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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

**Public Redacted Version of “Skeleton Argument in Defence Motion for
Acquittal”, ICC-02/05-01/20-903-Conf, 17 March 2023**

Source: Defence for Mr Ali Muhammad Ali Abd-Al-Rahman

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

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I. INTRODUCTION

1. Pursuant to the Trial Chamber's Decision on the Defence's application for leave to file a motion for acquittal ("Decision"), the Defence hereby files its motion for acquittal in skeleton argument form, since substantive arguments – including the comprehensive analysis of evidence - "will largely be oral" and taking into account the specific page limit instructed by the Trial Chamber pursuant to Regulation 36(2) of the Regulations of the Court ("RoC").¹

2. It is submitted that the correct test to be applied by the Trial Chamber is: is the evidence presented by the Prosecution sufficient in law to sustain a conviction on one or more of counts 6-9? The Appeals Chamber has held that this test is "fully consistent with the classic test of the [motion for acquittal] procedure, as applied in both international and national jurisdictions."²

3. It is also uncontroversial that the correct standard for what amounts to being sufficient in law to sustain a conviction must be proof beyond reasonable doubt.³

4. Even assuming, *arguendo*, the correctness of the Prosecution's case that Mr Abd-Al-Rahman and "*Ali Kushayb*" are the same person, the Defence submits that the Prosecution has not presented evidence sufficient in law to sustain convictions on counts 6-9.

II. SUBMISSIONS

A. **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**

5. As a preliminary point, it is important to be clear about the meaning of the words "surrounding areas" in counts 6-7 (and, indeed, counts 8-9). During the confirmation of charges hearing, the Prosecution initially sought to argue that "areas surrounding Kodoom and Bindisi, ... includes the villages which surrounds these

¹ Decision on the Defence's application for leave to file a motion for acquittal, [ICC-02/05-01/20-900](#), 10 March 2023, paras 13-14.

² *Gbagbo & Blé Goudé*, Judgment in the appeal of the Prosecutor against Trial Chamber I's decision on the no case to answer motions, [ICC-02/11-01/15-1400](#), 31 March 2021 ("*Gbagbo* Appeals Judgment"), para. 302.

³ *Gbagbo* Appeals Judgment, para. 309 (*see also* preceding discussion, paras 303-308).

areas, as is reflected on the map. Among these are Gausir, Seder and Tiro.”⁴ This was later clarified: “...when we speak of the surrounding areas in respect of Kodoom and Bindisi, we are speaking about the outer limits such as the fields and connected mountains.”⁵ In its Decision on the Confirmation of Charges, Pre-Trial Chamber II (“the PTC”) determined that “the geographical scope of Counts 1-11 is to be understood as extending to the roads and fields surrounding Kodoom and Bindisi insofar as the victims were present in these locations when initially targeted”.⁶

6. The Prosecution has not adduced any evidence that Mr Abd-Al-Rahman bears individual responsibility for other inhumane acts as a crime against humanity (count 6), or outrages upon personal dignity as a war crime (count 7), in Bindisi and surrounding areas between 15 and 16 August 2003, under either “inducing” or “ordering” modes of liability under Article 25(3)(b) of the Rome Statute.

7. The Prosecution initially gave notice of how it put its case in respect of counts 6 and 7 in its Document Containing the Charges (“DCC”).⁷ This was expanded upon with citations from the expected testimony of P-0011 and P-0015 in the Pre-Confirmation Brief (“PCB”).⁸ The Prosecution explained its case in respect of counts 6 and 7 during the confirmation of charges hearing, although it did little more than refer the PTC to the relevant parts of its PCB.⁹ In its Trial Brief (“PTB”), the Prosecution set out in slightly more detail how it puts its case.¹⁰

⁴ ICC-02/05-01/20-T-007, 24 May 2021, p. 49. It is not entirely clear which map the Prosecution was referring to, but *see* ICC-02/05-01/20-550-Conf-Anx8 as an illustrative example.

⁵ ICC-02/05-01/20-T-007, 24 May 2021, p. 63.

⁶ Corrected version of ‘Decision on the confirmation of charges against Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’), 9 July 2021, ICC-02/05-01/20-433, [ICC-02/05-01/20-433-Corr](#), 23 November 2021, para. 25.

⁷ Document Containing the Charges, Annex 1, ICC-02/05-01/20-325-Conf-Anx1, 29 March 2021; public redacted version of “Second Corrected Version of ‘Document Containing the Charges’, 29 March 2021, ICC-02/05-01/20-325-Conf-Anx1”, [ICC-02/05-01/20-325-Conf-Anx1-Corr2-Red](#), 22 April 2021, *see* paras 45-50 (the page limit precludes insertion of the paragraphs in this skeleton argument).

⁸ Prosecution’s Pre-Confirmation Brief, Annex A, ICC-02/05-01/20-346-Conf-AnxA, 16 April 2021; public redacted version, [ICC-02/05-01/20-346-AnxA-Red](#), 21 May 2021, *see* paras 180-186.

⁹ ICC-02/05-01/20-T-007, 24 May 2021, pp 6, 48-49, 61-62, 64.

¹⁰ Confidential Redacted Version of Corrected Version of “Prosecution’s Trial Brief”, 5 January 2022, ICC-02/05-01/20-550-Conf-Exp-Corr; Public Redacted Version of Corrected Version of “Prosecution’s Trial Brief”, 5 January 2022, [ICC-02/05-01/20-550-Corr-Red2](#), 4 February 2022, paras. 279-286.

8. During oral argument, the Defence will expand on the precise facts adduced in evidence that, according to its understanding of the Prosecution's case, amount to other inhumane acts or outrages upon personal dignity. To a large extent, and for the limited purposes of the instant motion, the Defence accepts that the witnesses called to testify about these counts came up to proof.

9. As previously argued by the Defence, "ordering" is essentially the same as "inducing" but with the added element of a position of authority, coupled with instruction as opposed to the exerting of influence.¹¹ Notwithstanding that distinction, the Defence submits that there is no evidence that Mr Abd-Al-Rahman induced, much less ordered, the commission of the *specific* acts that factually underpin the – undeniably nebulous – charges of inhumane acts or outrages upon personal dignity in counts 6-7.¹² Taking the Prosecution's case at its highest, there may be evidence that Mr Abd-Al-Rahman ordered or induced the crimes charged in counts 1-5 and 10-11. But there is no evidence that he meant (or intended) to order or induce the aforementioned *specific* acts to be carried out.

10. It is further submitted that there is no evidence that offences analogous to the aforementioned *specific* acts that factually underpin the charges of inhumane acts or outrages upon personal dignity had been earlier committed by anyone allegedly under the command or control of Mr Abd-Al-Rahman such that he had prior notice and would consequently be aware that such acts would be carried out in the ordinary course of events. The Prosecution has adduced no evidence to that effect.

11. It follows that there is no evidence before the Trial Chamber sufficient in law to sustain a finding that it is satisfied beyond reasonable doubt that Mr Abd-Al-Rahman is guilty of counts 6 or 7.

¹¹ Response to Prosecution's application for notice to be given pursuant to Regulation 55(2), [ICC-02/05-01/20-617](#), 4 March 2022, paras 21-22. The Defence also recalls that Mr Abd-Al-Rahman is not charged with aiding and abetting under article 25(3)(c) of the Rome Statute, *see* Corrected version of 'Decision on the confirmation of charges against Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')', 9 July 2021, ICC-02/05-01/20-433, [ICC-02/05-01/20-433-Corr](#), 23 November 2021, para. 95 (*see also* paras 105 and 114).

¹² *Contra* 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](#), 8 March 2023 ("Response"), para. 10.

B. Counts 8-9: No evidence of Mr Abd-Al-Rahman's individual responsibility for rape in Bindisi and surrounding areas

12. The Prosecution has not adduced any evidence that Mr Abd-Al-Rahman bears individual responsibility for rape as a crime against humanity (count 8), or rape as a war crime (count 9), concerning 13 Fur women and girls in Bindisi and surrounding areas between 15 and 16 August 2003, under either "inducing" or "ordering" modes of liability under Article 25(3)(b) of the Rome Statute.

13. The Prosecution initially gave notice of how it put its case in respect of counts 8 and 9 in the DCC.¹³ This was expanded upon with citations from the expected testimony of P-0007, P-0011, P-0015, P-0085, P-0834, P-0878, P-0882 and P-0921 in the PCB.¹⁴ The Prosecution explained its case in respect of counts 8 and 9 during the confirmation of charges hearing, again referring the PTC back to the relevant parts of its PCB.¹⁵ In its PTB, the Prosecution set out in more detail how it puts its case.¹⁶

14. During oral argument, the Defence will expand on the evidence adduced by the Prosecution that women and girls were raped in Bindisi or the roads or fields surrounding Bindisi. As it is hoped was made clear in the course of the trial, the Defence accepts that rapes took place. No rape victim was cross-examined on that point.

15. The real matter at issue is whether the Prosecution has adduced any evidence whatsoever that links Mr Abd-Al-Rahman, through ordering or inducing liability, or indeed in any other manner, to the rapes of the 13 Fur women and girls referred to in counts 8 and 9 in the DCC. The trial record is clear that there is, quite simply, none.

¹³ Document Containing the Charges, Annex 1, ICC-02/05-01/20-325-Conf-Anx1, 29 March 2021; public redacted version of "Second Corrected Version of 'Document Containing the Charges', 29 March 2021, ICC-02/05-01/20-325-Conf-Anx1", [ICC-02/05-01/20-325-Conf-Anx1-Corr2-Red](#), 22 April 2021, *see* paras 51-53 (again, the page limit precludes insertion of the paragraphs in this skeleton argument).

¹⁴ Prosecution's Pre-Confirmation Brief, Annex A, ICC-02/05-01/20-346-Conf-AnxA, 16 April 2021; public redacted version, [ICC-02/05-01/20-346-AnxA-Red](#), 21 May 2021, *see* paras 187-192. P-0834 and P-0882 were later withdrawn by the Prosecution.

¹⁵ ICC-02/05-01/20-T-007, 24 May 2021, pp 6, 21-22, 28-29, 48-49, 64-65.

¹⁶ Confidential Redacted Version of Corrected Version of "Prosecution's Trial Brief", 5 January 2022, ICC-02/05-01/20-550-Conf-Exp-Corr; Public Redacted Version of Corrected Version of "Prosecution's Trial Brief", 5 January 2022, [ICC-02/05-01/20-550-Corr-Red2](#), 4 February 2022, paras. 288-301.


16. The Prosecution will, it is anticipated, rely heavily on the evidence heard that Mr Abd-Al-Rahman called out to those allegedly under his command or control, “*Aksah amsah*”, to “wipe up [or out] and sweep [or swipe] away”.¹⁷ While it may be inferred, taking the Prosecution’s case at its very highest, that these words amount to ordering or inducing the crimes charged in counts 1-5 and 10-11, the Prosecution has produced no evidence whatsoever that they were meant (or intended) to order or induce the charged rapes to be committed.

17. The Defence will rely in oral argument that, to the contrary, there is evidence that Mr Abd-Al-Rahman (assuming again, *arguendo*, the correctness of the Prosecution’s case that he is “*Ali Kushayb*”) sent out a very clear message that a number of women and girls at risk of rape were not to be touched.¹⁸ This powerfully evidences Mr Abd-Al-Rahman’s state of mind that no rapes should be committed by those allegedly under his command or control. It is absurd for the Prosecution to suggest, as it has in its Response, that 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”¹⁹ since this assumes that Mr Abd-Al-Rahman knew of the rapes that were committed in and around Bindisi. The Prosecution has failed to produce the slightest evidence that he did.

CONCLUSION

18. The Defence respectfully requests that the motion for acquittal be granted.

Respectfully submitted,



Dr Cyril Laucci,
Lead Counsel for Mr Ali Muhammad Ali Abd-Al-Rahman

Dated this 29th day of March 2023 at The Hague, The Netherlands

¹⁷ Prosecution’s Pre-Confirmation Brief, Annex A, ICC-02/05-01/20-346-Conf-AnxA, 16 April 2021; public redacted version, [ICC-02/05-01/20-346-AnxA-Red](#), 21 May 2021, *see eg* paras 33 (fn. 122), 76, 200, 203, 209.

¹⁸ [REDACTED]

¹⁹ Response, para. 11.