

Original: **English**No.: **ICC-02/05-01/20**Date: **31 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  
With Public Annex**

**Public Redacted Version of “Prosecution’s response to ‘Skeleton Argument in Defence Motion for Acquittal’”, 24 March 2023, ICC-02/05-01/20-910-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 respectfully requests the Chamber to reject the Defence's application for a motion for acquittal<sup>1</sup> since there is sufficient evidence in law to sustain Mr Abd-Al-Rahman's individual criminal responsibility under article 25(3)(b) of the Rome Statute in respect of the crimes in Counts 6 to 9 ("Challenged Counts").<sup>2</sup> The counts relating to sexual and gender based crimes ("SGBC") are not subject to a higher standard of proof than the unchallenged counts<sup>3</sup> ("Unchallenged Counts") relating to the attack on Kodoom, Bindisi and surrounding areas<sup>4</sup> on or about 15 and 16 August 2003.<sup>5</sup> Rather, a nuanced approach to SGBC evidence is required.<sup>6</sup> The trial should proceed on all counts.

## II. SUBMISSIONS

### The applicable test in a motion for acquittal procedure

2. The test at this stage is as follows: "the trial chamber shall acquit the defendant or, as the case may be, dismiss one or more of the charges, where the evidence thus far presented is insufficient in law to sustain a conviction on one or more of the charges."<sup>7</sup> While the applicable standard of proof is "beyond reasonable doubt", its application is qualified in several ways at this stage. The focus of the analysis is on whether a Trial Chamber "could convict" and not whether it "would convict".<sup>8</sup> The Prosecution's case should be "taken at its highest", with its evidence considered in its "best light" (without focusing on strengths and weaknesses in isolation).<sup>9</sup> While the Trial Chamber may sensibly weigh credibility and reliability of the evidence presented, it must "exercise great care and circumspection in [...] pronouncements regarding findings on credibility and reliability" in the event the trial continues.<sup>10</sup> A motion for acquittal should be rejected so long as there is sufficient evidence to sustain one incident within the relevant count,<sup>11</sup> and one mode of criminal responsibility.<sup>12</sup>

<sup>1</sup> [Skeleton Argument in Defence Motion for Acquittal](#) ("Motion"). Pursuant to regulation 23bis(2) of the Regulations of the Court, this response is filed confidentially since it responds to a confidential document.

<sup>2</sup> [Decision on leave to file a motion for acquittal](#), para. 11. See [Confirmation Decision](#), p. 55-58 (paras. 40-47, 53-57); [PTB](#), paras. 279-301, 313-335; [Addendum to PTB](#).

<sup>3</sup> See [Motion](#), para. 16 where the Defence concede that "taking the Prosecution's case at its very highest, [the Accused's] words amount to ordering or inducing the crimes charged in counts 1-5 and 10-11."

<sup>4</sup> The Challenged Counts were committed either in Bindisi or the roads and fields surrounding Bindisi: see P-0007, [DAR-OTP-00000312](#); P-0011, [DAR-OTP-00000360](#); P-0015, [DAR-OTP-0088-0211](#) and [DAR-OTP-0088-0217](#); P-1073 [REDACTED] ([T-103-CT](#), 12:12-14, 15:9-14); P-1074 [REDACTED] (P-1074, [DAR-OTP-0224-0441](#) at 0447, paras. 32-33).

<sup>5</sup> [Confirmation Decision](#), p. 54-55, 57 (paras. 31-39, 48-52); [PTB](#), paras. 229-278, 302-312.

<sup>6</sup> [Ongwen AJ](#), para. 1088 (fn. 2404).

<sup>7</sup> [Gbagbo & Blé Goudé NCTA AJ](#), para. 301.

<sup>8</sup> [Gbagbo & Blé Goudé NCTA AJ](#), paras. 304, 309.

<sup>9</sup> [Gbagbo & Blé Goudé NCTA AJ](#), para. 317; [Ruto & Sang Judgments of Acquittal Decision](#), paras. 48-53 (Judge Eboe-Osuij Reasons), and [Judge Carbuccia Opinion](#), para. 18.

<sup>10</sup> [Gbagbo & Blé Goudé NCTA AJ](#), paras. 312, 316-317.

<sup>11</sup> [Ruto & Sang NCTA Procedure Decision](#), para. 27; [Nchamihigo Decision on MFA](#), para. 16; [Nizeyimana Decision on MFA](#), para. 7; [Hadžić Oral Decision on MFA](#), p. 9107, l. 17-p. 9108, l. 7.

<sup>12</sup> See [Ongwen NCTA Decision](#), para. 11; [Ruto & Sang NCTA Procedure Decision](#), paras. 28, 30, 32.

**There is sufficient evidence to establish the Accused’s individual criminal responsibility in respect of Counts 6 to 9**

***The Accused ordered or induced the commission of the crimes in the Challenged Counts***

3. The Accused was a senior Militia/*Janjaweed* leader in the Wadi Salih and Mukjar localities between at least August 2003 and at least April 2004,<sup>13</sup> and the commander of the attack on Kodoom, Bindisi and surrounding areas on or about 15 and 16 August 2003,<sup>14</sup> tasked by Ahmad HARUN with responsibility for “[d]estroying Bindisi Locality”.<sup>15</sup>

4. As the senior Militia/*Janjaweed* leader during the attack, using his position of authority and through his words and conduct, he ordered<sup>16</sup> or induced<sup>17</sup> the GoS Forces<sup>18</sup> and/or the Militia/*Janjaweed* to commit acts in the execution of which the Challenged Counts were carried out. He led and directed<sup>19</sup> the attack, issuing orders and instructions that were complied with.<sup>20</sup> He coordinated operations with GoS Forces,<sup>21</sup> continued the attack despite objections<sup>22</sup> and further brought about the commission of the crimes through his own violent conduct, conspicuous presence, approval and failure to prevent or punish crimes.<sup>23</sup>

5. In particular, the Accused ordered his men to “cut the straw and eat it raw”<sup>24</sup> (meaning “[d]on’t leave anyone behind, and bring no one alive”)<sup>25</sup> and used words like “*aksah amsah*”, ordering his forces to “wipe out, sweep away”<sup>26</sup> (meaning “clean everything [...] wipe out, burn

<sup>13</sup> P-0643, [T-56-CT](#), 24:8-26:2; P-1021, [T-80-CT](#), 31:15-32:14, 34:16-35:9, 36:10-39:2, 41:2-42:8, and [T-81-CT](#), 3:21-4:2; P-0874, [T-82-CT](#), 10:15-11:1, 16:24-17:8; P-0878, [T-78-CT](#), 25:15-26:21; P-0921, [T-111-CT](#), 38:23-39:7; P-0883, [T-71-CT](#), 14:8-17:23; 36:11-16; 38:3-39:3-20; 44:4-11; P-0012, [DAR-OTP-0119-0503](#) at 0511-0512, paras. 33, 36-38. The Accused was tasked with implementing the GoS plan to end the conflict in Darfur, and he was imbued with the authority to use any means necessary, including rape. See P-0547, [T-52-CT](#), 81:1-12.

<sup>14</sup> See e.g. P-0769, [T-97-CT](#), 27:12-29:9, and [T-98-CT](#), 39:24-41:25; P-0878, [T-78-CT](#), 25:15-26:21, 33:12-19; P-0874, [T-82-CT](#), 19:11-23, 40:15-18.

<sup>15</sup> P-0131, [T-112-CT](#), 29:16-33:21; [DAR-OTP-0134-0118](#) (English: [DAR-OTP-00000117](#)), and [DAR-OTP-0134-0116](#) (English: [DAR-OTP-00000116](#)).

<sup>16</sup> For ordering, it is only necessary to prove that the accused instructed a person in any form to perform an act or omission in the execution of which a crime is carried out. It is not essential to prove that the accused instructed anyone to commit the relevant crimes. See [Ntaganda CD](#), para. 145; [Mudacumura Article 58 Decision](#), para. 63.

<sup>17</sup> For inducement, it is only necessary to prove that the accused induced another person to perform an act or omission in the execution of which a crime is carried out. It is not essential to prove that the accused induced another person to commit a crime. See [Ntaganda CD](#), para. 153.

<sup>18</sup> 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.

<sup>19</sup> P-0878, [T-78-CT](#), 30:22-31:18, 36:16-18, 42:11-21, 45:13-19, 57:15-22; P-0921, [T-110-CT](#), 37:23-38:23; P-1021, [T-80-CT](#), 49:18-24, and [T-81-CT](#), 7:10-16.

<sup>20</sup> P-0878, [T-78-CT](#), 31:12-18, 41:4-18, 42:11-21, 57:15-22, 60:14-63:23; P-0921, [T-110-CT](#), 37:23-38:23, 41:4-42:5, 45:20-47:1, 52:1-25, and [T-111-CT](#), 49:13-17, 62:4-12, 68:23-25, 73:3-24; P-1021, [T-80-CT](#), 47:6-11, 49:3-8, and [T-81-CT](#), 6:8-20, 7:3-16, 10:11-22, 79:4-80:7, 86:7-20, 87:24-88:5.

<sup>21</sup> P-1021, [T-80-CT](#), 48:18-22; P-0878, [T-78-CT](#), 25:6-12, 30:15-31:4, 34:6-12, 41:25-46:18, 58:24-59:15; P-0921, [T-110-CT](#), 29:4-11, 31:11-22, 45:20-47:1, 52:1-53:24.

<sup>22</sup> [REDACTED]; P-1021, [T-80-CT](#), 47:6-11, 49:3-8; P-0878, [T-78-CT](#), 41:4-18, 60:14-63:2.

<sup>23</sup> P-0878, [T-78-CT](#), 26:10-21, 33:12-19, 48:3-24; P-0921, [T-110-CT](#), 35:23-36:16, 36:25-37:3, 39:2-21, 41:4-13; P-1021, [T-80-CT](#), 48:24-49:8, 50:6-7, and [T-81-CT](#), 5:23-6:14, 11:4-13, 12:17-21, 20:12-19; P-0986, [DAR-OTP-0222-0437](#) at 0447, paras. 47-50; P-0986, [T-65-CT](#), 10:9-18, 11:9-12, 47:1-3, 48:17-19.

<sup>24</sup> P-0921, [T-110-CT](#), 36:9-10, 38:21-23, 39:20-21.

<sup>25</sup> P-0921, [T-110-CT](#), 36:21-24, 61:23-62:3.

<sup>26</sup> P-0878, [T-78-CT](#), 21:8-10, 26:19-21, 34:6-18, 35:12-16, and [T-79-ET](#), 7:25-8:12, 49:1-5.

out and do not leave any trace behind”).<sup>27</sup> He issued orders to kill, shoot and beat,<sup>28</sup> burn and finish villages<sup>29</sup> and was “doing the killing himself”.<sup>30</sup> The Accused also influenced his men to commit violent crimes through his use of persecutory language, stating that “all the Fur would die”<sup>31</sup> and referring to Fur civilians as slaves.<sup>32</sup>

***The Accused’s words and conduct had a direct effect on the commission of the crimes in the Challenged Counts***

6. The Accused created a coercive environment that facilitated the commission of the crimes in the Challenged Counts in Kodoom, Bindisi and surrounding areas. The Militia/*Janjaweed* under his command understood his words and conduct to permit the commission of not only the crimes in the Unchallenged Counts, but equally in the Challenged Counts.<sup>33</sup> For example, following his order to “cut the straw and eat it raw”, the Militia/*Janjaweed* in Kodoom started “the shooting, the killing, the burning, and the raping.”<sup>34</sup>

7. The crimes in the Challenged Counts were thus an integral part of the attack on Kodoom, Bindisi and surrounding areas. Most of the crimes in the Challenged Counts happened in open areas, within view of others.<sup>35</sup> Civilians were openly stripped,<sup>36</sup> restrained,<sup>37</sup> searched and robbed,<sup>38</sup> and beaten and whipped,<sup>39</sup> especially women before they were raped and gang raped under humiliating circumstances.<sup>40</sup> The perpetrators thus made no effort to conceal the widespread commission of these specific crimes as opposed to others. This is reflective of the climate conducive to the commission of the crimes in the Challenged Counts, created by the Accused. The Challenged Counts should not be artificially distinguished from, or subjected to

<sup>27</sup> P-0878, [T-78-CT](#), 35:1-6. See also P-0905, [T-85-CT](#), 53:14-18, 77:9-12, and [T-87-CT](#), 65:14-66:3.

<sup>28</sup> P-0921, [T-110-CT](#), 41:4-13, 41:25-42:5, and [T-111-CT](#), 65:3-6; P-1021, [T-81-CT](#), 12:15-21; P-0986, [DAR-OTP-0222-0437](#) at 0448, paras. 53, 55, and [T-65-CT](#), 48:20-49:6.

<sup>29</sup> P-0921, [T-111-CT](#), 65:3-6; P-1021, [T-80-CT](#), 48:22-49:2.

<sup>30</sup> P-0921, [T-110-CT](#), 41:4-10.

<sup>31</sup> P-0986, [DAR-OTP-0222-0437](#) at 0448, para. 55.

<sup>32</sup> P-0986, [T-65-CT](#), 10:13-24, 47:18-25, and [DAR-OTP-0222-0437](#) at 0447, paras. 49-50.

<sup>33</sup> The commission of the Challenged and Unchallenged Counts often overlapped. See e.g. P-0007, [T-89-ET](#), 9:14-15, and [DAR-OTP-0088-0060](#) at 0071, para. 43; P-0011, [T-91-CT](#), 23:11-19, 27:6-30:7.

<sup>34</sup> P-0921, [T-110-CT](#), 38:21-39:21. See also P-0878, [T-78-CT](#), 23:7-9.

<sup>35</sup> P-0011, [T-91-CT](#), 23:24-24:2, and [DAR-OTP-00000367](#) at 000001, 000003; P-0015, [DAR-OTP-0088-0187](#) at 0196, para. 44, and [DAR-OTP-00000427](#) at 000002-000003, paras 16, 18, and [T-93-ET](#), 45:25-46:10, 56:4-7. See also P-0007, [T-89-ET](#), 7:16-25, 8:13-9:18.

<sup>36</sup> P-0007, [T-89-ET](#), 7:16-25, 8:13-15; P-0011, [T-91-CT](#), 24:15-25; P-0015, [DAR-OTP-0088-0187](#) at 0195-0196, paras. 38-39, 41-42.

<sup>37</sup> P-1073, [T-103-CT](#), 14:5-7, 14:18-23; P-0011, [T-91-CT](#), 23:14-19, 27:6-10, 28:4-30:7; P-0015, [DAR-OTP-0088-0187](#) at 0195, para. 38.

<sup>38</sup> P-0015, [DAR-OTP-0088-0187](#) at 0195-0196, paras. 39, 41.

<sup>39</sup> P-0007, [T-89-ET](#), 8:13-17; P-0011, [T-91-CT](#), 23:14-16, 24:3-12, and [DAR-OTP-00000366](#), and [DAR-OTP-00000367](#) at 000002; P-0015, [DAR-OTP-0088-0187](#) at 0195-0196, paras. 38-40, and [T-93-ET](#), 46:7-10, and [DAR-OTP-00000427](#); P-1073, [T-103-CT](#), 14:10-13; P-1074, [DAR-OTP-00000508](#), and [DAR-OTP-00000504](#).

<sup>40</sup> P-0011, [DAR-OTP-00000366](#), and [T-91-CT](#), 23:1-26:22, 28:4-22, and [DAR-OTP-00000367](#); P-0015, [DAR-OTP-0088-0187](#) at 0195-0196, paras. 38, 41-43, 45, and [DAR-OTP-00000427](#), and [T-93-ET](#), 44:4-46:10, 55:25-56:7; P-1073, [DAR-OTP-00000500](#), and [T-103-CT](#), 15:21-23, 21:19-22; P-1074, [DAR-OTP-00000508](#), and [DAR-OTP-00000504](#), and [T-103-CT](#), 45:1-25; P-0007, [DAR-OTP-0088-0060](#) at 0071, paras. 43-44; [T-89-ET](#), 8:13-12:2, 37:15-17; P-0085, [DAR-OTP-0110-0054](#) at 0062, para. 31.

a higher standard of proof than the Unchallenged Counts, simply because they involve sexual, rather than other forms of physical violence.<sup>41</sup>

8. The crimes in the Challenged Counts were committed by Militia/*Janjaweed* and/or GoS Forces under the command and influence of the Accused,<sup>42</sup> with some of the *Janjaweed* boasting they were “the men of Ali Kushayb” while raping and torturing women.<sup>43</sup> *Janjaweed* attackers made statements indicating their actions were supported by and/or reflected the Accused’s orders,<sup>44</sup> openly declaring “we will kill you all and we will rape you all”<sup>45</sup> and that they wanted to wipe out the victims.<sup>46</sup> In the course of these attacks the attackers also repeated the derogatory and persecutory language<sup>47</sup> used by the Accused.<sup>48</sup>

***The Accused acted intentionally and was aware that the crimes in the Challenged Counts would occur in the ordinary course of events***

9. The Accused meant to order or induce the commission of the crimes in the Challenged Counts and was aware that these crimes would be committed in the ordinary course of events, as a consequence of the execution or implementation of his orders or as a consequence of the realisation of his acts and omissions.

10. The Accused’s intent and/or awareness can be inferred from his leadership role and his overall conduct during the attack, including his orders and instructions.<sup>49</sup> The Accused’s awareness that the Militia/*Janjaweed* would, in the ordinary course of events commit the crimes in the Challenged Counts, is further demonstrated by the fact that rape, other forms of sexual violence and mistreatment of civilians were consistent features of prior GoS counterinsurgency campaigns<sup>50</sup> and also of the entire widespread and systematic attack on the civilian population in Wadi Salih and Mukjar Localities between August 2003 and at least April 2004.<sup>51</sup>

11. In addition, about a week before the attack, Ahmad HARUN, in the presence of the Accused, publicly threatened civilians that “you will be killed, you will be raped.”<sup>52</sup> Rape and

<sup>41</sup> [Gbagbo & Blé Goudé NCTA AJ Judge Ibáñez Dissenting Opinion](#), paras. 395-404 (395: finding the Trial Chamber’s approach “worrisome” for applying a higher threshold for crimes of rape, and 404: finding error for concluding the motivations for sexual violence was different from other crimes). See also [PTB](#), para. 334, fn. 1107.

<sup>42</sup> P-0007, [T-89-ET](#), 38:6-13; P-0011, [T-91-CT](#), 23:11-25:7; P-0015, [T-93-ET](#), 41:12-15, 44:14-16; P-1073, [T-103-CT](#), 13:19-21; P-1074, [DAR-OTP-0224-0441](#), para. 34.

<sup>43</sup> P-0015, [T-93-ET](#), 68:4-6.

<sup>44</sup> P-0011, [T-91-CT](#), 25:6-7; P-0015, [DAR-OTP-0088-0187](#) at 0196, para. 43.

<sup>45</sup> P-0007, [T-89-ET](#), 9:9-10.

<sup>46</sup> P-0015, [DAR-OTP-0088-0187](#) at 0197, para. 47, and [T-93-ET](#), 41:12-15.

<sup>47</sup> P-0015, [DAR-OTP-0088-0187](#) at 0197, para. 47; P-0011, [T-91-CT](#), 23:19-25:6.

<sup>48</sup> P-0986, [T-65-CT](#), 10:13-24, and [DAR-OTP-0222-0437](#) at 0447, para. 49.

<sup>49</sup> See above paras. 4-5.

<sup>50</sup> P-1042 (Joint Expert), [DAR-OTP-0220-1623](#), paras. 80, 151 and [T-27-ET](#), 53:9-19, and [T-28-ET](#), 16:11-18:11.

<sup>51</sup> See e.g. P-0726, [T-53-CT2](#), 15:1-24, 26:10-31:19, and [DAR-OTP-0210-0346](#) at 0355-0357, paras. 34-35, 38-39 (Forgo); P-0903, [T-32-CT](#), 71:20-72:23, 80:4-7 (Tendy); P-0905, [T-85-CT](#), 57:5-6, and [T-088-ET](#), 10:14-11:9 (Sindu), 27:8-16 (Arawala); P-0651, [T-34-CT2](#), 41:10-21 (Deleig). See also [Ongwen AJ](#), paras. 946-948.

<sup>52</sup> P-0878, [T-78-CT](#), 14:2-12. See also P-0877, [T-54-CT](#), 3:8-14, 8:14-20.

mistreatment of civilians also occurred in the villages attacked immediately prior to Bindisi,<sup>53</sup> with Militia/*Janjaweed* chasing women in Nyerli, Kodoom and Tiro “like a wild animal chasing its prey”.<sup>54</sup> The repeated occurrence of these violent acts in Bindisi and surrounding areas was therefore a foreseeable consequence of the Accused’s acts and conduct, including his dehumanising and derogatory language and his own involvement in the torture of a witness.<sup>55</sup>

12. Following the events on the first day of the attack, which were characterised by extreme violence,<sup>56</sup> the Accused congratulated his men, saying: “[y]ou’ve taught the enemy a lesson [...]. The Fur will never forget this lesson.”<sup>57</sup> The crimes in the Challenged Counts were also committed in the open<sup>58</sup> and during the attack, Militia/*Janjaweed* in close proximity to the Accused openly discussed women they had “aggressed and raped.”<sup>59</sup> Moreover, when confronted about crimes committed during the attack, the Accused overrode objections<sup>60</sup> and otherwise did not engage in efforts to prevent these crimes from happening or punish their perpetrators, even though he had the authority to do so.<sup>61</sup>

13. In the specific context of this attack, when the Accused instructed his men to “wipe out and sweep away” or to “cut the straw and eat it raw”, he was aware that in the ordinary course of events, the crimes in the Challenged Counts would be committed.<sup>62</sup>

### III. RELIEF REQUESTED

14. The Prosecution respectfully requests the Chamber to reject the Motion.




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**Karim A. A. Khan KC**  
**Prosecutor**

Dated this 31<sup>st</sup> day of March 2023

At The Hague, The Netherlands

<sup>53</sup> See e.g. P-0921, [T-110-CT](#), 39:3-4; P-0867, [DAR-OTP-0217-0173](#) at 0183, paras. 51-52; P-0932, [DAR-OTP-0222-0602](#) at 0611-0612, paras. 49-50, and [T-68-ET](#), 30:13-23; P-0927, [DAR-OTP-0221-0523](#) at 0530, paras. 31-32, and [Rule 68\(2\)\(b\) annex](#).

<sup>54</sup> [REDACTED].

<sup>55</sup> [REDACTED].

<sup>56</sup> [REDACTED].

<sup>57</sup> P-0878, [T-78-CT](#), 60:20-21.

<sup>58</sup> See above para. 7, fn. 34.

<sup>59</sup> P-0878, [T-78-CT](#), 63:7-11.

<sup>60</sup> [REDACTED]; P-1021, [T-80-CT](#), 47:6-11, 49:3-8; P-0878, [T-78-CT](#), 41:4-42:18, 60:14-63:15.

<sup>61</sup> P-0986, [DAR-OTP-0222-0437](#) at 0448, paras. 53, 55. [REDACTED] (P-0905, [T-086-CT](#), 9:19-13:10, and [T-088-ET](#), 55:4-58:22).

<sup>62</sup> P-0921, [T-110-CT](#), 61:23-64:3. See also para. 5, fn. 23-26 above.