



Original: **English**

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

Date: **19 March 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

**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)**

Source: Office of the Prosecutor

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

The Office of the Prosecutor

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**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. On 15 March 2021, the Defence for Mr Abd-Al-Rahman challenged the jurisdiction of the Court (“Challenge”).¹ The Prosecution respectfully requests Pre-Trial Chamber II (the “Chamber”) to permit the Prosecution, and other participants, to provide observations to the Challenge by 16 April 2021. It also requests the Chamber to allow observations from the Government of the Republic of Sudan (“Sudan”) by 3 May 2021.

II. SUBMISSIONS

2. In its 57-page Challenge, the Defence challenges the jurisdiction of the Court on different grounds. First, the Defence argues that United Nations Security Council Resolution 1593 is illegal because it infringes articles 2, 13(b) and 115(b) of the Statute.² Second, the Defence surmises that the Court cannot exercise jurisdiction in Sudan over the crimes set out in the two arrest warrants as a result of the principles of *nullum crimen sine lege* under article 22 and non-retroactivity under article 24(1) of the Statute.³

3. Pursuant to article 19(3) of the Statute, and rules 58(2) and (3) and 59 of the Rules of Procedure and Evidence, the Chamber shall: (i) decide on the procedure to be followed to resolve the Challenge, (ii) transmit the Challenge to the Prosecutor, the United Nations Security Council and the victims who have communicated with the Court, and permit them to file observations. The Chamber may also adopt other measures that it considers necessary to decide on the Challenge and must remain vigilant that the relevant States, entities and persons are provided with a meaningful opportunity to provide observations to the Challenge.⁴

¹ [ICC-02/05-01/20-302](#).

² Challenge, paras. 10-52.

³ Challenge, paras. 53-114.

⁴ [ICC-01/14-01/18-678-Red](#), para. 54 (“Although no specific obligation is imposed on Chambers dealing with issues of jurisdiction or admissibility, the Appeals Chamber considers that it is incumbent upon them to ensure that referring entities have a reasonable opportunity to exercise their prerogative under article 19(3) of the Statute to submit observations. As rule 58 of the Rules makes plain, and as confirmed by previous decisions of

4. In setting out the procedure, the Chamber is requested to permit the Prosecution, and other participants, to provide observations by 16 April 2021—the same date when the Prosecution will separately file its Pre-Confirmation Brief. This period of time is necessary to address the multifaceted Defence arguments in the Challenge, and takes into consideration the workload regarding the different filings due before the confirmation hearing. It also post-dates the Prosecution’s filing of the Document Containing the Charges, due on 29 March 2021.

5. Only by this date, there will be certainty with respect to the charges—and crimes—that the Prosecution requests the Chamber to confirm. The Chamber may rule on the Challenge in the Confirmation Decision itself, before it assesses the merits. This approach is consistent with the Court’s previous practice in deciding on jurisdictional challenges filed shortly before confirmation hearings.⁵ Alternatively, the Chamber may also decide on the Challenge in a separate decision after the confirmation hearing.

6. Further, and considering that the Challenge refers to the Sudanese legal framework,⁶ the Prosecution respectfully suggests that Sudan be afforded the opportunity to provide observations to the Challenge by 3 May 2021, after the Prosecution and other participants have filed their observations.

III. CONCLUSION

7. For all the foregoing reasons, the Prosecution respectfully requests the Chamber to decide on the procedure to be followed to rule on the Defence’s Challenge. The Prosecution requests the Chamber to permit the Prosecution, and

this Chamber, Chambers have wide discretion in this regard. However, this discretion does not extend to Chambers taking no measures whatsoever. Accordingly, Trial Chamber V erred by failing to take any steps to either ascertain whether the CAR, as the referring entity, wished to submit observations, or to provide it with a meaningful opportunity for doing so.”)

⁵ Pre-Trial Chamber I in the *Ruto, Sang and Kosgey* case followed this approach. The Defence filed its challenge the day before the start of the confirmation hearing ([ICC-01/09-01/11-305](#) and [ICC-01/09-01/11-306](#)). The Chamber set out a deadline for the Prosecution to respond ([ICC-01/09-01/11-T-5](#), pp. 15, 20-21) and decided in the confirmation decision ([ICC-01/09-01/11-373](#), paras.23-37).

⁶ See Challenge, paras. 69, 70, 79, 91, 103 and 106.

other participants, to provide observations by 16 April 2021. It also suggests that Sudan be afforded the opportunity to provide observations to the Challenge by 3 May 2021.

A handwritten signature in black ink that reads "James K. Stewart." The signature is written in a cursive style with a period at the end.

James Stewart
Deputy Prosecutor

Dated this 19th day of March 2021

At The Hague, The Netherlands