

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **4 March 2022**

**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”)**

**Confidential**

**Response to Prosecution’s application for notice  
to be given pursuant to Regulation 55(2) of the Regulations of the Court**

**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. By application dated 22 February 2022 ("Application"),<sup>1</sup> the Prosecution requested that Trial Chamber I give notice to the Parties and Participants of the possibility of the legal recharacterisation of facts related to Mr Abd-Al-Rahman's individual criminal responsibility, as described in the Decision on the Confirmation of Charges ("Confirmation Decision")<sup>2</sup> and the Document Containing the Charges ("DCC"),<sup>3</sup> pursuant to Regulation 55(2) of the Regulations of the Court ("RoC").
2. The Prosecution has requested that the Chamber notify the Parties and Participants of the possibility to change the legal characterisation of the facts and circumstances described in the charges related to Mr Abd-Al-Rahman's alleged participation in the attack on Kodoom, Bindisi and surrounding areas on 15 and 16 August 2003 (found in counts 1-11 of the DCC) to include the mode of liability of "ordering" under Article 25(3)(b) of the Rome Statute ("Statute").<sup>4</sup>
3. The Defence for Mr Abd-Al-Rahman ("Defence") opposes the Application in its entirety. Firstly, it was the Prosecution itself that chose to only charge "inducing" for counts 1-11 in the DCC as the appropriate mode of liability under Article 25(3)(b) of the Statute. It is incongruous for the Prosecution now to argue that Regulation 55 should be invoked to remedy a problem of its own making. Further, the Prosecution is plainly wrong in arguing that the findings of Pre-Trial Chamber II ("PTC") relating to modes of liability "cannot be considered exhaustive".<sup>5</sup>
4. Secondly, the Prosecution does not even begin to provide an explanation for the apparent inconsistency between its thinking behind the original charging decisions and its thinking today. It has not demonstrated the existence of any new

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<sup>1</sup> Prosecution's application for notice to be given pursuant to Regulation 55(2), ICC-02/05-01/20-604-Conf; public redacted version [ICC-02/05-01/20-604-Red](#), 22 February 2022.

<sup>2</sup> Corrected version of the "Decision on the confirmation of charges against Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')", [ICC-02/05-01/20-433-Corr](#), 9 July 2021 (corrected version 23 November 2021).

<sup>3</sup> Second Corrected Version of "Document Containing the Charges", ICC-02/05-01/20-325-Conf-Anx1-Corr2, [ICC-02/05-01/20-325-Conf-Anx1-Corr2-Red](#), 29 March 2021 (second corrected version 22 April 2021),

<sup>4</sup> Application, [ICC-02/05-01/20-604-Red](#), para. 2.

<sup>5</sup> Application, [ICC-02/05-01/20-604-Red](#), para. 12.

evidence that explains any change in its analysis of its case against Mr Abd-Al-Rahman that justifies recourse to Regulation 55 of the RoC.

5. Thirdly, the Application is unnecessary. Given the objective and subjective elements of the modes of liability of ordering and inducing that must be fulfilled, it is inconceivable that any potential accountability gaps might arise as a result of the legal qualifications confirmed in the pre-trial phase that may transpire to be incorrect.<sup>6</sup>

6. Fourthly, on the substance, the Prosecution inappropriately relies on uncharged attacks to support its allegations that Mr Abd-Al-Rahman gave instructions to others to commit crimes.

7. Pursuant to Regulation 23bis(2) of the RoC, this response is classified as confidential, mirroring the classification of the Application which itself contains sensitive information regarding the identities of Prosecution witnesses. A public redacted version will be filed shortly.

## II. *Submissions*

### (a) **The fundamental incongruity at the heart of the Application**

8. Firstly, it was open to the Prosecution to charge any of the myriad modes of liability available under Article 25(3)(a)-(d) of the Statute for the crimes alleged in counts 1-11 of the DCC. In Section 2 of the DCC, entitled “Common Elements of Modes of Individual Criminal Responsibility”,<sup>7</sup> the Prosecution specifically highlighted that it was its case that Mr Abd-Al-Rahman enjoyed a position of authority and influence at all material times. The Prosecution pleaded in terms that between at least August 2003 and at least April 2004 – that is, the time period during which the alleged attacks on Kodoom, Bindisi and surrounding areas on 15 and 16 August 2003 occurred – Mr Abd-Al-Rahman *inter alia* was a senior Militia/*Janjaweed* leader, and issued orders to members of GoS Forces including, in particular, those of lower rank.<sup>8</sup> At paragraph 16 of the DCC, the Prosecution pleaded that:

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<sup>6</sup> *Contra* Application, [ICC-02/05-01/20-604-Red](#), para. 7.

<sup>7</sup> DCC [ICC-02/05-01/20-325-Conf-Anx1-Corr2-Red](#), paras 13-29.

<sup>8</sup> DCC [ICC-02/05-01/20-325-Conf-Anx1-Corr2-Red](#), para. 14.

Between at least August 2003 and at least April 2004, the Militia/*Janjaweed* conducted armed operations in the Wadi Salih and Mukjar Localities. During this period, **ABD-AL-RAHMAN** was a senior leader of the Militia/*Janjaweed* in these localities... His orders, including orders to commit crimes, were obeyed by other members of the Militia/*Janjaweed*.<sup>9</sup>

9. At paragraph 26 of the DCC, the Prosecution pleaded that:

**ABD-AL-RAHMAN**, at times, issued orders to certain personnel of the GoS Forces, including to personnel of the SAF and PDF, which were obeyed. [...] This included orders to stay in or move to certain locations, to use or desist in using heavy weapons, arrest and detain persons, including in police and military facilities, transport detainees, and kill detainees, particularly in the Wadi Salih and Mukjar Localities.

10. Of most relevance, at paragraph 61 of the DCC, the Prosecution pleaded that:

Between about 15 and about 16 August 2003, **ABD-AL-RAHMAN** participated in the attack on Kodoom, Bindisi and surrounding areas with members of the Militia/*Janjaweed* and GoS Forces. [...] He also *gave instructions* during the operation to members of the GoS Forces...to follow him from one village to the next and to carry on with the attack.<sup>10</sup>

11. The Prosecution chose to charge Mr Abd-Al-Rahman under Articles 25(3)(b), (c), and (d) of the Statute for the crimes alleged in counts 1-11, but only for “inducing” under Article 25(3)(b),<sup>11</sup> notwithstanding it was its case that he “gave instructions” during the operations against Kodoom, Bindisi and surrounding areas. It would have been open to the Prosecution to charge “ordering” as well, given its arguments set out in paragraphs 13-25 of the Application. That “ordering” was not charged was a matter entirely for the Prosecution. As the PTC noted in the Confirmation Decision, “the Prosecutor is solely responsible for selecting and formulating the charges”.<sup>12</sup> The Prosecution relies extensively on findings made by the PTC in the Confirmation Decision in support of the Application.

12. The Prosecution accordingly placed all the evidence in its possession in support of its case of “inducing” liability under Article 25(3)(b) of the Statute during the confirmation proceedings, and the PTC accordingly confirmed charges 1-11 in the DCC under “inducing” liability, precisely as it was asked to do.

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<sup>9</sup> Emphasis added.

<sup>10</sup> Emphasis added.

<sup>11</sup> DCC, [ICC-02/05-01/20-325-Conf-Anx1-Corr2-Red](#), paras 27, 59- 63, 70.

<sup>12</sup> Confirmation Decision, [ICC-02/05-01/20-433-Corr](#), para. 96.

13. The Defence submits, therefore, that it is fundamentally incongruous for the Prosecution to now ask the Trial Chamber to invoke Regulation 55 of the RoC in order that the Chamber will “provide for a more fair and accurate representation” of Mr Abd-Al-Rahman’s alleged level of participation in the attack on Kodoom, Bindisi and surrounding areas, “consistent with his participation in other charged attacks.”<sup>13</sup> It is equally incongruous for the Prosecution to raise the spectre of “potential accountability gaps” arising out of what may transpire to be an incorrect legal qualification as confirmed by the PTC.<sup>14</sup> The Prosecution had many years to marshal and analyse its evidence and to prepare its case for confirmation. And according to its own submissions at paragraphs 13-25 of the Application, that evidence disclosed that “ordering” could have been charged in the DCC. Yet it was not. The situation that is presented to the Trial Chamber and the Defence virtually on the eve of trial is one that arises entirely out of the Prosecution’s own strategic decisions.

14. The fact that the situation is of the Prosecution’s own making and that the trial is due to start in one month’s time militate, it is submitted, against the granting of the Application.

15. Further, the Prosecution seeks to suggest that the PTC’s “determinations on all possible alternative modes for Mr Abd-Al-Rahman’s liability” in the Confirmation Decision “cannot be considered exhaustive.”<sup>15</sup> This submission does not survive scrutiny. The PTC stated that it considered that there were substantial grounds to believe that Mr Abd-Al-Rahman’s “contribution to the abovementioned crimes [counts 1-11] may be legally qualified under Article 25(3)(b) of the Statute”<sup>16</sup> without distinction before going on to specifically confirm “inducing”; the PTC did not confirm “ordering” or “soliciting” *proprio motu*. The PTC gave consideration to all available modes of liability, whether pleaded by the Prosecution or not. A clear example of this is that the PTC indicated a degree of surprise that the Prosecution had not sought confirmation of the Kodoom and Bindisi charges under Article

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<sup>13</sup> Application, [ICC-02/05-01/20-604-Red](#), para. 4.

<sup>14</sup> Application, [ICC-02/05-01/20-604-Red](#), para. 7.

<sup>15</sup> Application, [ICC-02/05-01/20-604-Red](#), para. 12.

<sup>16</sup> Confirmation Decision, [ICC-02/05-01/20-433-Corr](#), para. 95.

25(3)(a) (direct and indirect perpetration or co-perpetration) of the Statute.<sup>17</sup> As acknowledged by the Prosecution, the PTC deemed it “unnecessary to address Mr Abd-Al-Rahman’s alleged individual criminal responsibility under Article 25(3)(c) or (d) of the Statute”.<sup>18</sup>

16. It is submitted that the only reasonable inference to be drawn is that the PTC did intend its findings to be exhaustive and not merely “the broad parameters of Mr Abd-Al-Rahman involvement”<sup>19</sup> in the attacks.

17. Alternatively, if the Trial Chamber concludes that the PTC did not intend its findings to be exhaustive, the Defence would submit that the PTC’s deeming that it was unnecessary to address other modes of liability was an *obiter* comment. As such, it cannot properly be deployed by the Prosecution in an attempt to revisit its earlier strategic choices on the basis of similar evidence. The reliance on evidence referred to in the Prosecution’s Trial Brief does not justify its seeking to providing notice under Regulation 55 of the RoC a few short weeks from the start of the trial.

**(b) The Prosecution does not explain the evolution of its case theory in relation to counts 1-11**

18. Secondly, the Prosecution does not even begin to provide an explanation for the change in its case theory in relation to counts 1-11 such that Regulation 55 of the RoC should be invoked. During the entire pre-confirmation phase of proceedings, and up to the eve of trial, the Prosecution advanced “inducing” as the appropriate mode of liability for the alleged attacks on Kodoom, Bindisi and surrounding areas. Whilst some reference is made to “additional corroborating evidence” of Mr Abd-Al-Rahman’s alleged orders that has been gathered post-confirmation,<sup>20</sup> it is clear that the Prosecution relies predominantly on the evidence that has been available for some time and that was set out in the DCC and Confirmation Decision in order to seek to establish liability under the mode of “ordering”.<sup>21</sup>

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<sup>17</sup> Confirmation Decision, [ICC-02/05-01/20-433-Corr](#), para. 96.

<sup>18</sup> Application, [ICC-02/05-01/20-604-Red](#), para. 12 and fn. 19.

<sup>19</sup> Application, [ICC-02/05-01/20-604-Red](#), para. 12.

<sup>20</sup> Application, [ICC-02/05-01/20-604-Red](#), fn. 15.

<sup>21</sup> Application, [ICC-02/05-01/20-604-Red](#), fn. 15.

The Prosecution argues that there is a need for notice under Regulation 55 because there is evidence not only of the influence exercised by Mr Abd-Al-Rahman (required for “inducing”) but also of his use of his “*de facto* position of authority to order” the Militia/*Janjaweed* and/or GoS forces to commit the crimes alleged in counts 1-11.<sup>22</sup> But much if not most of this evidence was already in the possession of and had been analysed by the Prosecution. It was already referred to in the DCC and in the Prosecution’s Pre-Trial Brief.<sup>23</sup> The Prosecution is entirely silent in terms of providing reasons for its new approach, and in terms of justifying why it seeks to mould its case at the eleventh hour. This lack of justification militates against the granting of the Application.

**(c) The Application is unnecessary**

19. Thirdly, it is submitted that the request for notice under regulation 55 formulated in the Application is simply not necessary. The Prosecution acknowledges that, “[a] principal purpose of regulation 55 is to close any potential accountability gaps that might arise as a result of the legal qualifications confirmed in the pre-trial phase that turn out to be incorrect.”<sup>24</sup> There is support for the proposition that closing any accountability gap being “a principal purpose” of the use of Regulation 55 of the RoC has evolved into “*the* principal purpose”.<sup>25</sup>

20. Be that as it may, there is no risk of any accountability gap in the particular circumstances of Mr Abd-Al-Rahman’s case were the Prosecution to continue to pursue him on the basis of “inducing” as opposed to “ordering”.

21. The respective elements of “ordering” and “inducing” were considered in the *Ntaganda* case<sup>26</sup> and are detailed in the following table:

| Ordering                                            | Inducing                                                                                 |
|-----------------------------------------------------|------------------------------------------------------------------------------------------|
| (a) the person (“P.”) is in a position of authority | No superior-subordinate relationship between P. and the physical perpetrator is required |

<sup>22</sup> Application, [ICC-02/05-01/20-604-Red](#), para. 10.

<sup>23</sup> [ICC-02/05-01/20-346-Red](#), paras 200-201.

<sup>24</sup> Application, [ICC-02/05-01/20-604-Red](#), para. 7.

<sup>25</sup> See eg. Decision on the Prosecution’s Application for Notice to be given pursuant to Regulation 55(2) on Mr Yekatom’s Individual Criminal Responsibility, [ICC-01/14-01/18-542](#), 2 June 2020, para. 10.

<sup>26</sup> Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, [ICC-01/04-02/06-309](#), 9 June 2014, para. 145 (“ordering”) and para. 153 (“inducing”).



|                                                                                                                                                                                                     |                                                                                                                                                                                               |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| (b) P. instructs another person in any form to either: (i) commit a crime which in fact occurs or is attempted, or (ii) perform an act or omission in the execution of which a crime is carried out | (a) P. exerts influence over another person to either: (i) commit a crime which in fact occurs or is attempted or (ii) perform an act or omission as a result of which a crime is carried out |
| (c) the order has a direct effect on the commission or attempted commission of the crime                                                                                                            | (b) the inducement has a direct effect on the commission or attempted commission of the crime                                                                                                 |
| (d) P. is at least aware that the crime will be committed in the ordinary course of events as a consequence of the execution or implementation of the order                                         | (c) P. is at least aware that the crimes will be committed in the ordinary course of events as a consequence of the realisation of the act or omission                                        |

22. It can be seen that the elements of “inducing” that need to be satisfied by the Prosecution are subsumed within and are less onerous than those of “ordering”. In essence, “ordering” is simply “inducing” with the added element of proof that the accused is in position of authority. If the Prosecution successfully establishes proof of “ordering”, it is submitted that they will have necessarily established proof of “inducing”. If on the other hand the legal qualifications for “inducing” confirmed in the pre-trial phase turn out to be incorrect, requiring proof of an additional element of the person being in a position of authority to establish “ordering” will not save the Prosecution from an inevitable failure to establish liability. Logically, therefore, the addition of “ordering” does nothing to close any “potential accountability gaps”.

**(d) The Prosecution inappropriately relies on uncharged attacks to support its allegations of instructions to commit crime**

23. Finally, on the substance, the Defence notes that in support of its efforts to establish Mr Abd-Al-Rahman’s individual criminal responsibility for “ordering” in relation to counts 1-11, the Prosecution seeks to rely *inter alia* on pattern of conduct evidence pertaining to the alleged attacks on the villages of Nyerli and Tiro.<sup>27</sup> As acknowledged by the Prosecution, neither of these alleged attacks are charged in the DCC.<sup>28</sup> Long-standing jurisprudence going back to the *ad hoc* Tribunals is authority

<sup>27</sup> Application, [ICC-02/05-01/20-604-Red](#), para. 21 and fn 48.

<sup>28</sup> Application, [ICC-02/05-01/20-604-Red](#), fn 48.

for the proposition that instructions or the giving of orders can be established through circumstantial evidence.<sup>29</sup> The Defence submits that similar fact evidence of the type relied on by the Prosecution does not amount to circumstantial evidence that could properly found an inference that orders were given by Mr Abd-Al-Rahman in relation to the Kodoom and Bindisi charges, thereby satisfying the second element of the “ordering” mode of liability.

### III. Conclusion

24. For the foregoing reasons, the Defence respectfully requests that the Trial Chamber dismisses the Application.



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

Done on 4 March 2022, in The Hague, The Netherlands.

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<sup>29</sup> [ICC-01/04-01/12-1-Red](#), para. 63. See also, *Prosecutor v. Jean de Dieu Kamuhanda*, ICTR-99-54A-A, Appeals Judgement, 19 September 2005, para. 76; *Prosecutor v. Dario Kordić & Mario Čerkez*, IT-95-14/2-T, Trial Judgement, 26 February 2001, para. 388.