



Original: **English**

No.: **ICC-02/05-01/20**

Date: **6 March 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

Application for leave to present a motion for acquittal

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

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

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**Victims Participation and Reparations
Section**

1. In compliance with the directions of the Honourable Trial Chamber (“the Chamber”),¹ the Defence for Mr Ali Muhammad Ali Abd-Al-Rahman (“the Defence”, “Mr Abd-Al-Rahman”) applies for leave to present a motion for acquittal. This application complies with the five-day time limit. The Defence has endeavoured to meet the expectation of the Chamber in terms of a page limit.² The evidence on which the Defence will rely will be identified in the substantive motion for acquittal, should the Chamber grant leave.

2. It is submitted that the test at this initial application for leave stage should be low. The Defence respectfully suggests that all it need show is that it is reasonably arguable that Mr Abd-Al-Rahman should not be obliged to mount a defence against the counts enumerated below, even taking the Prosecution’s case that Mr Abd-Al-Rahman and “*Ali Kushayb*” are the same person at its highest.

A. All counts: The Foreseeability Test and Accessibility Test set out by the Appeals Chamber for the exercise of the Court’s jurisdiction have not been met by the evidence

3. In its Judgment OA8, the Honourable Appeals Chamber defined two cumulative tests (“the Foreseeability Test and the Accessibility Test”) that must be met for the Court to exercise its jurisdiction: “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” (emphasis added)³. The Appeals Chamber provisionally set out the criteria based on which it found that the Foreseeability and Accessibility Tests were

¹ Second Directions on the conduct of proceedings, [ICC-02/05-01/20-836](#), 15 December 2022, para. 11, as augmented by Addendum to Directions on the Conduct of Proceedings Motion for Acquittal, [ICC-02/05-01/20-855](#), 24 January 2023, paras 5-6.

² Email sent on behalf of Trial Chamber I, 28 February 2023, “...the application for leave should not contain any argument, but set out the charges and general nature of basis for requesting leave. In light of this, the Trial Chamber expects no more than two pages for such an application.”

³ Judgment OA8 [ICC-02/05-01/20-503 OA8](#), para. 85.

met in the case,⁴ prior to concluding 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*” (emphasis added)⁵.

4. The trial has now reached the stage at which the question of the legality of the charges can be definitely answered. The Defence submit that the Appeals Chamber’s criteria have not been established:

- a. there is evidence that non-commissioned officers received no training in International Humanitarian Law, and there is no evidence of the content of such training if some training was received;
- b. there is evidence that Mr Abd-Al-Rahman had civilian status throughout the relevant period of the charges, and there is no evidence that he had any kind of military status during that period;
- c. the evidence demonstrates that the domestic law of Sudan applicable at the relevant time provided that all conduct described in the charges were not, in the circumstances, criminalised, but were indeed mandatory, upon pain of criminal sanctions, once the Government of Sudan had ordered them to be carried out.
- d. there is no evidence that International Customary Law referred to by the Appeals Chamber was applicable in Sudan at the time; on the contrary, there is evidence to demonstrate that it was not.

5. Consequently, the foreseeability and accessibility tests set out by the Honourable Appeals Chamber for the Court to exercise its jurisdiction over Mr Abd-Al-Rahman are not met. Accordingly, he should be acquitted of all counts.

B. Counts 6-7: No evidence of Mr Abd-Al-Rahman’s individual responsibility for other inhumane acts or outrages upon personal dignity in Bindisi and surrounding areas

6. The Prosecution has not adduced any evidence that Mr Abd-Al-Rahman bears individual responsibility for other inhumane acts as a crime against humanity

⁴ Judgment OA8 [ICC-02/05-01/20-503 OA8](#), para. 86-90.

⁵ Judgment OA8 [ICC-02/05-01/20-503 OA8](#), para. 91.

(count 6), or outrages upon personal dignity as a war crime (count 7), in Bindisi and surrounding areas between 15 and 16 August 2003, under either “inducing” or “ordering” modes of liability under Article 25(3)(b) of the Rome Statute. These two counts necessarily cover alleged acts other than those specifically charged in counts 1-5 and 8-11. The Prosecution puts its case in respect of counts 6 and 7 in paragraphs 279-286 of its Trial Brief.⁶ The witness cited in paragraph 285 was not called. The evidence adduced does not support the allegation that Mr Abd-Al-Rahman knew about these alleged acts, much less induced or ordered that they be committed.

C. Counts 8-9: No evidence of Mr Abd-Al-Rahman’s individual responsibility for rape in Bindisi and surrounding areas

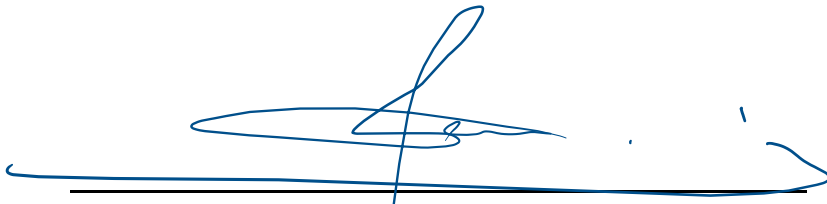
7. Similarly, the Prosecution has not adduced any evidence that Mr Abd-Al-Rahman bears individual responsibility for rape as a crime against humanity (count 8), or rape as a war crime (count 9), concerning 13 Fur women and girls in Bindisi and surrounding areas between 15 and 16 August 2003, under either “inducing” or “ordering” modes of liability under Article 25(3)(b) of the Rome Statute. Although it is conceded that there were instances of rape in Bindisi and surrounding areas, the Prosecution has adduced no evidence that Mr Abd-Al-Rahman knew about the rapes of these 13 Fur women and girls, much less induced or ordered that they be committed. Quite the opposite, there is evidence that a person called “*Ali Kushayb*” sent out a very clear message that a number of women and girls at risk of rape were not to be touched”.

CONCLUSION

8. The Defence respectfully requests that leave to present a motion for acquittal be granted.

⁶ Confidential Redacted Version of Corrected Version of “Prosecution’s Trial Brief”, 5 January 2022, ICC-02/05-01/20-550-Conf-Exp-Corr; Public Redacted Version of Corrected Version of “Prosecution’s Trial Brief”, 5 January 2022, [ICC-02/05-01/20-550-Corr-Red2](#), 4 February 2022.

Respectfully submitted,



Dr Cyril Laucci,
Lead Counsel for Mr Ali Muhammad Ali Abd-Al-Rahman

Dated this 6th day of March 2023 at The Hague, The Netherlands