

Original: **English**No.: ICC-02/05-01/20
Date: 14 December 2022**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 Confidential Annex A****Prosecution’s request to submit lists of victims from the bar table****Source:** Office of the Prosecutor

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

The Office of the Prosecutor

Mr Karim A. A. Khan KC
Ms Nazhat Shameem Khan
Mr Julian Nicholls

Counsel for the Defence

Mr Cyril Laucci
Mr Iain Edwards

Legal Representatives of the Victims

Ms Natalie von Wistinghausen
Mr Anand Shah

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Section

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Mr Philipp Ambach

Other

I. INTRODUCTION

1. The Prosecution requests Trial Chamber I (“Chamber”) to submit into evidence lists of persons killed or detained during the charged incidents in Kodoom and Bindisi, Mukjar, and Deleig contained in Annex A (“Victim Lists”), other than through witnesses, in accordance with articles 64(9)(a), 69(3) and 69(4) of the Rome Statute, rule 63(2) of the Rules of Procedure and Evidence, and the Directions on the conduct of proceedings (“Directions”)¹ (“Application”).

2. The Defence agrees to the introduction of the Victim Lists into evidence,² in lieu of the relevant witnesses³ being called to testify.

3. In accordance with the Directions, Annex A to this Application includes: (i) a description of each item; (ii) a description of its relevance and *prima facie* probative value; and (iii) the Defence’s position on the introduction of the item.

4. The submission of the Victim Lists into evidence would assist the Chamber in its determination of the truth and ensure an expeditious trial. The Victim Lists are relevant to material issues at trial, of probative value, and bear sufficient indicia of reliability to be submitted into evidence.

II. CLASSIFICATION

5. Pursuant to regulation 23*bis*(1) of the Regulations of the Court, Annex A is classified as confidential since it contains descriptions of confidential material.

III. SUBMISSIONS

(i) *Applicable law*

6. According to article 69(4) of the Statute, the Chamber may rule on “the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or

¹ Directions on the conduct of proceedings, [ICC-02/05-01/20-478](#), paras. 55-56.

² The Defence agreed to the admission of the Victim Lists contained in Annex A via e-mail on 8 September 2022 at 10:33, 27 October 2022 at 11:31 and 12 December 2022 at 10:33, respectively.

³ P-0589, P-0717, P-0834, P-0884, P-0992 and P-1018.

to a fair evaluation of the testimony of a witness". Article 64(9)(a) of the Statute also gives the Chamber power to rule on the "admissibility or relevance of evidence".

7. In *Lubanga*, Trial Chamber I admitted evidence from the bar table,⁴ reasoning that, "notwithstanding the express reference [in the Statute] to oral evidence from witnesses at trial, there is a clear recognition that a variety of other means of introducing evidence may be appropriate."⁵ The Trial Chambers in the *Katanga and Ngudjolo*,⁶ *Ruto and Sang*,⁷ and *Bemba*⁸ cases followed the same approach.

8. For an item of evidence to be relevant, it "must be logically connected to one or more facts at issue, in the sense that the item must have the capacity to make a fact at issue more or less probable than it would be without the item".⁹

9. The probative value of an item of evidence will always be a fact-specific inquiry. The Chamber "may take into account innumerable factors, including the indicia of reliability, trustworthiness, accuracy or voluntariness that inhere in the item of potential evidence, as well as the circumstances in which the evidence arose."¹⁰

10. The Chamber's weighing of the probative value of an item of evidence against the potential prejudicial effect, if any, of its admission into evidence is also a fact specific inquiry, and the Chamber may consider various factors, including whether an item's admission would encroach on the Accused's rights under article 67(1) of the Statute.¹¹

⁴ *Lubanga* Bar Table Decision, [ICC-01/04-01/06-1981](#); *Lubanga* Admissibility of Documents Decision, [ICC-01/04-01/06-1399-Corr](#).

⁵ *Lubanga* Admissibility of Documents Decision, para. 22.

⁶ *Katanga & Ngudjolo* Bar Table Decision, [ICC-01/04-01/07-2635](#). See also *Katanga & Ngudjolo* Conduct of Proceedings Directions, [ICC-01/04-01/07-1665-Corr](#), para. 100.

⁷ *Ruto & Sang* Admission of Documentary Evidence Decision, [ICC-01/09-01/11-1353](#).

⁸ *Bemba* Admission of Evidence First Decision, [ICC-01/05-01/08-2012-Red](#); *Bemba* Admission of Materials Decision, [ICC-01/05-01/08-2299-Red](#).

⁹ *Bemba* Admission of Evidence First Decision, para. 14. See also *Ruto & Sang* Admission of Documentary Evidence Decision, para. 15.

¹⁰ *Bemba* Admission of Evidence First Decision, para. 15. See also *Bemba et al.* Judgment, [ICC-01/05-01/13-1989-Red](#), para. 208.

¹¹ *Bemba* Admission of Evidence First Decision, para. 16. See also *Katanga & Ngudjolo* Bar Table Decision, para. 37.

(ii) *The Victim Lists are relevant to issues at trial*

11. The Victim Lists are relevant evidence as they are all logically connected to one or more facts at issue, and have the capacity to make a fact at issue more or less probable than it would be without the evidence. The Prosecution provides specific submissions on the relevance of the Victim Lists below. The Victim Lists have *prima facie* probative value, as they support one or more charged counts, such as murder and persecution.

12. The Victim Lists relate to persons killed during the charged incidents in Kodoom and Bindisi, Mukjar, and Deleig. The Victim Lists contain sufficient indicia of reliability and authenticity to be admitted into evidence in the absence of witnesses and have been agreed to by the Defence, as explained below.

Kodoom and Bindisi

13. Item 1 of Annex A is a list of 15 persons who were killed during the charged attack on Kodoom, Bindisi and surrounding areas on or about 15 and 16 August 2003, derived from the statements of three witnesses (P-0589, P-0717 and P-0834), that the Prosecution does not intend to call. The list sets out the names of the victims, their villages of origin, biographical details and the circumstances of their deaths (if known).

14. This list is relevant to establishing the number and identities of the persons killed during the Kodoom and Bindisi incident, and is therefore relevant, in particular, to Count 2 (Murder as a crime against humanity) and Count 11 (Persecution as a crime against humanity) of the confirmed charges.

15. Item 1 of Annex A is probative because it bears sufficient indicia of authenticity and reliability, as it is sourced from witnesses who were present during the charged events. The Defence has reviewed the statements of the witnesses and has agreed to the Victim Lists, including the circumstances of death, where known, being introduced

into evidence in lieu of these witnesses being called to testify.¹² Three of the 15 victims named on the list are corroborated by other witness evidence.¹³

Mukjar

16. Item 2 of Annex A is a list of seven persons detained at Mukjar police station and driven away in March 2004, derived from the statements of two witnesses (P-0884 and P-0992), that the Prosecution does not intend to call. The list sets out the names of the victims, and (if known) their villages of origin, biographical details including ethnicity (if known), and their circumstances of detention.

17. This list is relevant to establishing the identities, gender and ethnicity of persons detained and later killed during the events underlying the charges relating to Mukjar. It is therefore relevant, in particular, to Counts 17-18 (Murder as a crime against humanity and as a war crime) and 21 (Persecution as a crime against humanity) of the confirmed charges.

18. Item 2 of Annex A is probative because it bears sufficient indicia of authenticity and reliability, as it is sourced from witnesses who were present during the charged events. The Defence has reviewed the statements of the witnesses and has agreed to the Victim Lists being introduced into evidence in lieu of these witnesses being called to testify.¹⁴ Two of the seven victims named on the list are corroborated by other witness evidence.¹⁵

Deleig

19. Items 3 to 10 of Annex A are four pages (with respective translations) of a single list of 116 names and villages of origin of persons killed during the charged incident

¹² See Email of 27 October 2022 at 11:31.

¹³ Victim # 6, P-0816, [DAR-OTP-0214-0721-R02](#) at 0729-0730, para. 38 ; Victim # 10, P-0816, [DAR-OTP-0214-0721-R02](#) at 0729-0730, para. 38; P-0007, Annex, [DAR-OTP-0088-0077](#) (Translation at [DAR-OTP-0119-0475](#) at 0478); Victim # 11, P-0913, [DAR-OTP-0218-0021-R03](#) at 0029, para. 53.

¹⁴ See Email of 12 December 2022 at 10:33.

¹⁵ Victim #2, P-0041, Annex 4, [DAR-OTP-0206-0060](#) (Translation at [DAR-OTP-0221-0935](#) at 0966); Victim #7, P-0028, Annex B, [DAR-OTP-0094-0446](#) (Translation at [DAR-OTP-0153-1434](#) at 1445); P-0041, Annex 4, [DAR-OTP-0206-0060](#) (Translation at [DAR-OTP-0221-0935](#) at 0942, 0962).

in Deleig between about 5 and about 7 March 2004. The list was provided to the Prosecution on 7 December 2021 by P-1018 and his signature appears on each page.

20. The introduction of this list of victims was agreed to by the Defence in lieu of the Prosecution calling P-1018 to testify.¹⁶ This list is relevant to establishing the number, identities, gender and ethnicity of the persons killed during the Deleig incident, and is therefore relevant, in particular, to Counts 27-28 (Murder as a crime against humanity and as a war crime) and Count 31 (Persecution as a crime against humanity) of the confirmed charges.¹⁷ Approximately 27 names on the list are corroborated by witness evidence,¹⁸ and 79 names are corroborated by lists of persons killed during the Deleig incident published by other organisations.¹⁹

(iii) *The probative value of the submitted items outweighs any prejudicial effect*

21. The Prosecution submits that the probative value of the Victim Lists outweighs any prejudicial effect they may have because:

- a) the Victim Lists do not include any evidence linking the crimes to the Accused;
- b) the Victim Lists are relevant and probative to the charges of murder and persecution and will therefore assist the Chamber in the determination of the truth;²⁰
- c) the Victim Lists are generally corroborated by evidence on the record that persons were killed during the charged events;

¹⁶ See Email of 8 September 2022 at 10:33; [ICC-02/05-01/20-T-078-CONF ET](#), p. 80, l. 4-21 (“Mr Laucci: [...] The documents that have been submitted are only lists of identified victims, and this is not something that we intend to challenge”, p. 80, l. 9-10).

¹⁷ Although the list refers to the dates of 5 to 7 April 2004, it clearly relates to the charged in Deleig and this is not disputed by the Defence.

¹⁸ This estimate is based on witness evidence introduced in the trial to date and expected to be adduced before the end of the trial, and evidence the Chamber has authorised to be introduced by way of 68(2)(b) of the Rules.

¹⁹ See Annex 23 to the Trial Brief, [ICC-02/05-01/20-550-Conf-Anx23-Corr](#).

²⁰ See Counts 2, 11, 17-18, 21, 27-28 and 31.

- d) the Victim Lists, having been sourced from witnesses, possess indicia of reliability to warrant their admission and to enable the Chamber to fairly evaluate them; and
- e) The Defence has agreed to the submission into evidence of the Victim Lists.

IV. RELIEF REQUESTED

22. The Prosecution requests that the Chamber recognise the Victim Lists in Annex A as formally submitted.



Karim A. A. Khan KC
Prosecutor

Dated this 14th day of December 2022

At The Hague, The Netherlands