

1 International Criminal Court
2 Trial Chamber I
3 Situation: Darfur, Sudan
4 In the case of The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman
5 ("Ali Kushayb") - ICC-02/05-01/20
6 Presiding Judge Joanna Korner, Judge Reine Alapini-Gansou and
7 Judge Althea Violet Alexis-Windsor
8 Status Conference – Oral Decision - Courtroom 2
9 Wednesday, 19 April 2023
10 (The hearing starts in open session at 9.39 a.m.)
11 THE COURT USHER: [9:39:02] All rise.
12 The International Criminal Court is now in session.
13 Please be seated.
14 PRESIDING JUDGE KORNER: [9:39:21] Yes. Good morning, all.
15 Could we call the case, please.
16 THE COURT OFFICER: [9:39:27] Good morning, Madam President, your Honours.
17 This is the situation in Darfur, Sudan, in the case of The Prosecutor versus Ali
18 Muhammad Ali Abd-Al-Rahman ("Ali Kushayb"), case reference ICC-02/05-01/20.
19 And for the record, we are in open session.
20 PRESIDING JUDGE KORNER: [9:39:44] Yes.
21 Mr Laucci, before I deal with the appearances, I understand that your -- that
22 Mr Abd-Al-Rahman has had some bad news and therefore would prefer not to be in
23 court.
24 MR LAUCCI: [9:40:02](Interpretation) Yes, Madam President, I can confirm that.
25 PRESIDING JUDGE KORNER: [9:40:07] But I understand he's been brought here,

1 and I perfectly understand, and provided he has instructed you he does waive his
2 right to be present, is there any reason why he can't stay out of court and simply
3 watch the proceedings with the translation?

4 MR LAUCCI: [9:40:34](Interpretation) I believe that his absolute priority is to call his
5 family and get news about the exact situation in the Sudan.

6 PRESIDING JUDGE KORNER: [9:40:46] I'm sure that's right, and that he wants to
7 go straight back. But we're going to give the judgment, which is not going to be very
8 long, and I wondered whether it wouldn't be preferable, before he's taken back, if he
9 at least hears what the judgment is. But, I mean, if your instructions are he wants to
10 go straight back, well then, fine.

11 MR LAUCCI: [9:41:09](Interpretation) I believe that he's a bit anxious and he wants
12 to get the news as quickly as possible.

13 PRESIDING JUDGE KORNER: [9:41:19] So he wants to go straight back to
14 the detention unit?

15 MR LAUCCI: [9:41:24](Interpretation) Yes, to get news about his family. Yes,
16 Madam President.

17 PRESIDING JUDGE KORNER: [9:41:30] Right. But I understood that -- that what
18 you wanted was, after we've delivered the judgment, a break so that you can go and
19 speak to him, which I don't quite follow. That that's what I mean.

20 MR LAUCCI: [9:41:43](Interpretation) It is for the Court, Madam President, to
21 decide whether to immediately deliver your judgment, or after I would have talked
22 with Mr Rahman about the authorisation to be absent.

23 PRESIDING JUDGE KORNER: [9:42:00] Sorry, so you haven't -- you mean you want
24 to tell him that I've simply authorised his absence?

25 MR LAUCCI: [9:42:11](Interpretation) That's correct.

1 PRESIDING JUDGE KORNER: [9:42:12] Well, all right. Well, then, in
2 the circumstances we do and you can leave court and tell him that.

3 MR LAUCCI: [9:42:18] Okay, that will take one minute. (Interpretation) Very well.

4 PRESIDING JUDGE KORNER: [9:42:22] Right. Okay.

5 (Pause in proceedings)

6 PRESIDING JUDGE KORNER: [9:44:34] Yes, thank you very much, Mr Laucci.

7 Yes, well let's have the -- well, we started with the Defence.

8 Mr Laucci, you're appearing together with?

9 MR LAUCCI: [9:44:44](Interpretation) Madam President, Mr Abd-Al-Rahman is not
10 present in the hearing today. I am here with Ahmad Issa, our case manager;

11 Omar Soliman, who has joined us as a legal adviser, specifically in charge of
12 investigations; my learned colleague Iain Edwards; and myself, Cyril Laucci.

13 PRESIDING JUDGE KORNER: [9:45:09] Yes, thank you.

14 Yes, let's deal with the representatives of the victims then next.

15 MR SHAH: [9:45:15] Good morning, Madam President.

16 The participating victims are represented today by the legal representative

17 Ms von Wistinghausen, who's appearing by video link, and assisted by myself,

18 Anand Shah, Idriss Anbari, and our intern Saskia Adjowa Afande. Thank you.

19 PRESIDING JUDGE KORNER: [9:45:33] Yes, thank you very much, Mr Shah.

20 And, finally, the Prosecution.

21 MR NICHOLLS: [9:45:37] Good morning, Madam President. Good morning,

22 your Honours. Julian Nicholls, joined with our case manager Claire Sabatini;

23 Alison Whitford, Edward Jeremy and Pubudu Sachithanandan. Thank you very
24 much.

25 PRESIDING JUDGE KORNER: [9:45:48] Yes, thank you very much.

1 Yes, well the first item of business this morning is that we deliver the ruling on
2 the Defence Motion for a Judgment of Acquittal.
3 I start with the chronology:
4 On 24 January of this year, the Trial Chamber added to its Conduct of Proceedings
5 the procedure to be followed in the event that the Defence wished to seek a judgment
6 of acquittal on all or any counts.
7 In compliance with that procedure, after the Prosecution had filed a motion notifying
8 the closure of its case, on 6 March of this year the Defence filed a motion seeking leave
9 to apply for a judgment of acquittal on all counts; and in the alternative on counts 6, 7,
10 8 and 9.
11 Following the responses from the Prosecution and the Legal Representative of
12 the Victims, leave was granted only in respect of the individual counts.
13 The counts relate to the events in Bindisi and its surrounding areas between 15 and
14 16 August 2003.
15 Count 6 charges the accused with crimes against humanity, that's specifying other
16 inhumane acts.
17 Count 7: War crimes (outrages upon personal dignity).
18 Count 8: Crimes against humanity, namely rape.
19 And count 9: War crimes, namely rape.
20 The Defence filed what was called their skeleton argument on 17 March of this year.
21 This was responded to by the Prosecution and the Legal Representative of the Victims
22 on 24 March 2023.
23 Oral submissions to the Chamber, with Judge Alexis-Windsor attending remotely,
24 took place on 3 and 4 April of this year.
25 Before turning to the gravamen of the motion, the Trial Chamber wishes to express its

1 gratitude to the parties for the succinct and helpful written summary submissions,
2 otherwise described as skeleton arguments, as it enabled the judges to remind
3 themselves of the evidence and the law relevant to the submissions in advance of
4 the hearing.

5 I turn, therefore, to a summary of those submissions.

6 The Defence, in its written and oral arguments, submit that, in respect of those four
7 counts:

8 There is no evidence that Abd-Al-Rahman induced or ordered the crimes.

9 Second, that there is no evidence that such crimes had been committed before
10 the Bindisi attack such as to have put him on notice that such acts would be carried
11 out in the ordinary course of events.

12 And third, that the crimes of rape and the accompanying outrages on personal
13 dignity were not a natural and foreseeable consequence of his actions at the period
14 under consideration, namely 2003.

15 In essence, the Defence arguments concentrated on the allegations of rape. In their
16 oral submissions they pointed to inconsistencies between the evidence of witnesses.

17 For the purposes of these submissions, and I emphasise that, that purely for
18 the purposes of these submissions, the Defence accept that there is evidence that
19 Abd-Al-Rahman is the person known as Ali Kushayb and in respect of counts 1 to 5
20 and 10 to 11, there is evidence on which the Trial Chamber could convict, in other
21 words, that there is evidence, taken at its highest, that Abd-Al-Rahman induced or
22 ordered those specific crimes.

23 Further they accept that, in respect of the disputed counts, there is evidence that
24 Abd-Al-Rahman was the commander of the attack against Bindisi, (having been
25 tasked to carry it out by Harun), and that there was a use of persecutory language

1 such that a coercive environment was created.

2 And I take that from the LiveNote, the uncorrected LiveNote of the proceedings on
3 3 April at page 42.

4 Finally, the Defence accept, again for the purposes of this submission, that all
5 witnesses had told the truth and were by and large reliable.

6 And that is taken from the LiveNote, also of 3 April, at page 11.

7 The Prosecution in its written and oral responses, submitted that the evidence
8 showed:

9 First, that Abd-Al-Rahman led and directed the attack.

10 That, and I quote, "he brought about the commission of the crimes through his own
11 violent conduct, [and] conspicuous presence". And that comes from the written
12 submissions at paragraph 4.

13 Third, that his use of expresses translated - roughly - as "cut the straw and eat it raw"
14 and/or "wipe out and sweep away" influenced his men to commit violent crimes
15 including those which are the subject of the disputed counts.

16 That Abd-Al-Rahman's intent and awareness that the crimes would be committed in
17 the ordinary course of events may be inferred properly from the fact that, as
18 the expert pointed out, rape and other forms of sexual violence and mistreatment of
19 victims have been a feature of earlier Government of Sudan counterinsurgency
20 campaigns and indeed in all of the attacks which form the basis of the case against
21 Abd-Al-Rahman.

22 Fourth, that Abd-Al-Rahman was present -- fifth, I'm sorry, that Abd-Al-Rahman was
23 present at a meeting which took place before the attack, when Harun threatened Fur
24 civilians that they would be raped.

25 And, finally, that rapes had taken place during - uncharged - attacks on villages

1 which occurred before that attack on Bindisi.

2 The Representative of Victims takes the position that the Defence submissions are
3 based on a false premise, in other words, that the, and I quote, that the "acts
4 underpinning counts 6 to 9 can be ring-fenced and separated from the acts" which
5 underlie the other counts. And that is paragraph 8 of the written submissions.

6 The Representative for Victims makes the same point as that of the Prosecution,
7 namely that the attacks preceding that on Bindisi and Abd-Al-Rahman's actions
8 during those attacks, would have made it clear to him that the acts underpinning
9 counts 6 to 9 were virtually certain to occur in the ordinary course of events.

10 As I say, that is a summary of somewhat lengthier, certainly expanded on in the oral
11 hearings, submissions.

12 I turn now to the law.

13 The issue, at this stage of the case, is whether there is sufficient evidence to sustain
14 Abd-Al-Rahman's individual criminal responsibility under Article 25(3)(b) of
15 the Rome Statute. The two modes of liability which fall to be considered are
16 "inducing" and "ordering". In respect of the latter, the Trial Chamber issued
17 a Regulation 55(2) notice.

18 The test set out in the most recent of these cases that deals with this kind of motion,
19 the test set out in the Appeals Chamber's decision of Gbagbo and Blé Goudé,
20 31 March 2021 is, and I quote: "the test that guides the trial chamber's decision may be
21 expressed as follows: upon the conclusion of the evidence presented by
22 the prosecution (and on behalf of the victims, as appropriate), the trial chamber shall
23 acquit the defendant or, as the case may be, dismiss one or more of the charges, where
24 the evidence thus far presented is insufficient in law to sustain a conviction on one or
25 more of the charges."

1 And that is paragraph 301.

2 In respect of the standard to be applied, the Appeals Chamber stated:

3 "[T]he Appeals Chamber is satisfied that it is only when the evidence has satisfied
4 the standard of proof beyond reasonable doubt that it can be said to have been
5 'sufficient to sustain a conviction', or 'capable of supporting a conviction'; or evidence
6 upon which 'a jury properly directed [...] could convict' or evidence upon which
7 'a jury properly directed could [...] properly convict.' Nothing less would do.
8 The Appeals Chamber stresses that it is unhelpful to muddle the discussion by
9 alluding to the difference between 'could convict' and 'would convict,' as have been
10 done in -- as has been done in some of the case law. The test has never been
11 expressed as 'would convict'. Thus, it is a false contrast that only distracts from
12 the focus of the analysis, which must remain on 'could convict'."

13 And that is paragraph 309.

14 In respect of assessment of the evidence, the Appeals Chamber stated:

15 "Any assessment of credibility or reliability of the evidence, in the context of the no
16 case to answer process, must be understood to relate only to the Chamber's sense of
17 the evidence thus far presented. That is to say, it concerns only the evidence
18 presented by the prosecution or on behalf of the victims, as the case may be. On no
19 account should such a sense of the evidence prejudice the strength of the case for
20 the defence, in the event that the case is required to condition, following
21 the trial chamber's dismissal of the no case to answer motion; or in the event of
22 a successful prosecution appeal of an acquittal resulting from the no case to answer
23 motion - thus requiring a continuation of the trial before the same trial chamber. For
24 this reason, the Appeals Chamber encourages trial chambers to exercise great care
25 and circumspection in their pronouncements regarding findings on credibility and

1 reliability of the evidence, in order to avoid undue awkwardness in the event that
2 the trial may have to continue before the same composition of the trial chamber."

3 The Appeals Chamber continue:

4 "As to how the evidence should be assessed, as stated above, the prosecution
5 evidence should be considered in 'its best light' - in the sense of being undistracted,
6 unobstructed or unopposed for the time being by evidence introduced on behalf of
7 the defence. It is possible that clarity of thought is undermined by the usual
8 formulations which say that for the purposes of a no case to answer motion, the case
9 for the prosecution must be seen in 'its best light' or 'taken at its highest'. These
10 expressions do not mean that the prosecution evidence must be taken at face value or
11 be presumed to have satisfied its forensic objective. The expressions only mean that
12 the evidential assessment will focus on the strength of the evidence that
13 the prosecution has tendered to prove their case, rather than focusing on the strength
14 of any evidence that the defence might have introduced at that stage to neutralise
15 the strength of the prosecution evidence."

16 And that lengthy quote comes from paragraphs 316 to 317 of the judgment.

17 Before turning to the ruling, I should add that the law was basically agreed by both
18 sides in this matter.

19 So I turn finally to the ruling that we make.

20 As already stated, at this stage of the case, the test which this Trial Chamber applies to
21 the present submission is whether, and I quote again, the evidence "has satisfied
22 the standard of proof beyond reasonable doubt that it can be said to have been
23 'sufficient to sustain a conviction'."

24 The Defence, for again the purposes only of the submissions, accept that:

25 Abd-Al-Rahman is the person known as Ali Kushayb.

1 That he was in command of the attack on Bindisi and the surrounding areas.

2 That crimes were committed in the relevant period and locations.

3 And that in general terms the witnesses are both truthful and by and large reliable.

4 In respect of the credibility of the witnesses, the Defence pointed out that there were

5 inconsistencies between their accounts. However, the Defence do not suggest that

6 these inconsistencies are so great as to render their evidence nugatory. Accordingly,

7 at this stage of the case, the Trial Chamber is not required to make the final

8 determination in respect of credibility.

9 In essence, the Defence submissions amounted to a single proposition, namely that

10 there is no evidence that at the time of the Bindisi attacks Abd-Al-Rahman could have

11 anticipated or was aware of, or in any way induced or ordered the rapes, and

12 the connected outrages upon personal dignity, to take place because it was the first of

13 the attacks alleged in the case.

14 And I take that from the LiveNote at pages 65 to -- uncorrected LiveNote, 3 April,

15 pages 65 to 66.

16 In fact, as already pointed out, both the Prosecution and Legal Representatives for

17 the Victim point to the fact that there is evidence of earlier uncharged attacks on other

18 villages, before that on Bindisi, where the same type of crimes had been committed.

19 At this stage, taking the Prosecution's evidence at its highest - and again I emphasise

20 the words "at this stage" - for the purposes of this submission, the Trial Chamber is

21 satisfied, first:

22 That the rapes were committed.

23 Second, that the physical and physiological abuses took place which could amount to

24 other inhumane acts and outrages upon personal dignity.

25 That Abd-Al-Rahman was in command of the attack on Bindisi and surrounding

1 areas.

2 And that his attendance at the meeting at which Harun spoke, taken together with his
3 words and actions before and during the attack, are sufficient to show, at this stage,
4 that he bears individual criminal responsibility for the crimes set out in counts 6 to 9.

5 And, accordingly, we decline to enter a judgment of acquittal on any of the impugned
6 counts.

7 Right, that concludes our judgment on this matter. The other aspect of today's
8 proceedings was to hold a status conference in respect of various matters that were
9 raised -- have been raised over a number of months.

10 I think the best thing at the moment is to go into private session, to see what we're
11 going to be dealing with.

12 (Private session at 10.06 a.m.)

13 THE COURT OFFICER: [10:06:01] We're in private session, Madam President.

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19 (Open session at 10.31 a.m.)
20 THE COURT OFFICER: [10:31:20] We're back in open session, Madam President.
21 PRESIDING JUDGE KORNER: [10:31:22] Yes.
22 Now, Ms von Wistinghausen, do we understand that you don't want to start
23 the presentation of your case on the date set, which I think is 22 May, isn't it?
24 MS VON WISTINGHAUSEN: [10:31:41] Well, we would very much want to start
25 on -- on that date, but for all the reasons I set out in the email that I sent two days ago,

1 and where we explain quite in detail what the problems are, I just think that as of
2 today it's not realistic to stick with this date. There are many reasons for that and I
3 should say that, for us and my team, we don't want to lose the whole purpose of
4 a presentation of the victims' case, which is to bring participating victims in
5 the courtroom to be able to be -- to speak to you personally.
6 We don't want to lose this opportunity.
7 Of course, you know, we don't know how events will unfold in Sudan and what will
8 be possible within the coming weeks. But if we have one participating victim
9 probably having to appear via video link from Canada, for the reasons we explained;
10 two participating victims currently in Darfur and travelling is impossible, a no go at
11 the moment, and even to make travel arrangements is on hold. We are actually quite
12 far in the process, but now of course it's on hold. And the -- the travel arrangements
13 for participating victims coming from Chad has taken longer than anticipated by us
14 and by VW. It is still possible to stay within the anticipated dates, but it's going to be
15 very tight.
16 And, again, for us, the whole purpose of the presentation of the victims' case is to let
17 our clients speak. I think we make it very clear also in our trial brief that we don't
18 want to be, you know, the echo of what they think and feel and lived. And as much
19 as possible we want to stick to our original plan and to bring these people to
20 The Hague.
21 So we wanted to put the Trial Chamber on notice for these issues. We've done it
22 quite in detail. We can, of course, and we will update you on a very regular basis,
23 but I don't think that we can stick to the original plan and start on 22 May.
24 We could, but a big part of the purpose of what we intend to do on behalf and in
25 the interests of our clients would, yeah, couldn't be fulfilled, which I think, given that

1 the moment where the victims' case takes place is maybe not of such an importance as
2 other procedural activities, yeah, this is certainly something we would like to discuss
3 with you, but it also depends on -- on calendars and free courtrooms and -- and things
4 like that.

5 Other than that, I can of course confirm that we are trying to monitor the participating
6 victims' situation right now, especially those who are in Darfur, but also in Khartoum.

7 We have reached out to a couple of clients, we've reached out to our interlocutors and
8 our field assistants, and I can convey to you that what we unfortunately read in
9 newspapers and see on TV is confirmed by the people we have spoken with.

10 The situation is very tense. There is pillaging and looting and killing in Nyala, a
11 close place from where participating victims are. We just received an update
12 yesterday from a client in Bindisi that people are in great fear. And although
13 the village hasn't been targeted yet, there are people around the villages and there is
14 nobody to protect the population, no army, no police, no position. They are at their
15 mercy. I just want to put this on record because we have, like, you know, direct
16 contact to a few individuals and unfortunately we have to confirm what we read, and
17 that of course also means that at the moment there is no way we can move
18 participating victims around.

19 So this is just a small summary. I am not making, you know, a specific application at
20 this stage because let's never lose hope that things may improve. But we want
21 your Honours to be on notice and maybe to get your guidance on how to move on or,
22 you know, what your leeway is and how we can approach this.

23 PRESIDING JUDGE KORNER: [10:37:03] Okay. Well, first of all, you've made an
24 application for protective measures and video link.

25 The Prosecution had time to consider it. Is there any objection?

- 1 MR NICHOLLS: [10:37:15] No objection.
- 2 PRESIDING JUDGE KORNER: [10:37:17] Mr Laucci, Defence?
- 3 MR LAUCCI: [10:37:18](Interpretation) No objection, Madam President.
- 4 PRESIDING JUDGE KORNER: [10:37:22] Right. Well, then so that you don't have
5 to go any further, we'll grant those applications today.
6 Our view is this, the difficulty with dates is that because we vacated the start of
7 the Defence case as a result of the application, the judges now have other
8 commitments, and that was the date that you were suggesting you could present your
9 case.
10 What we were wondering is this, whether we couldn't preserve the dates that are
11 already fixed. You call such evidence as you are able to call, and then, if there is still
12 a problem with witnesses in Darfur, we could adjourn then to the -- a later date,
13 potentially probably at the end of August, so that, if other victims are available.
14 In addition, we've set the first status conference to follow directly on from -- from
15 your case.
16 So I -- Ms von Wistinghausen, at the moment I don't think we're going to move
17 the date. If there comes a point where it's clear that you can only get one witness for
18 whatever reason, one participating victim, well then you can apply at a later stage
19 and we undoubtedly will grant that, subject to there being proper reason. As it is --
- 20 MS VON WISTINGHAUSEN: [10:39:10] All right.
- 21 PRESIDING JUDGE KORNER: [10:39:11] As you say yourself, at the moment you're
22 only just raising the possibility. But, as I say, we would obviously adjourn your case
23 if you couldn't get all your witnesses here.
- 24 MS VON WISTINGHAUSEN: [10:39:30] Okay. Thank you.
25 I mean, I think we just need a few more days to know if the travel arrangements for

1 the participating victims from Chad could be done in time, and I think a lot depends
2 on that. Because if that doesn't work out, then we would just be left with one
3 participating victim having to relinquish his (indiscernible) which is --

4 PRESIDING JUDGE KORNER: [10:39:59] No. Well, if that's all -- if that's all you
5 can get.

6 MS VON WISTINGHAUSEN: [10:40:02] -- actually quite extraordinary
7 because -- yeah. Yeah.

8 PRESIDING JUDGE KORNER: [10:40:08] Yes, all right.

9 MS VON WISTINGHAUSEN: [10:40:09] Okay. Thank you.
10 I don't know if my (indiscernible) wants to add anything.

11 PRESIDING JUDGE KORNER: [10:40:15] Mr Shah, is there anything you want to
12 add?

13 MR SHAH: [10:40:20] No. No, I think Ms von Wistinghausen has covered it very
14 thoroughly.

15 PRESIDING JUDGE KORNER: [10:40:25] Yeah, well, I mean, as I say, this
16 is -- the problem of what has happened in Sudan affects everybody in this case,
17 though I accept mainly the Defence.

18 Yeah, well, if there is no -- if there are no other matters, then -- Mr Edwards.

19 MR EDWARDS: [10:40:40] Just one housekeeping matter. Mr Issa informs me that
20 the PowerPoint can certainly be ERNed and it will have the following ERN,
21 DAR-D31-00000127.

22 PRESIDING JUDGE KORNER: [10:40:57] Yeah. Very well. Yes, thank you,
23 Mr Edwards.

24 Yes, well then that concludes today's proceedings.

25 And I've forgotten, how long have you got to appeal and/or ask for reconsideration?

1 Until next Friday, isn't it? No.

2 MR LAUCCI: [10:41:26](Interpretation) For a request to appeal, the deadline would
3 be Monday, but I think if we decide to proceed, we will do so before. When it comes
4 to a request for reconsideration, there is no time limit, but I think it's up to you to give
5 us guidance as to what limit you would like to apply. Thank you. Mindful of
6 the fact that we have not yet decided whether or not to submit it.

7 PRESIDING JUDGE KORNER: [10:41:59] Okay. All right, Mr Laucci.

8 I'm not going to give you a cut-off date for reconsideration. But, obviously, at the
9 moment you've got certain deadlines still to meet and -- and you -- if you want
10 reconsideration, you're going to have to do that at a stage which will allow us to
11 reduce the deadlines, if you see, or extend the deadlines. Anyhow, it's up to you.

12 MR LAUCCI: [10:42:27](Interpretation) I follow your logic entirely. Thank you.

13 PRESIDING JUDGE KORNER: [10:42:31] Yes. All right. All right.

14 Well, thank you all very much indeed. And we'll adjourn then now. Thank you.

15 THE COURT USHER: [10:42:35] All rise.

16 (The hearing ends in open session at 10.42 a.m.)