

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 21 July 2021

THE APPEALS CHAMBER

Before: Judge Piotr Hofmański, Presiding Judge
Judge Luz del Carmen Ibáñez Carranza
Judge Marc Perrin de Brichambaut
Judge Solomy Balungi Bossa
Judge Gocha Lordkipanidze

SITUATION IN DARFUR, SUDAN

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

Public Document

**Submissions on behalf of Victims on the Defence Appeal against
the "Decision on the Defence 'Exception d'incompétence'"
(ICC-02/05-01/20-391)**

Source: Office of Public Counsel for Victims

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

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I. INTRODUCTION

1. Counsel representing a number of victims participating in the proceedings¹ (the “Legal Representative”) submits that the Defence appeal² against the “Decision on the Defence ‘*Exception d’incompétence*’” (the “Impugned Decision”)³ must be dismissed. The appeal does not demonstrate that Pre-Trial Chamber II (the “Chamber”) committed any error when issuing the Impugned Decision.

2. In particular, the Legal Representative opposes all grounds of appeal and posits that the Chamber (i) correctly established that the Situation in Darfur constitutes a ‘*situation*’ in accordance with the Court’s legal framework and practice; (ii) properly found that United Nations (the “UN”) budgetary considerations do not affect the legality of Resolution 1593 (2005) (the “Resolution 1593”);⁴ (iii) rightly considered that UN Resolution 2559 (2020) (the “Resolution 2559”)⁵ does not affect the referral of the *Situation in Darfur* to the International Criminal Court (the “ICC” or the “Court”); and (iv) properly interpreted article 13(b) in light of articles 11, 22, and 24 of the Rome Statute (the “Statute”) and its drafting history. The Defence’s submissions on a purported denial of justice based on the Chamber’s alleged refusal to address some of the Defence’s arguments are unsubstantiated. In addition, a Chamber is not required to address all arguments raised by the Parties as long as it indicates with sufficient clarity the basis for its decision. The Chamber properly did so in the case at hand.

¹ See the “Decision on victim applications for participation, legal representation, leave to appeal and amicus curiae requests” (Trial Chamber II, Single Judge), No. ICC-02/05-01/20-398, 20 May 2021.

² See the “*Mémoire d’appel de la Décision ICC-02/05-01/20-391 rejetant l’Exception d’incompétence*”, [No. ICC-02/05-01/20-418 OA8](#), 14 April 2021 (the “Defence Appeal”).

³ See the “Decision on the Defence ‘*Exception d’incompétence*’” (Pre-Trial Chamber II), [No. ICC-02/05-01/20-391](#), 17 May 2017 (the “Impugned Decision”).

⁴ See Resolution 1593 (2005) adopted by the Security Council at its 5158th meeting, on 31 March 2005, UN Doc. [S/RES/1593 \(2005\)](#).

⁵ See Resolution 2559 (2020) adopted by the Security Council on 22 December 2020, UN Doc. [S/RES/2559 \(2020\)](#).

3. Accordingly, the overall approach of the Chamber is correct and reasonable and the Defence does not show any error likely to warrant the quashing of the Impugned Decision.

4. Finally, the Legal Representative conveys the concerns of the Victims. To the extent possible, she discussed the Defence Appeal and the previous Challenge with the Victims. Despite the complex legal issues raised therein, they do understand that a successful challenge to the Court's jurisdiction may halt the present proceedings. In this regard, Victims have all indicated that they consider that – also given the extent and gravity of the crimes they suffered from – the ICC is the only court of law able to impartially and independently prosecute Mr Abd-Al-Rahman for his alleged acts and must proceed to do so in compliance with the Security Council's referral.

II. PROCEDURAL BACKGROUND

5. On 16 March 2021, the Defence filed a challenge to the Court's jurisdiction (the "Defence Challenge").⁶

6. On 16 April 2021, the Prosecution submitted its response, requesting the Chamber to reject the Defence Challenge.⁷

7. On the same day, Counsel from the OPCV and the other team of Legal Representatives of Victims respectively filed the "Submissions on behalf of Victims on the Defence's Challenge to the Court's Jurisdiction (*"Exception d'incompétence"* ICC-02/05-01/20-302)" (the "OPCV Observations")⁸ and the "Response on behalf of the Victims to the Defence *Exception d'incompétence* (ICC-02/05-01/20-302)" (the "LRVs Observations"),⁹ both requesting the Chamber to dismiss the Defence Challenge.

⁶ See the "*Exception d'incompétence*", [No. ICC-02/05-01/20-302](#), 16 March 2021 (the "Defence Challenge").

⁷ See the "Prosecution's response to the Defence challenge to the Court's jurisdiction (ICC02/05-01/20-302)", [No. ICC-02/05-01/20-347](#), 16 April 2021.

⁸ See the "Submissions on behalf of Victims on the Defence's Challenge to the Court's Jurisdiction (*"Exception d'incompétence"* (ICC-02/05-01/20-302))", [No. ICC-02/05-01/20-348](#), 16 April 2021.

⁹ See the "Response on behalf of the Victims to the Defence *Exception d'incompétence* (ICC-02/05-01/20-302)", [No. ICC-02/05-01/20-351](#), 16 April 2021.

8. On 17 May 2021, the Chamber issued the Impugned Decision,¹⁰ rejecting the Defence Challenge.

9. On 7 June 2021 the Defence filed the “*Mémoire d’appel de la Décision ICC-02/05-01/20-391 rejetant l’Exception d’incompétence*” (the “Defence Appeal”).¹¹

10. On 25 June 2021, the Appeals Chamber issued the “Order of the submission of observations” deciding, *inter alia*, that the victims and the United Nation Security Council may submit observations on the Defence’s appeal brief and the Prosecutor’s response by no later than 21 July 2021.¹²

11. On 29 June 2021, the Prosecution filed the “Prosecution’s Response to the Defence Appeal against the “Decision on the Defence ‘Exception d’incompétence’”.”¹³

12. On 9 July 2021, the Chamber issued the Decision confirming all charges against Mr Abd-Al-Rahman.¹⁴

III. SUBMISSIONS

1. First Ground: the Chamber correctly found that the Situation in Darfur constitutes a ‘situation’ under the Court’s legal framework

13. The Defence alleges that the Chamber committed two errors of fact and one of law when construing the term ‘situation’ in the context of a Security Council’s referral.¹⁵ In addition, the Defence argues that the alleged error of law in this regard also caused a denial of justice to the Accused.¹⁶ The Defence’s arguments are based on a

¹⁰ See the Impugned Decision, *supra* note 3.

¹¹ See the Defence Appeal, *supra* note 2.

¹² See the “Order of the submission of observations” (Appeals Chamber), [No. ICC-02/05-01/20-424 OA8](#), 25 June 2021.

¹³ See the “Prosecution’s Response to the Defence Appeal against the “Decision on the Defence ‘Exception d’incompétence’””, [No. ICC-02/05-01/20-427 OA8](#), 29 June 2021.

¹⁴ See the “Decision on the confirmation of charges against Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’)” (Pre-Trial Chamber II), [No. ICC-02/05-01/20-433](#), 9 July 2021.

¹⁵ See the Defence Appeal, *supra* note 2, paras. 5-8.

¹⁶ *Idem*, para. 9.

misrepresentation of the Impugned Decision and a misreading of the applicable law, and as such should be dismissed.

14. In particular, the Defence submits that the Chamber erred in fact (i) in finding that crimes within the jurisdiction of the Court were only committed in Darfur, instead of the whole territory of Sudan;¹⁷ and (ii) in misinterpreting the Defence's arguments on a '*situation*' – under article 13(b) of the Statute – as necessarily encompassing the entirety of a State territory.¹⁸ The Chamber also allegedly erred in law in failing to address the Defence's arguments on the difference between a '*situation*' and a '*case*' and in confounding the two concepts.¹⁹ In failing to address this line of arguments, the Chamber would also have occasioned a denial of justice to the Suspect.²⁰

15. Concerning the two alleged factual errors, the Legal Representative posits that the Chamber in fact (i) did not make any finding on the occurrence of crimes within the Court's jurisdiction in other regions of Sudan, as it was not required to do so; and (ii) correctly addressed the Defence's submissions on the relation between a '*situation*' and a State's territory and properly found that "*the term 'situation' is other than the one of a 'State'.*"²¹ Despite the Defence's attempt to re-characterise this line of arguments before the Appeals Chamber,²² the Legal Representative notes that in fact the Defence devoted about ten pages of its Challenge to argue that according to the Court's legal framework and practice a '*situation*' necessarily encompasses the entirety of a national territory.²³

16. In addition – and contrary to the Defence's submissions on the alleged error of law and denial of justice²⁴ – addressing the Defence's arguments on the definition of the term '*situation*', the Chamber noted that said term "*has its own precise meaning, which*

¹⁷ *Idem*, para. 6.

¹⁸ *Idem*, para. 7.

¹⁹ *Idem*, para. 8.

²⁰ *Idem*, para. 9.

²¹ See the Impugned Decision, *supra* note 3, para. 26.

²² See the Defence Appeal, *supra* note 2, para. 7.

²³ See the Defence Challenge, *supra* note 6, paras. 17-32.

²⁴ See the Defence Appeal, *supra* note 2, paras. 8-9.

differs both from the one of 'case' and from the one of 'territory of a State' or 'State'".²⁵ Moreover, the Chamber analysed the term 'situation' in relation to a referral under Chapter VII of the UN Charter – thereby also addressing the concerns newly raised by the Defence in the First Ground of its Appeal.²⁶ In this regard, the Chamber considered that "[a]rticle 13 of the Statute adopts the term 'situation' to identify the subject matter of a referral by the UN Security Council acting under Chapter VII of the United Nations Charter, without any further qualification; there is therefore no element indicating or otherwise warranting that a different approach should be taken when construing the term in the particular context of a Security Council referral".²⁷ The Chamber then rightly concluded that "the territorial scope of a State, on the one hand, and the territorial scope of a situation as the subject matter of a referral to the Court, on the other hand, do not necessarily overlap".²⁸

17. The Chamber's approach is in line with the legal framework and practice of the Court, and refers to her previous submissions on the definition of the term 'situation' before the ICC.²⁹ This term has never been interpreted as necessarily encompassing the entirety of a State territory. There is no provision suggesting this in the ICC legal texts, and none of the Defence's references to the Preparatory Works on article 13(b) of the Statute supports such a conclusion.³⁰ This approach is also in line with the interplay between the exercise of the Court's jurisdiction and the principle of complementarity. The existence of a link between the jurisdictional scope of a situation and the case at hand "is made necessary by the principles governing the relationship between the Court and the criminal jurisdictions of the States, whereby the primary responsibility for investigating and prosecuting the most serious crimes remains vested in States".³¹ Accordingly, "[t]he Statute cannot be interpreted as permitting a State to permanently abdicate its responsibilities

²⁵ See the Impugned Decision, *supra* note 3, para. 25.

²⁶ See the Defence Appeal, *supra* note 2, para. 7.

²⁷ See the Impugned Decision, *supra* note 3, para. 26.

²⁸ *Ibid.*

²⁹ See the "Submissions on behalf of Victims on the Defence's Challenge to the Court's Jurisdiction ("Exception d'incompétence" (ICC-02/05-01/20-302))", *supra* note 8, paras. 29-37.

³⁰ See the Defence Challenge, *supra* note 6, paras. 22-24.

³¹ See the "Decision on the 'Defence Challenge to the Jurisdiction of the Court'" (Pre-Trial Chamber I), [No. ICC-01/04-01/10-451](#), 26 October 2011, para. 21.

*by referring a wholesale of present and future criminal activities comprising the whole of its territory, without any limitation whether in context or duration. Such an interpretation would be inconsistent with the proper functioning of the principle of complementarity”.*³²

18. In this sense, it is obvious that for the purposes of the Statute and for the exercise of the Court’s jurisdiction also under article 13(b), the term *situation* cannot be construed as always coinciding with the entirety of a State’s territory and has instead often been limited to a region, or part thereof.³³ As per the practice of this Court, several *situations* have been also opened in one and the same country.³⁴ As a result, the Chamber did not err and did not cause a denial of justice in dismissing as irrelevant for the purposes of a jurisdictional challenge³⁵ the Defence’s argument that Darfur did not exist legally and administratively in 2005.³⁶

19. Accordingly, the Defence failed to demonstrate any error in the overall approach of the Chamber and to substantiate the alleged denial of justice. The First Ground should be accordingly dismissed.

2. Second Ground: the Chamber correctly found that United Nations budgetary considerations do not affect the legality of UN Resolution 1593 (2005)

20. The Defence alleges that the Chamber committed one error of fact and one of law – which in turn occasioned a denial of justice – by failing to properly address its arguments on the alleged incompatibility of Resolution 1593 with article 115(b) of the Statute.³⁷ The Defence’s submissions in this regard are either an expression of mere

³² *Ibid.*

³³ See *e.g.*, the regional focus on Northern Uganda, Ituri and North and South Kivu Provinces in DRC.

³⁴ See *e.g.*, Situation in the Bolivarian Republic of Venezuela I, “[Referral of the situation in Venezuela under Article 14 of the Rome Statute submitted by the Republic of Argentina, Canada, the Republic of Colombia, the Republic of Chile, the Republic of Paraguay and the Republic of Peru](#)”, 26 September 2018; and Situation in the Bolivarian Republic of Venezuela II, [Referral submitted by the Government of Venezuela](#), 12 February 2020. See also Situations in CAR I focussing on alleged war crimes and crimes against humanity committed in the context of a conflict in Central African Republic since 1 July 2002 and in CAR II focussing on alleged war crimes and crimes against humanity committed in the context of renewed violence starting in 2012 on the same territory.

³⁵ See the Impugned Decision, *supra* note 3, para. 27.

³⁶ See the Defence Challenge, *supra* note 6, para. 19 and the Defence Appeal, *supra* note 2, para. 5.

³⁷ See the Defence Appeal, *supra* note 2, paras. 13-15.

disagreement with the Impugned Decision or a plain repetition of arguments already advanced and rejected by the Chamber and the Presidency. As such, they should be dismissed in their entirety.

21. In particular, the Defence submits that the Chamber (i) erred in fact in misinterpreting the difference *in petitum* between the Defence Challenge and its previous article 115(b) requests;³⁸ and (ii) erred in law in declining to review the legality of any financial arrangement between the Court and the United Nations.³⁹ In turn, by summarily dismissing this line of arguments, the Chamber would have occasioned a denial of justice.⁴⁰

22. In relation to the alleged error of fact, the Legal Representative notes that the Chamber did address the different angles under which the Defence raised the issue of the financial contribution of the UN to the investigation and prosecution of cases arising from the Situation in Darfur.⁴¹ However, the Chamber rightly concluded that yet again the Defence had failed to “*provide any reasoning as to how or why a matter relating to the financial operation of the Court would have an impact on its jurisdiction*”.⁴² In fact, financial agreements between the ICC and the UN are the result of ancillary negotiations which fall outside the scope of both article 13(b) of the Statute and of the relevant Security Council resolutions. As such, they cannot affect – nor they can be interpreted as affecting – the object and purpose of the Statute and of the Security Council’s referrals.⁴³

³⁸ *Idem*, para. 13. See also the “Requête en vertu de l’Article 115-b”, [No. ICC-02/05-01/20-10](#), 26 June 2020, para. 14; the “Demande d’autorisation d’interjeter appel de la ‘Decision on the Defence Request under Article 115(b) of the Rome Statute (ICC-02/05-01/20-101)’”, [No. ICC-02/05-01/20-105](#), 27 July 2020 ; the “Demande de reconsidération de la Décision ICC-02/05-01/20-110 ”, [No. ICC-02/05-01/20-113](#), 13 August 2020; and the “Requête en vertu des Articles 38-3-a, 43-2 et 115-b”, [No. ICC-02/05-01/20-165](#), 25 September 2020.

³⁹ See the Defence Appeal, *supra* note 2, para. 14.

⁴⁰ *Idem*, para. 15.

⁴¹ See the Impugned Decision, *supra* note 3, paras. 28-29.

⁴² *Idem*, para. 29.

⁴³ See article 31(1) of the Vienna Convention on the Law of Treaties: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. See also, e.g., the “Judgment on the appeal of the Prosecutor against the decision of [REDACTED]” (Appeals Chamber), [No. ICC-ACRed-01/16](#), 15 February 2016, paras. 56-57; the “Judgment on the appeals of William Samoei Ruto and Mr Joshua Arap Sang against the decision

23. As regards the alleged error of law,⁴⁴ the Legal Representative considers that the Chamber properly reiterated that Judges do not have the competence to review the financial agreements concluded by the Court. Article 115(b) of the Statute implies that there are situations in which the UN should contribute to the Court's budget. It provides that the UN shall provide funds to the ICC, in particular to cover expenses incurred due to Security Council referrals. At the time of the adoption of the Statute, the aim of the Preparatory Committee was limited to finding a mechanism that would guarantee the independence and impartiality of the Court, *"while at the same time avoiding a situation in which the prospective financial burden could be a prohibitive factor for States considering accession to the Statute"*.⁴⁵ However – since article 115 alone does not make it mandatory for the UN to cover the said expenses – the release of funds is regulated by the terms of the UN-ICC Agreement and is subjected to separate arrangements.⁴⁶ As such, these types of agreements are clearly outside the scope of any Chamber's legal review.

24. Lastly, the Defence's submissions on a purported denial of justice caused by the Chamber's failure to address certain arguments⁴⁷ are unsupported and must equally fail. It is in fact necessary for any appellant claiming an error of law on the basis of the

of Trial Chamber V(A) of 17 April 2014 entitled 'Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation'" (Appeals Chamber), [No. ICC-01/09-01/11-1598 OA7 OA8](#), 9 October 2014, para. 105; the "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal" (Appeals Chamber), [No. ICC-01/04-168 OA3](#), 13 July 2006, para. 33; and the "Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction" (Appeals Chamber), [No. ICC-01/04-01/06-3121-Red A5](#), 1 December 2014, para. 277.

⁴⁴ See the Defence Appeal, *supra* note 2, para. 14.

⁴⁵ See TRIFFTERER (O.) and AMBOS (K.) (Eds.), *The Rome Statute of the International Criminal Court: a Commentary*, 3rd edition, C.H.Beck/Hart/Nomos, München/Oxford/Baden Baden, 2016, p. 2255.

⁴⁶ See the "Negotiated Relationship Agreement between the International Criminal Court and the United Nations", [ICC-ASP/3/Res.1](#), entered into force on 4 October 2004 (the "UN-ICC Agreement"), article 13(1) and (2): "1. The United Nations and the Court agree that the conditions under which any funds may be provided to the Court by a decision of the General Assembly of the United Nations pursuant to article 115 of the Statute shall be subject to separate arrangements. The Registrar shall inform the Assembly of the making of such arrangements. 2. The United Nations and the Court further agree that the costs and expenses resulting from cooperation or the provision of services pursuant to the present Agreement shall be subject to separate arrangements between the United Nations and the Court. The Registrar shall inform the Assembly of the making of such arrangements [...]".

⁴⁷ See the Defence Appeal, *supra* note 2, para. 15.

lack of a reasoned opinion to identify the specific issues, factual findings, or arguments the relevant chamber omitted to address and to explain why this omission invalidates the decision.⁴⁸ In addition, it is recalled that in any case a Chamber “*is not required to address all the arguments raised by the parties [...] provided that it indicates with sufficient clarity the basis for its decision*”.⁴⁹ In this regard, the Chamber properly explained its reasoning in dismissing the Defence’s arguments,⁵⁰ also recalling the Presidency’s findings on the same issue.⁵¹

25. The Chamber’s approach was correct and the Defence does not show any error in the Chamber’s reasoning and does not substantiate the alleged denial of justice. Accordingly, the Defence’s Second Ground should be likewise dismissed.

3. Third Ground: the Chamber correctly found that UN Resolution 2559 (2020) does not affect the referral to the Court of the *Situation in Darfur*

26. The Defence alleges that the Chamber committed one error of fact and one of law – which in turn occasioned a denial of justice – in failing to properly address the Defence’s arguments on the alleged invalidating effect of Resolution 2559 over the referral of the *Situation in Darfur* to the Court.⁵²

27. In particular, the Defence submits that the Chamber (i) erred in fact in misinterpreting the Defence’s arguments in so far it was not argued that Resolution 1593 was ‘*replaced by*’ Resolution 2559;⁵³ (ii) erred in law by relying of such

⁴⁸ See the STL, *In the case against Al Jadeed and Al Khayat*, STL-14-05/A/AP, F0028, [Appeal Judgement](#), 8 March 2016, para. 12. See also the IRMCT, *The Prosecution v. Karadžić*, [Appeals Judgement](#), MICT-13-55-A, 20 March 2019, para. 15; and the ICTY, *The Prosecution v. Prlić*, [Appeals Judgement](#), IT-04-74-A, 29 November 2017, para. 19.

⁴⁹ See the “Public Redacted Version of the Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled ‘Judgment pursuant to Article 74 of the Statute’” (Appeals Chamber), [No. ICC-01/05-01/13-2275-Red A A2 A3 A4 A5](#), 8 March 2018, para. 105.

⁵⁰ See the Impugned Decision, *supra* note 3, para. 29.

⁵¹ *Idem*, para. 30.

⁵² See the Defence Appeal, *supra* note 2, paras. 18-20.

⁵³ *Idem*, para. 18.

assumption to summarily dismiss the Defence's submissions in this regard.⁵⁴ In turn, by summarily rejecting this line of arguments, the Chamber would have occasioned a denial of justice.⁵⁵

28. Despite the Defence's attempt to re-characterise this line of arguments before the Appeals Chamber,⁵⁶ the Legal Representative notes that the Defence clearly put forward in its Challenge – and reiterated in its Appeal⁵⁷ – the argument that Resolution 2559 made Resolution 1593 obsolete or '*caduque*', thereby depriving it of its *effet utile*.⁵⁸ In addition, while it is true that the Chamber started by cautioned the Defence against the practice of merely repeating arguments already dismissed,⁵⁹ it nonetheless analysed the Defence's submissions on this specific issue.

29. In fact, the Chamber properly summarised⁶⁰ and addressed⁶¹ the Defence's arguments on the alleged invalidating effect of Resolution 2559 over Resolution 1593, in particular by depriving the Court of the logistical and security support essential to the conduct of its activities in Sudan. The Chamber correctly found that: "*(i) neither the Referral, nor Resolution 1593 are mentioned in Resolution 2559; (ii) the Preamble of Resolution 2559, far from making Resolution 1593 obsolete, explicitly reaffirms 'all its previous resolutions [...] concerning the situation in Sudan' [...]; and (iii) through Resolution 2559, the UNSC, [...] reaffirms its determination to pursue the aim of protecting civilians in Sudan, notwithstanding the end of the mandate of the UNAMID and including through the United Nations Integrated Transition Assistance Mission in Sudan [...]*".⁶²

30. The Chamber then correctly concluded that, contrary to Defence's submissions, the idea that "*the jurisdiction of the Court could be taken away by a simple act purportedly*

⁵⁴ *Idem*, para. 19.

⁵⁵ *Idem*, para. 20.

⁵⁶ See the Defence Appeal, *supra* note 2, para. 18.

⁵⁷ *Idem*, para. 16.

⁵⁸ See the Defence Challenge, *supra* note 6, para. 50.

⁵⁹ See the Impugned Decision, *supra* note 3, para. 31.

⁶⁰ *Idem*, para. 11(iii).

⁶¹ *Idem*, paras. 31-35.

⁶² *Idem*, para. 32.

*endowed with a contrary effect” [...] “runs counter to fundamental and critical features of the system governing the exercise of the Court’s jurisdiction, as enshrined in the Statute as a whole”.*⁶³

31. In this regard, the Legal Representative also reiterates that, as for financial arrangements, cooperation agreements between the ICC and the UN are the result of subsidiary negotiations which fall outside the scope of both article 13(b) of the Statute and of the relevant Security Council resolutions. In relation to article 2 of the Statute, the *Ad Hoc* Committee on the Establishment of an International Criminal Court highlighted that “[t]he conclusion of a special agreement between the court and the United Nations as envisaged in article 2 of the draft statute was considered by a number of delegations to be an appropriate way of establishing the required links of functional cooperation between the two institutions, while at the same time preserving the court’s independence as a judicial organ”.⁶⁴ The same conclusion can be drawn from the text of the Draft Report of the Preparatory Committee.⁶⁵

32. The Court is in fact *“in a position to cooperate with all kinds of peacekeeping forces within the latter’s mandates”*.⁶⁶ However, a lack of such cooperation would not have any effect on the referral’s validity and therefore on the Court’s jurisdiction. In this sense, the Chamber was thus correct in dismissing the Defence’s arguments on the basis, *inter alia*, that *“no serious attempt [was] made to explain how this would relate and affect the jurisdictional parameters of the Court’s action”*.⁶⁷

33. Lastly, the Defence’s submissions on a purported denial of justice caused by the Chamber’s failure to address certain arguments are unsubstantiated. As recalled

⁶³ *Idem*, para. 33.

⁶⁴ See the Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court, Fiftieth Session, Supplement No. 22, UN Doc. [A/50/22](#), 6 September 1995, para. 17.

⁶⁵ See the Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I: Proceedings of the Preparatory Committee during March-April and August 1996, Supplement No. 22, UN Doc. [A/51/22](#), 13 September 1996, p. 9, para. 29.

⁶⁶ See TRIFFTERER (O.) and AMBOS (K.) (Eds.), *The Rome Statute of the International Criminal Court: a Commentary*, 3rd edition, C.H. Beck/Hart/Nomos, München/Oxford/Baden Baden, 2016, p. 2033.

⁶⁷ See the Impugned Decision, *supra* note 3, para. 31.

supra,⁶⁸ the Chamber is not required to address all arguments raised by the Parties as long as it indicates with sufficient clarity the basis for its decision.⁶⁹ The Chamber did so in the case at hand.

34. Accordingly, the Chamber's approach was reasonable and the Defence failed to substantiate the alleged denial of justice and to show any error invalidating the Impugned Decision. As such, the Third Ground of Appeal should be also dismissed.

4. Fourth ground: the Chamber correctly interpreted article 13(b) in light of articles 11, 22 and 24 of the Statute

35. The Defence alleges that the Chamber's failure to correctly interpreted article 13(b) in light of articles 11, 22 and 24 of the Statute, and to properly address the Defence's relevant arguments, constitute both an error of fact and law and a denial of justice.⁷⁰

36. In particular, the Defence argues that the Chamber (i) committed an error of fact by misinterpreting the Defence's arguments, in so far it was not argued that the Court has jurisdiction only over conducts already criminalised by the relevant State that occurred after the entry into force of the Statute in that State.⁷¹ The Defence indicates that the criminalisation at the national level and the entry into force of the Statute were instead characterised as alternative conditions for the exercise of the Court's jurisdiction;⁷² (ii) committed an error of fact and law in finding that the Statute was in force in Sudan since 1 July 2002;⁷³ and (iii) erred in law by failing to correctly interpreted article 13(b) in light of articles 22 and 24 of the Statute and to examine the criminalisation at the national level of the charged conducts.⁷⁴ In turn, the Chamber

⁶⁸ See *supra*, para. 24.

⁶⁹ See the "Public Redacted Version of the Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled 'Judgment pursuant to Article 74 of the Statute'", *supra* note 49, para. 105.

⁷⁰ See the Defence Appeal, *supra* note 2, paras. 23-27.

⁷¹ *Idem*, para. 23.

⁷² *Ibid.*

⁷³ See the Defence Appeal, *supra* note 2, para. 24.

⁷⁴ *Idem*, paras. 25-26.

occasioned a denial of justice by refusing to make a determination as to whether, at the time of their commission, the conducts charged were criminalised by either Sudan's national law or as a matter of international customary law.⁷⁵

37. The Defence's arguments are ill-construed and should be dismissed in their entirety. On the first alleged error of fact,⁷⁶ the Chamber did not consider that the Defence required – in order for the Court to exercise its jurisdiction – a double test based on the cumulative conditions of the entry into force of the Statute in Sudan and the criminalisation of the acts by applicable national or international law. Instead, the Chamber correctly summarised the Defence's submissions as requiring not only that the crimes charged occurred after 1 July 2002 – *i.e.* after entry into force of the Statute – but also they were criminalised in Sudan under national and/or international customary law. Accordingly, the Chamber correctly understood and dismissed the Defence's submissions. The Chamber's reference to the entry into of force of the Statute clearly referred to the Court's jurisdiction *ratione temporis* under articles 11, 22 and 24 of the Statute, *i.e.* 1 July 2002;⁷⁷ and not, as argued by the Defence, to the entry into force of the Statute in the State of Sudan.

38. In relation to the second alleged error of law and fact,⁷⁸ it is recalled that if a State becomes a party to the Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of the Statute for that State, *unless* that State has made a declaration under article 12(3) of the Statute or, as in the case at hand, a situation within its territory is referred to the Court by the Security Council pursuant to article 13(b). In this sense, the Chamber correctly noted that “*the referral by the UN Security Council was included in the Statute as a tool suitable to potentially broaden the jurisdictional reach of the Court, namely by allowing it to exercise its jurisdiction vis-à-vis scenarios where crimes as defined in the Statute would be allegedly committed on the territory of States not party to the Statute and no nationals of a*

⁷⁵ *Idem*, para. 27.

⁷⁶ *Idem*, para. 23.

⁷⁷ See the Impugned Decision, *supra* note 3, paras. 37 and 39.

⁷⁸ See the Defence Appeal, *supra* note 2, para. 24.

State Party would be involved".⁷⁹ Accordingly for the proper exercise of the Court's jurisdiction in Sudan is not necessary that the Statute was ratified by the State, but only that a referral to the Court under article 13(b) of the Statute has been made by the Security Council in accordance with the Court's statutory legal framework.

39. Contrary to the Defence's arguments in support to its third alleged error of law,⁸⁰ the Chamber was in fact correct in concluding that "*the case against Mr Abd-Al-Rahman was brought by the Prosecutor before the Court on the basis of provisions detailing the prohibited conduct, which existed and were in force at the time of all of the events underlying the charges*".⁸¹ The Legal Representative recalls her submissions on the issue⁸² which underpin the correctness of the Impugned Decision.

40. In particular, the Legal Representative reiterates that Security Council's referrals are necessarily retrospective. The limit to their retroactivity coincides only with the date of the entry into force of the Statute and Court's temporal jurisdiction, namely 1 July 2002. Such a reading is not only confirmed by the letter of article 11, but also by articles 22 and 24 of the Statute. The provisions indicate respectively that "*a person shall not be criminally responsible [...] unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court*"⁸³ and that "*no person shall be criminally responsible [...] for conduct prior to the entry into force of the Statute*".⁸⁴

41. Resolution 1593 referred the Situation in Darfur since 1 July 2002, namely the date of the entry into force of the Statute. The 2003-2004 events and alleged conducts described in the Document Containing the Charges against Mr Abd-Al-Rahman⁸⁵ -

⁷⁹ See the Impugned Decision, *supra* note 3, para. 41.

⁸⁰ See the Defence Appeal, *supra* note 2, paras. 25-26.

⁸¹ See the Impugned Decision, *supra* note 3, para. 40.

⁸² See the "Submissions on behalf of Victims on the Defence's Challenge to the Court's Jurisdiction ("*Exception d'incompétence*" (ICC-02/05-01/20-302))", *supra* note 8, paras. 53-70.

⁸³ See article 22 of the Statute.

⁸⁴ See article 24 of the Statute (emphasis added).

⁸⁵ See the "Prosecution's submission of the Document Containing the Charges", [No. ICC-02/05-01/20-325](#), 29 March 2021.

and confirmed in the Decision Confirming the Charges⁸⁶ - fall therefore squarely within the temporal scope of the Security Council's referral.⁸⁷ The entry into force of the Statute in a specific State, as well as the State's consent,⁸⁸ is irrelevant for the purposes of a Security Council's referral under article 13(b) of the Statute – the *effet utile* thereof is precisely to bring to the Court's attention situations occurring in non-State Parties. Thus, the Security Council acted within its delegated powers⁸⁹ and within the ICC statutory framework.

42. The *travaux préparatoires* of article 13 of the Statute confirms such a conclusion. In this regard, the Legal Representative recalls *in toto* her analysis of the drafting history of said provision, as previously submitted before the Pre-Trial Chamber.⁹⁰ The final version of article 13 is the result of intense negotiations over several points. Referrals from States Parties and the Security Council were envisaged since the very beginning of the drafting history as the key triggering mechanisms for the Court's jurisdiction. The role of the UN Security Council in the triggering of prosecutorial action was first codified by the International Law Commission (the "ILC"), in article 23 of the 1994 Draft Statute for an International Criminal Court (the "1994 ILC Draft") which reads as follows:

*"Notwithstanding article 21, the Court has jurisdiction in accordance with this Statute with respect to crimes referred to in article 20 as a consequence of the referral of a matter to the Court by the Security Council acting under Chapter VII of the Charter of the United Nations [...]"*⁹¹

⁸⁶ See the "Decision on the confirmation of charges against Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')", *supra* note 14.

⁸⁷ See also the [Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004](#), Geneva, 25 January 2005, para. 581.

⁸⁸ See the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June -17 July 1998. Official Records, Volume I, Final Documents, UN Doc. [A/CONF.183/13 \(Vol. I\)](#), 7th plenary meeting, para. 31.

⁸⁹ See ICJ, [Reparations for injuries suffered in the service of the United Nations](#), Advisory Opinion of 11 April 1949, I.C.J. Reports, 1949, p. 182. See also, WOOD (M. C.), ["The Interpretation of Security Council Resolutions"](#), *Max Planck Yearbook of United Nations Law*, Vol. 20, 2017, p. 77.

⁹⁰ See the "Submissions on behalf of Victims on the Defence's Challenge to the Court's Jurisdiction ("Exception d'incompétence" (ICC-02/05-01/20-302))", *supra* note 8, paras. 60-65.

⁹¹ See the Report of the International Law Commission on its Forty-Sixth Session, Draft Statute for an International Criminal Court, 2 May-22 July, 1994, UN Doc. [A/49/10\(SUPP\)](#), September 1994, article 23.

43. In the ILC Report of its 46th session, the power conferred to the Security Council was thought as an alternative to the creation of additional *ad hoc* international tribunals.⁹² The UN Security Council was envisaged to refer “*matters*” in the sense of situations to which Chapter VII of the UN Charter applies and it would then be for the Prosecutor to establish which individuals should be charged.⁹³

44. During the 1995 September session of the *Ad Hoc* Committee on the Establishment of an International Criminal Court, delegations discussed article 23 of the 1994 ILC Draft. Some delegations agreed that the role of the UN Security Council under article 23 of the 1994 ILC Draft would be in line with its primary responsibility to safeguard international peace and security.⁹⁴

45. During the first and second session of the 1996 Preparatory Committee on the Establishment of an International Criminal Court, the issues on the role of the Security Council re-emerged. In support of the retention of article 23(1), some delegations envisioned that referrals by the UN Security Council would be a substitute for the creation of *ad hoc* tribunals in the future and that it would create a mandatory jurisdiction with powers similar to those.⁹⁵ The independence of the Court would still be safeguarded since the Prosecutor would be free to decide on the evidence required to indict a certain individual for a crime.⁹⁶ It was further argued that vesting referral powers to the Security Council “*corresponded with the role for the Security Council carved out in the Charter*”.⁹⁷

46. The triggering mechanisms were finally discussed in the Committee of the Whole during the first and the second weeks of the Rome Conference. Differently from

⁹² *Idem*, p. 44, para. 1.

⁹³ *Idem*, para. 2.

⁹⁴ See the Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court, *supra* note 64, para. 120.

⁹⁵ See the Report of the Preparatory Committee on the Establishment of an International Criminal Court, *supra* note 65, para. 132.

⁹⁶ *Idem*, para. 133.

⁹⁷ *Idem*, para. 131. See Article 24 of the [Charter of the United Nations](#) which reads as follows: “[the] members [of the United Nations] confer on the Security Council primary responsibility for the maintenance of international peace and security [...]”.

when the Court's jurisdiction is triggered by a State or by the Prosecutor, "*no State consent was required for the Court to initiate investigations if the Security Council referred a situation to the Court*".⁹⁸

47. The drafters' intentions are clear in delegating ample discretion to the Security Council when referring a given situation to the Court. In the present case, the Situation in Darfur was referred after the proposal by the International Commission of Inquiry in its January 2005 Report.⁹⁹ Among the reasons justifying said referral, it was argued that the Court was first established "*with an eye to crimes likely to threaten peace and security*", and that this was "*the main reason why the Security Council may trigger the Court's jurisdiction under article 13(b)*".¹⁰⁰ It was further noted that relevant conducts were within the Court's temporal jurisdiction, as allegedly committed after 1 July 2002.¹⁰¹

48. In the *Lubanga* case, Pre-Trial Chamber I held that, as long as the Court exercises its power on the basis of "*written (lex scripta) pre-existing criminal norms approved by the States Parties to the Rome Statute (lex previa), defining prohibited conduct and setting out the related sentence (lex certa), which cannot be interpreted by analogy in malam partem (lex stricta)*", the principle of legality would be satisfied.¹⁰² Thus, referrals under article 13(b) of the Statute only require that the alleged conduct is found within one of the core crimes included in the Statute and that the conduct takes place after the Statute's entry into force.¹⁰³

⁹⁸ See the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June -17 July 1998. Official Records, Volume II, Final Documents, UN Doc. [A/CONF.183/13 \(Vol. II\)](#), Summary records of the meeting of the Committee of the Whole, 7th plenary meeting (A/CONF.183/C.1/SR.7), p. 182, para. 31.

⁹⁹ See also the Report of the International Commission of Inquiry on Darfur, *supra* note 87.

¹⁰⁰ *Idem*, para. 572.

¹⁰¹ *Idem*, para. 581.

¹⁰² See the "Decision on the Confirmation of Charges" (Pre-Trial Chamber I), [No. ICC-01/04-01/06-803-tEN](#), 29 January 2007, para. 303.

¹⁰³ See COCO (A.), "[Commentary to Article 13, International Criminal Court's Statute](#)", in KLAMBERG (M.) (Ed.), *Commentary on the Law of the International Criminal Court*, 2017. See also, O'KEEFE (R.), *International Criminal Law*, Oxford University Press, 2015, p. 552, footnote 108. See also GALAND (A. S.), "[UN Security Council Referrals to the International Criminal Court: Legal Nature, Effects and Limits](#)", *Leiden Studies on the Frontiers of International Law*, Vol. 5, Brill Nijhoff, Leiden, 2018, p. 122.

49. Article 13(b) of the Statute is in fact a “*bridging mechanism*” between the ICC and the Security Council powers.¹⁰⁴ The referral power of the UN Security Council can be therefore understood as referring to the ICC jurisdictional power of any UN member State.¹⁰⁵ Judge Perrin de Brichambaut, in a minority opinion in *Al Bashir* case, noted that the question was not if Sudan had accepted or not the jurisdiction of the Court, but whether Sudan had an obligation to accept the jurisdiction of the Court.¹⁰⁶ By virtue of article 25 of the Charter, UN Member States have agreed to accept and carry out the decisions of the UN Security Council.¹⁰⁷ Since the entry into force of the Statute, Sudan is under an obligation to accept any jurisdictional referral by the Security Council under article 13(b) of the Statute.¹⁰⁸ Consequently, a referral by the Security Council of a situation threatening the international peace and security because of the alleged commission of crimes within the Court’s jurisdiction would never be in breach of article 24 of the Statute.

50. The jurisdiction *rationae materiae* of the Court – together with the mechanisms triggering such jurisdiction over non-State Parties – have been indeed affirmed and agreed upon by the Security Council at the time of the entry into force of the Statute.¹⁰⁹ Article 13(b) is thus simply a procedural device activating the right of the international community to prosecute crimes that it codified in the Rome Statute, entered into force on 1 July 2002. Contrary to the Defence’s submissions in this regard,¹¹⁰ articles 7 and 8

¹⁰⁴ See RASTAN (R.), “[Jurisdiction](#)”, in STAHN (C.) (Ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, Oxford, 2015, p. 157 and footnote 74.

¹⁰⁵ See AKANDE (D.), “[The jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits](#)”, *Journal of International Criminal Justice*, vol. 1, 2003, pp. 625-626.

¹⁰⁶ See the Minority Opinion of Judge Marc Perrin de Brichambaut (Pre-Trial Chamber II), [No. ICC-02/05-01/09-302-Anx](#), 6 July 2017, para. 15.

¹⁰⁷ See article 25 of the [Charter of the United Nations](#): “The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter”.

¹⁰⁸ *Ibid.*

¹⁰⁹ The Security Council may take any action under Chapter VII of the UN Charter, including making a determination that prohibition of certain conducts will lead to the restoration or maintenance of peace and security. “In this sense, criminal prescription is like any other device that the Security Council uses, which need not be specifically mentioned in the U.N. Charter to be valid”. See Gallant (K.S.), “[Jurisdiction to Adjudicate and Jurisdiction to Prescribe in International Criminal Courts](#)”, *Villanova Law Review*, Vol. 48, 2003, p. 828.

¹¹⁰ See the Defence Appeal, *supra* note 2, paras. 23-27.

of the Statute are in fact binding on Sudan since that date. It is thus inapposite – and plainly irrelevant for the purpose of the exercise of the Court’s jurisdiction – to verify whether or not national and/or international customary law provided for the criminalisation of such conducts in Sudan at the time of the events. The Chamber was thus correct in declining to make such a determination¹¹¹ and, by clearly explaining the reason for such decision,¹¹² did not cause any denial of justice to the Defence.

51. Accordingly, the Chamber’s approach was overall reasonable and correct, and the Defence does not show any error invalidating the Impugned Decision. As such, the Fourth Ground of Appeal should be equally rejected.

¹¹¹ See the Impugned Decision, *supra* note 3, para. 42.

¹¹² See the “Public Redacted Version of the Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled ‘Judgment pursuant to Article 74 of the Statute’”, *supra* note 49, para. 105.

IV. CONCLUSION

52. For the foregoing reasons, the Legal Representative respectfully requests the Appeals Chamber to dismiss the Defence Appeal in its entirety.

A handwritten signature in black ink, reading 'Paolina Massidda', with a horizontal line underneath the name.

Paolina Massidda
Principal Counsel

Dated this 21st day of July 2021

At The Hague, The Netherlands