Cour Pénale Internationale

International Criminal Court

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No.: **ICC-02/05-01/20**
Date: **16 April 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 response to the Defence challenge to the Court's jurisdiction (ICC-02/05-01/20-302)

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I. INTRODUCTION

1. The Defence's jurisdictional challenge ("Challenge") pursuant to article 19 of the Statute should be dismissed.[1] The Defence submissions lack merit because they mistake the Court's legal framework and the operation of referrals by the United Nations Security Council ("UNSC" or "UN Security Council"), and improperly repeat previous submissions.

2. Pursuant to article 13(b), UNSC Resolution 1593 of 31 March 2005 referred to the Court the situation in Darfur as of 1 July 2002. As a result, the Court is entitled to exercise its jurisdiction—and can apply the entirety of the Rome Statute—in the territory of Darfur during the charged period (2003-2004). Mr Abd-al-Rahman can thus be prosecuted for the charged crimes. As a UN member State, Sudan has known since at least 1998 that the UN Security Council could refer to the Court any qualifying situation on its territory, acting under chapter VII of the United Nations Charter. Furthermore, the crimes charged in this case are fully consistent with the requirements of articles 11(1), 22(1), and 24(1) of the Statute, and the principle of legality as an internationally recognised human right: the criminal conduct was, "at the time it [took] place, a crime within the jurisdiction of the Court" and occurred after "the entry into force of the Statute". 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.

3. Furthermore, the territorial scope of the referred situation—Darfur—is consistent with the Court's legal framework and the Prosecutor's obligations to investigate independently and objectively. The Defence fails to demonstrate otherwise. The remaining Defence arguments should be dismissed *in limine*, because they are not jurisdictional in nature and have already been raised. Nor in any event do those

[1] ICC-02/05-01/20-302 ("Challenge").

aspects of UNSC Resolution 1593 relating to the financial responsibilities of the Assembly of States Parties ("ASP") affect the Court's judicial functions, or infringe upon article 115(b) of the Statute. Likewise, 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.

II. PROCEDURAL HISTORY

4. On 15 March 2021, the Defence for Mr Abd-Al-Rahman challenged the jurisdiction of the Court ("Challenge"). The Defence filed the Challenge before the Prosecution filed its Document Containing the Charges ("DCC") (on 29 March 2020) to avoid a potential postponement of the confirmation hearing.[2] The Defence submitted that the Parties' agreement on the non-international character of the conflict provided sufficient basis to file the Challenge before the DCC.[3] The Defence further submitted that the Pre-Trial Chamber's previous finding in the article 58 decision that the Court had jurisdiction in this case was taken without the Defence being heard and does not preclude this Challenge.[4]

5. On 25 March 2021, the Chamber set out the procedure to rule on the Challenge "without prejudice to [its] assessment as to the correct legal qualification of the matters raised in the Defence Request". The Chamber allowed the Prosecution, the UN Security Council and the victims and victim applicants who have already communicated with the Court to respond by 16 April 2021 ("Order").[5]

[2] Challenge, para. 5.
[3] Challenge, para. 6.
[4] Challenge, para. 9 (quoting ICC-02/05-01/07-1-Corr, para. 25). The PTC however referred to the possibility of challenging admissibility and making a new determination on this matter. The PTC addressed jurisdiction in paragraphs 13 to 17.
[5] ICC-02/05-01/20-321.

III. SUBMISSIONS

6. The Challenge raises two general arguments. First, it questions the legality of the UN Security Council referral of the Darfur situation to the Court because UNSC Resolution 1593 inappropriately limited the territorial scope of the situation to Darfur, instead of Sudan.[6] Second, the Defence argues that the Court cannot exercise jurisdiction in Darfur over the crimes in the two arrest warrants because of the principles of *nullum crimen sine lege* under article 22(1) and non-retroactivity under article 24(1) of the Statute.[7] Both arguments lack merit and do not affect the Court's lawful exercise of jurisdiction in this situation. The Prosecution addresses these arguments in reverse order, in the interest of clarity.

7. In addition, two further arguments raised in the Challenge[8]—the purported violation of article 115(b) of the Statute and the expiration of UNSC Resolution 1593 due to UNAMID's withdrawal—are not only incorrect but also fail to raise any jurisdictional matters, and impermissibly attempt to re-litigate unsuccessful arguments from previous filings. They should be dismissed *in limine*.

A. The charged conduct, at the time it took place, constituted crimes "within the jurisdiction of the Court"

8. The Defence claims that Mr Abd-Al-Rahman may not be charged under articles 7 and 8 of the Statute with crimes against humanity and war crimes in non-international armed conflict because such charges would violate articles 22(1) (*nullum crimen sine lege*) and 24(1) (non-retroactivity).[9] According to the Defence, as Sudan was not a State Party to the Rome Statute when the crimes were committed, Mr Abd-Al-Rahman may only be prosecuted for crimes under Sudan's national legislation or crimes under applicable treaty law (other than the Statute) or customary international

[6] Challenge, paras. 17-32.
[7] Challenge, paras. 53-114.
[8] Challenge, paras. 33-52.
[9] Challenge, paras. 53-114.

law, which it interprets very narrowly. These claims must be rejected for the reasons set out below.

9. First, the Defence misunderstands the nature and scope of articles 22 and 24, and their relationship to the Court's exercise of jurisdiction when triggered by a UN Security Council referral under article 13(b). There is nothing exceptional in conferring jurisdiction upon the Court, when the UN Security Council acts under chapter VII of the UN Charter. As a UN Member State, Sudan consented to this regime, with consequential effects for Sudanese nationals and persons on Sudanese territory.

10. Precisely because article 13(b) of the Statute permits the UN Security Council to trigger the Court's jurisdiction *after* alleged crimes have taken place, article 22(1) of the Statute only requires that the conduct of an accused person, "at the time it takes place," constituted "a crime within the jurisdiction of the Court"—in the sense that it formed part of the jurisdiction *ratione materiae* in articles 5 to 8, which had entered into force under article 11(1) (jurisdiction *ratione temporis*). This strict requirement is intended to ensure that the Court does not deviate from the intention of the drafters that it should apply the statutorily defined crimes, and no others. It also ensures that accused persons will have the benefit of a prior, written criminal code (the Statute) to inform their conduct. Article 22(1) does not require that an accused's conduct was subject to the Court's jurisdiction *ratione loci* or *ratione personae* at the material time, since this would be inconsistent with the acknowledged potential for retroactive referrals under article 13(b) which, as noted, may be made *after* crimes have been committed.

11. Second, the Prosecution agrees that accused persons are entitled to reasonable notice that their conduct, at the time it takes place, is 'criminal'. This is consistent with internationally recognised human rights, as required by article 21(3) of the Statute. This requirement is satisfied if a reasonable person, at the material time, may access and has sufficient foresight of a body of criminal law which encompasses their conduct, and which imposes penalties of similar gravity to that which may subsequently be applied to them. However, they need not foresee the specific source

of law that may subsequently be applied, or appreciate the technical legal categorisation of their conduct. Nor is it required that they foresee the exercise of jurisdiction by a particular judicial body, provided this is governed by law. Accordingly, the Statute itself can satisfy these requirements, even with respect to conduct on the territory of non-States Parties, or by their nationals.

12. Third, and in any event, the Defence overlooks the relevant content of customary international law (and Sudanese domestic law) at the material times, which was also sufficiently foreseeable and accessible to satisfy any requirement of 'reasonable notice'. Notably, the relevant customary international law adheres closely to the contours of the crimes under the Statute with which Mr Abd-Al-Rahman is charged.

13. Properly understood, therefore, no concern about the principle of legality arises in this case.

(i) The UN Security Council can backdate the temporal scope of the referral to 1 July 2002, such that the Court may investigate and prosecute the crimes in article 5 in accordance with the Statute

14. The Defence misunderstands the exercise of the Court's jurisdiction resulting from a UN Security Council referral. Pursuant to article 13(b) of the Statute, the UN Security Council may refer a situation to the Prosecutor when acting under chapter VII of the UN Charter. Since the Court has temporal jurisdiction "with respect to crimes committed after the entry into force of this Statute", pursuant to article 11(1), the UN Security Council can backdate the temporal scope of its referral to 1 July 2002, when the Rome Statute entered into force.[10] This may not be uncommon, since referrals may often be prompted by the commission of precisely the kind of atrocities that the Court

[10] Statute, art. 11(1). *See* W. A. Schabas and G. Pecorella, 'Article 13: exercise of jurisdiction,' in O. Triffterer and K. Ambos (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, 3rd Ed. (München/Oxford/Baden Baden: C.H. Beck/Hart/Nomos, 2016), p. 696 (mn. 16: "the Security Council can backdate the jurisdiction *ratione temporis* to any time after the entry into force of the Statute").

must investigate and prosecute, and may themselves demonstrate the existence of the requisite threat to international peace and security.

15. This position is not altered by article 11(2) of the Statute, which applies only "[i]f a State becomes a Party to this Statute after its entry into force", with the effect of limiting the Court's exercise of jurisdiction "only with respect to crimes committed after the entry into force of this Statute *for that State*" (emphasis added). But it is clear that this limitation does not arise from concerns about the principle of legality as such, since it is subject to two clear exceptions. First, article 11(2) itself acknowledges that a State may permit retroactive application of the law in the Statute—subject to the absolute temporal limitation of 1 July 2002, set out in article 11(1)—if it makes a declaration under article 12(3). Second, article 11(2) does not apply to situations referred to the Prosecutor by the UN Security Council under article 13(b).[11] Accordingly, article 11(2) should be understood as a distinct provision which recognises that States newly acceding to the Statute only accept the potential exercise of the Court's jurisdiction under articles 13(a) and 13(c) on a *prospective* basis, unless they expressly permit otherwise.[12] Unlike article 11(1), article 11(2) does not relate to the principle of legality *stricto sensu*.

16. While the Defence seems to accept the retroactive application of the Statute as of 1 July 2002,[13] it seeks to exempt articles 5 to 8, and therefore assumes that articles 22(1) and 24(1) require the Court to apply *other* sources of law than the statutory crimes to prosecute Mr Abd-al-Rahman. This is not only incorrect, but illogical.

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[11] *See* W. A. Schabas, *The International Criminal Court: a Commentary on the Rome Statute*, 2nd Ed. (Oxford: OUP, 2016) ("Schabas (2016)"), p. 343 ("Where jurisdiction is exercised by the Court pursuant to a Security Council resolution, the date of entry into force with regard to a particular State does not arise. Authorization to exercise jurisdiction is being given to the Court by the Security Council regardless of whether the State in question has ratified or acceded to the Statute or formulated a declaration under article 12(3), and as a result article 11(2) is inapplicable. Nevertheless, article 11(1) continues to have full force and effect").

[12] This is also indicated by the reference to article 12(3) in article 11(2). Article 12(3) of the Statute only applies "[i]f the acceptance of a State which is not a Party to this Statute is required under [article 12(2)]". Article 12(2) only applies "[i]n the case of article 12, paragraph (a) or (c)", but not article 13(b).

[13] *See* Challenge, para. 76.

17. Article 22(1) has the opposite effect to that claimed by the Defence, insofar as it requires the Court to apply *only* the crimes set out in articles 5 to 8 of the Statute, provided the conduct occurs after 1 July 2002 (the entry into force of these provisions of the Statute, pursuant to article 11(1)).[14] It requires that "a person shall not be criminally responsible under this Statute unless the conduct in question, constitutes, at the time it takes place, *a crime within the jurisdiction of the Court*" (emphasis added). In other words, this provision is concerned with ensuring that the Court does not punish conduct beyond that falling (at the material time) within "article 5 of the Statute, listing four 'crimes within the jurisdiction of the Court'" and thus excluding "any possibility of prosecution for offences based *solely* upon customary law."[15]

18. This is confirmed by the *chapeau* of article 13—which expressly applies to situations referred to the Court by the UN Security Council under article 13(b)—which requires the Court to exercise its jurisdiction "with respect to *a crime referred to in article 5* in accordance with the provisions of this Statute".[16] While the Court may of course apply other sources of international law under article 21(1)(b), this is only "where appropriate" and to a limited extent—such as when the Statute expressly requires the elements of certain war crimes under article 8 to be interpreted "within the established framework of international law".[17]

19. Nor can it be said that Sudan has not consented to the UN Security Council's power to refer situations to the Court for the exercise of its jurisdiction, including retroactively. The precursor to article 13(b) of the Statute was part of the International Law Commission's 1994 draft, and did not undergo any significant change during the

[14] *Contra* Challenge, paras. 84-89. *See also* R. Rastan and M. E. Badar, 'Article 11: Jurisdiction *ratione temporis*,' in O. Triffterer and K. Ambos (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, 3rd Ed. (München/Oxford/Baden Baden: C.H. Beck/Hart/Nomos, 2016) ("Rastan and Badar"), p. 658 (mn. 2: "the reference to 'crime within the jurisdiction of the Court' [in article 22(1)] necessarily includes the notion of the temporal restriction expressed in article 11").
[15] Schabas (2016), p. 543 (emphasis added).
[16] Statute, art. 13 (emphasis added). *See further* ICC-02/05-01/09-397-Corr OA2 ("*Bashir* Appeal Judgment"), paras. 135, 139.
[17] ICC-01/04-02/06-1962 OA5 ("*Ntaganda* Jurisdiction Appeal Judgment"), para. 53.

subsequent negotiating process in which Sudan participated.[18] Even though Sudan did not ultimately ratify the Statute (although it did initially sign it), it had already consented to the plenary authority of the UN Security Council in identifying and addressing any threat to international peace and security by previously ratifying the 1945 UN Charter.[19] The Charter does not prescribe the measures that the UN Security Council may propose, but it was clear at the latest by 1998 that this included the possibility of referring to the Court a situation in any UN Member State for investigation or prosecution of the crimes in article 5 of the Statute, once these had entered into force on 1 July 2002.[20] Likewise, the UN General Assembly adopted the UN Relationship Agreement by consensus (therefore including Sudan), without a vote, which in article 17 contemplates the possibility of UN Security Council referrals.[21] And of course it was clear that the UN Security Council might create *ad hoc* tribunals with jurisdiction to investigate and prosecute crimes under customary international law and applicable treaty law more than ten years before that.[22]

20. Accordingly, consistent with the UN Charter and the Statute, UNSC Resolution 1593 enabled the Court to exercise its jurisdiction—and to apply the entirety of the Statute—in the territory of Darfur since 1 July 2002. As explained further below, articles 22(1) and 24(1) are therefore no bar to charging Mr Abd-al-Rahman with statutory crimes committed in Darfur during 2003 and 2004.

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[18] W. A. Schabas, *An Introduction to the International Criminal* Court, 6th Ed. (Cambridge: CUP, 2020) ("Schabas (2020)"), p. 160.
[19] Sudan became a UN member state in 12 November 1956. *See* UN Charter, art. 25, 39. *See also* *Bashir* Appeal Judgment, para. 140. *See further e.g.* Rastan and Badar, p. 663 (mn. 15: "The ICC Statute […] merely provides a procedural vehicle (article 13(b)) to enable the Court to recognize and act upon such measures [by the UN Security Council], which are based on authority external to the Statute itself").
[20] C. Stahn, *A Critical Introduction to International Criminal Law* (Cambridge: CUP, 2019), p. 195 (noting that "[i]n this case, the ICC becomes a 'quasi' ad hoc tribunal which does not require consent by the state concerned to exercise jurisdiction"). *See also* Relationship Agreement, article 17 (confirming that UN Security Council referrals to the ICC are governed by Chapter VII of the UN Charter and article 13(b) of the ICC Statute).
[21] *See* UNGA A/RES/58/318 (20 September 2004). The resolution was adopted in the UNGA by consensus, without a vote.
[22] *See e.g.* UNSC Resolution 827, 25 May 1993 (creating the ICTY); UNSC Resolution 955, 8 November 1994 (creating the ICTR); *see also* Schabas (2020), p. 160 (noting that the "[UNSC's authority under the Charter to act in this way was upheld in early ruling of the international tribunals, and would now appear to be beyond dispute").

(ii) Article 22 does not require that the Court already exercised jurisdiction over Mr Abd-Al-Rahman at the time his conduct took place

21. The Defence misunderstands the nature and scope of article 22(1), and relatedly of articles 11 and 24(1),[23] by assuming that it requires the Court to have been given jurisdiction over Sudanese territory (*ratione loci*) or Sudanese nationals (*ratione personae)* at the time material to the criminal conduct of an accused person. In this sense, the Defence suggests that articles 5 to 8 were not "in force" for Mr Abd-Al-Rahman, and therefore cannot be applied without breaching article 22.[24] This is incorrect, and confuses the procedural basis upon which the Court may come to exercise jurisdiction with the objective existence of the substantive law which is to be applied. Article 22(1) is concerned only with the latter. Notwithstanding the use of the word "jurisdiction" in article 22(1)—which is not freestanding, but part of the phrase "*crime* within the jurisdiction of the Court", referring to article 5—the purpose of article 22(1) is to ensure that the Court only applies the statutorily defined crimes adopted by the drafters, which have duly entered into force in accordance with article 11(1).[25] This serves the principle of legality, since it provides the clearest possible notice to potential accused persons of the crimes for which they may be prosecuted by the Court and ensures that the core elements of those crimes are not expanded via judicial interpretation.

22. Accordingly, since Mr Abd-Al-Rahman is charged with conduct which occurred in 2003 to 2004, it is evident that the crimes against humanity and war crimes proscribed by articles 5 to 8 were already "crime[s] within the jurisdiction of the Court" since, at that time, the Statute had already entered into force. That this itself satisfies the requirement of article 22(1) is consistent with the Court's established caselaw,

[23] B. Broomhall, 'Article 22: *nullum crimen sine lege*,' in O. Triffterer and K. Ambos (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, 3rd Ed. (München/Oxford/Baden Baden: C.H. Beck/Hart/Nomos, 2016) ("Broomhall"), p. 963 (mns. 52-53: observing that articles 11(1), 22(1), and 24(1) are "to some degree coextensive", with a "clear overlap" such that "there is little point in seeking out distinctions in application among them"). *See also* Rastan and Badar, p. 658 (mn. 3).
[24] Challenge, paras. 73-75.
[25] *See also above* para. 15 (concerning the relationship between articles 11(1) and (2)).

holding that "there is no infringement of the principle of legality if the Chamber exercises its power to decide whether [the accused] ought to be committed for trial on the basis of written (*lex scripta*) pre-existing criminal norms approved by the States Parties to the Rome Statute (*lex praevia*), defining prohibited conduct and setting out the related sentence (*lex certa*), which cannot be interpreted by analogy *in malam partem* (*lex stricta*)".[26]

23. The misconception in the Challenge concerning article 22(1) may arise from the assumption that the Statute is without *any* effect for the purpose of the principle of legality (as applied to conduct on the territory of non-States Parties or by their nationals) until such time as a given State ratifies the Statute. This is incorrect, and potentially arises from a misreading of article 11(2).[27] It is, of course, true that in 2003 and 2004 Sudan was not subject to the Court's jurisdiction or any of the obligations resulting from the Statute, because Sudan was not a State Party. The exercise of jurisdiction has only arisen retroactively, as a consequence of the chapter VII resolution of the UN Security Council. But, as another Pre-Trial Chamber has held, questions of jurisdiction and State cooperation are without prejudice to "the objective legal personality of the Court" and, consequently, the legal effectiveness of the Statute for certain other purposes.[28] Article 11(2) is not applicable in this situation, because Sudan has not yet become a party to the Statute.

24. The legal values protected by article 22 are clear—that accused persons are not unfairly prosecuted for conduct which they could not have reasonably appreciated to be criminal at the material time, and that the Court does not usurp the sole 'legislative' authority of the ASP, nor unilaterally add new crimes to its jurisdiction.[29] Yet in these

[26] ICC-01/04-01/06-803-tEN ("*Lubanga* Confirmation Decision"), paras. 302-303. *See also* ICC-02/05-01/09-3 ("*Bashir* Arrest Warrant"), para. 131 (referring to the application of the elements of crimes and RS to conform with the principle of *nullum crimen sine lege*). *But see also* Broomhall, p. 954 (mn. 15).
[27] *See above* para. 15.
[28] ICC-RoC46(3)-01/18-37 ("*Bangladesh/Myanmar* Article 19(3) Decision"), paras. 48-49. *See also* paras. 40-43.
[29] *See e.g.* Schabas (2016), pp. 539-540. *See also* ECCC, *Case 001 (KAING Guek Eav alias 'DUCH')*, Appeal Judgment, 001/18-07-2007-ECCC/SC, 3 February 2012 ("*Case 001* AJ"), para. 234 (recalling that "the principle of legality does not prohibit a Chamber from interpreting or clarifying the law or the contours of the elements of a crime", nor "prevent the Chamber from progressive development of the law", but "does not go so far as to allow

respects it is immaterial whether the Court was actually able to exercise its jurisdiction in a particular place or over a particular person. What matters is that any conduct over which the Court may come to exercise jurisdiction occurred after the entry into force of the Statute itself, and that the Court does not exceed the jurisdiction *ratione materiae* as prescribed by that Statute. This narrow effect of article 22(1) is consistent with the statutory context,[30] especially article 11(1) (which fixes the relevant date for any assessment of retroactivity at the time *the Statute* entered into force) and articles 5 to 9 (which set out exhaustively the basis for the Court's jurisdiction *ratione materiae*). Again, as explained above, nothing in article 11(2) is inconsistent with this interpretation.[31]

25. The 'conditional' nature of the application of the Statute to the territory of non-States Parties, or their nationals,[32] does not mean that the Statute is any less effective in discharging the requirements of the principle of legality. Indeed, the Statute itself provides for the mechanism by which the territory of non-States Parties and their nationals may become subject to the Court's jurisdiction, and all UN Member States (including Sudan) have previously consented to this mechanism, as explained above.[33] In any event, to any extent that it may further be required that persons on the territory of non-States Parties, or their nationals, were already subject to the possibility of criminal sanction at the time of the material conduct, this is satisfied by the fact that the crimes in articles 5-8 of the Statute are substantially the same as those in customary international law, as explained below.[34]

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a Chamber *to create new law* or to interpret existing law in such a way as to go beyond the reasonable bounds of clarification").

[30] *Cf.* K. S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge: CUP, 2009) ("Gallant"), p. 341 (describing a similar analysis as rather "cramped").

[31] *See above* para. 15.

[32] The application of the Statute would be 'conditional' in the sense that it would be subject to a future referral by the UN Security Council under chapter VII of the UN Charter, or an article 12(3) declaration, with retroactive effect.

[33] *Cf.* Gallant, p. 342 (responding to Schabas). *But see also* p. 394 ("The retrospective creation of jurisdictions to hear cases is not prohibited by customary international law […] It also does not prohibit expansion of jurisdiction of existing courts to hear cases concerning crimes that have already been committed, again so long as the acts were prohibited by *some* applicable criminal law at the time committed", emphasis added).

[34] *See below* paras. 34-37.

26. The Defence argument that articles 5 to 8 do not apply to Mr Abd-al-Rahman because the Court did not exercise its jurisdiction in Darfur at the relevant time would stand this logic on its head. If Sudan's status as a non-State Party were deemed relevant to article 22(1), and if it is accepted (as it must be) that the UN Security Council may still trigger the Court's jurisdiction over Sudanese territory or nationals *retroactively*,[35] then the only way to avoid an apparent breach of article 22(1) would be for the Court to try persons for crimes under customary international law, or arising from treaties other than the Statute—as the Defence, indeed, seems to invite.[36] But this is not only contradicted by articles 5 to 8 of the Statute, and articles 13 and 21(1)(b); it would also seem to contradict the object and purpose of article 22, since it would place the Court in a similar position to that of the *ad hoc* tribunals and deprive it of the principal benefits of a written Statute containing the substantive law to be applied—a position which the Defence also seems to recognise is undesirable.[37] Thus, notwithstanding the importance it attributes to the principle of legality, the Defence position would either seem to undermine that very principle, or risk internal inconsistency. On either analysis, the position is untenable.

(iii) Mr Abd-Al-Rahman had reasonable notice of the criminality of his conduct

27. The Defence is incorrect to assert that Mr Abd-Al-Rahman did not have reasonable notice of the illegality of his actions. Any reasonable person in his position would have realised that it was unlawful, for example, to kill civilians and/or persons *hors de combat*, to torture, to rape, to burn homes and to steal property, and that this could attract the most serious criminal punishment. Applying the crimes in articles 5 to 8 of the Statute, as required *inter alia* by article 22(1), only *increases* the foreseeability and accessibility of the substantive law, since it is the only codification of its kind. This is regardless of Sudan's status as a non-State Party.[38] In any event, any further question

[35] *See above* para. 14.
[36] Challenge, para. 82.
[37] Challenge, paras. 85-86.
[38] *See* Statute, art. 32(2). *See further below* fn. 44.

of reasonable notice of the charged crimes is dispelled by the content of customary international law, and even Sudanese domestic law, as the following paragraphs explain.[39]

28. Consistent with article 21(3) of the Statute, the Prosecution agrees that that the accused is entitled under article 22(1) to 'reasonable notice' of the criminality of their conduct.[40] But it is important to distinguish between the strict application of article 22(1) insofar as it requires that the alleged conduct attributed to the person concerned actually fell within the subject-matter and temporal jurisdiction of the Court at the material times as explained above—and which may be satisfied by showing that it is encompassed within articles 5 to 8—and the requirements for a reasonable person to be able to foresee the criminality of their conduct, consistent with internationally recognised human rights.

29. In this latter regard, as the Supreme Court Chamber of the ECCC has most recently recalled, it is necessary only that the general criminality of the material conduct was itself sufficiently foreseeable and accessible. The accused need have no subjective appreciation either of the source or legal category of the norm in question:[41] "what is required is not an analysis of the technical terms of the definition of the

[39] *Cf.* Gallant, p. 342 ("[i]t is not self-evident that all of the crimes listed in the [S]tatute are customary international law crimes"); *but see* p. 369 ("Most of the war crimes in the ICC Statute are clearly crimes under customary international law already, including those crimes which may be committed in non-international armed conflicts. The same can be said of genocide and crimes against humanity").

[40] *Cf.* Broomhall, p. 956 (mn. 21: "It is noteworthy that, while the *nullum crimen* principle under general international law is normally understood to include an element of notice (permitting an accused to have real or constructive knowledge that certain conduct was prohibited before the act alleged against him or her was committed) it appears that in the context of the Rome Statute this notice will arise under the separate provision on error of law (article 32)").

[41] *See further* ECCC, *Case 001* AJ, para. 96 (stressing that the accused must have been "able to appreciate that the conduct is criminal in the sense *generally understood*, *without reference to any specific provision*" (emphasis added), that even customary law or general principles of law are *per se* sufficiently accessible, and that domestic law or even the "immorality or appalling character" of an act may be relevant in refuting any claim that the accused did not appreciate their conduct was criminal). *See also* paras. 97 (fn. 184), 160, 212, 234. *See further* ECCC, *Case 002/01 (KHIEU Samphân and NUON Chea)*, Appeal Judgment, 002/19-09-2007-ECCC/SC, 23 November 2016 ("*Case 002/01* AJ"), para. 762; ICTY, *Prosecutor v. Hadžihasanović and Kubura*, IT-01-47-A, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, para. 34; *Prosecutor v. Ojdanić et al.*, IT-99-37-AR72, Appeal Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction—Joint Criminal Enterprise, 21 May 2003, paras. 21, 37-40, 42; *Prosecutor v. Blagojević and Jokić*, IT-02-60-T, Judgment, 17 January 2005, para. 695 (fn. 2145); ECtHR, *S.W. v. the United Kingdom*, Judgment, 20166/92, 22 November 1995, paras. 35-36; Kononov v. Latvia, 36376/04, para. 236; Vasiliauscas v. Lithuania, 35343/05, 20 October 2015, paras. 167-169.

crimes, but whether it was generally foreseeable that the conduct in question could entail criminal responsibility."[42]

30. Accordingly, even the fact that conduct is criminal under a different regime may suffice to give the requisite degree of notice. For example, the criminality of conduct under customary law will suffice, even if a subsequent prosecution is brought under the Statute.[43] Furthermore, since the essential requirement is that the accused can appreciate the criminality of their *conduct*, they need not necessarily foresee the particular legal categorisation which may later be applied, provided that the offence(s) for which a conviction is entered is of a similar degree of gravity (and warrants similar punishment) as the offence(s) which could have been foreseen.

31. These principles are consistent with article 32(2) of the Statute, which provides that "[a] mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility."[44]

32. Nor may Mr Abd-Al-Rahman raise any absence of relevant domestic law, or even any contrary indications of domestic law, to establish that he did not have reasonable notice of the criminality of his conduct under international law.[45] As one leading commentator has recalled:

> [T]he *nullum crimen* principle permits the prosecution of acts of individuals regardless of whether national law required, permitted, or was silent as to the relevant conduct. Any objection based on prior legality or on the fact that national law did not prohibit the international crime in question at the time it was committed can only be the result of misunderstanding the principle's proper scope. […] [I]ndividual responsibility arises directly under international

[42] ECCC, *Case 002/01* AJ, para. 765.
[43] *See also* Gallant, p. 399.
[44] *See further* O. Triffterer and J. D. Ohlin, 'Article 32: mistake of fact or mistake of law,' in O. Triffterer and K. Ambos (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, 3rd Ed. (München/Oxford/Baden Baden: C.H. Beck/Hart/Nomos, 2016), p. 1172 (mn. 31: "If a person evaluates 'a particular type of conduct' (correctly) as a crime but believes that this crime does not fall 'within the jurisdiction of the Court', he or she is just mistaken about the competence of the ICC to exercise its jurisdiction. This knowledge is, however, *not* an essential element of the crime nor has it any other importance for establishing, in principle, the criminal responsibility of the suspect. Similarly, in national law an error about which court is competent to prosecute the crime is completely irrelevant", emphasis supplied).
[45] *See also* ECCC, *Case 002/01* AJ, para. 763.

> law. As such, the international principle of *nullum crimen*, at least with respect to these crimes, does not require prohibition by national law. To allow otherwise would allow States to legislate their own agents out of their international responsibilities—something that the international community has deemed to be intolerable ever since Nuremberg.[46]

33. Mr Abd-Al-Rahman is charged with the following crimes: intentionally directing attacks against a civilian population as such, as a war crime (Count 1); murder and attempted murder as a war crime and crime against humanity (Counts 2, 3, 17, 18-20, and 27-30); pillaging as a war crime (Count 4); destruction of property of an adversary as a war crime (Count 5); other inhumane acts as a crime against humanity (Counts 6, 14 and 24); outrages upon personal dignity as a war crime (Counts 7, 16 and 26); rape as a war crime and crime against humanity (Counts 8, 9, 32 and 33); forcible transfer of civilian population as a crime against humanity (Count 10); persecution as a crime against humanity (Counts 11, 21, 31 and 34); torture as a war crime and crime against humanity (Counts 12, 13, 22 and 23); and cruel treatment as a war crime (Counts 15 and 25). As the following paragraphs explain, Mr Abd-Al-Rahman had reasonable notice of the criminality of the conduct giving rise to each of these charges, since the Statute is in general closely related to applicable customary international law and these charges in particular all have an analogue in customary law, or even under Sudanese domestic law in many cases. This law was sufficiently foreseeable and accessible to a reasonable person in the position of Mr Abd-Al-Rahman.

(iv) Crystallisation of customary international law

34. Crimes against humanity and war crimes were crystallised under customary international law applicable to Sudan at the time the crimes were committed. As the

[46] Broomhall, pp. 954-955 (mn. 16). *See also* mn. 18; Schabas (2016), p. 543 (noting that the reference to "national law" in article 11 of the Universal Declaration of Human Rights, pertaining to the principle of legality, authorises the prosecution of "atrocities based upon international criminal law provisions even when these were not part of the national penal codes at the time the crimes were committed").

ECCC and ICTY have both recalled, "treaty law and customary international law often mutually support and supplement each other."[47]

35. First, the Rome Statute was understood to be consistent with existing customary law at the time it was drafted,[48] which by its nature was already applicable to Sudan. In particular, while the relationship between the statutory definitions of genocide, crimes against humanity and war crimes and their customary law analogues is not always straightforward, it was hoped that Statute would provide a systematic codification.[49] Commentators agree that the Statute largely achieved these aims,[50] and in some limited respects arguably represented the crystallisation of certain norms into customary law.[51] Accordingly, consistent with the arguments above, Sudan's decision not to accede to the Statute was significant primarily for its effect on the potential scope of the Court's exercise of jurisdiction, but not for the substantive criminality of the conduct penalised in articles 5 to 8, at least insofar as these offences separately existed in customary law at the time. In this sense, it is important to note that the Defence does not seem to claim that Sudan is a persistent objector to any of the charged crimes in

[47] ECCC, *Case 001* AJ, para. 94; ICTY, *Prosecutor v. Tadić,* Decision on the Defence motion for interlocutory appeal on jurisdiction, 2 October 1995 ("*Tadić* Jurisdiction Appeal Judgment"), para. 98.
[48] *See* H. von Hebel and D. Robinson, 'Crimes within the jurisdiction of the Court,' in R. Lee (ed.), *The International Criminal Court: the making of the Rome Statute* (The Hague: Kluwer, 1999), p. 126. *See* also G. Werle, *Principles of International Criminal Law*, 2nd Ed, (The Hague, 2009), Preface to First Edition; E. Fronza, 'Le Fonti,' in E. Amati *et al*., *Introduzione al diritto penale internazionale*, 4th Ed. (Torino: Giappichelli, 2020), p. 68.
[49] *See e.g.* P. Kirsch, 'Customary humanitarian law, its enforcement, and the role of the international criminal court,' in L. Maybee and B. Chakka (eds.), *Custom as a Source of International Humanitarian Law* (New Delhi: ICRC, 2006), pp. 80, 83. *See also* J. Henckaerts and L. Doswald-Beck, *Customary international humanitarian law* (Cambridge: CUP/ICRC, 2005), p. 572; E. La Haye, *War Crimes in Internal Armed Conflicts* (Cambridge: CUP, 2008), p. 139; H. von Hebel, 'The Making of the Elements of Crimes,' in R. Lee *et al*. (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley: Transnational, 2001), p. 5 (recalling that, in 1997, the ICC Preparatory Committee considered it desirable for the crimes under the Statute to be already established under customary law in order to promote the acceptability and legitimacy of the Court).
[50] *See e.g.* Schabas (2016), p. 545 ("It is unarguable that the bulk of [the Rome Statute's] subject-matter provisions correspond to the state of customary law and, in fact, endeavour to codify it", even if "there is no absolute correspondence between the crimes defined in the Statute and existing, or future, customary law"); L. Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* (Cambridge: CUP, 2014), p. 302 ("the crimes in the Rome Statute are generally or largely reflective of custom", even though there may be "[d]epartures […] that are progressive [or] retrogressive"); Gallant, p. 369 ("Most of the war crimes in the ICC Statute are clearly crimes under customary international law already, including those crimes which may be committed in non-international armed conflicts. The same can be said of genocide and crimes against humanity"). *But see also* La Haye, p. 144 (quoting G. Abi-Saab, "'far from being a faithful snapshot, [the Rome Statute] is but a mere artist's sketch of war crimes in general international law'"); M. Cormier, *The Jurisdiction of the International Criminal Court over Nationals of Non-State Parties* (Cambridge: CUP, 2020), p. 177.
[51] *See e.g.* La Haye, pp. 140-144.

customary law,[52] and indeed Sudan initially signed the Statute even though it ultimately did not ratify it.

36. Furthermore, and in any event, at least some of the crimes under the Rome Statute constitute breaches of fundamental norms of international law that have the character and force of *jus cogens*.[53] This reflects their "higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules" and thus their non-derogable and overriding character.[54] In the view of Judges Eboe-Osuji, Morrison, Hofmański and Bossa in *Bashir*, "it has now been authoritatively settled that the proscriptions of genocide, crimes against humanity and war crimes enjoy the status of *jus cogens* norms".[55] These judges recalled the observation of an ICTY Trial Chamber, over which Judge Cassese presided, that "most norms of international humanitarian law, in particular those prohibiting war crimes, crimes against humanity and genocide, are also peremptory norms of international law or *jus cogens*".[56]

37. Second, there can be no doubt that the crimes charged against Mr Abd-Al-Rahman were specifically criminalised under customary international law at all times material to this case. This is demonstrated not only by the authoritative commentary and legal *dicta* described above, but also by the jurisprudence of international courts and tribunals. For example:

- Murder, persecution, and other inhumane acts were recognised as crimes against humanity under customary law at least by 1945, when they were

[52] *See e.g.* H. Thirlway, *The Sources of International Law* (Oxford: OUP, 2014), pp. 86-88.
[53] *Bashir* Appeal Judgment, para 123. *See* Challenge, para. 106 (where the Defence seems to concede that the Geneva Conventions are directly applicable to Sudan and that the prosecution for grave breaches satisfies the principle of legality and non-retroactivity).
[54] ICC-02/05-01/09-397-Anx1-Corr ("*Bashir* Appeal Judgment, Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański, and Bossa"), para. 205 (referring to ICTY, *Prosecutor v Anto Furundžija*, Judgment, IT-95-17/1-T, 10 December 1998, para. 153; *Prosecutor v Kupreškić et al*, Judgment, IT-95-16-T, 14 January 2000 ("*Kupreškić* Trial Judgment"), para. 520).
[55] *Bashir* Appeal Judgment, Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański, and Bossa, para. 207. *See also Bashir* Appeal Judgment, para. 123 ("the obligation of States Parties to cooperate with the Court when exercising its jurisdiction over crimes listed in article 5 of the Statute (the crime of genocide, crimes against humanity, war crimes and the crime of aggression) relates to breaches of fundamental norms of international law that have, such as the prohibition of genocide, the character and force of *jus cogens*").
[56] ICTY, *Kupreškić* Trial Judgment. para. 520.

included in the IMT and IMTFE Charters[57]—which the UN General Assembly unanimously considered to reflect general principles of international law.[58] To the extent that the *chapeau* requirements of article 7 of the Statute may differ from customary international law, they apply a somewhat higher standard (requiring proof of a State or organisational policy) and are thus more favourable to the accused.[59]

- As the International Law Commission later recalled in 1996, "[m]urder is a crime that is clearly understood and well defined in the national law of every State", such that "[t]his prohibited act does not require any further explanation."[60] The elements of this crime—with a definition that is perhaps somewhat broader than the Statute—were sufficiently foreseeable and accessible for the purpose of the principle of legality at least by 1975.[61]

- The antecedents of persecution stretch back even earlier than the 1940s,[62] and convictions for persecution as a crime against humanity were entered for conduct prior to 1945 by the IMT,[63] the NMT in the '*Justice*', *RuSHA*', and '*Ministries*' cases,[64] and in national proceedings such as

[57] IMT Charter, art. 6(c); IMTFE Charter, art. 5(c).
[58] *See* ECCC, *Case 001* AJ, paras. 109-112; *Case 002/01* AJ, para. 576; UNGA Res. 95(I) (1946); ILC, Nuremberg Principles, 1950, principle VI(c).
[59] *See e.g.* ECCC, *Case 002/01* AJ, paras. 711-732, 764.
[60] ILC, Draft Code of Crimes against the Peace and Security of Mankind, 1996, p. 48. *See also e.g.* ICTR, *Prosecutor v. Akayesu*, Judgment, ICTR-96-4-T, 2 September 1998 ("*Akayesu* Trial Judgment"), para. 587.
[61] ECCC, *Case 002/01* AJ, para. 765. *See also e.g.* ICTR, *Akayesu* Trial Judgment, para. 589; SCSL, *Prosecutor v. Sesay et al.*, Judgment, SCSL-04-15-T, 2 March 2009 ("*Sesay* Trial Judgment"), para. 137.
[62] *See e.g.* ECCC, *Case 001* AJ, paras. 216-219. *See also* H. Brady and R. Liss, 'The evolution of persecution as a crime against humanity,' in M. Bergsmo *et al.*, *Historical Origins of International Criminal Law: Volume 3* (Brussels: Torkel Opsahl Academic Epublisher, 2015) ("Brady and Liss"), p. 434 (quoting J. Brand, 'Crimes against humanity and the Nurnberg Trials,' [1949] 28(2) *Oregon Law Review* 111). *See further* pp. 435-445.
[63] *See* ECCC, *Case 001* AJ, para. 220 (citing IMT, *Judgment of the International Military Tribunal for the Trial of German Major War Criminals*, Vol. I, pp. 66-67, 282, 287-288, 295-298, 300-307, 328-330, 339-341; Vol. XXII, pp. 585-586).
[64] *See* ECCC, *Case 001* AJ, para. 221-22 (citing NMT, *US v. Alstoetter et al.*, Judgment, 1947, reprinted in *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, Vol. III ("*Justice* case"), pp. 23-25, 1110-1114, 1118, 1144-1156; *US v. Greifelt et al.*, Judgment, reprinted in *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*,Vols. IV-V ("*RuSHA* case"), pp. 152-153, 155, 158-182); *US v. von Weizsaecker et al.*, Judgment, reprinted in *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, Vol. XIV, 1949 ("*Ministries* case"), pp. 520-522, 526-528, 604).

Greiser, *Eichmann*, and *Barbie*.[65] The ECCC likewise entered convictions for conduct in 1975-1979.[66] It is hardly surprising that the *ad hoc* tribunals did the same for conduct in the 1990s.[67] While article 7(1)(h) of the Statute elaborates the prohibited grounds of discrimination more broadly than the statutes of previous tribunals, the core general prohibition is the commission of the underlying acts "by reason of the identity of the group or collectivity".[68] Furthermore, it does so by reference to grounds which are "universally recognized as impermissible under international law". As such, to any extent that these grounds must themselves be foreseeable and accessible, this is established by the pre-existing prohibition of discrimination in international human rights law.[69]

- Convictions for other inhumane acts were entered by the NMT in the '*Ministries*' and '*Medical*' cases,[70] among others, as well as by tribunals such as the ECCC[71] and the ICTY.[72] The elements of this crime, as defined under the Statute, were accepted by the ECCC Supreme Court Chamber

[65] *See* ECCC, *Case 001* AJ, paras. 223-224.
[66] *See e.g.* ECCC, *Case 002/01* AJ, Disposition.
[67] *See e.g.* ICTY, *Prosecutor v. Karadžić*, Public Redacted Version of Judgment Issued on 24 March 2016, IT-95-5/18-T, 24 March 2016, para. 6002.
[68] Statute, art. 7(2)(g).
[69] For example, the ECCC, ICTY, ICTR, and SCSL did not have cause to consider whether persecution on gender grounds was established in customary international law, because their respective statutes did not apparently grant jurisdiction over this form of persecution. While the express inclusion of gender as a prohibited discriminatory ground was an acknowledged innovation of the Statute, this reflected the progressive development "of the international human rights movement beginning in the 1940s, which led to the drafting of several human rights treaties and conventions with expansive non-discrimination provisions", including notably in this regard the International Covenant on Civil and Political Rights, the Convention on the Elimination of Discrimination Against Women, and other instruments. *See e.g.* Brady and Liss, pp. 551-552; V. Oosterveld. 'Gender, persecution, and the International Criminal Court: refugee law's relevance to the crime against humanity of gender-based persecution,' [2006] 17 *Duke Journal of Comparative and International Law* 49 ("International refugee law has acknowledged gender-related forms of persecution since 1985" even though this may not necessarily "be directly transferred" in its entirety "to the crime against humanity of gender-based persecution"). *See especially* pp. 60-62 (noting that the caselaw of the ICTY and ICTR illustrate the intersection of gender identities with racial, religious and political identities, and that this can lead to targeting on the basis of gender, and that certain prohibited acts are inextricably linked to sexual (and therefore gender-specific) acts). Concerning other grounds, *see e.g.* ECCC, *Case 001* AJ, paras. 234-280; *Case 002/01* AJ, paras. 667, 669-680.
[70] *See* ECCC, *Case 002/01* AJ, para. 576 (citing NMT, *Ministries* case, pp. 467-468; *US v. Brandt et al.*, Judgment, 1946, reprinted in *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, Vol. II (*"Medical* case"), p. 198).
[71] *See e.g.* ECCC, *Case 002/01* AJ, Disposition.
[72] *See e.g.* ICTY, *Prosecutor v. Stakić*, Judgment, IT-97-24-A, 22 March 2006 ("*Stakić* Appeal Judgment"), para. 315.

as falling within the parameters of the customary offence.[73] Consequently, forcible transfer—while not generally regarded as a crime against humanity in its own right until its inclusion in the Statute[74]—was nonetheless foreseeably punished as an 'other inhumane act' at least by 1975.[75]

- While torture was not enumerated as a crime against humanity in the IMT and IMTFE Charters, it was recognised as such in Control Council Law No. 10,[76] also enacted in 1945, and convictions were entered by the NMT on that basis including in the '*Medical*', '*Justice*', and '*Ministries*' cases.[77] The Supreme Court Chamber of the ECCC was further satisfied that it was a crime against humanity under customary law by 1975,[78] and as such was sufficiently foreseeable and accessible. This is supported by the caselaw of the ICTY and ICTR concerning conduct in the 1990s.[79]

- Likewise, rape was only included as a crime against humanity in Control Council Law No. 10, but not the IMT or IMTFE Charters.[80] However, unlike torture, the ECCC Supreme Court Chamber took a cautious approach in this respect, even by 1975, principally due to the fact that rape as a crime against humanity was never charged at the NMT.[81] Whether or not this was correct, the

[73] ECCC, *Case 002/01* AJ, paras. 578-586.
[74] *See e.g.* ECCC, *Case 002/01* AJ, para. 589; ICTY, *Stakić* Appeal Judgment, paras. 315, 317. *See also* G. Aquaviva, *Forced Displacement and International Crimes* (UNHCR Division of International Protection, 2011), p. 14; G. Boas *et al.*, *International Criminal Law Practitioner Library, Volume II: Elements of Crimes under International Law* (Cambridge: CUP, 2008) ("Boas *et al.*"), p. 103.
[75] ECCC, *Case 002/01* AJ, paras. 589-591, 654-660.
[76] Control Council Law No. 10, art. II(1)(c).
[77] *See e.g.* ECCC, *Case 001* AJ, paras. 185-187 (citing NMT, *Medical* case, pp. 198, 216-217, 240, 247-248, 271; *Justice* case, pp. 3-4, 23-25, 1087-1088, 1092-1093, 1107, 1155-1156, 1166, 1170; *US v. Pohl et al.*, Judgment, 1947, reprinted in *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, Vol. V, pp. 965-966, 970-971, 1036-1038; *Ministries* case, pp. 467-469, 471).
[78] ECCC, *Case 001* AJ, para. 188. The ECCC considered that the applicable definition in customary law at that time conformed to that of the 1975 Declaration on Torture: *see* paras. 189-205.
[79] *See e.g.* ICTR, *Akayesu* Trial Judgment, para. 593; ICTY, *Prosecutor v. Kunarac et al.*, Judgment, IT-96-23 & IT-96-23/1-A, 12 June 2002 ("*Kunarac* Appeal Judgment"), paras. 142-148.
[80] Control Council Law No. 10, art. II(1)(c).
[81] ECCC, *Case 001* AJ, paras. 176, 179-180. *See also* paras. 182-183. It should be noted that the ECCC did not apparently doubt that the prohibition of rape was sufficiently foreseeable and accessible for the accused to receive adequate notice, but rather that the norm of customary law had objectively crystallised by 1975.

ECCC nonetheless affirmed that rape had crystallised as a crime against humanity by "the 1990s",[82] and this is consistent with the jurisprudence of the ICTY, ICTR, and SCSL.[83] The ECCC also emphasised that rape fell within the scope of both torture and other inhumane acts as crimes against humanity at least by 1975, so that it was foreseeable that a person committing an act of rape could still sufficiently appreciate the criminal nature of their conduct.[84]

- Murder, torture, cruel treatment, and outrages upon personal dignity are war crimes in non-international armed conflict. This conduct is prohibited by common article 3 of the four Geneva Conventions of 1949, ratified by Sudan, and which itself is regarded as customary law.[85] As the ICTY Appeals Chamber has affirmed, serious violations of common article 3 have been subject to criminal responsibility under customary law since at least the 1990s.[86]

- Intentionally directing attacks against the civilian population has been recognised as a war crime in non-international armed conflict under customary law since at least the 1990s.[87]

- "Rape's prohibition as a war crime had long been established under international law", even if sometimes in euphemistic terms.[88] It is proscribed in

[82] ECCC, *Case 001* AJ, para. 179.
[83] *See e.g.* ICTR, *Akayesu* Trial Judgment, paras. 596-598; SCSL, *Sesay* Trial Judgment, para. 144.
[84] ECCC, *Case 001* AJ, paras. 207-208, 210-212.
[85] *See e.g.* ICRC Commentary to First Geneva Convention, 2016, art. 3, mn. 505; ICJ, *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, ICJ Reports 1986, p. 14, paras. 218-219; ICTY, *Prosecutor v. Delalić et al.*, Trial Judgment, IT-96-21-T, 16 November 1998 ("*Delalić* Trial Judgment"), para. 306; ICTR, *Akayesu* Trial Judgment, para. 608.
[86] *See e.g.* ICTY, *Tadić* Jurisdiction Appeal Judgment, paras. 128-136; *Delalić* Trial Judgment, paras. 307-309, 316; *Prosecutor v. Naletilić and Martinović*, Judgment, IT-98-34-T, 31 March 2003 ("*Naletilić* Trial Judgment"), para. 228; ICTR, *Akayesu* Trial Judgment, paras. 612-615; SCSL *Sesay* Trial Judgment, para. 174. *See also* S. Sivakumaran, *The Law of Non-International Armed Conflict* (Cambridge: CUP, 2012) ("Sivakumaran"), p. 478 ("there remains no serious debate that certain violations of international humanitarian law in non-international armed conflict amount to war crimes"); UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford: OUP, 2004) ("UK Ministry of Defence"), pp. 399-400 (mn. 15.32.2); Cormier, p. 177; ICRC Commentary to First Geneva Convention, 2016, art. 3, mn. 872.
[87] *Tadić* Jurisdiction Appeal Judgment, paras. 110-119, 129; *Prosecutor v. Martić*, Decision, IT-95-11-R61, 8 March 1996, paras. 10-14, 20; *Kupreškić* Trial Judgment, paras. 521, 524; SCSL, *Sesay* Trial Judgment, paras. 215-218. *See also* K. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge/Geneva: CUP/ICRC, 2002), pp. 443-446; Sivakumaran, p. 478.
[88] ECCC, *Case 001* AJ, para. 175 (citing *inter alia* *Instructions for the Government of Armies of the United States in the Field*, prepared by Francis Lieber, promulgated as General Order No. 100 by President Abraham Lincoln,

all kinds of armed conflict, including in the Fourth Geneva Convention of 1949 and Additional Protocols I and II of 1977.[89] The ECCC has specifically concluded that rape was "well established as a war crime by 1975".[90] Rape may also be a means of committing other violations of common article 3, such as torture.[91]

- Pillaging and destruction of the property of the adversary without military necessity have been recognised as unlawful since at least 1907, and have subsequently been accepted as war crimes under customary law, including in non-international armed conflict, since at least the 1990s.[92]

38. Finally, much of the conduct encompassed by these customary international law crimes would also be criminal within the context of Sudanese domestic law in force at the material times.[93]

1863, art. 44; 1899 Hague Regulations, art. 46; 1907 Hague Regulations, art. 46; M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, 2nd Ed. (Leiden: Martinus Nijhoff, 1999), p. 348). *See also* ICTY, *Delalić* Trial Judgment, para. 476.

[89] *See* Fourth Geneva Convention, art. 27; Additional Protocol I, art. 76(1); Additional Protocol II, art. 4(2)(e).

[90] ECCC, *Case 001* AJ, para. 176. *See also* ICTR, *Akayesu* Trial Judgment, paras. 616-617 (considering that the conduct prohibited by article 4 of Additional Protocol II, including rape, entailed individual criminal responsibility as a matter of customary international law); ICTY, *Prosecutor v. Kvočka et al.*, Judgment, IT-98-30/1-A, 28 February 2005, para. 395; *Prosecutor v. Furundžija*, Judgment, IT-95-17-A, 21 July 2000, para. 210; *Furundžija* Trial Judgment, paras. 165-169; Sivakumaran, p. 478.

[91] *See e.g.* ICTY, *Kunarac* Appeal Judgment, paras. 190-192. *See above* fn. 86.

[92] *See e.g.* ICTY, *Delalić* Trial Judgment, paras. 315 ("the prohibition on plunder is also firmly rooted in customary international law"), 316 ("the provisions of the Hague Regulations[] constitute rules of customary international law which may be applied […] to impose individual criminal responsibility"); ICTR, *Akayesu* Trial Judgment, paras. 616-617 (considering that the conduct prohibited by article 4 of Additional Protocol II, including pillage, entailed individual criminal responsibility as a matter of customary international law). *See further* Additional Protocol II, art. 4(2)(g); 1907 Hague Regulations, arts. 28, 47; 1899 Hague Regulations, arts. 28, 47. *See also* UK Ministry of Defence, pp. 427-428 (mns. 16.26-16.29); Sivakumaran, p. 478.

[93] *See e.g.* 2003 Penal Code, sections 229 ("Negligent Conduct Causing Danger to Person or Property"), 231 ("Omission to Assist Person Injured or Unconscious or in Peril of his Life"), 234 ("Obscene or Indecent acts"), 243 ("Injury or Defiling Place of Worship with Intent to Insult the Religion of any Class"), 244 ("Disturbing Religious Assembly"), 248 ("Murder Defined"), 251 ("Murder"), 259 ("Attempt to Murder"), 262 ("The Causing of Miscarriage, Injuries to Unborn Children, Exposure of Infants Cruelty to Children and Concealment of Births Causing Miscarriage"), 264 ("Death caused by act done with Intent to Cause Miscarriage"), 271 ("Hurt Defined"), 273 ("Voluntarily Causing Hurt Defined"), 279 ("Voluntarily Causing Hurt by Dangerous Weapon or Means"), 281 ("Voluntarily causing hurt to Extort Property or to Constrain to an illegal Act"), 284 ("Causing hurt by act Endangering life or Personal Safety of others"), 285 ("Wrongful Restraint Defined"), 286 ("Wrongful Confinement Defined"), 290 ("Wrongful Confinement in Secret"), 291 ("Wrongful Confinement to Extort Property or Constrain to illegal act"), 292 ("Wrongful Confinement to Extort Confession or Compel Restoration of Property"), 293 ("Force Defined"), 294 ("Criminal Force Defined"), 295 ("Assault Defined"), 296 ("Assault or Criminal Force Without Provocation"), 299 ("Assault or Criminal Force to Woman with Intent to Outrage her Modesty"), 300 ("Assault or Criminal Force in Attempt to Commit Theft or Property Carried by a Person"), 301 ("Assault or Criminal Force in Attempt to Wrongfully Confine a Person"), 303 ("Abduction Defined"), 306 ("Kidnapping or Abducting with Intent Secretly and Wrongfully to Confine Person"), 307 ("Kidnapping or Abducting Woman to Compel her Marriage, etc."), 308 ("Kidnapping or Abducting in Order to Subject Person to

39. Given the plain terms of the Statute, the intricate framework of customary international law with which it is closely related, and even the content of Sudanese domestic law, there can be no doubt that a reasonable person in Mr Abd-Al-Rahman's position had sufficient notice that his conduct was criminal. Indeed, such a person was arguably in a *better* position to foresee the crimes for which they might be prosecuted by the Court (under the Statute) than the crimes for which they might be prosecuted by an *ad hoc* tribunal (under customary international law).

B. The territorial scope of the 'Situation in Darfur' is properly defined

40. In its second argument the Defence alleges that UNSC Resolution 1593 erroneously referred the situation *in Darfur* to the Court, as opposed to the situation *in Sudan*, thus inappropriately limiting the territorial scope of the Court's jurisdiction in the situation.[94] The Defence argues that the UN Security Council improperly pre-selected crimes and 'cases' for the Court to prosecute, which is incompatible with the drafters' intention and the Prosecutor's independence.[95] Such territorial limitation would be inconsistent with the practice of State referrals, which relate to the totality of

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Grievous Hurt etc"), 311 ("Unlawful Compulsory Labour"), 316 ("Rape defined"), 317 ("Rape"), 319 ("Acts of Gross Indecency"), 320 ("Theft Defined"), 321 ("Theft"), 322 ("Theft in Dwelling House etc."), 324 ("Theft after Preparation made for Causing Death, Hurt or Restrain in Order to the Committing of the Theft"), 325 ("Extortion Defined"), 326 ("Extortion"), 328 ("Extortion by Putting a Person in Fear of Death or Grievous Hurt"), 332 ("Robbery Defined"), 333 ("Brigandage Defined"), 334 ("Robbery"), 336 ("Voluntarily Causing Hurt in Committing Robbery"), 337 ("Brigandage"), 338 ("Brigandage with Murder"), 339 ("Robbery or Brigandage with Attempt to cause Death or Grievous Hurt"), 340 ("Making preparation to Commit Brigandage"), 341 ("Belonging to Gang of Brigands"), 342 ("Belonging to Gang of Thieves"), 343 ("Assembling for Purpose of Committing Brigandage"), 353 ("Dishonestly Receiving Stolen Property"), 363 ("Mischief defined"), 364 (" Mischief"), 366 ("Mischief by Killing or Maiming Animal"), 367 ("Mischief by Killing or Maiming Cattle etc of Any Value"), 374 ("Mischief by Fire or Explosive Substance with Intent to Damage to an amount of Ls 50 or in Case of Agricultural Produce Ls 10"), 375 ("Mischief by Fire or Explosive Substance with Intent to Destroy House etc."), 379 ("Mischief Committed after Preparation made for causing Death or Hurt"), 380 ("Criminal Trespass Defined"), 381 ("House Trespass Defined"), 388 ("House-trespass in order to Commit Offence Punishable with Death"), 436 ("Criminal Intimidation Defined"), 439 ("Intentional insult with intent to provoke breach of the peace"). The 1991 Penal Code carries the corresponding crimes as well: *see* sections 60, 75, 87, 125, 127, 129, 130, 136, 138, 139, 142, 143, 144, 149, 151, 160, 161-164, 170, 174-176, 181-183.

[94] Challenge, paras. 17-32.

[95] Challenge, paras. 23-24. *See* Report of the Preparatory Committee on the Establishment of an ICC, vol. I (n. 19), para. 146 ("Some delegations were uneasy with a regime that allowed any State party to select individual suspects and lodge complaints with the Prosecutor with respect to them, for this could encourage politicization of the complaint procedure. Instead, according to these delegations, States parties should be empowered to refer 'situations' to the Prosecutor in a manner similar to the way provided in the Security Council in article 23(1). Once a situation was referred to the Prosecutor, it was noted he or she could initiated a case against an individual. It was suggested, however, that in certain circumstances a referral of a situation to the Prosecutor might point to particular individuals as likely targets for investigation").

a State's territory.[96] The Defence further argues that the Darfur referral does not correspond to the geographical area of concern (the entire territory of Sudan) which, in its view, prompted the Security Council to act under chapter VII of the UN Charter,[97] and that there is no contemporary legal or administrative definition of Darfur, which is fluid and evolving.[98] Accordingly, the Court is not properly seised of the situation in Darfur under article 13(2), and may not exercise its jurisdiction.[99]

41. For the reasons set out below, the Defence arguments should be dismissed. The Defence misunderstands the operation of UN Security Council referrals more generally, and the referral of the situation in Darfur under UNSC Resolution 1593 in particular. In any event, to the extent that a referral is inconsistent with the Statute, this would not necessarily result in its invalidity as a whole. Nor in this situation is the limitation of the situation to the territory of Darfur inconsistent with the Statute.

(i) The UN Security Council refers a "situation" to the Court

42. In referring the situations in Darfur and Libya to the Court under article 13(b) of the Statute,[100] the UN Security Council defined the geographical and temporal parameters of these situations and introduced personal limitations.[101] The Court is

[96] Challenge, paras. 27-29.
[97] Challenge, paras. 18 (noting that previous UNSC resolutions related to Sudan), 22 (noting that "situation" in the UN Charter is synonym to "*différend*" or "conflict"), 30 (citing paragraph 5 of the preamble).
[98] Challenge, paras. 19, 21.
[99] Challenge, paras. 20 (noting that the UNSC Resolution 1593 was issued alongside a series of resolutions adopted under Chapter VII regarding the situation in Sudan as a whole), 22, 30, 32.
[100] The Statute does not define "situation". In 2006, a Pre-Trial Chamber, relying on commentary and dealing with a State referral, generally defined a "situation" in terms of "temporal, territorial and in some cases personal parameters, such as the situation in the territory of the Democratic Republic of the Congo since 1 July 2002": ICC-01/04-101-tEN-Corr, para. 65. *See also* A. Marchesi and E. Chaitidou, 'Article 14: referral of a situation by a State Party,' in O. Triffterer and K. Ambos (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, 3rd Ed. (München/Oxford/Baden Baden: C.H. Beck/Hart/Nomos, 2016) ("Marchesi and Chaitidou"), p. 718 (mn. 27: explaining this definition: "[t]he territorial and personal parameters are in the alternative. The territorial parameter enquires whether the crime occurred on the territory of a State Party pursuant to article 12(2)(a) […] or of a State which lodged an *ad hoc* declaration under article 12(3). The personal parameter pertains to the perpetrator of the crime(s) who is a national of a State Party (article 12(2)(b)) or a non-State Party which lodged an article 12(3) declaration"); *see also* p. 717 (mn. 25: "the concept of a situation must be understood in a generic and broad fashion: a description of facts, defined by space and time, which circumscribe the prevailing circumstances at the time ('conflict scenario')"). *See also* R. Cryer, 'Sudan, Resolution 1593, and International Criminal Justice,' [2006] 19(1) *Leiden Journal of International Law* 195 ("Cryer"), p. 212 (arguing that the scope of a 'situation' in the Rome Statute is appropriately limited solely by temporal or geographical considerations).
[101] Concerning Darfur, *see* UNSC Resolution 1593, paras. 1 ("Decides to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court"), 6 ("Decides that nationals, current or former officials

bound by these parameters—as long as they are consistent with the Court's legal framework, including the Prosecutor's obligations under article 42(1) (to act independently) and under article 54(1)(a) (to investigate all relevant facts including incriminating and exonerating circumstances, equally, in order to establish the truth). Conversely, if a UN Security Council resolution envisages parameters which are inconsistent with the Statute (for example, by inappropriately seeking to focus the Prosecution's inquiry into specific cases, by way of a particular party to the conflict or to a group of persons, or by selectively excluding others), the Court would not be bound by them.[102]

43. Consistent with these principles, the UN Security Council can refer a situation to the Court with respect to alleged conduct occurring in any UN Member State (regardless of their status as a State Party) after 1 July 2002. This authority, derived from the UN Charter, is expressly foreseen in article 13(b) of the Statute.[103] By contrast, the Security Council cannot amend or derogate from the statutory regime—such as by inserting exemptions to the exercise of the Court's jurisdiction in the Statute—because

or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State"). Concerning Libya, *see* UNSC Resolution 1970, paras. 4 ("Decides to refer the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court"), 6 ("Decides that nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations in the Libyan Arab Jamahiriya established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State"). *Cf.* ICC OTP, Policy Paper Preliminary Examinations, paras. 37, 40.

[102] R. Rastan, 'Jurisdiction,' in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford: OUP, 2015) ("Rastan"), p. 158 (noting that "the imposition of restrictions on personal parameters by the Security Council as a matter of choice would arguably offend the principle that a referring body cannot limit the jurisdictional parameters of a situation to one side of the conflict or to particular individuals, or for that matter exclude certain nationals").

[103] Statute, art. 13(b). *See also* Rastan, pp. 157 ("when acting under Chapter VII of the UN Charter, the Security Council can place binding obligations (including the acceptance of jurisdiction) on any UN any UN Member State"), 170-171 ("this is expressly provided for within the jurisdictional scheme of the Statute").

this is *not* foreseen in the Statute.[104] The Security Council must thus respect the Court's mandate and its independence.[105]

44. However, if certain aspects of a referral from the UN Security Council do not accord with the Statute, this does not necessarily invalidate the entire referral, such that the Court is not properly seised of the situation under article 13. Instead, the referral may be interpreted in light of the Statute so that the parameters of the situation do not improperly limit the exercise of the Court's jurisdiction.[106]

45. The same approach would be followed in the event of a State Party referral under articles 13(a) and 14 of the Statute. Significantly, article 14(1) distinguishes between the act of a referral, whereby a State Party may request the Prosecutor to investigate a situation, and the Prosecutor's independent responsibility to determine whether one or more specific persons should be charged with the commission of crimes pursuant to articles 54(1) and 58.[107] This has already been the practice in referred situations, both those resulting from State Party referrals, as well as those referred by the UN Security Council.[108] For example:

- The Government of Uganda referred to the Court the "situation concerning the Lord's Resistance Army" in northern and western Uganda. Yet the Prosecution

[104] Statute, arts. 1 ("The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute"), 13 ("The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute […]"). *See also* Rastan, p. 162; Schabas (2016), p. 373 ("attempts to define a situation with reference to specific individuals or groups may have the result of improperly targeting the referral, precisely what the Rome Conference intended to avoid by using the term 'situation'").
[105] *See also* Relationship Agreement, art. 2(1): ("recognises the Court as an independent permanent judicial institution […]"), and article 2(3) ("The United Nations and the Court respect each other's status and mandate").
[106] F. Lafontaine and F. Bousquet, 'Article 13,' in Fernandez, Pacreau and Ubéda-Saillard (eds.), *Statut de Rome de la Cour pénale internationale: commentaire article par article*, 2nd Ed. (Éditions A. Pedone: Paris, 2019) ("Lafontaine and Bousquet"), p. 789 (noting that a UNSC referral may raise issues of interpretation and its legality more generally; according to the authors, the Court can assess the legality of the referral; also, the Prosecutor and the judges can assess or interpret the parameters of the resolution).
[107] The fact that the Statute prevents a referring body from restricting the scope of the preliminary examination or investigation does not mean that specific allegations against named individuals or identified incidents cannot be provided. Indeed States are encouraged to provide such information: Statute, art. 14(2). Likewise, such information may also be sought by the Prosecutor following a State Party or Security Council referral: *see* ICC RPE, rule 104.
[108] *See* Marchesi and Chaitidou, p. 715 (mn. 21: "State Party referrals are on par with SC referrals but differ on one important point: while the SC is called upon to refer situations to the Prosecutor 'acting under Chapter VII of the Charter of the United Nations'(*i.e.* only situations involving a threat to international peace and security), States Parties may refer any situation 'in which one or more crimes within the jurisdiction of the Court appear to have been committed', without there being a threat to international peace and security").

did not consider itself bound by these personal limitations, and responded that "the scope of the referral encompasses all crimes committed in Northern Uganda in the context of the on-going conflict involving the [Lord's Resistance Army]".[109]

- With respect to the Situation in the Democratic Republic of Congo ("DRC"), likewise, Pre-Trial Chamber I in *Mbarushimana* confirmed that a State Party may only refer to the Prosecutor an entire situation, and cannot select crimes committed by certain persons for the Court to investigate.[110]

- Similarly, in the case of UNSC Resolution 1593 (2005) (referring the *Situation in Darfur*) and UNSC Resolution 1970 (2011) (referring the *Situation in Libya*), the Prosecution has taken the view that personal limitations which may have the potential to unduly circumscribe the future scope of the investigation—by demarcating specific persons or groups of persons as either included or excluded from the scope of the situation[111]—are simply ineffective. Such limitations would violate article 27(1) of the Statute and improperly constrain the Prosecution's independence and duty to investigate objectively the commission of alleged crimes in the territories of Darfur and Libya. In the context of *Libya*, the former Prosecutor openly informed the UN Security Council that the referral could not bar any potential inquiry into alleged crimes

[109] ICC-02/04-01/05-68, paras. 4-5; Prosecutor Statement 24 October 2005, p. 2. *See also* ICC-02/04-01/05-67 (Registration in a record of proceedings of Statement by Luis Moreno-Ocampo, Informal meeting of Legal Advisors of Ministries of Foreign Affairs, New York, 24 October 2005), p. 29 ("'[i]n Uganda, if new crimes are committed by other LRA commanders' the OTP may investigate those persons; that the OTP 'will continue to evaluate information on all other groups' and that cases will be presented 'if they reach the gravity standards of the Statute'"). Pre-Trial Chamber II defined the situation in Uganda without further explanation.
[110] ICC-01/04-01/10-451, para. 27 ("[a]ccordingly, a referral cannot limit the Prosecutor to investigate only certain crimes, *e.g.* crimes committed by certain persons or crimes committed before or after a given date; as long as crimes are committed within the context of the situation of crisis that triggered the jurisdiction of the Court, investigations and prosecutions can be initiated"). *See also* para. 21 ("[..] the Chamber, the territorial and temporal scope of a situation is to be inferred from the analysis of the situation of crisis that triggered the jurisdiction of the Court through the referral. Crimes committed after the referral can fall within the jurisdiction of the Court when sufficiently linked to that particular situation of crisis).
[111] UNSC Resolution 1593, para. 6; UNSC Resolution 1970, para. 6. Both these resolutions sought to exclude from the scope of the Court's personal jurisdiction "nationals, current or former officials or personnel" from a contributing State outside Sudan or from a State outside Libyan Arab Jamahiriya, respectively, "which is not a party to the Rome Statute".

committed by nationals of third States on the territory of Libya.[112] This position has never been contested by the UN Security Council at any point in the following decade, which has continued to include regular briefings to the Council by the Prosecutor.

46. In conclusion, it is for the Court to determine the appropriate parameters of a situation, consistently with the Statute.[113] The consistency of any limitation with the Statute must be assessed on a case-by-case basis given the factual circumstances of each situation.[114] As the following paragraphs explain, the limitation of the geographical scope of this situation was not inconsistent with the Statute.

(ii) The geographical parameters of the UNSC Resolution 1593 (2011) are consistent with the Statute

47. UNSC Resolution 1593 establishes the geographical and temporal parameters of this situation (Darfur since 1 July 2002), as well as certain personal limitations (excluding "nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute"). The latter may not be effective for the reasons described above.[115]

48. However, the temporal or geographical parameters of the referred situation do not conflict with the Statute or the Prosecutor's duties under it. To the contrary, the geographical parameters, which define a well-known situation of violence within

[112] Third Report of the Prosecutor of the ICC to the UNSCT pursuant to UNSCR 1970 (2011), 16 May 2012, para. 54. *See also* Rastan, p. 160.
[113] Rastan, p. 162.
[114] *See* Lafontaine and Bousquet, p. 790 ("*si cette resolution renvoie une situation trop restreinte, la question sera plus délicate. La CPI pourrait soit retenir des 'paramètres éventuellement personnels', dans la mesure où ils ne sont pas trop restrictifs, par example si la situation est définie par rapport au groupe de victims affectées par les incidents, soit elle pourrait interpréter et rectifier les terms de la resolution, soit elle pourrait declarer la resolution incompatible avec l'article 13-b et refuser d'exercer sa competence, par example si sont visés des crimes précis ou des auteurs potentiels en particulier. Si une telle question vient un jour à se poser, sans doute que la solution dépendra du degré de la restriction impose par la resolution*").
[115] *See above* para. 45 (third bullet point). In particular, the Prosecution notes that the purported personal limitation may be inconsistent with various provisions of the Statute, including articles 21(3), 27, 42, and 54. *See further* Cryer, pp. 212 (noting that "a situation may not be limited *ratione personae*"), 214 ("it is unlikely that operative paragraph 6 is consistent with either Article 13(b) or 16"); Lafontaine and Bousquet, p. 788 (noting that the authority of the UN Security Council to refer a situation is limited by the Statute, and referring to articles 25 to 27 with respect to temporal parameters). *See also* *Bashir* Appeal Judgment, paras. 7, 149.

Sudan and the wide temporal parameters (acknowledging the past violence, and providing the Court with an open end date for the investigation) ensure that the situation can be properly and impartially investigated. This strongly suggests that there is an objective basis for the referral.

49. The Defence presents no compelling reason to consider that these parameters are inconsistent with the Statute—much less that they actually served to narrow or shape the investigation improperly—nor does it explain how Mr Abd-al-Rahman is prejudiced by them.[116] Reference in the UNSC Resolution 1593's preamble to the threat to international peace and security in the "situation in Sudan" did not mean that the Darfur conflict necessarily extended to the whole Sudanese territory. Rather, it acknowledged that the Darfur conflict affected, and occurred within, the State of Sudan, a UN member.[117] Nor does the Defence accurately describe the State declarations regarding Resolution 1593, which clearly referred to the conflict *in Darfur*, and unambiguously meant for the referral to encompass *Darfur*.[118] For example, States expressed their concern for the "conflict, violence and atrocities in Darfur",[119] the "grave crimes committed in Darfur"[120] and the "lethal conflict under way in Darfur".[121]

50. Indeed, notwithstanding the long-running non-international armed conflict between North and South Sudan, and recurrent spill overs of violence into neighbouring Chad, the situation of violence in Darfur has been consistently treated by the UN Security Council as a specific situation of concern.[122] For example, on 8 October 2004, a few months before UNSC Resolution 1593 referred the situation of Darfur to the Court, the then UN Secretary-General set up an International

[116] *Contra* Challenge, para. 24.
[117] *Contra* Challenge, para. 18.
[118] *Contra* Challenge, paras. 18, 20, 22, 30, 32. *See also* fn. 10 (referring to previous UNSC resolutions).
[119] Security Council, Doc. S/PV.5158, 31 March 2005, p. 2 (USA).
[120] Security Council, Doc. S/PV.5158, 31 March 2005, p. 7 (UK).
[121] Security Council, Doc. S/PV.5158, 31 March 2005, p. 10 (Benin). *See also* Security Council, Doc. S/PV.5158, 31 March 2005, pp. 6 (Philippines), 7 (UK), 9 (Greece), 9 (Tanzania), 10 (Romania, Russia and Benin), 11 (Brazil).
[122] Besides UNSC Resolutions 1769(2007), 1706(2006), 1679 (2006), 1593 (2005), 1591 (2005), 1627 (2005), which specifically refer to the Darfur situation solely, *see also*: UNSC Resolutions 1547 (2004), para. 6; 1556 (2004), paras. 1, 2, 5, 7, 12 and 14; 1564 (2004), paras. 2, 3, 7, 11, 12; 1590 (2005), paras. 2, 5, 7, 12 and 17; 1663(2006); 1784(2007), para. 3.

Commission of Inquiry "to examine violations of international humanitarian law and human rights law *in Darfur*, Sudan".[123] The report of that commission is recalled in the first paragraph of the Resolution itself.[124]

(iii) The territorial scope of a situation need not be precisely delimited

51. Even if *arguendo* the boundaries of Darfur are not precisely defined, this too would not impede the Court's exercise of jurisdiction or the validity of the referral. For example, the territorial scope of the situation in *Georgia* is not precisely defined, nor is it delimited by reference to exact borders.[125] There is no requirement that the territorial scope of a situation coincides with, or extends to, the totality of a State territory. Although this is generally the case, it is not required under the Statute.[126] The territorial scope of the situations in *Burundi* and *Afghanistan* goes beyond their national territory.[127] Although those investigations were triggered by the Prosecutor *proprio motu* under articles 13(c) and 15, there is no reason why referrals under article 13(a) or (b) should be treated differently. As long as the crimes are committed at least in part "on the territory" of a State, as required by article 12(2)(a), the Court can exercise its

[123] S/2005/60, p. 1 (emphasis added).
[124] UNSC Resolution 1593, preamble, para. 1 (citing S/2005/60).
[125] ICC-01/15-12 ("*Georgia* Article 15 Decision"), para. 64 ("an authorization to investigate, given by the Pre-Trial Chamber, extends to all crimes within the jurisdiction of the Court. It is only limited by the parameters of the situation, which in this case can be summarized as *events related to the conflict in and around South Ossetia between 1 July and 10 October 2008*. Therefore, in principle, events which did not occur in or around South Ossetia or which occurred outside the time period indicated in the Request would not fall into the parameters of the present situation unless they are sufficiently linked thereto and, obviously, fall within the Court's jurisdiction", emphasis added).
[126] Article 12(2)(a) only requires that a crime has been committed "on the territory" of a State, but this does not mean that the Court may exercise its jurisdiction on the entirety of the State's territory in all situations. Although Uganda referred the situation in "Northern Uganda", and the Pre-Trial Chamber named the situation as "situation in Uganda", there is no indication—nor does the Defence provide any evidence—that this was because the territorial scope of the referral had been inadequately framed. *Contra* Challenge, para. 27.
[127] *See e.g.* ICC-01/17-9-Red ("*Burundi* Article 15 Decision"), para. 194 ("with regard to the geographical scope of the authorized investigation, the Chamber underscores the fact that some crimes, as exemplified in this decision, were allegedly committed outside of Burundi by Burundian nationals pursuant to or in furtherance of the State policy described in Part IV of the present decision. Therefore, the Prosecutor may extend her investigation to all crimes within the jurisdiction of the Court committed on the territory of Burundi (article 12(2)(a) of the Statute) or committed outside Burundi by nationals of Burundi (article 12(2)(b) of the Statute) if the legal requirements of the contextual elements of crimes against humanity are fulfilled"); ICC-02/17-138 ("*Afghanistan* Appeal Judgment"), para. 79 (allowing the investigation "in relation to alleged crimes committed on the territory of Afghanistan in the period since 1 May 2003, as well as other alleged crimes that have a nexus to the armed conflict in Afghanistan and are sufficiently linked to the situation and were committed in the territory of other States Parties in the period since 1 July 2002").

jurisdiction in a given situation, so long as the remaining statutory requirements are met.

(iv) The Court has confirmed the legality of the referral

52. The preceding paragraphs have shown that the territorial parameters of the situation in Darfur are not inconsistent with the Court's legal framework, and that the Defence arguments must be dismissed. But this is not only the Prosecution's view. Several other chambers of this Court which have been seised with cases in this situation have confirmed the validity of UNSC Resolution 1593 and the Court's jurisdiction. For example, in the *Bashir* case the Appeals Chamber held in May 2019 that "Resolution 1593 gives the Court power to exercise its jurisdiction over the situation in Darfur, Sudan, which it must exercise 'in accordance with [the] Statute'".[128]

53. Furthermore, pursuant to article 19(1) of the Statute, the Court is *obliged* to satisfy itself that it has jurisdiction when a case is brought before it. Accordingly, all chambers of the Court which have dealt with cases in the Darfur situation would have been compelled to consider any potential invalidity of the UN Security Council referral before ruling on the issues presented in the cases before them. Had they not been satisfied that the Court's jurisdiction in this situation was effective, it would have been incorrect for them to issue arrest warrants or to declare that Sudan was obliged to cooperate with the Court.[129] This Chamber has itself previously been satisfied of the legality of the referral in recalling Sudan's obligation to cooperate under the UN Charter and the Statute.[130]

54. Although Mr Abd-Al-Rahman was not a party to those previous proceedings, the Chambers' findings remain highly persuasive.[131] The Defence has shown no reason

[128] *Bashir* Appeal Judgment, para. 7.
[129] *See e.g.* ICC-02/05-03/09-1-RSC, paras. 1-3 (second decision under article 58 in Mr Banda's case); ICC-02/05-01/07-2-Corr (arrest warrant against Mr Harun), p. 2; ICC-02/05-01/12-2 (arrest warrant against Mr Hussein), p. 3; ICC-02/05-01/07-57 (decision informing the UN on Sudan's lack of cooperation).
[130] ICC-02/05-01/12-33, paras. 12-13.
[131] Challenge, para. 9.

to suspect that all of these chambers were mistaken. Accordingly, their arguments challenging the legality of the UNSC Resolution should be dismissed.

C. The Chamber should dismiss *in limine* non-jurisdictional arguments already raised

55. Finally, two of the Defence arguments do not raise jurisdictional questions. The Defence's submissions are unrelated to the four aspects of the Court's jurisdiction[132] or to the Court's "competence to deal with a criminal cause or matter under the Statute".[133] In addition, the Defence has already made the same arguments—unsuccessfully—in previous filings.[134] The Chamber should dismiss these submissions *in limine*.

(i) Defence submissions regarding the Court's financing, and article 115(b) of the Statute, should be dismissed *in limine*

56. The Defence's submission that the Court does not have jurisdiction in Darfur because, in its view, paragraph 7 of UNSC Resolution 1593 (stating that the ICC States Parties should bear the costs of the referral)[135] infringes article 115(b) of the Statute[136] does not raise a jurisdictional question within article 19(2) and (4) of the Statute.[137]

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[132] C. K. Hall *et al*., 'Article 19: challenges to the jurisdiction of the Court or the admissibility of a case,' in O. Triffterer and K. Ambos (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, 3rd Ed. (München/Oxford/Baden Baden: C.H. Beck/Hart/Nomos, 2016), p. 864 (mn. 17: "the concept [of jurisdiction] is well understood and thus challenges can be made on any of the accepted jurisdictional grounds: territorial (*ratio loci*), subject matter (*ratione materiae*), personal (*ratione personae*) and temporal (*ratione temporis*) grounds. Grounds that fall outside of these parameters are not jurisdictional challenges and stand to be dismissed as such"). *See also* ICC-01/04-01/06-772 ("*Lubanga* Jurisdiction Appeal Judgment"), paras. 21-22; ICC-02/05-01/20-145 OA3 ("*Abd-Al-Rahman* Admissibility Decision"), paras. 6, 8.

[133] *Lubanga* Jurisdiction Appeal Judgment, para. 24. *See also* ICC-01/09-01/11-414, para. 21; ICC-01/04-02/06-1225, para. 39 ("challenges, which would, if successful, eliminate the legal basis for a charge on the facts alleged by the Prosecutor may be considered to be jurisdictional challenges"); *Abd-Al-Rahman* Admissibility Decision, para. 8.

[134] ICC-02/05-01/20-10, ICC-02/05-01/20-105, ICC-02/05-01/20-113 and ICC-02/05-01/20-269.

[135] UNSC Resolution 1593 (2005), para. 7 ("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 that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily").

[136] Statute, art. 115(b) ("The expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, as provided for in the budget decided by the Assembly of States Parties, shall be provided by the following sources: [...] (b) Funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council").

[137] Challenge, paras. 33-43.

Paragraph 7 of UNSC Resolution 1593 potentially affects the budgetary function of the ASP, but not the Court's competence to exercise jurisdiction (and judicial functions) in the situation in Darfur.[138] The Court and the ASP are different organs with different functions: on the one hand, the Court is an international organisation with a judicial function, namely, to exercise jurisdiction over persons for the most serious crimes of international concern in a given territory;[139] on the other, the ASP is an intergovernmental body responsible for the Court's budget and finances.[140] Accordingly, those aspects of UNSC Resolution 1593 dealing with the financing of the Court (para. 7) are distinct from those aspects allowing the Court to exercise its jurisdiction (and judicial functions) in the territory of Darfur (para. 1). The latter does not depend on the former. Thus, even assuming *arguendo* that the UN Security Council inappropriately interfered with the ASP's budgetary authority, this does not mean that it improperly or invalidly referred the situation in Darfur to the Court for the purpose of exercising jurisdiction.

57. In any event, the Defence is incorrect to argue that UNSC Resolution 1593 violates article 115(b) of the Statute.[141] Although it is desirable, and even logical, that the UN financially contributes to the Court's activities (because, in this regard, the Court acts on behalf of the international community and the UN Security Council has referred two situations),[142] UNSC Resolution 1593 did not forbid UN funding for the ASP. Rather, it stated that ICC States Parties would fund the Court's investigations or prosecutions *in Darfur*. The absence of UN contributions in Darfur does not mean that article 115(b) is violated because the UN can still contribute to the Court's financing

[138] *Contra* Challenge, paras. 35-37 (suggesting that there is a link between this issue and the judicial functions of the Court).
[139] *Bangladesh/Myanmar* Article 19(3) Decision, para. 48 (referring to the objective international personality of the ICC) .
[140] ICC-02/05-01/20-101, para. 8. *See also* M. Halff *et al.*, 'Article 115: funds of the Court and of the Assembly of States Parties,' in O. Triffterer and K. Ambos (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, 3rd Ed. (München/Oxford/Baden Baden: C.H. Beck/Hart/Nomos, 2016) ("Halff *et al.*"), p. 2255 (mn. 7).
[141] *Contra* Challenge, paras. 38-43.
[142] Halff *et al.*, p. 2260 (mn. 18: noting two views justifying the UN funding of the Court's activities: first, in situations referred by the UNSC the Court renders a service to the UN; second, the Court acts on behalf of the international community).

more generally. Nor does article 115(b) impose an obligation on the UN to fund the Court,[143] but instead regulates the possible sources of the Court's financing. The ASP has itself explicitly addressed this matter and has not indicated that the UN Security Council inappropriately interfered with its responsibilities.[144]

58. In addition, the Defence has already raised—and the Chamber has dismissed—this argument.[145] Although the Defence now seeks different relief, it disregards the Chamber's clear warning not to submit duplicative filings.[146] Moreover, the import of the Chamber's prior ruling is apposite:[147] not only did the Chamber find that the Defence's arguments lacked merit[148] but it also noted that such submissions "plainly fall[] outside the ambit of the Defence, and that the Defence has no legal standing to either evaluate []or provide recommendations regarding the Court's financial management".[149]

59. Because of the foregoing, the Chamber should dismiss *in limine* the Defence submissions regarding article 115(b) of the Statute.

(ii) Defence submissions regarding the impact of UNAMID's withdrawal should be dismissed *in limine*

60. The Chamber should likewise dismiss the Defence's argument that the Court does not have jurisdiction because UNSC Resolution 1593 has expired as a result of UNSC Resolution 2559 (2020), which terminated UNAMID's mandate and withdrew

[143] D. Ruiz Verduzco, 'The relationship between the ICC and the United Nations Security Council,' in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford: OUP, 2015), p. 40 ("Article 115(b) is not and could not constitute an instruction to the United Nations to provide funding to the Court"); Halff *et al.*, p. 2260 (mn. 17).
[144] Halff *et al.*, p. 2261 (mn. 20: referring to the 2011 ASP resolution on the budget where it "invite[d] the Court to include this matter in its institutional dialogue with the United Nations and to report thereon to the eleventh session of the Assembly", and noting that the issue of financing has been raised in other fora but there has been no substantive progress).
[145] The Defence has already presented this argument before in ICC-02/05-01/20-10, ICC-02/05-01/20-105 and ICC-02/05-01/20-113. The PTC has dismissed it in ICC-02/05-01/20-101, ICC-02/05-01/20-110 and ICC-02/05-01/20-163.
[146] ICC-02/08-01/20-186, para. 8.
[147] *Contra* Challenge, para. 34 (noting that although the previous decisions are res judicata the Defence had never requested to consider the consequence of the lack of UN financing).
[148] ICC-02/05-01/20-101, para. 8.
[149] ICC-02/05-01/20-101, para. 7.

deployed uniformed and civilian personnel deployed.[150] The Defence submits that this violates articles 2 and 87(6) of the Statute, and the Relationship Agreement between the Court and the UN, because the Court might be deprived of logistical and security support in Darfur.[151] Again, these arguments are incorrect and speculative, are not jurisdictional in nature, and merely repeat previous submissions.[152]

61. First, UNSC Resolution 1593 has not expired. The referral and the Court's jurisdiction was not made contingent upon UNAMID deployment. Nor can the UN Security Council withdraw or 'call back' a previous referral, in particular, after the Court has already decided to exercise its jurisdiction into the referred situation. This is not foreseen in the Statute and would violate both the Prosecutor's and the Court's independence. In any event, Resolution 2559 does not relate to UNSC Resolution 1593 or to the Court's jurisdiction but instead addresses the distinct question of UNAMID's withdrawal from Sudan. This resolution—and UNAMID's withdrawal—has no impact on the referral or the legality of the Court's exercise of jurisdiction. Notably, UNSC Resolution 2559 expressly recalls the validity of previous resolutions in Sudan, which includes UNSC Resolution 1593.[153]

62. Second, the Defence misinterprets the UN's role in the Court's activities, as provided by the Relationship Agreement, and misreads article 87(6) of the Statute.[154] UN peacekeeping presence in a given territory is not a pre-requisite for the Court's exercise of jurisdiction. Nor is UN assistance a pre-requisite for the Court's operation in a situation. Article 87(6) of the Statute imposes no such obligation; it only says that the Court "may" request cooperation or assistance from intergovernmental organisations. In this context, the Relationship Agreement is a *sui generis* institutional arrangement which provides the general framework for the Court's relationship with

[150] Challenge, paras. 44-52.
[151] Challenge, paras. 44-52.
[152] ICC-02/05-01/20-269.
[153] UNSC Resolution 2559 ("Reaffirming all its previous resolutions and presidential statements concerning the situation in Sudan and underlining the importance of full compliance with and implementation of these […]").
[154] Relationship Agreement. *Contra* Challenge, paras. 45, 48-52.

the UN.[155] Article 3 of the Relationship Agreement, for example, envisages close cooperation between the two organisations "whenever appropriate", but it does not oblige the UN to guarantee safety or provide security to ICC staff anywhere and anytime. As necessary, these general provisions may be developed by more concrete technical agreements taking into account the needs of the Court and the mandate, characteristics and capacity of the relevant peacekeeping operation, if any, and the consent of the State(s) concerned.[156] Indeed, the Court has adopted memoranda of understanding to regulate these matters within the framework of the Relationship Agreement in four situations, but not in Darfur.[157]

63. Third, contrary to the Defence's assertion, the UN will continue to have a presence in Sudan. On 4 June 2020, the UN Security Council adopted Resolution 2524 which established a transitional assistance mission in Sudan ("United Nations Integrated Transition Assistance Mission in Sudan" or "UNITAMS") with the aim to, *inter alia*, assist the political transition, democratic governance, peacebuilding,

[155] P. Ambach, 'Article 2; relationship of the Court with the United Nations,' in O. Triffterer and K. Ambos (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, 3rd Ed. (München/Oxford/Baden Baden: C.H. Beck/Hart/Nomos, 2016) ("Ambach"), pp. 29-30. The Defence misreads or selectively quotes article 3 ("The United Nations and the Court agree that, with a view to facilitating the effective discharge of their respective responsibilities, they shall cooperate closely, whenever appropriate, with each other and consult each other on matters of mutual interest pursuant to the provisions of the present Agreement and in conformity with the respective provisions of the Charter and the Statute"), article 10(1) ("The United Nations agrees that, upon the request of the Court, it shall, subject to availability, provide on a reimbursable basis, or as otherwise agreed, for the purposes of the Court such facilities and services as may be required, including for the meetings of the Assembly of States Parties ("the Assembly"), its Bureau or subsidiary bodies, including translation and interpretation services, documentation and conference services. When the United Nations is unable to meet the request of the Court, it shall notify the Court accordingly, giving reasonable notice") and article 18(1) ("With due regard to its responsibilities and competence under the Charter of the United Nations and subject to its rules, the United Nations undertakes to cooperate with the Prosecutor and to enter with the Prosecutor into such arrangements or, as appropriate, agreements as may be necessary to facilitate such cooperation, in particular when the Prosecutor exercises, under article 54 of the Statute, his or her duties and powers with respect to investigation and seeks the cooperation of the United Nations in accordance with that article"). *See* Challenge, para. 45.

[156] *See generally* Ambach, pp. 34-35.

[157] Memorandum of understanding between the United Nations and the International Criminal Court concerning cooperation between the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) and the International Criminal Court, UNTS II-1292; Memorandum of understanding between the United Nations and the International Criminal Court concerning cooperation between the United Nations Organization Mission in Cote d'Ivoire (UNOCI) and the International Criminal Court, UNTS II-1371; Memorandum of understanding between the United Nations and the International Criminal Court concerning cooperation between the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA) and the International Criminal Court, UNTS II-1374; Memorandum of understanding between the United Nations and the International Criminal Court concerning cooperation between the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA) and the International Criminal Court, UNTS II-1379.

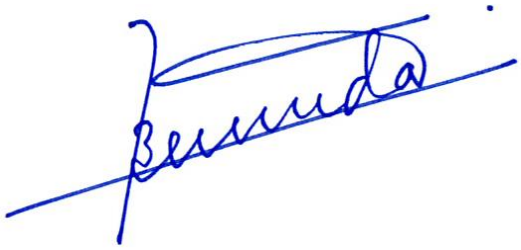
protection and promotion of human rights and rule of law, in particular in Darfur. That UNITAMS' mandate does not expressly envisage UN support or cooperation with the Court does not mean that it excludes such assistance,[158] nor does it preclude that the Court could enter an agreement with UNITAMS should it deem it necessary. Notably, UNAMID's mandate did not envisage specific support or cooperation with the ICC either.[159] Moreover, unlike in other situations, the Court never entered into a memorandum of understanding with UNAMID to facilitate technical cooperation with the Court.[160] In fact, the Defence shows no prejudice resulting from UNAMID's departure—even before UNSC Resolution 2559, the Defence had been informed that it could not conduct fact-finding missions in Sudan as a result of security issues.[161] Nor does the Statute include an absolute and an all-encompassing right by the Defence (and Prosecution) to conduct on-site investigations.[162]

64. Accordingly, the Defence submission regarding UNAMID's withdrawal should be dismissed *in limine*.

[158] Challenge, paras. 46, 48 (arguing that the support to the Court's activities was initially included and subsequently withdrawn). However, the document cited in fns. 68 and 70 only says that " Russia opposed […] language referring to the ICC".
[159] *See* UNSC Resolution 2148 (2014). UNAMID's mandate included: (i) protecting civilians, without prejudice to the responsibility of the Government of Sudan; (ii) facilitating the delivery of humanitarian assistance and ensuring the safety of humanitarian personnel; (iii) mediating between the Government of Sudan and non-signatory armed movements on the basis of the Doha Document for Peace in Darfur; and (iii) supporting the mediation of community conflict, including through measures to address its root causes.
[160] Ambach, p. 35 (mn. 4: noting that three MoUs have been entered with UN operations in Ivory Coast, Mali and DRC, as well as a fourth MoU with the UN Office on Drugs and Crime). The Court has also adopted a MoU with MINUSCA in the CAR.
[161] *See* ICC-02/05-01/20-269, para. 2.
[162] ICC-02/05-03/09-410, para. 99. *See also* para. 100 ("Given this legal framework, and as a general principle, the Chamber should not automatically conclude that a trial is unfair, and stay proceedings as a matter of law, in circumstances where States would not allow defence (or prosecution) investigations in the field even if, as a result, some potentially relevant evidence were to become unavailable. Furthermore, the investigation and prosecution of the most serious crimes of international concern should not become contingent upon a States' choice to cooperate or not cooperate with the Court. Instead, as developed below, the Chamber needs to be satisfied that the accused persons have been provided with adequate facilities for the preparation of their defence and the opportunity to obtain the attendance of witnesses on their behalf by means other than on-site investigations").

IV. CONCLUSION

65. For all the foregoing reasons, the Prosecution respectfully requests the Chamber to reject the Defence Challenge.



Fatou Bensouda
Prosecutor

Dated this 16th day of April 2021

At The Hague, The Netherlands