

PUBLIC REDACTED VERSION OF

ANNEX 2 TO
Motion for Judicial Review of Legal Aid Decision
under Regulation 83(4) of the Regulations of the Court



To : [REDACTED] Counsel Support Section

From: Dr Cyril Laucci, Lead Counsel for the Defence of Mr Ali Muhammad Ali Abd-Al-Rahman

Re: Review of Preliminary Assessment of Complexity Level under the new Legal Aid Policy

The Hague, 31st January 2024

Dear Counsel Support Section,

Further to our exchanges of last month relating to our wish for CSS to reassess the provisional complexity level of the *Abd-Al-Rahman* case per paragraph 46 of the new legal aid policy ("LAP"), I write to formally request reassessment, and to provide further information and advance additional arguments in support of our position that the *Abd-Al-Rahman* case should either be assessed at complexity level 3, or in the alternative, should see the allocation of one additional full-time case manager to put us back into the position we were in before the coming into force of the LAP.

Our current team is composed as follows:

1. Lead counsel (Cyril Laucci)
2. Co-counsel (Iain Edwards)
3. Assistant to counsel/legal advisor [REDACTED]
4. Legal assistants [REDACTED]
5. Case managers [REDACTED] Please note that [REDACTED] is currently appointed on a part-time basis at 50%.
6. Language assistant [REDACTED], currently appointed on a part-time basis at 50%.

Prior to the coming into force of the new LAP, our team was composed as follows:

1. Lead counsel (Cyril Laucci)
2. Co-counsel (Iain Edwards)
3. Assistant to counsel/legal advisor [REDACTED]
4. Evidence review/legal assistants ([REDACTED]).
5. Case manager ([REDACTED]).
6. Language assistant [REDACTED].

All of the above worked on the team on a full-time basis.

I also recall that [REDACTED] who served as another evidence review/legal assistant in the team, was not replaced when she departed to join the *Mokom* Defence team in March 2023. Her position remained vacant.

Therefore, in deciding that, for the transitional period, the *Abd-Al-Rahman* case fell into complexity level 2, the team has been obliged to reduce its prior staffing level by (i) 50% for one of the – what is now called – case managers, and (ii) 50% for our language assistant. The vacant position of [REDACTED] was also not taken into account in the assessment of the provisional complexity level. The Defence is thus losing, as a minimum, one position and a half as a consequence of this assessment, which announced purpose was to keep the same level of resources as under the previous Legal Aid Policy. This is contrary to the Registry's stated aim of ensuring "team stability" by provisionally applying a complexity level in line with pre-new LAP team resources. The provisional complexity assessment as level 2 thus defeats its own announced purpose.

Furthermore, regarding our language assistant specifically, this is contrary to the Registry's prior accommodation of the defence's requirement to have a full-time language assistant assigned to the team from its legal aid budget throughout the pre-trial and trial stages of the case on account of Mr Abd-Al-Rahman's inability to speak French or English. The reduction of our language assistant position to 50% is directly and highly prejudicial to the daily work of the Defence team. [REDACTED] has *de facto* worked full time in January 2024, because we could not afford being deprived of his services half of the time. Our current efforts to bring our witnesses to Court would have been significantly impeded and our capacity to communicate with Mr Abd-Al-Rahman would have been limited. I remind you that [REDACTED] is due to travel to [REDACTED] in the coming months and can certainly not do so on a part-time basis.

I ask that this untenable situation be remedied by reassessing the complexity level of the *Abd-Al-Rahman* case from level 2 to level 3. This would provide the defence team with one additional associate counsel (which in any event I do not need and will not recruit), one additional legal assistant, and half an additional case manager. I would propose to use the 50% new case manager to "upgrade" our language assistant to full-time. The additional legal assistant position will also allow us to appoint [REDACTED] on a full-time basis as soon as she becomes available to take up that position full-time. Her deep knowledge of the case and of the evidence is needed to help us with, notably, the drafting of our final trial brief.

I also submit that, when the parameters listed in paragraph 50 of the LAP are applied to the *Abd-Al-Rahman* case, it is clear that the appropriate complexity level is level 3. These are taken in turn below.

- (i) Not applicable: there has been no plea-bargaining.
- (ii) Number and nature of charges: a large number of substantive international crimes, namely 31 counts of war crimes and crimes against humanity, including attacks against the civilian population, murder and attempted murder, pillaging, destruction of property, outrages upon personal dignity, rape, torture, and cruel treatment as war crimes, and murder and attempted murder, rape, torture, forcible transfer, persecution, and other inhumane acts as crimes against

humanity. Compare with 7 counts in *Said*, 13 counts in *Al Hassan*, and 42 counts in *Yekatom & Ngaïssona*.

The complexity of numerous factual and legal arguments deriving from these charges is at a high level. This is the first case in which the jurisdiction of the ICC has been accepted by virtue of a Security Council Resolution (Res. 1593 of 2005). It is the first trial involving a country that is not a State Party to the ICC. It is the first case in which neither the OTP nor the Defence have been able to access the area – Darfur – where the crimes were allegedly committed and where the majority of potential Defence witnesses are to be found. Finally, Sudan has been consumed by a civil war since April 2023. Setting aside difficulties arising from Sudanese non-cooperation, it has been too dangerous for the Defence to access Darfur. All meetings with Defence witnesses

██████████ to date have had to be conducted in ██████████

██████████ This all adds to the high level of complexity in defending Mr Abd-Al-Rahman against the OTP's charges.

Novel and complex legal arguments have been raised during the trial, and will inevitably be pursued on appeal relating to the jurisdiction of the Court, the legality and validity of the co-operation agreement between the Court and Sudan, and the admissibility of much of the OTP's evidence used in the case.

- (iii) Number and nature of the modes of liability confirmed: Mr Abd-Al-Rahman is charged under four modes of liability: direct perpetration (article 25(3)(a)), direct co-perpetration (article 25(3)(a)), ordering (article 25(3)(b)), and inducing (article 25(3)(b)). The fact that he is charged as a direct perpetrator and co-perpetrator creates factual complexities in that, in addition to advancing a primary defence that Mr Abd-Al-Rahman is not *Ali Kushayb*, witness who purport to have observed *Ali Kushayb* committing the charged offences are either mistaken or lying.
- (iv) Number of accused: this is a single-accused case.
- (v) Number and nature of the evidence disclosed: The Prosecution have disclosed 18,537 pieces of evidence in the case in 377 disclosure packages. The LRV have disclosed an additional 52 pieces of evidence. The Defence have thus far disclosed 207 exhibits in 43 packages.

The evidence spans a wide range of material, including witness statements, UN reports, media articles, audio-visual material, social media material, NGO reports and expert evidence. The nature of the case is multi-layered involving the need for the Defence to keep different balls in the air: Mr Abd-Al-Rahman denies that he is *Ali Kushayb*, and so a great deal of evidence focusses on establishing a link between the two. This has included reliance by the Prosecution on witness evidence, NGO reports, internal documentation from the Government of Sudan, media reports, UN reports, social media content purportedly from the client's children, and expert facial mapping evidence. The Defence has had to seek to counter all of this evidence, including through the use of its own experts. A second line of defence focusses on the unlikelihood of Mr Abd-Al-Rahman being such a senior Janjaweed leader as alleged. This has necessitated a profound enquiry into who Mr Abd-Al-Rahman is and was, and an exploration of his actual power and authority. These investigations have been extremely complex given the inability of the Defence to enjoy cooperation from the Sudanese authorities. The same line of defence also relates to the evidential disconnect between the Popular Defence Forces ("PDF") and the Janjaweed and focusses on the lack of evidence of Mr Abd-Al-Rahman ever having had any association with the

PDF. This is a complex line of defence since there is little consensus about the status, functions, training, and hierarchy of the PDF, and its relationship with the Janjaweed. This has required a deep and broad investigation into the workings of the PDF, including through the engagement of expert witnesses. Finally, the third line of defence relies on Mr Abd-Al-Rahman's lack of knowledge and understanding of international humanitarian law and the extent of its implementation in Sudanese law at the material time. This once again has required extensive investigations on complex legal issues in a language that required the invaluable work of our language assistant.

- (vi) Accused's alleged position within a political or military hierarchy: although hotly contested, the Prosecution allege that Mr Abd-Al-Rahman, as *Ali Kushayb*, was a senior – possibly the most senior – Janjaweed commander in the Wadi Saleh and Mukjar localities of West Darfur. Witnesses have said that he commanded many thousands of Janjaweed fighters. He was allegedly an *Agid al Ogada*, a Colonel of Colonels. His position was sufficiently highly placed that he allegedly communicated and coordinated with senior officials of the Government of Sudan at a national level, including the then Minister of the Interior, Ahmad Muhammad Harun, and high-ranking members of the Government at a local level. It is also alleged by the Prosecution that he exerted influence over and issued orders to members of the Government of Sudan forces, including the Sudanese Armed Forces and military intelligence officers.
- (vii) Number and type of witnesses called: the Prosecution called a total of 56 witnesses to testify live at trial, 26 *viva voce* and 30 under Rule 68(3). There were in addition 18 witnesses introduced under Rule 68(2)(b), and 7 under Rule 68(2)(c), making a total of 81 witnesses. However, at the beginning of the trial, the Prosecution were expecting to rely on, and had disclosed statements of, over 125 witnesses. The witnesses covered the whole range of eye-witnesses, victims, accomplice witnesses, political commentators, insiders, technical experts and context experts. The LRV only called 4 witnesses. By the close of its case, the Defence expects it will have called at last 20 witnesses. This relatively low number of defence witnesses must be considered in the context of the unprecedented difficulties faced by a defence team at the ICC in contacting and meeting with potential defence witnesses, almost all of whom are based in Darfur.
- (viii) Number of victims participating in the proceeding: the most up-to-date figure is 1004 participating victims.
- (ix) Geographical and temporal scope of the case: the geographical scope of the case covers large parts of Wadi Saleh and Mukjar localities in West Darfur. There are four main crime sites (Kodoom, Bindisi, Mukjar and Deleig) but well over a dozen other locations of relevance to the case as a whole, including the villages of Seder, Tiro, Gausir, Tendy, Kaskeidi, Um Jameina, Forgo, Andi, Arawala, Fere, Taringa, Nyerli, Garsila (where Mr Abd-Al-Rahman was living at the material time), Rehad-al-Berdi (the main town in which the Ta'aisha tribe is based), Nyala, El Obeid (where Mr Abd-Al-Rahman trained with the Central Reserve Forces) and Khartoum itself. As a result of non-cooperation from Sudan, and more recently the civil war which broke out in April 2023, it has not been possible to travel to any of these locations save Khartoum (and then only once). Most Defence investigations have to be conducted remotely, which creates considerable and unprecedented challenges.

The temporal scope is broad: the crimes are alleged to have been committed between August 2003 and April 2004.

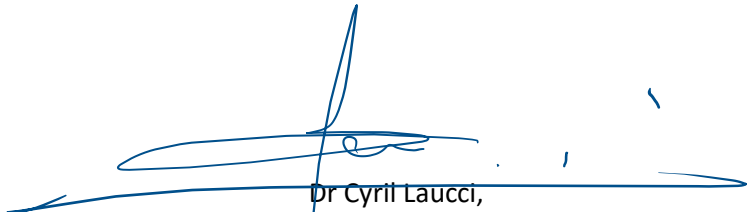
- (x) Security situation in Sudan: defence investigations required missions to Sudan. However, save for one mission to Khartoum, visas were not issued by the Sudanese authorities. In order for the Defence to be able to meet and interview witnesses, and for those witnesses to testify in conditions of security, it was necessary to [REDACTED]

[REDACTED] This was complex and complicated, although very much assisted by the staff of CSS and VWU. Many witnesses were reluctant due to the abysmal security situation created by the fratricidal war that broke out between the Sudanese Armed Forces and the Rapid Support Forces. The Registry is very familiar with the situation. JTAG's recommendation for almost the whole of 2023 was that all missions to Sudan be suspended until further notice. I submit that it is likely that no other case before the ICC has had to deal with a worse security environment in the situation country during trial than the *Abd-Al-Rahman* case. It is yet another unprecedented feature of the case militating in favour of a complexity level 3 assessment.

- (xi) Scope of any specific request or order by the relevant Chamber: none identified.
- (xii) Relevant connection to ongoing or closed cases before the Court: the *Abd-Al-Rahman* case is closely connected to the case against Ahmad Muhammad Harun (ICC-02/05-01/07) and to a lesser extent Abdel Raheem Muhammad Hussein (ICC-02/05-01/12). Indeed, the first warrant of arrest for Mr Abd-Al-Rahman was issued in his joint case with Mr Harun.

I trust that this letter provides sufficient detail for you to reassess the complexity level of this case and that you will agree that there is no reason it should not be provisionally reassessed at complexity level 3 with immediate effect on 1st January 2024. Please do not hesitate to come back to me if you require additional information or submissions.

Kind regards,


Dr Cyril Laucchi,
Lead Counsel for the Defence of Mr Ali Muhammad Ali Abd-Al-Rahman