

Original: **English**No.: ICC-02/05-01/20
Date: 24 February 2023**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 reply to ‘Defence response to Prosecution’s second request to submit material from the bar table of 31 January 2023’, 13 February 2023, ICC-02/05-01/20-871-Conf”, 22 February 2023, ICC-02/05-01/20-878-Conf****Source:** Office of the Prosecutor

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

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I. INTRODUCTION

1. The Prosecution replies to the “Defence response to Prosecution’s second request to submit material from the bar table of 31 January 2023” (“Defence Response”),¹ as directed by Trial Chamber I (“Chamber”).²

II. CLASSIFICATION

2. Pursuant to regulation 23*bis*(2) of the Regulations of the Court, this reply is classified as confidential since it refers to a document with the same classification. The Prosecution will file a public redacted version as soon as practicable.

III. SUBMISSIONS

3. In the following section, the Prosecution addresses several of the issues raised in the Defence Response, and otherwise relies on its submissions in the “Prosecution’s second request to submit material from the bar table” (“Prosecution Request”).³

4. At the outset, the Prosecution notes that, in accordance with the Directions on the conduct of proceedings (“Directions”), “[g]enerally, the Chamber will recognise the submission of [items of evidence] without a prior ruling on the admissibility of the evidence [and] will ultimately assess the relevance, probative value and potential prejudice of the evidence (the ‘standard evidentiary criteria’) as part of the holistic assessment of all evidence submitted when deciding on the guilt or innocence of the accused, in its judgment pursuant to Article 74 of the Statute”.⁴

5. In addition, the Prosecution withdraws its request in relation to the seven items that are already formally submitted.⁵

¹ Defence Response, [ICC-02/05-01/20-871-Red](#).

² See Email of 20 February 2023 at 12:32.

³ Prosecution Request, [ICC-02/05-01/20-860-Red](#).

⁴ Directions, [ICC-02/05-01/20-478](#), para. 25. See also *Ongwen Intercept Related Evidence Decision*, [ICC-02/04-01/15-615](#), paras. 5-7.

⁵ See [Defence Response](#), para. 23. Although the Defence indicated that eight items were already formally submitted, the Prosecution has only been able to identify seven. These items, six of which are in the Map Book, are DAR-OTP-0219-3235, DAR-OTP-0220-3702, DAR-OTP-0220-3705, DAR-OTP-0220-3707, DAR-OTP-0220-4778, DAR-OTP-0220-4740 and DAR-OTP-0215-2766. Item DAR-OTP-0215-2766 was formally submitted on 31 January 2023, on the same day the Prosecution Request was filed.

(a) Documents that are not on the List of Evidence

6. The Prosecution acknowledges that it should have applied to the Chamber to update its List of Evidence (“LoE”)⁶ to include the relevant items.⁷ However, this omission did not create an “unacceptable risk that the [Defence was] unprepared for these items during the Prosecution’s evidence presentation”,⁸ for the following reasons.

7. First, of the 96 items that are not on the LoE, 78 form part of the Map Book that was distributed to the Chamber, Parties and participants on 17 June 2022.⁹ Of these 78 items, 28 are derived from annexes to the Trial Brief.¹⁰ The Map Book was subsequently used, without objection, as a reference tool during the proceedings. This includes during the testimony of multiple witnesses, including by the Chamber¹¹ and the Defence.¹² The Defence therefore had ample notice that the Map Book may be submitted into evidence, and no prejudice flows from the fact that these items were not formally added to the LoE.

8. In relation to the transcript at DAR-OTP-0202-0092, which was disclosed to the Defence on 30 October 2020, whilst this item is not on the LoE, the video to which it relates is.¹³ As the Directions provide, “recognising the formal submission of audio-visual material automatically includes recognising the formal submission of any associated transcripts or translations which were duly disclosed [...] irrespective of

⁶ LoE, [ICC-02/05-01/20-685-Conf-Anx3](#).

⁷ See [Defence Response](#), para. 22; [Directions](#), para. 8.

⁸ See *Bemba et al.*, Bar Table Decision, [ICC-01/05-01/13-1524](#), para. 6.

⁹ See ICC-02/05-01/20-T-052-CONF-ENG CT, p. 94, l. 10-19.

¹⁰ Annex 2, DAR-OTP-0220-3699; Annex 3, DAR-OTP-0220-3700; Annex 8, DAR-OTP-0220-3701, DAR-OTP-0220-4735, DAR-OTP-0220-4736, DAR-OTP-0220-4737; Annex 9, DAR-OTP-0220-3702, DAR-OTP-0220-4756, DAR-OTP-0220-4757, DAR-OTP-0220-4698; Annex 10, DAR-OTP-0220-3705, DAR-OTP-0223-0503; Annex 13, DAR-OTP-0220-3706, DAR-OTP-0220-4738; Annex 14, DAR-OTP-0220-3707, DAR-OTP-0220-4758, DAR-OTP-0220-4759, DAR-OTP-0220-4760; Annex 15, DAR-OTP-0220-3710, DAR-OTP-0220-4748; Annex 16, DAR-OTP-0220-3712, DAR-OTP-0220-4739; Annex 19, DAR-OTP-0220-4700; Annex 20, DAR-OTP-0220-3713, DAR-OTP-0220-3737; Annex 21, DAR-OTP-0220-3716, DAR-OTP-0219-5483; Annex 22, DAR-OTP-0220-3717.

¹¹ See e.g. the Chamber used DAR-OTP-0220-4767 with P-0907 (see ICC-02/05-01/20-T-096-CONF-ENG ET, p. 50, l. 11-p. 52, l. 19).

¹² See e.g. the Defence used DAR-OTP-0220-4779 with P-0905 (see ICC-02/05-01/20-T-087-CONF-ENG CT, p. 23, l. 20-p. 27, l. 15), and DAR-OTP-0220-4781 with P-0643 (see ICC-02/05-01/20-T-058-ENG CT, p. 15, l. 3-p. 17, l. 16 and p. 30, l. 11-16).

¹³ See [LoE](#), p. 82, no. 1585 (DAR-OTP-0122-0002).

whether these transcripts/translations were on the list of evidence".¹⁴ This approach is consistent with the prior jurisprudence of the Court.¹⁵

9. In relation to item DAR-OTP-0021-0353, which is a copy of the Criminal Procedure Act 1991, during consultations with the Prosecution, the Defence did not oppose its introduction into evidence.¹⁶ The Defence now objects to this item solely on the basis that it is not included on the LoE.¹⁷ The Prosecution submits that, given this was the relevant criminal procedural law in force at the relevant time, placing it in the record of the case would be in the interests of justice and would cause no prejudice to the Defence.

10. The remaining 10 items (plus 6 translations), are as follows:

- a. Photographs of two envelopes in which the [REDACTED] the Government of Sudan ("GoS") interview with the Accused was received,¹⁸ and a brief investigation report of a related meeting with the GoS [REDACTED];¹⁹
- b. Two photographs depicting persons alleged to have been killed during the Deleig incident, accompanied by an investigation report relating to their collection;²⁰

¹⁴ [Directions](#), para. 33.

¹⁵ See [Bemba et al. Bar Table Decision](#), para. 7 ("given that the video concerned was indicated on the list of evidence, the defence was given ample notice that the video itself may be submitted during the trial and no prejudice is caused by considering the transcript once the video is recognised as formally submitted" and "it would be unduly formalistic to recognise the submission of a video but not a written record designed to faithfully reflect its contents for better comprehension").

¹⁶ Annex to Prosecution Request, [ICC-02/05-01/20-860-Conf-Anx](#), p. 25, no. 2.

¹⁷ Annex A to Defence Response, [ICC-02/05-01/20-871-Conf-AnxA](#), p. 47, no. 2.

¹⁸ DAR-OTP-0218-0350 (Translation at DAR-OTP-00001010); DAR-OTP-0218-0431 (Translation at DAR-OTP-00001011). These items were disclosed to the Defence on 20 January 2023.

¹⁹ DAR-OTP-00001013. This item was disclosed to the Defence on 27 January 2023. The Prosecution further notes that the GoS interview with the Accused is included on the LoE, just not the envelopes in which it was received. See [LoE](#), p. 172 (no. 3182), 174 (no. 3204), 206 (no. 3720), 207 (no. 3730),

²⁰ DAR-OTP-0222-5202; DAR-OTP-0222-5203; DAR-OTP-0220-4200. These items were disclosed to the Defence on 8 June 2022. In addition, items DAR-OTP-0222-5202 was included on the lists of material for P-0931 and P-0883, and DAR-OTP-0222-5203 was included on the list of material for P-0883.

- c. Two certificates relating to Mr Abd-Al-Rahman's sons that were seized from him during his surrender to the Court;²¹ and
- d. Two news articles pertaining to the death of Mr Abd-Al-Rahman's son, dated 7 June 2022.²²

11. The Prosecution submits that the probative value of the above items, which are relevant to the chain of custody of the GoS interview with the Accused, the identities of two alleged Deleig victims, and biographical details relating to some of Mr Abd-Al-Rahman's family members, outweighs any prejudicial effect that their omission from the LoE may occasion to the Defence.

12. In this regard, the Prosecution notes that the items were promptly disclosed to the Defence following their collection. In addition, the items are relevant to known issues that the Defence would have anticipated, and therefore there is no risk that the Defence was unprepared for such items to be submitted. Such issues include the Prosecution's intention to seek to introduce the GoS interview with the Accused, which was foreshadowed in the Trial Brief.²³

(b) Documents that "should have been submitted through witnesses"

13. The Defence argues that items that were included on the list of material for any Prosecution witness, but ultimately not submitted through that witness, should not be submitted from the bar table.²⁴ In accordance with the Directions, the Prosecution only submitted through witnesses items that were used during the questioning of that witness.²⁵ In any case, there is no principle requiring that an item that *could* be

²¹ DAR-OTP-0216-0244 (Translation at DAR-OTP-0216-0778); DAR-OTP-0216-0245 (DAR-OTP-0216-0780). The originals of these items were disclosed to the Defence on 30 September 2020.

²² DAR-OTP-00000510 (Translation at DAR-OTP-00000811); DAR-OTP-00000701 (Translation at DAR-OTP-00000838). The originals of these items were disclosed to the Defence on 14 December 2022 and 13 January 2023, respectively.

²³ See Prosecution's Trial Brief, [ICC-02/05-01/20-550-Corr-Red](#), paras. 5, 12, 501-502.

²⁴ [Defence Response](#), para. 24.

²⁵ [Directions](#), para. 31(i).

submitted through a witness, *must* be submitted or else cannot be introduced from the bar table.²⁶

(c) Documents that are “irrelevant in light of agreed facts”

14. The Defence asserts that a number of documents relied on by the Prosecution to establish the contextual elements of war crimes or crimes against humanity are already the subject of agreed facts and thus have little to no potential impact on the issues before the Chamber.²⁷ In this respect, the Defence overstates the extent to which certain material elements of the contextual elements of war crimes and crimes against humanity are no longer in dispute.

15. While some facts regarding the contextual elements of war crimes have been agreed (namely, the existence of the armed conflict in Darfur in 2003-2004 and the parties to the conflict), which has reduced the number of items that the Prosecution would otherwise have sought to submit from the bar table, the Prosecution seeks to submit materials that provide further relevant information regarding the structure, function and activities of GoS Forces²⁸ and the rebel armed groups during the charged period. This additional relevant information will assist the Chamber to understand and assess the context in which the alleged war crimes have occurred.

16. In addition, there are currently no agreed facts that satisfy the material elements of the contextual elements of crimes against humanity. The facts that have been agreed regarding the contextual elements of crimes against humanity relate primarily to background information about the GoS State apparatus, including administrative boundaries, the composition of the National Security Council, and the names and titles of GoS officials. These agreed facts do not, however, extend to whether the GoS and Militia/*Janjaweed* committed a widespread and systematic attack on the civilian population of Wadi Salih and Mukjar Localities in furtherance of a GoS State policy.

²⁶ See *Ongwen* Rule 68(2)(b) Decision, [ICC-01/04-02/06-596-Red](#), para. 36; *Gbagbo & Blé Goudé* Rules 68(2)(b) and 68(3) Decision, [ICC-02/11-01/15-573-Red](#), para. 9.

²⁷ See [Defence Response](#), para. 28.

²⁸ 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.

The materials that the Prosecution seeks to submit will significantly advance the Chamber's inquiry into these essential issues.

(d) Category A: Reports

17. The Defence factually misstates the nature of certain reports in asserting they are not sourced.²⁹ The reports provide the methodology for the collection of the information provided therein, the reporting agency is clearly and correctly identified in all of them, and they are overall reliable.³⁰

18. The Defence incorrectly asserts that a number of the reports are testimonial in nature, since they contain information provided by witnesses.³¹ However, the fact that a report is informed by witness statements does not make it testimonial in nature nor does it bar its submission from the bar table.³²

19. The Defence's assertions that some reports would not be admissible for being, in most part, irrelevant to the charges should also be rejected. The amount of relevant information contained in a report that the Prosecution seeks to introduce has no bearing on its admissibility.³³

20. In relation to the lists of persons killed during the Deleig incident,³⁴ the Defence argues that these should not be submitted because the Chamber has already submitted several lists of Deleig victims through the bar table or witnesses.³⁵ However, these lists are not duplicates of each other and are properly viewed as corroborative, not repetitive, of other evidence. With respect to the Defence submission that these victim

²⁹ See [Defence Response](#), para. 26.

³⁰ *Ntaganda* Sentencing Judgment, [ICC-01/04-02/06-2667-Red](#), para. 245.

³¹ See [Defence Response](#), paras. 33-34.

³² *Yekatom & Ngaissona* Decision on the First Prosecution Submission Request from the Bar Table (Sexual and Gender Based Violence), [ICC-01/14-01/18-1359](#), paras. 17-19; *Yekatom & Ngaissona* Decision on the Fourth Prosecution Submission Request from the Bar Table (Recruitment and Use of Children), [ICC-01/14-01/18-1428](#), paras. 16, 18.

³³ *Katanga* Decision on the Prosecutor's Bar Table Motions, [ICC-01/04-01/07-2635](#), paras. 16-17.

³⁴ See [Prosecution Request](#), paras. 13-14.

³⁵ See Annex A to Defence Response, [ICC-02/05-01/20-871-Conf-AnxA](#), p. 10-12, 14-15, 27.

lists should have been submitted through witnesses such as P-0718 or P-0584,³⁶ this has no force since neither of those witnesses were in a position to speak to those lists.

(e) Category D: Government of Sudan Interview with the Accused

21. In relation to the GoS interview with the Accused, the Defence's assertion that the interview is a fake, purportedly produced by some person within the GoS,³⁷ is speculative and has no evidentiary support. This submission should be given no credence in light of the chain of custody and various indicia of authenticity set out in the Prosecution Request.³⁸

22. In assessing its authenticity, it should be recalled that the Prosecution received the interview, directly from the GoS, [REDACTED].³⁹ [REDACTED]⁴⁰ [REDACTED], is powerful evidence of its authenticity. When looking at the file as a whole, the lack of a header on the sheets of paper in the handwritten version of the interview is unremarkable.⁴¹

23. Furthermore, that the interview does not contain a stamp from the GoS Ministry of Foreign Affairs has no impact on the assessment of its authenticity.⁴² That the [REDACTED] is also of little importance.⁴³ It is sufficient that the interview was carried out in accordance with domestic law by an investigation committee established by the GoS, which was composed of members of the Attorney-General's Office.⁴⁴

24. Finally, the Defence's assertion that certain details contained in the interview could have been inserted there because they were widely published following the

³⁶ See [Annex A to Defence Response](#), p. 10-12, 14-15, 27.

³⁷ See [Defence Response](#), paras. 39-43.

³⁸ See [Prosecution Request](#), paras. 19-23.

³⁹ See [Prosecution Request](#), para. 20; DAR-OTP-00001013 at 000001-000002.

⁴⁰ See [Prosecution Request](#), para. 20, fn. 20.

⁴¹ See [Defence Response](#), para. 42. [REDACTED].

⁴² See [Defence Response](#), para. 41.

⁴³ See [Defence Response](#), para. 42.

⁴⁴ See [Prosecution Request](#), para. 19; DAR-OTP-00001013 at 000003.

warrant of arrest issued in 2007 by the Court,⁴⁵ ignores the fact that the interview took place in November 2006.⁴⁶

(f) Category H: Map Book

25. The Map Book is intended as a demonstrative exhibit for the reference of the Chamber, Parties and participants during the proceedings. The maps and satellite imagery give geographical context to the locations relevant to the charged crimes and contextual elements, and are intended to assist the Chamber to understand and analyse the evidence presented during the trial.⁴⁷ Given that it has been used as a reference tool throughout the proceedings,⁴⁸ and will continue to be, the Prosecution considers it appropriate to submit the entire contents of the Map Book into the record of the case.

26. To the extent that certain maps and satellite imagery contain annotations based on witness testimony or other evidence, this is without prejudice to the Chamber's ultimate findings on the material facts in its judgement under article 74, based on the totality of the evidence presented at trial.⁴⁹ There is therefore no prejudice to the Defence caused by the submission of the Map Book into evidence.

27. In relation to maps without a date,⁵⁰ the geographical features found on items DAR-OTP-0220-4738, DAR-OTP-0220-4739 and DAR-OTP-0220-4740 are considered stable locations and their coordinates are therefore not constrained by specific dates. In relation to the aerial photograph of Deleig (DAR-OTP-0219-5483),⁵¹ the fact that this was taken on 16 January 2005 by the United Nations International Commission of

⁴⁵ See [Defence Response](#), para. 42.

⁴⁶ See [Prosecution Request](#), para. 19.

⁴⁷ See e.g. ICC-02/05-01/20-T-034-CONF-ENG CT, p. 26, l. 14-p. 27, l. 10 (“we will work on a map book that will have different maps of all the areas we think are important as a stand-alone product that maybe the Chamber would bring into the courtroom”).

⁴⁸ See *above*, para. 7.

⁴⁹ In relation to sourcing for these annotations, for items derived from annexes to the Trial Brief this is found in the sourcing pages of the original annexes as filed in the court record. See Annex B to Defence Response, [ICC-02/05-01/20-871-Conf-AnxB](#), p. 4-5.

⁵⁰ See [Annex B to Defence Response](#), p. 2.

⁵¹ See [Annex B to Defence Response](#), p. 2.

Inquiry on Darfur is established by one of the reports that the Prosecution seeks to submit into evidence from the bar table.⁵²

28. For items not included on the LoE, or that the Defence submits should have been introduced through witnesses, the Prosecution's reply on these issues is set out above.⁵³

29. Finally, the Prosecution clarifies that it seeks the submission of the duplicates DAR-OTP-0223-0513, DAR-OTP-0223-0514 and DAR-OTP-0223-0515, which are disclosed, in the place of items DAR-OTP-0224-0576, DAR-OTP-0224-0577 and DAR-OTP-0224-0578, which are not disclosed.⁵⁴

IV. RELIEF REQUESTED

30. The Prosecution respectfully requests that the Chamber grant the Prosecution Request and recognise the relevant items as formally submitted.



Karim A. A. Khan KC
Prosecutor

Dated this 24th day of February 2023

At The Hague, The Netherlands

⁵² [Annex to Prosecution Request](#), p. 9-10; DAR-OTP-0013-0119 at 0121, 0157.

⁵³ *See above*, paras. 7, 13.

⁵⁴ *See [Annex B to Defence Response](#)*, p. 8; [Annex to Prosecution Request](#), p. 56.