

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-02/05-01/20

Date: **11 April 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

Public Redacted Version of “Response on behalf of victims to the ‘Skeleton Argument in Defence Motion for Acquittal’”, 24 March 2023 (ICC-02/05-01/20-911-Conf)

Source: The Common Legal Representative of Victims

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

The Office of the Prosecutor

Mr Karim A. A. Khan
Ms Nazhat Shameem Khan
Mr Julian Nicholls

Counsel for the Defence

Mr Cyril Laucci
Mr Iain Edwards

Legal Representatives of the Victims

Ms Natalie von Wistinghausen
Mr Anand Shah

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

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

Mr Xavier-Jean Keïta

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Mr Pieter Vanaverbeke

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. The Common Legal Representative of Victims (“CLR/V”), on behalf of the 489 individuals presently admitted to participate in these proceedings, and further to the Trial Chamber’s instructions,¹ files this response to the “Skeleton Argument in Defence Motion for Acquittal”² in respect of counts 6 to 9 of the charges. The CLR/V advises that at least nine of the participating victims (three of whom are dual status witnesses) report being direct victims of conduct that likely constitutes other inhumane acts as a crime against humanity (count 6), outrages upon personal dignity as a war crime (count 7), and/or rape as war crime and crime against humanity (counts 8 and 9), arising from the attack on Bindisi and its surrounding areas on 15 and 16 August 2003.³
2. The CLR/V appreciates the Defence’s position, and as was made clear during the Prosecution’s presentation of evidence, that the Defence does not contest the core particulars of the relevant evidence of Prosecution witnesses who were direct victims of and/or witnessed acts falling within the definitions of counts 6 to 9.⁴
3. The Defence, however, submits that per the standard for a motion for acquittal, “the Prosecution has not presented evidence sufficient in law to sustain convictions”⁵ against the accused under the charged mode of liability of ‘inducing’, or that of ‘ordering’ (for which a Regulation 55(2) notice was issued⁶).
4. The Appeals Chamber of the Court has also described the proper test for a motion for acquittal (or a ‘no case to answer’ submission) as one in which the Trial

¹ Decision on the Defence’s application for leave to file a motion for acquittal, 10 March 2023, [ICC-02/05-01/20-900](#), paras 13, 15 (instructing the Prosecutor and CLR/V to file any response to the Defence’s motion for acquittal, not to exceed five pages, by 24 March 2023).

² Skeleton Argument in Defence Motion for Acquittal, 17 March 2023, ICC-02/05-01/20-903-Conf (“Acquittal Argument”).

³ These are participating victims: a/25010/21, a/10241/22, a/10363/22, a/10480/22 (P-1073), a/10244/22, a/10301/22 (P-0011), a/10364/22, a/10362/22, a/10486/22 (P-1074).

⁴ Acquittal Argument, paras 8, 14.

⁵ *Id.*, para. 4 (using the Appeals Chamber’s language in *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.

⁶ Decision on the Prosecution’s application for notice to be given pursuant to Regulation 55(2), 18 March 2022, [ICC-02/05-01/20-634](#).

Chamber should assess whether there are “substantial weaknesses in the evidence presented thus far by the prosecution”.⁷

5. In the view of the CLRV, such fundamental weaknesses do not exist in the Prosecution’s evidence in relation to Mr Abd-Al-Rahman’s alleged liability for inducing and/or ordering the commission of the acts underlying counts 6 to 9 of the confirmed charges. The Defence’s motion for acquittal in respect of these counts should accordingly be dismissed.

II. Submissions

6. The core of the Defence position is that the Prosecution’s evidence does not demonstrate in any respect that Mr Abd-Al-Rahman induced or ordered the “specific acts that factually underpin the [...] charges of inhumane acts or outrages upon personal dignity in counts 6-7”,⁸ and similarly, that there is no evidence at all “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” Document Containing the Charges.⁹
7. The Defence submits, for example, that even taking the Prosecution’s case at its highest in respect of the accused allegedly calling out to those under his command or control “Aksah amsah” (“wipe up [or out] and sweep [or swipe] away”), no inference can be drawn that these words “were meant (or intended) to order or induce the charged rapes to be committed”.¹⁰
8. The Defence’s position is built on a false premise – namely, that the acts underpinning charges 6-9 can be ringfenced and separated from the acts underlying counts 1-5 and 10-11, as well the larger context in which they occurred. Rather, the appropriate evidentiary lens through which counts 6-9 must be evaluated – taking the Prosecution’s case at its highest – includes, *inter alia*, the military campaign the accused allegedly led and participated in commencing on

⁷ *Gbagbo Appeals Judgment*, para. 302.

⁸ *Acquittal Argument*, para. 9 (italics in original).

⁹ *Id.*, para. 15.

¹⁰ *Id.*, para. 16.

15 August 2003, of which Bindisi and its surroundings was just one of multiple predominately Fur villages that was targeted for attack.

9. The manner in which these preceding uncharged attacks took place, as well as the charged attack on Kodoom, and Mr Abd-Al-Rahman's alleged actions during these events and what he would have observed of the Janjaweed militia allegedly under his control,¹¹ would have made clear to him that the acts underpinning counts 6-9 were virtually certain to occur in the ordinary course of events.¹² When properly viewed within this interconnected context, it is unclear on what basis the Defence rather arbitrarily submits that alleged acts underpinning counts 1-5 and 10-11,¹³ could be linked to Mr Abd-Al-Rahman's actions (taking the Prosecution's case at its highest),¹⁴ but that the acts underlying counts 6-9 could not.¹⁵
10. These connected attacks on primarily Fur villages that took place on 15 and 16 August 2003, are characterised by the wanton and dehumanizing nature of their commission. The Defence's attempt to distinguish the context and nature of the alleged acts underlying counts 1-5 and 10-11, from those underpinning counts 6-9, is therefore primarily one of fiction, not fact. Mr Abd-Al-Rahman's actions inducing or ordering those under his command or control to carry out the noted attacks on 15 and 16 August 2003 in the manner that they did, and his observation of the same, more than sufficiently demonstrates his culpability in respect of

¹¹ In respect of these preceding attacks and Mr Abd-Al-Rahman's alleged presence and actions, *see*, for example, the evidence of witnesses P-0874, P-0878, P-0921, P-1021.

¹² *Lubanga*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, 1 December 2014, [ICC-01/04-01/06-3121-Red](#), para. 447 (holding that the "applicable standard for the foreseeability of events" under Article 30(2)(b) and (3) of the Statute (mental element) is "virtual certainty", but not "absolute certainty").

¹³ *See*, for example, the evidence of: P-0007 (*subsequently granted victim status*), DAR-OTP-0088-0069-R02, paras 21, 22 ("They started firing randomly. [...] When the attackers got closer to the town, they started killing people and set fire to the huts. I heard them shouting 'Nuba nuba' or 'black' as they attacked the town. [...] Young boys, men, women and children were all killed as the attackers did not differentiate their targets."); P-0015 (*subsequently granted victim status*), DAR-OTP-0088-0187-R03, paras 24-28 (describing the chaotic situation and confusion of the population following the attack on Bindisi); [REDACTED], [REDACTED] (describing [REDACTED] Bindisi on the day following the attack, and finding "corpses everywhere. The town was burned down. There was no one there that we could see. People ran away.").

¹⁴ Acquittal Argument, para. 16.

¹⁵ *See*, for example, the evidence of P-0007, DAR-OTP-0088-0069-R02, para. 43 and ICC-02/05-01/20-T-089-CONF-ENG ET, pp 7-12 (describing the rapes and murders of three women, carried out in the open in Bindisi, in brutal fashion); P-0011 (*subsequently granted victim status*), ICC-02/05-01/20-T-091-CONF-ENG CT, p. 23-25 (describing her own rape and that of another woman, when they were under the control of Janjaweed attackers in the area surrounding Bindisi); P-0015, DAR-OTP-0088-0187-R03, paras 38-45, DAR-OTP-00000427, paras 16-18 (describing the rapes and abuse of a group of women who were under the control of Janjaweed attackers in the area surrounding Bindisi).

counts 6-9 under the standard applicable for motions for acquittal. Nothing in the evidence presented during the Prosecution case suggests that Mr Abd-Al-Rahman cautioned restraint or otherwise indicated to the men under his command and control – particularly after observing their actions during the attacks preceding Bindisi – that they should not cross certain legal, moral or cultural lines when carrying out the attacks in question, including on Bindisi and its surrounding areas. To the contrary, the use of exhortations like “Aksah amsah” in this context would have strongly conveyed to the attackers that no rules applied, and that all transgressions were acceptable and encouraged.

11. The testimony of [REDACTED], which the Defence indicates it will rely on, does not assist its position in relation to counts 8-9.¹⁶ Mr Abd-Al-Rahman’s intervention on behalf of several women and girls in the custody of [REDACTED] forces is said to have occurred several months after the 15 and 16 August 2003 attacks on Bindisi and other predominantly Fur villages. At most, it provides evidence of “Mr Abd-Al-Rahman’s state of mind”¹⁷ (or calculated decision) in this particular instance, [REDACTED].¹⁸ It does not evidence the fundamental moral or decisional bright line the Defence asserts.¹⁹
12. The Defence makes the further submission “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”.²⁰ While, as submitted, there was no need for the same or analogous acts to those underpinning counts 6 and 7 to have previously taken place within Mr Abd-Al-Rahman’s presence or knowledge to engage his responsibility, the Defence’s submission is also incorrect on its face.

¹⁶ Acquittal Argument, para. 17.

¹⁷ *Id.*, para. 17.

¹⁸ [REDACTED].

¹⁹ Acquittal Argument, para. 17 (“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.”)

²⁰ *Id.*, para. 10.

13. In particular, the prior recorded and *viva voce* testimony of dual status witness P-0986, when taking the Prosecution's case at its highest, establishes that Mr Abd-Al-Rahman was not only present at, but also specifically ordered, or at the very least induced the men under his control, to beat and whip the witness²¹ and to otherwise "torture" him,²² including binding the witness' hands, legs [REDACTED]²³ during the charged attack on Kodoom. P-0986 further testified that the individual he identified as Ali Kushayb put his foot on P-0986's neck and called him an "abid" ("slave").²⁴ This conduct, which the individual identified as Ali Kushayb is alleged to have directed and participated in, is analogous to the alleged acts underlying counts 6-7 of the confirmed charges.

III. Conclusion

14. For the reasons above, which the CLRV may elect to expand on during the scheduled 3 April hearing, the CLRV respectfully requests the Chamber to dismiss the Defence's motion for acquittal in respect to counts 6-9 of the charges.

Respectfully submitted,



Natalie v. Wistinghausen

Common Legal Representative of Victims

Dated this 11 April 2023

At Berlin, Germany

²¹ DAR-OTP-0222-0347-R01, para. 49.

²² *Id.*, para. 53.

²³ *Id.*, Para. 54.

²⁴ ICC-02/05-01/20-T-065-CONF-ENG ET, p. 9, line 4, to p. 11, line 18.