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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 Godcha Lordkipanidze

SITUATION IN DARFUR, SUDAN

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

Public Document

**Consolidated Response to the Observations Filed in Connection with the OA8
Appeal**

Source: Defence for Mr Ali Muhammad Ali Abd-Al-Rahman

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

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1. The present filing is the Defence’s Consolidated Response (“Consolidated Response”) to the observations filed by the Distinguished Legal Representatives of Victims (“LRVs”) in connection with the OA8 appeals proceedings.¹ It also addresses the lack of response from the United Nations Security Council. The Consolidated Response has been submitted within the time limit set by the Honourable Appeals Chamber.² As instructed by the Honourable Appeals Chamber,³ the Consolidated Response does not respond to the submissions from the Office of the Prosecutor (“OTP”), save where the distinguished LRVs have co-opted them as part of their own observations.

2. Since the United Nations Security Council has not filed any observations in response to the Honourable Appeals Chamber’s invitation,⁴ the Defence will, in the first place, draw conclusions from its silence, before responding to the Observations of the Distinguished LRVs in the order of presentation of the grounds of appeal.

THE GROUNDS OF APPEAL ARE UNCONTESTED BY THE SECURITY COUNCIL

3. As the Honourable Pre-Trial Chamber II has previously done,⁵ the Honourable Appeals Chamber⁶ invited the United Nations Security Council to submit observations in response to the Defence submissions in relation to the “*Exception d’Incompétence*” [Jurisdictional Challenge] (“Challenge”).⁷ Of the submissions, those on the incompatibility of Security Council [Resolution 1593](#) with articles 2,⁸ 13(b)⁹ and 115(b)¹⁰ of the Statute of the Court, and those on its illegality and the consequences thereof for the jurisdiction of the Court, which together formed the three limbs of the 1st head of

¹ ICC-02/05-01/20-441 OA8; ICC-02/05-01/20-442 OA8.

² [ICC-02/05-01/20-435 OA8](#), para. 5.

³ [ICC-02/05-01/20-424 OA8](#), p. 3, at (3); [ICC-02/05-01/20-435 OA8](#), para. 9.

⁴ [ICC-02/05-01/20-424 OA8](#), p. 3, at (2).

⁵ [ICC-02/05-01/20-321](#), p. 4.

⁶ [ICC-02/05-01/20-424 OA8](#), p. 3, at (2).

⁷ [ICC-02/05-01/20-302](#).

⁸ [ICC-02/05-01/20-302](#), paras. 17-32.

⁹ [ICC-02/05-01/20-302](#), paras. 44-52.

¹⁰ [ICC-02/05-01/20-302](#), paras. 33-43.

jurisdictional challenge advanced in the Challenge, in particular called for observations from the Security Council in support of the legality of its Resolution 1593 and the jurisdiction of the Court. The Security Council tacitly declined the two successive invitations by not making any observation in response to the Defence's arguments. The Defence invites the Honourable Appeals Chamber to draw every conclusion from the lack of observations on the part of the Security Council.

4. First, the lack of response from the Security Council to the two successive invitations from the Court cannot be attributed to a lack of time. Had time been lacking, the Security Council, upon which the successive invitations of the Chambers of the Court conferred de facto the status of "participant" in the proceedings adjudicating the Challenge, did have the opportunity to seek, on the basis of regulation 35(2) of the Regulations of the Court ("RoC"), further time in which to submit observations, as for example the Defence has done regarding the time limit for submission of its Consolidated Response.¹¹ This it did not do, waiving the two opportunities afforded to it to defend the legality of [Resolution 1593](#) in respect of articles 2, 13(b) and/or 115(b) of the Statute.

5. The Honourable Appeals Chamber has already had occasion to rule on an instance in which the OTP chose not to defend the admissibility of some of its evidence in the case *sub judice*. The Defence contended that the lack of response from the OTP on the issue amounted to a tacit admission of the inadmissibility of its evidence or, at minimum, a choice not to defend the impugned admissibility of its evidence and not to discharge the burden of proof which rests with it.¹² At paragraph 69 of its OA7 Judgment, the Honourable Appeals Chamber declines to draw the conclusions advanced by the Defence and does so for the main reason that, even though the OTP did not respond to the 1st Request from the Defence for the exclusion of evidence,¹³ the OTP had already explained why its evidence had to be found admissible and the fact that it did not repeat the same arguments in response to the Request could not amount

¹¹ [ICC-02/05-01/20-425 OA8](#).

¹² [ICC-02/05-01/20-365 OA7](#), paras. 18-20.

¹³ [ICC-02/05-01/20-322](#).

to tacit acceptance of the well-foundedness of the Defence submissions.¹⁴ The Honourable Appeals Chamber also makes the point that the lack of response from the OTP is not a “[TRANSLATION] new circumstance” of relevance to the detention review and that regulation 34(b) of the RoC does nothing more than lay down the applicable time limit for submission of a response and does not permit of the conclusion that the lack of response amounts to acceptance.¹⁵

6. The Defence notes that the very same reasons which, in the OA7 Judgment, entailed rejection of the Defence’s submissions on the consequences of the lack of response from the OTP must necessarily entail, inasmuch as they are relevant to the matter at bar, the opposite conclusion: the Security Council does not dispute that [Resolution 1593](#) is illegal vis-à-vis articles 2, 13(b) and 115(b) of the Statute.

7. Contrary to what the OTP claimed to have done in relation to the OA7 Appeal,¹⁶ the Security Council has never made any submission in support of the legality of [Resolution 1593](#), despite the two successive invitations from the Court. There is therefore no submission from the Security Council setting out why the Defence submissions might, in its view, be factually and/or legally ill-founded and should be rejected.

8. The second argument on the lack of a “[TRANSLATION] new circumstance” is particular to the detention review proceedings, which were the subject of the OA7 Appeal. It cannot be transplanted and is without relevance to the present OA8 Appeal.

9. The third argument based on regulation 34(b) of the RoC is equally without relevance as neither of the invitations to the Security Council to file observations on the Jurisdictional Challenge was based on regulation 34 of the RoC, which, therefore, is inapplicable. The two successive offers made to the Security Council for it to file observations on the Challenge had nothing to do with the routine exercise of the right to reply which regulation 24 of the RoC affords Parties and participants in the proceedings. At issue were specific invitations, addressed to the author of [Resolution](#)

¹⁴ [ICC-02/05-01/20-415 OA7](#), para. 69.

¹⁵ [ICC-02/05-01/20-415 OA7](#), para. 69.

¹⁶ [ICC-02/05-01/20-371-Red OA7](#), para. 25.

[1593](#), for observations in response to the challenge to the legality of the resolution by the Defence. The Honourable Pre-Trial Chamber II had specifically invited the Security Council to make observations “as the referring entity”.¹⁷ Although the Honourable Appeals Chamber gave no reason for the invitation extended to the Security Council to file observations,¹⁸ it is reasonable to think that the rationale for the invitation was the same as the Honourable Pre-Trial Chamber II’s rationale and/or that it was a consequence of the previous invitation extended at first instance to the Security Council to participate with the standing of “participant” in the proceedings adjudicating the Challenge. In both cases, the fact that the Security Council did not respond to the specific invitations which the Court had addressed to it cannot be regarded as just an inability to adhere to the prescribed time limit for responding but instead must be seen as an admission of its unwillingness and/or inability to defend the legality of [Resolution 1593](#) which the Defence impugns.

10. The fact that the legality of [Resolution 1593](#) is undefended by its author is a telling indication of the well-foundedness of the Defence submissions which the Honourable Appeals Chamber is requested to appreciate fully in adjudicating the OA8 Appeal. Irrespective of their aptitude for argument, the OTP and the distinguished LRVs are ill-placed to defend the legality of [Resolution 1593](#) in the stead of its author. The arguments they set out in support of the legality of [Resolution 1593](#) are essentially pure speculation driven by the substantial procedural interest they have in seeing the legality of the resolution affirmed. Aside the outcome of the prosecution of Mr Ali Muhammad Ali Abd-Al-Rahman, what lies at stake in the adjudication of the Challenge is the future of all proceedings connected to the Situation in Darfur, all of the prosecutions instituted by the OTP since 2005 in relation to that situation and the right of all of the victims of the situation to obtain reparations for the harm they suffered as result of the crimes committed in Darfur. The OTP and the LRVs therefore have a keen and shared procedural interest in seeing the Honourable Appeals Chamber affirm the Honourable Pre-Trial Chamber II’s rejection of the Challenge. This

¹⁷ [ICC-02/05-01/20-321](#), para. 5.

¹⁸ [ICC-02/05-01/20-424 OA8](#), p. 3, at (2).

pressing need to protect the procedural interests of the OTP and the LRVs¹⁹ cannot however supplant the capacity of the Security Council alone, as author of [Resolution 1593](#), to justify, vis-à-vis the provisions of the Statute of the Court, the legality of the choices it made. The Security Council, which is uniquely authorized to do so, chose on two occasions not to and has never explained why [Resolution 1593](#) and the related decisions it took were warranted and in keeping with the law of the Court. The Honourable Appeals Chamber is invited to draw every conclusion from the fact that the Security Council has not contested the Defence submissions on the illegality of [Resolution 1593](#) vis-à-vis articles 2, 13(b) and 115(b) of the Statute.

11. The observations of the OTP and the distinguished LRVs are no substitute for observations from the Security Council, nor can they make up for its decision not to defend the legality of the action it took. The Honourable Appeals Chamber is thus invited not to attach undue weight to those observations and to appreciate fully the essentially speculative character of their submissions, in particular those connected to the three limbs of the first head of jurisdictional challenge set out in the Challenge.

RESPONSE TO THE VICTIMS' OBSERVATIONS ON THE 1ST GROUND OF APPEAL

12. The Defence submissions concerning the 1st ground of appeal are stated at paragraphs 4 to 9 of the Appeal Brief²⁰ with reference to paragraphs 17 to 32 of the Challenge.²¹ In a nutshell, the Defence argued that the only “[TRANSLATION] situation [...] under Chapter VII of the Charter of the United Nations” was – having regard to the series of Security Council resolutions, [Resolution 1593](#) included – “Sudan”, and that the referral of a situation confined exclusively to “Darfur” was, therefore, incompatible with article 13(b) of the Statute and constituted an undue limitation on the independence of the Court to prosecute all of the crimes committed within the geographic parameters encompassed by the triggering of Chapter VII of the Charter.

¹⁹ ICC-02/05-01/20-441 OA8, para. 4.

²⁰ [ICC-02/05-01/20-418 OA8](#), paras. 4-9.

²¹ [ICC-02/05-01/20-302](#), paras. 17-32.

The distinguished LRVs request that the 1st ground of appeal be rejected and the Decision under Appeal be affirmed as regards the 1st limb of the 1st head of jurisdictional challenge. Aside rehashing at some length the reasons for the Decision under Appeal which they assert – no further justification provided – are well-founded,²² the distinguished LRVs set out the following arguments, to which the Defence responds below.

13. The distinguished LRVs maintain that, in its Challenge, the Defence claimed that the geographic parameters of a situation necessarily had to correspond to the territory of the State concerned.²³ It will suffice for the Honourable Appeals Chamber to read paragraph 30 of the Challenge²⁴ to ascertain the manifest unfoundedness of that submission. The Defence's exact submission on the issue of the geographic parameters of the situation is that the parameters must be defined by the referral and that, in the event of a Security Council referral, the geographic parameters of the situation referred must necessarily correspond to those of the situation in respect of which the Security Council is acting under Chapter VII of the Charter. Since all of the Security Council resolutions adopted in relation to Sudan, [Resolution 1593](#) itself included, identify "Sudan" as the situation under Chapter VII of the Charter,²⁵ "Sudan", and nothing else, is the situation corresponding to the geographic parameters which met the criteria for referral laid down at article 13(b) of the Statute. The referral of a situation confined exclusively to "Darfur" – which, in any case, is not defined²⁶ – was therefore illegal under article 13(b) of the Statute.²⁷ To distort the Defence submissions on this point only goes to preventing them from being addressed. The distinguished LRVs' submissions regarding this limb are therefore without relevance and of no assistance at all to the Honourable Appeals Chamber's adjudication of the 1st ground of appeal.

²² ICC-02/05-01/20-441 OA8, para. 16; ICC-02/05-01/20-442 OA8, paras. 8, 11.

²³ ICC-02/05-01/20-441 OA8, para. 15; ICC-02/05-01/20-442 OA8, para. 7.

²⁴ [ICC-02/05-01/20-302](#), para. 30.

²⁵ [ICC-02/05-01/20-302](#), para. 18.

²⁶ [ICC-02/05-01/20-302](#), para. 19.

²⁷ [ICC-02/05-01/20-302](#), para. 31.

14. The Distinguished LRVs further rely on a decision of the Honourable Pre-Trial Chamber I given in *Mbarushimana* in 2010 which is ill-suited for the purpose.²⁸ Although the decision cited rejects the Defence for Mr Mbarushimana's objection to the extension of the Situation in the Democratic Republic of the Congo beyond just the specific region of Ituri,²⁹ the Distinguished LRV attempts to infer therefrom that the geographic parameters of a situation may legitimately be restricted to a single region, which the Defence has never disputed.³⁰ Hence the argument is without relevance and does not respond to the Defence submission that the only situation amenable to referral to the Court under article 13(b) of the Statute was, by virtue of the string of Security Council resolutions which includes [Resolution 1593](#) itself, the situation under Chapter VII of the Charter, that is to say, the Situation in Sudan. The argument is, therefore, of no value to the Honourable Appeals Chamber's deliberation.

15. The Distinguished LRVs submit that the fact that the geographic parameters of the referral effected by [Resolution 1593](#) should, in accordance with article 13(b) of the Statute, have been Sudan, instead of Darfur exclusively, is inconsequential to the case *sub judice* since the sum-total of the crimes prosecuted were actually committed in Darfur, *viz.*, within the geographic parameters defined by [Resolution 1593](#).³¹ The submission neglects the Defence arguments regarding the impact on the judicial independence of the Court of restricting the referral to Darfur exclusively.³² The Distinguished LRV asserts that the Security Council is empowered to define the parameters of the situations it refers to the Court,³³ which is not disputed,³⁴ but she does not respond to the Defence's exact argument that the geographic parameters thus defined must correspond to those of the situation under Chapter VII of the Charter, which themselves are defined by the Security Council, and which, in this instance,

²⁸ ICC-02/05-01/20-441 OA8, paras. 17-18.

²⁹ [ICC-01/04-01/10-451](#), para. 21.

³⁰ [ICC-02/05-01/20-302](#), para. 30.

³¹ ICC-02/05-01/20-442 OA8, para. 10.

³² [ICC-02/05-01/20-302](#), paras. 23-24.

³³ ICC-02/05-01/20-442 OA8, para. 12.

³⁴ [ICC-02/05-01/20-302](#), para. 30.

corresponded to Sudan, not Darfur.³⁵ By not responding to the exact argument of the Defence on this aspect, the Distinguished LRV's submission is of no value to the Honourable Appeals Chamber's adjudication of the 1st ground of appeal.

16. The Distinguished LRVs refer in other respects to paragraphs 5 to 12 of the OTP Response,³⁶ which they co-opt in their Observations.³⁷ As the foregoing Observations of the Distinguished LRVs do, the OTP submissions referenced confine themselves, for the most part, to rehashing at some length the Decision under Appeal which, they assert, is well-founded, without addressing the exact submissions from the Defence,³⁸ or to recasting the submissions so as to eviscerate them,³⁹ not offering anything capable of assisting the Honourable Appeals Chamber in its deliberation of the exact issues raised in the Challenge. The OTP's submissions on the creation of the United Nations Commission of Inquiry⁴⁰ have no bearing on the fact that the entire corpus of Security Council resolutions concerning Darfur, rehearsed at paragraph 18 of the Challenge,⁴¹ [Resolution 1593](#) included, identifies "Sudan", not "Darfur", as the situation of which the Security Council is seized under Chapter VII. Whereas the creation of a Commission of Inquiry does constitute the exercise of discretion by the Security Council, which is unfettered when it comes to defining its remit, the referral of a situation to the Court is governed by article 13(b) of the Statute which requires the situation referred to be a situation under Chapter VII of the Charter. Lastly, the reference to decisions given in other cases in the Situation in Darfur⁴² is of no relevance inasmuch as the decisions were given without the Defence being represented, without presentation of oral argument and without it being open for any separate remedy to appeal them. The reference made by the Distinguished LRVs to the OTP's submissions

³⁵ [ICC-02/05-01/20-302](#), para. 24.

³⁶ [ICC-02/05-01/20-427 OA8](#), paras. 5-12.

³⁷ ICC-02/05-01/20-442 OA8, para. 9.

³⁸ [ICC-02/05-01/20-427 OA8](#), paras. 6, 11.

³⁹ [ICC-02/05-01/20-427 OA8](#), paras. 7-9.

⁴⁰ [ICC-02/05-01/20-427 OA8](#), para. 10.

⁴¹ [ICC-02/05-01/20-302](#), para. 18, footnote 10.

⁴² [ICC-02/05-01/20-427 OA8](#), para. 12.

therefore offers no argument of value to the Honourable Appeals Chamber's deliberation.

RESPONSE TO THE VICTIMS' OBSERVATIONS ON THE 2ND GROUND OF APPEAL

17. The Defence submissions concerning the 2nd ground of appeal are stated at paragraphs 10 to 15 of the Appeal Brief⁴³ with reference to paragraphs 33 to 43 of the Challenge.⁴⁴ The distinguished LRVs request that the 2nd ground of appeal be rejected and the Decision under Appeal be affirmed as regards the 2nd limb of the 1st head of jurisdictional challenge. As they do in their submissions on the 1st ground of appeal, the LRVs mostly confine themselves to rehashing at some length the reasons for the Decision under Appeal which they assert – providing no further justification capable of assisting the Honourable Appeals Chamber in its deliberation – are well-founded.⁴⁵

18. The Distinguished LRVs adopt the ground, in the Decision under Appeal, that the Defence has not established a relationship between the arrangements for funding the Court's activities and the exercise of its jurisdiction.⁴⁶ That argument disregards the Defence's exact submissions, stated at paragraphs 40 and 41 of the Challenge and paragraph 14 of the Appeal Brief, which contend that compliance with article 115(b) of the Statute is a *sine qua non* to the exercise, under the chapeau of article 13, of the jurisdiction of the Court "in accordance with the provisions of this Statute" and to the right, under the chapeau of article 67(1), of Mr Ali Muhammad Ali Abd-Al-Rahman to a hearing that complies with the statutory provisions. The two provisions establish an inseverable relationship between the conditions at article 115(b) of the Statute for funding the activities of the Court in the event of referral by a Security Council resolution on the one hand, and the exercise of the jurisdiction of the Court and respect for the rights of the Defence on the other. By refusing to consider the relationship

⁴³ [ICC-02/05-01/20-418 OA8](#), paras. 10-15.

⁴⁴ [ICC-02/05-01/20-302](#), paras. 33-43.

⁴⁵ ICC-02/05-01/20-441 OA8, paras. 24-25; ICC-02/05-01/20-442 OA8, paras. 15, 17, 19-20.

⁴⁶ ICC-02/05-01/20-441 OA8, para. 23; ICC-02/05-01/20-442 OA8, para. 19.

identified in the Defence submissions, the Distinguished LRVs sidestep it and squander an opportunity to assist the Honourable Appeals Chamber in its deliberation of this particular point.

19. Similarly, the submission that article 115(b) of the Statute does not require the Court's activities related to a Security Council referral to be funded by the United Nations neglects the exact submissions of the Defence that the decision whether or not to fund the Court's activities is a matter for the United Nations General Assembly and not the Security Council.⁴⁷ By not addressing that exact point, the Distinguished LRVs deprive the Honourable Appeals Chamber of submissions relevant to its deliberation.

20. The Distinguished LRVs refer in other respects to paragraphs 13 to 18 of the OTP Response,⁴⁸ which they co-opt in their Observations.⁴⁹ The OTP submissions adverted to are in essence the same as those adopted by the Distinguished LRVs on the purported absence of a relationship between the funding arrangements at article 115(b) of the Statute and the exercise of the jurisdiction of the Court and/or respect for Mr Ali Muhammad Ali Abd-Al-Rahman's fundamental rights.⁵⁰ The Defence has addressed them in the paragraphs that precede. The Court's funding arrangements have a direct impact on the exercise of its jurisdiction and of its judicial functions.⁵¹ Aside the aforementioned juridical relationship established by the chapeaux of articles 13 and 67(1) of the Statute, the arrangements for and level of funding of the Court have a direct bearing on the exercise of its jurisdiction and its judicial functions and on respect for Mr Ali Muhammad Ali Abd-Al-Rahman's fundamental rights. The Honourable Judges of the Court said as much in arguing before the Administrative Tribunal of the International Labour Organization ("ILOAT") that their conditions of remuneration put the principle of judicial independence in jeopardy.⁵² Moreover, it has come to the attention of the Defence that the Court's finances no longer allowed the

⁴⁷ [ICC-02/05-01/20-302](#), para. 38; [ICC-02/05-01/20-418 OA8](#), paras. 10, 13.

⁴⁸ [ICC-02/05-01/20-427 OA8](#), paras. 13-18.

⁴⁹ [ICC-02/05-01/20-442 OA8](#), para. 16.

⁵⁰ [ICC-02/05-01/20-427 OA8](#), paras. 14, 18.

⁵¹ [ICC-02/05-01/20-427 OA8](#), para. 15.

⁵² ILOAT, [Judgment No. 4354](#), 7 December 2020, pp. 3-5.

Court to respect the right of Mr Ali Muhammad Ali Abd-Al-Rahman to visits from family members when in detention.⁵³ Those two markedly different and isolated problems are just striking examples of a much wider picture, which demands that the Court be afforded appropriate and sufficient funding to discharge its mandate and accomplish its judicial activities satisfactorily. The Honourable Pre-Trial Chamber II⁵⁴ and the OTP have in turn acknowledged this wider picture as being “beyond controversy”.⁵⁵ To request the rejection of the Defence submissions regarding this point is tantamount to refusing to draw conclusions from this universally acknowledged state of affairs and having Mr Ali Muhammad Ali Abd-Al-Rahman alone shoulder the consequences, depriving him of his fundamental right to a hearing in accordance with the provisions of the Statute and article 115(b) in particular. Instead, the Appeals Chamber is asked to confront this state of affairs and to draw conclusions as to the Court’s inability to exercise, on the basis of [Resolution 1593](#), its jurisdiction under article 13(b). As before, the reference made by the Distinguished LRVs to the OTP’s submissions therefore, again, offers no argument of value to the Honourable Appeals Chamber’s deliberation and must be rejected.

RESPONSE TO THE VICTIMS’ OBSERVATIONS ON THE 3RD GROUND OF APPEAL

21. The Defence submissions concerning the 3rd ground of appeal are stated at paragraphs 16 to 20 of the Appeal Brief⁵⁶ with reference to paragraphs 44 to 52 of the Challenge.⁵⁷ The distinguished LRVs request that the 3rd ground of appeal be rejected and the Decision under Appeal be affirmed as regards the 3rd limb of the 1st head of

⁵³ Letter from the Defence for Mr Ali Muhammad Ali Abd-Al-Rahman to the Registry of the Court on 6 July 2021.

⁵⁴ [ICC-02/05-01/20-110](#), para. 13.

⁵⁵ [ICC-02/05-01/20-427 OA8](#), para. 16 (“it is desirable, and even logical, that the UN 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)”).

⁵⁶ [ICC-02/05-01/20-418 OA8](#), paras. 16-20.

⁵⁷ [ICC-02/05-01/20-302](#), paras. 44-52.

jurisdictional challenge. As they do in their submissions on the 1st and 2nd grounds of appeal, the LRVs mostly confine themselves to rehashing at some length the reasons for the Decision under Appeal which they assert – providing no further justification capable of assisting the Honourable Appeals Chamber in its deliberation – are well-founded.⁵⁸

22. The Distinguished LRVs adopt the previous argument on the lack of relationship between the violation, alleged in the Challenge, of article 2 of the Statute and the jurisdiction of the Court.⁵⁹ As before, the Distinguished LRVs neglect to mention, in order to sidestep, the relationship identified by the Defence on the basis of the chapeau of article 13 of the Statute which requires that the Court exercise its jurisdiction “in accordance with the provisions of this Statute”.⁶⁰ Nor do they address the impact of the violation on the right of Mr Ali Muhammad Ali Abd-Al-Rahman under article 67(1) of the Statute to a hearing having regard to the provisions of the Statute.⁶¹ In so doing, the Distinguished LRVs make no submission capable of assisting the Honourable Appeals Chamber in its deliberation of the 3rd ground of appeal.

23. As before, the Distinguished LRVs refer furthermore to paragraphs 19 to 23 of the OTP Response,⁶² which they co-opt in their Observations.⁶³ The OTP submissions referenced neglect to address the relationship identified by the Defence between the violation of article 2 of the Statute and the Court’s exercise of its jurisdiction.⁶⁴ The Defence has already addressed this point in the paragraph that precedes. Nor does the OTP’s reasoning co-opted by the Distinguished LRVs – that [Resolution 2559](#) cannot have replaced [Resolution 1593](#) or invalidated the referral of the Situation in Darfur which it effects⁶⁵ – respond to the exact argument of the Defence that the withdrawal, effected by [Resolution 2559](#), of UNAMID without a replacement does away with the

⁵⁸ ICC-02/05-01/20-441 OA8, paras. 29-30, 33-34; ICC-02/05-01/20-442 OA8, para. 23.

⁵⁹ ICC-02/05-01/20-441 OA8, paras. 31-32; ICC-02/05-01/20-442 OA8, para. 23.

⁶⁰ [ICC-02/05-01/20-302](#), para. 49; [ICC-02/05-01/20-418 OA8](#), paras. 18-19.

⁶¹ [ICC-02/05-01/20-302](#), para. 51; [ICC-02/05-01/20-418 OA8](#), para. 19.

⁶² [ICC-02/05-01/20-427 OA8](#), paras. 19-23.

⁶³ ICC-02/05-01/20-442 OA8, para. 23.

⁶⁴ [ICC-02/05-01/20-427 OA8](#), para. 20.

⁶⁵ [ICC-02/05-01/20-427 OA8](#), para. 21.

conditions that allow the Court to, as the chapeau of article 13 requires, exercise its jurisdiction “in accordance with the provisions of this Statute”, article 2 included.⁶⁶ Whereas [Resolution 2559](#) did not replace or invalidate [Resolution 1593](#), what it did do, however, was to do away with the conditions that allow the Court, pursuant to article 13 of the Statute, to exercise its jurisdiction “in accordance with the provisions of this Statute”. Likewise, the Distinguished LRVs make an error of law by co-opting the OTP submission that United Nations support is not a pre-condition to the Court’s undertaking its activities in the field.⁶⁷ The provisions of the “Negotiated Relationship Agreement between the International Criminal Court and the United Nations” (“[UN-ICC Agreement](#)”), including articles 3, 10(1) and 18(1) to which specific reference is made at paragraph 45 of the Challenge,⁶⁸ are part and parcel of the legal landscape defined by the Statute, and in this particular case by article 2 thereof under whose provisions the Court is authorized to exercise its jurisdiction in accordance with the chapeau of article 13 of the Statute. Removal of the conditions set by the [UN-ICC Agreement](#) does away with the conditions that allow the Court, pursuant to article 13, to exercise its jurisdiction “in accordance with the provisions of this Statute”. By removing those conditions, [Resolution 2559](#) did not, therefore, “withdraw” the referral effected by [Resolution 1593](#), but it did remove the conditions that allow the Court to exercise its jurisdiction on the basis of that referral.⁶⁹ That exact submission from the Defence is not addressed by the Distinguished LRVs or by the OTP’s submissions to which they advert. Their observations are, as a result, of no value to the Honourable Appeals Chamber’s deliberation of the exact question posed and must be dismissed.

⁶⁶ [ICC-02/05-01/20-302](#), para. 50; [ICC-02/05-01/20-418 OA8](#), para. 19.

⁶⁷ [ICC-02/05-01/20-427 OA8](#), para. 22.

⁶⁸ [ICC-02/05-01/20-302](#), para. 45.

⁶⁹ [ICC-02/05-01/20-302](#), paras. 50-51; [ICC-02/05-01/20-418 OA8](#), para. 19.

RESPONSE TO THE VICTIMS' OBSERVATIONS ON THE 4th GROUND OF APPEAL

24. The Defence submissions concerning the 4th ground of appeal are stated at paragraphs 21 to 27 of the Appeal Brief⁷⁰ with reference to paragraphs 53 to 114 of the Challenge.⁷¹ The distinguished LRVs request that the 4th ground of appeal be rejected and the Decision under Appeal be affirmed as regards the 2nd head of jurisdictional challenge. As they do in their submissions on the 1st, 2nd and 3rd grounds of appeal, the LRVs mostly confine themselves to rehashing at some length the reasons for the Decision under Appeal which they assert – providing no further justification capable of assisting the Honourable Appeals Chamber in its deliberation – are well-founded.⁷² The account of the negotiating history of the Rome Statute given by the Distinguished LRVs⁷³ is wholly consonant with the Defence submissions on the subject,⁷⁴ which, in essence, they confirm. The conclusions drawn from this history are where the Distinguished LRVs and the Defence diverge.

25. The Distinguished LRVs submit that the date of reference for the exercise of the Court's jurisdiction in the event that the Security Council refers a situation in connection with a Non-party State is the date of entry into force of the Statute for those States which had ratified it before that date, 1 July 2002.⁷⁵ In so doing, they sidestep the specific submission from the Defence based on article 126(2) of the Statute⁷⁶ and hence do not respond to it.

26. The reference made by the Distinguished LRVs to the "Decision on the confirmation of charges" in *Lubanga* only goes to bolster and confirm the Defence's analysis regarding the 4th ground of appeal: by holding that there "is no infringement of the principle of legality if the Chamber exercises its power to decide whether Thomas Lubanga Dyilo ought to be committed for trial on the basis of [...] pre-existing

⁷⁰ [ICC-02/05-01/20-418 OA8](#), paras. 21-27.

⁷¹ [ICC-02/05-01/20-302](#), paras. 53-114.

⁷² ICC-02/05-01/20-441 OA8, paras. 37-39, 50-51; ICC-02/05-01/20-442 OA8, para. 27.

⁷³ ICC-02/05-01/20-441 OA8, paras. 42-47.

⁷⁴ [ICC-02/05-01/20-302](#), paras. 22-24.

⁷⁵ ICC-02/05-01/20-441 OA8, para. 40.

⁷⁶ [ICC-02/05-01/20-302](#), paras. 73-74, 101, 114-115.

criminal norms approved by the States Parties to the Rome Statute (*lex praevia*)",⁷⁷ the Honourable Pre-Trial Chamber I, which was adjudicating in respect of a situation which had arisen on the territory of a State Party, said the same as the Defence did in its Challenge, when it argued that, as regards Non-party States, for the exercise of the jurisdiction to meet the conditions of articles 22(1) and 24(1) of the Statute, it must rest on other sources of international law in force for that Non-party State predating the commission of the crimes alleged.⁷⁸

27. Similarly, the reference made to the Honourable Judge Marc Perrin de Brichambaut's dissent in *Al Bashir*⁷⁹ is without relevance to the exact question posed by the Defence. The question is not one of an obligation, if any, on Sudan to accept the jurisdiction of the Court – and that is the only question on which the Honourable Judge expresses a view⁸⁰ – but a question of the repercussions of Sudan's refusal to accept its jurisdiction, albeit in violation its obligations vis-à-vis the United Nations Charter, on the protection of Mr Ali Muhammad Ali Abd-Al-Rahman's rights which articles 22(1) and 24(1) of the Statute safeguard. The dissent cited has nothing to say about the application of articles 22(1) and 24(1) of the Statute to Mr Al Bashir and is thus without relevance and cannot assist the Honourable Appeals Chamber in its deliberation.

28. The Distinguished LRVs also sidestep the Defence submission that referral of a situation by the Security Council allows the Court to give itself dispensation from all or some of the provisions of its Statute in prosecuting in relation to that situation.⁸¹ Nor do they address the Defence submissions on the lack of tension between articles 22(1) and 24(1) of the Statute on the one hand, and the effectiveness of article 13(b) on the other.⁸² The Distinguished LRVs' arguments premised on the effectiveness of article 13(b) of the Statute⁸³ are, in this regard, nothing but a baseless motion which the Honourable Appeals Chamber's deliberation cannot entertain.

⁷⁷ [ICC-01/04-01/06-803-tEN](#), para. 303.

⁷⁸ [ICC-02/05-01/20-302](#), paras. 88-89.

⁷⁹ ICC-02/05-01/20-441 OA8, para. 49.

⁸⁰ [ICC-02/05-01/09-302-Anx](#), para. 15.

⁸¹ [ICC-02/05-01/20-302](#), paras. 78-80.

⁸² [ICC-02/05-01/20-302](#), paras. 81-82.

⁸³ ICC-02/05-01/20-441 OA8, para. 41.

29. The Distinguished LRVs also co-opt the OTP's submissions⁸⁴ that the war crimes and crimes against humanity listed in the charges are criminal offences under customary international law.⁸⁵ This unspecific claim is not, however, founded on any precise showing that the way the said offences are defined in customary international law satisfies the principle of legality and it is careful not to respond to the exact arguments of the Defence on the relegation of customary international law to a very subsidiary position when it comes to defining the Elements of Crimes.⁸⁶ The Honourable Appeals Chamber will glean no information of relevance to its deliberation of this point from the Distinguished LRVs' and the OTP's submissions, which must be dismissed.

30. The other submissions from the OTP,⁸⁷ co-opted by the Distinguished LRVs,⁸⁸ are of no more value to the Honourable Appeals Chamber's deliberation. In essence, they rehash at some length the Decision under Appeal to state the view that the Decision is warranted, providing no basis for that opinion,⁸⁹ which alone cannot illuminate the deliberation of the present appeal. The submissions co-opted by the Distinguished LRVs seek to show the necessarily retroactive character of the referral of a situation by the Security Council⁹⁰ and the obligation on Sudan to comply with its resolutions⁹¹ – two points which the Defence does not dispute⁹² – but do not respond to the exact question of the repercussions that the lack of acceptance of the jurisdiction of the Court and the lack of effect given on the domestic plane to the definitions of the crimes within its jurisdiction have on the individual rights of Mr Ali Muhammad Ali Abd-Al-Rahman which articles 22(1) and 24(1) of the Statute guarantee.⁹³ Nor do the submissions co-opted by the Distinguished LRVs address the difference in nature in

⁸⁴ [ICC-02/05-01/20-427 OA8](#), para. 35.

⁸⁵ [ICC-02/05-01/20-442 OA8](#), para. 27.

⁸⁶ [ICC-02/05-01/20-302](#), paras. 85-87.

⁸⁷ [ICC-02/05-01/20-427 OA8](#), paras. 24-50.

⁸⁸ [ICC-02/05-01/20-442 OA8](#), para. 27.

⁸⁹ [ICC-02/05-01/20-427 OA8](#), paras. 25-28, 46-48.

⁹⁰ [ICC-02/05-01/20-427 OA8](#), paras. 29-31.

⁹¹ [ICC-02/05-01/20-427 OA8](#), paras. 32-35.

⁹² [ICC-02/05-01/20-302](#), para. 77.

⁹³ [ICC-02/05-01/20-302](#), paras. 78-83.

the law applicable to the definitions of the crimes within the jurisdiction of the ad hoc tribunals and the law applicable to the definitions of the crimes within the jurisdiction of the Court.⁹⁴ The Distinguished LRVs make a fundamental error of law by adopting the OTP's submissions which purport that article 126(2) of the Statute does not apply to Sudan and has no bearing on the application of the principle of non-retroactivity:⁹⁵ according to that submission, more obligations would be cast on a State which, like Sudan, has never acceded to the Statute of the Court than on a State which has ratified its Statute – a submission which is wholly antithetical to the principle in public international law of the relative effect of treaties whereby “[a] treaty does not create either obligations or rights for a third State without its consent.”⁹⁶

31. On 3 August 2021, the Sudanese authorities passed a bill which paves the way to Sudan's accession to the Court.⁹⁷ Should it come to fruition, this welcome piece of news for the Court, which is the best possible response, in terms of the future, to the Challenge in the case *sub judice*, would be a vindication, after the fact, of the Defence's submissions: under article 126(2) of the Statute, the Statute shall enter into force for Sudan on the first day of the month after the 60th day following the deposit of the instruments of accession, that is, on 1 November 2021 if they are deposited in August. However, this development is of no consequence to the jurisdictional conundrums of the case *sub judice*, raised in the Challenge, as it comes too late to resolve them satisfactorily. Sudan's accession to the Rome Statute will nonetheless be a milestone, which will allow the Court to prosecute, on the basis of article 13(a) or 13(c) of the Statute, crimes within its jurisdiction committed in Sudan, thereby ironing out the difficulties inherent in the exercise of jurisdiction on the flawed basis of article 13(b) and [Resolution 1593](#).

32. Ultimately, the assertion co-opted by the Distinguished LRVs – that the entry into force of the Statute of the Court for States Parties and its establishment on

⁹⁴ [ICC-02/05-01/20-302](#), paras. 84-87.

⁹⁵ [ICC-02/05-01/20-427 OA8](#), paras. 39-45.

⁹⁶ [Vienna Convention on the Law of Treaties](#), 23 May 1969, article 34.

⁹⁷ www.dabangasudan.org: “[Sudan Cabinet Unanimous on Bill to Joint the Rome Statute of ICC](#)”, 3 August 2021.

1 July 2002 afforded Mr Ali Muhammad Ali Abd-Al-Rahman, as it did any offenders on the territory of Sudan, sufficient notice to satisfy the principles of legality and non-retroactivity of criminal law⁹⁸ – appears to be a pure contrivance. It disregards the express conditions for the application of the principle of legality which mandate that criminal offences be defined in the domestic or international law applicable at the material time:⁹⁹ the Statute of the Court was not applicable to Sudan at the material time and the crimes within its jurisdiction were not defined in the domestic law of Sudan or in the international law applicable to Sudan. Nor does it factor in the situation on the ground in Sudan as regards access to information or the fact that the Statute of the Court was unlikely to have been at Sudanese nationals' fingertips at the point when it had just entered into force but was not in force for Sudan, let alone put into effect at the domestic level and/or promulgated in Sudanese law. Lastly, it gives no consideration to the fact, which the Sudanese authorities now officially confirm,¹⁰⁰ that it was not the crimes within the jurisdiction of the Court that were a criminal offence under Sudanese law but cooperation on the part of its nationals with the Court instead.

POSTSCRIPT

33. In the postscript included at the end of its Challenge, the Defence addressed the quandary, as regards the victims, when it comes to a finding that the Court lacks jurisdiction.¹⁰¹ The Defence refers to its observations on the subject and sees no need to return to them.

34. The weighty matters raised in the present OA8 Appeal have far-reaching implications whose impact the Defence has striven to underscore throughout the pre-trial phase.¹⁰² The fact of the Court's lack of jurisdiction is in step with and, in reality, cannot be divorced from, the fact that the legal requirements for the Court to

⁹⁸ [ICC-02/05-01/20-427 OA8](#), paras. 31-34; [ICC-02/05-01/20-441 OA8](#), para. 50; [ICC-02/05-01/20-442 OA8](#), para. 27.

⁹⁹ [ICC-02/05-01/20-302](#), para. 79.

¹⁰⁰ [ICC-02/05-01/20-397-Conf-Exp](#); [ICC-02/05-01/20-438-Red](#).

¹⁰¹ [ICC-02/05-01/20-302](#), para. 117.

¹⁰² [ICC-02/05-01/20-231-Red](#); [ICC-02/05-01/20-269](#); [ICC-02/05-01/20-272-Red](#); [ICC-02/05-01/20-340-Red](#); [ICC-02/05-01/20-349-Red](#); [ICC-02/05-01/20-363-Red](#).

exercise its jurisdiction and pursue its activities on the territory of Sudan have not been met. The announcement on 3 August 2021 of Sudan's forthcoming accession to the Statute of the Court so confirms, after the fact, by laying this problem to rest as far as the future and other cases are concerned.

35. For the sole ends of holding the confirmation hearing ("CH") scheduled for 24 May 2021, the Defence submissions were, on 21 May 2021, rejected on the factually flawed basis of the purported decriminalization of cooperation with the Court in Sudanese law.¹⁰³ Had it not been for the serendipitous *ex parte* filing of this false information,¹⁰⁴ the CH could not, and should not, have taken place.¹⁰⁵ The fallaciousness of this claim has since been confirmed with the reclassification, on 12 July 2021, of the Registry's filing which had transmitted that claim.¹⁰⁶ The decision rejecting the Defence submissions on those aspects is now the subject of a request for reconsideration filed on 16 July 2021.¹⁰⁷ The request is pending before Pre-Trial Chamber II. The time in which to respond to it has now expired, but neither the OTP nor the Distinguished LRVs ventured to object to it, thus acknowledging the necessity of reconsideration. The Defence is in the process of looking at the consequences of the manifest erroneousness of the information underlying the decision of 21 May 2021 and of its reconsideration on the decision on the confirmation of charges;¹⁰⁸ separate submissions on the subject will follow.

36. That notwithstanding, by allowing the present OA8 Appeal, the Honourable Appeals Chamber will seal the end of proceedings which should have long since finished and which were drawn out in disregard of Mr Ali Muhammad Ali Abd-Al-Rahman's right to a hearing having regard to the provisions of the Statute and in disregard of the law governing the Court's activities, and at the expense of exposing victims, witnesses, intermediaries, the Court's officials and other persons at risk on

¹⁰³ [ICC-02/05-01/20-402](#), para. 40.

¹⁰⁴ ICC-02/05-01/20-397-Conf-Exp.

¹⁰⁵ [ICC-02/05-01/20-363-Red.](#)

¹⁰⁶ ICC-02/05-01/20-397-Conf-Exp.

¹⁰⁷ [ICC-02/05-01/20-438-Red.](#)

¹⁰⁸ [ICC-02/05-01/20-433.](#)

account of their activities to considerable and imminent risk of criminal prosecution in Sudan and other serious obstructions of the Court's administration of justice, with no way of shielding them in an effective way. That this risk has, to the Defence's knowledge, yet to materialize does nothing to detract from its chilling reality. While it may be uncertain whether the risk will come to pass, the fact that it exists has now been confirmed by the Sudanese authorities themselves.¹⁰⁹

37. The Honourable Appeals Chamber will put an end to the risk hanging over those persons by holding that the Court has no jurisdiction under article 13(b) of the Statute and [Resolution 1593](#). Once Sudan's accession to the Statute becomes reality, then may the Court exercise its jurisdiction over crimes within its jurisdiction on the firmer footing of article 13(a) and/or 13(c) of its Statute, without the objections raised in the Challenge in relation to article 13(b) of the Statute and [Resolution 1593](#) applying.

FOR THESE REASONS, LEAD COUNSEL HUMBLY PRAYS THE HONOURABLE APPEALS CHAMBER TO ALLOW THE OA8 APPEAL, TO REVERSE THE DECISION UNDER APPEAL AND TO HOLD THAT THE COURT HAS NO JURISDICTION IN THE CASE *SUB JUDICE*.

[signed]

Mr Cyril Laucci,
Lead Counsel for Mr Ali Muhammad Ali Abd-Al-Rahman

Dated this 4 August 2021,

At The Hague, Netherlands

¹⁰⁹ ICC-02/05-01/20-397-Conf-Exp; [ICC-02/05-01/20-438-Red.](#)