219-6910](#).

<sup>2646</sup> See **PART III – Chapter 3 – Section 4** above.

<sup>2647</sup> See **PART III – Chapter 3 – Section 1 - I** above..

<sup>2648</sup> See **PART VI – Chapter 2** below.

<sup>2649</sup> **P-0020**: T-041, p. 73, lines 11-13, p. 76, line 18-p.77, line 4; T-042, p. 34, line 19-p. 37, line 23; **P-0119**: T-038, p. 66, lines 10-24.

<sup>2650</sup> P-0012, P-0029, P-0119, P-0131, P-0585, P-0769, P-0874, P-0892, P-0905, P-0907, P-0932, P-0990, P-0994.

who claim to have personal knowledge of one or more of his family members,<sup>2651</sup> and four witnesses who claim to have a personal knowledge of Mr Abd-Al-Rahman.<sup>2652</sup>

696. In its assessment of the credibility of these witnesses, the Trial Chamber shall be mindful that, as of 27 February 2007, the link between Mr Abd-Al-Rahman and the nickname *Ali Kushayb* and his pharmacy had become public knowledge, as a result of the publication of the Prosecution's motion for summonses to appear against Harun and Mr Abd-Al-Rahman/*Ali Kushayb* and related press release.<sup>2653</sup> From that date on, no one with interest in the activities of the Court in the *Situation in Darfur*, such as those who had suffered from the 2003-2004 events, could credibly ignore that Mr Abd-Al-Rahman, under the nickname *Ali Kushayb*, was accused by the Court of being a JJW leader involved in the events mentioned in the charges and "owned a veterinary pharmacy in the market in Garsila".<sup>2654</sup> The sole mention of Mr Abd-Al-Rahman's name, of the alias *Ali Kushayb*, and/or of the pharmacy on Garsila market, even less so when they mentioned a veterinary pharmacy, is deprived of any reliability as proof that the witnesses had knowledge of him after 27 February 2007: they may as well have adapted their evidence to the public information disseminated by the Court to become ICC witnesses, to receive benefit and protection and/or to obtain a condemnation by the Court of the crimes committed in 2003-2004, whoever the person on whom that sanction would fall was.

697. The evidence on record shows that there are only four witnesses who mentioned *Ali Kushayb* in their statements prior to 27 February 2007: **P-0011**, **P-0012**, **P-0029** and **P-0116**. The credibility of their respective evidence is addressed below with the other witnesses. P-0011 and P-0029 mentioned the name *Kushayb*, with different spelling, but did not link it with to Mr Abd-Al-Rahman in their initial statement made before 27 February 2007. That link was added later and may be the result of their direct or indirect contamination by the Court's public statements. The case of P-0116 is addressed below. The only witness who mentions Mr Abd-Al-Rahman with a link to *Ali Kushayb* before 27 February 2007 is P-0012, but he had no personal knowledge of Mr Abd-Al-Rahman. P-0012 is the only witness who made a link between the two names without having been possibly contaminated by the Court's activities. The Trial Chamber should pay particular attention to that aspect in its assessment of the relevant witnesses' evidence.

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<sup>2651</sup> P-0011, P-0883, P-0935.

<sup>2652</sup> P-0643, P-0878, P-0921, P-1021.

<sup>2653</sup> [ICC-02/05-56](#); [DAR-D31-00000009](#).

<sup>2654</sup> [ICC-02/05-56](#), para. 203.

*A - Witnesses Claiming Personal Knowledge of Mr Abd-Al-Rahman*

698. **P-0011** is one of the four witnesses who made their first statement to the Prosecution before 27 February 2007. She had a screening interview in 2005, during which she made no mention of *Ali Kushayb*.<sup>2655</sup> The Defence does not dispute that the first time she mentioned *Ali Kushayb* was in her statement to the OTP later in 2005.<sup>2656</sup> However, it was suggested to P-0011 that she had not mentioned in her OTP statement later in 2005 anything about the presence of *Ali Kushayb* during the distribution of weapons in Garsila,<sup>2657</sup> but that this was something raised for the first time in her evidence in Court.<sup>2658</sup> She did not deny this, and the matter was not dealt with in re-examination.<sup>2659</sup> She testified that she [REDACTED]<sup>2660</sup> knew one of his daughters called Nada.<sup>2661</sup> She said it was Nada who disclosed her father's true name as being Ali Abd-Al-Rahman Muhammad.<sup>2662</sup> But P-0011 testified that Nada was older than her, about 20 years old in 2003.<sup>2663</sup> Mr Abd-Al-Rahman's eldest daughter was 16 years old in 2023. Mr Abd-Al-Rahman's *état civil* records, the disclosure of which the Defence has been asking since November 2020 but never received, would have established as much. P-0011's evidence is further contradicted by the evidence of other witnesses who testified that they knew Mr Abd-Al-Rahman in Garsila by his name, or by the nicknames "Uncle Ali" or "Doctor Ali", not *Ali Kushayb*. The way P-0011 described Nada telling her the name of her father suggests that this name was a secret, which no other witness suggests. Finally, P-0011 had no explanation for not mentioning the name of Mr Abd-Al-Rahman in her statement of 2005 and for not mentioning his presence in the Bindisi attacks,<sup>2664</sup> whereas she testified in Court that he was leading these.<sup>2665</sup> The only explanation for these major variations in her evidence between 2005 and 2021 is her direct or indirect contamination by the activities of the Court in the meantime. P-0011's evidence of the link between Mr Abd-Al-Rahman and *Ali Kushayb* is neither credible nor reliable.

699. [REDACTED] testified that he knew Mr Abd-Al-Rahman for more than five years prior to the events in Wadi Salih.<sup>2666</sup> They met and discussed the topic of the insurgency and the

<sup>2655</sup> **P-0011**: T-091, p. 42, lines 2-24.

<sup>2656</sup> **P-0011**: T-091, p. 42, lines 5-6.

<sup>2657</sup> **P-0011**: T-091, p. 43, lines 4-8.

<sup>2658</sup> **P-0011**: T-091, p. 43, lines 5-8.

<sup>2659</sup> **P-0011**: T-091, p. 49, line 1.

<sup>2660</sup> **P-0011**: T-091, p. 42, lines 14-18 (Conf).

<sup>2661</sup> **P-0011**: T-091, p. 12, lines 5-13 (Conf).

<sup>2662</sup> **P-0011**: T-091, p. 12, line 17-p. 13, line 5 (Conf).

<sup>2663</sup> **P-0011**: T-091, p. 45, lines 17-23.

<sup>2664</sup> **P-0011**: T-091, p. 42, lines 2-24.

<sup>2665</sup> **P-0011**: T-091, p. 44, line 25-p. 45, line 5.

<sup>2666</sup> [REDACTED]

associated looting incidents.<sup>2667</sup> The Defence refers to its earlier submissions regarding credibility issues impacting on [REDACTED].<sup>2668</sup> [REDACTED]'s personal knowledge of Mr Abd-Al-Rahman primarily derives from his alleged visits to his pharmacy,<sup>2669</sup> but his basis for knowledge that he is *Ali Kushayb* stems from a document he allegedly viewed. This document is not in evidence. It allegedly referenced the appointment of Mr Abd-Al-Rahman, nicknamed *Ali Kushayb*, as head of the *Mujahideen* sub-committee, a sub-committee of the Mobilisation Committee [REDACTED].<sup>2670</sup> The Defence has established that Mr Abd-Al-Rahman could not sit in, even less chair, such a sub-committee because of his old age and that the mere existence of such sub-committee was not proven.<sup>2671</sup> No other witness corroborates the assertion that Mr Abd-Al-Rahman, as *Ali Kushayb*, was ever a member of the *Mujahideen* sub-committee. [REDACTED]'s evidence in this regard is contradicted by, at least, [REDACTED],<sup>2672</sup> [REDACTED].<sup>2673</sup> It is thus not credible.

700. [REDACTED] testified that he saw *Ali Kushayb* for the first time in 1984 [REDACTED].<sup>2674</sup> When asked how he knew that this person was *Ali Kushayb*, [REDACTED] responded that *Ali Kushayb* was well known at the time, without providing any explanation for such renown. Indeed, [REDACTED] admitted to not being acquainted with the group of soldiers with which *Ali Kushayb* was associated,<sup>2675</sup> nor actually knowing that that person was known by the name *Ali Kushayb*.<sup>2676</sup> [REDACTED] refers to *Ali Kushayb* owning a pharmacy in the Garsila market later on in 1989, but this is based purely on hearsay from a colleague<sup>2677</sup> and the evidence on record shows that Mr Abd-Al-Rahman opened his pharmacy after his retirement from the SAF in early-to-mid 1990s.<sup>2678</sup> [REDACTED] never went to the pharmacy himself. The Defence further refers to its earlier submissions regarding credibility issues impacting on [REDACTED].<sup>2679</sup>

701. **P-0921** testified that he met *Ali Kushayb* for the first time between 1995 and 1998 when he was a medical assistant in the army and was stationed in Garsila.<sup>2680</sup> The evidence on record

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<sup>2667</sup> [REDACTED].

<sup>2668</sup> See **PART III – Chapter 2 – Section 3 - III** above.

<sup>2669</sup> [REDACTED].

<sup>2670</sup> [REDACTED].

<sup>2671</sup> See **PART IV – Chapter 4** above.

<sup>2672</sup> [REDACTED].

<sup>2673</sup> [REDACTED].

<sup>2674</sup> [REDACTED]

<sup>2675</sup> [REDACTED]

<sup>2676</sup> [REDACTED]

<sup>2677</sup> [REDACTED]

<sup>2678</sup> [ICC-02/05-01/20-504-AnxA](#), items 10-11.

<sup>2679</sup> See **PART III – Chapter 2 – Section 3 - I** and **PART V – Chapter 1** above.

<sup>2680</sup> **P-0921**: T-110, p. 23, lines 4-12 (Conf); T-111, p. 25, lines 3-9 (Conf).

shows that Mr Abd-Al-Rahman retired from the army in the early- to mid-1990s.<sup>2681</sup> The Defence further refers to its earlier submissions regarding credibility issues impacting on P-0921.<sup>2682</sup> He clearly had an interest in off-loading blame onto the shoulders of the man he calls *Ali Kushayb*. The TC will note that the Prosecution took the decision not to elicit evidence from P-0921 in relation to the events in Mukjar.<sup>2683</sup> The conclusion is clear: P-0921 is a partial and unreliable witness, and his evidence should be disregarded in its entirety.

702. **P-0935** alleges that he came to know the man he refers to as *Ali Kushayb* through his friends in 1999.<sup>2684</sup> [REDACTED].<sup>2685</sup> When it was put to him that Mr Abd-Al-Rahman never had a son named Muhammad, P-0935 had no real answer to give.<sup>2686</sup> Mr Abd-Al-Rahman's *état civil* records, the disclosure of which the Defence has been asking since November 2020 but never received, would have established as much. The Prosecution has provided no proof of the existence of a son of Mr Abd-Al-Rahman called Muhammad. In the absence of such proof and in light of the overall low-level of reliability of his entire testimony,<sup>2687</sup> P-0935's evidence cannot be relied upon and should, it is submitted, be disregarded.

703. The same applies to **P-1021**, [REDACTED].<sup>2688</sup> P-1021 testified that he was introduced to *Ali Kushayb* [REDACTED] in 1996 in Garsila at his pharmacy.<sup>2689</sup> P-1021, described his relationship with *Ali Kushayb* prior to 2003 as brotherly. He estimates they saw each other between seven and ten times before 2003.<sup>2690</sup> At that time, P-1021 referred to him as "*Ali. Just Ali. Nothing else.*"<sup>2691</sup> P-1021's sole basis for linking *Ali Kushayb* to Mr Abd-Al-Rahman is his claim that he read "*Ali Muhammad Ali Abd-Al-Rahman Kushayb*" on a cheque deposited at a bank by Mr Abd-Al-Rahman.<sup>2692</sup> P-1021 failed to provide any explanation as to why Mr Abd-Al-Rahman would have shown him the cheque, why he would be so interested to try and read what was written on a cheque. The Prosecution has not presented any evidence of a cheque bearing this name. Nor has any explanation for why a nickname would be written on an official bank document. The witness's account is self-evidently unworthy of belief.

<sup>2681</sup> [ICC-02/05-01/20-504-AnxA](#), items 10-11.

<sup>2682</sup> See **PART III – Chapter 2 – Section 3 - I** and **PART V – Chapter 1** above.

<sup>2683</sup> **P-0921**: T-110, p. 63, lines 3-20 (Conf).

<sup>2684</sup> **P-0935**: T-090, p. 12, line 23-p. 13, line 8 (Conf).

<sup>2685</sup> **P-0935**: T-090, p. 13, lines 15-16 (Conf), p. 15, lines 9-11 (Conf), p. 92, lines 4-16 (Conf).

<sup>2686</sup> **P-0935**: T-090, p. 95, lines 22-24 (Conf).

<sup>2687</sup> **P-0935**: T-090, p. 62, lines 21-23, p. 66, lines 14-16; See **PART III – Chapter 2 – Section 1** above.

<sup>2688</sup> See **PART III – Chapter 2 – Section 3 - I** and **PART V – Chapters 1 and 2** above.

<sup>2689</sup> **P-1021**: T-081, p. 3 lines 2-11 (Conf), p. 74 lines 14-23 (Conf).

<sup>2690</sup> **P-1021**: T-081, p. 90, line 15-p. 91, line 5 (Conf).

<sup>2691</sup> **P-1021**: T-081, p. 91, lines 6-8 (Conf).

<sup>2692</sup> **P-1021**: T-081, p. 91, line 22-p. 92, line 4.

*B - Witnesses with no Significant Personal Knowledge of Mr Abd-Al-Rahman*

704. Other Prosecution witnesses have testified that the legal name of *Ali Kushayb* is Ali Muhammad Ali Abd-Al-Rahman, but their accounts are all based on no direct personal knowledge of *Ali Kushayb* or Mr Abd-Al-Rahman, or on the basis of extremely limited knowledge. Much of the evidence is based on speculation, hearsay, “common knowledge”, or may be influenced by the activities of the Court and/or media reports, rather than from reliable, personal knowledge. Given the general lack of first-hand familiarity of the subject matter, it is submitted that the TC should assign no weight to this class of evidence.

705. **P-0012** is the second of the four witnesses who made their first statement to the Prosecution before 27 February 2007. His statement was entered in [REDACTED], about one month before the application for summons to appear against Mr Abd-Al-Rahman.<sup>2693</sup> P-0012 testified that he encountered Mr Abd-Al-Rahman in his pharmacy in 2001 and 2002 while occasionally purchasing medication during his visits to Garsila to treat his animals in Bindisi.<sup>2694</sup> P-0012 described a purely commercial interaction, not a close relationship. P-0012 testified that he only called Mr Abd-Al-Rahman by the nickname “Uncle Ali” and only knew his name Ali Mohamed Ali through common knowledge.<sup>2695</sup> Such reliance on common knowledge cannot be relied upon. Other information provided by P-0012 to describe *Ali Kushayb* do not match Mr Abd-Al-Rahman and suggest that he may be talking of someone else.<sup>2696</sup> Overall, his knowledge of Mr Abd-Al-Rahman and the link he makes with *Ali Kushayb* are not sufficiently strong to be relied upon.

706. **P-0029** is the third of the four witness who made his first statement to the Prosecution before 27 February 2007. His statement was entered in [REDACTED]. P-0029 testified that he had met *Ali Kushayb* in his veterinary pharmacy in Garsila, where he bought medication from time to time. Based on anonymous hearsay, P-0029 was informed that the pharmacy was *Ali Kushayb*’s shop.<sup>2697</sup> According to P-0029, this was common knowledge in Garsila.<sup>2698</sup> They did not formally introduce each other.<sup>2699</sup> P-0029 heard later on from the media that *Ali Kushayb* was wanted and had been arrested by the ICC and noted that the media referred to him as “Ali

<sup>2693</sup> **P-0012**: [DAR-OTP-0119-0503-R01](#).

<sup>2694</sup> **P-0012**: [DAR-OTP-0119-0503-R01](#), para. 38.

<sup>2695</sup> **P-0012**: T-045, p. 9, line 18-p. 10, line 20.

<sup>2696</sup> **P-0012**: [DAR-OTP-0119-0503-R01](#), para. 38: “hunched”, “from Eastern Darfur, from Al Deain”, “an educated man”, “the slave of the *Rizeigat*”, “partly *Rizeigat*”, selling “medicine for animals”.

<sup>2697</sup> **P-0029**: T-031, p. 78, lines 20-25.

<sup>2698</sup> **P-0029**: T-031, p. 79, lines 1-16.

<sup>2699</sup> **P-0029**: T-031, p. 78, lines 23-25.

Abd-Al-Rahman *Ali Kushayb*”.<sup>2700</sup> The link P-0029 makes between *Ali Kushayb* and Mr Abd-Al-Rahman is thus the direct consequence from the media coverage on the activities of the Court. P-0029 also mentions that *Ali Kushayb* had a hole in one ear,<sup>2701</sup> which does not match Mr Abd-Al-Rahman. With that inconsistency, P-0029’s evidence based on hearsay and contamination by ICC activities cannot be relied upon as proof that Mr Abd-Al-Rahman is *Ali Kushayb*.

707. **P-0116** is the fourth witness who made his first statement to the Prosecution before 27 February 2007. P-0116 mentioned *Kushayb*, again with a different spelling, with no link to Mr Abd-Al-Rahman in his first statement of [REDACTED],<sup>2702</sup> but mentioned in his second statement of [REDACTED] that he heard that “*Abd-Al-Rahman Koshib*” was a suspect before the Court. He added that he had no more knowledge regarding this person, whom he did not know and had never met.<sup>2703</sup> P-0116’s statements were admitted into evidence pursuant to Rule 68(2)(c) of the Rules. He could not be cross-examined. He is not a witness of the link between Mr Abd-Al-Rahman and *Ali Kushayb*.

708. **P-0119** claimed in his statement that he had met with *Ali Kushayb* many times,<sup>2704</sup> but during his testimony, he admitted to visiting *Ali Kushayb* only once in his pharmacy in 1992,<sup>2705</sup> marking it as the sole instance of interaction with him.<sup>2706</sup> Even that remote interaction is doubtful, as evidence on record shows that Mr Abd-Al-Rahman opened his pharmacy only after his retirement from the SAF in early-to-mid 1990s.<sup>2707</sup> This variation of his evidence and contradiction are casting significant doubt on P-0119’s evidence about his knowledge of *Ali Kushayb*, based on a single unmemorable interaction more than a decade prior to the events in question during which no mention of his name is reported. P-0119 testified that he knew Mr Abd-Al-Rahman’s name from hearsay from a third person, who told him a bizarre and uncorroborated story about Mr Abd-Al-Rahman being from a non-Arab tribe from South-Sudan and having served as a “*Jana-Jaysh*”.<sup>2708</sup> This story is not corroborated and is in contradiction with agreed facts and other evidence on record according to which Mr Abd-Al-Rahman is Ta’aisha. P-0119 is thus not a reliable witness of Mr Abd-Al-Rahman’s identity.

<sup>2700</sup> **P-0029**: T-031, p. 58, lines 13-16.

<sup>2701</sup> **P-0029**: T-031, p. 85, line 25–p. 86, line 1.

<sup>2702</sup> **P-0116**: [DAR-OTP-0123-0039](#), para. 45.

<sup>2703</sup> **P-0116**: [DAR-OTP-0127-0318](#), para. 48.

<sup>2704</sup> **P-0119**: [DAR-OTP-0124-0196-R03](#), para.121.

<sup>2705</sup> **P-0119**: T-038, p. 68, line 18-p. 69, line 25, p. 77, line 13-p. 78, line 1.

<sup>2706</sup> **P-0119**: T-038, p. 71, lines 13-20.

<sup>2707</sup> [ICC-02/05-01/20-504-AnxA](#), items 10-11.

<sup>2708</sup> **P-0119**: T-038, p. 12, lines 7-22, p. 82, line 4-p. 83, line 17.

709. **P-0131** has presented two conflicting accounts regarding his interactions with *Ali Kushayb*: he first explained that he had met him two times, first at an event in 2003<sup>2709</sup> and the second instance in Khartoum in 2007.<sup>2710</sup> He later varied his account by saying that he actually only met him on the first instance, not the second.<sup>2711</sup> **P-0131** had no clear and coherent basis for identifying *Ali Kushayb* as Mr Abd-Al-Rahman,<sup>2712</sup> except on the basis of alleged “reports” that he read [REDACTED] with Mr Abd-Al-Rahman’s full name followed by “*Kushayb*” in brackets,<sup>2713</sup> just like in ICC filings. **P-0131** provided to the OTP what he claimed being his handwritten copy of these reports. The Defence refers to its above submissions about the lack of evidentiary value of these alleged handwritten copies and the overall lack of credibility of **P-0131**’s evidence.<sup>2714</sup>

710. **P-0585** had not mentioned the name of Mr Abd-Al-Rahman, which he allegedly knew since a meeting held in his village in 2003,<sup>2715</sup> in his written statement. It is on this occasion that the Prosecution admitted that they did not ask questions about *Ali Kushayb*’s identity in the normal course of their investigations.<sup>2716</sup> This alleged Prosecution’s failure to fulfil its duty falls short of providing a justification for **P-0585**’s omission though. It is difficult to understand why he did not provide a full account of that meeting. That important omission makes that **P-0585**’s late identification of Mr Abd-Al-Rahman as *Ali Kushayb* cannot be relied upon.

711. [REDACTED] testified that he first encountered the name “*Ali Kushayb*” in a signal [REDACTED].<sup>2717</sup>[REDACTED].<sup>2718</sup> [REDACTED]. The Defence further refers to its earlier submission on the overall unreliability of **P-0769**’s evidence.<sup>2719</sup>

712. **P-0874** testified that he did not have a close relationship with the man he knew as *Ali Kushayb*, describing him as “*recognisable*” in the Garsila market”.<sup>2720</sup> He testified that he would visit the pharmacy once a month to purchase medicine,<sup>2721</sup> indicating that his personal knowledge of *Ali Kushayb* is largely limited to these brief alleged commercial interactions with him. **P-0874** provided to the Prosecution a notebook which allegedly contained

<sup>2709</sup> **P-0131**: T-112, p. 11, line 8-p. 12, line 3 (Conf).

<sup>2710</sup> **P-0131**: T-112, p. 14, lines 1-4 (Conf).

<sup>2711</sup> **P-0131**: T-113, p. 51, lines 2-14 (Conf).

<sup>2712</sup> **P-0131**: T-112, p. 11, lines 8-9 (Conf).

<sup>2713</sup> **P-0131**: T-112, p. 14, lines 11-24 (Conf), T-113, p. 36, lines 14-25 (Conf).

<sup>2714</sup> See **PART III – Chapter 2 – Section 3 – I** and **PART V – Chapter 1** above.

<sup>2715</sup> **P-0585**: T-102, p. 14, line 25-p. 15, line 7.

<sup>2716</sup> **P-0585**: T-102, p. 15, lines 22-25.

<sup>2717</sup> [REDACTED].

<sup>2718</sup> **P-0769**: T-098, p. 43, lines 4-10 (Conf).

<sup>2719</sup> See **PART III – Chapter 2 – Section 4** above.

<sup>2720</sup> **P-0874**: T-082, p. 6, lines 21-24 (Conf).

<sup>2721</sup> **P-0874**: T-082, p. 7, lines 4-19 (Conf).

contemporaneous notes of him. The notebook did not list *Ali Kushayb* among the identified JJW leaders, but this name appeared on a different page, with no relation with the text of that page. P-0874 was then compelled to admit that he may have added some information in his notebook at a later stage, making his initial assertion that its content was contemporaneous notes at least partially untrue. [REDACTED]<sup>2722</sup>, but the document was not adduced in evidence. The Defence further refers to its earlier submission on the overall unreliability of P-0874's evidence.<sup>2723</sup>

713. **P-0883** testified that he knew Mr Abd-Al-Rahman, whom he also referred to as *Ali Kushayb*,<sup>2724</sup> but P-0883's basis of knowledge of this person is fundamentally rooted in assumption. He testified that he knew Mr Abd-Al-Rahman's brother, Hassan Muhammad Ali Abd-Al-Rahman, and inferred their relationship based on their physical resemblance.<sup>2725</sup> P-0883 further indicated that there was no other way for him to know *Ali Kushayb*'s name.<sup>2726</sup> There is no evidence on record that Mr Abd-Al-Rahman ever had a brother by the name of Hassan. Mr Abd-Al-Rahman's *état civil* records, the disclosure of which the Defence has been asking since November 2020 but never received, would have assisted the Chamber in its assessment of P-0883's evidence. P-0883's assumptive and baseless identification of Mr Abd-Al-Rahman as *Ali Kushayb* cannot be relied upon. The Defence further refers to its earlier submission on the overall unreliability of P-0883's evidence.<sup>2727</sup>

714. **P-0892** testified that he heard that *Ali Kushayb* was also known as Ali Abd-Al-Rahman, asserting that he only became certain of this information when the ICC Warrant of Arrest confirmed it<sup>2728</sup>. P-0892 could not recall when he first heard this information, nor did he provide answers to questions regarding the source of this initial hearsay<sup>2729</sup>. P-0892's assertion that Mr Abd-Al-Rahman and *Ali Kushayb* are one and the same person is based solely on an anonymous hearsay and a clear instance of contamination by the ICC activities. His evidence cannot be relied upon.

715. **P-0905** testified that in 2003, he heard Hamdi reading a signal regarding the distribution of weapons and uniforms to "*Ali Abd-Al-Rahman Kushayb*".<sup>2730</sup> The Defence refers to its earlier

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<sup>2722</sup> **P-0874**: T-083, p. 5, lines 1-16 (Conf).

<sup>2723</sup> See **PART III – Chapter 2 – Section 3 - I** above.

<sup>2724</sup> **P-0883**: T-071, p. 14, line 16-p. 15, line 17.

<sup>2725</sup> **P-0883**: T-071, p. 24, lines 8-18 (Conf).

<sup>2726</sup> **P-0883**: T-071, p. 19, line 17-p. 21, line 2 (Conf), p. 24, lines 8-18 (Conf), T-072, p. 44, lines 15-18; T-073, p. 80, lines 7-13.

<sup>2727</sup> See **PART III – Chapter 2 – Section 3 - III** above.

<sup>2728</sup> **P-0892**: T-048, p. 57, lines 4-25.

<sup>2729</sup> **P-0892**: T-048, p. 57, lines 4-25.

<sup>2730</sup> **P-0905**: T-085, p. 35, line 6-p. 37, line 3 (Conf), p. 37, lines 11-15 (Conf), p. 38, lines 10-23 (Conf).

submission on the overall unreliability of P-0905's evidence.<sup>2731, 2732</sup> [REDACTED].<sup>2733</sup> P-0905 further admitted having heard on Sudanese radio that Mr Abd-Al-Rahman had surrendered to the Court<sup>2734</sup> prior to his initial screening interview of November 2020 with the OTP. This aspect of his testimony reflects contamination from media reports regarding the Court's activities.

716. **P-0907** testified that he purchased medication from *Ali Kushayb*'s pharmacy in Garsila twice or three times in about 2002.<sup>2735</sup> They also met from time to time at a restaurant on the market.<sup>2736</sup> P-0907 would greet him as "Doctor Ali".<sup>2737</sup> But he and his community only heard that *Ali Kushayb*'s real name was Ali Muhammad Ali Abd-Al-Rahman after his surrender to the ICC.<sup>2738</sup> P-0907 was interviewed by the Prosecution after he became aware of that link. The link P-0907 makes between *Ali Kushayb* and Mr Abd-Al-Rahman is thus the direct consequence from the media coverage on the activities of the Court. It cannot be relied upon as evidence that Mr Abd-Al-Rahman is *Ali Kushayb*.

717. **P-0932** testified that he met *Ali Kushayb* on several occasions between 2000 and 2004, but they never introduced each other by name.<sup>2739</sup> He linked the name *Ali Kushayb* to Mr Abd-Al-Rahman solely after hearing about his arrest by the ICC custody over the radio in approximately 2020. P-0932 entered his statement with the Prosecution in October 2021, about one year after becoming aware of Mr Abd-Al-Rahman's detention at the ICC.<sup>2740</sup> The connection made by P-0932 between both names is a pure product of the media coverage of the ICC activities. It has no probative value.

718. **P-0990** testified that he met *Ali Kushayb* twice at his pharmacy in Garsila in 1999. During these encounters, the latter allegedly introduced himself as "*Ali Abd-Al-Rahman Ali Kushayb*", told P-0990 that he was a former master sergeant in the army, and that the name "Kushayb" was derived from his great-grandfather.<sup>2741</sup> P-0990 further asserted that he recognised *Ali Kushayb* at the Mukjar police station in 2004, noting that *Ali Kushayb* introduced himself once again as "*Ali Abd-Al-Rahman Ali Kushayb*" in the presence of Al-Tayyib.<sup>2742</sup> The OTP adduced no

<sup>2731</sup> See **PART III – Chapter 2 – Section 3 - II** above.

<sup>2732</sup> **P-0905**: [DAR-OTP-0215-5256-R02](#).

<sup>2733</sup> **P-0905**: T-087, p. 9, lines 7-15 (Conf), p. 36, line 21-p. 38, line 14 (Conf).

<sup>2734</sup> **P-0905**: T-086, p. 67, line 12-p. 68, line 5 (Conf).

<sup>2735</sup> **P-0907**: T-094, p. 26, line 18-p. 27, line 24.

<sup>2736</sup> **P-0907**: T-095, p. 55, lines 15-25.

<sup>2737</sup> **P-0907**: T-095, p. 56, line 4-p. 57, line 8.

<sup>2738</sup> **P-0907**: T-094, p. 28, lines 6-20, T-095, p. 25, lines 16-22, p. 34, line 3-p.35, line 10.

<sup>2739</sup> **P-0932**: T-068, p. 14, lines 11-24.

<sup>2740</sup> **P-0932**: T-068, p. 22, lines 3-17.

<sup>2741</sup> **P-0990**: T-041, p. 20, lines 6-18.

<sup>2742</sup> **P-0990**: T-041, p. 29, lines 13-19.

corroborative evidence of Mr Abd-Al-Rahman's great-grandfather bearing the nickname *Kushayb*. No other witness at the Mukjar police station has confirmed that *Ali Kushayb* identified himself there in this manner. Additionally, P-0990's ability to recall in 2004 a name he allegedly heard only once five years prior on an unmemorable occasion raises reasonable doubts as to the reliability of his evidence.

719. **P-0994** testified that it was common knowledge that Mr Abd-Al-Rahman was known as *Ali Kushayb*.<sup>2743</sup> He allegedly heard this information from "people in the street"<sup>2744</sup> and cannot be more specific as the source of his hearsay.<sup>2745</sup> P-0994 reported no direct interaction with *Ali Kushayb*, nor any reason why he would be discussing the name of *Ali Kushayb* with others.<sup>2746</sup> P-0994 therefore lacks a basis for the connection he makes between Mr Abd-Al-Rahman and *Ali Kushayb*. The Defence refers to its earlier submission on the overall unreliability of P-0994's evidence.<sup>2747</sup>

## ***II – Mr Abd-Al-Rahman's Pharmacy***

720. From 27 February 2007 on, the fact that Mr Abd-Al-Rahman had a pharmacy in the market of Garsila had become public knowledge.<sup>2748</sup>

721. The public information was about a veterinary pharmacy. This information was erroneous. Mr Abd-Al-Rahman's pharmacy was not a veterinary pharmacy. He was not licensed to sell veterinary products. Mr Abd-Al-Rahman holds a Certificate from the Council of Medical Assistance and Technical Professions delivered in 1984, when he was serving in the SAF Medical Unit, and a licence from the Federal Council for Pharmaceuticals and Toxicology to sell medicine for humans.<sup>2749</sup> His pharmacy in the market of Garsila was a pharmacy for human beings. He was not qualified to sell veterinary medication.

722. Yet, **P-0012**, **P-0029**, **P-0119**, **P-0651**, **P-0697**, **P-0736**, **P-0874**, **P-0905**, **P-0931**, **P-0932**, **P-0986**, and **P-0994** allege having seen *Ali Kushayb* in or near his pharmacy, uniformly asserting that it operated as a veterinary pharmacy.<sup>2750</sup> As of itself, the fact that so many

<sup>2743</sup> **P-0994**: T-084, p. 37, lines 4-10 (Conf).

<sup>2744</sup> **P-0994**: T-084, p. 41, lines 8-21 (Conf).

<sup>2745</sup> **P-0994**: T-084, p. 36, line 12-p. 37, line 10 (Conf).

<sup>2746</sup> **P-0994**: T-084, p. 41, lines 22-p. 42, line 1 (Conf).

<sup>2747</sup> See **PART III – Chapter 2 – Section 3 - III** above.

<sup>2748</sup> [ICC-02/05-56, para. 203](#), [DAR-D31-00000010](#).

<sup>2749</sup> [DAR-D31-0001-0005](#); [DAR-D31-0001-0006](#); See [ICC-02/05-01/20-504-AnxA](#), Items 9-10, 12.

<sup>2750</sup> **P-0012**: [DAR-OTP-0119-0503-R01](#), para. 38; **P-0029**: T-030, p. 17, lines 3-11; **P-0119**: T-038, p. 21, lines 2-9, p. 68, lines 12-17; **P-0651**: [DAR-OTP-0205-0015-R02](#), para. 66; **P-0697**: T-101, p. 6, line 22– p. 7, line 6; **P-0736**: T-035, p. 46, lines 14-18; [DAR-OTP-0210-0248-R02](#), paras. 27, 29, 45; **P-0874**: T-082, p. 7, lines 3-12 (Conf); **P-0905**: T-085, p. 20, lines 21-24; **P-0931**: T-062, p. 52, lines 4-15; p. 53, lines 5-11; **P-0932**: [DAR-OTP-0222-0602-R02](#), para. 24; T-068, p. 14, lines 1-10; **P-0986**: [DAR-OTP-0222-0437-R01](#), paras. 26, 28; **P-0994**: T-084, p. 40, lines 1-8 (Conf).

witnesses could agree on an information that is manifestly untrue is striking. There would be no explanation for that, had the information about the veterinary pharmacy not become public since 27 February 2007. With the only two exceptions of P-0012 and P-0029, who entered their statement before that information became public and may have been the sources of that mistaken information about the veterinary nature of the pharmacy, the only reasonable conclusion is that all other witnesses had their evidence contaminated, directly or indirectly, by the Court's activities and adapted their evidence to suit the Prosecution's theory. This is another major element of relevance in the Trial Chamber's assessment of the non-credibility of these witnesses. With respect to P-0012 and P-0029, they must have been mistaken about the nature of the pharmacy, which is quite possible in light of their limited interaction with it.

723. Many witnesses positioned the pharmacy close to the Agricultural Bank. Once the information that the pharmacy was located in the market of Garsila had been made public,<sup>2751</sup> anyone knowing Garsila, the position of its market and of the bank could say so. This piece of information is only evidence that the witnesses have already been in Garsila, not evidence that Mr Abd-Al-Rahman is *Ali Kushayb*.

724. The evidence on record also shows that there were many shops selling medicine in the Garsila market.<sup>2752</sup> This resulted in confusing information about the exact location of Mr Abd-Al-Rahman's pharmacy. For instance, **P-0907** identified the pharmacy as being located in a neighbourhood called Sagargar<sup>2753</sup>, while **P-0921** and **P-0585** asserted that it was not situated in that area.<sup>2754</sup> No finding can be reached beyond reasonable doubt on the basis of such confusion.

725. Moreover, witnesses whose claims regarding Ali Kushayb's ownership of a pharmacy are solely based on hearsay<sup>2755</sup> should not be afforded any weight regarding the alleged link between *Ali Kushayb* and Mr Abd-Al-Rahman's pharmacy, especially so if they entered their statement after 27 February 2007.

726. There were also contradictions regarding the description of the pharmacy. **P-0921** testified that a table was centrally located inside the pharmacy,<sup>2756</sup> while **P-0012** maintained that the table was not in the pharmacy itself, but outside and would not allow the customers to

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<sup>2751</sup> [ICC-02/05-56](#), para. 203.

<sup>2752</sup> **P-0029**: T-031, p. 53 lines 1-16; **P-0585**: T-099, p. 39, lines 5-10; **P-0883**: T-074, p. 19, lines 14-24, p. 21, line 17-p. 22, line 23.

<sup>2753</sup> **P-0907**: T-095, p. 56 lines 10-22.

<sup>2754</sup> **P-0921**: T-111, p. 29, line 17-p. 30, line 15 (Conf); **P-0585**: T-102, p. 12 line 20-p. 13 line 3.

<sup>2755</sup> **P-0129**: T-076, p. 14, lines 7-18; **P-0581**: T-064, p. 50, lines 11-25; **P-0850**: [DAR-OTP-0216-0002-R04](#), para. 18; **P-0892**: T-048, p. 35, line 19-p. 36, line 9; **P-0903**: T-033, p. 62, lines 5-12 ; **P-0984**: T-067, p. 81 lines 1-6.

<sup>2756</sup> **P-0921**: T-111 p. 26, line 20-p. 27, line 10 (Conf).

walk in but compelled them to buy medicine from the outside.<sup>2757</sup> **P-0918**<sup>2758</sup> and **P-0878**<sup>2759</sup> both testified that *Ali Kushayb* had a stall from which he sold medicine, while several other witnesses explain that he had an actual physical shop not just a stall.<sup>2760</sup> **P-0585** claimed that multiple chairs were available for Arab cattle owners,<sup>2761</sup> yet no other witnesses corroborated that detail. P-0585 also testified that the pharmacy had two doors, one that opens towards the East and another one that opened towards the West,<sup>2762</sup> while **P-0986**<sup>2763</sup> and **P-0935**<sup>2764</sup> referenced only one door. **P-0029** testified that the pharmacy was always open,<sup>2765</sup> and P-0935 asserted that it opened daily;<sup>2766</sup> conversely, **P-0921** indicated that its hours were inconsistent, stating it was sometimes open and sometimes closed, suggesting further inconsistency in operational hours, as working in the pharmacy allegedly was not *Ali Kushayb*'s full time occupation.<sup>2767</sup>

727. The OTP failed to adduce consistent and reliable evidence about Mr Abd-Al-Rahman's pharmacy. The fact that it did not use the opportunities it had, since 2005, to go to Garsila and investigate *in situ*<sup>2768</sup> certainly impeded its capacity to present a strong case about it. But this cannot be used as an argument to alleviate its burden to establish the truth and prove Mr Abd-Al-Rahman's guilt beyond reasonable doubt. In the absence of coherent evidence about the pharmacy, this element cannot support the Prosecution's demonstration that Mr Abd-Al-Rahman is *Ali Kushayb*.

### ***III – Other Irrelevant Elements Relied Upon at Trial by the Prosecution***

728. During the trial, the Prosecution has tried to rely on new elements, not pleaded in its Trial Brief, to strengthen its evidence of the alias.

729. The Prosecution has particularly sought to establish that the attempt of assassination of Mr Abd-Al-Rahman in July 2013 in Nyala constituted an attempt on *Ali Kushayb* as well, by relying on a series of media articles presented during the testimony of Defence witnesses.<sup>2769</sup>

<sup>2757</sup> **P-0012**: T-045, p. 86 lines 16-22.

<sup>2758</sup> **P-0918**: T-077, p. 19 lines 12-19 (Conf).

<sup>2759</sup> **P-0878**, T-077, p. 60 lines 1-5.

<sup>2760</sup> **P-0012**, T-045, p. 85 lines 6-11; **P-0029**: T-031, p. 59 lines 3-8; **P-0119**: T-038, p. 21, lines 2-9, p. 72, lines 2-24; **P-0921**: T-111, p. 27 lines 1-4 (Conf): "Inside the pharmacy."

<sup>2761</sup> **P-0585**: T-099, p. 39, line 17-p. 40, line 23.

<sup>2762</sup> **P-0585**: T-099 p. 39, line 17-p. 40 line 16.

<sup>2763</sup> **P-0986**: [DAR-OTP-0222-0437-R01](#), para. 26.

<sup>2764</sup> **P-0935**: T-090, p. 12 lines 15-20 (Conf).

<sup>2765</sup> **P-0029**: T-031, p. 55, lines 17-20.

<sup>2766</sup> **P-0935**: T-090, p. 17, lines 13-18.

<sup>2767</sup> **P-0921**: T-111, p. 27 line 16-p. 28 line 7 (Conf).

<sup>2768</sup> See **PART II – Chapter 2 – Section 2 – I – C** above.

<sup>2769</sup> [DAR-OTP-00005660](#) (Translation at [DAR-OTP-00006581](#)); [DAR-OTP-00006171](#) (Translation at [DAR-OTP-00006771](#)).

While the Defence does not contest the occurrence of an assassination attempt on Mr Abd-Al-Rahman, it vehemently disputes the characterization of the events and timeframe as articulated in the media articles and the purported connection to *Ali Kushayb*, which was obviously nothing else than a relaying of the information disseminated by the Court that Mr Abd-Al-Rahman was *Ali Kushayb* and was a suspect at large. All media articles on this event mention the ICC case.

730. A limited number of OTP witnesses have referred to the alleged assassination attempt against *Ali Kushayb* during their testimony. Specifically, **P-0883** stated that he was informed of the incident and subsequently visited *Ali Kushayb* in the hospital to “wish him a speedy recovery”.<sup>2770</sup> It strains credulity that a witness lacking personal knowledge of *Ali Kushayb* would visit him solely for this purpose. The Defence further refers to its earlier submissions regarding P-0883’s lack of credibility.<sup>2771</sup> **P-0651**’s testimony regarding the assassination attempt against *Ali Kushayb* in Nyala is based solely on hearsay.<sup>2772</sup> His credibility is also challenged.<sup>2773</sup> **P-0119** referenced two assassination attempts that fall outside the temporal scope delineated in the media articles; these claims remain uncorroborated and are also rooted in hearsay.<sup>2774</sup>

731. The same applies to media articles mentioning Mr Abd-Al-Rahman a.k.a. *Ali Kushayb* in relation to the conflict between the Salamat and the Ta’aisha.<sup>2775</sup> All these media articles post-dated the ICC public announcements of 27 February 2007. The link they draw between Mr Abd-Al-Rahman and *Ali Kushayb* is nothing else than a reference to the case before the Court. All media articles mentioning Mr Abd-Al-Rahman and/or *Ali Kushayb* also mention that he is wanted by the Court. They thus can have no evidentiary value with respect to the alias.

732. The OTP also tried to rely on a screenshot from the Um-Sory video<sup>2776</sup> at timestamp 09:09:19, where an axe is observed apparently being carried by Mr Abd-Al-Rahman. However, the Defence submits that the screenshot does not definitively identify the individual holding the axe. It remains unclear whether the axe was held by Mr Abd-Al-Rahman or by an individual to his left visible at timestamp 08:55:02, dressed with a red fabric.<sup>2777</sup> This ambiguity is enhanced by the presence of multiple individuals carrying unidentifiable objects throughout the video as

<sup>2770</sup> **P-0883**: T-072, p. 38 lines 1-14 (Conf).

<sup>2771</sup> See **PART III – Chapter 2 – Section 3 – III** and **PART VI – Chapter 1 – Section 1 – I – B** above.

<sup>2772</sup> **P-0651**: T-034, p. 20 lines 3-8.

<sup>2773</sup> See **PART III – Chapter 2 – Section 1** above.

<sup>2774</sup> **P-0119**: T-038, p. 12 line 12–p. 24 line 1.

<sup>2775</sup> [DAR-OTP-00005646](#) (Translation at [DAR-OTP-00006766](#)); [DAR-OTP-00005648](#) (Translation at [DAR-OTP-00006585](#)); [DAR-OTP-00005650](#) (Translation at [DAR-OTP-00006582](#)); [DAR-OTP-00005652](#) ([DAR-OTP-00006587](#)); [DAR-OTP-00005668](#) (Translation at [DAR-OTP-00006583](#)); [DAR-OTP-00005676](#) (Translation at [DAR-OTP-00006589](#)).

<sup>2776</sup> **P-0643**: [DAR-OTP-0220-5454](#).

<sup>2777</sup> **P-0643**: [DAR-OTP-0220-4835](#).

can be seen at 01:16:06 and at 02:53:13, which may consist of sticks or axes.<sup>2778</sup> Conversely, both of Mr Abd-Al-Rahman's hands are momentarily visible throughout the video and none of them are seen carrying an axe.<sup>2779</sup> The Defence suggests that Mr Abd-Al-Rahman is not the individual carrying the axe that is spotted on the Prosecution's screenshot.

733. Even if Mr Abd-Al-Rahman had indeed carried an axe on the day that video was shot, sometimes in 2015, this would in any case be no proof that he is *Ali Kushayb*. Testimonies from **P-0129** and **P-0883** indicate that carrying an axe is commonplace in Sudanese culture. P-0129 described the *Fas*, an axe traditionally used for cutting trees<sup>2780</sup>, as often employed as a walking stick.<sup>2781</sup> Likewise, P-0883 testified that many civilians, including *Umdahs* and elderly people, frequently carried a small axe made out of wood or iron, known as a *Farrar*.<sup>2782</sup> Given this commonality within this cultural context, the use of an axe as an identifying feature is unreliable for establishing a direct evidentiary link between Mr Abd-Al-Rahman and *Ali Kushayb*.

#### ***IV - Conclusion on the Prosecution's Evidence of the Alias***

734. Out of the five categories of evidence relied upon by the OTP in its Trial Brief to prove that Mr Abd-Al-Rahman is *Ali Kushayb*, the only relevant categories were witness evidence thereof and evidence related to his pharmacy. But the Prosecution ruined itself the credibility and reliability of its own witnesses by disseminating at the very early stage of its 2007 application for a summons to appear the information about the nickname and the pharmacy in the public domain. What happened next was quite foreseeable. All witnesses were contaminated, directly or indirectly, by the information disseminated by the Prosecution and relayed by all media, especially in Sudan. Some rare witnesses admitted that their source of information that Mr Abd-Al-Rahman was *Ali Kushayb* came from the Court's activities and its coverage. But the way the manifestly erroneous information about the veterinary nature of the pharmacy spread out among the Prosecution's witnesses gives a glimpse of the extensiveness of its impact. Taken at its highest, **P-0012** may be the only witness who provided a coherent, non-possibly contaminated statement about *Ali Kushayb* owning a pharmacy in Garsila. But his evidence is based on very limited interaction with the pharmacy, presents several inconsistencies<sup>2783</sup> and is mistaken about the veterinary nature of the pharmacy, thus demonstrating that his recollection of what he alleges is not so good and can only be given

<sup>2778</sup> **P-0643**: [DAR-OTP-0220-4835](#).

<sup>2779</sup> **P-0643**: [DAR-OTP-0220-4835](#), See for the right hand: 01:18:12; See for the left hand: 00:15:08.

<sup>2780</sup> **P-0129**: T-076, p. 41, lines 5-10.

<sup>2781</sup> **P-0129**: T-076, p. 41, lines 15-25.

<sup>2782</sup> **P-0883**: T-072, p. 26, lines 14-16, p. 27, line 3-p. 28, line 13, **P-0883**: [DAR-OTP-0219-5828](#).

<sup>2783</sup> **P-0012**: [DAR-OTP-0119-0503](#), para. 38: "hunched", "from Eastern Darfur, from Al Deain", "an educated man", "the slave of the *Rizeigat*", "partly *Rizeigat*", selling "medicine for animals".

limited reliance. On the basis of such weak evidence, no reasonable conclusion can be drawn that Mr Abd-Al-Rahman was *Ali Kushayb*.

## **Section 2 – Evidence on Record Shows that Mr Abd-Al-Rahman Is Not *Ali Kushayb***

735. The Prosecution evidence that Mr Abd-Al-Rahman is *Ali Kushayb* is not only weak. It is contradicted by a significant body of evidence that Mr Abd-Al-Rahman is not *Ali Kushayb*. In that category falls the evidence from Defence witnesses with personal knowledge of Mr Abd-Al-Rahman, but also evidence from OTP witnesses about the physical description of *Ali Kushayb*, which does not match with Mr Abd-Al-Rahman, suggesting either that the witnesses are mistaken, or lying, or that they are describing an *Ali Kushayb* who is not Mr Abd-Al-Rahman.

### ***I – Physical Descriptors of Ali Kushayb Do Not Match with Mr Abd-Al-Rahman***

736. The first reason why the OTP so lamentably failed in establishing such a link is the way it persisted throughout its investigation and Case to ask its witnesses whether they recognised *Ali Kushayb* by showing them a photograph of Mr Abd-Al-Rahman, either the one published on the *Ali Kushayb* webpage of the Court during the investigation, or his passport photo<sup>2784</sup> or the one taken during his surrender in Central African Republic during the trial,<sup>2785</sup> to ask them if they recognized *Ali Kushayb*.<sup>2786</sup> The inadequacy of such methodology was discussed at large at trial.<sup>2787</sup> No dock recognition was allowed by the Trial Chamber.<sup>2788</sup> The proper way of proceeding to obtain a reliable recognition through a lining-up was explained to the Prosecution, who remained deaf to the advice.<sup>2789</sup> [REDACTED] even testified that the lining-up procedure was the one followed in Sudan,<sup>2790</sup> despite its low standard of compliance with fair trial rights. But the OTP was not even capable to level-up its processes to the Sudanese standard. As a result, no reliable recognition of Mr Abd-Al-Rahman as *Ali Kushayb* is on record.

737. Mr Abd-Al-Rahman consented to participate in a Biometric Session which was held in 2021.<sup>2791</sup> Significant discrepancies exist between the result of this biometric session and the witnesses' evidence of their recollection of *Ali Kushayb*. These inconsistencies raise substantial

<sup>2784</sup> **P-0643:** [DAR-OTP-0222-0037](#); **P-0994:**[DAR-OTP-0222-0082](#); **P-1021:** [DAR-OTP-0221-0891](#); **P-0874:** [DAR-OTP-0221-0778](#).

<sup>2785</sup> **P-0643:** [DAR-OTP-0220-5589](#).

<sup>2786</sup> See eg: **P-0994:** DAR-OTP-0222-055-R01, para. 93; **P-0643:** T-057, p. 43, line. 14-p. 45, line 17 (Conf); **P-0874:** T-083, p. 47 lines 1-7 (Conf); **P-0883:** T-072, p. 39, line 19-p. 4, line 4(Conf); **P-0905:** T-086, p. 59, line 10 (Conf); **P-0921:** T-110, p. 57, line 7- p. 58, line 4 (Conf); **P-1021,** p. 24, line 18-p. 25, line 2 (Conf).

<sup>2787</sup> **P-0643:** T-057, p. 3, line 6-p. 11, line 15; p. 20, line 6-p. 23 line 23.

<sup>2788</sup> **P-0922:** T-039, p. 28, lines 4-11.

<sup>2789</sup> **P-0643:** T-057, p. 32, lines 16-20 (Conf); **P-0874:** T-083, p. 90, line 2-p. 91, line 12.

<sup>2790</sup> [REDACTED].

<sup>2791</sup> **P-1061:** [DAR-OTP-0223-0241](#) (Translation at [DAR-OTP-0220-1529](#))

doubt on whether the individual nicknamed *Ali Kushayb* described by the witnesses and Mr Abd-Al-Rahman are, in fact, the same person, or whether the witnesses providing that description invented their alleged interaction with *Ali Kushayb* or Mr Abd-Al-Rahman – when they had actually none.

738. Firstly, most of the Prosecution witnesses describe *Ali Kushayb* as dark-skinned,<sup>2792</sup> tall,<sup>2793</sup> thin,<sup>2794</sup> of an “average”<sup>2795</sup> or “athletic build”.<sup>2796</sup> While these features serve as baseline descriptors, they do not by themselves enable a precise and definitive identification of a specific individual. In the Sudanese context, these features are particularly unhelpful, as the population is predominantly dark-skinned and such builds are quite common. Consequently, that combination could realistically apply to a large number of men in Darfur, as confirmed by **P-0919**.<sup>2797</sup> As witnesses **P-0011**, **P-0671**, **P-0718**, **P-0720**, **P-0726** and **P-0919** only described *Ali Kushayb* on the basis of these broad and vague indicators,<sup>2798</sup> which do not form a solid evidentiary basis allowing for the recognition of any particular individual, their evidence on this specific topic should therefore be disregarded by the Trial Chamber as inconclusive.

739. In describing other distinguishing features, **P-0119** asserted that *Ali Kushayb*’s skin colour was similar to that of “people living in South Sudan, and not people from Darfur”.<sup>2799</sup> Furthermore, **P-0119** testified that he heard that *Ali Kushayb* did not belong to the Ta’aisha

<sup>2792</sup> **P-0012**: T-046, p. 4, lines 1-19; **P-0012**: [DAR-OTP-0119-0503-R01](#), para. 38; **P-0029**: T-030, p. 18, line 3; **P-0029**: T-031, p. 85, line 20-p. 86, line 1; **P-0129**: [DAR-OTP-0128-0128-R04](#), para. 94; **P-0581**: [DAR-OTP-0216-0560-R02](#), para. 27; **P-0585**: T-099, p. 44, lines 5-9; **P-0651**: [DAR-OTP-0205-0015-R02](#), para. 27; **P-0697**: [DAR-OTP-0209-0155-R02](#), para. 18; **P-0712**: [DAR-OTP-0209-1884-R04](#), para. 60; **P-0718**: [DAR-OTP-0209-2004-R02](#), para. 81; **P-0720**: [DAR-OTP-0210-0291-R02](#), para. 105; **P-0726**: [DAR-OTP-0210-0346-R03](#), para. 79; **P-0850**: [DAR-OTP-0216-0002-R04](#), para. 20; **P-0913**: [DAR-OTP-0218-0021-R02](#), para. 83; **P-0919**: [DAR-OTP-0217-0423-R03](#), para. 41; **P-0955**: [DAR-OTP-0220-0620-R02](#), para. 35; **P-0986**: [DAR-OTP-0222-0437-R01](#), para. 28; **P-0918**: [DAR-OTP-0218-0120-R04](#), para. 16; **P-0932**: [DAR-OTP-0222-0602-R01](#), para. 22; **P-0994**: [DAR-OTP-0222-0055-R01](#), para. 23; **P-1073**: [DAR-OTP-0222-5026-R01](#), paras. 24-25.

<sup>2793</sup> **P-0011**: T-091, p. 43, lines 9-10; **P-0012**: T-046, p. 4, lines 1-19; **P-0012**: [DAR-OTP-0119-0503-R01](#), para. 38; **P-0129**: [DAR-OTP-0128-0128-R04](#), para. 94; **P-0581**: [DAR-OTP-0216-0560-R02](#), para. 27; **P-0584**: [DAR-OTP-0200-1540-R02](#), para. 110; **P-0585**: T-099, p. 44, lines 5-9; **P-0651**: [DAR-OTP-0205-0015-R02](#), para. 27; **P-0671**: [DAR-OTP-0206-0105-R02](#), para. 44; **P-0718**: [DAR-OTP-0209-2004-R02](#), paras. 80, 82; **P-0736**: T-035, p. 12, lines 5-9; **P-0918**: [DAR-OTP-0218-0120-R04](#), para. 16; **P-0932**: [DAR-OTP-0222-0602-R02](#), para. 22; **P-0955**: [DAR-OTP-0220-0620-R02](#), para. 35; **P-0984**: T-066, p. 52, line 1-p. 53, line 25 (Conf); **P-0986**: [DAR-OTP-0222-0437](#), para. 28; **P-0994**: [DAR-OTP-0222-0055-R01](#), para. 23.

<sup>2794</sup> **P-0129**: [DAR-OTP-0128-0128-R04](#), para. 94; **P-0697**: [DAR-OTP-0209-0155-R02](#), para. 18; **P-0736**: T-035, p. 12, lines 5-9; **P-0850**: [DAR-OTP-0216-0002-R04](#), para. 20; **P-0919**: [DAR-OTP-0217-0423-R03](#), para. 41; **P-0932**: [DAR-OTP-0222-0602-R02](#), para. 22; **P-0984**: T-066, p. 52-53 (Conf); **P-0986**: [DAR-OTP-0222-0437-R01](#), para. 28; **P-0994**: [DAR-OTP-0222-0055-R01](#), para. 23.

<sup>2795</sup> **P-0584**: [DAR-OTP-0200-1540-R02](#), para. 110; **P-0718**: [DAR-OTP-0209-2004-R02](#), para. 80.

<sup>2796</sup> **P-0651**: [DAR-OTP-0205-0015-R02](#), para. 27; **P-0712**: [DAR-OTP-0209-1884-R04](#), para. 60; **P-0913**: [DAR-OTP-0218-0021-R02](#), para. 83.

<sup>2797</sup> **P-0919**: T-061, p. 15, lines 10-15.

<sup>2798</sup> **P-0011**: T-091, p. 43, lines 9-10; **P-0671**: [DAR-OTP-0206-0105-R02](#), para. 44; **P-0718**: [DAR-OTP-0209-2004-R02](#), para. 80; **P-0720**: [DAR-OTP-0210-0291-R02](#), para. 105; **P-0726**: [DAR-OTP-0210-0346-R03](#), para. 79; **P-0919**: [DAR-OTP-0217-0423-R03](#), para. 41.

<sup>2799</sup> **P-0119**: T-038, p. 19, lines 22-24.

tribe, but was instead affiliated with a non-Arab tribe in South-Sudan.<sup>2800</sup> **P-0012** initially raised questions regarding *Ali Kushayb*'s tribal affiliation and region of origin, speculating that he might be "partly Rizeigat",<sup>2801</sup> or a member of the Rizeigat tribe<sup>2802</sup> from Al-Deain, East Darfur.<sup>2803</sup> However **P-0012** revised this assertion after being influenced by a You-tube video.<sup>2804</sup> It is established within these proceedings and agreed between the Parties that Mr Abd-Al-Rahman was born in Rahad-Al-Berdi, South Darfur,<sup>2805</sup> and is a member of the Ta'aisha tribe.<sup>2806</sup> The discrepancies between the witnesses' accounts and Mr Abd-Al-Rahman's confirmed tribal affiliation further underscore the witnesses' inability to connect *Ali Kushayb* with Mr Abd-Al-Rahman, thereby calling into question the reliability of their evidence on this matter.

740. Multiple OTP witnesses also estimated *Ali Kushayb*'s age during their purported encounters with the latter.<sup>2807</sup> At the outset, Mr Abd-Al-Rahman was born in 1949,<sup>2808</sup> and was thus between fifty-four and fifty-five years old in 2003-2004. Nonetheless, **P-0986** estimated that *Ali Kushayb* was in his thirties or forties during their encounter in 2001.<sup>2809</sup> Similarly, **P-1074** stated that *Ali Kushayb* was in his forties<sup>2810</sup> when she first saw him in. Furthermore, the Prosecution was afforded ample opportunity to cross-examine [REDACTED] regarding his 2006 interaction with *Ali Kushayb*<sup>2811</sup> and his recollection of him as a man in his late thirties.<sup>2812</sup> However, this opportunity was not utilised. As a result, the assertion that *Ali Kushayb* was in his late thirties in 2006 remains unchallenged, corroborated as it is by the testimony of **P-0986**. This estimation, falling between 30 and 40 years, introduces reasonable doubt concerning *Ali Kushayb*'s profile and age. Indeed, the individual presented to the witnesses as *Ali Kushayb* appeared to be manifestly much younger than Mr Abd-Al-Rahman. This disparity between the alleged age and witness assessment is substantial enough to exceed any plausible margin of error. The person these witnesses describe thus cannot have been Mr Abd-Al-Rahman.

<sup>2800</sup> **P-0119**: T-038, p. 81, line 25-p. 82, line 11.

<sup>2801</sup> **P-0012**: [DAR-OTP-0119-0503-R01](#), para. 38..

<sup>2802</sup> **P-0012**: T-046, p. 13, lines 17-24.

<sup>2803</sup> **P-0012**: T-046, p. 9, lines 12-18.

<sup>2804</sup> **P-0012**: T-046, p. 9, lines 12-18.

<sup>2805</sup> [ICC-02/05-01/20-504-AnxA](#), item 7.

<sup>2806</sup> [ICC-02/05-01/20-504-AnxA](#), item 4.

<sup>2807</sup> **P-0850**: [DAR-OTP-0216-0002-R04](#), para. 20; **P-0986**: [DAR-OTP-0222-0437-R01](#), para. 28; **P-1074**: [DAR-OTP-0224-0441-R02](#), para. 50.

<sup>2808</sup> [OTP Trial Brief](#), para. 2; [ICC-02/05-01/20-504-AnxA](#), item 1.

<sup>2809</sup> **P-0986**: [DAR-OTP-0222-0437-R01](#), para. 28.

<sup>2810</sup> **P-1074**: [DAR-OTP-0224-0441-R02](#), para. 50.

<sup>2811</sup> [REDACTED].

<sup>2812</sup> [REDACTED].

741. Witnesses have also provided detailed descriptions of *Ali Kushayb*'s physical appearance, notably a hunched back. **P-0905** testified that the latter was "leaning forward" and had a "crunch".<sup>2813</sup> **P-0932** stated that *Ali Kushayb* had a "hump", describing his shoulders as "bent forward",<sup>2814</sup> a description corroborated by **P-0994**, a Policeman in Deleig at the same time, and **P-0012**.<sup>2815</sup> **P-0129** described *Ali Kushayb* as "a bit bent [from his shoulders]" or "crooked",<sup>2816</sup> indicating that this feature stood out in his memory.<sup>2817</sup> Although this feature is usually accentuated with age, photographs from Mr Abd-Al-Rahman's Biometric Session show that he does not exhibit this characteristic and stands perfectly straight, even over twenty years after the charged events.<sup>2818</sup>

742. Witnesses have also provided conflicting accounts regarding scars on *Ali Kushayb*'s face. **P-0905** testified that *Ali Kushayb* had scars on both cheeks,<sup>2819</sup> yet he had previously denied their existence during an interview with the OTP, raising questions about the reliability of his testimony.<sup>2820</sup> **P-0994** and **P-1073** both testified that *Ali Kushayb* had scars on his forehead, but provided differing descriptions. While **P-1073**, who claimed to have seen *Ali Kushayb* in a car during the 2003 attack in Bindisi, asserted that he had one scar in the center of his forehead "right where he would prostate in prayer",<sup>2821</sup> **P-0994**, who had allegedly seen *Ali Kushayb* multiple times in 2004, testified to the presence of two parallel scars at the top of his forehead.<sup>2822</sup> **P-1073**'s account is further undermined by both her absence of knowledge of *Ali Kushayb*'s identity<sup>2823</sup> and the context of her observation of the said scar. Other Prosecution witnesses did not mention similar scars. Mr Abd-Al-Rahman has no visible scar on his face. His Biometric Session revealed some faint lines which can be seen only with very favourable light exposure, but these are anyhow too faint to be seen with naked eyes and in natural light. These could not have been seen by the witnesses and are not noticeable traits to describe Mr Abd-Al-Rahman.

743. The most significant discrepancy regarding the physical features attributed to *Ali Kushayb* and Mr Abd-Al-Rahman pertains to their ears. At the outset, photographs from Mr Abd-Al-

<sup>2813</sup> **P-0905**: T-087, p. 29, lines 1-4 (Conf).

<sup>2814</sup> **P-0932**: [DAR-OTP-0222-0602-R02](#), para. 22.

<sup>2815</sup> **P-0012**: [DAR-OTP-0119-0503-R01](#), para. 38; **P-0994**: [DAR-OTP-0222-0055-R01](#), para. 23: **P-0994** described that *Ali Kushayb* was "bending down from the shoulders" because of his height.

<sup>2816</sup> **P-0129**: [DAR-OTP-0128-0128-R04](#), para. 94.

<sup>2817</sup> **P-0129**: T-076, p. 16, lines 2-23.

<sup>2818</sup> **P-1061**: [DAR-OTP-0221-1368](#).

<sup>2819</sup> **P-0905**: T-087, p. 27, line 16-p. 28, line 17 (Conf).

<sup>2820</sup> **P-0905**: T-087, p. 32, lines 7-19 (Conf).

<sup>2821</sup> **P-1073**: T-103, p. 31, lines 12-24 (Conf).

<sup>2822</sup> **P-0994**: T-084, p. 42, lines 3-19 (Conf).

<sup>2823</sup> **P-1073**: T-103, p. 10, lines 17-25; p. 31, lines 5-9.

Rahman's Biometric Session and the corresponding Forensic Examination Report<sup>2824</sup> demonstrate that he bears no mark or piercing on his ears. Conversely, seven Prosecution witnesses indicated having seen or heard that *Ali Kushayb* had either a piercing, a hole or a mark on at least one ear. **P-0029** testified that he noticed a "pierce or a hole" in *Ali Kushayb*'s ear but could not remember which one,<sup>2825</sup> noting that it was unusual for men in Sudan to have pierced ears.<sup>2826</sup> The existence of this feature was corroborated by other witnesses,<sup>2827</sup> including **P-0581**, who stated that *Ali Kushayb* had a "tribal piercing" on one earlobe,<sup>2828</sup> and **P-0913**, who mentioned "a piece of jewellery" in one of his ears.<sup>2829</sup> **P-0932** testified that *Ali Kushayb* had both ears pierced.<sup>2830</sup> Other witnesses, such as **P-0877** and **P-0903**, relayed that they heard from general talk amongst the community that *Ali Kushayb* had a "hole" or "cut" on his ear,<sup>2831</sup> suggesting that this information was widely circulated within villages and amongst different communities. As acknowledged by P-0029, pierced ears are not a common feature for men in the Sudanese culture. Hence, the fact that several witnesses mentioned this uncommon feature can hardly be interpreted as an *ex post facto* reconstruction of their memory: it must have been based on something, be it their actual interaction with a man called *Ali Kushayb* who had pierced ears, or their invention of an interaction with Mr Abd-Al-Rahman with the added detail of the pierced ear(s) to make their encounter appear more reliable. In any event, the witnesses' claim is defeated by the absence of such a feature, or at least a scar or mark, on the ears of the Accused. Consequently, the repetitive mention of *Ali Kushayb*'s pierced ear(s) is casting serious doubt as to the witnesses' identification of Mr Abd-Al-Rahman as the man nicknamed *Ali Kushayb*, and only further damages the reliability of their evidence.

744. In summary, the portrait depicted by the aforementioned Prosecution witnesses does not match Mr Abd-Al-Rahman's actual features and does not align with the physical description and analysis of Mr Abd-Al-Rahman, as noted in his Biometric Session. Hence, they cannot substantiate the identification of Mr Abd-Al-Rahman as *Ali Kushayb*. Moreover, whilst broad descriptors such as skin colour and physique can facilitate the identification of an individual, they are inconclusive in the Darfurian context. The evidence on record related to physical

<sup>2824</sup> **P-1061**: [DAR-OTP-0223-0241](#) (Translation at [DAR-OTP-0220-1529](#)).

<sup>2825</sup> **P-0029**: T-031, p. 57, lines 1-4, p. 85, line 22-p. 86, line 1.

<sup>2826</sup> **P-0029**: T-031, p. 57, lines 5-8.

<sup>2827</sup> **P-0916**: [DAR-OTP-0224-0023-R01](#), paras. 56-57: "I would describe the man who was identified to me as Ali Kushayb as being very tall with a hole on one of his ears. I am not sure which side"; "I would recognise him again if I saw him today [...] little hole on one of his ears".

<sup>2828</sup> **P-0581**: [DAR-OTP-0216-0560-R02](#), para. 27.

<sup>2829</sup> **P-0913**: T-069, p. 67, lines 18-23 (Conf).

<sup>2830</sup> **P-0932**: T-068, p. 35, lines 15-20.

<sup>2831</sup> **P-0877**: T-055, p. 72, line 25-p. 74, line 25 (Conf); **P-0903**: T-033, p. 68, lines 21-25.

details, like *Ali Kushayb*'s facial hair, preeminent nose, apparent age, tribal affiliation, hunched back, face scars and pierced ears, are irreconcilable with Mr Abd-Al-Rahman's actual features. These inconsistencies in the witnesses' descriptions raise reasonable doubt regarding either their credibility or their identification of the person introduced to them as *Ali Kushayb*. In any case, without ruling out that the evidence provided by the Prosecution witnesses may point to someone else, the Prosecution has failed to demonstrate a credible connection between *Ali Kushayb* and Mr Abd-Al-Rahman based on physical descriptors.

## ***II – Defence Witnesses Prove that Mr Abd-Al-Rahman Is Not Ali Kushayb***

745. The Defence has called nine witnesses<sup>2832</sup> who have known Mr Abd-Al-Rahman for significant periods of time, and for some, for much of their lives. All are extremely well-placed to speak about him, and any nicknames by which he is known. They have all confirmed that Mr Abd-Al-Rahman was never known by the nickname *Ali Kushayb* and that the only nickname he has or has ever had is *Abu Nasser*, after the name of his first-born son. Most Defence witnesses have known Mr Abd-Al-Rahman longer and better than any OTP witness. Their testimony regarding any link between Mr Abd-Al-Rahman and the name *Ali Kushayb* should be preferred over any evidence to the contrary of OTP witnesses, like **P-0012** who only encountered from time to time Mr Abd-Al-Rahman in his pharmacy during his visits to Garsila,<sup>2833</sup> had a purely commercial interaction with him and did not even know his name, other than "Uncle Ali".<sup>2834</sup>

746. Despite the considerable difficulties that limited the Defence's capacity to identify, locate and contact witnesses, and then arrange for them to testify before the TC, and acknowledging that it is not a strict arithmetical exercise, it nevertheless cannot be denied that there are quantitatively more witnesses with a significant personal knowledge of Mr Abd-Al-Rahman who have testified that he is not *Ali Kushayb* than allegedly well-placed OTP witnesses who say he is.

747. The TC has before it a substantial block of consistent Defence evidence that Mr Abd-Al-Rahman is not *Ali Kushayb* to which it should attach a great deal of weight. That evidence will be balanced against contrary OTP evidence that is itself undermined by significant discrepancies, contradictions, credibility challenges and contamination as a result of the OTP's own public dissemination of identifying information since 2007. The Defence is confident that, once it has completed a full and fair analysis of the evidence, the only conclusion open to the TC is that the Prosecution has not proved its case beyond reasonable doubt.

<sup>2832</sup> **D-0001, D-0002, D-0003, D-0005, D-0007, D-0008, D-0011, D-0032, D-0039.**

<sup>2833</sup> **P-0012:** [DAR-OTP-0119-0503](#), para. 38.

<sup>2834</sup> **P-0012:** T-045, p. 9, line 18- p. 10, line 20.

*A - Witnesses with Personal Knowledge of Mr Abd-Al-Rahman Have Consistently Confirmed that he is Not Ali Kushayb*

748. Witnesses who have known Mr Abd-Al-Rahman for very many years have confirmed that he is not and never has been known by the nickname *Ali Kushayb*. These include [REDACTED] credible figures within the Ta'aisha tribe who have personally known Mr Abd-Al-Rahman for many years, have never known him by the name *Ali Kushayb*, and have only encountered this name within the context of media reports on the work of the ICC.<sup>2835</sup> Such witnesses include [REDACTED], who has known Mr Abd-Al-Rahman since 2010,<sup>2836</sup> and [REDACTED], who testified that he has known Mr Abd-Al-Rahman since [REDACTED] the late 1970s in Al Fasher. [REDACTED] only knows Mr Abd-Al-Rahman by the nickname *Abu Nasser*.<sup>2837</sup>

749. [REDACTED] has known Mr Abd-Al-Rahman since childhood.<sup>2838</sup> He never heard anyone refer to Mr Abd-Al-Rahman as *Ali Kushayb* until “the issue of the International Criminal Court” arose.<sup>2839</sup> [REDACTED] first heard the name *Kushayb* in connection with the ICC’s investigations,<sup>2840</sup> noting that locals were surprised to learn of the allegations against Mr Abd-Al-Rahman. He had always been thought of as an ordinary man uninvolved in the events underpinning the OTP’s allegations.<sup>2841</sup>

750. [REDACTED] has known Mr Abd-Al-Rahman since 2011<sup>2842</sup> [REDACTED].<sup>2843</sup> [REDACTED] knows Mr Abd-Al-Rahman exclusively by the name *Abu Nasser* and has never heard anyone refer to him as *Ali Kushayb*, nor has he heard him refer to himself by the name *Ali Kushayb*.<sup>2844</sup>

751. Witnesses that have served in the military with Mr Abd-Al-Rahman do not know him as *Ali Kushayb*. [REDACTED]<sup>2845</sup> and has known him since 1983,<sup>2846</sup> theirs was a professional relationship.<sup>2847</sup> [REDACTED] never heard Mr Abd-Al-Rahman refer to himself as *Ali Kushayb*.<sup>2848</sup> [REDACTED] met Mr Abd-Al-Rahman in 1964 during their military service in

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<sup>2835</sup> [REDACTED]

<sup>2836</sup> [REDACTED]

<sup>2837</sup> [REDACTED]

<sup>2838</sup> [REDACTED]

<sup>2839</sup> [REDACTED]

<sup>2840</sup> [REDACTED]

<sup>2841</sup> [REDACTED]

<sup>2842</sup> [REDACTED]

<sup>2843</sup> [REDACTED]

<sup>2844</sup> [REDACTED]

<sup>2845</sup> [REDACTED].

<sup>2846</sup> [REDACTED].

<sup>2847</sup> [REDACTED]

<sup>2848</sup> [REDACTED]

the army in Al Fasher.<sup>2849</sup> He testified that Mr Abd-Al-Rahman was only known by the nickname *Abu Nasser* following the birth of his son,<sup>2850</sup> and that he has never heard the nickname *Ali Kushayb* being associated to Mr Abd-Al-Rahman.<sup>2851</sup>

752. [REDACTED].<sup>2852</sup> [REDACTED] who first met Mr Abd-Al-Rahman between 1969 and 1972,<sup>2853</sup> and [REDACTED], who first met Mr Abd-Al-Rahman in 2004,<sup>2854</sup> have both never heard him or anyone else use the name *Ali Kushayb*,<sup>2855</sup> but have heard that name in the media. They did not know who *Ali Kushayb* was, nor did they know that Mr Abd-Al-Rahman was being linked to the nickname.<sup>2856</sup>[REDACTED],<sup>2857</sup> [REDACTED],<sup>2858</sup> has only known him as *Abu Nasser* and never heard Mr Abd-Al-Rahman refer to himself as *Ali Kushayb*.<sup>2859</sup>

*B - Other Defence witnesses demonstrate that Mr Abd-Al-Rahman is not Ali Kushayb*

753. Defence witnesses who possess no personal knowledge of Mr Abd-Al-Rahman have confirmed that he is not the individual known by the nickname *Ali Kushayb*.

754. [REDACTED]<sup>2860</sup> [REDACTED] whose credibility went unchallenged, testified that on 4 June 2006, in Khartoum, he was introduced to an individual called *Ali Kushayb*. [REDACTED]<sup>2861</sup> [REDACTED].<sup>2862</sup> The individual introduced as *Ali Kushayb* was presented to [REDACTED] as a member of the PDF.<sup>2863</sup> [REDACTED] noted that this person seemed to be towards the end of his 30s.<sup>2864</sup> [REDACTED] was shown a passport photograph of Mr Abd-Al-Rahman, a document with which the Court is now familiar.<sup>2865</sup> [REDACTED] was unable to state that the *Ali Kushayb* whom he met in 2006 was the same person as depicted in the passport photograph.<sup>2866</sup> The passport appears to have been issued in October 2006,<sup>2867</sup> which

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<sup>2849</sup> [REDACTED]

<sup>2850</sup> [REDACTED]

<sup>2851</sup> [REDACTED]

<sup>2852</sup> [REDACTED].

<sup>2853</sup> [REDACTED].

<sup>2854</sup> [REDACTED].

<sup>2855</sup> [REDACTED].

<sup>2856</sup> [REDACTED].

<sup>2857</sup> [REDACTED].

<sup>2858</sup> [REDACTED].

<sup>2859</sup> [REDACTED].

<sup>2860</sup> [REDACTED].

<sup>2861</sup> [REDACTED].

<sup>2862</sup> [REDACTED].

<sup>2863</sup> [REDACTED].

<sup>2864</sup> [REDACTED].

<sup>2865</sup> [DAR-OTP-0222-0037](#).

<sup>2866</sup> [REDACTED].

<sup>2867</sup> [DAR-OTP-0216-0782](#) at 0787.

allows for the inference that the photo<sup>2868</sup> is reasonably contemporaneous with [REDACTED]'s meeting with *Ali Kushayb*.

755. At the time of the meeting in 2006, Mr Abd-Al-Rahman was approximately 57 years old, roughly 20 years older than the individual described by [REDACTED]. Here, the passport photo of Mr Abd-Al-Rahman shows his face in his mid-50s. It is submitted that one would not give his age as being late 30s. Whilst conceding that witnesses sometimes have difficulty estimating ages, the TC will, from its own experience, know that small under- or overestimates of age are far more common – and so ought not have an impact on a witness's reliability – than large under- or overestimates. An underestimate of a person's age by some 20 years is sufficiently remarkable so as to call into question whether the witness actually saw the person of interest or a different person altogether.

756. The OTP has not claimed that Mr Abd-Al-Rahman was ever a member of the PDF. The OTP had ample opportunity to cross-examine [REDACTED] on whether the person introduced to him as *Ali Kushayb* in June 2006 was, in fact, Mr Abd-Al-Rahman. The Prosecution did not in any way test the evidence of the June 2006 meeting. Strangely, the Prosecution went suddenly extremely cautious as to not put this mysterious meeting under the spotlight. The rationales of that extra-care have been addressed above.<sup>2869</sup> Whatever its reasons, the fact that it was not challenged means that the Defence is entitled to proceed on the assumption that the evidence that *Ali Kushayb* is significantly younger than Mr Abd-Al-Rahman and was in 2006 a member of the PDF of a sufficiently high rank to be called to meet with the delegation from the ICC Prosecution, is unchallenged. The importance of the unchallenged evidence of [REDACTED] cannot be overstated. If he met a PDF officer in his late 30s called *Ali Kushayb* in 2006, that person was not Mr Abd-Al-Rahman.

757. **D-0035** [REDACTED].<sup>2870</sup> [REDACTED].<sup>2871</sup> [REDACTED].<sup>2872</sup>

758. [REDACTED] confirmed that he is not *Ali Kushayb*. [REDACTED], who has known Mr Abd-Al-Rahman since 2001<sup>2873</sup> and [REDACTED], who has known him since 2010,<sup>2874</sup> [REDACTED] know him by his nickname *Abu Nasser* only and say he is not and never has been referred to as *Ali Kushayb*.<sup>2875</sup> Both witnesses have only heard about the name *Ali Kushayb*

<sup>2868</sup> [DAR-OTP-0216-0782](#) at 0785.

<sup>2869</sup> See **PART II – Chapter 3** above.

<sup>2870</sup> [REDACTED].

<sup>2871</sup> [REDACTED].

<sup>2872</sup> [REDACTED].

<sup>2873</sup> [REDACTED].

<sup>2874</sup> [REDACTED].

<sup>2875</sup> [REDACTED].

on the radio, TV, and in newspaper announcements.<sup>2876</sup> [REDACTED] heard the name in the context of the ICC proceedings.<sup>2877</sup> They know that the person accused of such horrific crimes against their own people is not the man in the dock.

### **Conclusion: Mr Abd-Al-Rahman Is Not *Ali Kushayb***

759. In light of the above, the holistic consideration of the entire evidence on record leads, *a minima*, to the conclusion that the fact that Mr Abd-Al-Rahman is *Ali Kushayb* has not been proven beyond reasonable doubt. There is no solid body of evidence establishing so, in particular due to the OTP's negligence in the conduct of its investigation – not even asking its witnesses about the identity of the suspect, not seeking evidentiary proof of his identity from Sudanese authorities – and throughout the trial – no lining-up aimed at setting the basis for a proper identification -. The purported evidence of the nickname is made of improvisations, sometimes crossing the red line of due process rights,<sup>2878</sup> approximations, confusion and contamination. The biggest bulk of witness evidence of the alias is undermined by inconsistencies, feeding proof of the exact opposite, that Mr Abd-Al-Rahman is not *Ali Kushayb*. On the other side, the Defence has called a solid body of consistent evidence from witnesses who knew Mr Abd-Al-Rahman for ages, including Fur witnesses, who all testify that the only nickname he ever had is *Abu Nasser*. If the OTP is not convinced by the credibility of this body of witnesses, it had full opportunity to go to Rahad-El-Berdi to find witnesses from Mr Abd-Al-Rahman's community who would have testified that everybody knew him as *Ali Kushayb* there. It did not. It thus cannot criticize or question the credibility of the Defence witnesses who have taken enormous risks to appear in this trial, traveling through their country at war without support, even less protection from the Court. And finally [REDACTED], whom the Prosecution did not challenge and who was unanimously admitted as an expert witness with unstained credibility, who has no link with Mr Abd-Al-Rahman, who is highly educated and had a demonstrated record of dedication to IHL and HR, testified that the *Ali Kushayb* he saw [REDACTED], was a PDF officer twenty years younger than Mr Abd-Al-Rahman. His evidence, read in light of the OTP's serious breach of its disclosure obligations regarding this meeting, or intended meeting with *Ali Kushayb* on that day,<sup>2879</sup> should constitute for the Chamber the definitive and unchallengeable proof that Mr Abd-Al-Rahman is not *Ali Kushayb*.

### **Chapter 2 – Defence Line 2: Mr Abd-Al-Rahman Has Never Been a *Janjaweed* Leader**

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<sup>2876</sup> [REDACTED].

<sup>2877</sup> [REDACTED].

<sup>2878</sup> See PART III – Chapter 3 – Section 1 – I above.

<sup>2879</sup> See PART II – Chapter 4 above.

760. The OTP's factors a) to e) identified at paragraph 89 of its Trial Brief are inevitably interdependent. As specifically mentioned, it is the "*combination of these factors*" which is alleged to have placed Mr Abd-Al-Rahman in the position of authority and influence which enabled him to contribute to alleged crimes. In particular, factors b) to e) are a direct consequence of factor a): the OTP alleges that it is because Mr Abd-Al-Rahman was a senior Militia/*Janjaweed* leader that he can have interacted with the senior officials and senior members of the forces of the GoS in the way alleged in factors b) to e). The entirety of the OTP case thus relies on the alleged position of authority of Mr Abd-Al-Rahman as a JJW leader between August 2003 and April 2004.

### **Section 1 - Mr Abd-Al-Rahman Has Never Been in Position of Authority over the Janjaweed Militias**

761. The OTP alleges that Mr Abd-Al-Rahman served as leader of JJW/Militia without defining those. The only elements of definition of the JJW/Militia are provided at paragraph 40 of OTP's Trial Brief.<sup>2880</sup> This blur aims at avoiding entering a demonstration as to what the JJW/Militia are, who their leader was and whether Mr Abd-Al-Rahman could have been one of them. With no proper definition of the JJW, the OTP tries to rely on the sole evidence describing Mr Abd-Al-Rahman as a JJW leader at a given time, without explaining how and when he became one. By doing so, the OTP fails to fulfil its duty of establishing the truth, which extends to all facts and evidence of relevance to the Case, pursuant to Article 54(1)(a) of the Statute.

762. The evidence describing Mr Abd-Al-Rahman as a JJW leader between August 2003 and April 2004 cannot be assessed as reliable without proving how and when the admitted retiree from the SAF Medical Unit and pharmacist in Garsila shifted from that modest condition to that alleged preeminent status. How and when did Mr Abd-Al-Rahman become the JJW leader he allegedly was is directly relevant to the Case. The OTP should have investigated it and bears the burden of proving it. Without such a proof that, at some point in his life, Mr Abd-Al-Rahman became a JJW leader, the evidence of his alleged presence and role in Kodoom, Bindisi, Mukjar and Deleig cannot be reconciled with the admitted fact that he was a simple pharmacist at the time of the events described in the charges. A holistic assessment of all evidence in the case will thus necessarily fail to pass the threshold of proof beyond reasonable doubt of his guilt.

763. The evidence in the case is that the JJW were, at the relevant time, an aggregation of three categories of persons: (i) PDF, (ii) Border Guards and/or (iii) Tribal Militias and that the other groups of foreign fighters, "Mujahideen", "Murahileen", "Fursan" or "Strike Force" were

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<sup>2880</sup> [OTP Trial Brief](#), para. 40.

actually sub-categories included in the three main categories.<sup>2881</sup> To have been the JJW leader described in the charges, Mr Abd-Al-Rahman must thus have fallen into one of these three categories. The evidence on records shows that he belonged to none of the three.

***I – Mr Abd-Al-Rahman Was Never in the PDF***

764. The OTP never even alleged that Mr Abd-Al-Rahman or that *Ali Kushayb* ever belonged to the PDF. The brief biography the Prosecution provides for Mr Abd-Al-Rahman only mentions that he served in the SAF Medical Unit until the early- to mid-1990s, then opened a pharmacy in Garsila, prior to joining the CRF in July 2005,<sup>2882</sup> without passing by the PDF. The OTP and the Defence agreed on the same biography.<sup>2883</sup> The evidence that Mr Abd-Al-Rahman or *Ali Kushayb* would have served in the PDF thus does not form part of the Prosecution's case and cannot be relied upon. If considered and believed, the evidence that *Ali Kushayb* served in the PDF can only lead to the conclusion that he and Mr Abd-Al-Rahman are two different persons, as submitted by the Defence.<sup>2884</sup> The only other option would be that the relevant witnesses are mistaken or did not tell the truth about Mr Abd-Al-Rahman. In any case, it is uncontested that Mr Abd-Al-Rahman never served in the PDF in his life.

765. **D-0001, D-0002, D-0003, D-0005, D-0007, D-0008, D-0011, D-0028, D-0029, D-0032, D-0035, and D-0039** all knew personally Mr Abd-Al-Rahman.<sup>2885</sup> Some of them remember his career in the SAF,<sup>2886</sup> other his profession as pharmacist or medical assistant,<sup>2887</sup> whilst others refer to his role within the CRF, starting in 2005.<sup>2888</sup> Witness D-0035 is specific on the fact that Mr Abd-Al-Rahman was one of the first recruits in Garsila when the CRF launched its recruitment campaign in March 2004, and that he must have been encamped from that date until completion of his training.<sup>2889</sup> None of the above-mentioned witnesses indicate that he had ever passed by the PDF at any point in his life.

<sup>2881</sup> See **PART IV – Chapter 5 – Section 2 – II** above.

<sup>2882</sup> [OTP Trial Brief](#), para. 2.

<sup>2883</sup> [ICC-02/05-01/20-504-AnxA](#), Items 10-11, 13.

<sup>2884</sup> See **PART VI – Chapter 1** above.

<sup>2885</sup> **D-0002**: T-156, p. 42, lines 6-14; **D-0008**: T-139, p. 20, line 22-p. 21, line 2; **D-0011**: T-138, p. 49, lines 14-18; **D-0032**: T-140, p. 17, line 21-p. 20, line 23.

<sup>2886</sup> **D-0003**: T-155, p. 36, lines 1-12, p. 38, line 18-p. 39, line 23; **D-0007**: T-149, p. 7, lines 2-5 (Conf); **D-0008**: T-139, p. 28, lines 2-8; **D-0035**: [DAR-D31-00000274](#), para. 20; **D-0039**: T-159, p. 27, lines 19-24.

<sup>2887</sup> **D-0002**: T-156, p. 48, lines 8-24; **D-0028**: [DAR-D31-00000150](#), para. 27; **D-0029**: T-157, p. 24, line 22-p. 27, line 17; **D-0032**: T-140, p. 26, lines 13-14, p. 27, line 12-p. 28, line 4; **D-0039**: T-159, p. 32, lines 4-8; p. 33, lines 12-22.

<sup>2888</sup> **D-0001**: T-154, p. 56, line 2-p. 57, line 25; **D-0002**: T-156, p. 48, lines 8-24; **D-0003**: T-155, p. 46, lines 18-20; **D-0005**: T-158, p. 7, lines 3-5; **D-0007**: T-149, p. 7, lines 2-5 (Conf); **D-0008**: T-139, p. 26, line 15-p. 27, line 18; p. 84, lines 9-12; **D-0011**: T-138, p. 51, lines 15-23, p. 52, lines 7-15; p. 53, lines 20-25; **D-0028**: [DAR-D31-00000150-0001](#), para. 23; **D-0029**: T-157, p. 24, line 22-p. 27, line 17; **D-0032**: T-140, p. 45, lines 19-23 (Conf); **D-0035**: [DAR-D31-00000274](#) (0006), para. 23; **D-0039**: T-159, p. 34, lines 15-17.

<sup>2889</sup> **D-0035**: [DAR-D31-00000274](#), para. 22.

## ***II – Mr Abd-Al-Rahman Was Never in the Border Guards***

766. There is no evidence on record suggesting that Mr Abd-Al-Rahman could have belonged to the Border Guards. Nor is it alleged by the OTP.

## ***III – Mr Abd-Al-Rahman Did Not Serve in a Tribal Militia in 2003-2004***

767. Mr Abd-Al-Rahman belongs to the Ta'aisha tribe.<sup>2890</sup> The evidence establishes that the Ta'aisha tribe refused to contribute to the 2003-2004 counterinsurgency and remained neutral (**A.**). Mr Abd-Al-Rahman obeyed that injunction from his tribe (**B.**). The evidence further establishes that Mr Abd-Al-Rahman has never been an *Agid* or *Agid-Al-Ogada* (**C.**), as alleged by the OTP as proof that he was a JJW leader.<sup>2891</sup>

### ***A – The Ta'aisha Tribe Did Not Contribute to the 2003-2004 Counterinsurgency***

768. There is no evidence suggesting that the Ta'aisha tribe would have contributed through its tribal militia to the 2003-2004 counterinsurgency in West Darfur. Indeed, no witness has alleged so. The only witnesses who have addressed that question responded by the negative: the Ta'aisha tribe did not participate in the 2003-2004 counterinsurgency.<sup>2892</sup> The decision not to join the counterinsurgency was taken by the then *Nazir* of the Ta'aisha, the late Abd-Al-Rahman Bishara Al Senussi.<sup>2893</sup> The main reasons for his decision were that the Ta'aisha had no land dispute with the Fur<sup>2894</sup> and had a significant Fur population in its *dar*.<sup>2895</sup> The Ta'aisha tribe's decision not to join the counterinsurgency has had dire consequences on its relations with the GoS ever since.<sup>2896</sup>

### ***B – Mr Abd-Al-Rahman Followed the Position of his Tribe***

769. In the course of the trial, it was suggested that, although the Ta'aisha tribe itself had opted not to join the counterinsurgency, some members of that tribe may have disregarded this decision and gone against the instruction from the leader of their tribe.<sup>2897</sup> However, no concrete evidence of such scenario was adduced. The evidence on record shows that the main Arab tribe contributing to the mobilisation of the JJW militias in Wadi Saleh and Mukjar in 2003-2004

<sup>2890</sup> [ICC-02/05-01/20-504-AnxA](#), Item 4; [OTP Trial Brief](#), para. 2. For a presentation on the Ta'aisha tribe, see **PART IV – Chapter 3 – Section 2 – IV** above.

<sup>2891</sup> [OTP Trial Brief](#), paras. 90, 96.

<sup>2892</sup> See **PART IV – Chapter 5 – Section 2 – II – B** above. **P-0020**: T-042, p. 26, lines 3-5 (Conf); **P-0585**: T-099, p. 62, lines 1-3; **P-1042**: [DAR-OTP-0220-1623](#), para. 141; **D-0001**: T-154, p. 40, lines 2-7; **D-0002**: T-156, p. 44, line 5-p. 45, line 14; **D-0003**: T-155, p. 50, lines 4-20; **D-0007**: T-149, p. 21, lines 1-20 (Conf); **D-0036**: T-153, p. 48, line 19; **D-0039**: T-159, p. 54, lines 9-21.

<sup>2893</sup> **D-0001**: T-154, p. 38, lines 10-16 (Conf), p. 40, lines 7-16 (Conf); **D-0002**: T-156, p. 44, line 5-p. 45, line 14; **D-0003**: T-155, p. 50, lines 4-20; **D-0007**: T-149, p. 21, lines 1-20 (Conf); **D-0039**: T-159, p. 54, lines 9-21.

<sup>2894</sup> **P-1042**: T-028, p. 59, lines 7-11.

<sup>2895</sup> **D-0001**: T-154, p. 16, lines 6-20; **D-0002**: T-156, p. 55, line 24-p. 56, line 1; **D-0008**: T-139, p. 17, line 1; **D-0029**: T-157, p. 16, lines 5-9.

<sup>2896</sup> **D-0001**: T-154, p. 39, line 17-p. 45, line 8.

<sup>2897</sup> **P-0020**: T-042, p. 26, lines 5-6 (Conf).

were the Salamat.<sup>2898</sup> The Salamat tribe had long-standing tensions with the Fur<sup>2899</sup> and the Ta'aisha.<sup>2900</sup> To join predominantly Salamat JJW Militias of Wadi Saleh and Mukjar, such Ta'aisha renegades would have faced the first difficulty of getting accepted within their ranks. It is highly unlikely in this context that the JJW militias in Wadi Saleh and Mukjar in 2003-2004, who were predominantly Salamat, would have precisely chosen a member of the enemy Ta'aisha tribe, like Mr Abd-Al-Rahman, as their leader.

770. The Ta'aisha tribe was described as one of the strongest Arab tribes, one of those enjoying its own *Dar*.<sup>2901</sup> The Ta'aisha tribe's leadership was powerful and respected. Disobeying the instructions from its *Nazir* had serious consequences for the offender.<sup>2902</sup> The evidence on record shows that the *Nazir* had full authority to refer the offender before the entire tribe, implement the customs of the tribe,<sup>2903</sup> arrest him and hand him to the police,<sup>2904</sup> or, in worst case scenario, banish the most serious offenders.<sup>2905</sup> At first, the mere suggestion that a member of the Ta'aisha tribe may disobey the instruction of his *Nazir* was described as an impossibility by [REDACTED]: "*In our tribe, nobody disobeys a decision by the Nazir.*"<sup>2906</sup> At trial, it took some time and insistence from the Defence and then from the Presiding Judge to get an answer to that scenario:<sup>2907</sup> the answer was "if a person refuses the decision of a Nazir, this person would have to be outside of the administration – outside of the Ta'aisha tribe",<sup>2908</sup> "he is rejected out of the tribe",<sup>2909</sup> "if he does not obey the words of the leader, he would be banished",<sup>2910</sup> "it's a very serious punishment",<sup>2911</sup> "If they do this, they would be banished. However, I'm sure that if a nazir in the Ta'aisha tribe makes a decision, nobody in this tribe would refuse it. Nobody would refuse it. So you said, for example, if a person refuses to respect an order -- so this person would be banished, so nobody would refuse this. So all the members of the Ta'aisha tribe would respect the decision of the leader of the tribe."<sup>2912</sup>

771. In cross-examination, the OTP asked [REDACTED] and obtained confirmation that, had it been known that he had murdered members of the *Fur* tribe, Mr Abd-Al-Rahman would

<sup>2898</sup> P-1042: T-028, p. 50, line 20-p. 52, line 13, p. 62, line 6-p. 63, line 6.

<sup>2899</sup> P-1042: [DAR-OTP-0220-1623](#), para. 67; T-027, p. 64, lines 7-19; T-028, p. 62, lines 6-20.

<sup>2900</sup> P-1042: T-028, p. 50, lines 9-24; D-0001: T-154, p. 23, lines 3-14.

<sup>2901</sup> P-1042: T-028, p. 34, lines 1-5; p. 42, line 25-p. 43, line 1.

<sup>2902</sup> P-1042: T-028, p. 74, lines 2-5.

<sup>2903</sup> [REDACTED].

<sup>2904</sup> [REDACTED].

<sup>2905</sup> [REDACTED].

<sup>2906</sup> [REDACTED].

<sup>2907</sup> [REDACTED].

<sup>2908</sup> [REDACTED].

<sup>2909</sup> [REDACTED].

<sup>2910</sup> [REDACTED].

<sup>2911</sup> [REDACTED].

<sup>2912</sup> [REDACTED].

have been banished.<sup>2913</sup> The OTP did not challenge further that evidence. This evidence of the authority of the Ta'aisha *Nazir* and its consequences refutes the scenario of stray members of the Ta'aisha tribe joining the JJW militia in the 2003-2004 counterinsurgency. If there were some, Mr Abd-Al-Rahman was not one of them.

772. Before [REDACTED], **P-1042** had already mentioned, though in less dramatic terms and not specifically in relation to the Ta'aisha tribe, the consequences of disobeying an order from his *Nazir* for a member of a tribe: although he opined that the banishment had not be used since the colonial era, P-1042 confirmed that the offender and his family would endure significant consequences in terms of social standing and esteem within his community.<sup>2914</sup>

773. Not only did the Defence Witnesses [REDACTED] not report that Mr Abd-Al-Rahman had ever been banished, or sanctioned for not obeying an instruction from the Ta'aisha *Nazir*, but they are unanimous in describing him as a person of good standing and reputation within his tribe,<sup>2915</sup> not at all one ostracised for disloyalty to his *Nazir*'s authority. Mr Abd-Al-Rahman was welcome back in Rahad-El-Berdi when he settled there in 2009-2010.<sup>2916</sup> In his capacity as member of the CRF in Rahad-El-Berdi, he was admitted as a member of the local Security Committee<sup>2917</sup> and was even given the honorific title of *Musha'arif*.<sup>2918</sup> The Um-Sory and Teachers videos are also proof that, far from being ostracised, Mr Abd-Al-Rahman was a highly respected member of his tribe at the time these were shot, i.e. 2013-2015 and 2019 respectively.<sup>2919</sup> None of the consequences identified by **P-1042** and/or [REDACTED] thus applied to Mr Abd-Al-Rahman. The unanimously good reputation of Mr Abd-Al-Rahman within his tribe confirms that he cannot have been suspected of having disobeyed the *Nazir*'s instructions at any point in his life, especially an instruction so important as the one not to join a counterinsurgency against the Fur tribe, which formed an important portion of the population of Rahad-el-Berdi. The only reasonable conclusion is that Mr Abd-Al-Rahman obeyed the instruction from the *Nazir* of his tribe that he shall not join in the counterinsurgency.

*C – Mr Abd-Al-Rahman Was Never “Agid-Al-Ogada”*

- (i) *Lack of Evidence of the Appointment of Mr Abd-Al-Rahman as “Agid-al-Ogada”*

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<sup>2913</sup> [REDACTED].

<sup>2914</sup> **P-1042**: T-028, p. 73, line 23 – p. 74, line 14.

<sup>2915</sup> [REDACTED].

<sup>2916</sup> [REDACTED].

<sup>2917</sup> [REDACTED].

<sup>2918</sup> [REDACTED].

<sup>2919</sup> See **PART III – Chapter 3 – Section 1 – II above**.

774. In its Trial Brief, the OTP relied on **P-0883** to submit that Mr Abd-Al-Rahman had been appointed *Agid-al-Ogada* because he was “a fearless warrior”,<sup>2920</sup> but, even when asked by the Defence, P-0883 did not confirm so during his appearance.<sup>2921</sup> The OTP relied on **P-0905** to submit that Mr Abd-Al-Rahman was the “chief of the Arabs” in Garsila,<sup>2922</sup> nonetheless P-0905 did not testify to this during his appearance. The OTP further relied on **P-0643** to assert that Mr Abd-Al-Rahman was “the commander of all the tribal leaders”,<sup>2923</sup> however he testified that the “Commander of the Mujahideen” was Hamdi<sup>2924</sup> and that the “Emir of all Arab tribes” for Wadi Saleh was Emir Hessine Sayyid Al Helu, of the Nawaiba tribe.<sup>2925</sup> The last attempt of this discomfiture was OTP’s reliance on **P-0012** and P-0643 to submit that *Ali Kushayb* was either appointed or elected by local *Agids* as *Agid-al-Ogada* because of his alleged military experience and education.<sup>2926</sup> This is addressed below.

775. There was no consistency in OTP’s evidence as to the way and to the time when *Ali Kushayb* was allegedly appointed as *Agid-Al-Ogada*. According to some witnesses, *Ali Kushayb* was directly appointed by Commissioner Jaafar Abd-Al-Hakam.<sup>2927</sup> For others, he was elected by the other *Agids*.<sup>2928</sup> Some OTP witnesses eventually made fantasist assertions regarding the titles of *Agid* or *Agid-al-Ogada*. According to **P-0585**, the position of *Agid* did not exist in Sudan and was invented after *Ali Kushayb* was allegedly appointed the first ever *Agid-al-Ogada*.<sup>2929</sup> **P-0907** also testified that *Ali Kushayb* was the first ever *Agid-al-Ogada*.<sup>2930</sup> **P-0984** even compared the position of *Agid-al-Ogada* to one of Prime Minister.<sup>2931</sup> On the exact opposite of the spectrum in terms of authority, P-0585 testified that the function of the person he calls *Ali Kushayb* consisted in taking care of checkpoints, visiting Mindo village to enquire about developments and protect the citizens against JJW aggressions.<sup>2932</sup> These assertions do not resist the evidence of the actual definition of the word, as presented above.<sup>2933</sup>

(ii) *Mr Abd-Al-Rahman Was Never an Agid-Al-Ogada for his tribe*

<sup>2920</sup> [OTP Trial Brief](#), para. 97.

<sup>2921</sup> **P-0883**: T-074, p. 6, lines 6-14.

<sup>2922</sup> [OTP Trial Brief](#), para. 97.

<sup>2923</sup> [OTP Trial Brief](#), para. 98.

<sup>2924</sup> **P-0643**: T-058, p. 21, lines 7-14.

<sup>2925</sup> **P-0643**: T-058, p. 10, lines 17-23 (Conf).

<sup>2926</sup> [OTP Trial Brief](#), para. 98.

<sup>2927</sup> **P-0129**: [DAR-OTP-0128-0128-R04](#), para. 24; **P-0907**: T-095, p. 60, lines 7-9.

<sup>2928</sup> **P-0643**: T-058, p. 82, lines 4-15.

<sup>2929</sup> **P-0585**: T-099, p. 41, lines 4-10; **P-0585**: T-102, p. 23, line 25-p. 24, line 19, p. 25, line 24-p. 26, line 5.

<sup>2930</sup> **P-0907**: T-095, p. 58, lines 1-3.

<sup>2931</sup> **P-0984**: T-066, p. 64, lines 9-11.

<sup>2932</sup> **P-0585**: T-099, p. 58, lines 13-17; T-100, p. 3, lines 10-21; T-102, p. 22, line 21-p. 23, line 6; p. 37, line 18-p. 38, line 6.

<sup>2933</sup> See **PART IV – Chapter 3 – Section 2 – III** above.

776. The OTP never alleged that Mr Abd-Al-Rahman had been an *Agid-Al-Ogada* for the Ta'aisha tribe. Had it done so, the evidence that the Ta'aisha tribe did not take part in the counterinsurgency would have been proof that he wasn't. Instead, relying on the absence of definition of the word *Agid-Al-Ogada*, the OTP affirms that he had this position, without explaining what he was *Agid-Al-Ogada* of and how he had become one. The evidence shows that one cannot be *Agid-Al-Ogada* out of nowhere: be it on the Fur or the Arab side, the *Agid-Al-Ogada* title is a tribal position.<sup>2934</sup>

777. Mr Abd-Al-Rahman was a member of the Ta'aisha tribe.<sup>2935</sup> The Ta'aisha tribe had no significant presence in Wadi Saleh and Mukjar.<sup>2936</sup> There was only one *Agid-Al-Ogada* and one deputy for the Ta'aisha tribe at the time. He was based in Rahad-El-Berdi.<sup>2937</sup> Mr Abd-Al-Rahman has never been an *Agid-Al-Ogada* of the Ta'aisha tribe.<sup>2938</sup> He could not have been one in 2003-2004, as this would have required him to live in the *Dar* of the Ta'aisha<sup>2939</sup> and he was away in Garsila. The core of the JJW in Wadi Saleh and Mukjar was constituted of Salamat.<sup>2940</sup> The Salamat were longstanding enemies of the Ta'aisha.<sup>2941</sup> A Ta'aisha like Mr Abd-Al-Rahman, even if he had disobeyed the instruction of his *Nazir* to join the counterinsurgency, would never have been accepted among the JJW of Wadi Saleh, even less so as their leader.

778. Mr Abd-Al-Rahman did not have the profile for election as *Agid-Al-Ogada* for his tribe. **P-0012** stated that his election as *Agid-al-Ogada* was based on his alleged military experience and education,<sup>2942</sup> but did not substantiate these. P-0012 further stated that Mr Abd-Al-Rahman was not an *Agid* himself or became one very late.<sup>2943</sup> **P-0643** also referred to Mr Abd-Al-Rahman's extensive experience and knowledge as the basis for his election as *Agid-Al-Ogada*.<sup>2944</sup> This explanation is inconsistent with the admitted facts that Mr Abd-Al-Rahman's only known qualification is his certificate of medical assistant delivered in 1984 by the Council of Medical Assistance and Technical Professions<sup>2945</sup> and that he served in the SAF Medical Corps.<sup>2946</sup> There is no evidence on record that Mr Abd-Al-Rahman achieved another grade in

<sup>2934</sup> **P-1042**: [DAR-OTP-0220-1623](#), para. 61; **P-0907**: T-095, p. 61, lines 6-10.

<sup>2935</sup> **D-0001**: T-154, p. 29, line 19-p. 30, line 6, p. 31, lines 6-16; **D-0003**, T-155, p. 42, lines 2-10, p. 45, lines 18-21.

<sup>2936</sup> **D-0003**, T-155, p. 42, lines 1-18.

<sup>2937</sup> See **PART IV – Chapter 3 – Section 2 – IV above**.

<sup>2938</sup> [REDACTED].

<sup>2939</sup> [REDACTED].

<sup>2940</sup> **P-1042**: T-028, p. 52, lines 6-13; p. 59, lines 18-22; p. 62, line 18-p. 63, line 2.

<sup>2941</sup> **P-1042**: T-028, p. 50, lines 9-24; **D-0001**: T-154, p. 23, lines 3-14.

<sup>2942</sup> **P-0012**: [DAR-OTP-0119-0503](#), para. 35.

<sup>2943</sup> **P-0012**: [DAR-OTP-0119-0503](#), para. 35.

<sup>2944</sup> **P-0643**: T-058, p. 82, lines 20-23.

<sup>2945</sup> [ICC-02/05-01/20-504-AnxA](#), Item 9.

<sup>2946</sup> [ICC-02/05-01/20-504-AnxA](#), Item 10; [OTP Trial Brief](#), para. 2.

his education, nor that he had any other experience in the SAF. P-0643 acknowledged that Mr Abd-Al-Rahman's job as a nurse was not relevant to become *Agid*,<sup>2947</sup> even less so *Agid-Al-Ogada*, but he had no better explanation to provide other than his unspecified and uncorroborated past military experience.<sup>2948</sup> P-0643 himself and other witnesses admitted that the function of a nurse in the medical unit of the army was to treat people,<sup>2949</sup> not combat. **D-0016** excluded the possibility that an officer within the medical unit exercise combat activities or be entrusted with commandment of an operation.<sup>2950</sup> [REDACTED] provided first-hand evidence that the functions of Mr Abd-Al-Rahman in the medical unit formed part of the administrative services of the army and did not encompass combat, even less so command, activities.<sup>2951</sup> The explanation that Mr Abd-Al-Rahman was appointed *Agid-Al-Ogada* because of his military experience is thus not credible. His "*renowned [...] previous military experience*"<sup>2952</sup> forming the only explanation for his appointment as *Agid-Al-Ogada* has no materiality.

779. As a matter of comparison, the *Agid-Al-Ogada* of the Ta'aisha tribe in 2003-2004, [REDACTED],<sup>2953</sup> had an experience of nineteen years, from 1965 until 1984, in the SAF.<sup>2954</sup> He formed part of the elite forces of the SAF deployed abroad on missions in Egypt and Lebanon.<sup>2955</sup> That is a good example of significant military experience qualifying a person to be appointed as *Agid-Al-Ogada*: the exact military experience that Mr Abd-Al-Rahman never had. In a country with such a long history of warfare,<sup>2956</sup> Mr Abd-Al-Rahman's education and former military experience thus fall short from qualifying him, rather than anyone else, to be elevated to the alleged position of *Agid-Al-Ogada* to be entrusted with the commandment of JJW militias.

(iii) *The Prosecution's "Agid-Al-Ogada" Theory Relies on a Misconception of the Position*

780. Instead of alleging that Mr Abd-Al-Rahman was *Agid-Al-Ogada* for the Ta'aisha tribe in 2003-2004, the Prosecution's theory is that he was *Agid-Al-Ogada* of all JJW militia in Wadi Saleh and Mukjar.<sup>2957</sup> Nevertheless, the concept of *Agid-Al-Ogada* of all JJW militia, i.e. militia

<sup>2947</sup> **P-0643**: T-058, p. 66, lines 8-9, p. 83, line 10.

<sup>2948</sup> **P-0643**: T-058, p. 83, lines 8-10.

<sup>2949</sup> **P-0643**: T-058, p. 65, lines 14-15; **P-0883**: T-074, p. 5, line 25-p. 6, line 5.

<sup>2950</sup> **D-0016**: T-131, p. 19, lines 3-16; T-132, p. 89, lines 20-25.

<sup>2951</sup> [REDACTED].

<sup>2952</sup> [OTP Trial Brief](#), para. 96.

<sup>2953</sup> [REDACTED].

<sup>2954</sup> [REDACTED].

<sup>2955</sup> [REDACTED].

<sup>2956</sup> See **PART IV – Chapter 1**.

<sup>2957</sup> [OTP Trial Brief](#), para. 90.

from various tribes, is irreconcilable with the definition of the position as one of leadership over the *Agids* of one and the same tribe only.<sup>2958</sup> The position of *Agid-Al-Ogada* is not and has never been a position of inter-tribal coordination. Hence the number of Arab *Agids-Al-Ogada* co-existing at the same time. Presenting the position of *Agid-Al-Ogada* as one of inter-tribal coordination is a misconception.

781. The only position of inter-tribal coordination reflected in the evidence on record is the position of “*Emir of all Arab tribes*” for Wadi Saleh<sup>2959</sup> held by *Emir Hessine Sayyid Al Helu*, of the Nawaiba tribe.<sup>2960</sup> *Emir Hessine Sayyid Al Helu* was appointed in that capacity before 2003 by the *Umdahs* of the Arab tribes with no *Dar* in Wadi Saleh, namely the Rizeigat, Mahariya, Awlad Zeid, Awlad Nyba, Beni Halba, Khuzam, Salamat, Gimir, Tama<sup>2961</sup> and Nawaiba<sup>2962</sup> (or “*Nawabiya*”<sup>2963</sup>). This title was unique.<sup>2964</sup> He lived in Garsila.<sup>2965</sup> He had authority over all Arab tribes with no *Dar* living in Wadi Saleh. This excluded the Ta’aisha tribe, which had its own *Nazir* in Rahad-Al-Berdi.<sup>2966</sup> **P-0643** described the central role played by the *Emir Hessine Sayyid Al Helu* in the coordination of all Arab tribes and the mobilization,<sup>2967</sup> distribution of weapons,<sup>2968</sup> and conduct of operations of Arab tribes militia<sup>2969</sup> from his house in Garsila.<sup>2970</sup> **P-0643** even referred to the house of *Emir Hessine Sayyid Al Helu* as the operation room of Arab tribes.<sup>2971</sup> The functions attached by the OTP to the position of *Agid-Al-Ogada* allegedly held by Mr Abd-Al-Rahman under the nickname *Ali Kushayb* are actually the functions of *Emir Hessine Sayyid Al Helu*.

782. The mix between the position of *Agid-Al-Ogada*, not defined, and the position of “*Emir of all Arab tribes*” is a fatal flaw of the Prosecution’s theory. The OTP had the burden of establishing and providing complete and satisfactory proof of what was this mysterious title of *Agid-Al-Ogada* which had, according to its theory, empowered the modest pharmacist of

<sup>2958</sup> **P-1042**: [DAR-OTP-0220-1623](#), para. 61.

<sup>2959</sup> **P-0643**: T-058, p. 10, lines 17-23 (Conf).

<sup>2960</sup> **P-0643**: T-058, p. 10, lines 17-23 (Conf).

<sup>2961</sup> **P-0643**: T-058, p. 12, lines 11-15 (Conf).

<sup>2962</sup> **P-0643**: T-058, p. 11, line 22-p. 12, line 5 (Conf).

<sup>2963</sup> **P-0585**: T-099, p. 62, lines 1-3: **P-0585** mentions first the Nawabiya tribe among tribes composing the *Janjaweed*, together with Misseriya, Khozam, Tarjam tribes.

<sup>2964</sup> **P-0643**: T-058, p. 11, lines 13-15 (Conf).

<sup>2965</sup> **P-0643**: T-058, p. 14, lines 17-25 (Conf).

<sup>2966</sup> **P-0643**: T-058, p. 12, line 21-p. 13, line 1 (Conf).

<sup>2967</sup> **P-0643**: T-058, p. 13, lines 6-12 (Conf).

<sup>2968</sup> **P-0643**: T-058, p. 9, lines 14-20 (Conf).

<sup>2969</sup> **P-0643**: T-058, p. 19, line 17-p. 20, line 4 (Conf).

<sup>2970</sup> **P-0643**: T-058, p. 14, lines 17-25 (Conf).

<sup>2971</sup> **P-0643**: T-058, p. 14, lines 17-25, p. 17, line 25-p. 18, line 1 (Conf).

Garsila to become the almighty head of all JJW militias in Wadi Saleh and Mukjar. Because it decided not to define that position, the OTP failed in providing that proof.

#### ***IV – Conclusion on the Alleged Position of Authority Over the Janjaweed Militias***

783. Irrespective of the assessment of the direct evidence of the presence of Mr Abd-Al-Rahman in his alleged capacity as JJW leader in Kodoom, Bindisi, Mukjar and Deleig, the holistic approach of the evidence must lead to the only reasonable conclusion that the authority of Mr Abd-Al-Rahman over the JJW militia has not been proved. Without that authority, Mr Abd-Al-Rahman can neither have ordered, nor induced the crimes charged. In addition, without such authority, he, the pharmacist of Garsila, could not be present at the crime scenes in Kodoom, Bindisi, Mukjar and Deleig. The holistic assessment of all evidence must lead to the only reasonable conclusion that he cannot have been there and thus cannot be responsible for direct co-perpetration under Article 25(3)(a) of the Statute. Mr Abd-Al-Rahman must thus be acquitted of all charges.

### **Section 2 - The Prosecution Provides No Explanation for What Happened to Mr Abd-Al-Rahman After 2004**

#### ***I – Mr Abd-Al-Rahman’s Recruitment Within the CRF***

784. An Order for Assignment of police recruits dated 28 July 2005, signed by the Commander of the CRF, states that Mr Abd-Al-Rahman was appointed as a member of a group of the Central Reserve Police.<sup>2972</sup> Further evidence provides details as to the exact timing and unfolding of that incorporation.

#### ***A – Mr Abd-Al-Rahman’s Training Within the CRF: March 2004 – July 2005***

785. [REDACTED] evidence of the launching of a national recruitment campaign within the CRF in March 2004. Around that period and as part of that recruitment campaign, a special authorisation was sought by the Chief of the CRF Garsila Division to recruit Mr Abd-Al-Rahman. A special authorisation was needed because Mr Abd-Al-Rahman was significantly older than the age limit of 25 years for recruitment within the CRF. The special authorization was sought because of the medical skills of Mr Abd-Al-Rahman, which were needed within the CRF Garsila Division.<sup>2973</sup> Mr Abd-Al-Rahman’s recruitment within the CRF was thus exceptionally authorised. He was thus recruited within the CRF in March 2004.<sup>2974</sup>

786. Because Mr Abd-Al-Rahman had served as a *Musaid* in the SAF, he did not need the basic military training followed by new CRF recruits. The training he received was limited to

<sup>2972</sup> [ICC-02/05-01/20-504-AnxA](#), Item 13; [DAR-D31-0002-0003](#), translation at [DAR-D31-0002-0007](#).

<sup>2973</sup> [REDACTED].

<sup>2974</sup> [REDACTED].

an advanced training of three months in El Obeid.<sup>2975</sup> Before training, Mr Abd-Al-Rahman went through a calling period. During the calling period, the new recruits pass tests and undergo a medical and security clearance. They are encamped, receive salary and are tasked with various works, like building barracks. [REDACTED], Mr Abd-Al-Rahman must have passed this calling period within the CRF Camp in Garsila, prior to being transferred to El Obeid. [REDACTED] could not remember when Mr Abd-Al-Rahman was transferred to El Obeid.<sup>2976</sup> The OTP did not cross-examine [REDACTED] on his evidence regarding the recruitment in the CRF and encampment of Mr Abd-Al-Rahman in March 2004. It is thus not challenged. [REDACTED],<sup>2977</sup> further corroborated Mr Abd-Al-Rahman's recruitment in early 2004.<sup>2978</sup> [REDACTED] was expected to give more precise dates as to the entry of Mr Abd-Al-Rahman in the CRF in early March 2004. His evidence was expected to support a partial alibi for the Deleig events. However, as a result of Sudan's non-cooperation, [REDACTED] could not appear.<sup>2979</sup>

*B – Mr Abd-Al-Rahman's Initial Incorporation in July 2005*

787. Mr Abd-Al-Rahman was formally admitted and incorporated within the CRF in July 2005.<sup>2980</sup> **D-0035** recognised the “*Order for Assignment of police recruits*” dated 28 July 2005<sup>2981</sup> as authentic.<sup>2982</sup> This document mentions the name of Mr Abd-Al-Rahman with the batch number 189 and the title of “recruit”.<sup>2983</sup> The Prosecution did not cross-examine D-0035 on his evidence regarding the recruitment in the CRF and encampment of Mr Abd-Al-Rahman in March 2004. It is thus not challenged.

788. Mr Abd-Al-Rahman's incorporation within the CRF in 2005 undermines the evidence of **P-0028** and **P-0547**, who stated that the person called *Ali Kushayb* was already in the CRF in 2003-2004.<sup>2984</sup> These two witnesses were mistaken, were talking of another person than Mr Abd-Al-Rahman or did not present truthful evidence to the Court.

*C – Mr Abd-Al-Rahman's Highest Rank Within the CRF*

789. At some point after the completion of his CRF training, [REDACTED] remembers meeting again Mr Abd-Al-Rahman, who had received the rank of *Musaid* or warrant officer.<sup>2985</sup>

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<sup>2975</sup> [REDACTED].

<sup>2976</sup> [REDACTED].

<sup>2977</sup> [REDACTED].

<sup>2978</sup> [REDACTED].

<sup>2979</sup> See **PART II – Chapter 2 – Section 1.**

<sup>2980</sup> [ICC-02/05-01/20-504-AnxA](#), Item 13.

<sup>2981</sup> [DAR-D31-0002-0003](#).

<sup>2982</sup> [REDACTED].

<sup>2983</sup> [DAR-D31-0002-0003](#), at 0005.

<sup>2984</sup> **P-0547**: T-050, p. 47, line 19-p. 48, line 10.

<sup>2985</sup> [REDACTED].

This rank corresponded to his former rank within the SAF.<sup>2986</sup> Giving him that rank was not a promotion. The *Musaid* rank of Mr Abd-Al-Rahman after 2005 is confirmed by several witnesses.<sup>2987</sup> A CRF payslip of Mr Abd-Al-Rahman dated 2020 identifies him as being still a warrant officer, i.e. *Musaid*.<sup>2988</sup> It is proof that Mr Abd-Al-Rahman remained at the same rank of *Musaid* within the CRF from 2005 until his surrender in 2020, without ever being promoted. This is also confirmed by [REDACTED].<sup>2989</sup>

## ***II – Comparison with Janjaweed Leader***

790. The Defence may further address that aspect in its oral arguments, if necessary.

791. Shakrutallah, the General Leader of all JJW for West-Darfur<sup>2990</sup> and their Chief of Operations in Western Darfur,<sup>2991</sup> one of the main members of the counterinsurgency in West Darfur,<sup>2992</sup> was, according to **P-0120**, promoted from Major to Lieutenant-Colonel during the events surrounding 2003.<sup>2993</sup> **P-0883** confirmed that Bonjouse, *Agid-Al-Ogada* for the JJW in Mukjar<sup>2994</sup> and alleged to have been the deputy of *Ali Kushayb*,<sup>2995</sup> now has the rank of Brigadier-General within the Rapid Support Forces (“RSF”) in charge of commanding the whole Wadi Salih. One of **P-0883**’s sons serves in the RSF in Al Fasher.<sup>2996</sup> The case of Musa Hilal is less telling in as much as he was already a paramount chief of the Mahamid, a branch of the Northern Rizeigat<sup>2997</sup> prior to becoming the major JJW leader he has been.<sup>2998</sup> The way he benefited from his actions in the counterinsurgency, particularly in West Darfur,<sup>2999</sup> is thus less obvious. Finally, the most spectacular example of promotion of a JJW leader active during the 2003-2004 counterinsurgency is undoubtedly the case of Mohamed Hamad Dagalo, also

<sup>2986</sup> [REDACTED].

<sup>2987</sup> **D-0001**: T-154, p. 57, lines 22-25; **D-0002**: T-156, p. 60, lines 13-15; **D-0003**: T-155, p. 46, lines 18-20; **D-0007**: T-149, p. 28, lines 9-14; **D-0008**: T-139, p. 28, lines 2-8, p. 63, lines 5-7, p. 84, lines 13-24; **D-0011**: T-138, p. 52, lines 5-9; **D-0028**: [DAR-D31-00000150](#), para. 23; **D-0029**: T-157, p. 25, lines 2-19; **D-0032**: T-140, p. 88, lines 17-19; **D-0032**: T-141, p. 22, lines 5-6; **D-0039**: T-159, p. 34, lines 10-17; p. 79, lines 20-23.

<sup>2988</sup> [DAR-D31-0002-0002](#).

<sup>2989</sup> [REDACTED].

<sup>2990</sup> **P-0040**: [DAR-OTP-0094-0165-R02](#), para. 38.

<sup>2991</sup> **P-0008**: [DAR-OTP-0008-0058-R02](#), para. 36.

<sup>2992</sup> **P-0020**: T-042, p. 9, lines 8-14 (Conf).

<sup>2993</sup> **P-0120**: T-037, p. 53, line 15-p. 54, line 1 (Conf).

<sup>2994</sup> **P-1021**: T-080, p. 32, line 1 (Conf).

<sup>2995</sup> **P-0012**: [DAR-OTP-0119-0503-R01](#), para. 33; **P-0643**: T-056, p. 24, lines 4-7 (Conf); **P-0883**: T-074, p. 59, lines 15-19 (Conf).

<sup>2996</sup> **P-0883**: T-074, p. 58, line 20-p. 60, line 5 (Conf).

<sup>2997</sup> **P-0119**: [DAR-OTP-0124-0196-R03](#), paras. 89, 91; **P-0120**: T-037, p. 34, line 13-p. 35, line 11; **P-0547**: T-051, p. 94, lines 4-7 (Conf); T-052, p. 4, line 19, p. 30, lines 8-12 (Conf); **P-0769**: T-097, p. 51, lines 1-6 (Conf); **P-1042**: T-027, p. 80, lines 5-12.

<sup>2998</sup> **P-1042**: [DAR-OTP-0220-1623](#), para. 126.

<sup>2999</sup> **P-1042**: T-029, p. 20, lines 9-20.

known as Hemeti, who escalated from the position of secondary JJW leader<sup>3000</sup> up to becoming the Supreme Leader of the RSF and the Vice-President of Sudan.<sup>3001</sup>

792. Compared to this, Mr Abd-Al-Rahman was recruited within the CRF and offered the rank of *Musaid*, which was the same he held before his retirement from the SAF. The only reference to a reward that he, or the person named *Ali Kushayb* would have received is provided by P-0129 in the form of an assumption: “*Ali Kushayb used to be a poor man before the conflict. Now, he goes about his own vehicle.*”<sup>3002</sup> There is no further proof of the existence of that vehicle. P-0129 was assuming that the car he was talking about indeed belonged to *Ali Kushayb* and was not, for instance, a CRF vehicle used by him in an official function. In any case, a vehicle is nothing in comparison to the previous examples of rewards received by the other JJW leaders, including his alleged subordinates.

### **Section 3 – Conclusion on Defence Line 2**

793. The Defence submits that the Prosecution has failed to make the demonstration and to provide evidence beyond reasonable doubt of Mr Abd-Al-Rahman’s authority over the JJW militia between August 2003 and April 2004. Quite the opposite, the evidence on record shows that Mr Abd-Al-Rahman was not a member of the PDF, was not a member of the Border Guards and could not be a member of tribal militias involved in the 2003-2004 counterinsurgency because his tribe, the Ta’aisha, did not get involved and remained neutral, because there is no evidence that Mr Abd-Al-Rahman disregarded this positioning of his tribe and because he was not the *Agid-Al-Ogada* of his tribe.

794. In the absence of reasonable proof of his authority as JJW leader, and irrespective of the assessment of the direct evidence of the presence of Mr Abd-Al-Rahman in his capacity as JJW leader in Kodoom, Bindisi, Mukjar and Deleig, a holistic consideration of the entire evidence on record is casting reasonable doubt on the fact that, without that authority, Mr Abd-Al-Rahman could have ordered or induced the crimes charged pursuant to Article 25(3)(b) of the Statute and that he, the pharmacist of Garsila, was present on the crime scenes in Kodoom, Bindisi, Mukjar and Deleig to participate in the crimes as a direct co-perpetrator under Article 25(3)(a) of the Statute. Mr Abd-Al-Rahman must thus be acquitted of all charges.

### **Chapter 3 – Defence Line 3: Knowledge Has Not Been Proved**

<sup>3000</sup> P-0120: T-037, p. 49, lines 13-18; P-0547: T-052, p. 12, line 17-p. 13, line 7 (Conf).

<sup>3001</sup> P-0883: T-074, p. 60, line 24-p. 61, line 1.

<sup>3002</sup> P-0129: [DAR-OTP-0128-0128-R04](#), para. 124.

795. *Actus non facit reum nisi mens sit rea*. Fault is an essential component of criminal liability. It cannot be presumed. The burden of proving it lies with the OTP under Article 66(2) of the Rome Statute.

796. Prior to making its submissions on this aspect, the Defence deems it necessary here to warn against any legitimate cultural bias that the Western legal education of all protagonists of the trial, including the OTP, the Defence, the Representatives of Victims and the Bench, may induce *vis-à-vis* the level of knowledge and understanding of International Law and IHL Principles that people in Sudan may have. Knowing and understanding the principles of IHL shall not be considered as obvious, especially so for people with no legal education who have grown up and witnessed the overall context of ongoing armed violence, HR violations and non-compliance with IHL principles that has rampaged Sudan, especially Darfur, for ages.<sup>3003</sup> Against this dreadful context, one shall not assume that the most basic principles of IHL were known and understood by any Darfur lay person in 2003-2004. There may have been an overall perception that the alleged acts underlying the charges were wrong and shocked the conscience of Humanity. But this perception did not necessarily imply knowledge that these were crimes under International Law, even less so in 2003-2004 when the Court had just been established and had not yet been seized of the Situation in Sudan. The referral of the Situation in Sudan and the work of the Court are likely to have significantly improved the overall level of knowledge about international crimes and accountability in Sudan. But the Court would be wrong if it were to presume that the resulting level of understanding of these matters nowadays was necessarily the same in 2003-2004. The consideration of the below submissions will require particular caution and discernment on these aspects.

### **Section 1 – The Burden of Proving Knowledge**

797. The Defence is not suggesting that, as discussed in Trial Chamber X’s Trial Judgment of 26 June 2024 in *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* (“*Al Hassan Judgment*”),<sup>3004</sup> the OTP should have demonstrated that Mr Abd-Al-Rahman had knowledge that his alleged conduct constituted a crime within the jurisdiction of the Court. Unlike Mali in 2012-2013,<sup>3005</sup> Sudan was not a State Party to the Rome Statute in 2003-2004. At paragraph 87 of its Judgment on Appeal OA8, the Appeals Chamber has found that the crimes under the jurisdiction of the Court were thus not directly applicable to Mr Abd-Al-

<sup>3003</sup> See **PART IV – Chapters 1 and 2**.

<sup>3004</sup> [Al Hassan TJ](#), para. 1767.

<sup>3005</sup> [Mali](#) ratified the Statute of the Court on 16 August 2000. It entered into force on [1<sup>st</sup> July 2002](#) for that State.

Rahman.<sup>3006</sup> Whether Mr Abd-Al-Rahman had knowledge that his alleged conduct constituted a crime within the jurisdiction of the Court is thus irrelevant in the present case. Such belief would have been erroneous. The alleged conduct committed in Sudan by Sudanese nationals did not constitute a crime within the jurisdiction of the Court in 2003-2004.

798. The Defence's contention is that the facts underlying the charges cannot incur criminal liability if those committing these (i) acted under the genuine and honest belief that these acts were lawful and mandatory under their national Law and (ii) were not aware of their criminalisation under International Law. The first prong would amount to mistake of law under Article 32(2) of the Statute; the second prong would amount to a lack of knowledge under Article 30(3) of the Statute. It is submitted that the mistake of law (i) contributed to preventing knowledge (ii). In these circumstances, a finding of guilt would amount to a violation of the principle of individual criminal responsibility in the absence of required *mens rea*.<sup>3007</sup>

799. As early as January 2007, Pre-Trial Chamber I found that a defence of mistake of law can succeed if the accused "*was unaware of a normative objective element of the crime as a result of not realising its social significance (its every day meaning)*" ("*Lubanga Confirmation Decision*").<sup>3008</sup> This finding essentially reflects the German legal concept of the "layman's parallel evaluation test".<sup>3009</sup> Seventeen years later, the majority of Trial Chamber X confirmed in its *Al Hassan* Judgment of 26 June 2024 that "*when criminal responsibility requires that the accused committed a crime with intent and/or knowledge in relation to the legal characterisation of his conduct, a mistake of law which negates the mental element may be a defence.*"<sup>3010</sup>

800. For all crimes charged, the mistake of law under Article 32(2) of the Statute consisted in the belief that these acts were lawful and mandatory under Sudanese law. This is an application of the *Common Law* concept of mistake of legal element, as summarized by Glanville Williams: "*if a statute creates a crime requiring knowledge, the accused is not guilty*

<sup>3006</sup> [ICC-02/05-01/20-503](#), para. 87.

<sup>3007</sup> G. Werle, *Principles of International Criminal Law*, 4<sup>th</sup> Ed., The Hague, TMC Asser, 2020, p. 289 at 755.

<sup>3008</sup> [Lubanga DCC](#), para. 316 referring to footnote 405: A. Eser, "Mental Element – Mistake of Fact and Mistake of Law" in A. Cassese, P. Gaeta, J.R.W.D. Jones (Eds.), *The Rome Statute of the International Criminal Court – A Commentary*, Oxford University Press, (2002), p. 961.

<sup>3009</sup> See K. J. Heller, "Mistake of Legal Element, the Common Law, and Article 32 of the Rome Statute, A Critical Analysis", (2008) (6) *Journal of International Criminal Justice* 419, at pp. 436-440; M.E. Badar, "Mens Rea, Mistake of Law and Mistake of Fact in German Criminal Law: a Survey for International Criminal Tribunals", (2005) 5 *International Criminal Law Review* 203, at p. 214, n. 56; G. Werle, *Principles of International Criminal Law*, 4<sup>th</sup> Ed., The Hague, TMC Asser, (2020), p. 290 at 756.

<sup>3010</sup> [Al Hassan TJ](#), para. 1769.

*if, owing to a misunderstanding of some part of the general civil law, he thought the facts did not fall within the concepts used in the definition of the crime.*”<sup>3011</sup>

801. In the case of War Crimes, knowledge that the targeted persons and properties were protected and that their protection implied that attacking those was a crime under IHL must be proved. The Elements of Crimes confirm that “*awareness of the factual circumstances that established the protected status of persons or property*” is an element of all War crimes defined under Article 8(2) of the Statute.<sup>3012</sup> The same reasoning was followed in relation to War Crimes, in particular with respect to the responsibility of military commanders, in the *Von Leeb et al.* (“*High-Command Case*”): “[A commander] *cannot be held criminally responsible for a mere error in judgment as to disputable legal questions.*”<sup>3013</sup> and in the *List et al.* (“*Hostages Case*”): “*Where room exists for an honest error in judgment, such army commander is entitled to the benefit thereof by virtue of his presumption of innocence.*”<sup>3014</sup>

802. With respect to Crimes against Humanity, knowledge that the acts formed part of a widespread or systematic attack against a civilian population and, as such, constituted Crimes against Humanity under Customary International Law, must also be proved.

803. The General Introduction to the Elements of Crimes provides that the “*existence of intent and knowledge can be inferred from relevant facts and circumstances*”.<sup>3015</sup> Knowledge cannot be presumed. It must be proved, either by adducing evidence or by way of inference. As relevantly ruled by the ICTR Appeals Chamber in its *Gacumbitsi* Judgment, “*the inferential approach does not relieve the Prosecution of its burden to prove each element of its case, including genocidal intent, beyond reasonable doubt. Rather, it is simply a different means of satisfying that burden.*”<sup>3016</sup> The use of “*can be*” necessarily implies that the same relevant facts and circumstances can also lead to inference that the required intent or knowledge did not exist. Whatever the nature and seriousness of the crimes, the standard of proving the absence of knowledge cannot be higher than the standard of proving their existence.

804. The OTP bears the burden of proving, either through actual evidence or by inference, Mr Abd-Al-Rahman’s knowledge of the criminal nature of the alleged acts underlying the charges. The OTP did not adduce evidence thereof. It did not even plead it. None of the paragraphs of its Trial Brief address that specific aspect of the required knowledge: (i) in

<sup>3011</sup> G.L. Williams, *Criminal Law: The General Part*, 2<sup>nd</sup> edn., London: Stevens and Sons, 1961, p. 321.

<sup>3012</sup> Elements of Crimes, Article 8(2)(a)(i), Footnote 32.

<sup>3013</sup> USA, *United States of America v. Von Leeb et al.* TJ, p. 50, at 511.

<sup>3014</sup> USA, *United States of America v. List et al.* TJ, p. 16-17, at 1245-1246.

<sup>3015</sup> Elements of Crimes, General introduction, para. 3.

<sup>3016</sup> [Gacumbitsi AJ](#), para. 41.

relation to the attack on Kodoom and Bindisi, the OTP addresses knowledge under Article 30 under the sole aspect of awareness that the JJW would commit crimes in the ordinary course of action;<sup>367</sup> (ii) for Mukjar, the OTP only addresses intent, without mentioning knowledge;<sup>368</sup> and (iii) for Deleig, the OTP mentions knowledge that the crimes would occur in the ordinary course of action and knowledge of a Common plan and Mr. Abd-Al-Rahman's role therein.<sup>369</sup>

805. Not a line is dedicated to proving, even by inference, Mr. Abd-Al-Rahman's knowledge of the criminal nature of his alleged actions. Yet, the Prosecution had been on notice since, at least, the Confirmation Hearing that this aspect formed part of the lines of Defence of Mr. Abd-Al-Rahman.<sup>3017</sup> The relevant aspect of knowledge of the criminal nature of the alleged acts under Article 30(3) is not even pleaded by the OTP. It is even less proved, not even by inference. The OTP was aware that this would form a line of Defence and neglected to fulfil its burden of proof on that aspect. Yet, "*the inferential approach does not relieve the Prosecution of its burden to prove each element of its case*"<sup>3018</sup>. This burden of proof has not been fulfilled, with the consequence that the common element knowledge of all crimes charged has not been proven. In the absence of proof of the required knowledge of their criminal nature by the OTP, these facts and circumstances lead to the only reasonable conclusion that such knowledge did not exist and that an element of *mens rea* common to all crimes pleaded in the charges is thus missing.

## **Section 2 – Mr Abd-Al-Rahman Could not Have the Required Knowledge**

### ***I – Error of Law: Committing the Acts Was Mandatory***

806. The Defence refers to the agreed facts of relevance for Mr Abd-Al-Rahman's biography.<sup>3019</sup> Non-contested evidence on record provides additional information on his biography. [REDACTED].<sup>3020</sup> Being born in 1949, Mr Abd-Al-Rahman was thus about 15 years old when he entered the army. [REDACTED], Mr Abd-Al-Rahman joined the Medical Unit after six to seven years in the SAF, i.e. around 1970-1971.<sup>3021</sup> **D-0007** testified that, [REDACTED],<sup>3022</sup> Mr Abd-Al-Rahman held the rank of warrant officer, *Musa'id*, which corresponds to the medical assistant rank within the SAF Medical Unit.<sup>3023</sup> There is no evidence whatsoever on record that Mr Abd-Al-Rahman ever reached a higher rank in the SAF prior to

<sup>3017</sup> T-009, p. 3, line 23-p. 34, line 12; [ICC-02/05-01/20-616](#), para. 28.

<sup>3018</sup> [ICTR, Gacumbitsi AJ](#), para. 41.

<sup>3019</sup> [OTP Trial Brief](#), para. 2; [ICC-02/05-01/20-504-AnxA](#): items 1, 9, 10, 11, 12; See also [DAR-OTP-0216-0241](#) (English translation: [DAR-OTP-0216-0773](#)); [DAR-OTP-0216-0235](#) (English translation: [DAR-OTP-0216-0765](#)).

<sup>3020</sup> [REDACTED].

<sup>3021</sup> [REDACTED].

<sup>3022</sup> [REDACTED].

<sup>3023</sup> **D-0007**: T-149, p. 6, line 16-p. 7, line 11 (Conf).

his retirement by early-to-mid 1990s. There is also no evidence whatsoever on record that he ever studied law or, even, completed any secondary or superior level of education, other than his medical assistant certificate and licence to sell medication. Mr Abd-Al-Rahman is literate, which supports that he may have completed his primary cycle of education, no more.

807. IHL training within the SAF started around 2000.<sup>3024</sup> Before that date, the evidence on record shows that IHL training was limited to officers sent on mission in foreign countries.<sup>3025</sup> There is no evidence on record supporting that Mr Abd-Al-Rahman was ever deployed on mission in a foreign country during his time in the SAF. The approximate date of retirement of Mr Abd-Al-Rahman from the SAF, by early-to-mid 1990s, is anterior to the generalization of IHL training within the SAF. According to that evidence, Mr Abd-Al-Rahman never received any training on IHL principles during his career in the army or at any time before or after.

808. Instead of receiving IHL training, all SAF soldiers were taught, as part of their regular military training, that they were under an obligation to obey orders, even when these were perceived as unlawful,<sup>3026</sup> and that disobeying an order was a criminal offence incurring the death penalty.<sup>3027</sup> The same obligation and penalty applied to *Emirs*, i.e. *Mujahideen* or *Janjaweed*<sup>3028</sup> leaders placed under the command of the Head of operations of the PDF:<sup>3029</sup> “*the consequence of [disobeying orders] will be either prosecuted in the battlefield or executed.*”<sup>3030</sup> The evidence shows that the first definition of “*lawful order*” was introduced in Article 3 of the 2007 Armed Forces Act.<sup>3031</sup> Under the previous 1986 Act, which was in force in 2003-2004, a mention of “*lawful order*” did exist,<sup>3032</sup> but it was not defined.<sup>3033</sup>

809. Mere references to God or Islam in general did not necessarily prevent the commission of crimes, nor foster adherence to IHL principles.<sup>3034</sup> Recipients of orders were thus left with no clear basis to assess their lawfulness, while they were taught that disobedience in operation incurred death penalty and possibly summary execution without trial.

<sup>3024</sup> See **PART IV – Chapter 2 – Section 2- III.**

<sup>3025</sup> **P-0547:** T-052, p. 59, lines 5-19 (Conf).

<sup>3026</sup> **P-0883:** T-073, p. 16, lines 8-13, p. 19, lines 5-17.

<sup>3027</sup> [DAR-OTP-00006136](#), at 0020, Article 48(c); **P-0883:** T-073, p. 15, lines 12-20; **D-0016:** T-131, p. 5, lines 4-21 (Conf). See **PART IV – Chapter 2 – Section 2 – IV – B.**

<sup>3028</sup> **P-0954:** [DAR-OTP-0221-0571-R01](#), para. 43.

<sup>3029</sup> **P-0954:** [DAR-OTP-0221-0571-R01](#), paras. 24-27.

<sup>3030</sup> **P-0954:** [DAR-OTP-0221-0571-R01](#), para. 43.

<sup>3031</sup> [DAR-D31-0003-0074](#), at 0077, Article 3; **D-0016:** T-130, p. 79, lines 8-23 (Conf).

<sup>3032</sup> [DAR-OTP-00006136](#), at 0023, Article 60; **D-0016:** T-130, p. 82, lines 3-5 (Conf).

<sup>3033</sup> See **PART IV – Chapter 2 – Section 2 – IV – B** above.

<sup>3034</sup> See **PART IV – Chapter 2 – Section 3.**

810. “*Aksah Amsah*”, literally meaning “wipe out and sweep away”,<sup>3035</sup> was, like “*Allahu Akbar*” and “*Mayenoom*”, a usual chant sung to boost the morale of soldiers and to awaken them as regards their combat and non-combat duties.<sup>3036</sup> In no way did it imply an order to violate the rights of civilians.<sup>3037</sup>

811. Another aspect of the rules of engagement in force within the SAF was *Ghanima*, defined as stealing everything, including physical properties, vehicles, weapons, anything that can be collected in the camps and places of the enemy.<sup>3038</sup> *Ghanima*, i.e. pillaging, for the benefit of the armed forces was considered legal.<sup>3039</sup>

812. The evidence on records has also shown that extrajudicial arrests, detention, torture, and extrajudicial execution of prisoners formed part of the routine procedures in force in the NISS and Military Intelligence,<sup>3040</sup> especially so in times when a state of emergency was declared,<sup>3041</sup> like in 2003-2004 in Darfur.

813. Finally, the evidence on record shows a regular reliance on the doctrine of military necessity as a pretext for violating IHL.<sup>3042</sup> That doctrine is likely to have contributed to strengthening an overall perception that everything was permissible while on operations on account of the GoS.

814. Mr Abd-Al-Rahman, like any other lay person in Darfur, could only assess and understand his obligations *vis-à-vis* the authorities under Sudanese Law in light of (i) that dreadful context of ongoing armed violence and Human Rights violations, (ii) the absence of IHL training and/or dissemination, (iii) the knowledge of an obligation to obey orders, even when perceived as unlawful, under penalty of summary execution, (iv) the “*Aksah Amsah*” and “*Allahu Akbar*” motos, (v) the legality of the practice of *Hiraba* and *Ghanima* and (vi) the doctrine of military necessity. These are the only relevant factors provided by his background and education on the basis of which he could individually assess the legality of the counterinsurgency and of the acts perpetrated in response thereto.

<sup>3035</sup> [OTP Trial Brief](#), para. 290; **P-0131**: T-112, p. 22, lines 9-12 (Conf); **P-0878**: T-078, p. 21, lines 8-10 (Conf), p. 34, lines 6-12 (Conf).

<sup>3036</sup> **D-0016**: T-133, p. 17, lines 18-22 (Conf); See **PART IV – Chapter 2 – Section 4**.

<sup>3037</sup> **D-0016**: T-132, p. 89, lines 9-11 (Conf).

<sup>3038</sup> See **PART IV – Chapter 2 – Section 2 – IV – A**.

<sup>3039</sup> **D-0016**: T-131, p. 65, line 18-p. 66, line 11 (Conf), p. 69, lines 3-11 (Conf).

<sup>3040</sup> **P-0020**: T-042, p. 17, lines 11-18; p. 18, line 15-p. 19, line 6; p. 21, line 15-p. 22, line 13; **P-0120**: T-036, p. 63, lines 14-24; **P-0547**: T-051, p. 40, lines 17-24 (Conf), p. 41, lines 10-16 (Conf); **P-0769**: T-097, p. 75, line 19-p. 76, line 7 (Conf); **D-0016**: T-130, p. 74, lines 6-23 (Conf). See **PART IV – Chapter 2 – Section 1**.

<sup>3041</sup> **P-0020**: T-042, p. 21, line 15-p. 22, line 13; **P-0120**: T-037, p. 18, lines 22-23; See **PART IV – Chapter 2 – Section 5**.

<sup>3042</sup> See **PART IV – Chapter 2 – Section 2 – IV – C**.

815. The OTP alleges that these acts were committed as part of the counterinsurgency and in response to a State policy of the GoS, involving, *inter alia*, Al Bashir, Vice-President Taha, the National Security Council, Minister of Defence Salih, Minister of Interior Hussein, Harun, Commissioner Abd-Al-Hakam, Commissioner Abdullah Torshein, CRF Commander Himeidan, the PDF, the PPF, the CRF, Military Intelligence, and the NISS.<sup>3043</sup> For a lay person in Darfur, like Mr Abd-Al-Rahman, there was thus no doubt that the counterinsurgency had been decided and was implemented by persons with authority.

816. Attacking and pillaging Kodoom and Bindisi<sup>3044</sup> fell under the practice of *Ghanima* and/or *Hiraba*, which were legal under Sudanese Law. Harun had specifically confirmed so in his speeches inviting JJW militia to *Ghanima*.<sup>3045</sup>

817. Inhabitants of the attacked localities were suspected of supporting the rebellion, either by recruiting for it, financing it, providing intelligence to it, hiding its members, providing logistical support, such as the provision of food or cooking for it, singing songs to encourage its fighters, or providing health care to them.<sup>3046</sup> No distinction was made between men and women, children or elders, subject of such suspicion. In case there was any doubt as to the legality of attacking villages and killing apparent civilians, the “*Aksah Amsah*” and “*Allahu Akbar*” motos were there to encourage fighters and persuade them that these attacks were pleasing God. The criminalization of disobedience to orders, with possible death penalty or summary execution associated to it, played in any case as a strong deterrent against questioning the legality of such attack, once ordered by the authorities.<sup>3047</sup>

818. The arrests, detention, torture and execution of prisoners<sup>3048</sup> in Mukjar<sup>3049</sup> and Deleig<sup>3050</sup> were an application of the routine procedures in force in NISS and Military Intelligence, as facilitated by the declaration of state of emergency.<sup>3051</sup> Like in Kodoom and Bindisi, the speeches and instructions delivered by the representatives of the Government of Sudan, “*Aksah*

<sup>3043</sup> [OTP Trial Brief](#), paras. 51-78.

<sup>3044</sup> See **PART V – Chapter 1**.

<sup>3045</sup> **P-0757**: [DAR-OTP-0211-0003-R02](#), para. 57. See also **PART IV-Chapter 2-Section IV- A**.

<sup>3046</sup> **P-0020**: T-042, p. 19, line 7-p. 20, line 25. See **PART IV – Chapter 2 – Section 1**.

<sup>3047</sup> See **Part IV-Chapter 2-Section IV**.

<sup>3048</sup> **P-0020**: T-042, p. 17, lines 11-18; p. 18, line 15-p. 19, line 6; p. 21, line 15-p. 22, line 13; **P-0120**: T-036, p. 63, lines 14-24; **P-0547**: T-051, p. 40, lines 17-p. 41, line 3 (Conf), p. 41, lines 10-17 (Conf); **P-0769**: T-097, p. 75, line 20-p. 76, line 8 (Conf); **D-0016**: T-130, p. 74, lines 6-23 (Conf). See **PART IV – Chapter 2 – Section 1**.

<sup>3049</sup> See **PART V – Chapter 2**.

<sup>3050</sup> See **PART V – Chapter 3**.

<sup>3051</sup> **P-0012**: [DAR-OTP-0119-0503-R01](#), para. 26; **P-0120**: T-036, p. 67, lines 12-13; **D-0016**: T-131, p. 25, lines 13-15 (Conf); p. 26, lines 9-16 (Conf). See **PART IV – Chapter 2 – Section 5**.

*Amsah*”, “*Allahu Akbar*” and the criminalisation of disobedience to orders, were there to persuade anyone doubting of the legality of these actions.<sup>3052</sup>

819. All acts underlying the charges were also facilitated by the absence of training and/or dissemination of IHL principles<sup>3053</sup> and Darfur’s longstanding history of armed violence.<sup>3054</sup>

820. As a result of this context, the only reasonable conclusion is that Mr Abd-Al-Rahman was simply not equipped to doubt of the legality of the counterinsurgency and its underlying acts. If, as submitted by the Defence, he did not participate, Mr Abd-Al-Rahman’s incapacity to perceive and measure the criminal nature of these acts is irrelevant. If, as submitted by the OTP, the Trial Chamber is convinced beyond reasonable doubt that Mr Abd-Al-Rahman did participate in the acts underlying the charges, then the only reasonable conclusion is that he could not be aware of their criminal nature, as a result of mistakenly believing that their legality under Sudanese law was enough and that their commission was mandatory once instructed by the legal authorities of the GoS. This amounts to a mistake of legal element under Article 32(2) of the Statute, which resulted in the negation of the mental element knowledge under its Article 30(3). The mental element knowledge is common to all crimes mentioned in the charges. Its absence shall lead to the acquittal of Mr Abd-Al-Rahman in totality.

## ***II – Lack of Knowledge That the Acts Incurred Criminal Liability under International Law***

821. Mr Abd-Al-Rahman could not be aware that these acts incurred criminal liability under International Law. The honest and candid belief that these were legal and mandatory under Sudanese Law<sup>3055</sup> already played as a screen preventing a lay person like Mr Abd-Al-Rahman from suspecting that these may be criminalized under another, alien or international, body of Law, and that their criminalization under that other Law had any bearing or relevance in Sudan. A person with no legal education honestly and candidly believes that the laws that apply to him and which he should obey are those of his country. The existence or relevance of any other foreign or international body of Law is not an information that a lay person can reasonably be expected to have. To be aware of the criminalization of certain acts under International Law, one must in the first place be aware of the existence of International Law. The same goes to the relevance of that international criminalization: one must in the first place be aware of the relevance, i.e. the applicability of International Law, to himself as a national of his State.

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<sup>3052</sup> See **Part IV-Chapter 2-Section IV**.

<sup>3053</sup> See **PART IV – Chapter 2 – Section 2 – III**.

<sup>3054</sup> See **PART IV – Chapter 1**.

<sup>3055</sup> See **PART IV- Chapter- 2- Section 2- II**.

822. In the case of Sudan in 2003-2004, knowledge of the crimes under jurisdiction of the Court was highly unlikely.<sup>3056</sup>

823. The same applies to crimes under International Law, be it treaties or Customary International Law. Treaties had not been implemented in Sudan's domestic system in 2003-2004.<sup>3057</sup> The same non-implementation also applied to Customary International Law, in particular the definition of international crimes.<sup>3058</sup> It is with the entry into force of the 2007 Armed Forces Act and the introduction of a definition of international crimes therein<sup>3059</sup> that awareness about the prohibition of international crimes and their prosecution improved.<sup>3060</sup>

824. One may argue that the domestic implementation of International Law norms makes no real difference in the knowledge and understanding of these norms by lay persons with no legal education. Issues about domestic implementation are highly legalistic and cannot reasonably be expected to be understood by persons with no legal education. What matters here is that, as a result of their domestic implementation, international norms, especially the definition of crimes, become part of the domestic Law of the State. As a consequence, lay persons can understand that they shall abide by these rules, as any other rule from their national Law, irrespective of their awareness, or not, of the existence and/or relevance of International Law to themselves. A proper implementation of international rules is also expected to have consequences on their dissemination within the domestic system. In the case of rules of warfare and the definition of international crimes, their implementation also implies the introduction of relevant International Humanitarian Law trainings for the armed forces.

825. Mr Abd-Al-Rahman retired from the army in the early-to-mid 1990s<sup>3061</sup> with a rank of warrant officer.<sup>3062</sup> This was before the start of the first IHL trainings by the late 1990s, before the first edition of the IHL booklet of 2000, before the 2005 Interim Constitution and before the 2007 Armed Forces Act. There is thus no evidence on record supporting a conclusion that he may reasonably have been trained, or even sensitised, to IHL principles during his time in the army. With no other legal education, Mr Abd-Al-Rahman was thus a perfect lay man in relation to the existence and/or relevance of International Law and international crimes. He thus cannot

<sup>3056</sup> See **PART II – Chapter 1 – Section 3.**

<sup>3057</sup> **P-0120:** T-036, p. 68, line 20-p. 69, line 6; **D-0016:** T-130, p. 47, lines 14-18 (Conf); p. 49, line 11-p. 50, line 10 (Conf); **D-0023:** [DAR-OTP-00005970](#), paras. 73-74, 77-78; T-136, p. 40, lines 5-14, p. 40, line 20-p. 41, line 13; See **PART IV – Chapter 2 – Section 2 – I.**

<sup>3058</sup> **P-0120:** T-037, p. 43, lines 12-13 (Conf); **D-0016:** T-130, p. 51, line 2-p. 52, line 6 (Conf); p. 69, line 4-p. 71, line 23 (Conf); **D-0023:** [DAR-OTP-00005970](#), paras. 83-84; T-136, p. 45, line 24-p. 46, line 10; See **PART IV – Chapter 2 – Section 2 – II.**

<sup>3059</sup> [DAR-D31-0003-0074](#): Art. 153-163.

<sup>3060</sup> **D-0016:** T-130, p. 71, lines 11-23 (Conf).

<sup>3061</sup> [OTP Trial Brief](#), para. 2; [ICC-02/05-01/20-504-AnxA](#): item 10.

<sup>3062</sup> **D-0007:** T-149, p. 6, line 22-p. 7, p. 11 (Conf).

be reasonably expected to have been aware of the existence of international crimes, let alone that the acts described in the charges, which he must have believed legal under Sudanese Law, could have been criminalized under International Law.

826. The only reasonable conclusion is that Mr Abd-Al-Rahman had no awareness of the criminal nature of the acts described in the charges in 2003-2004. If, as submitted by the Defence, he did not participate, Mr Abd-Al-Rahman's incapacity to perceive and measure the criminal nature of these acts is irrelevant. If the Trial Chamber is convinced beyond reasonable doubt that Mr Abd-Al-Rahman did participate in the acts underlying the charges, then the only reasonable conclusion is that he could not be aware of their criminal nature under International Law and thus lacked the mental element knowledge required under Article 30(3) of the Statute. The mental element knowledge is common to all crimes mentioned in the charges. Its absence shall lead to the acquittal of Mr Abd-Al-Rahman in totality.

## CONCLUSION

827. Throughout its Final Brief, the Defence has identified seven different grounds on which Mr Abd-Al-Rahman should be acquitted of all charges and released: i) The Court's lack of jurisdiction to prosecute him;<sup>3063</sup> it is respectfully submitted that this requires a preliminary ruling by the TC, prior to any deliberations on the merits; ii) Breaches of fair trial rights caused by Sudan's non-cooperation with the Court;<sup>3064</sup> iii) Serious breaches by the OTP of its disclosure obligations;<sup>3065</sup> iv) Mr Abd-Al-Rahman played no role in and was not present at the location of the events underlying the charges;<sup>3066</sup> v) Mr Abd-Al-Rahman is not *Ali Kushayb* (Line 1);<sup>3067</sup> vi) In the alternative, Mr Abd-Al-Rahman was not a JJW leader (Line 2);<sup>3068</sup> and vii) In the alternative, Mr Abd-Al-Rahman could not have known that the acts alleged in the charges incurred criminal accountability, and would have believed that their commission was mandatory under Sudanese law (Line 3).<sup>3069</sup>

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<sup>3063</sup> See **PART II – Chapter 1** above.

<sup>3064</sup> See **PART II – Chapter 2** above.

<sup>3065</sup> See **PART II – Chapter 3** above.

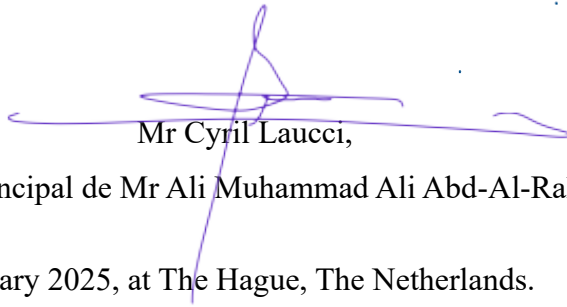
<sup>3066</sup> See **PART V** above.

<sup>3067</sup> See **PART VI – Chapter 1** above.

<sup>3068</sup> See **PART VI – Chapter 2** above.

<sup>3069</sup> See **PART VI – Chapter 3** above.

828. Each of these seven grounds stands independently. Should the TC find that the Prosecution has failed to rebut any of the Defence's arguments in respect of grounds (i) to (iii) and (vii), or fail to prove its case in respect of grounds (iv) to (vi), beyond reasonable doubt, Mr Abd-Al-Rahman will be entitled to be acquitted of all charges and released without delay.



Mr Cyril Laucci,  
Conseil Principal de Mr Ali Muhammad Ali Abd-Al-Rahman

Dated this 26<sup>th</sup> day of February 2025, at The Hague, The Netherlands.