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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

Public Redacted Version of “Prosecution’s application for notice to be given pursuant to Regulation 55(2)”, 22 February 2022, ICC-02/05-01/20-604-Conf

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I. INTRODUCTION

1. The Office of the Prosecutor (“Prosecution”) requests that Trial Chamber I (“Chamber”) notify the Parties and Participants of the possibility of the legal re-characterisation of facts related to Mr Abd-Al-Rahman’s individual criminal responsibility, as described in the Decision on the Confirmation of Charges (“Confirmation Decision”)¹ and the Document Containing the Charges,² pursuant to regulation 55(2) of the Regulations of the Court (“Regulations”).

2. Specifically, the Prosecution requests that the Chamber notify the Parties and Participants of the possibility to change the legal characterisation of the facts and circumstances described in the charges related to Mr Abd-Al-Rahman’s participation in the attack on Kodoom, Bindisi and surrounding areas on 15 and 16 August 2003 (Counts 1-11) to include the mode of liability of “ordering” under article 25(3)(b) of the Rome Statute (“Application”).

3. There is sufficient evidence in the factual findings by Pre-Trial Chamber II (“Pre-Trial Chamber”) to establish substantial grounds to believe that “ordering” would be a suitable mode of liability for Mr Abd-Al-Rahman’s individual criminal responsibility.³ The Pre-Trial Chamber found that Mr Abd-Al-Rahman occupied a senior position of authority over members of the Militia/*Janjaweed* and/or GoS Forces⁴ and utilised “the senior position he occupied and the ensuing authority over the

¹ [ICC-02/05-01/20-433-Corr](#) (“Confirmation Decision”). Because the Prosecution’s application to amend the charges is still pending before the Pre-Trial Chamber, it will only address the facts and circumstances underlying the “Corrected version of the ‘Decision on the confirmation of charges against Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’)’” that was issued on 23 November 2021. See [ICC-02/05-01/20-563-Conf](#).

² [ICC-02/05-01/20-325-Anx1-Corr2-Red](#) (“DCC”). *Al Hassan* Regulation 55(2) Appeals Decision, [ICC-01/12-01/18-1562-Red](#), paras. 5, 93-94 (“Where the confirmation decision does not directly address certain factual allegations advanced by the Prosecutor, a trial chamber may find it necessary to read the confirmation decision together with the document containing the charges and subsequent amendments to see whether those allegations are within the scope of the case.”); *Ntaganda* Decision on Updated DCC, [ICC-01/04-02/06-450](#), para. 39 (“As a general principle, and as noted in Section A above, where the Pre-Trial Chamber was silent on a particular allegation in the DCC, it cannot be presumed to have been rejected, and such silence need not automatically result in its removal from the Updated DCC.”). See also *Ruto & Sang* Decision on Updated DCC, [ICC-01/09-01/11-522](#), paras. 14-19.

³ [Confirmation Decision](#), paras. 95-96.

⁴ The GoS forces included the Sudanese Armed Forces, also known as the Sudanese People’s Armed Forces, the Popular Defence Forces, the Central Reserve Forces, the Popular Police Forces and the Sudanese Police (together, the “GoS Forces”).

Militia/*Janjaweed*, as well as the latter's deference and immediate obedience to him"⁵ to order his subordinates to commit crimes in Kodoom, Bindisi and surrounding areas.⁶ As a result, the Prosecution submits that the Chamber should be aware of the possibility of a change in the legal characterisation of facts and circumstances regarding Mr Abd-Al-Rahman's individual criminal responsibility necessitating notice under regulation 55(2).⁷

4. By re-characterising the exact nature of Mr Abd-Al-Rahman's responsibility, within the narrow scope of already confirmed facts and circumstances, the Chamber will provide for a more fair and accurate representation of his level of participation in the attack on Kodoom, Bindisi and surrounding areas consistent with his participation in other charged attacks. The availability of an additional mode of liability at this early stage of proceedings will aid the Chamber in making the most appropriate finding at the end of the trial, without unduly restricting it to the limited list of legal characterisations confirmed by the Pre-Trial Chamber.

5. Furthermore, seeking notice of the potential legal re-characterisation of Mr Abd-Al-Rahman's individual criminal responsibility at this very early stage fully respects the rights of the Accused and can result in no prejudice to the Defence. While indeed it will remain possible to give such notice later in the proceedings, considerations of procedural economy favour doing so at this point.

⁵ [Confirmation Decision](#), para. 96.

⁶ The Pre-Trial Chamber's factual findings regarding the attack on Kodoom, Bindisi and surrounding areas have already provided notice to the Defence that there may be sufficient evidentiary support for the related mode of liability of "ordering." See e.g. [Confirmation Decision](#), para. 88 ("Upon Mr Abd-Al-Rahman's orders, the Militia/*Janjaweed* and GoS Forces assaulted the population [in Kodoom] by insulting, chasing and opening fire against the civilians, either wounding or killing several and causing the rest of them to flee.") and para. 91 ("The looters acted upon Mr Abd-Al-Rahman's orders and instructions. Also upon Mr Abd-Al-Rahman's orders, the Militia/*Janjaweed* and GoS Forces destroyed, particularly by setting them on fire, houses and buildings both in Kodoom and Bindisi, where the attackers also destroyed shops, warehouses where food supplies were stored, a mosque with its Islamic books, the police station and the house of the chief of police.").

⁷ Regulation 55(2) of the Regulations ("If, at any time during the trial, it *appears* to the Chamber that the legal characterisation of facts may be subject to change, the Chamber *shall* give notice") (emphasis added); [Al Hassan Regulation 55\(2\) Appeals Decision](#), para. 9 ("As the pre-trial chamber's task is to determine the parameters of the charges, it remains for the trial chamber to assess the individual factual allegations within the scope of the charges.").

II. CLASSIFICATION

6. Pursuant to regulation 23*bis*(1) of the Regulations, this Application is classified as confidential, since it contains sensitive information regarding the identities of Prosecution witnesses. The Prosecution will file a public redacted version as soon as practicable.

III. SUBMISSIONS

7. Pursuant to regulation 55, the Chamber may change the legal characterisation of the facts to accord with the crimes under articles 6, 7 or 8, or to accord with the form of participation of the Accused under articles 25 and 28. This change must not “exceed [] the facts and circumstances described in the charges and any amendments to the charges” consistent with the Chamber’s evaluation under article 74(2) of the Statute at the end of trial. A principal purpose of regulation 55 is to close any potential accountability gaps that might arise as a result of the legal qualifications confirmed in the pre-trial phase that turn out to be incorrect, particularly based on the evidence presented at the trial.⁸

8. If the Chamber grants this Application, notice would be properly issued before trial because it does “not result in an actual legal re-characterisation of any facts at this time [but is] simply a notice of the possibility of such re-characterisation.”⁹ Where practicable, early notice of other potentially applicable modes of liability enhances the fairness of the trial and expeditiousness of the process, because it allows the Parties and Participants to prepare their cases with all possible legal characterisations in mind and avoids delays by making adjournments and recall of witnesses unnecessary. The filing of this Application as early as possible ensures the absence of prejudice to the Parties and Participants, in particular the Defence.¹⁰

⁸ *Lubanga* Regulation 55 Appeals Judgment, [ICC-01/04-01/06-2205 OA15 OA16](#), para. 77; *Katanga* Regulation 55 Judgment, [ICC-01/04-01/07-3363 OA13](#), paras. 22, 104.

⁹ *Ruto & Sang* Decision on Conduct of Trial Proceedings, [ICC-01/09-01/11-1 334](#), para. 30 (fn. omitted).

¹⁰ *Katanga* Regulation 55 Judgment, para. 24. When possible, Trial Chambers have recognised that an early request for notice under regulation 55(2) should be made “particularly in circumstances in which the Prosecution has made an early application for this notice on the basis of the facts and circumstances pleaded in the charging document.” See e.g. *Ruto & Sang* Regulation 55 Decision, [ICC-01/09-01/11-1122](#), para. 27; *Gbagbo & Blé Goudé* Regulation 55(2) Appeals Judgment, [ICC-02/11-01/15-369](#), para. 51.

The confirmed facts and circumstances establish substantial grounds to believe that Mr Abd-Al-Rahman is responsible for “ordering”

9. The Prosecution seeks notice of the possible re-characterisation of Mr Abd-Al-Rahman’s individual criminal responsibility for “ordering” under article 25(3)(b) of the Statute in relation to the crimes listed in Counts 1-5 and 10-11 in Kodoom, Bindisi and surrounding areas and the crimes listed in Counts 6-9 in Bindisi and surrounding areas between 15 and 16 August 2003.¹¹ This mode of liability is cumulative and/or alternative to Mr Abd-Al-Rahman’s individual criminal responsibility for “inducing” under article 25(3)(b),¹² as confirmed by the Pre-Trial Chamber.¹³

10. Under article 25(3)(b), a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that persons orders, solicits or induces the commission of such a crime which in fact occurs or is attempted. In the Confirmation Decision, the Pre-Trial Chamber found that there were substantial grounds to believe that Mr Abd-Al-Rahman induced the Militia/*Janjaweed* and/or GoS Forces to commit crimes during the attack on Kodoom, Bindisi and surrounding areas in August 2003 pursuant to article 25(3)(b) of the Statute.¹⁴ The present need for notice under regulation 55 arises from the evidence demonstrating that Mr Abd-Al-Rahman not only exerted considerable influence over members of the Militia/*Janjaweed* and/or GoS Forces, prompting them to commit crimes during the attack, but also utilised his *de facto* position of authority to order them to do so.¹⁵

11. To establish individual criminal responsibility under “ordering”, it is necessary to prove that: (i) the Accused was in a position of authority; (ii) the Accused instructed

¹¹ [Confirmation Decision](#), p. 54-58.

¹² [Confirmation Decision](#), para. 29 (“As discussed in the section illustrating its general approach on the matter, the Chamber notes that alternative charges are, in principle, permissible and do not *per se* necessarily prejudice the suspect’s right to be informed in detail of the charges [...] Under these circumstances, the Chamber cannot discern any prejudice deriving from the fact that the Prosecutor charged alternative forms of criminal responsibility.” (fn. omitted)).

¹³ [Confirmation Decision](#), p. 57-58.

¹⁴ [Confirmation Decision](#), paras. 55-57.

¹⁵ In addition to the evidence set out in the Confirmation Decision and DCC, the Prosecution has also since gathered additional corroborating evidence of the orders that Mr Abd-Al-Rahman issued during the attack on Kodoom, Bindisi and surrounding areas, which it summarised in the Trial Brief and intends to present at trial. See Prosecution’s Trial Brief, [ICC-02/05-01/20-550-Conf-Red-Corr](#) (“Trial Brief”), para. 1.

another person in any form to either: commit a crime which in fact occurs or is attempted or perform an act or omission in the execution of which a crime is carried out; (iii) the order had a direct effect on the commission or attempted commission of the crime; and (iv) the Accused was at least aware that the crime will be committed in the ordinary course of events as a consequence of the execution or implementation of the order.¹⁶ In order to find a position of authority for the purposes of article 25(3)(b), there is no requirement for a formal superior-subordinate relationship. Rather, it is sufficient that there is proof the Accused possessed *de facto* authority.¹⁷

12. This Application for notice of possible legal re-characterisation regarding Mr Abd-Al-Rahman's individual criminal responsibility does not exceed the facts and circumstances underlying the charges. In the Confirmation Decision, the Pre-Trial Chamber considered it unnecessary to reference all possible factual allegations¹⁸ and make determinations on all possible alternative modes for Mr Abd-Al-Rahman's conduct.¹⁹ Therefore, its findings cannot be considered exhaustive, but instead were intended to set out the broad parameters of Mr Abd-Al-Rahman's involvement in the attack in Kodoom, Bindisi and surrounding areas. The facts that form the basis of the Application, including the identities of the direct perpetrators of the attack, were already confirmed by the Pre-Trial Chamber under the related mode of "inducing" under article 25(3)(b) of the Statute.

13. These factual conclusions regarding "inducing", when read in conjunction with other confirmed facts establishing Mr Abd-Al-Rahman's position of authority, sufficiently establish that he was likewise responsible for ordering the commission of

¹⁶ *Ntaganda* Confirmation Decision, [ICC-01/04-02/06-309](#), para. 145; *Mudacumura* Article 58 Decision, [ICC-01/04-01/12-1-Red](#), para. 63. See also [Confirmation Decision](#), paras. 92-93, 129-130 and p. 62, 67.

¹⁷ [Ntaganda Confirmation Decision](#), fn. 598. See also [Trial Brief](#), fn. 628.

¹⁸ [Confirmation Decision](#), para. 39 ("Whilst having carefully considered all of the arguments advanced by the parties and participants as part of its determination, the Chamber will only refer in this decision to those elements (i.e., submissions and items of evidence) which it considers necessary to show the line of reasoning underpinning its conclusions.").

¹⁹ [Confirmation Decision](#), para. 95 ("As regards the individual criminal responsibility of Mr Abd-Al-Rahman, the Chamber considers that there are substantial grounds to believe that Mr Abd-Al-Rahman's contribution to the abovementioned crimes may be legally qualified under article 25(3)(b) of the Statute. The Chamber is further satisfied that Mr Abd-Al-Rahman's contribution establishes that he (i) fulfils the specific *mens rea* elements pertaining to the aforementioned crimes; and (ii) had intent and knowledge in relation to these crimes under article 30 of the Statute. Accordingly, the Chamber deems it unnecessary to address Mr Abd-Al-Rahman's alleged individual criminal responsibility under article 25(3)(c) or (d) of the Statute.").

these same crimes. As set out in the Confirmation Decision, Mr Abd-Al-Rahman's power to instruct members of the Militia/*Janjaweed* and/or GoS Forces to commit crimes, and perform acts or omissions in the execution of crimes, extended well beyond influence. Mr Abd-Al-Rahman's *de facto* authority as a Militia/*Janjaweed* leader was widely recognised and respected, and it was to this authority that members of the Militia/*Janjaweed* and other GoS Forces acquiesced completely – such that his orders were indeed the proximate cause of crimes committed in Kodoom, Bindisi and surrounding areas.²⁰

Mr Abd-Al-Rahman was in a position of authority

14. Mr Abd-Al-Rahman held a senior position of authority in the Militia/*Janjaweed* as *agid al-ogada* in the Wadi Salih and Mukjar Localities between at least August 2003 and March 2004.²¹ On several occasions, Mr Abd-Al-Rahman introduced himself as a leader of the Militia/*Janjaweed* in public meetings and speeches.²²

15. Mr Abd-Al-Rahman's authority was widely recognised amongst members of the Militia/*Janjaweed* "who saluted him as their commander and promptly obeyed his orders".²³ He issued orders and instructions to other Militia/*Janjaweed* commanders in the region, including his deputies Al-Dayf Samih ("Samih"), Muhammad Adam Bonjouse [REDACTED] who were seen with him during the attack on Kodoom, Bindisi and surrounding areas.²⁴ [REDACTED].²⁵

16. Mr Abd-Al-Rahman's status and role in the counterinsurgency campaign in Darfur was also acknowledged by senior civilian officials of the GoS ("GoS Officials") and members of GoS Forces, with whom he maintained a close relationship.²⁶ He met frequently with GoS Officials who visited Darfur and received instructions from them,

²⁰ [Confirmation Decision](#), paras. 87-88, 91.

²¹ [Confirmation Decision](#), paras. 69-73 and p. 52-54; [DCC](#), paras. 14-26; [Trial Brief](#), paras. 90-102.

²² [Confirmation Decision](#), para. 70.

²³ [Confirmation Decision](#), paras. 69-72, 96; [DCC](#), paras. 13-26.

²⁴ [Confirmation Decision](#), para. 71; [Trial Brief](#), paras. 103-111, [REDACTED].

²⁵ [REDACTED].

²⁶ [DCC](#), paras. 22-26.

in particular State Minister for the Ministry of the Interior Ahmad Harun (“Harun”).²⁷ Mr Abd-Al-Rahman was “put in charge” to destroy “B[i]ndisi locality” and raid the *Zakat* Office by Harun, who provided weapons and vehicles for this express purpose.²⁸

17. Mr Abd-Al-Rahman’s refusal to heed the objections of members of the GoS Forces and other Militia/*Janjaweed* leaders was indicative of his overall authority over the operation in Kodoom, Bindisi and surrounding areas.²⁹ Mr Abd-Al-Rahman was the highest commander on the ground during the attack, and other members of the Militia/*Janjaweed* appeared to be protecting him.³⁰ Others were afraid to challenge him because he received his orders from, and reported directly to, senior GoS Officials.³¹

18. In addition to his *de facto* authority over subordinates in the Militia/*Janjaweed* and assorted GoS Forces, Commissioner of Garsila Ja’afar Abd-Al-Hakam appointed Mr Abd-Al-Rahman as head of the Mujahidin Committee, empowering him to recruit, fund, arm and train members of the Militia/*Janjaweed* on the behalf of the GoS.³² Mr Abd-Al-Rahman often received delegations of GoS Officials who came to the Wadi Salih and Mukjar Localities to deliver weapons, ammunition, vehicles, uniforms, food salaries and other forms of support,³³ and even signed an acknowledgement form for the receipt of arms and ammunition on the behalf of the Militia/*Janjaweed* that was sent back to Khartoum.³⁴

Mr Abd-Al-Rahman issued orders to the Militia/Janjaweed and/or GoS Forces to commit crimes that were carried out

19. Mr Abd-Al-Rahman’s orders took many forms, and these orders were carried out by members of the Militia/*Janjaweed* and/or GoS Forces as a matter of course. He participated in planning meetings with GoS Officials in Mukjar prior to the attack and

²⁷ [Confirmation Decision](#), para. 73; [DCC](#), para. 20.

²⁸ [Confirmation Decision](#), para. 87; [Trial Brief](#), paras. 126, 189, 220-221.

²⁹ [Confirmation Decision](#), p. 57-58; [DCC](#), para. 64(d); [Trial Brief](#), paras. 315, 332-334.

³⁰ [Trial Brief](#), paras. 93, 324.

³¹ [Trial Brief](#), paras. 125-126, 131, 149.

³² [Confirmation Decision](#), para. 72; [Trial Brief](#), paras. 99, 101, 112, 142.

³³ See e.g. [Trial Brief](#), paras. 129-136.

³⁴ [Trial Brief](#), paras. 154, 161.

jointly coordinated with members of GoS Forces.³⁵ Mr Abd-Al-Rahman further issued orders to the Militia/*Janjaweed* under his command and organised their movement as they left their camp in Mukjar.³⁶ During the attack on Kodoom, Bindisi and surrounding areas, in particular, Mr Abd-Al-Rahman led the operation and determined the timing, route, tactics and movement from one predominantly Fur village to the next.³⁷

20. Mr Abd-Al-Rahman's orders regarding the manner in which the attack on Kodoom, Bindisi and surrounding areas was conducted include, *inter alia*:³⁸

- a. Encouraging the Militia/*Janjaweed* and/or GoS Forces throughout the attack by shouting "wipe out and swipe away",³⁹
- b. Deciding the route of the attack and directing the movement of the Militia/*Janjaweed* and/or GoS Forces.⁴⁰ Mr Abd-Al-Rahman instructed PDF Officer Abd-Al-Rahman Dawud Hammudah, also known as Hassaballah, to move from the village [REDACTED] to Tiro, [REDACTED].⁴¹ After the first day of the Bindisi attack, Mr Abd-Al-Rahman ordered his forces to attack the southern part of town the following day;⁴²
- c. Riding in the front of the attackers and distributing them in different directions.⁴³ Specifically, in Kodoom on 15 August and in Bindisi on 16 August, Mr Abd-Al-Rahman directed the movement of the

³⁵ [DCC](#), para. 64; [Trial Brief](#), paras. 218-222.

³⁶ [Trial Brief](#), paras. 223-224.

³⁷ [Confirmation Decision](#), para. 87.

³⁸ [Confirmation Decision](#), para. 87; [DCC](#), paras. 26, 61-62.

³⁹ [Confirmation Decision](#), para. 88. [REDACTED] the words "wipe out and sweep away" indicated that Mr Abd-Al-Rahman was giving a free pass to the Militia/*Janjaweed* and/or GoS Forces to "cleans[e] the whole area" and do what they wanted, including commit rape. See [Trial Brief](#), para. 290.

⁴⁰ [Confirmation Decision](#), para. 87; [DCC](#), para. 61.

⁴¹ [Trial Brief](#), paras. 168, 329.

⁴² [Confirmation Decision](#), para. 87; [DCC](#), paras. 61, 64.

⁴³ [Confirmation Decision](#), para. 88; [DCC](#), paras. 61, 64; [Trial Brief](#), paras. 318-322. See also Prosecution's Pre-Confirmation Brief, [ICC-02/05-01/20-346-Red-AnxA](#) ("Pre-Confirmation Brief"), paras. 201-202.

Militia/*Janjaweed* and/or GoS Forces with his gestures and occasionally by also blowing a whistle;⁴⁴

d. Giving orders to the Militia/*Janjaweed* in Bindisi to destroy, loot and do whatever else they wished;⁴⁵ and

e. [REDACTED].⁴⁶

21. During the attack, Mr Abd-Al-Rahman regularly relayed orders to his deputies, in particular Samih.⁴⁷ [REDACTED] Mr Abd-Al-Rahman when the Militia/*Janjaweed* and/or GoS Forces reached the village of Nyerli⁴⁸ and heard him tell his forces [REDACTED].⁴⁹ [REDACTED].⁵⁰ [REDACTED].⁵¹

22. As noted by the Pre-Trial Chamber in the Confirmation Decision, multiple crimes occurred as a direct result of Mr Abd-Al-Rahman's orders in Kodoom, Bindisi and surrounding areas,⁵² including in particular the indiscriminate targeting of predominantly Fur villagers,⁵³ pillaging and burning of homes, pillaging of shops and the *Zakat* Office,⁵⁴ insulting, chasing and opening fire on the civilian population causing them to flee,⁵⁵ and the murder of civilians.⁵⁶

Mr Abd-Al-Rahman was aware that crimes would be committed as a direct consequence of his orders

⁴⁴ [Trial Brief](#), para. 322; [Pre-Confirmation Brief](#), para. 202; [Confirmation Decision](#), para. 88.

⁴⁵ [Trial Brief](#), para. 323.

⁴⁶ [REDACTED].

⁴⁷ [DCC](#), para. 17; [Trial Brief](#), paras. 326-328.

⁴⁸ Although the attacks on the villages of Nyerli and Tiro are not charged, the acts and conduct of Mr Abd-Al-Rahman in these locations are indicative of the acts and conduct he adopted later in Kodoom and Bindisi during the same attack. The only reasonable inference is that the orders and instructions given to the Militia/*Janjaweed* and/or GoS Forces at the beginning of the attack were followed throughout the attacks on other locations on the same day.

⁴⁹ [Trial Brief](#), para. 319; [Pre-Confirmation Brief](#), para. 201.

⁵⁰ [REDACTED].

⁵¹ [REDACTED].

⁵² Mr Abd-Al-Rahman's words and conduct, including in the villages attacked immediately prior to the attack on Bindisi, contributed to a coercive environment conducive to the rape of women and girls and facilitated the commission of these crimes. [Trial Brief](#), paras. 289, 334. *See also* fn. 39 above.

⁵³ [Trial Brief](#), paras. 189-190, 193.

⁵⁴ [Confirmation Decision](#), para. 91.

⁵⁵ [Confirmation Decision](#), para. 88.

⁵⁶ [Confirmation Decision](#), paras. 88, 92-93.

23. Under article 30(1) of the Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

24. As the Pre-Trial Chamber determined with the related mode of “inducing” under article 25(3)(b), Mr Abd-Al-Rahman’s intent can be inferred from his own acts and conduct in Kodoom, Bindisi and surrounding areas, including his instructions to “wipe out and sweep away,” leading the attack from the front of the convoy at certain times, and his verbal and physical cues. Moreover, Mr Abd-Al-Rahman’s conspicuous presence and approval before, during and after the attack is indicative of the overall permissive environment in which he led the operation, including his failure to challenge or punish any members of the Militia/*Janjaweed* under his command for the crimes that they committed.⁵⁷

25. At all times during the attack on Kodoom, Bindisi and surrounding areas, as confirmed by the Pre-Trial Chamber, Mr Abd-Al-Rahman was aware that he held a position of authority, his orders would be carried out by members of the Militia/*Janjaweed* and/or GoS Forces, and these orders would result in the commission of the crimes in the ordinary course of events.⁵⁸

The Defence retains ample opportunity to prepare its case in light of this potential legal re-characterisation

26. Under regulations 55(3)(a) and 55(3)(b), the Chamber shall ensure that the Accused has adequate time and facilities for the effective preparation of his defence and, if necessary, be given the opportunity to examine witnesses, call new witnesses or present other evidence in accordance with articles 67(1)(b) and 67(1)(e) of the

⁵⁷ [Confirmation Decision](#), para. 95.

⁵⁸ [Confirmation Decision](#), para. 95.

Statute. The Prosecution has filed this Application over a month prior to the commencement of trial on 5 April 2022 and the entirety of the Prosecution case.

27. By notifying the Parties and Participants of the possibility of re-characterising Mr Abd-Al-Rahman's individual criminal responsibility now, there would be no material impact on the time and facilities available to the Defence to prepare its case, including the opportunity to address these issues in the Defence Trial Brief. Moreover, there would be no material impact on the ability of the Defence to examine Prosecution witnesses on which the "ordering" mode of liability relies and present other contrary evidence.

28. Furthermore, the Defence already has notice regarding Mr Abd-Al-Rahman's potential individual criminal responsibility for "ordering" in relation to the charges in Mukjar and Deleig. In particular, for these incidents, the Prosecution relied on much of the same evidence establishing Mr Abd-Al-Rahman's authority as a senior Militia/*Janjaweed* leader which now also forms the basis for re-characterising his "inducing" liability during the attack on Kodoom, Bindisi and surrounding areas as "ordering".

IV. CONCLUSION

29. For the foregoing reasons, the Prosecution respectfully requests that the Chamber grant this Application for notice of the possible legal re-characterisation of Mr Abd-Al-Rahman's individual criminal responsibility under regulation 55(2) of the Regulations.



Karim A.A. Khan QC
Prosecutor

Dated this 28th day of February 2022

At The Hague, The Netherlands