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No. ICC-02/05-01/20

Date: 17 May 2021

PRE-TRIAL CHAMBER II

Before:

**Judge Rosario Salvatore Aitala, Presiding Judge
Judge Antoine Kesia-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

Decision on the Defence '*Exception d'incompétence*' (ICC-02/05-01/20-302)

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

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Other

PRE-TRIAL CHAMBER II (the ‘Chamber’) of the International Criminal Court (the ‘Court’), in the case of *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* (‘*Ali Kushayb*’), having regard to articles 19 and 57(2)(a) of the Rome Statute (the ‘Statute’) and rules 58 and 59 of the Rules of Procedure and Evidence (the ‘Rules’), issues this Decision on the Defence ‘*Exception d’incompétence*’.

I. PROCEDURAL HISTORY

1. On 31 March 2005, by adopting Resolution 1593 (2005) (‘Resolution 1593’) the United Nations Security Council (the ‘UN Security Council’ or ‘UNSC’) referred to the Prosecutor the situation in Darfur, Sudan, as of 1 July 2002, pursuant to article 13(b) of the Statute (the ‘Referral’).¹

2. On 27 April 2007, Pre-Trial Chamber I issued a warrant of arrest against Mr Abd-Al-Rahman for crimes against humanity and war crimes allegedly committed in the localities of Kodoom, Bindisi, Mukjar, Arawala and their surrounding areas (Darfur, Sudan) between August 2003 and March 2004 (the ‘First Warrant of Arrest’).² On 16 January 2018, Pre-Trial Chamber II, in its previous composition, issued a second warrant of arrest against Mr Abd-Al-Rahman for crimes against humanity and war crimes allegedly committed in the locality of Deleig and surrounding areas (Darfur, Sudan) between on or about 5 to 7 March 2004 (the ‘Second Warrant of Arrest’).³

3. On 9 June 2020, Mr Abd-Al-Rahman surrendered himself to the Court; on 15 June 2020, he made his first appearance before Judge Rosario Salvatore Aitala,⁴ acting as Single Judge on behalf of Pre-Trial Chamber II.⁵ Upon the Prosecutor’s requests,⁶ the date for the commencement of the confirmation of charges hearing, initially set for

¹ S/RES/1593 (2005).

² Decision on the Prosecution Application under Article 58(7) of the Statute, ICC-02/05-01/07-1-Corr; Warrant of arrest for Ali Kushayb, ICC-02/05-01/07-3-Corr.

³ Second warrant of arrest for Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’), ICC-02/05-01/07-74-Conf (public redacted version notified on 11 June 2020, ICC-02/05-01/07-74-Red).

⁴ Transcript of hearing, ICC-02/05-01/20-T-001-ENG.

⁵ Decision on the designation of a Single Judge, 9 June 2020, ICC-02/05-01/07-80.

⁶ Corrected Version of ‘Prosecution’s request to postpone the confirmation hearing’, 16 September 2020, ICC-02/05-01/20-157-Conf-Exp-Corr (confidential and public redacted versions notified on the same day, ICC-02/05-01/20-157-Conf-Red-Corr and ICC-02/05-01/20-157-Corr-Red); Prosecution’s second request to postpone the confirmation hearing and related deadlines, 3 December 2020, ICC-02/05-01/20-218-Conf (public redacted version notified on 4 December 2020, ICC-02/05-01/20-218-Red).

7 December 2020, was later postponed, together with all related time limits, first to 22 February 2021⁷ and then to 24 May 2021.⁸

4. On 15 March 2021, the Defence submitted its '*Exception d'incompétence*' challenging the jurisdiction of the Court in the present case pursuant to article 19(2)(a) of the Statute (the 'Jurisdictional Challenge' or 'Challenge').⁹

5. On 19 March 2021, the Prosecutor filed 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)',¹⁰ (i) requesting 'the Chamber to permit the Prosecution, and other participants, to provide observations by 16 April 2021'; and (ii) suggesting 'that Sudan be afforded the opportunity to provide observations to the Challenge by 3 May 2021'.

6. On 22 March 2021, the Defence filed its '*Réponse à la Requête ICC-02/05-01/20-313*',¹¹ requesting the Chamber *inter alia* to (i) reject the Prosecutor's request; and (ii) issue its decision on the Challenge as soon as possible before 24 May 2021.

7. On the same day, the Office of Public Counsel for Victims (the 'OPCV') filed 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',¹² submitting *inter alia* that 'Counsel [...] will need at least 4 weeks to be able to present meaningful submissions on behalf of the victims' and that 'Sudan should be invited to file its observations by the deadline eventually established by the Chamber for the submissions of all other participants'.

8. On 25 March 2021, by its 'Order setting time limits for submissions in relation to the Defence *Exception d'incompétence* (ICC-02/05-01/20-302)',¹³ the Chamber decided that the Prosecutor, the UN Security Council, the victims and victim applicants

⁷ Decision on Prosecutor's Request for Postponement of the Confirmation Hearing and related deadlines, 2 November 2020, ICC-02/05-01/20-196.

⁸ Decision on the Prosecutor's Second Request to Postpone the Confirmation Hearing and Requests for Variation of Disclosure Related Time Limits, 18 December 2020, ICC-02/05-01/20-238.

⁹ ICC-02/05-01/20-302.

¹⁰ ICC-02/05-01/20-313.

¹¹ ICC-02/05-01/20-315.

¹² ICC-02/05-01/20-318.

¹³ ICC-02/05-01/20-321.

who had already communicated with the Court may submit written observations by no later than Friday, 16 April 2021 and clarified that this determination was ‘[w]ithout prejudice to [its] assessment as to the correct legal qualification of the matters raised’ in the Challenge.

9. On 16 April 2021, the Prosecutor submitted the ‘Prosecution’s response to the Defence challenge to the Court’s jurisdiction (ICC-02/05-01/20-302)’,¹⁴ requesting the Chamber to reject the Jurisdictional Challenge (the ‘Prosecutor’s Observations’).

10. On the same day, the OPCV and the Legal Representatives of Victims (the ‘LRVs’) respectively filed the ‘Submissions on behalf of Victims on the Defence’s Challenge to the Court’s Jurisdiction (“*Exception d’incompétence*” ICC-02/05-01/20-302)’¹⁵ (the ‘OPCV Observations’) and the ‘Response on behalf of the Victims to the Defence *Exception d’incompétence* (ICC-02/05-01/20-302)’¹⁶ (the ‘LRVs Observations’), both requesting the Chamber to dismiss the Jurisdictional Challenge.

II. SUBMISSIONS

Defence for Mr Abd-Al-Rahman

11. The Defence requests the Chamber to find that the Court has no jurisdiction in the *Abd-Al-Rahman* case based on two grounds, the first of which based on arguments revolving around the alleged illegality of the UNSC Referral (the ‘First Ground’). In the Defence’s submission, if Resolution 1593 were to be found illegal the Court would be deprived of its jurisdiction in the *Abd-Al-Rahman* case, since that Resolution and the Referral contained in it constitute the sole trigger of the Court’s jurisdiction in the case. The legality of Resolution 1593 is questioned by the Defence based on the following arguments:

- (i) Darfur, as opposed to Sudan as a whole, would not constitute a ‘situation’ suitable to be referred to the Court pursuant to article 13(b) of the Statute: according to the Defence, limiting a referral to a specific geographical area within the boundaries of a State would be contrary both to the intention of the drafters of the Statute and to the practice of the Court; in the specific instance of Darfur,

¹⁴ ICC-02/05-01/20-347.

¹⁵ ICC-02/05-01/20-348.

¹⁶ ICC-02/05-01/20-351.

this would also be erroneous since Darfur ‘*ne fait l’objet d’aucune définition légale contemporaine*’ and ‘*n’avait aucune existence légale ou administrative en 2005*’. In the Defence’s submission, at the time of the adoption of Resolution 1593, the UNSC could only have referred to the Court under Chapter VII of the United Nations Charter the Situation *in Sudan* as a whole; by restricting the territorial scope of the referred situation to Darfur, the UNSC would have operated an unwarranted preselection of the crimes and cases that may fall within the Court’s jurisdiction in connection with that situation, which would be in violation of article 13(b) of the Statute and therefore invalidate both Resolution 1593 and the Referral operated by it (‘First Argument’);

(ii) paragraph 7 of Resolution 1593, stating that expenses incurred in connection with the Referral shall be borne by States Parties and not by the United Nations, would be in violation both of article 115(b) of the Statute, stating *inter alia* that expenses related to a referral by the UNSC shall in particular be provided by the United Nations, and of article 13 of the Statute, requiring that the Court’s exercise of jurisdiction be in accordance with the provisions of the Statute (‘Second Argument’);

(iii) UN Security Council Resolution 2559 (2020), adopted on 22 December 2020 and terminating the mandate of the African Union-United Nations Hybrid Operation in Darfur (‘UNAMID’) (‘Resolution 2559’), would have also resulted in invalidating Resolution 1593, in particular by depriving the Court of the logistical and security support essential to the conduct of its activities in Sudan. Furthermore, Resolution 2559 would also have violated articles 2 and 87(6) of the Statute, respectively referring to the agreement governing the relationship between the Court and the United Nations and providing that the Court must be able to rely on the cooperation of an international organisation such as the United Nations; accordingly, the Referral itself would also have been invalidated by Resolution 2559 (‘Third Argument’).

12. The second ground relied upon by the Challenge is based on the assertion that, since Sudan was not a State Party to the Statute at the time of the Referral and of the events underlying the First and the Second Warrant of Arrest, the principles of *nullum crimen sine lege* and of non-retroactivity *ratione personae* of criminal law, respectively

enshrined in articles 22(1) and 24(1) of the Statute, would restrict the Court's ability to exercise its jurisdiction to crimes against humanity and war crimes committed in the context of a non-international armed conflict, as respectively defined in articles 7 and 8 of the Statute, only to the extent that those crimes, at the time of their alleged commission, were defined as such either in Sudan's domestic law or in the international treaty and/or customary law applicable to Sudan (the 'Second Ground'). Since, in the Defence's submission, neither of these sources of law provided for the crimes against humanity and war crimes charged against Mr Abd-Al-Rahman at the time of their alleged commission, and the conflict ongoing in Sudan at the time of the events relevant to the charges was non-international in nature, the need to comply with the principles set forth in articles 22(1) and 24(1) of the Statute would deprive the Court of its jurisdiction.

The Prosecutor

13. The Prosecutor submits that the 'Defence submissions lack merit because they mistake the Court's legal framework and the operation of referrals by the United Nations Security Council [...], and improperly repeat previous submissions'.

14. With regard to the First Ground of the Challenge, the Prosecutor notes that '[t]here is no requirement that the territorial scope of a situation coincides with, or extends to, the totality of a State territory' and that, accordingly, the territorial scope of the situation referred by UNSC Resolution 1593, i.e. Darfur, 'is consistent with the Court's legal framework and the Prosecutor's obligations to investigate independently and objectively'. Moreover, the Prosecutor submits that the Second and Third Arguments of the Defence 'are not only incorrect but also fail to raise any jurisdictional matters, and impermissibly attempt to re-litigate unsuccessful arguments from previous filings': as such, they should both be dismissed *in limine*. More specifically, in the Prosecutor's submission (i) 'those aspects of UNSC Resolution 1593 relating to the financial responsibilities of the Assembly of States Parties' do not 'affect the Court's judicial functions, or infringe upon article 115(b) of the Statute'; and, (ii) 'since the Court's jurisdiction in Darfur is not contingent upon UNAMID's presence in Darfur, withdrawal of UNAMID's mandate (and its replacement) is unrelated to the exercise of the Court's jurisdiction in Darfur'.

15. As to the Second Ground of the Challenge, the Prosecutor submits that ‘the crimes charged in this case are fully consistent with [...] the principle of legality’, as enshrined in articles 22(1) and 24(1) of the Statute, and that the Defence would have mischaracterised their nature and scope. The Prosecutor takes the view that (i) the crimes against humanity and war crimes proscribed by articles 7 and 8 of the Statute were evidently crimes falling within the jurisdiction of the Court in 2003 and 2004, i.e. at the time when the charged conducts occurred, since the Statute had already entered into force; and (ii) ‘[a] reasonable person in the position of Mr Abd-Al-Rahman was on reasonable notice, at the material time, that the charged conduct was criminal, not only on the basis of the Statute but also customary international law and even Sudanese domestic law’.

The OPCV and the LRVs

16. Both the OPCV and the LRVs submit that the Challenge should be rejected.

17. In the view of the OPCV, to the extent that both the First and the Second Grounds ‘put into question the legality of Resolution 1593 (2005) and the ensuing referral under article 13(b) of the Statute’, the Challenge ‘must be dismissed *in limine* as the Chamber lacks the authority to review the legality of a Security Council resolution’. Should the Chamber find that it has the authority to address the arguments raised by the Defence, the OPCV notes that the UNSC ‘validly referred the Situation in Darfur [...] in adopting Resolution 1593 (2005) and correctly identified its temporal and territorial parameters in accordance with the Court’s legal framework and practice’, namely in light of the fact that ‘the definition of the term *‘situation’* before the ICC has never been interpreted as necessarily encompassing the entirety of a State territory’. As regards 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’, and ‘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’, the OPCV takes the view that, even assuming that the Defence would have standing to address those matters, none of the issues it raises ‘affects the legality of Resolution 1593 (2005)’ and, therefore, the Court’s jurisdiction over the Situation in Darfur and the present case.

18. With regard to the Second Ground of the Challenge, the OPCV submits that ‘the Defence’s arguments are based on a blatant misinterpretation of the Statute’s relevant provisions’, in particular articles 13(b), 22 and 24 of the Statute. The OPCV asserts that (i) ‘Security Council referrals are necessarily retrospective’ and that the ‘limit to their retroactivity coincides with the date of the entry into force of the Statute’, i.e. 1 July 2002: accordingly, the crimes of which Mr Abd-Al-Rahman is charged would ‘fall therefore squarely within the temporal scope of the Security Council’s referral’; furthermore, (ii) as member State of the United Nations, ‘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’.

19. As to the First Ground of the Challenge, the LRVs submit that the UNSC Referral of the Situation in Darfur by Resolution 1593 does not violate any statutory provision, since (i) the Statute ‘does not limit the definition of a ‘situation’ to one relating to an entire state’, nor would there be a legal basis for ‘the legal authority of the Security Council to pass a resolution limited to a geographically delimited part of a country’ to be restricted; (ii) ‘the question of whether the United Nations has provided funding to the Court has no bearing on the issue of jurisdiction’; and (iii) the Defence has not sufficiently demonstrated ‘how termination of a peacekeeping mandate by the United Nations Security Council can be held to violate’ the Statute’s provisions.

20. As to the Second Ground of the Challenge, the LRVs take the view that the Court’s exercise of jurisdiction over the crimes alleged in the First and the Second Warrant of Arrest issued against Mr Abd-Al-Rahman is in accordance with the principle of legality. First, ‘[i]t is well established that war crimes and crimes against humanity were crimes under customary international law in 2003-2004, the time of the relevant conduct in this case’ and that the conduct was also criminalised under the general principles of law; second, since ‘the charges at issue in this case relate to 2003 and later’, the requirement of article 24(1) of the Statute ‘that the Court not adjudicate crimes committed before 1 July 2002’ is likewise fulfilled.

III. DETERMINATION BY THE CHAMBER

21. The Chamber notes articles 2, 11, 12, 13, 16, 19, 21, 22, 24, 115 and 127 of the Statute.

A. Preliminary considerations: the timing of the Challenge

22. At the outset, the Chamber highlights that all but one of the elements relied upon in support of either the First or the Second Ground (namely, the terms of the Referral; the type of crimes charged against the suspect; and the specific questions allegedly arising in connection with the principles of legality and non-retroactivity of criminal law, as respectively enshrined in articles 22 and 24 of the Statute), existed and were known to the Defence since Mr Abd-Al-Rahman's initial appearance before the Court; only the matter regarding the consequences on the Referral of UNSC Resolution 2559 (adopted and entered into force on 22 December 2020) came into existence during these proceedings.

23. The Chamber is cognisant that, as stated by the Defence, the jurisdiction of the Court may only be challenged once by a person or State and that the Statute only restricts a party's discretion as to the time when this challenge should be brought by providing that, bar exceptional circumstances, this must happen prior to or at the commencement of the trial (article 19(4) of the Statute). Accordingly, the choice of delaying the submission of the Challenge until this advanced stage of the proceedings cannot *per se* be considered as amounting to abuse of process, despite the fact that most of the arguments relied upon by the Defence existed or occurred at a date earlier than the suspect's first appearance and that dozens of filings and decisions obviously premised on the existence of the Court's jurisdiction have been submitted since then.

24. By the same token, the Chamber notes that some features of the Challenge might qualify as dubious in terms of good faith. First, the reiteration of lines of arguments previously submitted – and rejected – in various forms and before various instances; second, the choice to rely on an argument centred upon the non- international character of the conflict in Sudan, on which the Prosecutor and the Defence had just reached an agreement, thereby resulting in curtailing to some extent the Prosecutor's very ability to respond to the argument.

B. The First Ground

First Argument: The Darfur situation does not constitute a 'situation' in accordance with the Statute

25. The concept and term of 'situation' has been devised, included in the Statute and construed with a view to identifying a specific set of events in respect of which credible

allegations of crimes are made, and hence to define and circumscribe the perimeter of the action of the Court. As such, it is instrumental in determining the scope of any investigation and prosecution and has its own precise meaning, which differs both from the one of ‘case’ and from the one of ‘territory of a State’ or ‘State’. As clarified by Pre-Trial Chamber I in the situation in the Democratic Republic of the Congo, and subsequently in the case of *The Prosecutor v. Callixte Mbarushimana* arising within it, a situation is ‘generally defined in terms of temporal, territorial and in some cases personal parameters’,¹⁷ possibly including ‘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 which was ongoing at the time of the referral’.¹⁸

26. Accordingly, because of its specific meaning and function, the term ‘situation’ is other than the one of a ‘State’; the territorial scope of a State, on the one hand, and the territorial scope of a situation as the subject matter of a referral to the Court, on the other hand, do not necessarily overlap. It is therefore possible to envisage a situation both extending beyond, and restricted to a specific area located within, the territory of one State, as well as several situations within the territorial boundaries of one and the same State. Article 13 of the Statute adopts the term ‘situation’ to identify the subject matter of a referral by the UN Security Council acting under Chapter VII of the United Nations Charter, without any further qualification; there is therefore no element indicating or otherwise warranting that a different approach should be taken when construing the term in the particular context of a Security Council referral.

27. In light of the above, it is unnecessary for the Chamber to address the Defence’s argument to the effect that, as a matter of internal territorial organisation of the State of Sudan, Darfur did not legally and administratively exist in 2005: since a situation is defined by the scope of the criminal action allegedly committed within it, rather than by pre-determined boundaries established for other purposes as a matter of

¹⁷ Decision on the Applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 (Public Redacted Version), 17 January 2006 (notified on 19 January 2006), ICC-01/04-101-tEN-Corr, para. 65.

¹⁸ Decision on the “Defence Challenge to the Jurisdiction of the Court”, 26 October 2011, ICC-01/04-01/10-451, para. 16.

administrative or international law, it is irrelevant to assess the accuracy of that argument for the purposes of this decision.

Second Argument: Resolution 1593 would be incompatible with article 115(b) of the Statute

28. The issue of the financial contribution of the United Nations to the investigation and prosecution of cases arising from the Situation in Darfur was first raised by the Defence in its ‘*Requête en vertu de l’Article 115-b*’, dated 26 June 2020,¹⁹ and has since been reiterated both before this Chamber²⁰ and the Presidency.²¹ As the Chamber stated in its ‘Decision on the Defence request under article 115(b) of the Rome Statute’ dated 23 July 2020,²² and reiterated when adjudicating the Defence’s request for leave to appeal that decision on 13 August 2020,²³ ‘the Defence has no legal standing to either evaluate nor provide recommendations regarding the Court’s financial management’; furthermore, since ‘the Court’s statutory framework clearly distinguishes the role of the Court, as a judicial institution’ from that of the Assembly of States Parties, ‘which is responsible for considering and deciding on the Court’s budget’, ‘[t]here is no legal basis for the Chamber to engage in the financial matters of the Court’ and, regardless of the adequacy or appropriateness of financial conditions or arrangements relating to the Court, the judiciary ‘cannot play any role in the budgetary process, let alone in the negotiation of any financial agreements’.

29. The Chamber regrets and strongly censures the Defence decision to, yet again, try and have a previously rejected argument considered under a different angle. The weakness of the purported link between the Second Argument and the matter of jurisdiction is all too apparent from its very wording, which tries to hide the duplicative nature of the strategy by focusing on the alleged difference *in petitum* between the Challenge and previous requests, while failing to provide any reasoning as to how or

¹⁹ ICC-02/05-01/20-10.

²⁰ *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)*, 27 July 2020, ICC-02/05-01/20-105; *Demande de reconsideration de la Décision ICC-02/05-01/20-110*, 13 August 2020, ICC-02/05-01/20-113.

²¹ *Requête en vertu des Articles 38-3-a, 43-2 et 115-b*, 25 September 2020, ICC-02/05-01/20-165.

²² ICC-02/05-01/20-101.

²³ Decision on the Defence Request for Leave to Appeal the ‘Decision on the Defence request under article 115(b) of the Rome Statute’, ICC-02/05-01/20-110.

why a matter relating to the financial operation of the Court would have an impact on its jurisdiction.

30. The Chamber notes that reiterating one and the same argument for multiple purposes (and even before different *fora*) is a recurrent element of the strategy pursued by the Defence throughout these proceedings; a fact which has not escaped the attention of the Presidency. Called to ‘take appropriate measures to obtain funding from the United Nations [...] in respect of the Darfur situation’, on the basis of a request relying on virtually the same arguments previously raised before this Chamber, and rejected by it, the Presidency dismissed the Defence request *in limine*, after pointing out that ‘duplication of proceedings is unwarranted, interferes with the expeditious administration of justice and may even be considered an abuse of process’.²⁴

Third Argument: Resolution 1593 would have been replaced by Resolution 2559 in December 2020 and would therefore now be obsolete

31. Similar flaws affect the Third Argument developed in support of the First Ground of the Challenge. Considerations relating to the perceived inadequacy of the support provided by the State of Sudan and/or the United Nations missions in Sudan has been repeatedly invoked as the basis for a series of requests to the Chamber, broadly referring to the Defence’s ability to carry out investigations in Sudan.²⁵ The Chamber notes that no serious attempt is made to explain how this would relate and affect the jurisdictional parameters of the Court’s action and recalls that, in any event, as also stated by the Presidency, ‘issues concerning the general administration of the Court, *including in matters of diplomatic relations*, do not give rise to an entitlement to a remedy for parties in proceedings’ (emphasis added).²⁶

²⁴ 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), 12 October 2020, ICC-02/05-01/20-180, para. 6.

²⁵ *Requête en vertu des Articles 4-2 et 68-1 du Statut*, 14 December 2020, ICC-02/05-01/20-231-Conf-Exp (public redacted version notified on the same day, ICC-02/05-01/20-231-Red); *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*, 26 January 2021, ICC-02/05-01/20-269; *Requête en vertu de l’Article 43-1 du Statut et de la Règle 13 du Règlement de Procédure et de Preuve* with confidential ex parte Annexes 1-4, 29 January 2021, ICC-02/05-01/20-272-Conf-Exp (public redacted version notified on the same day, ICC-02/05-01/20-272-Red); *Requête aux fins d’audience*, 22 March 2021, ICC-02/05-01/20-317-Conf (public redacted version notified on the same day); *Nouvelle Requête aux Fins de Convocation Urgente d’une Audience*, 9 April 2021, ICC-02/05-01/20-336.

²⁶ 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), 12 October 2020, ICC-02/05-01/20-180, para. 4.

32. For the purposes of this decision, it is therefore not necessary for the Chamber to comprehensively review the features of Resolution 2559, or to assess in detail the accuracy of the Defence's assumptions as to its possible impact *vis-à-vis* other instruments governing the action of the United Nations and its field missions in Sudan. Suffice it to say, however, that (i) neither the Referral, nor Resolution 1593 are mentioned in Resolution 2559; (ii) the Preamble of Resolution 2559, far from making Resolution 1593 obsolete, explicitly reaffirms '*all its previous resolutions [...] concerning the situation in Sudan*' (emphasis added); and (iii) through Resolution 2559, the UNSC, by urging 'the Government of Sudan to fully and swiftly implement the national Plan for Civilian Protection and to protect civilians in Darfur in accordance with international human rights law and international humanitarian law',²⁷ reaffirms its determination to pursue the aim of protecting civilians in Sudan, notwithstanding the end of the mandate of the UNAMID and including through the United Nations Integrated Transition Assistance Mission in Sudan (the 'UNITAMS'), which counts among its objectives to '[a]ssist, advise and support the Government of Sudan to establish a secure and stable environment [...] by providing effective support to national and local authorities on civilian protection [...] in the conflict-affected areas [and] supporting the Government of Sudan in implementing the National Plan for Civilian Protection (S/2020/429)'.²⁸

33. More fundamentally, the Chamber notes that the very idea that the effect of an act triggering the jurisdiction of the Court could be simply taken away by a subsequent act – and one not even relating to the same subject matter – runs counter to fundamental and critical features of the system governing the exercise of the Court's jurisdiction, as enshrined in the Statute as a whole. Specific mechanisms and guarantees have been built into the Statute precisely against the risk that, once established, the jurisdiction of the Court could be taken away by a simple act purportedly endowed with a contrary effect. The withdrawal of a State Party from the Statute, whilst provided for under article 127 and therefore possible, has no effect on the previously established jurisdiction of the Court and takes effect only one year after the date of its receipt at the earliest; also, it has no impact either on already ongoing proceedings or on duties of

²⁷ S/RES/2559 (2020), para. 4; *see also* S/2020/429.

²⁸ S/RES/2524 (2020), para. 2(iii)(c).

cooperation with the Court in connection with investigations and proceedings having commenced prior to the date on which the withdrawal became effective, nor does it otherwise prejudice ‘the continued consideration of any matter which was already under consideration by the Court’ prior to that date.

34. Furthermore, specifically in respect of UN Security Council referrals, the situation where the UNSC might consider it desirable to cancel the effects of a previous referral has been considered by the drafters of the Statute, and ruled upon in such a way as to make the Council’s manoeuvring space extremely limited. Once it has referred a situation, the UN Security Council is not allowed to simply withdraw its own act, even if it were willing to do so. Should it consider that an existing referral creates a risk to peace and security, the only possible action for the Council is to try and mitigate its effects on a temporary basis, by requesting a deferral ‘for a period of 12 months’, in compliance with the restrictive procedure set up in article 16 of the Statute: the UNSC would have to adopt a resolution under Chapter VII of the United Nations Charter, based on a determination that commencing or proceeding with an investigation or prosecution before the Court on the basis of the original referral would be detrimental to the maintenance of international peace and security; a renewal of that request would have to comply with the same conditions.

35. Against this background, the contention that a subsequent UNSC resolution relating to administrative matters pertaining to the United Nations field missions in Darfur might have an impact or otherwise affect a previous UNSC referral to the Court appears deprived of any legal basis and therefore frivolous.

C. The Second Ground

36. The Chamber notes that the present case satisfies all the relevant statutory requirements of jurisdiction: Mr Abd-Al-Rahman is charged with crimes against humanity and war crimes, which are among those provided for in the Statute (jurisdiction *ratione materiae*), in respect of events having allegedly took place within the perimeters of the territory of Darfur, Sudan (jurisdiction *ratione loci*) between August 2003 and March 2004, i.e. after the entry into force of the Statute (jurisdiction *ratione temporis*). Since the requirements relating to the Court’s jurisdiction *ratione loci* and *ratione personae* are alternative, and the *ratione loci* parameter is satisfied, the

fact that the suspect is not a national of a State Party is irrelevant for the purpose of establishing the jurisdiction of the Court.

37. The Defence does not make any convincing attempt at explicitly linking its arguments to any of these parameters of jurisdiction; rather, it seems to frame the Second Ground of the Challenge in such a way that it would have an impact on the temporal element of the Court's jurisdiction. The Defence appears to suggest that, in order for the Court's temporal jurisdiction to exist, it would be necessary not only that the charged events took place after the entry into force of the Statute, but also that, at the time of their commission, the relevant crimes were already criminalised and punished as such either by the criminal laws of the State which would ordinarily have jurisdiction, or as a matter of customary international law; in the absence of such criminalisation, a positive finding as to the existence of the jurisdiction of the Court *ratione temporis* would result in violating the fundamental principles of legality and non-retroactivity of criminal law, as enshrined in articles 22 and 24 of the Statute.

38. In the view of the Chamber, the Defence's argument unduly conflates the issue of jurisdiction and the ones relating to the principle of legality and non-retroactivity of criminal law, relies on a mischaracterisation of their respective purpose and scope and does not find support in the text of the Statute.

39. Article 22(1) (*Nullum crimen sine lege*), included in Part 3 of the Statute, devoted to 'General principles of criminal law', requires that the conduct of the accused person, 'at the time it takes place', constituted 'a crime within the jurisdiction of the Court', i.e. fell within the jurisdiction *ratione materiae* of the Court as set forth in articles 5 to 8 of the Statute. As put by the Prosecutor, the provision aims at ensuring that the Court 'does not deviate from the intention of the drafters that it should apply the statutorily defined crimes, and no others'²⁹ and fulfils the crucial need to ensure that any potential accused benefit from the possibility to know in advance which acts and conducts may amount to the crimes provided in the Statute. These acts and conducts are listed and defined by the Statute and the Elements of Crimes in sufficient detail as to provide adequate information on which of them are punishable as international criminal offences and therefore suitable to entail criminal responsibility. As to article

²⁹ Prosecutor Observations, para. 10.

24 ('Non-retroactivity *ratione personae*'), also included in Part 3 of the Statute, it prevents the Court from exercising its jurisdiction *vis-à-vis* acts and conducts carried out prior to the entry into force of the Statute, i.e. before 1 July 2002.

40. The case against Mr Abd-Al-Rahman was brought by the Prosecutor before the Court on the basis of provisions detailing the prohibited conduct, which existed and were in force at the time of all of the events underlying the charges. The Chamber is satisfied that, under these circumstances, no violation of the principle of legality or non-retroactivity of criminal law can be detected.

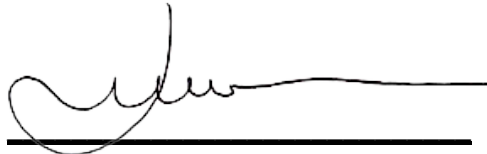
41. Furthermore, the Chamber notes that the referral by the UN Security Council was included in the Statute as a tool suitable to potentially broaden the jurisdictional reach of the Court, namely by allowing it to exercise its jurisdiction *vis-à-vis* scenarios where crimes as defined in the Statute would be allegedly committed on the territory of States not party to the Statute and no nationals of a State Party would be involved. In the view of the Chamber, the Defence's reading of the relevant statutory provisions, to the effect that a UNSC referral would only be compliant with the principle of legality and non-retroactivity of criminal law to the extent that it covers conducts already adequately criminalised either by the relevant State or States, or as a matter of customary international law at the time of their commission, would result in restricting its scope to such an extent as to call into question the very *raison d'être* of that particular triggering mechanism; indeed, adhering to that reading would result in preventing this mechanism from operating precisely *vis-à-vis* some of the scenarios which convinced the drafters of the Statute of its necessity, in particular those instances where a State is unwilling and/or unable (typically, because of the inadequacy of its own legal system) to investigate and prosecute the most serious crimes.

42. The Chamber is not persuaded by the Defence's argument. Accordingly, the Second Ground is rejected and it is unnecessary for the Chamber to make a determination as to whether and to what extent, at the time of their commission, the conducts charged against Mr Abd-Al-Rahman were criminalised by either Sudan's national law or as a matter of international customary law.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Defence Jurisdictional Challenge.

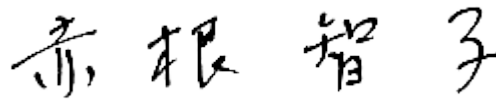
Done in both English and French, the English version being authoritative.



**Judge Rosario Salvatore Aitala,
Presiding Judge**



Judge Antoine Kesia-Mbe Mindua



Judge Tomoko Akane

Dated this Monday, 17 May 2021

At The Hague, The Netherlands