

**Original: English****No. ICC-02/05-01/20****Date: 10 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**Decision on the Defence's application for leave to file a motion for acquittal**

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

The Office of the Prosecutor

Karim A.A. Khan
Nazhat Shameem Khan
Julian Nicholls

Counsel for the Defence

Cyril Laucchi
Iain Edwards

Legal Representatives of Victims

Natalie von Wistinghausen
Anand Shah

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar
Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

1. In accordance with the directions on the conduct of proceedings given by the Chamber,¹ on 6 March 2023, the Defence filed an application for leave to present a motion for acquittal (the ‘Application’).²
2. On 8 March 2023, the Prosecution, and the Common Legal Representatives for Victims (the ‘CLRV’) filed their responses to the Application.³
3. The Chamber recalls that it is within its discretion whether to grant leave,⁴ and that should leave be refused, the decision shall not contain any assessment of evidence.⁵
4. In its Application, the Defence requests leave to file a motion for acquittal on three aspects of the case.
5. First, in respect of all counts, the Defence submits, referring to a previous Appeals Chamber judgment in this case,⁶ that the foreseeability and accessibility tests set out by the Appeals Chamber regarding the exercise of the Court’s jurisdiction have not been met by the evidence.⁷
6. Second, in respect of counts 6-7, the Defence submits that there is no evidence of Mr Abd-Al-Rahman’s individual responsibility for other inhumane acts or outrages upon personal dignity in Bindisi and surrounding areas.⁸

¹ Directions on the conduct of proceedings, 4 October 2021, ICC-02/05-01/20-478 with Annex A; Second Directions on the Conduct of Proceedings, 15 December 2022, ICC-02/05-01/20-836; Addendum to the Directions on the Conduct of Proceedings Motion for Acquittal, 24 January 2023, ICC-02/05-01/20-855 (hereinafter: ‘Addendum’). *See also* Transcript of the hearing on 24 January 2023, ICC-02/05-01/20-T-108-ENG, p. 81, lines 2 *et seq.*

² Application for leave to present a motion for acquittal, ICC-02/05-01/20-891. The Prosecution filed a notice of the conclusion of its presentation of evidence on 28 February 2023, Notice of the conclusion of the Prosecution’s presentation of evidence, 28 February 2023, ICC-02/05-01/20-887.

³ Prosecution’s response to “Application for leave to present a motion for acquittal”, 6 March 2023, ICC-02/05-01/20-891, ICC-02/05-01/20-896 (hereinafter: ‘Prosecution Response’); Observations on behalf of victims on the Defence “Application for leave to present a motion for acquittal”, ICC-02/05-01/20-895 (hereinafter ‘CLRV Response’).

⁴ Addendum, ICC-02/05-01/20-855, para. 6.

⁵ Addendum, ICC-02/05-01/20-855, para. 7.

⁶ 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 (OA8).

⁷ Application, ICC-02/05-01/20-891, paras 3-5.

⁸ Application, ICC-02/05-01/20-891, para. 6.

7. Third, in respect of counts 8-9, the Defence submits that there is no evidence of Mr Abd-Al-Rahman's individual responsibility for rape in Bindisi and surrounding areas.⁹

8. As determined by the Appeals Chamber, the procedure for 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'.¹⁰ The Chamber agrees, as submitted by the Prosecution and the CLRVs,¹¹ that the first aspect of the Application is fundamentally a jurisdictional legal issue. On this point, the Application does not relate to the lack of evidence in relation to specific charges, but to the legality of all charges and thus of the Court's jurisdiction. As submitted by the CLRV,¹² what the Defence seeks is a dismissal of the case on the basis that the Court lacks jurisdiction to try the accused pursuant to Article 22(1) of the Rome Statute. The Chamber fails to see why a motion for acquittal on such a matter would lead to a fairer and more expeditious trial.¹³ A motion for acquittal is not the appropriate avenue to decide this question. Furthermore, as stated by the Prosecution,¹⁴ the Defence will have the opportunity to make legal submissions on this issue at the conclusion of the trial. The Chamber notes that in fact the Defence appreciates this as they have filed a motion before the Appeals Chamber seeking reconsideration of the Appeal AO8 referred to in their Application.¹⁵

9. The Chamber further notes, *obiter*, that previously the Defence stated that it had identified 'five or six of the charges' for an eventual motion for acquittal. The Defence further stated: 'We would seek to, if your Honours allowed us to, we would seek to argue that entire counts out of the total of 31 be – be adjudged at this point as being counts to which the accused has no case to answer. It's certainly not the case that we're

⁹ Application, ICC-02/05-01/20-891, para. 7.

¹⁰ Appeals Chamber, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Judgment in the appeal of the Prosecutor against Trial Chamber I's decision on the no case to answer motions, 31 March 2023, ICC-02/11-01/15-1400 (A), para. 301.

¹¹ Prosecution Response, ICC-02/05-01/20-896, paras 7-8 ; CLRV Response, ICC-02/05-01/20-895, para. 3.

¹² CLRV Response, ICC-02/05-01/20-895, para. 3.

¹³ Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on Defence Request for Leave to File a No Case to Answer Motion, 18 July 2018, ICC-02/04-01/15-1309, para. 10.

¹⁴ Prosecution Response, ICC-02/05-01/20-896, para. 8.

¹⁵ Requête aux fins de reconsidération du Jugement rendu dans la procédure d'appel OA8, 10 March 2023, ICC-02/05-01/20-898-Conf.

looking to seek dismissal of the entire indictment containing the charges' (emphasis added).¹⁶

10. In respect of counts 6-7 and 8-9, and despite the Prosecution's assertion that the evidence is strong,¹⁷ the Chamber considers that these are precisely the questions that need to be discussed and decided upon in a motion for acquittal procedure.

11. In light of the above, the Chamber hereby grants the Defence leave to file a motion for acquittal on:

- Mr Abd-Al-Rahman's individual responsibility in respect of counts 6-7, other inhumane acts and outrages upon personal dignity in Bindisi and surrounding areas;
- Mr Abd-Al-Rahman's individual responsibility in respect of counts 8-9, rape in Bindisi and surrounding areas.

12. The Chamber rejects the remainder of the Application.

13. The Chamber sets out below the timeline for the proceedings to hear the Defence's motion for acquittal. The Chamber emphasises that arguments will largely be oral, so a strict 5-page limit will apply.

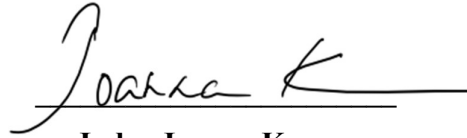
14. Defence shall file the appropriate motion in writing, by 17 March 2023, stating its grounds in support.

15. The Prosecutor and the CLRV may respond by 24 March 2023.

¹⁶ Transcript of 6 December 2022, ICC-02/05-01/20-T-105-ENG, p. 58, line 7 to page 59, line 7.

¹⁷ Prosecution Response, ICC-02/05-01/20-896, paras 9-11.

16. Thereafter, the Chamber will hold a hearing on 3 April 2023. The Defence will have 2.5 hours to present its arguments. The CLRV will have 30 minutes and the Prosecution will have 1.5 hours to respond.

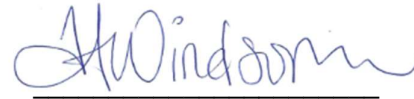


Judge Joanna Korner

Presiding Judge



Judge Reine Alapini-Gansou



Judge Althea Violet Alexis-Windsor

Dated this 10 March 2023

At The Hague, The Netherlands