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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**

**Prosecution’s response to “Application for leave to present a motion for acquittal”,  
6 March 2023, ICC-02/05-01/20-891**

**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 Trial Chamber I (“Chamber”) to reject the Defence’s “Application for leave to present a motion for acquittal” (“Application”).<sup>1</sup>

2. In relation to the first ground identified by the Defence,<sup>2</sup> which amounts to a challenge to the jurisdiction of the Court, the Prosecution submits that a motion for acquittal is not the proper procedural avenue for these legal arguments. In relation to the second and third grounds,<sup>3</sup> given the strength of the evidence presented by the Prosecution on the relevant counts, a motion for acquittal procedure would not further the fair and expeditious conduct of the proceedings.

## II. SUBMISSIONS

3. The Application sets out three grounds on which the Defence request leave to file a motion for acquittal:

- a. “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” (“Ground A”);<sup>4</sup>
- b. “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” (“Ground B”);<sup>5</sup> and
- c. “C. Counts 8-9: No evidence of Mr Abd-Al-Rahman’s individual responsibility for rape in Bindisi and surrounding areas” (“Ground C”).<sup>6</sup>

### **The Chamber has a broad discretion whether to grant the Application**

4. As held by the Appeals Chamber, although the Court’s legal texts do not expressly allow for a “no case to answer” or “motion for acquittal” procedure, such a procedure is permissible under article 64(6)(f) of the Rome Statute and rule 134(3) of the Rules of Procedure and Evidence, to ensure a fair, impartial and expeditious trial in accordance with articles 64(2), (3)(a) and 67 of the Statute.<sup>7</sup>

<sup>1</sup> Application, [ICC-02/05-01/20-891](#).

<sup>2</sup> See below, para. 3.a.

<sup>3</sup> See below, para. 3.b-3.c.

<sup>4</sup> Application, paras. 3-5.

<sup>5</sup> Application, para. 6.

<sup>6</sup> Application, para. 7.

<sup>7</sup> *Gbagbo & Blé Goudé* No Case to Answer Appeals Judgment, [ICC-02/11-01/15-1400](#), paras. 104-105, 108, 300; *Ntaganda* No Case to Answer Appeals Judgment, [ICC-01/04-02/06-2026](#), paras. 43-45.

5. The Chamber has set out the relevant procedure in the “Addendum to the Directions on the Conduct of Proceedings Motion for Acquittal”, noting that it “will decide in its discretion whether to grant leave” to the Defence to present a motion for acquittal.<sup>8</sup> The Appeals Chamber has confirmed that the Chamber has a broad discretion whether to entertain submissions on a motion for acquittal “to the effect that the imperatives of a fair, impartial and expeditious hearing [...] may not warrant putting the defence to its case, due to substantial weaknesses in the evidence presented thus far by the prosecution.”<sup>9</sup>

6. In *Ntaganda*, the Trial Chamber (as upheld by the Appeals Chamber<sup>10</sup>), in declining to conduct a no case to answer procedure, considered that “a motion arguing that there is no case to answer, in whole or in part, 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.”<sup>11</sup> In *Ongwen*, the Trial Chamber similarly declined to conduct a no case to answer procedure since it did not consider that this would further the fair and expeditious conduct of the proceedings.<sup>12</sup>

#### **Ground A: A motion for acquittal is not the proper procedural avenue**

7. As held by the Appeals Chamber, the purpose of a motion for acquittal procedure is to “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>13</sup> In the Application, the Defence asks the Chamber to re-examine the Court’s jurisdiction in this case based on the evidence presented during the trial to date, by applying the test for the principle of legality set out by the Appeals Chamber in an earlier interlocutory appeal.<sup>14</sup> Although cast by the Defence as an evidentiary issue, this is fundamentally a legal question—that is, whether the specific conduct in question was a crime within the Court’s

<sup>8</sup> Addendum to the Directions on the Conduct of Proceedings Motion for Acquittal, [ICC-02/05-01/20-855](#), para. 6.

<sup>9</sup> [Gbagbo & Blé Goudé No Case to Answer Appeals Judgment](#), para. 300. See also [Ntaganda No Case to Answer Appeals Judgment](#), paras. 44-46; *Ntaganda* No Case to Answer Decision, [ICC-01/04-02/06-1931](#), paras. 25-26; *Ongwen* No Case to Answer Decision, [ICC-02/04-01/15-1309](#), para. 5.

<sup>10</sup> [Ntaganda No Case to Answer Appeals Judgment](#), paras. 55-56.

<sup>11</sup> [Ntaganda No Case to Answer Decision](#), para. 26 (emphasis added).

<sup>12</sup> [Ongwen No Case to Answer Decision](#), para. 16.

<sup>13</sup> [Gbagbo & Blé Goudé No Case to Answer Appeals Judgment](#), paras. 301, 311. See also paras. 301-317 (where the Appeals Chamber set out the full test to be applied in a motion for acquittal, particularly, that the standard of proof is “beyond reasonable doubt”, the focus of the analysis is on “could convict” and not “would convict”, the Prosecution evidence should be taken “at its highest”, and the Trial Chamber is not precluded from “sensibly weighing the credibility and reliability of the evidence”). See also [Ntaganda No Case to Answer Appeals Judgment](#), para. 46.

<sup>14</sup> [Application](#), paras. 3-5; 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)”, [ICC-02/05-01/20-503](#) (“Jurisdiction Appeals Judgment”), paras. 85-91.

jurisdiction at the relevant time.<sup>15</sup> A motion for acquittal, which deals with sufficiency of evidence on individual charges, is therefore not the proper procedural avenue to decide this question.<sup>16</sup>

8. The Defence will have the opportunity to make legal submissions on this issue at the conclusion of the trial or, with the Chamber's leave, in a jurisdictional challenge pursuant to article 19 of the Statute.<sup>17</sup> The Prosecution will make submissions on the substance of the Defence's arguments, which it opposes, at the appropriate juncture.

**Grounds B and C: A motion for acquittal procedure would not further the fair and expeditious conduct of the proceedings**

9. Given the strength of the evidence presented in relation to Counts 6 to 9, a motion for acquittal is unlikely to succeed, and entertaining further submissions would therefore not further the fair and expeditious conduct of the proceedings.

10. The evidence presented clearly shows that the Accused, as leader of the *Militia/Janjaweed* and Government of Sudan Forces ("GoS Forces") during the attack on Bindisi and surrounding areas, ordered or induced the commission of the crimes charged in Counts 6 to 9. The evidence further demonstrates that the Accused meant to engage in this criminal conduct and was aware that the *Militia/Janjaweed* and GoS Forces would, in the ordinary course of events, commit the crimes charged in Counts 6 to 9 and that his actions contributed to their commission. The evidence presented in relation to Counts 6 to 9 largely

<sup>15</sup> [Jurisdiction Appeals Judgment](#), paras. 85-91.

<sup>16</sup> See [Ongwen No Case to Answer Decision](#), para. 10 (in which the Trial Chamber declined to conduct a no case to answer procedure in relation to a question of legal interpretation regarding the crime of pillaging) ("For a pure question of legal interpretation, [...] the answer to this question does not necessarily require presentation of additional Defence evidence to resolve it. The Chamber fails to see why a [no case to answer] procedure on such a matter would lead to a fairer and more expeditious trial. The Defence will have the opportunity to present its legal arguments in relation to this issue. The Request in this respect is tantamount to asking for the Chamber's understanding of the applicable law prior to its judgment. The Chamber sees no justification for making such an advance determination in the present proceedings."); *Prosecutor v. Blaskic*, Decision of Trial Chamber I on the Defence Motion to Dismiss, 3 September 1998, [IT-05-14](#), p. 2-5 (in which the Trial Chamber declined to consider, as part of a motion for judgment of acquittal procedure, a question of law relating to the existence of an international armed conflict).

<sup>17</sup> The Defence has already raised a jurisdictional challenge under article 19(2), which was rejected by the Pre-Trial Chamber, whose decision the Appeals Chamber upheld. See *Exception d'incompétence*, [ICC-02/05-01/20-302](#); Decision on the Defence "*Exception d'incompétence*" (ICC-02/05-01/20-302), [ICC-02/05-01/20-391](#); [Jurisdiction Appeals Judgment](#). In exceptional circumstances, the Chamber may grant leave for a challenge to the jurisdiction of the Court to be brought more than once or at a time later than the commencement of the trial. See article 19(4) of the Statute.

followed the evidence set out in the Prosecution's Trial Brief.<sup>18</sup> The withdrawal of P-0589 had no material impact on the evidentiary foundation of Counts 6 and 7.

11. In challenging the strength of the evidence in relation to the Accused's individual criminal responsibility for rape during the attack he led on Bindisi and surrounding areas, the Defence refers only to evidence of the Accused selectively choosing to use his authority in Sindu,<sup>19</sup> a number of months later, to stop further harm to girls who had already been sexually assaulted and raped, after their mothers started screaming for their return.<sup>20</sup> Far from absolving the Accused of criminal responsibility for rape in Bindisi and surrounding areas, this evidence simply demonstrates that the Accused had the authority to protect persons from rape during the attack that he led, but chose not to exercise it.

12. In sum, as there are no "substantial weaknesses in the evidence presented thus far by the Prosecution"<sup>21</sup> in relation to Counts 6 to 9, a motion for acquittal procedure would not further the fair and expeditious conduct of the proceedings in this case.

### III. CONCLUSION

13. The Prosecution respectfully requests the Chamber to reject the Application.



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

Dated this 8<sup>th</sup> day of March 2023

At The Hague, The Netherlands

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<sup>18</sup> Prosecution's Trial Brief, [ICC-02/05-01/20-550-Corr-Red](#), paras. 279-301; Addendum to Prosecution's Trial Brief, [ICC-02/05-01/20-646-AnxA-Red](#).

<sup>19</sup> [Application](#), para. 7.

<sup>20</sup> T-86 ET, 9:19-13:10; T-88 ET, 55:3-58:22.

<sup>21</sup> See [Gbagbo & Blé Goudé No Case to Answer Appeals Judgment](#), para. 300.