

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **8 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

Observations on behalf of victims on the Defence “Application for leave to present a motion for acquittal”

Source: The Common Legal Representative of Victims

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

The Office of the Prosecutor

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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
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States' Representatives

Amicus Curiae

REGISTRY

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Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
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Other

I. Introduction

1. The Common Legal Representative of Victims (“CLR V”), on behalf of the 376 individuals presently admitted to participate as victims in the proceedings, and pursuant to Regulation 24(2) of the Regulations of the Court, files these observations on the Defence for Mr Abd-Al-Rahman’s “Application for leave to present a motion for acquittal”.¹ In particular, the CLR V addresses the following:
 - a. The applicable standard for grant of an application for leave to present a motion for acquittal (Application, paragraph 2);
 - b. Whether the proposed jurisdictional challenge under section A amounts to a motion for acquittal (Application, paragraphs 3 to 5); and
 - c. The Defence’s submission under Section B (*counts 6 and 7 of the confirmed charges – other inhumane acts or outrages upon personal dignity in Bindisi and surrounding areas*) that the relevant alleged acts are not covered under other charges (Application, paragraph 6).

II. Observations

a. Applicable standard for grant of leave to file a motion for acquittal

2. The Defence submits “that the test at this initial application for leave stage should be low” and proposes a “reasonably arguable” standard.² The CLR V observes that the Trial Chamber’s establishment of a leave process for motions for acquittal suggests that the test should be on the higher end of the scale, commensurate with other motions requiring leave under the Court’s legal framework.³

b. Jurisdictional challenge to all counts (Application, Section A)

¹ Application for leave to present a motion for acquittal, 6 March 2023, [ICC-02/05-01/20-891](#) (“Application”).

² *Id.*, para. 2.

³ Rome Statute (“Statute”), arts 19(4), 82(1)(d). Trial Chamber VI, in the *Ntaganda* case, determined that leave to file a motion for acquittal (or ‘no case to answer’ motion) “ought to be entertained only if it appears sufficiently likely to the Chamber that doing so would further the fair and expeditious conduct of the proceedings”, and distinguished the case before that Trial Chamber from the situation in *Ruto and Sang*, wherein at the time of the filing of ‘no case’ motions the parties and participants were fully cognizant of the fact that “the presentation of evidence by the Prosecution had been severely affected by the special circumstances of that case” (*Prosecutor v. Ntaganda*, Decision on Defence request for leave to file a ‘no case to answer’ motion, 1 June 2017, [ICC-01/04-02/06-1931](#), paras 26, 28).

3. Section A of the Application seeks leave to file a motion for acquittal on all charged counts, founded on the jurisdictional ‘foreseeability’ and ‘accessibility’ tests identified by the Appeals Chamber in its judgment on an earlier Defence appeal concerning, *inter alia*, the interpretation and application of the *nullum crimen sine lege* principle under Article 22(1) of the Statute (in light of Article 21(3)).⁴ The CLRV observes that a jurisdictional challenge does not properly fall within the scope and purpose of a motion for acquittal, which should normally result in a judgment of acquittal on one or more counts, or a dismissal of the motion and continuation of the trial on one or more counts.⁵ Instead, the ultimate relief sought by the Defence is not an acquittal of the accused after assessing the Prosecution’s evidence taken at its highest, but a dismissal of the case on the basis that the Court lacks jurisdiction to try the accused pursuant to Article 22(1) of the Statute. The CLRV accordingly observes that Section A of the Application appears incompatible with a motion for acquittal and should be dismissed on this basis.

c. Counts 6 and 7 – qualification of alleged acts (Application, Section B)

4. In section B of the Application, the Defence submits that counts 6 and 7 of the confirmed charges “necessarily cover alleged acts other than those specifically charged in counts 1-5 and 8-11”.⁶ In this respect, the CLRV observes, as set out in the Prosecution’s Trial Brief, that the acts alleged under counts 6 and 7 are also relevant to counts 1 (war crime of intentionally directing attacks against the civilian population) and 11 (persecution as a crime against humanity).⁷

III. Conclusion

5. The CLRV respectfully requests the Trial Chamber to take into consideration the above observations when deliberating on the Defence’s Application for leave.

⁴ Application, paras 3-5, referring to Judgment on the appeal of Mr Abd-Al-Rahman against the Pre-Trial Chamber II’s “Decision on the Defence ‘Exception d’incompétence’ (ICC-02/05-01/20-302)”, 1 November 2021, [ICC-02/05-01/20-503](#), paras 85-95).

⁵ In *Ruto and Sang*, the Trial Chamber (by majority) vacated the charges, and discharged the accused, without prejudice to a possible new prosecution, instead of issuing final acquittals (Decision on Defence Applications for Judgments of Acquittal, 5 April 2016, [ICC-01/09-01/11-2027-Red-Corr](#), p. 1).

⁶ Application, para. 6.

⁷ Public Redacted Version of Corrected Version of “Prosecution’s Trial Brief”, 5 January 2022, ICC-02/05-01/20-550-Conf-Exp-Corr, 4 February 2022, [ICC-02/05-01/20-550-Red-Corr-Red](#), paras 233, 312.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'N. Wistinghausen', with a long horizontal flourish extending to the right.

Natalie v. Wistinghausen
Common Legal Representative of Victims

Dated this 8th of March 2023

At Berlin, Germany