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Date: **16 April 2021**

**PRE-TRIAL CHAMBER II**

**Before:** Judge Rosario Salvatore Aitala , Presiding Judge  
Judge Antoine Keisa-Mbe Mindua  
Judge Tomoko Akane

**SITUATION IN DARFUR, SUDAN**

**IN THE CASE OF  
THE PROSECUTOR *v.*  
ALI MUHAMMAD ALI ABD-AL-RAHMAN (“ALI KUSHAYB”)**

**Public**

**Submissions on behalf of Victims on the Defence’s Challenge  
to the Court’s Jurisdiction  
(“*Exception d’incompétence*” (ICC-02/05-01/20-302))**

**Source:** Office of Public Counsel for Victims

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

**The Office of the Prosecutor**

Ms Fatou Bensouda

Mr Julian Nicholls

**Counsel for the Defence**

Mr Cyril Laucci

**Legal Representatives of the Victims**

Ms Amal Clooney

Mr Nasser Mohamed Amin Abdalla

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**The Office of Public Counsel for  
Victims**

Ms Paolina Massidda

Ms Sarah Pellet

Ms Ludovica Vetrucchio

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

**States' Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Mr Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and  
Reparations Section**

**Other**

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## I. INTRODUCTION

1. Counsel representing the victims having communicated with the Court,<sup>1</sup> and more generally the victims' interests in the proceedings,<sup>2</sup> requests Pre-Trial Chamber II (the "Chamber") to dismiss the Defence's challenge to the Court's jurisdiction (the "Defence Challenge")<sup>3</sup> in its entirety.

2. At the outset, Counsel submits that the Defence Challenge must be dismissed *in limine* as the Chamber lacks the authority to review the legality of a Security Council resolution.

3. Should the Chamber be minded to entertain the merits of the Defence Challenge, Counsel posits that the Security Council validly referred the Situation in Darfur to the International Criminal Court (the "Court" or the "ICC") in adopting Resolution 1593 (2005) and correctly identified its temporal and territorial parameters in accordance with the Court's legal framework and practice.

4. Moreover, the Defence has no standing before the Chamber to entertain the Court's financial management and cooperation agreements. Accordingly, the Defence's arguments challenging the legality of Resolution 1593 (2005) on the basis of budgetary and logistical considerations should be summarily dismissed. In the alternative, Counsel submits that financial and cooperation agreements between the ICC and the United Nations (the "UN") are the result of ancillary negotiations which fall outside the scope of both article 13(b) of the Rome Statute (the "Statute") and the relevant Security Council resolutions. As such, they do not affect the object and purpose of the Statute and of the Security Council referrals.

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<sup>1</sup> See the "Decision establishing the principles applicable to victims' and representation during the Confirmation Hearing" (Pre-Trial Chamber II, Single Judge), [No. ICC-02/05-01/20-259](#), 18 January 2021. See also, the "Decision supplementing the Chamber's first decision on victims' participation and representation and providing additional guidance" (Pre-Trial Chamber II, Single Judge), [No. ICC-02/05-01/20-277](#), 5 February 2021; and the "Order setting time limits for submissions in relation to the Defence *Exception d'incompétence*" (Pre-Trial Chamber II), [No. ICC-02/05-01/20-321](#), 25 March 2021.

<sup>2</sup> See regulation 81 of the Regulations of the Court.

<sup>3</sup> See the "*Exception d'incompétence*", [No. ICC-02/05-01/20-302](#), 16 March 2021 (the "Defence Challenge").

5. Lastly, Counsel argues that the Security Council referral under article 13(b) is valid and does not contradict articles 22 and 24 of the Statute. Security Council referrals are necessarily retrospective. The limit to their retroactivity coincides with the date of the entry into force of the Statute, namely 1 July 2002. This reading is confirmed by the letter and drafting history of articles 11 and 13, as well as by articles 22 and 24 of the Statute.

6. The jurisdiction *rationae materiae* of the Court – together with the mechanisms triggering such jurisdiction over non-State Parties – have been affirmed and agreed upon by the Security Council at the time of the entry into force of the Statute. By virtue of article 25 of the UN Charter, UN Member States have agreed to accept and carry out the decisions of the UN Security Council. Accordingly, Sudan has an obligation since 1 July 2002 to accept the material jurisdiction of the Court following a referral by the Security Council under Chapter VII of the UN Charter and article 13(b) of the Statute.

7. To the extent possible, Counsel discussed the Defence Challenge with the victims it represents. Counsel notes it is difficult for victims to fully appreciate the complex legal issues raised therein. However, they understand that a successful challenge to the Court's jurisdiction may halt the present proceedings. In this regard, victims have all indicated that they have been waiting for justice for many years, and they consider that the ICC is the only court of law able to impartially and independently prosecute Mr Abd-Al-Rahman for the crimes he allegedly committed.

## II. PROCEDURAL HISTORY

8. On 16 March 2021, the Defence filed a challenge to the Court's jurisdiction.<sup>4</sup>

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<sup>4</sup> See the Defence Challenge, *supra* note 3.

9. On 19 March 2021, the Prosecution filed the “Request to set out a procedure under rule 58(2) with respect to the Defence’s Challenge of the Court’s jurisdiction” (the “Prosecution Request”).<sup>5</sup>

10. On 22 March 2021, Counsel filed her response supporting the Prosecution Request asking for a similar deadline to submit observations to be applied to both participants and the State of Sudan.<sup>6</sup>

11. On 25 March 2021, the Chamber determined that the Prosecutor, the UN Security Council, and victims having communicated with the Court in relation to the present case, may submit written observations by no later than 16 April 2021.<sup>7</sup>

12. On 29 March 2021, the Prosecution filed the Document Containing the Charges.<sup>8</sup>

### **III. PRELIMINARY OBSERVATIONS – THE DEFENCE CHALLENGE MUST BE DISMISSED *IN LIMINE* AS THE CHAMBER LACKS THE AUTHORITY TO REVIEW A SECURITY COUNCIL RESOLUTION**

13. The Defence advances two separate sets of arguments to support its challenge to the Court’s jurisdiction. Both put into question the legality of Resolution 1593 (2005)<sup>9</sup> and the ensuing referral under article 13(b) of the Statute.

14. In its first ground, the Defence takes issue with the content of the Resolution in relation to (i) the territorial parameters of the Situation referred;<sup>10</sup> (ii) the provision according to which the UN shall not bear expenses incurred in connection with the

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<sup>5</sup> See the “Prosecution’s request to set out a procedure under rule 58(2) with respect to the Defence’s challenge of the Court’s jurisdiction (ICC-02/05-01/20-302)”, [No. ICC-02/05-01/20-313](#), 19 March 2021.

<sup>6</sup> See the “Response on behalf of Victims to the Prosecution’s Request to set a procedure under Rule 58(2) of the Rules of Procedure and Evidence”, [No. ICC-02/05-01/20-318](#), 22 March 2021.

<sup>7</sup> See the “Order setting time limits for submissions in relation to the Defence *Exception d’incompétence*”, *supra* note 1.

<sup>8</sup> See the “Prosecution’s submission of the Document Containing the Charges”, No. [ICC-02/05-01/20-325](#), 29 March 2021.

<sup>9</sup> See Resolution 1593 (2005) adopted by the Security Council at its 5158<sup>th</sup> meeting, on 31 March 2005, UN Doc. [S/RES/1593 \(2005\)](#).

<sup>10</sup> See the Defence Challenge, *supra* note 3, paras. 17-32.

referral;<sup>11</sup> and (iii) its irreconcilability with subsequent Security Council Resolution 2559 (2020), ending the mandate of the African Union-United Nations Hybrid Operation in Darfur (UNAMID) on 31 December 2020.<sup>12</sup>

15. In its second ground, the Defence challenges the temporal parameters of the Situation as set in Resolution 1593 (2005).<sup>13</sup> The Defence argues that the Security Council impermissibly triggered the Court's jurisdiction retroactively over conducts that took place in 2003-2004. According to the Defence, the Security Council was barred from referring the Situation in Darfur since 1 July 2002 and the Court should be considered to have jurisdiction over the Situation only from the date of the referral, namely on 31 March 2005.

16. Counsel submits that the Defence Challenge must be dismissed *in limine* as the Chamber lacks the authority to review a Security Council resolution. The Security Council has broad discretion in exercising its authority under Chapter VII of the UN Charter and there are few limits on the exercise of said discretion. In fact, the Security Council "*cannot, in principle, act arbitrarily and unfettered by any restraints*"<sup>14</sup> or "*for an ulterior purpose*".<sup>15</sup> Such a limitation is a corollary of the principle that the organs of the UN must act in accordance with the powers delegated to them.<sup>16</sup> Accordingly, Security

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<sup>11</sup> *Idem*, paras. 33-43.

<sup>12</sup> *Idem*, paras. 44-52. See also, Resolution 2559 (2020) adopted by the Security Council on 22 December 2020, UN Doc. [S/RES/2559 \(2020\)](#).

<sup>13</sup> See the Defence Challenge, *supra* note 3, paras. 77-78.

<sup>14</sup> See ICTY, *The Prosecutor v. Tadić*, "[Decision on the Defence Motion on Jurisdiction](#)" (Trial Chamber), Case No. (IT-94-1), 10 August 1995, paras. 14-15, citing BOWETT (D. W.), *The Law of International Institutions*, 4<sup>th</sup> Edition, Stevens & Sons for the London Institute of Foreign Affairs, London, 1982, p. 33; and BROWNLIE (I.), "[The Decisions of Political Organs of the United Nations and the Rule of Law](#)", in ST. JOHN MACDONALD (R.) (Ed.), *Essays in Honour of Wang Tieya*, M. Nijhoff Publishers, Dordrecht, London, 1992, p. 95.

<sup>15</sup> *Idem*, para. 15. See also article 24(1) and (2) of the United Nations Charter, providing that the UN Members: "*confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf*" and that in exercising its powers the Security Council may act only "*in accordance with the Purposes and Principles of the United Nations*".

<sup>16</sup> See ICJ, [Reparations for injuries suffered in the service of the United Nations](#), Advisory Opinion of 11 April 1949, I.C.J. Reports, 1949, p. 182. See also, WOOD (M. C.), "[The Interpretation of Security Council Resolutions](#)", *Max Planck Yearbook of United Nations Law*, Vol. 20, 2017, p. 77; FRANK (T.), "[The Power of Appreciation: Who is the ultimate guardian of UN legality?](#)", *American Journal of International*

Council referrals could not direct the Court to act outside of its statutory legal framework by, for example, asking it to investigate crimes committed prior to the entry into force of the Statute.<sup>17</sup>

17. Although it is not for the Court to evaluate the reasonableness of the acts of the Security Council, it is without doubt that, with respect to the referral of the Situation in Darfur, the Security Council did not act arbitrarily. To the contrary, the referral is based on the Security Council's informed finding that violations of international humanitarian law were occurring in Darfur and that said violations amounted to a threat to peace and security. In addition, the referral is complemented by the relevant norms of the Statute providing for a detailed descriptions of the punishable conducts and for the explicit temporal limit of 1 July 2002 to the retroactive exercise of the Court's jurisdiction.<sup>18</sup> The Security Council's discretion in the use of its Chapter VII powers operated in conformity with the Statute when referring the Situation in Darfur to the Court.<sup>19</sup>

18. Accordingly, in the case at hand the jurisdictional parameters of the Situation in Darfur set by the Security Council are not to be interpreted by the Chamber. The Resolution explicitly states that the Security Council acted "*under Chapter VII of the United Nations Charter*".<sup>20</sup> As mentioned *supra*,<sup>21</sup> the Security Council has discretion as to the characterisation of a particular situation as a threat to international peace and

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*Law*, Vol. 86(3), 1992, p. 521; and PAENSON (I.), *Manual of the terminology of Public International Law (Law of Peace) and International Organizations*, Bruylant, Brussels, 1983, p. 362.

<sup>17</sup> See RASTAN (R.), "[Jurisdiction](#)", in STAHN (C.) (Ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, Oxford, 2015, pp. 141-178. Accordingly, the Court still cannot prosecute cases outside of its subject matter (article 5), temporal (article 11(1)) or personal (article 26) jurisdiction, even if arising from a Security Council referral.

<sup>18</sup> *Ibid.*

<sup>19</sup> See CONDORELLI (L.) and VILLALPANDO (S.), "[Can the Security Council Extend the ICC's Jurisdiction?](#)" in CASSESE (A.), GAETA (P.), and JONES (J.R.W.) (Eds.), *The Rome Statute of the International Criminal Court: a commentary*, Vol. I, Oxford University Press, Oxford, 2002, pp. 575-578.

<sup>20</sup> See Resolution 1593 (2005), *supra* note 9.

<sup>21</sup> See *supra* para. 7.

security and the Court cannot judicially review the Security Council's actions.<sup>22</sup> Once the Security Council has determined the existence of a threat to international peace and security under article 39 of the Charter, it lies at its discretion to determine which measures are required to maintain or restore international peace and security. Such a determination may be influenced by a plethora of complex legal, political, and other considerations. The inapplicability of strictly legal criteria to that determination makes it impossible to establish any meaningful standard of review.

19. The Defence seems to be aware of this limitation when suggesting that it is not seeking a judicial review of Resolution 1593 (2005).<sup>23</sup> However, despite its submissions to the contrary, the Defence is in fact challenging the legality of the Security Council's actions. Not only in relation to the jurisdictional parameters set in the Resolution at hand but also regarding relevant UN budgetary considerations and cooperation issues.

20. A judicial review involves a court examining *"the steps taken by another body acting administratively – such as whether it acted reasonably, took irrelevant matters into account and afforded natural justice to the parties – but with the objective of making a declaration of rights or a binding order"*.<sup>24</sup> In the present case, a judicial review of Resolution 1593 (2005) would entail reviewing and determining (i) whether the Security Council validly assessed a threat to international peace and security under Chapter VII of the Charter; and (ii) whether it acted within its powers when referring the Situation in Darfur to the ICC as of 1 July 2002.

21. However, the Statute does not vest the Chambers of this Court with any power to review the actions taken by the Security Council nor to make either a binding order or a declaration carrying legal weight in respect of its actions. Similarly, the

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<sup>22</sup> See STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/AC/AR90.1 F002, "[Decision on the Defence Appeals against the Trial Chamber's 'Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal'](#)" (Appeals Chamber), 24 October 2012.

<sup>23</sup> See the Defence Challenge, *supra* note 3, paras. 32 *et seq.*

<sup>24</sup> See STL, *Ayyash et al.*, Case No. STL-11-01/PT/TC F0352, "[Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal](#)" (Trial Chamber), 27 July 2012, paras. 54-55.

UN Charter is silent on the possibility to review the Security Council's determinations. Assessing whether a *situation of crisis*<sup>25</sup> existed in Darfur and justified its referral to the ICC, is the sole responsibility of the Security Council. The same holds true for the determination of whether referring said situation pursuant to article 13(b) of the Statute is in fact likely to be conducive to the restoration of peace and security in Darfur, and more generally in Sudan. As such, no judicial body can review these determinations.

22. The Appeals Chamber of the Special Tribunal for Lebanon (the "STL") rejected the Defence's challenge to the legality of the Tribunal established by Security Council's Resolution 1757 (2007),<sup>26</sup> on this ground alone.<sup>27</sup> Apart from one exception before the ICTY in relation to Resolution 827 (1993),<sup>28</sup> no other international and regional court has ever hold that it had the authority to judicially review Security Council resolutions. In the *Tadić* case, a majority of Judges of the Appeals Chamber decided that it had the authority "*to examine the plea against its jurisdiction based on the invalidity of its establishment by the Security Council*"<sup>29</sup> and that it was not barred from doing so by the "*so called 'political' or 'non-justiciable' nature of the issues it raises*".<sup>30</sup>

23. In reaching this conclusion, the ICTY Appeals Chamber relied upon its incidental or inherent jurisdiction, as recognised in decisions of the International Court

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<sup>25</sup> See the "Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana" (Pre-Trial Chamber I), [No. ICC-01/04-01/10-1](#), 11 October 2010, para. 6.

<sup>26</sup> See Resolution 1757 (2007), adopted by the Security Council at its 5685th meeting, on 30 May 2007, UN Doc. [S/RES/1757 \(2007\)](#).

<sup>27</sup> See STL, *Ayyash et al.*, "Decision on the defence appeals against the trial chamber's 'decision on the defence challenges to the jurisdiction and legality of the tribunal'", *supra* note 22.

<sup>28</sup> See Resolution 827 (1993) adopted by the Security Council at its 3217<sup>th</sup> meeting, on 25 May 1993, UN Doc. [S/RES/827 \(1993\)](#).

<sup>29</sup> See ICTY, *The Prosecutor v. Tadić*, "[Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction](#)" (Appeals Chamber), Case No. (IT-94-1), 2 October 1995, para. 22.

<sup>30</sup> *Idem*, para. 25.

of Justice (the “ICJ”).<sup>31</sup> However, as also noted by the Appeals Chamber of the STL,<sup>32</sup> this case law does not support the conclusion that a judicial body is competent to exercise judicial review over the Security Council’s actions. In the *Namibia* Advisory Opinion, the Security Council itself requested the ICJ for an advisory opinion which involved the legal consequences of its Resolution 276 (1970), issued pursuant to Chapter VII of the UN Charter. In order to address the question, the ICJ briefly referred to two related Security Council resolutions but did not review their validity. Similarly, in the *Effect of Awards* advisory opinion, the General Assembly itself requested the ICJ to provide an advisory opinion as to whether it could refuse to give effect to an award of compensation made by the UN Administrative Tribunal. The ICJ opined that the UN General Assembly had the authority to create the UN Administrative Tribunal, and to explicitly authorise the latter to issue orders binding upon it.<sup>33</sup> It is noteworthy that (i) the General Assembly itself requested the ICJ to provide the advisory opinion; and (ii) as an advisory opinion, it was without binding legal effect.

24. There is in fact a difference between exercising judicial review in a non-binding advisory opinion and exercising judicial review for the purpose of issuing a binding legal order. Had the ICTY Appeals Chamber determined that the Security Council had not validly exercised its authority, this would have negated the effect of Security Council Resolution 827 (1993).<sup>34</sup> In the case at hand, the ultimate consequence of the Chamber reviewing the legality of the Security Council’s actions and making a similar finding, would be to discontinue the proceedings in the Situation in Darfur, directly rendering nugatory the will of the Security Council as expressed in Resolution 1593 (2005). Such a decision would clearly go beyond the mere provision

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<sup>31</sup> *Idem*, paras. 20-21 (relying on ICJ, [Legal Consequences for States of the Continued Presence of South Africa on Namibia \(South West Africa\) notwithstanding Security Council Resolution 276 \(1970\)](#), Advisory Opinion of 21 June 1971; and ICJ, [Effect of Awards of Compensation made by the United Nations Administrative Tribunal](#), Advisory Opinion of 13 July 1954 (the “*Effect of Awards* Advisory Opinion”).

<sup>32</sup> See STL, *Ayyash et al.*, “Decision on the defence appeals against the trial chamber’s ‘decision on the defence challenges to the jurisdiction and legality of the tribunal’”, *supra* note 22, para. 41.

<sup>33</sup> See ICJ, *Effect of Awards* Advisory Opinion, *supra* note 31, pp. 53, and 56-61.

<sup>34</sup> See Resolution 827 (1993), *supra* note 28.

of advice and guidance, as in the ICJ advisory opinions analysed *supra*, and would have the effect of a binding legal order.

25. In light of the above, Counsel submits that the Defence Challenge must be dismissed *in limine*. In the alternative, should the Chamber be minded to entertain the Defence Challenge's merits, Counsel provides the following observations thereto.

#### IV. SUBMISSIONS ON THE MERITS OF THE DEFENCE CHALLENGE

##### A. The Security Council validly referred the *Situation in Darfur* to the Court through Resolution 1593 (2005)

26. The Defence challenges the legality of the Security Council Resolution 1593 (2005) and ensuing referral under article 13(b) of the Statute, on the grounds that:

- (i) a *situation* before the Court must always be interpreted as encompassing the entirety of the country's territory and cannot be limited to a specific geographical zone, such as the Darfur in Sudan;<sup>35</sup>
- (ii) the indication in paragraph 7 of the Resolution 1593 (2005) that the United Nations shall not bear expenses incurred in connection with the referral is contrary to article 115(b) of the Statute;<sup>36</sup>
- (iii) the referral has been invalidated by Security Council Resolution 2559 (2020), ending the mandate of the African Union-United Nations Hybrid Operation in Darfur (UNAMID) on 31 December 2020<sup>37</sup> and thereby contradicting the UN cooperation obligations under

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<sup>35</sup> See the Defence Challenge, *supra* note 3, paras. 17-32.

<sup>36</sup> *Idem*, paras. 33-43.

<sup>37</sup> See Resolution 2559 (2020), *supra* note 12.

article 2, 87(6), and 115(b) of the Statute and article 3 of the Agreement between the ICC and the UN.<sup>38</sup>

27. Counsel submits that none of these arguments affects the legality of Resolution 1593 (2005), the validity of the referral and, as such, the Court's jurisdiction over the Situation in Darfur. The cumulative consideration of the identified flaws calls for the dismissal of the Defence's arguments in their entirety.

**1. *The Security Council correctly identified the Situation in accordance with the legal framework and practice of the Court***

28. The Security Council validly exercised its discretion in identifying (i) a situation of crisis in Darfur, justifying a referral under article 13(b) of the Statute; and (ii) the jurisdictional parameters thereof, in accordance with the existing legal framework and practice of the Court. In fact, the overall Security Council's referral as formulated through Resolution 1593 (2005) is in line with the Court's relevant provisions and constant jurisprudence.

29. Contrary to the Defence's submissions,<sup>39</sup> the definition of the term '*situation*' before the ICC has never been interpreted as necessarily encompassing the entirety of a State territory. There is no provision suggesting such an interpretation in the ICC legal texts, and none of the Defence's references to the Preparatory Works on article 13(b) of the Statute points to such a conclusion.<sup>40</sup>

30. The choice of the drafters to prefer the term "*situation*" over "*case*", as well as the reference to Security Council's establishment of the *ad hoc* Tribunals, were essentially linked to the need that referrals enact a broader *mandatory jurisdiction* and preserve the independence of the Prosecutor – who should "*be free to decide whether*

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<sup>38</sup> See the Defence Challenge, *supra* note 3, paras. 44-52. See also the "Negotiated Relationship Agreement between the International Criminal Court and the United Nations", [ICC-ASP/3/Res.1](#), entered into force on 4 October 2004 (the "UN-ICC Agreement").

<sup>39</sup> See the Defence Challenge, *supra* note 3, paras. 17-32.

<sup>40</sup> *Idem*, paras. 22-24.

*there [is] sufficient evidence to indict a particular individual for a crime”.*<sup>41</sup> Accordingly, the Security Council “*would merely refer a general matter or situation to the court, as opposed to bringing a case against a specific individual – which would preserve the independence and autonomy of the court in the exercise of its investigative, prosecutorial and judicial functions*”.<sup>42</sup>

31. This approach is also in line with the interplay between the exercise of the Court’s jurisdiction and the principle of complementarity. As noted by Pre-Trial Chamber I in the *Mbarushimana* case, the existence of a link between the jurisdictional scope of a situation and the case at hand “*is made necessary by the principles governing the relationship between the Court and the criminal jurisdictions of the States, whereby the primary responsibility for investigating and prosecuting the most serious crimes remains vested in States*”.<sup>43</sup> The Pre-Trial Chamber further observed, “[t]he Statute cannot be interpreted as permitting a State to permanently abdicate its responsibilities by referring a wholesale of present and future criminal activities comprising the whole of its territory, without any limitation whether in context or duration. Such an interpretation would be inconsistent with the proper functioning of the principle of complementarity”.<sup>44</sup>

32. Accordingly, a State cannot provide the Court with jurisdiction “*carte blanche*”<sup>45</sup> and thereby “*abdicate its responsibility for exercising jurisdiction over atrocity crimes for eternity*”.<sup>46</sup> In this sense, a referral of a situation – whether by the Security Council under article 13(b) of the Statute or by a State Party under article 14 of the Statute – cannot be left indeterminate and it must adhere to certain jurisdictional parameters, in terms of temporal and geographical scope of the alleged events. The entire ‘complementarity’ framework applies to all cases, regardless of the mechanism used

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<sup>41</sup> See the Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I: Proceedings of the Preparatory Committee during March-April and August 1996, Supplement No. 22, UN Doc. [A/51/22](#), 13 September 1996, para. 133.

<sup>42</sup> See the Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court, Fiftieth Session, Supplement No. 22, UN Doc. [A/50/22](#), 6 September 1995, para. 120.

<sup>43</sup> See the “Decision on the ‘Defence Challenge to the Jurisdiction of the Court’” (Pre-Trial Chamber I), [No. ICC-01/04-01/10-451](#), 26 October 2011, para. 21.

<sup>44</sup> *Ibid.*

<sup>45</sup> See RASTAN (R.), “[The Jurisdictional Scope of Situations before the International Criminal Court](#)”, *Criminal Law Forum*, Vol. 23, 2012, p. 6.

<sup>46</sup> See the “Decision on the ‘Defence Challenge to the Jurisdiction of the Court’”, *supra* note 43, para. 16.

to trigger the Court's jurisdiction, including therefore when the referral emanates from the Security Council – as evidenced by the admissibility decisions in the Libya cases.<sup>47</sup>

33. Resolution 1593 (2005) while triggering the Court's jurisdiction over crimes committed on the territory of a non-State Party also correctly identified the jurisdictional parameters of the Situation referred – namely, crimes under the Statute that appear to have been committed in Darfur since 1 July 2002. The Defence confounds the mechanism triggering the Court's jurisdiction with regard to a non-State Party with the scope of a situation and ensuing investigations. Indeed, as per the practice of this Court, several *situations* can be opened in one and the same country depending on the parameters set by the relevant referral(s).<sup>48</sup>

34. As noted in the *Mbarushimana* case, *"it is only within the boundaries of the situation of crisis for which the jurisdiction of the Court was activated that subsequent prosecutions can be initiated. Such a situation can include not only crimes that had already been or were being committed at the time of the referral, but also crimes committed after that time, in so far as they are sufficiently linked to the situation of crisis referred to the Court as ongoing at the time of the referral"*.<sup>49</sup> Hence, the opening of a new situation would be necessary in order to enable the Prosecutor to investigate crimes that are not sufficiently linked to the

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<sup>47</sup> See the "Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled 'Decision on the admissibility of the case against Abdullah Al-Senussi'" (Appeals Chamber), [No. ICC-01/11-01/11-565 OA6](#), 24 July 2014; and the "Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi'" (Appeals Chamber), [No. ICC-01/11-01/11-547-Red OA4](#), 21 May 2014.

<sup>48</sup> See *e.g.*, Situation in the Bolivarian Republic of Venezuela I, ["Referral of the situation in Venezuela under Article 14 of the Rome Statute submitted by the Republic of Argentina, Canada, the Republic of Colombia, the Republic of Chile, the Republic of Paraguay and the Republic of Peru"](#), 26 September 2018; and Situation in the Bolivarian Republic of Venezuela II, [Referral submitted by the Government of Venezuela](#), 12 February 2020. See also Situations in CAR I focussing on alleged war crimes and crimes against humanity committed in the context of a conflict in Central African Republic since 1 July 2002 and in CAR II focussing on alleged war crimes and crimes against humanity committed in the context of renewed violence starting in 2012 on the same territory.

<sup>49</sup> See the "Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana" (Pre-Trial Chamber I), [No. ICC-01/04-01/10-1](#), 28 September 2010 (reclassified public on 11 October 2010), para. 6 (emphasis added). This finding was later confirmed in the "Decision on the 'Defence Challenge to the Jurisdiction of the Court'" (Pre-Trial Chamber I), [No. ICC-01/04-01/10-451](#), 26 October 2011, paras. 26-27.

*situation of crisis* that originally triggered the referral. In this sense, it is obvious that for the purposes of the Statute and for the exercise of the Court's jurisdiction, the term *situation* cannot be construed as always encompassing the entirety of a State's territory and has instead often been limited to a region or part thereof.<sup>50</sup> Therefore, the Defence's claims that Resolution 1593 (2005) is contrary to the Court's legal texts and practice<sup>51</sup> is wholly unsubstantiated.

35. As a result, the Defence's argument that Darfur as such did not exist legally and administratively in 2005<sup>52</sup> is also irrelevant for the purposes of a jurisdictional challenge and, in any case, inaccurate. Darfur is a region of the western Sudan, neighbouring Libya, Chad and the Central African Republic.<sup>53</sup> Historically, it was ruled by the Keira from approximately 1640 to 1916. In the 1870s Darfur became a province of Egypt and in 1883 was incorporated into al-Mahdī's dominions. Following the killing of Darfur's sultan Ali Dīnār in the 1915 rebellion, Darfur became a province within Sudan.<sup>54</sup> In 1994, Darfur was divided into three states: North Darfur (capital *El Fashir*), South Darfur (capital *Nyala*) and West Darfur (capital *El Geneina*). Sudan's Constitution from 28 March 1998, preceding the one from 17 July 2005, also refers to the repartition of Darfur into the three states mentioned.<sup>55</sup> At the time of the adoption of Resolution 1593 (2005), Darfur was in fact a region defined geographically and organised administratively.

36. In addition and contrary to the Defence's submissions,<sup>56</sup> the Resolutions previously adopted by the Security Council in relation to Sudan all referred generally to the State of Sudan and to the *specific* region of Darfur.<sup>57</sup> There is no reference to any

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<sup>50</sup> See, e.g., the regional focus on Northern Uganda, Ituri and North and South Kivu Provinces in DRC.

<sup>51</sup> See the Defence Challenge, *supra* note 3, paras. 26-30.

<sup>52</sup> *Idem*, para. 19.

<sup>53</sup> See the [Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004](#), Geneva, 25 January 2005, para. 51.

<sup>54</sup> See THE EDITORS OF ENCYCLOPAEDIA, "[Darfur](#)", *Encyclopaedia Britannica*, 15 June 2015.

<sup>55</sup> See the [Constitution of the Republic of Sudan](#), 1998, article 108.

<sup>56</sup> See the Defence Challenge, *supra* note 3, para. 18.

<sup>57</sup> See Resolution 1556 (2004) adopted by the Security Council at its 5015th meeting, on 30 July 2004, UN Doc. [S/RES/1556 \(2004\)](#), 30 July 2004, pp. 1-2, 5, 7-8, 11-13, and 15. See also Resolution 1574 (2004)

other geographical area or region of Sudan. Lastly, the Defence's allegations that in adopting Resolution 1593 (2005) none of the UN Member States understood to limit the referral to the region of Darfur are equally incorrect.<sup>58</sup> In its declaration with respect to the adoption of Resolution 1593 (2005), the United States made specific reference to Darfur.<sup>59</sup> The same can be said for, *inter alia*, the delegations of Philippines,<sup>60</sup> Tanzania,<sup>61</sup> Romania,<sup>62</sup> Russia,<sup>63</sup> Benin<sup>64</sup> and China.<sup>65</sup> All of these delegations

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adopted by the Security Council at its 5082th meeting, on 19 November 2004, UN Doc. [S/RES/1574 \(2004\)](#), 19 November 2004, pp. 1-2, 10, 13, and 16; Resolution 1590 (2005) adopted by the Security Council at its 5151th meeting, on 24 March 2005, UN Doc. [S/RES/1590 \(2005\)](#), 24 March 2005, pp. 1-2, 7, 12, and 17; and Resolution 1591 (2005) adopted by the Security Council at its 5153th meeting, on 29 March 2005, UN Doc. [S/RES/1591 \(2005\)](#), 29 March 2005, pp. 1-3, and 6.

<sup>58</sup> See the Defence Challenge, *supra* note 3, para. 20.

<sup>59</sup> See the minutes of the Security Council 5158th meeting, UN Doc. [S/PV.5158](#), 31 March 2005, pp. 2-3: *"The sanctions resolution recognizes that conflict, violence and atrocities in Darfur continue and that the Council must take steps now to pressure the parties to end the violence in Darfur and to conclude a political settlement peacefully. We strongly urge the parties to the conflict in Darfur to cease the violence and atrocities and to resume political negotiations immediately in order to reach a political settlement peacefully. [...] The resolution will refer the situation in Darfur to the International Criminal Court (ICC) for investigation and prosecution"*.

<sup>60</sup> *Idem*, p. 6: *"We may ask whether the Security Council has the prerogative to mandate the limitation of the jurisdiction of the ICC under the Rome Statute once the exercise of its jurisdiction has advanced. Operative paragraph 6 subtly subsumed the independence of the ICC into the political and diplomatic vagaries of the Security Council. Nevertheless, that eventuality may well be worth the sacrifice if impunity is, indeed, ended in Darfur; if human rights are, indeed, finally protected and promoted; and if, indeed, the rule of law there is upheld. Thus, we voted in favour of resolution 1593 (2005)"*.

<sup>61</sup> *Idem*, p. 9: *"The human tragedy in Darfur is a matter of serious concern to us and to Africa, as it is to the international community. In that regard, in the interest of justice and accountability, we believe that further delay in reaching an agreement in the hope of a more desirable outcome would not serve the ends of justice or the aspirations of the people of Darfur to peace, justice and reconciliation"*.

<sup>62</sup> *Idem*, p. 10: *"Romania deems the adoption of resolution 1593 (2005) [...] as proof that our common resolve to bring an end to impunity in the Sudan and Darfur has ultimately proved stronger than the differences members might have. At the end of the day, what the Council said today is that there is no way, in our times, that anyone, anywhere in the world, can get away without just retribution for the commission of serious crimes. Like my Greek colleague, we also hold it manifest that, by deciding to refer the case of reported crimes in Darfur to the ICC, the Security Council enhances its conflict prevention and resolution capabilities"*.

<sup>63</sup> *Ibid.*: *"The members of the Security Council have frequently reaffirmed that the struggle against impunity is one of the most important elements of a long-term political settlement in Darfur and the Sudan as a whole. All who are guilty of gross violations of human rights in Darfur must be duly punished, as is rightly pointed out in the report of the International Commission of Inquiry. We believe that the resolution adopted today by the Security Council will contribute to an effective solution in the fight against impunity in Darfur in the context of providing for the normalization and stability of the situation in that region of the Sudan"*.

<sup>64</sup> *Ibid.*: *"[R]eferring the matter to the International Criminal Court ensures that credible and timely action will be taken against persons charged with atrocities and serious crimes. Fourthly, Benin voted in support of the resolution out of respect for human dignity and the right to life that has been denied to thousands of people in Darfur, to whom the international community owes protection in view of their vulnerability"*.

<sup>65</sup> *Idem*, p. 5: *"We are not in favour of referring the question of Darfur to the International Criminal Court (ICC) without the consent of the Sudanese Government, because we are afraid that that would not only severely*

mentioned the region in an explicit fashion and specifically stated the need to refer the *Situation in Darfur* to the ICC.

37. Incidentally, Counsel notes that the Defence has recently acknowledged that “[b]etween at least August 2003 and at least April 2004, West Darfur State was a State in the Republic of the Sudan”.<sup>66</sup> Accordingly, this line of arguments became moot.

## ***2. The Defence has no standing to entertain the Court’s financial management and cooperation agreements***

38. The Defence argues that the Security Council referral (i) is illegal in so far as paragraph 7 of Resolution 1593 (2005) indicates that the United Nations shall not bear any expenses incurred in connection with said referral in contradiction with article 115(b) of the Statute;<sup>67</sup> and (ii) it has been invalidated by Security Council Resolution 2559 (2020),<sup>68</sup> ending the mandate of the African Union-United Nations Hybrid Operation in Darfur (UNAMID) on 31 December 2020.<sup>69</sup>

39. The Defence previously addressed the Chamber<sup>70</sup> and the Presidency,<sup>71</sup> advancing similar arguments. On 23 July 2020, the Single Judge dismissed the Defence’s request to (i) order the Registry or any other competent authority to: (a) submit a funding request to the UN pursuant to article 115(b) of the Statute; and

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*complicate efforts to secure an early settlement of the Darfur issue, but also have unforeseeable consequences for the north-south peace process in the Sudan”.*

<sup>66</sup> See the “Second Joint Prosecution and Defence submission on agreed facts”, Annex A, [No. ICC-02/05-01/20-343-AnxA](#), 15 April 2021, Agreed fact No. 2. This is reinforced by the fact that the Defence agrees upon the map annexed as Annex B ([No. ICC-02/05-01/20-343-AnxB](#)), although stating that the date of production of said map “may imply that the administrative boundaries represented therein may not have been exactly the same in 2003-2004”. See the “Second Joint Prosecution and Defence submission on agreed facts”, [No. ICC-02/05-01/20-343](#), 15 April 2021, para. 3. Indeed, *a contrario*, the Defence therefore acknowledges that West Darfur was in fact a region defined geographically and organised administratively as of at least 2003. See *supra* para. 35.

<sup>67</sup> See the Defence Challenge, *supra* note 3, paras. 33-43.

<sup>68</sup> *Idem*, paras. 44-52.

<sup>69</sup> See Resolution 2559 (2020), *supra* note 12.

<sup>70</sup> See the “Requête en vertu de l’Article 115-b”, [No. ICC-02/05-01/20-10](#), 26 June 2020, para. 14 ; and the “Requête en vertu des Articles 2, 67-1-b et 87-6 du Statut et de la Norme 24bis-1 du Règlement de la Cour”, [No. ICC-02/05-01/20-269](#), 26 January 2021.

<sup>71</sup> See the “Requête en vertu des Articles 38-3-a, 43-2 et 115-b”, [No. ICC-02/05-01/20-165](#), 25 September 2020.

(b) immediately engage with the UN for the negotiation of separate arrangements on the matter, pursuant to article 13(1) of the ICC-UN Agreement; and (ii) order the Registry to submit regular reports to Pre-Trial Chamber II and the Defence, on any progress made with regard to the financing of Court activities in the present case by the UN, the progress on the negotiations of the separate arrangements on financial matters pursuant to article 13(1) of the ICC-UN Agreement, the authorisation of such expenditure by the UN, and the payment of any financial contribution to the Court's activities.<sup>72</sup>

40. Summarily rejecting the Defence's request, the Single Judge noted that it was plainly *"outside the ambit of the Defence, and that the Defence has no legal standing to either evaluate nor provide recommendations regarding the Court's financial management"*.<sup>73</sup> In addition, the Single Judge recalled that *"the Court's statutory framework clearly distinguishes the role of the Court, as a judicial institution entrusted with the power to exercise its jurisdiction over persons for the most serious crimes of international concern; the position of the Assembly of States Parties, which is responsible for considering and deciding on the Court's budget; and the duties of the judiciary and Chambers. The judiciary, indisputably, cannot play any role in the budgetary process, let alone in the negotiation of any financial agreements. There is no legal basis for the Chamber to engage in the financial matters of the Court, nor has the Single Judge authority to refer such a request to the Presidency"*.<sup>74</sup> The Defence's request was accordingly deemed moot, and rejected in its entirety. On 13 August 2020, the full Chamber denied leave to appeal the Single Judge Decision<sup>75</sup> and reiterated that the Chamber is not the appropriate forum to raise issues on the

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<sup>72</sup> See the "Decision on the Defence request under article 115(b) of the Rome Statute" (Pre-Trial Chamber II, Single Judge), [No. ICC-02/05-01/20-101](#), 23 July 2020, paras. 5-7.

<sup>73</sup> *Idem*, para. 7.

<sup>74</sup> *Idem*, para. 8.

<sup>75</sup> See the "*Demande d'autorisation d'interjeter appel de la 'Decision on the Defence Request under Article 115(b) of the Rome Statute (ICC-02/05-01/20-101)'*", [No. ICC-02/05-01/20-105](#), 27 July 2020.

Court's financial management.<sup>76</sup> On 23 September 2020, the Chamber also rejected the Defence's request for reconsideration of its Decision on Leave to Appeal.<sup>77</sup>

41. Following the rejection of leave to appeal and of the request for reconsideration, the Defence nevertheless brought an almost identical request before the Presidency.<sup>78</sup> The Presidency likewise dismissed the request considering that was "*clearly devoid of any legal basis*"<sup>79</sup> and adding that "[s]uch duplication of proceedings is unwarranted, interferes with the expeditious administration of justice and may even be considered an abuse of process".<sup>80</sup>

42. Counsel submits that the Chamber and Presidency's considerations apply to the proceedings at hand. Consequently, the Defence's arguments concerning the financial resource management of the Court's activities, and the question of UN funding in relation to expenses incurred due to referrals by the UN Security Council, should be rejected on this basis alone.

43. By the same token, the Defence does not have standing to raise issues concerning the UN cooperation, Court's diplomacy, and in particular any impact of Security Council Resolution 2559 on the future prospects for logistical or security support to the Court's activities and investigative missions in Sudan. A previous Defence's request advancing similar arguments is currently pending before the

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<sup>76</sup> See the "Decision on the Defence Request for Leave to Appeal the 'Decision on the Defence request under article 115(b) of the Rome Statute'" (Pre-Trial Chamber II), [No. ICC-02/05-01/20-110](#), 13 August 2020, paras. 13-14.

<sup>77</sup> See the "*Demande de reconsidération de la Décision ICC-02/05-01/20-110*", [No. ICC-02/05-01/20-113](#), 13 August 2020 ; and the "*Décision relative à la demande aux fins de réexamen de la décision ICC-02/05-01/20-110 présentée par la défense (ICC-02/05-01/20-113)*" (Pre-Trial Chamber II), [No. ICC-02/05-01/20-163](#), 23 September 2020, p. 7.

<sup>78</sup> See the "Request under Articles 38(3)(a), 43(2) and 115(b)", [No. ICC-02/05-01/20-165-tENG](#), 25 September 2020.

<sup>79</sup> See the "Decision on the 'Requête en vertu des Articles 38-3-a, 43-2 et 115-b' dated 25 September 2020 (ICC-02/05-01/20-165)" (Presidency), [No. ICC-02/05-01/20-180](#), 12 October 2020, para. 6.

<sup>80</sup> *Ibid.*

Chamber.<sup>81</sup> However, as noted by the Prosecution,<sup>82</sup> the Defence has not identified any legal basis supporting (i) its standing to request the Prosecution and the Registry to make observations on the consequences of UNAMID's withdrawal from Sudan on the Court's activities; and (ii) the legal basis for the Chamber to evaluate the Court's cooperation agreements. Accordingly, the Defence's arguments in the present proceedings should be summarily dismissed.

### 3. *UN budgetary and logistic considerations do not affect the legality of Resolution 1593 (2005)*

44. Should the Chamber consider that the Defence has standing to raise issues concerning the general administration of the Court and cooperation with the UN, Counsel submits that none of the concerns it advanced affects the legality of Resolution 1539 (2005).

45. Article 115(b) of the Statute implies that there are situations in which the UN should contribute to the Court's budget. It provides that the UN shall provide funds to the ICC, in particular to cover expenses incurred due to Security Council referrals. Since article 115 alone does not make it mandatory for the UN to cover the said expenses, the release of such funds is regulated by the terms of the UN-ICC Agreement and shall be subjected to separate arrangements.<sup>83</sup>

46. In turn, according to paragraph 7 of Resolution 1539, the Security Council:

*"Recognizes that none of the expenses incurred in connection with the referral including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and*

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<sup>81</sup> See the "*Requête en vertu des Articles 2, 67-1-b et 87-6 du Statut et de la Norme 24bis-1 du Règlement de la Cour*", [No. ICC-02/05-01/20-269](#), 26 January 2021.

<sup>82</sup> See the "Prosecution's response to '*Requête en vertu des Articles 2, 67-1-b et 87-6 du Statut et de la Norme 24bis-1 du Règlement de la Cour*'", [No. ICC-02/05-01/20-280](#), 5 February 2021, para. 5.

<sup>83</sup> See the UN-ICC Agreement, *supra* note 38, article 13(1) and (2): "1. The United Nations and the Court agree that the conditions under which any funds may be provided to the Court by a decision of the General Assembly of the United Nations pursuant to article 115 of the Statute shall be subject to separate arrangements. The Registrar shall inform the Assembly of the making of such arrangements. 2. The United Nations and the Court further agree that the costs and expenses resulting from cooperation or the provision of services pursuant to the present Agreement shall be subject to separate arrangements between the United Nations and the Court. The Registrar shall inform the Assembly of the making of such arrangements [...]"

*that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily”.*<sup>84</sup>

47. Resolution 1970 (2011) on the *Situation in Libya* contains an identical provision ruling out provision of funds by the UN to the Court.<sup>85</sup> Such a clause was not discussed and did not affect the triggering of the Court’s jurisdiction over the two referred Situations.<sup>86</sup> In the same vein, the Defence’s arguments imputing to Security Council Resolution 2559 (2020)<sup>87</sup> an invalidating effect over the referral of the Situation in Darfur should be disregarded. The exercise of the Security Council’s discretion in ending the mandate of the African Union - United Nations Hybrid Operation in Darfur (“UNAMID”) on 31 December 2020<sup>88</sup> does not affect the object and purpose of Resolution 1593 (2005) and, consequently, the Court’s jurisdiction over the Situation in Darfur.

48. Indeed, financial and cooperation agreements between the ICC and the UN are the result of ancillary negotiations which fall outside the scope of both article 13(b) of the Statute and of the relevant Security Council resolutions. As such, they cannot affect – nor they can be interpreted as affecting – the object and purpose of the Statute and of the Security Council’s referrals.<sup>89</sup>

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<sup>84</sup> See Resolution 1593 (2005), *supra* note 9, para. 7.

<sup>85</sup> See Resolution 1574 (2004) adopted by the Security Council at its 5082<sup>nd</sup> meeting, on 19 November 2004 in Nairobi, UN Doc. [S/RES/1574 \(2004\)](#), para. 8.

<sup>86</sup> See the “Decision Assigning the Situation in the Libyan Arab Jamahiriya to Pre-Trial Chamber I” (Presidency), [No. ICC-01/11-1](#), 4 March 2011.

<sup>87</sup> See the Defence Challenge, *supra* note 3, paras. 44-52.

<sup>88</sup> See Resolution 2559 (2020), *supra* note 12.

<sup>89</sup> See article 31(1) of the Vienna Convention on the Law of Treaties: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. See also, e.g., the “Judgment on the appeal of the Prosecutor against the decision of [REDACTED]” (Appeals Chamber), [No. ICC-ACRed-01/16](#), 15 February 2016, paras. 56-57; the “Judgment on the appeals of William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V(A) of 17 April 2014 entitled ‘Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation’” (Appeals Chamber), [No. ICC-01/09-01/11-1598 OA7 OA8](#), 9 October 2014, para. 105; the “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” (Appeals Chamber), [No. ICC-01/04-168 OA3](#), 13 July 2006, para. 33; and the “Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction” (Appeals Chamber), [No. ICC-01/04-01/06-3121-Red A5](#), 1 December 2014, para. 277.

49. In relation to article 2 of the Statute, the *Ad Hoc* Committee on the Establishment of an International Criminal Court highlighted that “[t]he conclusion of a special agreement between the court and the United Nations as envisaged in article 2 of the draft statute was considered by a number of delegations to be an appropriate way of establishing the required links of functional cooperation between the two institutions, while at the same time preserving the court’s independence as a judicial organ”.<sup>90</sup> The same conclusion can be drawn from the text of the Draft Report of the Preparatory Committee.<sup>91</sup>

50. At the time of the adoption of the Statute, the aim of the Preparatory Committee was limited to finding a mechanism that would guarantee the independence and impartiality of the Court, “while at the same time avoiding a situation in which the prospective financial burden could be a prohibitive factor for States considering accession to the Statute”.<sup>92</sup> Turning to the Defence’s arguments on the alleged violation of article 87(6) of the Statute, the Court is in fact “in a position to cooperate with all kinds of peacekeeping forces within the latter’s mandates”.<sup>93</sup> However, a lack of such cooperation would not have any effect on the referral’s validity and therefore on the Court’s jurisdiction. As for financial arrangements, the details of cooperation and assistance requests are indeed subject to subsidiary negotiations which fall outside the scope of the Security Council’s referrals and of the Statute.<sup>94</sup>

51. Counsel also notes that the Security Council has not made a request under article 16 of the Statute to halt the relevant Court’s investigations and prosecutions in the Situation in Darfur.<sup>95</sup> In addition, nothing in Resolution 2559 (2020) points to the

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<sup>90</sup> See the Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court, *supra* note 42, para. 17.

<sup>91</sup> See the Report of the Preparatory Committee on the Establishment of an International Criminal Court, *supra* note 41, p. 9, para. 29.

<sup>92</sup> See TRIFFTERER (O.) and AMBOS (K.) (Eds.), *The Rome Statute of the International Criminal Court: a Commentary*, 3<sup>rd</sup> edition, C.H.Beck/Hart/Nomos, München/Oxford/Baden Baden, 2016, p. 2255.

<sup>93</sup> *Idem*, p. 2033.

<sup>94</sup> See *supra* paras. 44-48.

<sup>95</sup> Article 16 of the Statute reads as follows: “No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions”.

alleged intention of the Security Council to cease its engagement in promoting the rule of law, protecting human rights and fighting impunity in Darfur.<sup>96</sup> After the mission's withdrawal, a UN presence is maintained through the UN Integrated Transition Assistance Mission in Sudan, which mandate includes supporting progress towards democratic governance.<sup>97</sup>

52. Lastly, Counsel recalls that the interests of victims are not only to be pursued where justice is within easy reach.<sup>98</sup> One cannot be oblivious to the fact that the history of victims' rights – and of international justice as a whole – is punctuated by hard-fought victories in challenging geopolitical, security and humanitarian situations.

**B. The Security Council's referral under article 13(b) is valid and does not contradict articles 22 and 24 of the Statute**

53. With the second set of arguments, the Defence challenges the temporal parameters of the Situation as set by Resolution 1593 (2005). In particular, the Defence argues that the Security Council could not include in the Resolution crimes that took place before the date of the referral under article 13(b) of the Statute, namely before 31 March 2005. According to the Defence's arguments, the Security Council was barred from referring the Situation in Darfur since 1 July 2002 by the principles of *Nullum crimen sine lege* and Non-retroactivity *ratione personae*, enshrined, respectively, in article 22 and 24 of the Statute. The Defence thus argues that Mr Abd-Al-Rahman cannot be prosecuted before the Court for crimes against humanity and war crimes he allegedly committed in 2003-2004.

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<sup>96</sup> See UN News, Joint Statement of Secretary General Antonio Guterres and Chairperson Moussa Faki Mahamat, [United Nations, African Union reiterate commitment to Sudan, as joint mission ends operations](#), 31 December 2020.

<sup>97</sup> See Resolution 2524 (2020) adopted by the Security Council on 3 June 2020, UN Doc. [S/RES/2524 \(2020\)](#).

<sup>98</sup> See the "OPCV Consolidated Submissions pursuant to the 'Order Scheduling a Hearing before the Appeals Chamber and Other Related Matters' (No. ICC-02/17-72-Corr)", [No. ICC-02/17-93 OA OA2 OA3 OA4](#), 22 October 2019, paras. 59-60.

54. Counsel submits that the Defence's arguments are based on a blatant misinterpretation of the Statute's relevant provisions, and that the Security Council acted within the Court's statutory legal framework. Accordingly, the Defence's contentions should be dismissed in their entirety.

55. The Court has jurisdiction only with respect to crimes committed after the entry into force of the Statute. If a State becomes a party to the Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of the Statute for that State, unless that State has made a declaration under article 12(3) of the Statute or a situation within its territory is referred to the Court by the Security Council pursuant to article 13(b).

56. Article 13 of the Statute comprises an exhaustive list of three procedural mechanisms which can be used to trigger the Court's jurisdiction, as defined by articles 5 to 8 *bis* (*ratione materiae*), article 11 (*ratione temporis*) and article 26 (*ratione personae*), and whose exercise is subject to the preconditions under article 12. The Office of the Prosecutor is entrusted with the mandate to investigate situations in which crimes under the Court's jurisdiction may have been committed. Hence, States Parties' and Security Council's referrals are bringing situations under the Prosecutor's attention.

57. Article 13(b) of the Statute indicates that the Court may exercise its jurisdiction with respect to a crime referred to in article 5, if "[a] *situation in which one or more of such crimes appears to have been committed* is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations".<sup>99</sup> As the Defence noted,<sup>100</sup> by definition, such a referral occurs after the alleged commission of the crimes and in reaction to the allegations of their occurrence. Any other interpretation of the provision limiting the jurisdiction of the Court to only crimes committed after the

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<sup>99</sup> Emphasis added.

<sup>100</sup> See the Defence Challenge, *supra* note 3, para. 76.

referral of a Situation by the Security Council would deprive article 13(b) of its meaning and *effet utile*.<sup>101</sup>

58. Security Council's referrals are thus necessarily retrospective. The limit to their retroactivity coincides only with the date of the entry into force of the Statute and Court's temporal jurisdiction, namely 1 July 2002. Such a reading is not only confirmed by the letter of article 11, but also by articles 22 and 24 of the Statute. The provisions indicate respectively that "*a person shall not be criminally responsible [...] unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court*"<sup>102</sup> and that "*no person shall be criminally responsible [...] for conduct prior to the entry into force of the Statute*".<sup>103</sup>

59. Security Council Resolution 1593 (2005), referred the Situation in Darfur since 1 July 2002, namely the date of the entry into force of the Statute. The 2003-2004 events and alleged conducts described in the Document Containing the Charges against Mr Ali Abd-Al-Rahman<sup>104</sup> fall therefore squarely within the temporal scope of the

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<sup>101</sup> The Court, in line with other international tribunals, has referred multiple times to the principle of effectiveness in rejecting any interpretation that would nullify or render inoperative a provision of the Statute. See, e.g., the "Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine'" (Pre-Trial Chamber I), [No. ICC-01/18-143](#), 5 February 2021, para. 105; and the "Judgment pursuant to article 74 of the Statute" (Trial Chamber II), [No. ICC-01/04-01/07-3436-tENG](#), 20 April 2015, para. 46: "*The principle of effectiveness of a provision also forms an integral part of the General Rule as that Rule mandates good faith in interpretation. Thus, in interpreting a provision of the founding texts, the bench must dismiss any solution that could result in the violation or nullity of any of its other provisions*". See also PCIJ, [The Case concerning the Factory at Chorzów \(Germany v. Poland\) \(Claim for indemnity\)\(Jurisdiction\)](#), Judgment, 26 July 1927, P.C.I.J. Series A. No. 9, para. 64: "*For the interpretation of Article 23, account must be taken of not only of the historical development of arbitration treaties, as well as of the terminology of such treaties, and of the grammatical and logical meaning of the words used, but also and more especially of the function which, in the intention of the contracting Parties, is to be attributed to this provision*"; ICTY, *The Prosecutor v. Kordić & Čerkez*, "[Decision on Appeal regarding the admission into evidence of seven affidavits and one formal statement](#)" Appeals Chamber, Case No. IT-95-14/2-AR73.6, 18 September 2000, para. 23; and ECtHR, *Loizidou v. Turkey* (Preliminary objections), [Application No. 15318/89](#), 23 March 1995, para. 72: "*The object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective*".

<sup>102</sup> See article 22 of the Statute.

<sup>103</sup> See article 24 of the Statute (emphasis added).

<sup>104</sup> See the "Prosecution's submission of the Document Containing the Charges", No. [ICC-02/05-01/20-325](#), 29 March 2021.

Security Council's referral.<sup>105</sup> Contrary to the Defence's suggestion,<sup>106</sup> the entry into force of the Statute in a specific State, as well as the State's consent,<sup>107</sup> is irrelevant for the purposes of a Security Council's referral under article 13(b) of the Statute – the *effet utile* thereof is precisely to bring to the Court's attention situations occurring in non-State Parties. Thus, the Security Council acted within its delegated powers<sup>108</sup> and within the ICC Statutory framework.

60. The *travaux préparatoires* of article 13 of the Statute confirms such a conclusion. The final version of said provision is in fact the result of intense negotiations over several points. Referrals from States Parties and the Security Council were envisaged since the very beginning of the drafting history as the key triggering mechanisms for the Court's jurisdiction. The role of the UN Security Council in the triggering of prosecutorial action was first codified by the International Law Commission (the "ILC"), in article 23 of the 1994 Draft Statute for an International Criminal Court (the "1994 ILC Draft") which reads as follows:

*"Notwithstanding article 21, the Court has jurisdiction in accordance with this Statute with respect to crimes referred to in article 20 as a consequence of the referral of a matter to the Court by the Security Council acting under Chapter VII of the Charter of the United Nations [...]"*.<sup>109</sup>

61. In the ILC Report of its 46<sup>th</sup> session, the commentary related to this provision noted that the power conferred to the Security Council was thought as an alternative to the creation of additional *ad hoc* international tribunals.<sup>110</sup> The ILC expressed that the Security Council "*would not normally refer to the [C]ourt a 'case' in the sense of an allegation against name individuals*".<sup>111</sup> The UN Security Council was envisaged to refer

<sup>105</sup> See also the Report of the International Commission of Inquiry on Darfur *supra* note 53, para. 581.

<sup>106</sup> See the Defence Challenge, *supra* note 3, paras. 54, and 73-76.

<sup>107</sup> See the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June -17 July 1998. Official Records, Volume I, Final Documents, UN Doc. [A/CONF.183/13 \(Vol. I\)](#), 7<sup>th</sup> plenary meeting, para. 31.

<sup>108</sup> See ICJ, *Reparations for injuries suffered in the service of the United Nations*, *supra* note 16, p. 182. See also WOOD (M. C.), *op. cit.*, *supra* note 16, p. 77.

<sup>109</sup> See the Report of the International Law Commission on its Forty-Sixth Session, Draft Statute for an International Criminal Court, 2 May-22 July, 1994, UN Doc. [A/49/10\(SUPP\)](#), September 1994, article 23.

<sup>110</sup> *Idem*, p. 44, para. 1.

<sup>111</sup> *Idem*, p. 44, para. 2.

“*matters*” in the sense of situations to which Chapter VII of the UN Charter applies and it would then be for the Prosecutor to establish which individuals should be charged.<sup>112</sup>

62. During the 1995 September session of the *Ad Hoc* Committee on the Establishment of an International Criminal Court, delegations discussed article 23 of the 1994 ILC Draft. Several delegations agreed with the view, also expressed within the ILC, that the UN Security Council should be authorised to refer matters to the Court as a mean to bypass the creation of future *ad hoc* tribunals and to enhance the Court’s effectiveness through referrals made under Chapter VII of the UN Charter.<sup>113</sup> It was described that the role of the UN Security Council under article 23 of the 1994 ILC Draft would be in line with its primary responsibility to safeguard international peace and security.<sup>114</sup>

63. During the first and second session of the 1996 Preparatory Committee on the Establishment of an International Criminal Court, the issues on the role of the Security Council re-emerged. In support of the retention of article 23(1), some delegations noted that the Security Council “*had already demonstrated a capacity to address the core humanitarian law crimes through the creation of two ad hoc tribunals, for the former Yugoslavia and for Rwanda, and had created the International Commission of Inquiry in Burundi to report on violations of international humanitarian law*”.<sup>115</sup> They envisioned that referrals by the UN Security Council would be a substitute for the creation of *ad hoc* tribunals in the future and that it would create a mandatory jurisdiction with powers similar to those.<sup>116</sup> The independence of the Court would still be safeguarded since the Prosecutor would be free to decide on the evidence required to indict a certain individual for a crime.<sup>117</sup> It was further argued that vesting referral powers to the

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<sup>112</sup> *Ibid.*

<sup>113</sup> See the Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court, *supra* note 42, para. 120.

<sup>114</sup> *Ibid.*

<sup>115</sup> See the Report of the Preparatory Committee on the Establishment of an International Criminal Court, *supra* note 91, para. 133.

<sup>116</sup> *Idem*, para. 132.

<sup>117</sup> *Idem*, para. 133.

Security Council “corresponded with the role for the Security Council carved out in the Charter”.<sup>118</sup> The Security Council’s exercise of its Chapter VII authority in creating the ICTY and the ICTR demonstrates its powers in the judicial resolution of international conflict.<sup>119</sup> The Charter clearly envisions a preeminent role for the Security Council in matters of international peace and security.<sup>120</sup>

64. The triggering mechanisms were finally discussed in the Committee of the Whole during the first and the second weeks of the Rome Conference. During the 7<sup>th</sup> meeting of the Committee of the Whole, the role of the UN Security Council was addressed further. It was noted that differently from when the Court’s jurisdiction is triggered by a State or by the Prosecutor, “no State consent was required for the Court to initiate investigations if the Security Council referred a situation to the Court”.<sup>121</sup> Accordingly, the Security Council should be able to make such a referral to the Court given its role as “first port of call in international crises”.<sup>122</sup>

65. The drafters’ intentions are clear in delegating ample discretion to the Security Council when referring a given situation to the Court. In the present case, the Situation in Darfur was referred after the proposal by the International Commission of Inquiry in its January 2005 Report.<sup>123</sup> Among the reasons justifying said referral, it was argued that the Court was first established “with an eye to crimes likely to threaten peace and security”, and that this was “the main reason why the Security Council may trigger the Court’s jurisdiction under article 13(b)”.<sup>124</sup> It was further noted that relevant conducts

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<sup>118</sup> *Idem*, para. 131.

<sup>119</sup> AMIGO (A.), [The International Criminal Court and the Triggering of Prosecutorial Action](#), A Paper of the International Human Rights/Humanitarian Law Project of Suffolk University Law School.

<sup>120</sup> See Article 24 of the [Charter of the United Nations](#) which reads as follows: “[the] members [of the United Nations] confer on the Security Council primary responsibility for the maintenance of international peace and security [...]”.

<sup>121</sup> See the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June -17 July 1998. Official Records, Volume II, Final Documents, UN Doc. [A/CONF.183/13 \(Vol. II\)](#), Summary records of the meeting of the Committee of the Whole, 7<sup>th</sup> plenary meeting (A/CONF.183/C.1/SR.7), p. 182, para. 31.

<sup>122</sup> *Idem*, Summary records of the plenary meetings, 8<sup>th</sup> plenary meeting, A/CONF.183/SR.8, p. 118, para. 66.

<sup>123</sup> See also the Report of the International Commission of Inquiry on Darfur *supra* note 53.

<sup>124</sup> *Idem*, para. 572.

were within the Court's temporal jurisdiction, as allegedly committed after 1 July 2002.<sup>125</sup>

66. In the *Lubanga* case, Pre-Trial Chamber I held that as long as the Court exercises its power on the basis of “*written (lex scripta) pre-existing criminal norms approved by the States Parties to the Rome Statute (lex previa), defining prohibited conduct and setting out the related sentence (lex certa), which cannot be interpreted by analogy in malam partem (lex stricta)*”, the principle of legality would be satisfied.<sup>126</sup> Indeed, as some scholars noted, referrals under article 13(b) of the Statute only require that the alleged conduct is found within one of the core crimes included in the Statute and that the conduct takes place after the Statute's entry into force.<sup>127</sup>

67. Article 13(b) of the Statute is in fact a “*bridging mechanism*” between the ICC and the Security Council powers.<sup>128</sup> The referral power of the UN Security Council can be therefore understood as referring to the ICC jurisdictional power of any UN member State.<sup>129</sup> Judge Perrin de Brichambaut, in a minority opinion in *Al Bashir* case, noted that the question was not if Sudan had accepted or not the jurisdiction of the Court, but whether Sudan had an obligation to accept the jurisdiction of the Court.<sup>130</sup> By virtue of article 25 of the Charter, UN Member States have agreed to accept and carry out the decisions of the UN Security Council.<sup>131</sup> Since the entry into force of the Statute, Sudan is under an obligation to accept any jurisdictional referral by the Security Council

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<sup>125</sup> *Idem*, para. 581.

<sup>126</sup> See the “Decision on the Confirmation of Charges” (Pre-Trial Chamber I), [No. ICC-01/04-01/06-803-tEN](#), 29 January 2007, para. 303.

<sup>127</sup> See COCO (A.), “[Commentary to Article 13, International Criminal Court's Statute](#)”, in KLAMBERG (M.) (Ed.), *Commentary on the Law of the International Criminal Court*, 2017. See also, O'KEEFE (R.), *International Criminal Law*, Oxford University Press, 2015, p. 552, footnote 108. See also GALAND (A. S.), “[UN Security Council Referrals to the International Criminal Court: Legal Nature, Effects and Limits](#)”, *Leiden Studies on the Frontiers of International Law*, Vol. 5, Brill Nijhoff, Leiden, 2018, p. 122. .

<sup>128</sup> See RASTAN (R.), *op. cit.*, *supra* note 17, p. 157 and footnote. 74.

<sup>129</sup> See AKANDE (D.), “[The jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits](#)”, *Journal of International Criminal Justice*, vol. 1, 2003, pp. 625-626.

<sup>130</sup> See the Minority Opinion of Judge Marc Perrin de Brichambaut (Pre-Trial Chamber II), [No. ICC-02/05-01/09-302-Anx](#), 6 July 2017, para. 15.

<sup>131</sup> See article 25 of the [Charter of the United Nations](#): “*The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter*”.

under article 13(b) of the Statute.<sup>132</sup> Consequently, a referral by the Security Council of situation threatening the international peace and security because of the alleged commission of crimes within the Court's jurisdiction would never be in breach of article 24 of the Statute.

68. The jurisdiction *rationae materiae* of the Court – together with the mechanisms triggering such jurisdiction over non-State Parties – have been indeed affirmed and agreed upon by the Security Council at the time of the entry into force of the Statute.<sup>133</sup> Article 13(b) is thus simply a procedural device activating the right of the international community to prosecute crimes that it codified in the Rome Statute, entered into force on 1 July 2002. Contrary to the Defence's submissions in this regard,<sup>134</sup> articles 7 and 8 of the Statute are in fact binding on Sudan since that date. It is thus inapposite – and plainly irrelevant for the purpose of the exercise of the Court's jurisdiction – to verify whether or not national and/or international customary law provided for the criminalisation of such conducts in Sudan at the time of the events.<sup>135</sup>

69. In this sense, Counsel submits that the requirements of foreseeability and accessibility are also respected. The suspect or accused must be able to appreciate that the concrete conduct is criminal in the sense generally understood, without reference to any specific provision.<sup>136</sup> In addition, if the wrongful nature of the conduct was such that the individual could not have ignored it, its criminalisation was reasonably foreseeable.<sup>137</sup>

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<sup>132</sup> *Ibid.*

<sup>133</sup> As discussed *supra*, the Security Council may take any action under Chapter VII of the UN Charter, including making a determination that prohibition of certain conducts will lead to the restoration or maintenance of peace and security. “In this sense, criminal prescription is like any other device that the Security Council uses, which need not be specifically mentioned in the U.N. Charter to be valid”. See Gallant (K.S.), “[Jurisdiction to Adjudicate and Jurisdiction to Prescribe in International Criminal Courts](#)”, *Villanova Law Review*, Vol. 48, 2003, p. 828.

<sup>134</sup> See the Defence Challenge, *supra* note 3, paras. 53-89.

<sup>135</sup> *Idem*, paras. 90-114.

<sup>136</sup> See ICTY, *The Prosecutor v. Hadžihasanović et al.*, “[Decision on Interlocutory Appeal Challenging Jurisdiction in relation to Command Responsibility](#)” (Appeals Chamber), Case No. IT-01-47-AR72, 16 July 2003, para. 34.

<sup>137</sup> See SCHABAS, (W. A.), *An Introduction to the International Criminal Court*, Cambridge University Press, 2011, p. 74.

70. As a result, the Defence's contentions that Security Council Resolution 1593 (2005) violates article 22 and 24 of the Statute and that Mr Abd-Al-Rahman cannot be prosecuted before the Court for crimes against humanity and war crimes he allegedly committed in 2003-2004, equally fail and must be rejected.

## V. CONCLUSION

71. In light of these considerations, Counsel submits that the Defence Challenge must be dismissed in its entirety.

Respectfully submitted.

A handwritten signature in black ink, appearing to read 'Paolina Massidda', with a horizontal line drawn underneath the name.

**Paolina Massidda**  
**Principal Counsel**

Dated this 16<sup>th</sup> day of April 2021

At The Hague, The Netherlands