

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 15 March 2021

PRE-TRIAL CHAMBER II

Before: Judge Antoine Kesia-Mbe Mindua, Presiding Judge
Judge Tomoko Akane
Judge Rosario Salvatore Aitala

SITUATION IN DARFUR, SUDAN

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

PUBLIC DOCUMENT

Jurisdictional Challenge

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1 – INTRODUCTION

1. By this request (“Challenge”), the Defence exercises the right of Mr Ali Muhammad Ali Abd-Al-Rahman to challenge the jurisdiction of the Court in the case of *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”)*, registered under case record number ICC-02/05-01/20, pursuant to article 19(2)(a) of the Court’s Statute (“Statute”).

2. This Challenge is filed within the 60-page limit laid down in regulation 38(2)(c) of the Regulations of the Court (“RoC”).

2 – TIMING OF THE FILING OF THE CHALLENGE

3. Under article 19(4) of the Statute, the jurisdiction of the Court may be challenged only once by a person for whom a warrant of arrest has been issued. This challenge must take place before or at the commencement of the trial.

4. Some of the submissions made in this Challenge regarding the Court’s jurisdiction relate to the nature of the charges brought against Mr Ali Muhammad Ali Abd-Al-Rahman.

5. Ordinarily, the Defence should have waited for the Prosecutor to file the document containing the charges (“DCC”) to make these submissions. However, the filing of the DCC was postponed twice by the Honourable Pre-Trial Chamber II. Originally scheduled for early November 2020, i.e. no later than 30 days before the initial date of the confirmation hearing set for 7 December 2020, the filing of the DCC was successively to 4 January 2021¹ and then to 29 March 2021.² Waiting to receive the DCC before filing the present Challenge would entail running the risk of yet another postponement of the confirmation hearing pending determination of this Challenge, which the Defence refuses under articles 61(1) and 67(1)(c) of the Statute.

6. During the process to agree on the material facts of the case, the OTP and the Defence concluded and registered a first agreement on 5 March 2021 in which they

¹ [ICC-02/05-01/20-196](#).

² [ICC-02/05-01/20-238](#).

concurred that the armed conflict under way in Sudan at the time of the events stated in the two warrants of arrest for Mr Ali Muhammad Ali Abd-Al-Rahman was a non-international armed conflict.³ The fact that the parties reached agreement on the characterization of this armed conflict is, in itself, a necessary and sufficient basis in the absence of the DCC to enable the Defence to articulate its submissions in **Section 4.5** of this Challenge regarding the charges of war crimes referred to in the warrants of arrest. The Defence is therefore choosing to file this Challenge now, in advance of the OTP's filing of the DCC, so as to avoid delaying the confirmation hearing.

7. In the unlikely event the OTP should decide to introduce new charges in the DCC in connection with an international armed conflict, this exceptional circumstance would prompt the Defence to request leave of the Court to file a new challenge under article 19(4) of the Statute, limited to that new development. Such a possibility is not reasonably anticipated at this stage.

8. The other grounds of jurisdictional challenge argued in this Challenge could theoretically have been raised earlier. However, because article 19(2)(a) of the Statute limits the right to dispute the Court's jurisdiction to one and only one challenge, the Defence deferred the submission of those grounds until the nature of the war crimes charges laid by the OTP in the warrants of arrest had been clarified, in order to be able to submit all the grounds of jurisdictional challenge in their entirety in one single Challenge.

9. The Defence is well aware that the Court's Honourable Chambers and its Presidency have already issued decisions relating to the situation in Sudan and to the consequences, for the Court's jurisdiction, of the referral thereof by [Resolution 1593](#), without questioning the legality of that resolution.⁴ It nonetheless submits that those decisions are "without prejudice to any challenge [to jurisdiction or] to the admissibility of the case under article 19(2)(a) and (b) of the Statute and without

³ [ICC-02/05-01/20-191-AnxA](#), Agreed fact no. 1.

⁴ [ICC-02/05-1-Corr](#); [ICC-02/05-111](#), para. 6; [ICC-02/05-01/07-1-Corr](#), para. 25.

prejudice to any subsequent determination”.⁵ They therefore cannot be invoked against Mr Ali Muhammad Ali Abd-Al-Rahman since they were issued at a stage of the proceedings at which his defence was not represented and was unable to assert the submissions contained in this Challenge. Accordingly, those previous decisions do not preclude the Defence from reopening the debate on the Court’s jurisdiction and from disputing it under article 19(2)(a) of the Statute by means of this Challenge.⁶

3 – FIRST HEAD OF JURISDICTIONAL CHALLENGE: ILLEGALITY OF THE SECURITY COUNCIL’S REFERRAL UNDER ARTICLE 13(B) OF THE STATUTE

10. By means of its [Resolution 1593](#) of 31 March 2005, the United Nations Security Council referred the situation in Darfur since 1 July 2002 to the Court under article 13(b) of the Statute. Darfur is not a sovereign State. It is located on the national territory of Sudan. Sudan is not a State Party to the Rome Statute and has not accepted the Court’s jurisdiction under article 12(3) of the Statute. Pursuant to the chapeau of article 13 of the Statute, “Exercise of jurisdiction”, the referral of the situation in Darfur by [Resolution 1593](#) is the event that conferred jurisdiction on the Court to take action against the crimes referred to in article 5 of the Statute. If [Resolution 1593](#) is illegal, the Court consequently loses the sole basis for its jurisdiction to prosecute the crimes referred to in article 5 of the Statute committed in the Situation in Darfur. Without an alternative jurisdictional basis on which to prosecute crimes committed in Sudan, the Court would then find itself deprived of jurisdiction in the case of *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* (“*Ali Kushayb*”) (ICC-02/05-01/20). This is what the Defence intends to show under the first head of jurisdictional challenge advanced in this Challenge.

⁵ [ICC-02/05-01/07-1-Corr](#), para. 25.

⁶ [ICC-01/04-169 OA](#), paras. 46-53; [ICC-02/04-01/05-377](#), para. 29; [ICC-02/05-01/07-1-Corr](#), para. 25.

3.1 – Summary of the grounds of challenge to the legality of [Resolution 1593](#) under article 13(b)

11. By the present Challenge, the Defence submits that [Resolution 1593](#) of 31 March 2005 fails to fulfil the legal criteria for the referral of a situation to the Court by the Security Council under article 13(b) of the Statute and that the Situation in Darfur, Sudan (ICC-02/05) is therefore unlawfully laid before the Court. The legality of [Resolution 1593](#) is challenged on the basis of three alternative grounds, submitted successively under the first head of jurisdictional challenge:

- (i) The Defence will show that the situation in Darfur referred to the Court by the Security Council by [Resolution 1593](#) is not a “situation” within the meaning of article 13(b) of the Statute (First Ground);
- (ii) The Defence will also show that [Resolution 1593](#) is illegal in that it does not comply with article 115(b) of the Statute (Second Ground); and/or
- (iii) The Defence will lastly argue that [Resolution 1593](#) has become inoperative on account of the United Nations’ withdrawal of support for the Court’s operations on the territory of Sudan, effected by [Resolution 2559](#) of 22 December 2020,⁷ with no replacement in view (Third Ground).

12. The three grounds are submitted both alternatively and cumulatively. Acceptance of any one of the three grounds, considered separately, by the Honourable Pre-Trial Chamber II will suffice for it to determine that [Resolution 1593](#) is illegal and, as a result, that the Court lacks a basis for jurisdiction to prosecute crimes committed on the territory of Sudan. The illegality of [Resolution 1593](#) and its inability to confer on the Court a basis for jurisdiction to prosecute crimes committed in Sudan can also be accepted, and become even more flagrant, upon consideration of these three grounds as a whole.

⁷ United Nations Security Council, [Resolution 2559](#), 22 December 2020.

3.2 – Applicable law

13. Under article 2 of the Statute, the Court is brought into relationship with the United Nations (UN) by the “Negotiated Relationship Agreement between the International Criminal Court and the United Nations” of 4 October 2004 (“[UN-ICC Agreement](#)”).⁸

14. Under article 13(b) of the Statute, the United Nations Security Council, “acting under Chapter VII of the Charter of the United Nations” may refer to the Court “[a] situation in which one or more of [the crimes referred to in article 5 of the Statute] appears to have been committed”.

15. Under article 87(6) of the Statute, the Court may request assistance which may be agreed upon with an intergovernmental organization, foremost among them being the UN under article 2 of the Statute. In the event of non-cooperation by the UN, the only means of dispute settlement identified by the instruments is a decision of the Court pursuant to article 119(1) of the Statute, insofar as the dispute concerns the judicial functions of the Court, which is the case in this instance.

16. Under article 115(b) of the Statute:

The expenses of the Court [...] shall be provided by the following sources: [...] (b) Funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council.

3.3 – First Ground: the “situation in Darfur” was not a “situation” amenable to referral to the Court under article 13(b)

17. As the first ground of challenge to the legality of [Resolution 1593](#), the Defence for Mr Ali Muhammad Ali Abd-Al-Rahman submits that the “situation in Darfur” referred to the Court by this resolution does not qualify as a “situation” amenable to referral to the Court by the United Nations Security Council pursuant to article 13(b) of the Statute. The “situation in Darfur” is restricted to a particular geographic area in the territory of Sudan – “Darfur” – for which there is no contemporary legal definition,

⁸ Negotiated Relationship Agreement between the International Criminal Court and the United Nations, 4 October 2004, [doc. ICC-ASP/3/Res. 1](#).

whereas the Security Council is empowered to refer a “situation” to the Court’s jurisdiction only when acting “under Chapter VII of the Charter of the United Nations”, and the only “situation” under Chapter VII of the Charter at the time of the adoption of [Resolution 1593](#) was that of Sudan as a whole, not “Darfur” exclusively.

18. [Resolution 1593](#) was adopted without prior debate on the basis of a draft resolution submitted by the United Kingdom of Great Britain and Northern Ireland (“United Kingdom”).⁹ It is one in a long series of Security Council resolutions adopted under Chapter VII of the United Nations Charter in relation to Sudan.¹⁰ All of these resolutions were adopted pursuant to Chapter VII of the United Nations Charter insofar as it applied to the “situation in Sudan”, characterized as a “threat to international peace and security”.¹¹ None of these resolutions defines “Darfur” nor designates it as the only area of Sudan presenting a “threat to international peace and security”, whereas other areas of Sudan were experiencing situations of conflict, for example the conflict in South Sudan, which culminated in that region’s outright secession and official independence on 9 July 2011. The Defence observes that, despite the peace agreement signed in Naivasha, Kenya on 9 January 2005, the situation in South Sudan remained perilous and was kept under close monitoring by the international community, including the United Nations Security Council, during the same period. [Resolution 1593](#) is no exception to this approach – “*Determining that the situation in Sudan continues to constitute a threat to international peace and security*”¹² – yet paradoxically limits the scope of the referral to the Court to simply one “situation in Darfur”, defined merely on the basis of a temporal parameter – “since 1 July 2002” – with no precise contemporary definition of its geographic parameter.¹³

⁹ Security Council, [Doc. S/2005/218](#), 31 March 2005 (original in English).

¹⁰ As mere examples: Resolutions [S/Res/1556](#) of 30 July 2004; [S/Res/1564](#) of 18 September 2004; [S/Res/1574](#) of 19 November 2004; [S/Res/1590](#) of 25 March 2005; and [S/Res/1591](#) of 29 March 2005.

¹¹ [S/Res/1556](#), p. 2; [S/Res/1564](#), p. 2; [S/Res/1574](#), p. 2; [S/Res/1590](#), p. 3; [S/Res/1591](#), p. 3; [S/Res/1593](#) of 31 March 2005, p. 1.

¹² [Resolution 1593](#), p. 1.

¹³ [Resolution 1593](#), para. 1.

19. The Defence recalls that “Darfur” did not exist legally or administratively in 2005: no province or other recognized administrative entity in Sudan was called “Darfur” in 2005. Darfur was initially known in the seventeenth century as a sultanate and was incorporated into Sudan in 1917 by the British. Its geographic boundaries have fluctuated over time. In the modern history of Sudan, as of its independence in 1956, the administrative entity “Darfur” existed as a region only until 1 July 1974.¹⁴ In 2005, when [Resolution 1593](#) was adopted, three federal States had “Darfur” in their names:¹⁵ “North Darfur”, whose capital was El Fasher; “West Darfur”, whose capital was Geneina; and “South Darfur”, whose capital was Nyala. These administrative divisions have since been altered. Although the “Doha Document for Peace in Darfur” of May 2011 attempted to establish a Darfur Regional Authority,¹⁶ the administrative subdivisions endured, while the northern border of Darfur was redrawn again to its 1956 configuration.¹⁷ In January 2012, two new administrative entities with “Darfur” in their names were created – Central Darfur and East Darfur – bringing the total to five along with the existing North Darfur, West Darfur and South Darfur.¹⁸ The referendum of 11-13 April 2016 confirmed these five subdivisions and rejected their merger into a single entity, resulting in the dissolution of the Darfur Regional Authority established by the Doha Document for Peace in Darfur of 2011.¹⁹ The reference made to “Darfur” in [Resolution 1593](#) of 2005 therefore has no legal or administrative signification. It is imprecise and refers to an essentially historical, bygone notion and whose geographical boundaries have shifted over time, including since the adoption of [Resolution 1593](#). It does not correspond to the “situation” under Chapter VII of the Charter as defined by the United Nations Security Council in its

¹⁴ [Sudan states \(worldstatesmen.org\)](#): Darfur.

¹⁵ Sudan, [Constitution of 28 March 1998](#), article 108. The [Interim National Constitution of the Republic of Sudan](#), 17 July 2005, which came after [Resolution 1593](#), makes no mention of any geographical entity in Sudan called “Darfur”.

¹⁶ [Doha Document for Peace in Darfur](#), May 2011, para. 59.

¹⁷ [Doha Document for Peace in Darfur](#), May 2011, paras. 29 and 80.

¹⁸ AllAfrica.com: “[Sudan: President Bashir appoints new State Governors](#)”, 10 January 2012.

¹⁹ [Sudan states \(worldstatesmen.org\)](#): Darfur.

resolutions, including in the fifth preambular paragraph of [Resolution 1593](#), which is that of “Sudan”, a sovereign State whose geographic borders were clearly delimited in 2005 and modified in 2011.

20. Although [Resolution 1593](#) was adopted without debate, the statements made by the Member States of the Security Council in support of their votes illustrate the extent of the misunderstanding represented by the limitation of the referral to only “Darfur”, whereas the aim was the return of peace and stability to “Sudan” as a whole, as confirmed by the large number of resolutions to that end. The United Kingdom, which had submitted the draft resolution,²⁰ explained that the resolution was part of an integrated strategy for dealing with Sudan as a whole.²¹ This reference to an integrated Sudan strategy of the Security Council was reiterated in the statements of eight other States: Benin (in favour), Brazil (abstaining), the United States of America (abstaining), Greece (in favour), the Philippines (in favour), Romania (in favour), Russia (in favour) and Tanzania (in favour).²² China (abstaining) made express reference to the importance of the North-South process in Sudan.²³ Five States – Algeria (abstaining), Argentina (in favour), Denmark (in favour), France (in favour) and Japan (in favour) – referred only to “Darfur” in their explanations of vote.²⁴ None of the States justified why the referral was limited to “Darfur” alone, whereas [Resolution 1593](#) was one in a series of resolutions adopted under Chapter VII relating to the situation in Sudan. In total, of the eleven States that voted in favour of [Resolution 1593](#), seven – Benin, Greece, the Philippines, Romania, the United Kingdom, Russia and Tanzania – justified their votes by reference to the overall situation in Sudan. Only four – Argentina, Denmark, France and Japan – confirmed that the reason behind their votes was the particular, undefined situation of “Darfur”, without ruling out that crimes

²⁰ Security Council, [Doc. S/2005/218](#), 31 March 2005.

²¹ Security Council, [Doc. S/PV.5158](#), 31 March 2005: United Kingdom, p. 7.

²² Security Council, [Doc. S/PV.5158](#), 31 March 2005: United States of America, pp. 2-4; Philippines, p. 6; Greece, p. 9; Tanzania, p. 9; Romania, p. 10; Russia, p. 10; Benin, pp. 10-11.

²³ Security Council, [Doc. S/PV.5158](#), 31 March 2005: China, p. 5.

²⁴ Security Council, [Doc. S/PV.5158](#), 31 March 2005: Algeria, pp. 4-5; Denmark, p. 6; Japan, pp. 6-7; Argentina, pp. 7-8; France, pp. 8-9.

within the Court's jurisdiction were committed elsewhere in Sudan, which overall constitutes a situation to which Chapter VII of the Charter applies. Under the Security Council's voting rules, [Resolution 1593](#) could not have been adopted on the votes of those four States alone.

21. The lack of clarity surrounding the administrative entity concerned by [Resolution 1593](#), which is not defined, is all the more problematic since the selective referral of a geographic area of a State is not consonant with either the intention of the drafters of the Rome Statute, according to the *travaux préparatoires*, or with the practice of the Court, including its previous judicial decisions, since its creation.

22. It can be seen from the *travaux préparatoires* of the Statute, in particular of what would become article 13(b), that the term "situation" appeared only at a late stage of the negotiations. The draft Statute prepared by the International Law Commission ("ILC") originally used the word "matter", which the ILC defined by reference to a "situation under Chapter VII of the Charter"; the word "situation" did not appear as such in the text.²⁵ The ILC report therefore explains the origin of the word "situation", which comes from the vocabulary of the Security Council, itself derived from the United Nations Charter. The word "situation" appears seven times in the United Nations Charter: it is used as an alternative to the word "dispute" in articles 1(1), 12(1), 34, 35(1) and 36(1); it is used alone in reference to the "peaceful adjustment" of a situation and to its likeliness to impair the "general welfare" or "friendly relations among nations" in article 14; it is used alone and followed by the words "which are likely to endanger international peace and security" in article 11(3); it appears only once in Chapter VII of the Charter at article 40, which refers directly to a "situation", under article 39, of any "threat to the peace, breach of the peace, or act of aggression"; and it appears finally with an entirely different meaning in [the French version of] article 100(1) of the Charter. With the exception of the latter occurrence, the word

²⁵ Report of the International Law Commission on the work of its forty-sixth session, 2 May-22 June 1994, document A/49/10, p. 85: "Article 23 (1) envisages that the Security Council would refer to the Court a 'matter', that is to say, a situation to which Chapter VII of the Charter applies."

“situation” therefore does indeed refer to the existence of a dispute, tension or conflict that may threaten peace and security. It is in this sense that the Security Council uses it in its resolutions based on Chapter VII of the Charter, including those relating to Sudan,²⁶ such as [Resolution 1593](#).

23. The proposal to replace the word “matter” in the ICL draft with the word “situation” was put forth, at the initiative of several delegations, including the United Kingdom²⁷ and Belarus,²⁸ in paragraph 19 of part D. “Trigger mechanism”, of the Proceedings of the Preparatory Committee during the Period 25 March-12 April 1996.²⁹ This proposal was impelled and underpinned by the aversion of many delegations to the referral of “cases” against individuals by the Security Council, which was widely considered to be in contradiction with the independence desired of the Court.³⁰ A number of delegations, including Belarus, the United Kingdom and Russia, compared the role sought for the Security Council, whereby it would be able to refer a “situation”, to that which it had performed several times by the establishment of ad hoc international tribunals.³¹ It was ultimately this parallel with the Security Council’s power to establish ad hoc international courts that prevailed in the introduction of the

²⁶ [S/Res/1556](#), p. 2; [S/Res/1564](#), p. 2; [S/Res/1574](#), p. 2; [S/Res/1590](#), p. 3; [S/Res/1591](#), p. 3; [S/Res/1593](#) of 31 March 2005, p. 1.

²⁷ Ad Hoc Committee on the Establishment of an International Criminal Court, “Summary of Observations made by the Representative of the United Kingdom of Great Britain and Northern Ireland on 3, 4, 5, 6 and 7 April 1995”, [Press Release no. 32/95](#), 7 April 1995, p. 7.

²⁸ [Doc. A/AC.244/1](#): “Comments received pursuant to Paragraph 4 of General Assembly Resolution 49/53 on the Establishment of an International Criminal Court”, 20 March 1995, Belarus, pp. 2-8, para. 16.

²⁹ [Doc. A/AC.249/CRP.5](#): Proceedings of the Preparatory Committee during the Period 25 March-12 April 1996, D - Trigger Mechanism, 8 April 1996, para. 19.

³⁰ [Doc. A/AC.249/CRP.5](#): Proceedings of the Preparatory Committee during the Period 25 March-12 April 1996, D - Trigger Mechanism, 8 April 1996, para. 19; [Doc. A/CONF.183/SR.3](#): Summary of the Records of the 3rd Plenary Meeting held on 16 June 1998 - Costa Rica, 20 November 1998, para. 75.

³¹ [Doc. A/AC.249/CRP.5](#): Proceedings of the Preparatory Committee during the Period 25 March-12 April 1996, D - Trigger Mechanism, 8 April 1996, para. 17; Belarus: [Doc. A/AC.244/1](#): “Comments received pursuant to Paragraph 4 of General Assembly Resolution 49/53 on the Establishment of an International Criminal Court”, 20 March 1995, Belarus, pp. 2-8, paras. 13 and 16; United Kingdom: Ad Hoc Committee on the Establishment of an International Criminal Court, “Summary of Observations made by the Representative of the United Kingdom of Great Britain and Northern Ireland on 3, 4, 5, 6 and 7 April 1995”, [Press Release no. 32/95](#), 7 April 1995, p. 7; Russia: [Statement by the Representative of the Russian Federation to the Ad Hoc Committee on the Establishment of an International Criminal Court](#), 5 April 1995, p. 3.

word “situation” – with its above-mentioned origin – into what became article 13(b) of the Statute. However, the Security Council’s power to establish ad hoc international courts had always been exercised in relation to “situations” encompassing the whole of the territory of the State(s) concerned: for instance, “the territory of the former Yugoslavia”,³² “the territory of Rwanda”,³³ “the territory of Sierra Leone”,³⁴ “for Lebanon”³⁵ and “the territory of the former Yugoslavia” and “the territory of Rwanda”.³⁶ None of these ad hoc tribunals established by the Security Council had its jurisdiction *ratione loci* limited to one particular area of the State on whose territory the situation under Chapter VII warranting its establishment had been observed. The parallel drawn between the referral of a “situation” by the Security Council pursuant to article 13(b) of the Statute and the earlier creation of ad hoc tribunals gives confirmation that, in accordance with its origin, the “situation” referred did – according to the drafters of the Statute – correspond to the entirety of the “situation” under Chapter VII of the Charter rather than to a particular sub-area within that situation. The distinction between the “situation” under Chapter VII of the Charter, i.e. that of Sudan, and a particular undefined sub-area referred to the Court, i.e. Darfur, goes against the letter and the spirit of article 13(b) of the Statute, which requires the contemplated referral to be made “by the Security Council acting under Chapter VII of the Charter of the United Nations”.

24. The negotiating history of article 13(b) of the Statute, moreover, brings to the fore the fact that any attempt by the Security Council to limit the geographic scope of the situation referred, compared with the Chapter VII situation before it, would raise the same doubts and suspicions about respect for the Court’s independence that were expressed to reject the referral of “cases”, which guided the choice of the word “situation”.³⁷ These doubts are pertinent to the referral limited merely to the “situation

³² [Statute of the International Criminal Tribunal for the Former Yugoslavia](#), art. 1.

³³ [Statute of the International Criminal Tribunal for Rwanda](#), art. 1.

³⁴ [Statute of the Special Court for Sierra Leone](#), art. 1(1).

³⁵ [Statute of the Special Tribunal for Lebanon](#), art. 1.

³⁶ [Statute of the International Residual Mechanism for Criminal Tribunals](#), Preamble.

³⁷ [Doc. A/AC.249/CRP.5](#): Proceedings of the Preparatory Committee during the Period 25 March-12 April 1996, D - Trigger Mechanism, 8 April 1996, para. 19; [Doc. A/CONF.183/SR.3](#): Summary of the Records of the 3rd Plenary Meeting held on 16 June 1998 - Costa Rica, 20 November 1998, para. 75.

in Darfur”, when other areas of Sudan, in particular those which would secede in 2011, were beset by armed violence and the commission of crimes enumerated in article 5 of the Statute. By limiting the referral solely to the undefined “Darfur”, when its sole prerogative under article 13(b) was to refer the Chapter VII situation, i.e. that of Sudan, pursuant to the fifth preambular paragraph of [Resolution 1593](#), the Security Council overreached its power by performing, on an undefined geographic basis, an initial screening of the crimes and cases the Court is empowered to prosecute, whereas, by independently carrying out its remit with respect to the Chapter VII situation, the Court could have conducted investigations and prosecuted in other areas of Sudan. By exceeding its prerogative under article 13(b) of the Statute, the Security Council therefore prevented the Court from independently fulfilling its remit.

25. The Court’s practice and previous decisions regarding the referral of “situations” are likewise at odds with the limitation to “Darfur” alone, rather than Sudan of the referral effected by [Resolution 1593](#).

26. Since its creation, the Court has made public 10 referrals received from States Parties pursuant to article 13(a) of the Statute and 2 referrals from the Security Council pursuant to article 13(b).

27. Of these ten article 13(a) referrals, eight concern the whole of the territory of the State in question; one relates to the particular situation specifically provided for by article 12(2)(a) of the Statute regarding crimes committed on board a vessel or aircraft and is immaterial to the present discussion on the geographic scope of situations on the territory of States;³⁸ the last concerned an undefined area on the territory of the State concerned, “Northern Uganda”.³⁹ That delimitation was utterly ignored; the Office of the Prosecutor (OTP) was quick to explain that regardless of the fact that the Ugandan authorities’ referral was limited to “Northern Uganda” alone – nowhere defined and therefore impossible to demarcate – it considered itself authorized to

³⁸ [ICC-01/13-1-Anx2](#); [ICC-01/13-6-AnxA](#), para. 14.

³⁹ Press Release [ICC-OTP-20040419-50](#).

investigate the crimes of the Lord's Resistance Army committed anywhere "in Uganda".⁴⁰ Gabon's referral of the situation on its own territory lacked sufficient specifics on its exact geographic scope; before taking action, the OTP therefore had that State's authorities specify that it encompassed the entire territory of Gabon,⁴¹ thereby suggesting that the referral would have been disregarded had it been more restricted. Lastly, the referral of the situation in Palestine likewise raised the issue of its geographic scope on account of that State's particular history. In its decision of 5 February 2021, the Honourable Pre-Trial Chamber I determined that the geographic scope of the situation in Palestine extended to the entire territory of that State, including the territories occupied by Israel since 1967,⁴² thus maximizing the notion of the territory of the situation State and ruling out any geographic restriction.

28. The first situation, referred by [Resolution 1593](#), is that in "Darfur". The second, referred by Security Council resolution 1970, is the "situation in the Libyan Arab Jamahiriya since 15 February 2011".⁴³ It covers the entire territory of Libya.

29. Of the 12 situations in total referred to the Court by a State Party or by the Security Council under article 13(a) and (b) of the Statute, the referral of the "situation in Darfur" effected by [Resolution 1593](#) therefore remains the one and only isolated aberration: a referral to the Court of a situation that does not encompass the entire territory of the State concerned. In all the other instances where the Court has had to make a determination on the geographic scope of the situation referred to it, it has always favoured the broadest notion, covering the entirety of the territory of the State concerned, and rejected attempts to restrict that scope.⁴⁴

30. The Court's previous decisions have established that the situations referred to it are defined by a set of "temporal, territorial and in some cases personal parameters" specified in the referral.⁴⁵ It is only when the OTP acts *proprio motu* on the basis of

⁴⁰ [ICC-02/04-01/05-67](#), p. 29.

⁴¹ [ICC-01/16-1-AnxI](#).

⁴² [ICC-01/18-143](#), para. 118.

⁴³ [ICC-01/11-1-Anx](#); Resolution 1970 of 26 February 2011 appended, para. 4.

⁴⁴ Uganda: [ICC-02/04-01/05-67](#), p. 29; Gabon: [ICC-01/16-1-AnxI](#); Palestine: [ICC-01/18-143](#), para. 118.

⁴⁵ [ICC-01/04-101-tEN-Corr](#), para. 65.

article 15 of the Statute that the Court determines itself, and in full independence, the parameters of its intervention.⁴⁶ The Security Council had defined the geographic parameter of the situation in Sudan, *viz.* the whole of Sudanese territory, well before [Resolution 1593](#), and had decided that Chapter VII of the United Nations Charter applied indiscriminately to that territory. Once that decision was made, the Security Council could not retract it and revise the scope of the situation referred to the Court without prejudicing the Court's independence in a way that the drafters of the Rome Statute had wished to avert.⁴⁷ It was even less able to do so, since [Resolution 1593](#), referring the situation to the Court's jurisdiction, in its fifth preambular paragraph, identifies the "situation" threatening international peace and security and falling under Chapter VII of the United Nations Charter as that of Sudan. Since the geographic framework of the Security Council's action under Chapter VII of the United Nations Charter was, according to the fifth preambular paragraph of [Resolution 1593](#), Sudan, the Security Council could refer only the "situation in Sudan" – under article 13(b) of the Statute which requires that it act on the basis of Chapter VII of the United Nations Charter – and not an undefined "situation in Darfur".

31. Given the fact that [Resolution 1593](#) was adopted under Chapter VII of the United Nations Charter, applicable to the entire situation in Sudan, in accordance with its fifth preambular paragraph; the lack of a contemporary legal and/or administrative definition of "Darfur" and the fluctuating nature of its boundaries; the negotiating history of the Rome Statute and the etymology of the word "situation" inserted into the final version of article 13(b); and the Court's practice and consistent decisions in the past regarding the definition of the geographic scope of "situations" referred to the Court by a third party, the only possible conclusion that can be drawn is that the limitation of the situation referred to the Court by [Resolution 1593](#) to "Darfur" alone

⁴⁶ [ICC-01/15-12](#), para. 64.

⁴⁷ [Doc. A/AC.249/CRP.5](#): Proceedings of the Preparatory Committee during the Period 25 March-12 April 1996, D - Trigger Mechanism, 8 April 1996, para. 19; [Doc. A/CONF.183/SR.3](#): Summary of the Records of the 3rd Plenary Meeting held on 16 June 1998 - Costa Rica, 20 November 1998, para. 75.

was at odds with the letter and spirit of article 13(b) of the Statute, in that the referral should have included the whole of Sudan – the only relevant “situation” under Chapter VII of the United Nations Charter.

32. The Defence is not asking the Honourable Pre-Trial Chamber II to set itself up as arbiter of the legality of [Resolution 1593](#) vis-à-vis the United Nations Charter, notwithstanding that the referral it effects was inconsistent with the definition of the word “situation” in that treaty. The Defence is asking the Honourable Pre-Trial Chamber II to adjudge and declare that the [Resolution 1593](#) referral did not meet the criteria under article 13(b) of the Statute, in that it did not correspond to the geographic scope on the basis of which the Security Council acted under Chapter VII of the United Nations Charter, *viz.* the entirety of the situation in Sudan, at the time of its adoption. Insofar as the situation referred to the Court by [Resolution 1593](#) does not correspond to the situation under Chapter VII of the United Nations Charter brought before the Security Council, the referral effected by this resolution does not meet the criterion of action by the Security Council under Chapter VII of the UN Charter, laid down by article 13(b) of the Statute. No referral in accordance with article 13(b) of the Statute has therefore been made to the Court and, in the absence of any other event conferring jurisdiction on it under article 13(a) or (c) – which are not applicable by virtue of article 12(2) of the Statute – the Court has no legal basis on which to exercise jurisdiction to prosecute the crimes committed in Sudan.

3.4 – Second Ground: [Resolution 1593](#) is inconsistent with article 115(b)

33. At paragraph 7 of [Resolution 1593](#), the Security Council

[r]ecognizes that none of the expenses incurred in connection with the referral including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily.

34. Here the Defence adverts to its previous submissions under article 115(b) of the Statute, in which it had moved the Honourable Pre-Trial Chamber II⁴⁸ and then the

⁴⁸ [ICC-02/05-01/20-10](#); [ICC-02/05-01/20-105](#); [ICC-02/05-01/20-113](#).

Presidency⁴⁹ to order the Court's Registry to submit a request to the United Nations for payment of the outstanding contributions it owed to the Court to fund its activities relating to the situation in Darfur referred by the Security Council. This specific request to seek the United Nations' contribution was rejected successively by both those bodies on the principal grounds that the Defence had no legal standing to have a say in the Court's financial arrangements⁵⁰ and that the Court's judicial authorities were also not competent to take decisions on matters relating to the budget or to the negotiation of agreements with the United Nations.⁵¹ The Defence has taken note of the rulings rendered on its submissions and respects that they are *res judicatae*. For that reason, article 115(b) of the Statute is not invoked in this Challenge as a basis for requesting – as previously – that the Court's activities relating to the situation in Darfur be financed by the United Nations. Reference to article 115(b) is made here to draw the conclusions from the lack of funding by the United Nations. This lack must be taken as a *de facto* state of affairs, imposed upon the Court and the parties, which the earlier requests of the Defence relating to article 115(b) of the Statute have made clear they have no jurisdiction to rectify.

35. Determining whether or not an article of the Statute was violated is part and parcel of the exercise of the Court's judicial functions, which falls to its Chambers pursuant to article 39(2)(a) of the Statute. Making such a determination is one of the essential and indisputable elements of the judicial function and of the judicial power, defined in Black's Law Dictionary as

the authority vested in courts and judges to hear and decide cases and to make binding judgments on them; the power to construe and apply the law when controversies arise over what has been done or not done under it.⁵²

Although articles 39(2)(a) and 119(1) of the Statute have entrusted the exercise of the Court's judicial functions to its Chambers without defining what that exercise entails, the interpretation of the Court's instruments – in the first instance its Statute – in the

⁴⁹ [ICC-02/05-01/20-165-tENG](#).

⁵⁰ [ICC-02/05-01/20-101](#), para. 7; [ICC-02/05-01/20-180](#), paras. 4 and 6.

⁵¹ [ICC-02/05-01/20-101](#), para. 8.

⁵² B.A. Garner (ed.), *Black's Law Dictionary*, 9th edition, Thomson Reuters, 2009, p. 924.

context of pending judicial proceedings is clearly a vital aspect, the core, of the judicial function.

36. Commentators on the Statute say no less:

[A]t the least, anything that could be said to have some relationship, however tenuous, to prosecution of an individual or a group of individuals in the basis of a concrete complaint of a breach of the Statute, would be included in the notion of judicial functions.⁵³

The term “judicial functions” appears elsewhere in the Rome Statute, where it seems to have the meaning of proceedings or trials.⁵⁴

[TRANSLATION] It is abundantly clear that the Court’s “judicial functions” exceed the activity of the Chambers alone or the individual conduct of the judges and include the organization and the functioning of the Court itself, that is to say, the interpretation and application of the Statute over time.⁵⁵

37. The Honourable Pre-Trial Chamber II itself exercised this prerogative when ruling that “the proposition that the Court needs funding in order to perform its role, and that this funding must be provided in accordance with the obligations deriving from the Statute in accordance with international law, **is beyond controversy**” [Emphasis added].⁵⁶ The fact that article 115(b) relates to the funding of the Court therefore does not exclude it from the exercise of the Court’s judicial functions: making a determination on whether or not it was violated by paragraph 7 of [Resolution 1593](#) does indeed come within the jurisdiction of the Honourable Pre-Trial Chamber II. It is that jurisdiction which this Challenge calls upon the Chamber to exercise under this ground.

38. The situation brought about by paragraph 7 of [Resolution 1593](#) is inconsistent with the letter and spirit of article 115(b) of the Statute, which provides that the expenses incurred due to referrals by the Security Council must, in particular, be funded by the United Nations, subject to approval by its General Assembly. This situation has arisen as a direct result of the Security Council’s exclusion of

⁵³ R.S. Clark, “Article 119”, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers’ Notes, Article by Article*, 2nd ed., Beck-Hart-Nomos, 2008, p. 1729.

⁵⁴ W.A. Schabas, *The International Criminal Court – A Commentary of the Rome Statute*, Oxford University Press, 2010, p. 1162.

⁵⁵ E. Decaux, “Article 119”, in J. Fernandez, X. Pacreau, M. Ubéda-Saillard (eds.), *Statut de Rome de la Cour pénale internationale – Commentaire article par article*, 2nd edition, Pedone, 2019, p. 2527.

⁵⁶ [ICC-02/05-01/20-110](#), para. 13.

any financial contribution by the United Nations to fund the Court's activities in relation to the situation in Darfur, as imposed in the aforementioned paragraph 7 of [Resolution 1593](#). Paragraph 7 of [Resolution 1593](#) thus gives rise to illegality vis-à-vis article 115(b) of the Statute on two counts: first, it precludes the funding of the Court's activities in relation to the situation referred, whereas such funding is required under article 115(b) of the Statute; and, second, the source of this preclusion is the United Nations Security Council, whereas article 115(b) of the Statute refers to the preserve of the United Nations General Assembly. While the Court has no remit to determine which of these two organs is competent in budgetary matters under the United Nations Charter, it is on the other hand within its remit, in the exercise of its judicial functions under articles 39(2)(a) and 119(1) of the Statute, to ensure compliance with article 115(b) of its Statute, which refers to a decision of the United Nations General Assembly and not of the Security Council.

39. Given that the illegality of [Resolution 1593](#) in relation to article 115(b) of the Statute can scarcely be disputed – it was not disputed in any one of the submissions exchanged or decisions rendered on the Defence's previous requests on the matter – the issue put before the Honourable Pre-Trial Chamber II for its consideration by way of this Challenge is that of the consequence of that illegality for the validity of the referral of the situation effected by [Resolution 1593](#). The Honourable Pre-Trial Chamber II is therefore called upon to determine whether the patent violation of article 115(b) of the Statute by [Resolution 1593](#) affects the Court's jurisdiction over the situation referred by that resolution under article 13(b) of the Statute.

40. The Defence respectfully submits, and moves the Honourable Pre-Trial Chamber II to hold, that the illegality of [Resolution 1593](#) vis-à-vis article 115(b) of the Statute compromises its validity in every respect, including the referral of the situation which it effects under article 13(b) of the Statute. Indeed, the chapeau of article 13 expressly provides that "[t]he Court may exercise its jurisdiction with respect to a crime referred to in article 5" in each of the three scenarios set out in article 13(a), (b) and (c), but must do so "**in accordance with the provisions of this Statute**" [Emphasis

added]. In other words, none of the scenarios considered in this article envisages that it authorizes the Court to unbind itself from the provisions of the Statute. Where the Security Council refers a situation under article 13(b) of the Statute, it has no authority to release the Court from the provisions of its Statute and article 115(b) among them. Thus, by imposing a financing arrangement that is illegal according to article 115(b) of the Statute, the Security Council has rendered the [Resolution 1593](#) referral inconsistent with the letter of article 13, and in particular the reference made to the provisions of the Statute, including article 115(b), in its chapeau. The [Resolution 1593](#) referral therefore does not meet the article 13 conditions. Consequently, it could not have conferred jurisdiction on the Court to prosecute crimes committed in the situation which this resolution was intended to refer to the Court's jurisdiction. Without an alternative jurisdictional basis pursuant to article 12 and article 13(a) or (c) of the Statute, the Defence submits that the Court therefore has no jurisdiction over the crimes committed in the situation referred by [Resolution 1593](#).

41. The conclusion that the violation of article 115(b) of the Statute by [Resolution 1593](#) deprives the Court of jurisdiction to prosecute crimes committed in the situation which that resolution intended to refer to it under the chapeau of article 13 of the Statute also follows inevitably from Mr Ali Muhammad Ali Abd-Al-Rahman's right to a hearing in accordance with the provisions of the Statute, afforded by article 67(1). To accord the Security Council authority to dispense with the application of certain provisions of the Rome Statute would indeed be inconsistent with the right of persons charged to be tried in accordance with the provisions of the Statute. If the Security Council found itself thus authorized to make an exception to the rights of the defence in situations it refers to the Court, the ramification of such a conclusion would be worse than the problem which the drafters of the Statute aimed to prevent by limiting the authority of the Security Council to the referral of a "situation", as opposed to a "case", in order to safeguard the independence of the Court.⁵⁷

⁵⁷ [Doc. A/AC.249/CRP.5](#): Proceedings of the Preparatory Committee during the Period 25 March-12 April 1996, D-Trigger Mechanism, 8 April 1996, para. 19; [Doc. A/CONF.183/SR.3](#): Summary of the Records of the 3rd Plenary Meeting held on 16 June 1998 - Costa Rica, 20 November 1998, para. 75.

42. The disastrous repercussions on the Court's finances of the lack of contribution by the United Nations to the funding of the Court's operations relating to the two situations referred under article 13(b) of the Statute have been described in the Defence's earlier submissions under article 115(b).⁵⁸ The Defence will not revisit those repercussions, other than to mention that this bleak scenario in which the Court's financial independence is imperilled only confirms that the Court cannot exercise its jurisdiction in accordance with the Statute without funding for its operations in connection with the situations referred to it by the Security Council.

43. Accordingly the Defence submits, and moves the Honourable Pre-Trial Chamber II to hold, that the violation of article 115(b) of the Statute by paragraph 7 of [Resolution 1593](#) also compromises its legality pursuant to the chapeau of article 13 of the Statute, that [Resolution 1593](#) therefore could not have legally conferred jurisdiction on the Court to prosecute crimes committed in the situation referred under article 13(b) and that, as a result, the Court has no jurisdiction to prosecute the case at bar.

3.5 – Third Ground: [Resolution 1593](#) is now inoperative

44. The third ground set out under the first head of jurisdictional challenge based on the illegality of the referral effected by [Resolution 1593](#) refers to the Defence's earlier submissions articulated in its request of 26 January 2021 ("Request under Article 2")⁵⁹ relating to the withdrawal of the United Nations Mission in Darfur (UNAMID). The OTP filed a brief response to that request on 5 February 2021 ("OTP Response on Article 2"),⁶⁰ in which it does not dispute any of the submissions set out in the Request under Article 2 but expresses its trust in the Registry's efforts to resolve the situation. The Registry for its part did not react to it. The Request under Article 2 is pending before the Honourable Pre-Trial Chamber II at the time of the filing of this Challenge. So that the Honourable Pre-Trial Chamber II is aware of the latest development, the Defence reports that it received an email from the Registry on 3 March 2020,⁶¹

⁵⁸ [ICC-02/05-01/20-10](#), paras. 3-12; [ICC-02/05-01/20-113](#); [ICC-02/05-01/20-165-tENG](#), paras. 3-7 and 26-30.

⁵⁹ [ICC-02/05-01/20-269](#).

⁶⁰ [ICC-02/05-01/20-280](#).

⁶¹ Email from the Counsel Support Section on 3 March 2021 at 11:13.

informing it that the Registry still had no solution that could ensure the safety of the Defence were it to travel in Sudan outside Khartoum, which until then had been the responsibility of the United Nations. Subject to information to the contrary from the Registry, the Defence infers from this that no solution has been found as yet to replace UNAMID.

45. As mentioned previously, article 2 of the Statute provides that the relationship between the Court and the United Nations is to be governed by the [UN-ICC Agreement](#). Among other things, this Agreement provides in its article 3 that the UN and the Court have a reciprocal obligation of cooperation and coordination. The Defence understands and submits that this reciprocal obligation is intended to apply *a fortiori* and even more compellingly in situations in which the Court acts pursuant to a Security Council referral under article 13(b) of the Rome Statute, as is the case in Sudan and in the instant case. Article 10(1) of the [UN-ICC Agreement](#) further stipulates that “the United Nations agrees that, upon the request of the Court, it shall, subject to availability, provide on a reimbursable basis, or as otherwise agreed, for the purposes of the Court such facilities and services as may be required”.⁶² In addition, pursuant to article 18(1) of the [UN-ICC Agreement](#),

the United Nations undertakes to cooperate with the Prosecutor and to enter with the Prosecutor into such arrangements or, as appropriate, agreements as may be necessary to facilitate such cooperation, in particular when the Prosecutor exercises, under article 54 of the Statute, his or her duties and powers with respect to investigation and seeks the cooperation of the United Nations in accordance with that article.⁶³

On the basis of these relevant provisions of the [UN-ICC Agreement](#), the Court has entered into various agreements with the UN and its peacekeeping missions in the various situation States, which provide for, *inter alia*, access by the Court to administrative and logistical services, medical services, land and air transportation, equipment and military support to ensure the safety of deployed Court staff including, *mutatis mutandis*, at the request of the Registry, for the defence’s investigations

⁶² [UN-ICC Agreement](#), art. 10(1).

⁶³ [UN-ICC Agreement](#), art. 18(1).

pursuant to an order issued by the competent Chamber.⁶⁴

46. By its [Resolution 2559](#) of 22 December 2020,⁶⁵ the United Nations Security Council terminated UNAMID's mandate with effect from 31 December 2020, with a gradual drawdown of its personnel as of 1 January until 30 June 2021. [Resolution 2559](#) transfers the task of protecting civilians to the Government of Sudan under its "national plan for civilian protection".⁶⁶ Neither [Resolution 2559](#) nor the national plan for civilian protection makes mention of support for the Court's external operations in Sudan. There is likewise no mention in the mandate of the other United Nations mission in Sudan ("UNITAMS"), established by resolution 2524 of 3 June 2020,⁶⁷ of support for the Court's external operations in Sudan. The Security Council activity report of 3 June 2020 explains that a reference regarding support for the Court's activities in Sudan was originally to be included in the UNAMID mandate but was deliberately removed at the express request of Russia.⁶⁸ This removal therefore *de facto* bars any UNITAMS support for the Court's activities in Sudan.

47. The Request under Article 2 has already addressed the repercussions that UNAMID's withdrawal and the non-replacement of the support it was supposed to provide for the Court's activities with support from UNITAMS or any other UN programme will have on the activities of the Defence, the OTP, the Legal Representatives of Victims and the Court.⁶⁹ The Defence will not revisit those repercussions. However, the Defence respectfully submits that this development has consequences not only for the Court's exercise of its jurisdiction pursuant to the [Resolution 1593](#) referral but also for that jurisdiction itself, which is the aspect of this Challenge at issue here.

⁶⁴ As an example of such an agreement, the Defence adverts to the agreement between the Court and the United Nations Organization Mission in the Democratic Republic of the Congo ("MONUC") of 8 November 2005: [ICC-01/04-01/06-1267-Anx2](#).

⁶⁵ United Nations Security Council, [Resolution 2559](#), 22 December 2020.

⁶⁶ "The national plan of the Sudan for protecting civilians after the exit of the African Union-United Nations Hybrid Operation in Darfur (UNAMID)", [Doc. S/2020/429](#), 21 May 2020.

⁶⁷ United Nations Security Council, [Resolution 2524](#), 3 June 2020.

⁶⁸ United Nations Security Council Report, [What's in Blue](#), 3 June 2020.

⁶⁹ [ICC-02/05-01/20-269](#), *op. cit.*, paras. 13-16.

48. In Sudan, the Court acts on the basis of the referral of the situation in Sudan by Security Council [Resolution 1593](#) pursuant to article 13(b) of the Statute. By withdrawing its mission, which up until then had provided its support for the Court's activities in a situation referred by the Security Council, and by expressly excluding from the UNITAMS mandate the provision of the same services to the Court,⁷⁰ the UN is essentially depriving the Court, a little further, of the means to fulfil the remit received from its Security Council, in breach of the UN's obligations under article 3 of the UN-ICC Agreement and article 87(6) of the Statute. This problematic situation – the failure by the United Nations to take follow-up action on the Sudan referral to the Court – was specifically identified in 2013 by the Honourable Pre-Trial Chamber II in a former composition.⁷¹ Combined with the UN's breach of its obligations to finance the Court's activities pursuant to article 115(b) of the Statute,⁷² the withdrawal of UNAMID gives rise to the conclusion that the UN's consecutive breaches of its obligations under articles 2, 87(6) and 115(b) of the Statute and under article 3 of the UN-ICC Agreement are capable of calling into question the validity and/or current relevance of the referral of the situation in Sudan by Security Council [Resolution 1593](#) pursuant to article 13(b) of the Statute.

49. As previously observed, article 13(b) of the Statute enables the Court to exercise its jurisdiction on the basis of a Security Council referral “in accordance with the provisions of [the] Statute”. These provisions include not only the aforementioned article 115(b) relating to the financing of the Court's activities but also articles 2 and 87(6). Article 2 of the Statute refers to the [UN-ICC Agreement](#), which provides for a

⁷⁰ UNSC Report, [What's in Blue](#), 3 June 2020.

⁷¹ [ICC-02/05-01/09-151](#), para. 22: “When the Security Council, acting under Chapter VII of the UN Charter, refers a situation to the Court as constituting a threat to international peace and security, it is expected that the Council would respond by way of taking such measures which are considered appropriate, if there is an apparent failure on the part of the relevant State Party to the Statute to cooperate in fulfilling the Court's mandate entrusted to it by the Council. Otherwise, if there is no follow up action on the part of the Security Council, any referral by the Council to the ICC under Chapter VII would never achieve its ultimate goal, namely, to put an end to impunity. Accordingly, any such referral would become futile.”

⁷² [ICC-02/05-01/20-10](#); [ICC-02/05-01/20-105](#); [ICC-02/05-01/20-113](#); [ICC-02/05-01/20-165-tENG](#).

range of services and facilities that the United Nations is supposed to make available to the Court, especially in situations in which the Court acts under article 13(b) on referral by the Security Council. Article 87(6) provides that the Court must be able to rely on the cooperation of an international organization, such as the United Nations.

50. By denying the Court the logistical and security support vital for it to conduct its activities on the territory of Sudan by withdrawing but not replacing UNAMID, [Resolution 2559](#) has therefore violated articles 2 and 87(6) of the Statute and deprived the Court of the means to carry out prosecutions “in accordance with the provisions of [the] Statute” on the basis of the [Resolution 1593](#) referral. [Resolution 2559](#) places the Court in a position where it can no longer conduct prosecutions “in accordance with the provisions of [the] Statute”, or at least articles 2 and 87(6), on the basis of [Resolution 1593](#), which is thereby rendered inoperative. Since [Resolution 2559](#) eliminates the possibility of carrying out prosecutions “in accordance with the provisions of [the] Statute”, the [Resolution 1593](#) referral no longer meets the express conditions of article 13, in particular its chapeau, and can no longer serve as a basis for the Court’s jurisdiction with respect to the crimes committed on the territory of Sudan. Without an alternative jurisdictional basis pursuant to articles 12 and 13(a) or (c) of the Statute, the Defence thus submits that [Resolution 2559](#) has deprived the Court of the jurisdiction conferred on it by [Resolution 1593](#) over the crimes committed in Sudan.

51. The conclusion that the violation of articles 2 and 87(6) of the Statute by [Resolution 2559](#) deprives the Court of its jurisdiction to prosecute crimes committed in Sudan pursuant to [Resolution 1593](#) also follows inevitably from Mr Ali Muhammad Ali Abd-Al-Rahman’s right to a hearing in accordance with the provisions of the Statute, afforded by article 67(1). As was previously observed with regard to the violation of article 115(b) of the Statute by paragraph 7 of [Resolution 1593](#), to accord the Security Council the authority to dispense with the application of certain provisions of the Rome Statute would indeed be inconsistent with the right of persons charged to be tried in accordance with the provisions of the Statute.

52. Accordingly, the Defence submits, and moves the Honourable Pre-Trial Chamber II to hold, that the withdrawal of UNAMID by [Resolution 2559](#) and the non-replacement of the support it was supposed to provide for the Court's activities in Sudan violated articles 2 and 87(6) of the Statute and *de facto* rendered inoperative the [Resolution 1593](#) referral of the situation in Sudan, insofar as that withdrawal denies the Court the means to prosecute that situation "in accordance with the provisions of [the] Statute" as required by the chapeau of article 13 of the Statute and that, as a result, the Court no longer has jurisdiction to prosecute the case at bar.

4 – SECOND HEAD OF JURISDICTIONAL CHALLENGE: *NULLUM CRIMEN SINE LEGE* AND THE DEFINITION OF THE CRIMES STATED IN THE WARRANTS OF ARREST IN THE LAW APPLICABLE TO SUDAN (ARTICLES 7, 8(2)(C), 8(2)(E), 22(1), 22(2) AND 24(1) OF THE STATUTE)

53. The two successive warrants of arrest issued by the Court for Mr Ali Muhammad Ali Abd-Al-Rahman in the case at bar charge him with 24 counts of crimes against humanity under article 7 of the Statute⁷³ and 29 counts of war crimes committed in the context of a non-international armed conflict ("NIAC"), of which 12 are crimes are alleged under article 8(2)(c) of the Statute⁷⁴ and 17 are crimes alleged under article 8(2)(e) of the Statute.⁷⁵ Under the second head of jurisdictional challenge set out in this Challenge, the Defence intends to show that the Court may not exercise its jurisdiction over these crimes, since doing so would run counter to the principles of *nullum crimen sine lege* and of non-retroactivity *ratione personae* of criminal law, enshrined respectively in articles 22(1) and 24(1) of the Statute.

⁷³ [ICC-02/05-01/20-18-Corr](#), Counts 1, 2, 4, 9, 10, 11, 13, 17, 20, 21, 22, 24, 25, 28, 29, 34, 35, 39, 40, 42, 48 and 51; [ICC-02/05-01/20-80-Red](#), Counts (i) and (iii).

⁷⁴ [ICC-02/05-01/20-18-Corr](#), Counts 3, 5, 12, 23, 26, 27, 30, 31, 41, 46, 47; [ICC-02/05-01/20-80-Red](#), Count (ii).

⁷⁵ [ICC-02/05-01/20-18-Corr](#), Counts 6, 7, 8, 14, 15, 16, 18, 19, 32, 33, 36, 38, 43, 44, 45, 49 and 50.

4.1 – Summary of the grounds based on articles 22(1), 22(2) (*nullum crimen sine lege*) and 24(1) of the Statute (non-retroactivity *ratione personae*)

54. By the present Challenge, the Defence submits that prosecuting Mr Ali Muhammad Ali Abd-Al-Rahman on charges of crimes against humanity (Fourth Ground) and/or war crimes committed in the context of an NIAC (Fifth Ground) would run counter to the principles of *nullum crimen sine lege*, of specificity and of non-retroactivity *ratione personae* of criminal law, enshrined respectively in articles 22(1), 22(2) and 24(1) of the Statute. The Defence submits that, since Sudan has not ratified the Court's Statute, the sole crimes in the Court's jurisdiction for which Mr Ali Muhammad Ali Abd-Al-Rahman could be held responsible under articles 22(1) and 24(1) of the Statute are those defined in Sudanese national law or, at least, in the international law in force that applied to Sudan at the time of the offences stated in the warrants of arrest. Given that neither Sudanese national law, nor the international conventions applicable to Sudan, nor customary international law defined the specific crimes stated in the warrants of arrest, Mr Ali Muhammad Ali Abd-Al-Rahman cannot be prosecuted and/or held potentially responsible – subject to the OTP's evidence – on the basis of those crimes, and the Court may not, in respect of him, exercise the jurisdiction that the Security Council intended to refer to it pursuant to article 13(b) of the Statute.

55. The Fourth and Fifth Grounds are presented cumulatively. Each of these two grounds is independent and limited, respectively, to the allegations of crimes against humanity and the allegations of war crimes set out in the warrants of arrest. Should the Honourable Pre-Trial Chamber II uphold either of these two grounds considered individually, the Court will lack jurisdiction only over the category of alleged crimes to which it refers, without prejudice to the other. Only if the Honourable Pre-Trial Chamber II upholds both grounds will the Court lack jurisdiction over the entirety of the case.

56. The Fourth and Fifth Grounds are both alternative and cumulative in relation to the First, Second and Third Grounds set out under the first head of jurisdictional challenge. Should the First, Second or Third Ground and/or the Fourth and Fifth Grounds together be upheld, the Court will have no jurisdictional basis on which to prosecute any of the crimes alleged in the warrants of arrest for Mr Ali Muhammad Ali Abd-Al-Rahman.

4.2 – Applicable law

57. Under article 7(1) of the Statute, crime against humanity means any of the acts enumerated in paragraphs (a) through (k) of that article “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”.

58. Under article 8(2)(c) of the Statute, war crimes committed in the context of an NIAC include “serious violations of article 3 common to the four Geneva Conventions of 12 August 1949 [...]”.

59. Under article 8(2)(e) of the Statute, war crimes committed in the context of an NIAC also include “other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the [...] acts [enumerated in paragraphs (i) to (xii) of that article].”

60. Under article 21(1) of the Statute (“Applicable Law”):

The Court shall apply: (a) In the first place, [the] Statute, Elements of Crimes and its Rules of Procedure and Evidence; (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict.

61. Under article 21(3) of the Statute:

The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

62. Under article 22(1) of the Statute (“*Nullum crimen sine lege*”), “[a] person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.”

63. Under article 22(2) of the Statute, “[t]he definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.”

64. Under article 24(1) of the Statute (“*Non-Retroactivity Ratione Personae*”), “[n]o person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.”

65. In accordance with article 126 of the Statute, the Statute of the Court entered into force on 1 July 2002 for States that had ratified it. For other States that were not parties as at 1 July 2002, article 126(2) of the Statute specifies that it shall enter into force only “on the first day of the month after the 60th day following the deposit by such State of its instrument of ratification, acceptance, approval or accession.”

66. Sudan is not a State Party to the Court’s Statute but did sign it on 8 September 2000. On 26 August 2008, Sudan accompanied its signature with the following statement: “[...] Sudan does not intend to become a party to the Rome Statute. Accordingly, Sudan has no legal obligation arising from its signature on 8 September 2000.”⁷⁶ No objections were made to this statement. Sudan has not accepted the Court’s jurisdiction under article 12(3) of the Statute. Subject to the First, Second and Third Grounds above, the Court is exercising its jurisdiction over the crimes alleged in the warrants of arrest for Mr Ali Muhammad Ali Abd-Al-Rahman on the basis of the referral of the situation in Darfur by Security Council [Resolution 1593](#) under article 13(b) of the Statute.

⁷⁶ United Nations, [Treaty Collection, Chap. XVIII.10](#), “Sudan”.

67. Sudan acceded to the Geneva Conventions of 12 August 1949 ("[Geneva Conventions](#)") on 23 September 1957.⁷⁷ It acceded to Additional Protocol I to the Geneva Conventions of 8 June 1977, applicable to situations of international armed conflict ("[Additional Protocol I](#)"), on 7 March 2006 and to Additional Protocol II of 8 June 1977, applicable to situations of NIAC ("[Additional Protocol II](#)") on 13 July 2006.⁷⁸ It is also a party to the Hague Convention for the Protection of Cultural Property of 14 May 1954 ("[Convention on Cultural Property](#)"), to which it acceded on 23 July 1970,⁷⁹ to the Convention on the Rights of the Child of 20 November 1989 ("[Convention on the Rights of the Child](#)"), which it ratified on 3 August 1990, and to its Optional Protocol on the involvement of children in armed forces of 25 May 2000 ("[Protocol on Child Soldiers](#)"), ratified on 26 July 2005.⁸⁰ The complete list of international humanitarian law conventions to which Sudan is a party is available on the "Sudan" page of the [international humanitarian law database](#) on the website of the International Committee of the Red Cross ("ICRC").

68. Sudan is also a party to the Vienna Convention on the Law of Treaties of 23 May 1969 ("[Vienna Convention](#)"), which it ratified on 18 April 1990,⁸¹ and to the International Covenant on Civil and Political Rights of 16 December 1966 ("[International Covenant on Civil and Political Rights](#)"), to which it acceded on 18 March 1986. None of Sudan's declarations on the application of the state of emergency under article 4 of the International Covenant applies to the period stated in the warrants of arrest.⁸² It is also a party to the Convention on the Suppression of the Crime of Apartheid of 30 November 1973 ("[Convention against Apartheid](#)"), which it ratified on 20 March 1977.⁸³ Lastly, Sudan is in addition a party to the African

⁷⁷ ICRC, [International humanitarian law database](#), "Sudan".

⁷⁸ ICRC, [International humanitarian law database](#), "Sudan".

⁷⁹ ICRC, [International humanitarian law database](#), "Sudan".

⁸⁰ ICRC, [International humanitarian law database](#), "Sudan".

⁸¹ United Nations, [Treaty Collection, Chap. XXIII.1](#), "Sudan".

⁸² United Nations, [Treaty Collection, Chap. IV.4](#), "Sudan".

⁸³ United Nations, [Treaty Collection, Chap. IV.7](#), "Sudan".

Charter on Human and Peoples' Rights of 27 June 1981 ("[Banjul Charter](#)"), which it ratified on 18 February 1986.⁸⁴

69. The Constitution of Sudan in force at the time of the events stated in the warrants of arrest was that of 28 March 1998 ("[Constitution of 1998](#)").⁸⁵ It has since been replaced by the Interim National Constitution of the Republic of Sudan, in force since 17 July 2005 ("[Constitution of 2005](#)").⁸⁶

70. On 31 December 2003, Sudan promulgated its new penal code ("[Penal Code of 2003](#)"),⁸⁷ which replaced the previous Penal Code of 20 February 1991 ("[Penal Code of 1991](#)"),⁸⁸ in force until then.

4.3 – Preliminary considerations on the principle of legality of criminal offences in the law of the Court (articles 22(1), 22(2) and 24(1) of the Statute)

71. Before elaborating on its Fourth and Fifth Grounds of jurisdictional challenge regarding, respectively, crimes against humanity and war crimes committed in a situation of an NIAC, the Defence considers it relevant to advance the following preliminary arguments on the principle of legality before the Court and the various ways of satisfying that principle.

72. Under the *nullum crimen sine lege* principle, enshrined in article 22(1) of the Statute, the Court may not exercise its jurisdiction to prosecute a person whose alleged conduct did not constitute a crime within the Court's jurisdiction at the time it took place. This provision is supplemented by the non-retroactivity *ratione personae* principle set out in article 24(1) of the Statute, which provides that no person shall be criminally responsible under the Statute for conduct prior to the entry into force of the Statute. The two principles enshrined in articles 22(1) and 24(1) of the Statute are read

⁸⁴ African Union, [List of countries which have signed, ratified/acceded to the African Charter on Human and People's Rights](#).

⁸⁵ Sudan, [Constitution of 28 March 1998](#).

⁸⁶ Sudan, [Interim National Constitution of the Republic of Sudan](#), 17 July 2005.

⁸⁷ Sudan, *Laws of the New Sudan – The Penal Code, 2003*, published on 31 December 2003 (in English).

⁸⁸ Sudan, [The Criminal Act, 1991](#), passed on 20 February 1991 (in English).

one in the light of the other in the submissions presented in this Challenge relating to the Fourth and Fifth Grounds.

73. At the time of the events stated in the warrants of arrest, that is to say, 2003 to 2004, Sudan was not a party to the Court's Statute. The Court's Statute, which entered into force on 1 July 2002 for States that had ratified it, was therefore not in force for Sudan at the material time. Article 126(2) of the Statute gives confirmation that the entry into force of the Statute on 1 July 2002 applied only to those States that had deposited their instrument of ratification, acceptance, approval or accession no later than 60 days before that date. For other States, such as Sudan, the Statute therefore did not enter into force on 1 July 2002 and was not in force in 2003-2004 at the material time.

74. Sudan did indeed sign the Statute on 8 September 2000 but signing it did not suffice to make it a State Party or to mean that the Statute took effect for Sudan under article 126(2) of the Statute. Furthermore, Sudan's signature is accompanied by the following express statement: "[...] Sudan does not intend to become a party to the Rome Statute. Accordingly, Sudan has no legal obligation arising from its signature on 8 September 2000".⁸⁹ No objections were made to this statement by the States Parties to the Statute, and it was duly recorded by the depositary authority of the Statute designated in article 125(1). It is therefore considered to be accepted and produces the full effects indicated by its wording, thus releasing Sudan from any legal obligation, such as that of incorporating the offences enumerated in articles 5 to 8 *bis* of the Statute into its national law. Sudan has also not accepted the Court's jurisdiction under article 12(3) of the Statute.

75. Under article 24(1) of the Statute, no person may thus be held criminally responsible for crimes that were committed before the entry into force of the Statute for the State(s) capable of conferring jurisdiction on the Court under article 12(2) of the Statute, i.e. (a) the State on the territory of which the alleged crimes were committed

⁸⁹ United Nations, [Treaty Collection, Chap. XVIII.10](#), "Sudan".

and/or (b) the State of which the person accused of those crimes is a national. In the instant case, the State on the territory of which the alleged crimes were committed and the State of which Mr Ali Muhammad Ali Abd-Al-Rahman is a national are one and the same: Sudan.

76. There is a single exception to the precondition that the Statute must have entered into force for the State on the territory of which the alleged crimes were committed and/or the State of which the person accused of having committed them is a national: where the Security Council has, under article 13(b) of the Statute, referred the situation in the context of which the alleged crimes were committed. By definition, such a referral occurs essentially after the alleged crimes have been committed and in reaction to allegations of their commission. It is only in the specific instance of ongoing criminal conduct, continuing after the Security Council's referral of the situation, that such a referral conferring jurisdiction on the Court may precede the commission of certain crimes relating to the situation. A strict interpretation of article 24(1) of the Statute, whereby the Court's jurisdiction is limited to only the crimes committed after the Security Council's referral of a situation in a non-party State, would deprive article 13(b) of its effectiveness [*effet utile*]. Such an interpretation is precluded by article 12(2) of the Statute, which treats such a referral as an exception to the precondition of accession to the Statute or of acceptance of the Court's jurisdiction by the State on the territory of which the alleged crimes were committed and/or by the State of which the person is a national. The Security Council's referral under article 13(b) of the Statute of a situation on the territory, or involving the nationals, of a non-party State must therefore be recognized as retroactively conferring jurisdiction on the Court over the earlier crimes alleged to have been committed within the temporal scope of the situation referred.

77. In the case of Sudan, [Resolution 1593](#) of 2005 referred to the Court the situation in Darfur "since 1 July 2002". The events of 2003-2004 stated in the warrants of arrest therefore come within the temporal scope of that referral. Subject to the foregoing submissions challenging its legality, [Resolution 1593](#) of 2005 was therefore intended to

retroactively confer jurisdiction on the Court to prosecute crimes allegedly committed during the period stated in the warrants of arrest. Nevertheless, this conferral of jurisdiction *ex post facto* does not alter the fact that in 2003-2004, at the material time, the Court had no jurisdiction over the crimes alleged in the warrants of arrest. That jurisdiction was conferred on the Court retroactively in 2005 by [Resolution 1593](#). From the perspective of the individual right of persons charged to respect for the principle of legality of offences and jurisdiction *ratione personae* under articles 22(1) and 24(1) of the Statute, the general jurisdiction vested in the Court in 2005 over the events of 2003-2004 cannot have any bearing. A way must therefore be found to respect those principles despite the Court's lack of jurisdiction at the material time.

78. The fact that the Court's jurisdiction was vested in it retrospectively by a Security Council resolution cannot however constitute, by itself, an exception to the application of the general principles of criminal law enshrined in the Statute, especially those of the legality of criminal offences ("*nullum crimen sine lege*") under article 22(1) and of non-retroactivity *ratione personae* under article 24(1) of the Statute. The Statute says nothing of the sort when its article 12 provides that the exception whereby the Court's jurisdiction need not have been accepted as a precondition applies in the event of a Security Council referral. Previous decisions of the Court, including those of the Appeals Chamber, have made it clear that where a referral is made under article 13(b) of the Statute, the provisions of the Statute apply in their entirety,⁹⁰ among them articles 22(1) and 24(1). Under article 31(1) of the [Vienna Convention](#), to which Sudan was a party at the material time,⁹¹ "a treaty shall be interpreted in good faith in

⁹⁰ [ICC-02/05-01/09-302](#), para. 85: "The Chamber finds, in line with previous decisions of other Chambers of the Court that the effect of a Security Council resolution triggering the Court's jurisdiction under article 13(b) of the Statute is that the legal framework of the Statute applies, **in its entirety**, with respect to the situation referred. In this regard, article 13 of the Statute indeed indicates that the Court exercises its jurisdiction 'in accordance with the provisions of the Statute' and that this is so irrespective of how the exercise of jurisdiction is triggered in the particular situation." [Emphasis added]; [ICC-02/05-01/09-397-Corr OA2](#), para. 135: "The *chapeau* of article 13 stipulates that, regardless of how the Court's jurisdiction is triggered, it must be exercised 'in accordance with [the] Statute'. This means that, also in case of a referral by the UN Security Council, **the Court is bound by the provisions of the Statute.**" [Emphasis added].

⁹¹ United Nations, [Treaty Collection, Chap. XXIII.1](#), "Sudan".

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”. An interpretation whereby the referral of a situation by the Security Council under article 13(b) of the Statute dispenses with and makes an exception to the general principles of criminal law – legality of criminal offences and their non-retroactivity – would be inconsistent with articles 22(1) and 24(1) of the Statute, which do not provide for such an exception to their application and which remain applicable by virtue of the Court’s previous decisions.⁹² Such an interpretation would run counter to the object and purpose of the Statute as “reaffirmed” by paragraph 7 of the preamble to the Statute by reference to the “Purposes and Principles of the [Charter of the United Nations](#)”, which include “respect for human rights and for fundamental freedoms”.⁹³ It would also run counter to article 21(3) of the Statute, under which “[t]he application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights”.

79. The principle of legality of criminal offences enshrined under the maxim *nullum crimen sine lege* by article 22(1) of the Statute is an internationally recognized fundamental human right. It is enshrined, *inter alia*, in article 15(1) of the [International Covenant on Civil and Political Rights](#), to which Sudan was a party at the material time,⁹⁴ which provides: “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.” Article 4(2) of the [International Covenant on Civil and Political Rights](#) includes article 15 in the list of its provisions from which no derogation can be made on grounds of a state of emergency. The principle of legality of criminal offences thus belongs to the oft-cited *noyau dur* [hard core] of internationally recognized and protected human rights. It is also recognized by article 7(2) of the [Banjul Charter](#), also in force for Sudan at the time of the

⁹² [ICC-02/05-01/09-302](#), para. 85; [ICC-02/05-01/09-397-Corr OA2](#), para. 135.

⁹³ [Charter of the United Nations](#), 26 June 1945, articles 1-3.

⁹⁴ United Nations, [Treaty Collection, Chap. IV.4](#), “Sudan”.

facts stated in the warrants of arrest.⁹⁵ Other major international instruments for the protection of human rights, to which Sudan is not a party, similarly enshrine this principle, such as in article 7(1) of the [European Convention on Human Rights](#) and article 9 of the [American Convention on Human Rights](#). In Sudanese law, this principle was enshrined first in article 32 of the [Constitution of 1998](#) and subsequently in article 34(4) of the [Constitution of 2005](#). To construe the Statute of the Court, and article 13(b) in particular, as permitting departure from this principle enshrined at article 22(1) would, therefore, run counter to the object and purposes of the Statute (which encompass respect for human rights), to the rule of construction set forth at article 21(3) and to Sudanese law.

80. The principle of non-retroactivity of criminal law, enshrined in article 24(1) of the Statute, is often described as the essential corollary to articles 22 and 23 of the Statute in the definition of the principle of legality.⁹⁶ The treaty provisions underpinning the principle set out at article 24(1) of the Statute are the same as those indicated above. As is the case for article 22(1), to construe the Statute of the Court, and article 13(b) in particular, as permitting departure from this principle enshrined at article 24(1) would, therefore, run counter to the object and purposes of the Statute (which encompass respect for human rights), to the rule of construction set forth at article 21(3) and to Sudanese law.

81. There is, in any event, no incompatibility between the jurisdiction conferred upon the Court under article 13(b) of the Statute and the general principles of criminal law laid down in articles 22(1) and 24(1) to warrant such an interpretation. Under article 13(b), the Security Council may confer jurisdiction on the Court to prosecute in relation to a situation it refers to the Court. However, the Court's exercise of its

⁹⁵ African Union, [List of countries which have signed, ratified/acceded to the African Charter on Human and People's Rights](#).

⁹⁶ R. P. Pangalangan, "Article 24 – Non-retroactivity *ratione personae*", in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article*, Beck-Hart-Nomos, 2nd ed., 2008, p. 735; W. A. Schabas, *The International Criminal Court: a Commentary of the Rome Statute*, Oxford University Press, 2010, p. 417; D. Scalia, "Article 24", in J. Fernandez, X. Pacreau, M. Ubéda-Saillard (eds.), *Statut de Rome de la Cour pénale internationale – Commentaire article par article*, Pedone, 2nd ed., 2019, p. 1005.

jurisdiction continues to be subject to the same principles and limits laid down in the Statute, including those at articles 22(1) and 24(1). For the effectiveness [*effet utile*] of article 13(b) of the Statute to be preserved, the Court must nonetheless be able to exercise its jurisdiction on the basis of the Security Council referral over crimes whose alleged commission on the territory of a non-party State and which has not accepted the Court's jurisdiction, in accordance with the principles enshrined in articles 22(1) and 24(1).

82. This is so because the Rome Statute, articles 7 and 8 in particular, cannot be the one and only source of criminal offences that satisfy the principle of legality. As made clear by article 15(1) of the [International Covenant on Civil and Political Rights](#), to which Sudan was a party at the material time,⁹⁷ the offence must have been proscribed as criminal under national law or the international law applicable at the material time.

83. Article 15(2) of the [International Covenant on Civil and Political Rights](#) refers moreover to an “act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.” It seems, however, that the instruments applicable before the Court and the Court's previous decisions view the reference to the “general principles of law recognized by the community of nations” highly unfavourably for defining the elements of crimes, as opposed to other issues such as the bases of responsibility.

84. Here, it is necessary to draw a distinction in relation to the ad hoc international criminal tribunals. The ad hoc international criminal tribunals engaged extensively in the exercise of concluding that a particular crime referred to in their statutes was defined in international custom. For instance, the Appeals Chambers of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and of the Special Court for Sierra Leone (“SCSL”) held that the definitions of the crimes in their statutes

⁹⁷ United Nations, [Treaty Collection, Chap. IV.4](#), “Sudan”.

derived from international custom.⁹⁸ However, those decisions were inextricably linked to the normative environment of those tribunals, whose statutes listed the crimes within their jurisdiction without giving an in-depth definition of the elements constituting those crimes, and whose *travaux préparatoires* expressly indicated deliberate reference to customary international law for further detail on the scope and definition of the elements of the crimes. This point is very clearly confirmed by the decisions of those tribunals.⁹⁹

85. However, the normative context of the Court is dissimilar to that of the ad hoc tribunals. Not only are the crimes within its jurisdiction listed but their elements are defined in great detail in articles 6 to 8 *bis* of the Statute and the Elements of Crimes. This difference in the content and level of detail in the definition of the crimes was born of criticisms sparked by the liberties taken in the previous decisions of the ad hoc tribunals with the principles of legality and non-retroactivity of criminal offences;

⁹⁸ ICTY, Appeals Chamber, *Prosecutor v. Tihomir Blaškić*, “[Judgement](#)”, 29 July 2004, No. IT-95-14-A, para. 141: “the Tribunal may enter convictions only where it is satisfied that the offence is proscribed under customary international law at the time of its commission”; ICTY, Appeals Chamber, *Prosecutor v. Milan Milutinović et al.*, “[Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction – Joint Criminal Enterprise](#)”, 21 May 2003, No. IT-99-37-AR72, para. 9: “The scope of the Tribunal’s jurisdiction *ratione materiae* may therefore be said to be determined both by the Statute, insofar as it sets out the jurisdictional framework of the International Tribunal, and by customary international law, insofar as the Tribunal’s power to convict an accused of any crime listed in the Statute depends on its existence *qua* custom at the time this crime was allegedly committed”; SCSL, Appeals Chamber, *Prosecutor v. Sam Hinga Norman*, “[Decision on Preliminary Motion Based on Lack of Jurisdiction \(Child Recruitment\)](#)”, 31 May 2004, No. SCSL-04-14-AR72(E), para. 20: “The widespread recognition and acceptance of the norm prohibiting child recruitment in Additional Protocol II and the CRC provides compelling evidence that the conventional norm entered customary international law well before 1996.”

⁹⁹ ICTY, Appeals Chamber, *Prosecutor v. Milan Milutinović et al.*, “[Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction – Joint Criminal Enterprise](#)”, 21 May 2003, No. IT-99-37-AR72, para. 9: “In his Report to the Security Council, the Secretary-General of the United Nations proposed that the International Tribunal shall apply, as far as crimes within its jurisdiction are concerned, rules of international humanitarian law which are ‘beyond any doubt part of customary international law’ [footnote: Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993), (“Secretary-General’s Report”), par 34.]. The fact that an offence is listed in the Statute does not therefore create new law and the Tribunal only has jurisdiction over a listed crime if that crime was recognised as such under customary international law at the time it was allegedly committed.”

these criticisms resonated during the negotiation of the Rome Statute.¹⁰⁰ The inclusion of these principles in at least two articles of the Statute, the minutely detailed definitions of the crimes contained in articles 6 to 8 *bis* of the Statute and the addition of the Elements of Crimes are products of those criticisms. No reference to “international custom” as a possible source of the definition of the crimes is, for that matter, made in the Statute, whose drafters, as the *travaux préparatoires* show,¹⁰¹ took special care to replace the reference to this mutable and difficult to circumscribe source of law with reference to the Elements of Crimes alone.¹⁰² Decisions of the Court endorsed this shift at a very early stage by considering application of the Elements of Crimes as compulsory for defining crimes under article 22 of the Statute,¹⁰³ thereby leaving little or no room for ever-changing international custom. The specification in article 22(2) of the Statute that “the definition of a crime shall be strictly construed and shall not be extended by analogy” sets stronger limitations so that their elements are

¹⁰⁰ W.A. Schabas, *The International Criminal Court – A Commentary of the Rome Statute*, Oxford University Press, 2010, pp. 403-404 and 408-409; B. Broomhall, “Article 22”, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers’ Notes, Article by Article*, 2nd ed., Beck-Hart-Nomos, 2008, p. 725; V. Malabat, “Article 22”, in J. Fernandez, X. Pacreau, M. Ubéda-Saillard (eds.), *Statut de Rome de la Cour pénale internationale – Commentaire article par article*, 2nd edition, Pedone, 2019, p. 979; C. Kreß, “The International Criminal Court as a Turning Point in the History of International Criminal Justice”, in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice*, Oxford University Press, 2009, p. 145.

¹⁰¹ Doc. A 51/22, [Report of the Preparatory Committee on the Establishment of an International Criminal Court – Volume I](#), 1996, para. 56: “Some delegations expressed the view that the constituent elements of the crimes should be set forth in the Statute or in an annex to provide the clarity and precision required for criminal law, to provide additional guidance to the Prosecution and the Court, to ensure respect for the rights of the accused and to avoid any political manipulation of the definitions. It was further stated by some delegations that **States, and not judges, should be responsible for legislating the elements of the crimes.**” [Emphasis added]. The adoption of the Elements of Crimes shows that this is the approach which ultimately prevailed.

¹⁰² A. Pellet, “Nouveau regard sur les sources du droit applicable par la Cour pénale internationale”, in P. Acconci, D. Donat-Cattin, A. Marchesi, G. Palmisano and V. Santori (eds.), *International Law and Protection of Humanity – Essays in Honor of Flavia Lattanzi*, Brill, 2017, pp. 456-461.

¹⁰³ [ICC-02/05-01/09-3](#), para. 131: “The Majority considers that this interpretation is also supported by the object and purpose of article 9(1) of the Statute, which consists of furthering the *nullum crimen sine lege* principle embraced in article 22 of the Statute, by providing *a priori* legal certainty on the content of the definition of the crimes provided for in the Statute. In the Majority’s view, **had the application of the Elements of Crimes been fully discretionary for the competent Chamber, the safeguards provided for by the article 22 *nullum crimen sine lege* principle would be significantly eroded.**” [Emphasis added].

not construed beyond the provisions of the Elements of Crimes through reference to customary international law similar to that used by the ad hoc tribunals.¹⁰⁴ The Appeals Chamber has confirmed this point by differentiating, in the application of the principle of legality, between the definition of the constituent elements of crimes – which it bases solely on the Statute and the Elements of Crimes – and other issues such as modes of liability, for which it permits – albeit to an extremely limited extent and in extremely exceptional instances¹⁰⁵ – reference to customary international law as a basis for their legality.¹⁰⁶ By attaching the Elements of Crimes to the Statute and according it primacy over other rules of international law, “including the established principles of the international law of armed conflict” in article 21(1)(b), the drafters of the Statute thus fixed strict limits that drastically curtailed the liberties taken by the ICTY and the SCSL in their decisions for defining the crimes within their jurisdiction by reference to customary international law, so that the Statute and Elements of Crimes would serve as the sole reference to that end.

86. Irrespective of the regrets that the proponents of international criminal law – members of the Defence team included – may have as to this change from the earlier normative framework of the ad hoc international criminal tribunals, the wishes of the

¹⁰⁴ [ICC-01/04-01/07-3436-tENG](#), para. 52: “In application of the principle of strict construction, the provisions of the Statute concerning the crimes may not, therefore, be defined by analogy or **applied to situations not expressly provided for in the actual wording of the statutory provisions**. The Chamber therefore cannot adopt a method of interpretation that might broaden the definition of the crimes and it is instead duty-bound to apply strictly the provisions which specifically proscribe only the conduct which the drafters expressly intended to criminalise.” [Emphasis added].

¹⁰⁵ [ICC-01/04-01/07-717](#), para. 508: “Principles and rules of international law constitute a secondary source **applicable only when the statutory material fails to prescribe a legal solution**. Therefore, and since the Rome Statute expressly provides for this specific mode of liability, the question as to whether customary law admits or discards the ‘joint commission through another person’ is not relevant for this Court.” [Emphasis added]; [ICC-01/04-01/07-3436-tENG](#), para. 1395: “As stated in the section of the judgment concerning applicable law, it behoves the Chamber to afford precedence to application of the Statute and, **in contrast to the ad hoc tribunals, it need not inquire into the existence of a rule of international custom**.” [Emphasis added]; [ICC-01/09-01/11-373](#), para. 289.

¹⁰⁶ [ICC-01/09-01/11-414 OA4](#), para. 32: “However, this appeal was specifically assessing whether a particular mode of liability, namely command responsibility for acts committed prior to assuming the role of commander, existed under customary international law in order to satisfy the principle of legality. **This can be distinguished from determining the legal interpretation of ‘organizational policy’ as it appears in the Statute and Elements of Crimes**, and the sufficiency of supporting evidence in relation to it.” [Emphasis added].

States that negotiated the Statute make it incumbent upon the Court to accept that change, which must therefore be respected. Restoring to the Honourable Judges of the Court discretion – akin to that enjoyed by their predecessors at the ad hoc tribunals – to assess the elements of the crimes within the Court’s jurisdiction in comparison to customary international law would entail at a minimum amending the Elements of Crimes to incorporate a reference to the changing state of customary international law. While the Honourable Judges of the Court, acting by an absolute majority, or the OTP, may propose such an amendment under article 9(2)(b) or 9(2)(c) of the Statute, the current rule forming the framework for the exercise of the judicial function of defining crimes prevails and must be respected in the instant case vis-à-vis Mr Ali Muhammad Ali Abd-Al-Rahman.

87. It follows that, for the purpose of defining the constituent elements of the crimes, reference to the Statute and the Elements of Crimes takes absolute precedence over the “general principles of law recognized by the community of nations” under article 15(2) of the [International Covenant on Civil and Political Rights](#), to which regard may be had on only a very subordinate basis pursuant to article 21(1)(b) of the Statute, in compliance with the rules of strict construction excluding any extension by analogy, in accordance with article 22(2) of the Statute. Whenever the response to a question of law is given in the Statute or the Elements of Crimes – such as that of the definition of crimes against humanity and war crimes, at articles 7 and 8 and in the Elements of Crimes – it is therefore not an option in the Court’s system to resort to the subsidiary sources under article 21(1)(b) of the Statute, such as “the principles and rules of international law, including the established principles of the international law of armed conflict”.¹⁰⁷ As the Honourable Pre-Trial Chamber II held, in the matter of the

¹⁰⁷ [ICC-01/09-01/11-373](#), para. 289: “[A]pplying a customary rule of international law only ‘where appropriate’ **limits its application to cases where there is a lacuna in the Statute and the other sources referred to in article 21(1)(a).** In other words, the Chamber should not resort to applying article 21(1)(b), **unless it has found no answer in paragraph (a).** This is not the case as the modes of liability of co-perpetration and indirect perpetration are already captured by the language of article 25(3)(a) [...]”

definition of crimes against humanity and war crimes in articles 7 and 8 of the Statute, in the judgment issued in *Katanga*:

The Chamber considers **that the Statute and the Elements of Crimes comprehensively regulate the Court's subject-matter jurisdiction** in relation to **the crimes** or the modes of criminal liability with which the accused is charged. Accordingly, the Chamber considers that **it need not apply the subsidiary sources of law** under article 21(1)(b) and 21(1)(c) of the Statute to these two points. **In the case at bar, the Chamber will apply only articles 7, 8, 25 and 30 of the Statute.** [Emphasis added].¹⁰⁸

88. Hence, notwithstanding the fact that Sudan was not a State Party to the Statute at the time of the offences alleged in the warrants of arrest, the Court may, without contravening articles 22(1) and 24(1), nonetheless exercise the jurisdiction conferred upon it by [Resolution 1593](#) over criminal offences defined in Sudanese national law, in the international treaties in force for Sudan at the material time or, failing that and by strict construction excluding any analogy, in the general principles of law recognized by the community of nations. Such a verification requires examining the international conventions to which Sudan was a party at the material time or, failing that, the customary international law applicable to Sudan, to ascertain whether they provide a definition of the crimes in question – crimes against humanity and war crimes committed in a situation of an NIAC – which satisfy the criteria of the principles of legality and non-retroactivity set out in articles 22(1) and 24(1) of the Statute. Where elements of offences are found in the applicable international treaty law or applicable international customary law, it is additionally appropriate to ascertain that those elements meet the criteria of strict construction, foreseeability and accessibility underlying the principles of legality and non-retroactivity of criminal offences.¹⁰⁹

¹⁰⁸ [ICC-01/04-01/07-3436-tENG](#), para. 40.

¹⁰⁹ W.A. Schabas, *The International Criminal Court – A Commentary of the Rome Statute*, Oxford University Press, 2010, p. 404, citing judgments of the European Court of Human Rights: [S.W. v. The United Kingdom](#), no. 20166/92, 22 November 1995, Series A, Vol. 335-B, paras. 35-36; [C.R. v. The United Kingdom](#), no. 20190/92, 22 November 1995, Series A, Vol. 335-B, paras. 33-34; [Kokkinakis v. Greece](#), no. 14307/88, 25 May 1993, Series A, Vol. 260-A, para. 52. See also, along the same lines, B. Broomhall, “Article 22”, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers’ Notes, Article by Article*, 2nd ed., Beck-Hart-Nomos, 2008, pp. 716-717; and V. Malabat, “Article 22”, in J. Fernandez, X. Pacreau, M. Ubéda-Saillard (eds.), *Statut de Rome de la Cour pénale internationale – Commentaire article par article*, 2nd edition, Pedone, 2019, p. 983.

89. Since it is not possible to rely on the definitions in articles 7 and 8 of the Statute, which are not applicable to Sudan, it is therefore in Sudanese law, the international law in force in Sudan at the material time and/or, failing that and by strict construction, the general principles of law recognized by the community of nations, that the source of the offences capable of satisfying the principles of articles 22(1) and 24(1) must be sought. The Defence will now undertake that inquiry in this Challenge with regard to crimes against humanity – Fourth Ground – and war crimes committed in a situation of an NIAC – Fifth Ground.

4.4 – Fourth Ground: the offence of crimes against humanity cannot be alleged against Mr Ali Muhammad Ali Abd-Al-Rahman

90. As regards the crimes against humanity alleged in the warrants of arrest,¹¹⁰ the definition given in article 7 of the Statute cannot satisfy the principle of legality as set out in articles 22(1) and 24(1), since that definition was not in force for Sudan and Sudan had not accepted its jurisdiction at the material time. This point is confirmed by Sudan's express statement accompanying its signature of the Court's Statute that it had "no legal obligation arising from its signature on 8 September 2000",¹¹¹ which is considered to have been accepted; no objections were made by the States Parties to the Statute, and it was duly recorded by the depositary authority of the Statute designated in article 125(1).

91. At the time of the facts stated in the warrants of arrest, the offence of crimes against humanity did not exist in Sudanese criminal law. Neither the [Penal Code of 1991](#) nor the [Penal Code of 2003](#) that replaced it as of 31 December 2003 contains this offence. Both codes do refer to certain specific conduct also found in the definition of crimes against humanity, such as murder (article 7(1)(a) of the Statute, article 130 of

¹¹⁰ [ICC-02/05-01/20-18-Corr](#), Counts 1, 2, 4, 9, 10, 11, 13, 17, 20, 21, 22, 24, 25, 28, 29, 34, 35, 39, 40, 42, 48 and 51; [ICC-02/05-01/20-80-Red](#), Counts (i) and (iii).

¹¹¹ United Nations, [Treaty Collection, Chap. XVIII.10](#), "Sudan".

the [Penal Code of 1991](#), Section 248 of the [Penal Code of 2003](#)) and rape (article 7(1)(g) of the Statute, article 149 of the [Penal Code of 1991](#), Section 316 of the [Penal Code of 2003](#)), but therein they are considered offences under the ordinary law which do not share the constituent elements of the corresponding crimes against humanity as defined in the Elements of Crimes. In his communication addressed to the Security Council on 18 June 2005 in reaction to the referral of the situation in Darfur under article 13(b) of the Court's Statute, the representative of Sudan to the United Nations could, for that matter, only refer to offences involving "violations of honour, killing, bloodshed or the plundering or destruction of property",¹¹² offences under the ordinary law that are not criminalized as crimes against humanity. The offences defined by the Sudanese penal codes therefore do not fall within the Court's subject-matter jurisdiction under article 5 of the Statute. They therefore cannot satisfy the requirements of the principle of legality of offences under articles 22(1) and 24(1) of the Statute.

92. At the time of the facts stated in the warrants of arrest, the only international or regional convention in force offering a comprehensive definition of crimes against humanity was the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity of 26 November 1968 ("[Convention on Non-Applicability of Statutory Limitations](#)"),¹¹³ whose article 1(b) defines those crimes as follows:

¹¹² [Document S/2005/403](#), 22 June 2005: Annex to the "Letter dated 18 June 2005 from the Chargé d'affaires a.i. of the Permanent Mission of the Sudan to the United Nations addressed to the President of the Security Council", 18 June 2005.

¹¹³ United Nations, [Treaty Collection, Chap. IV.6](#).

Crimes against humanity whether committed in time of war or in time of peace as they are defined in the [Charter of the International Military Tribunal, Nürnberg, of 8 August 1945](#)¹¹⁴ and confirmed by [resolutions 3 \(I\)](#)¹¹⁵ of 13 February 1946 and [95 \(I\)](#)¹¹⁶ of 11 December 1946 of the General Assembly of the United Nations, eviction by armed attack or occupation and inhuman acts resulting from the policy of apartheid, and the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, even if such acts do not constitute a violation of the domestic law of the country in which they were committed.

Regardless of the fact that this definition departs substantially from that set out in article 7 of the Statute, Sudan is not a party to the [Convention on Non-Applicability of Statutory Limitations](#),¹¹⁷ which therefore does not apply to it.

93. Sudan is, on the other hand, a party to the [Convention against Apartheid](#), which it ratified on 20 March 1977¹¹⁸ and which defines apartheid in article 1(1) as a crime against humanity. The elements of the crime against humanity of apartheid according to the definition in article 1(1) of the [Convention against Apartheid](#) diverge substantially, however, from those provided in article 7(2)(h) of the Statute and in the Elements of Crimes regarding article 7(1)(j). This definition therefore cannot satisfy the requirements of the principle of legality under articles 22(1) and 24(1) of the Statute insofar as it refers to constituent elements different from those in the Statute and the Elements of Crimes and consequently fails to satisfy the principle of strict construction of the definition of crimes under article 22(2) of the Statute.

94. The international conventions in force in Sudan at the material time therefore contain no definition of any offence on the basis of which crimes defined in article 7 of the Statute could potentially be prosecuted without violating the principles of legality, strict construction and non-retroactivity of criminal offences, enshrined in articles 22(1), 22(2) and 24(1) of the Statute.

¹¹⁴ [Charter of the International Military Tribunal of Nuremberg of 8 August 1945](#), article 6(c) (note added).

¹¹⁵ United Nations, General Assembly, [Resolution 3\(I\)](#) – “Extradition and Punishment of War Criminals”, 13 February 1946 (note added).

¹¹⁶ United Nations, General Assembly, [Resolution 95\(I\)](#) – “Affirmation of the principles of international law recognized by the Charter of the Nürnberg Tribunal”, 11 December 1946 (note added).

¹¹⁷ United Nations, [Treaty Collection, Chap. IV.6](#).

¹¹⁸ United Nations, [Treaty Collection, Chap. IV.7](#), “Sudan”.

95. To consider, on a very subsidiary basis and subject to the strict construction of the definitions of the crimes, that the principles of legality and non-retroactivity can – for the purposes of the Court’s exercise of jurisdiction over crimes defined in article 7 of the Statute – be satisfied by relying on the reference to the “general principles of law recognized by the community of nations” on the basis of article 15(2) of the [International Covenant on Civil and Political Rights](#) to which Sudan was a party at the material time,¹¹⁹ it is necessary to scrutinize both the existence and the substance of such “general principles of law recognized by the community of nations” as they pertain to the definition of the offence of crimes against humanity. The inspiration that the drafters of article 7 of the Statute might have drawn from customary international law¹²⁰ is stripped of relevance, since the *travaux préparatoires*,¹²¹ the Court’s texts – articles 21(1) and 22(2) in particular – and its previous decisions cited above¹²² preclude any freedom on the part of the Honourable Judges of the Court to refer to these earlier customary sources to make a determination on any issue governed by the rules applicable before the Court, including the definition of crimes against humanity under article 7 of the Statute and the Elements of Crimes. It is the existence and the content of a definition of crimes against humanity in customary international law which must be sought. If a customary definition – applicable generally or to Sudan – is recognized as having existed at the material time, it must then be ascertained whether it satisfies the criteria of the principles of legality, strict construction and non-retroactivity of criminal offences, enshrined in articles 22(1), 22(2) and 24(1) of the Statute.

96. Seeking a customary rule is no easy task. It is to be recalled that under article 38(b) of the [Statute of the International Court of Justice](#) (“ICJ”), to which Sudan is a party and whose compulsory jurisdiction it accepted on 2 January 1958,¹²³ in order

¹¹⁹ United Nations, [Treaty Collection, Chap. IV.4](#), “Sudan”.

¹²⁰ Doc. A 51/22, [Report of the Preparatory Committee on the Establishment of an International Criminal Court – Volume I](#), 1996, para. 54.

¹²¹ Doc. A 51/22, [Report of the Preparatory Committee on the Establishment of an International Criminal Court – Volume I](#), 1996, para. 56.

¹²² [ICC-02/05-01/09-3](#), para. 131; [ICC-01/04-01/07-717](#), para. 508; [ICC-01/04-01/07-3436-tENG](#), paras. 40 and 1395; [ICC-01/09-01/11-414 OA4](#), para. 32; [ICC-01/09-01/11-373](#), para. 289.

¹²³ ICJ, [Declarations recognizing the jurisdiction of the Court as compulsory](#): Sudan, 2 January 1958.

for a rule of customary international law to become apparent it must be predicated on “evidence of a general practice [material element] accepted as law [mental element or *opinio juris*]”.

97. Where the customary source has been codified by a convention, it then becomes easier to identify, even if the date when it appeared – which usually precedes that of its codification – can be more challenging to establish. Thus far, the only convention in force in respect of crimes against humanity – save the Court’s Statute – proposing a definition of crimes against humanity is the [Convention on Non-Applicability of Statutory Limitations](#), to which Sudan is not a party¹²⁴ and which therefore does not apply to it. Given the limited success of the [Convention on Non-Applicability of Statutory Limitations](#), with only 56 States Parties in 2021,¹²⁵ it cannot be asserted that the definition of crimes against humanity proposed in its article 1(b) corresponds to a “general practice accepted as law” within the meaning of article 38(b) of the [ICJ Statute](#).

98. An attempt at codification was undertaken by the International Law Commission (“ILC”), culminating in a [Draft Code of Crimes against the Peace and Security of Mankind](#) in 1996. Article 18 of this draft contains a definition of crimes against humanity which, despite a number of common points, diverges from that of article 7 of the Statute. The ILC’s task of codification might suggest that the draft code reflects the status of custom at the time it was drafted, i.e. in 1996. However, the fact that this draft code was not adopted by the States and did not enter in force means that its content is deprived of the mental element of custom – *opinio juris* – required by article 38(b) of the [ICJ Statute](#). Furthermore, article 13(1) of the draft code expressly prohibits any person from being convicted under its provisions before its entry into force, which never occurred. It is therefore the [Draft Code of Crimes against the Peace and Security of Mankind](#) itself that precludes any reference to it as a source for the definition of crimes against humanity, alternative to that of article 7 of the Statute.

¹²⁴ United Nations, [Treaty Collection, Chap. IV.6](#).

¹²⁵ United Nations, [Treaty Collection, Chap. IV.6](#).

99. Lastly, decisions of the courts and tribunals responsible for ensuring compliance with international human rights instruments do not favour defining crimes against humanity on the basis of “general principles of law recognized by the community of nations” under article 15(2) of the [International Covenant on Civil and Political Rights](#). To illustrate, it is only in the case of crimes committed in the specific context of the Second World War, and on the basis of an explicit exception foreseen in the *travaux préparatoires* of the [European Convention on Human Rights](#), that the European Court of Human Rights (“ECtHR”) accepts the validity of convictions entered in reliance on a customary definition of crimes against humanity.¹²⁶ This exception does not find application elsewhere. Beyond this circumstance expressly indicated in the *travaux préparatoires*, the ECtHR, ruling on article 7(2) of the [European Convention on Human Rights](#) in connection with the events that occurred in Hungary in 1956, held that the conviction of a person for a crime against humanity on the basis of a definition found in customary international law had violated this provision.¹²⁷

100. Absent any clear reference in customary international law enshrining a definition of crimes against humanity similar to that in article 7 of the Statute and the Elements of Crimes and applicable to Sudan at the material time, the Defence respectfully submits that the “general principles of law recognized by the community of nations” offer no definition of these crimes alternative to that in the Statute and capable of satisfying the criteria of the principle of legality, strict construction and non-retroactivity of criminal offences, pursuant to articles 22(1), 22(2) and 24(1) of the Statute, with respect to Sudan.

¹²⁶ ECtHR, Commission, Chambers, *Touvier v. France*, “[Decision](#)”, 13 January 1997, application no. 29420/95: “The Commission recalls that it transpires from the preparatory work to the Convention that the purpose of paragraph 2 of Article 7 is to specify that this article does not affect laws which, in the wholly exceptional circumstances at the end of the Second World War, were passed in order to punish war crimes, treason and collaboration with the enemy and does not in any way aim to pass legal or moral judgment on those laws (see No. 268/57, Dec 20.7.57 Yearbook 1, p. 241). It considers that this reasoning is also applicable to crimes against humanity.”

¹²⁷ ECtHR, Grand Chamber, *Korbely v. Hungary*, “[Judgment](#)”, 19 September 2008, application no. 9174/02, paras. 94-95: “[I]t has not been shown that it was foreseeable that the applicant’s acts constituted a crime against humanity under international law. As a result, there has been a violation of article 7 of the Convention.”

101. Neither Sudanese law, nor the international conventions applicable to Sudan, nor customary international law therefore offers any definition of crimes against humanity, alternative to that in article 7 of the Statute and which was applicable to Sudan at the time of the facts stated in the warrants of arrest. As the Statute did not, pursuant to article 126(2), apply to Sudan at the material time, the Defence prays the Honourable Pre-Trial Chamber II to draw the only possible conclusion: that none of the conduct alleged in the warrants of arrest constituted, at the time it is alleged to have occurred, a crime within the Court's jurisdiction, with respect to Sudan, under article 22(1) of the Statute, and that Mr Ali Muhammad Ali Abd-Al-Rahman cannot – even if the alleged facts were borne out, which is disputed – be held criminally responsible under article 24(1) of the Statute.

4.5 – Fifth Ground: the offence of war crimes in a situation of an NIAC cannot be alleged against Mr Muhammad Ali Abd-Al-Rahman

102. For the same reasons as those indicated in connection with the Fourth Ground relating to crimes against humanity, as regards the war crimes alleged in the warrants of arrest,¹²⁸ the definition given in article 8(2)(c) and 8(2)(e) of the Statute cannot satisfy the principle of legality as set out in articles 22(1) and 24(1), since that definition was not in force for Sudan and Sudan had not accepted its jurisdiction at the material time. This point is confirmed by Sudan's express statement accompanying its signature of the Court's Statute that it had "no legal obligation arising from its signature on 8 September 2000",¹²⁹ which is considered to have been accepted; no objections were made by the States Parties to the Statute, and it was duly recorded by the depositary authority of the Statute designated in article 125(1).

103. At the time of the facts stated in the warrants of arrest, the offence of war crimes did not exist in Sudanese criminal law. Neither the [Penal Code of 1991](#) nor the

¹²⁸ [ICC-02/05-01/20-18-Corr](#), Counts 3, 5, 6, 7, 8, 12, 14, 15, 16, 18, 19, 23, 26, 27, 30, 31, 32, 33, 36, 38, 41, 43, 44, 45, 46, 47, 49 and 50; [ICC-02/05-01/20-80-Red](#), Count (ii).

¹²⁹ United Nations, [Treaty Collection, Chap. XVIII.10](#), "Sudan".

[Penal Code of 2003](#) that replaced it as of 31 December 2003 contains this offence. Both codes do refer to certain offences in connection with armed conflict, such as waging or participating in a war against the State (article 51 of the [Penal Code of 1991](#), sections 96 and 98 of the [Penal Code of 2003](#)), assisting in the escape of prisoners of war (article 54 of the [Penal Code of 1991](#), sections 99-101 of the [Penal Code of 2003](#)), certain acts of espionage (articles 52-53 and 55-57 of the [Penal Code of 1991](#), sections 104 to 104C of the [Penal Code of 2003](#)), mutiny (article 58 of the [Penal Code of 1991](#), sections 108-109 of the [Penal Code of 2003](#)), desertion (article 59 of the [Penal Code of 1991](#), sections 111-112 of the [Penal Code of 2003](#)), the unlawful wearing of military dress or military insignia (article 60 of the [Penal Code of 1991](#), section 114 of the [Penal Code of 2003](#)), incitement to rebellion (articles 62-63 of the [Penal Code of 1991](#), sections 114B to 114D of the [Penal Code of 2003](#)) and rioting (articles 67-68 of the [Penal Code of 1991](#), sections 120-122 of the [Penal Code of 2003](#)). In his communication addressed to the Security Council on 18 June 2005 in reaction to the referral of the situation in Darfur under article 13(b) of the Court's Statute, the representative of Sudan to the United Nations could, for that matter, only refer to offences involving "violations of honour, killing, bloodshed or the plundering or destruction of property",¹³⁰ offences under the ordinary law that are not criminalized as war crimes. However, these offences do not constitute war crimes either under article 8 of the Statute or according to other definitions of these crimes in international law. The offences defined by the Sudanese penal codes therefore do not fall within the Court's subject-matter jurisdiction under article 5 of the Statute. They therefore cannot satisfy the requirements of the principle of legality of offences under articles 22(1) and 24(1) of the Statute.

¹³⁰ [Document S/2005/403](#), 22 June 2005: Annex to the "Letter dated 18 June 2005 from the Chargé d'affaires a.i. of the Permanent Mission of the Sudan to the United Nations addressed to the President of the Security Council", 18 June 2005.

104. At the time of the facts stated in the warrants of arrest, the only international or regional convention in force offering a comprehensive definition of war crimes was the [Convention on Non-Applicability of Statutory Limitations](#),¹³¹ whose article 1(a) defines them as follows:

War crimes as they are defined in the [Charter of the International Military Tribunal, Nürnberg, 8 August 1945](#)¹³² and confirmed by [resolutions 3 \(I\)](#)¹³³ of 13 February 1946 and [95 \(I\)](#)¹³⁴ of the General Assembly of the United Nations, particularly the “grave breaches” enumerated in the [Geneva Conventions](#) of 12 August 1949 for the protection of war victims.

Sudan is, however, not a party to the [Convention on Non-Applicability of Statutory Limitations](#),¹³⁵ which therefore does not apply to it.

105. Sudan is, on the other hand, a party to the [Geneva Conventions](#), which it ratified on 23 September 1957.¹³⁶ The definition of grave breaches of the [Geneva Conventions](#)¹³⁷ therefore applies to Sudan. Admittedly, [Additional Protocol I](#), whose article 85(5) makes clear that grave breaches of the Geneva Conventions are war crimes, was not in force in Sudan at the material time stated in the warrants of arrest. Sudan ratified it only on 7 March 2006,¹³⁸ that is to say, after the material time. However, given that the definition of grave breaches of the [Geneva Conventions](#) has remained unchanged since 1949 and articles 49, 50, 129 and 146 of the [Geneva Conventions I-IV](#) specifically require States Parties to criminalize grave breaches in their national law and to prosecute “persons alleged to have committed, or to have ordered to be committed,

¹³¹ United Nations, [Treaty Collection, Chap. IV.6](#).

¹³² [Charter of the International Military Tribunal of Nuremberg, 8 August 1945](#), article 6(c) (note added).

¹³³ United Nations, General Assembly, [Resolution 3\(I\)](#) – “Extradition and Punishment of War Criminals”, 13 February 1946 (note added).

¹³⁴ United Nations, General Assembly, [Resolution 95\(I\)](#) – “Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal”, 11 December 1946 (note added).

¹³⁵ United Nations, [Treaty Collection, Chap. IV.6](#).

¹³⁶ ICRC, [International humanitarian law database](#), “Sudan”.

¹³⁷ [Geneva Convention \(I\) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field \(“Convention I”\)](#), art. 50; [Geneva Convention \(II\) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea \(“Convention II”\)](#), art. 51; [Geneva Convention relative to the Treatment of Prisoners of War \(“Convention III”\)](#), art. 130; and [Geneva Convention relative to the Protection of Civilian Persons in Time of War \(“Convention IV”\)](#), art. 147.

¹³⁸ ICRC, [International humanitarian law database](#), “Sudan”.

such grave breaches”, it is appropriate to examine whether and to what extent the definition of grave breaches provided by the [Geneva Conventions](#) was sufficient, at the material time, to satisfy the requirements of the principle of legality, strict construction and non-retroactivity of criminal offences, under articles 22(1), 22(2) and 24(1) of the Statute.

106. The response to this question is partly contingent on the importance accorded to international conventions in Sudanese law by the Constitution of Sudan, and in particular on whether properly ratified conventions, such as the [Geneva Conventions](#), are considered directly applicable in Sudan national law (a monist system) or need to be incorporated into national law by national legislation (a dualist system). Without purporting to possess the slightest expertise in Sudanese constitutional law, the Defence limits itself here to noting that it has been unable to identify any provisions requiring national implementing legislation to be passed in order for conventions duly ratified by Sudan to be applicable, and that articles 71, 90(2) and 90(4) of the [Constitution of 1998](#) seem to entail direct applicability of conventions in national law, therefore appearing to follow the monist system. On the basis of this analysis, the definition of grave breaches given by the [Geneva Conventions](#) would be directly applicable in Sudanese law and criminal prosecution of those offences would satisfy the requirements of the principles of legality and non-retroactivity of criminal offences.

107. Since the definition of “grave breaches” in the [Geneva Conventions](#) is the same, presented differently, as that of war crimes in article 8(2)(a) of the Statute, the strict construction criterion under article 22(2) of the Statute is likewise satisfied by reference to the grave breaches defined in articles 50, 51, 130 and 147 of the [Geneva Conventions I-IV](#). Although the Statute was not in force for Sudan at the time of the facts alleged in the warrants of arrest, the definition of grave breaches given by the [Geneva Conventions](#) therefore satisfies the requirements of the principles of legality, strict construction and non-retroactivity of criminal offences under articles 22(1), 22(2) and 24(1) of the Statute. The jurisdiction vested retroactively in the Court by the referral of the situation in Sudan by Security Council [Resolution 1593](#) – subject to the

foregoing submissions disputing its legality – may therefore be exercised by the Court over the war crimes defined in article 8(2)(a) of the Statute, in full compliance with articles 22(1), 22(2) and 24(1) of the Statute.

108. As regards the other war crimes defined in article 8(2)(b), 8(2)(c) and 8(2)(e) of the Statute, the definition of grave breaches given in the [Geneva Conventions](#) does not, in contrast, resolve the issue of their legality. Some war crimes enumerated in article 8(2)(b) roughly correspond to those listed in article 85(3) and 85(4) of [Additional Protocol I](#), especially those in article 8(2)(b)(i) (article 85(3)(a) of [Additional Protocol I](#)), 8(2)(b)(iv) (article 85(3)(b) of [Additional Protocol I](#)), 8(2)(b)(v) (article 85(3)(d) of [Additional Protocol I](#)), 8(2)(b)(vi) (article 85(3)(e) of [Additional Protocol I](#)), 8(2)(b)(vii) (article 85(3)(f) of [Additional Protocol I](#)), 8(2)(b)(viii) (article 85(4)(a) of [Additional Protocol I](#)) and 8(2)(b)(ix) (article 85(4)(d) of [Additional Protocol I](#)). Although there is no certainty that the variations in article 8(2)(b) of the Statute compared to article 85(3) and 85(4) of [Additional Protocol I](#) satisfy the strict construction requirement for the definition of the crimes under article 22(2) of the Statute, there is no need to delve further into this discussion, since in any event Sudan did not ratify [Additional Protocol I](#) until 7 March 2006,¹³⁹ i.e. after the facts stated in the warrants of arrest. Additionally, none of the crimes stated in the warrants of arrest comes under article 8(2)(b) of the Statute.

109. The entirety of the war crimes alleged in the warrants of arrest are defined by article 8(2)(c) and 8(2)(e) of the Statute. This is because the warrants of arrest describe the situation of armed conflict prevailing in Sudan at the time of the facts as an NIAC, whereas the war crimes under article 8(2)(a) and 8(2)(b) of the Statute are defined in relation to a context of international armed conflict. On 5 March 2021, the OTP and the Defence jointly submitted to the Honourable Pre-Trial Chamber II their agreement on the fact that, at the time of the facts stated in the warrants of arrest, the armed conflict taking place in Sudan was an NIAC.¹⁴⁰ Accordingly, article 8(2)(a) and 8(2)(b) of the

¹³⁹ ICRC, [International humanitarian law database](#), “Sudan”.

¹⁴⁰ [ICC-02/05-01/20-191-AnxA](#), Agreed fact no. 1.

Statute are not applicable. Only article 8(2)(c) and 8(2)(e) of the Statute apply – on the condition, nevertheless, that the requirements of the principles of legality, strict construction and non-retroactivity of criminal offences under articles 22(1), 22(2) and 24(1) of the Statute are satisfied.

110. However, no definition of war crimes in a situation of an NIAC is provided in any convention in force to which Sudan was a party at the material time. Common article 3 of the [Geneva Conventions](#), which was in force in Sudan at the time of the facts alleged in the warrants of arrest and forms the principle reference for the definition of war crimes in article 82(c) of the Statute, gives no definition of any criminal offence applicable to individuals and merely sets out obligations on States Parties and other parties to the NIAC, without modifying the legal status of those other parties. That the ICJ positioned common article 3 of the [Geneva Conventions](#) at the level of “elementary considerations of humanity” unquestionably having the force of custom¹⁴¹ does nothing to change the fact that that article does not define any criminal offence which could meet the requirements of the principle of legality of criminal offences. [Additional Protocol II](#) relating to the protection of victims of NIACs was not ratified by Sudan until 13 July 2006,¹⁴² i.e. after the facts alleged in the warrants of arrest. Like common article 3 and unlike the [Geneva Conventions](#) and [Additional Protocol I](#), it does not define any criminal offence and creates no obligation on the States Parties to prosecute violations of its provisions. The [Convention on Cultural Property](#), to which Sudan acceded on 23 July 1970,¹⁴³ does contain a single article – article 19 – which applies in situations of NIAC, but neither this article

¹⁴¹ ICJ, *Nicaragua v. United States of America*, “[Judgment \[Merits\]](#)”, 27 June 1986, para. 218: “Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court’s opinion, reflect what the Court in 1949 called ‘elementary considerations of humanity’ ([Corfu Channel, Merits, I.C.J. Reports 1949](#), p. 22; paragraph 215 above). The Court may therefore find them applicable to the present dispute, and is thus not required to decide what role the United States multilateral treaty reservation might otherwise play in regard to the treaties in question.”

¹⁴² ICRC, [International humanitarian law database](#), “Sudan”.

¹⁴³ ICRC, [International humanitarian law database](#), “Sudan”.

nor the rest of the [Convention on Cultural Property](#) creates any criminal offence comparable to grave breaches of the [Geneva Conventions](#). Article 28 of the convention (“Sanctions”) is limited to one undertaking by the States Parties

to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the [[Convention on Cultural Property](#)].

This undertaking alone cannot equate to, or take the place of, the legal definition of a criminal offence in accordance with the requirements of the principle of legality and strict construction of criminal offences under article 22(1) and 22(2) of the Statute. It must also be noted that no corresponding offence appears in the [Penal Code of 1991](#)¹⁴⁴ and/or the [Penal Code of 2003](#),¹⁴⁵ and that article 28 of the [Convention on Cultural Property](#) has therefore not been implemented by Sudan. Mr Ali Muhammad Ali Abd-Al-Rahman bears no responsibility for this deficiency, which must not call into question the principle of legality and non-retroactivity of criminal offences in his regard. The international conventions in force in Sudan at the time of the facts alleged in the warrants of arrest therefore provide no definition of war crimes, applicable in an NIAC, alternative to that in article 8(2)(c) and 8(2)(e) of the Statute.

111. International humanitarian law, or the law of armed conflict, places significant emphasis on customary international law. The unstructured nature of the situations to which this law applies is indeed more conducive to the development of practices accepted as law than to the promulgation of legislation or the conclusion of contracts or conventions. It was on the basis of this observation that, in its [Resolution I](#) of December 1995, the 26th International Conference of the Red Cross and Red Crescent – to which Sudan is a party, *qua* party to the [Geneva Conventions](#), endorsed a [recommendation](#) for the preparation of a “report on customary rules of IHL applicable in international and non-international armed conflicts”. Following this recommendation and [Resolution I](#) of the 26th International Conference of the Red Cross

¹⁴⁴ Sudan, [The Criminal Act, 1991](#), passed on 20 February 1991 (in English).

¹⁴⁵ Sudan, *Laws of the New Sudan* – [The Penal Code, 2003](#), published on 31 December 2003 (in English).

and Red Crescent, the ICRC prepared and, in 2005, adopted its report identifying 161 rules of customary international humanitarian law ("[Rules of Customary IHL](#)").¹⁴⁶ The decisions of the Court have referred to the [Rules of Customary IHL](#) drawn up by the ICRC.¹⁴⁷ Among these [Rules of Customary IHL](#), rule 156 states that "[s]erious violations of international humanitarian law constitute war crimes", while rule 101 provides that "[n]o one may be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time the criminal offence was committed [...]."

112. The aforementioned reservations regarding reference to customary international law in the definition of the crimes within the Court's jurisdiction could probably be placed into context in relation to the definition of war crimes, given in article 8(2)(b) and 8(2)(e) in their chapeaus, by reference to the "laws and customs applicable in armed conflicts". Yet, the Elements of Crimes contribute nothing in the way of a definition in relation with the chapeaus of those provisions and contain no reference to international custom in the definitions they give of the elements of crimes applicable to the offences set out in those two provisions. The absolute primacy accorded to the Elements of Crimes over the "principles and rules of international law, including the established principles of the international law of armed conflict" under article 21(1)(a) and 21(1)(b) of the Statute, and the strict construction of the definitions of crimes imposed by article 22(2) of the Statute nevertheless call for the utmost restraint to be exercised in referring to customary international law in the definitions of war crimes, including those in article 8(2)(b) and 8(2)(e) of the Statute.

113. In the light of those reservations, the substantial discrepancy between the definitions of war crimes under [Rule 156 of Customary IHL](#) and article 8 of the Statute, and the fact that [Rule 101 of Customary IHL](#) expressly enshrines the principle of legality, the Defence accordingly submits that [Rule 156 of Customary IHL](#) cannot

¹⁴⁶ J.M. Henckaerts, L. Doswald-Beck (eds.), *Droit international humanitaire coutumier – Volume I : Règles*, ICRC, Bruylant, 2006, 878 pp.; J.M. Henckaerts, L. Doswald-Beck (eds.), *Customary International Humanitarian Law – Volume II: Practice*, ICRC, Cambridge University Press, 2005, 4411 pp.

¹⁴⁷ [ICC-02/05-02/09-243-Red](#), para. 88.

constitute a definition of war crimes, committed in a situation of an NIAC, which is alternative to that in article 8(2)(c) and 8(2)(e) of the Statute and which satisfies the requirements, under article 22(1) and 22(1) of the Statute, of the principle of legality and strict construction of the definitions of offences. The fact that the [Rules of Customary IHL](#) were adopted in 2005, that is to say, after the facts alleged in the warrants of arrest, also means that reference to those rules would be inconsistent with the principle of non-retroactivity under article 24(2) of the Statute and with [Rule 101 of Customary IHL](#) itself.

114. Neither Sudanese law, nor the international conventions applicable to Sudan, nor customary international law therefore offers any definition of war crimes, in a situation of an NIAC, alternative to that in article 8(2)(c) and 8(2)(e) of the Statute and which was applicable to Sudan at the time of the facts stated in the warrants of arrest. As the Statute did not, pursuant to article 126(2), apply to Sudan at the material time, the Defence prays the Honourable Pre-Trial Chamber II to draw the only possible conclusion: that none of the conduct alleged in the warrants of arrest constituted, at the time it is alleged to have occurred, a war crime within the Court's jurisdiction, with respect to Sudan, under article 22(1) of the Statute, and that Mr Ali Muhammad Ali Abd-Al-Rahman cannot – even if the alleged facts were borne out, which is disputed – be held criminally responsible under article 24(1) of the Statute.

5 – Conclusion and postscript

115. On the basis of the submissions presented in this Challenge, the Defence prays the Honourable Pre-Trial Chamber II to determine that Security Council [Resolution 1593](#), referring the situation in Darfur to the Court, is illegal in that it is inconsistent with articles 13(b) (First Ground), 115(b) (Second Ground) and 2 (Third Ground) of the Statute and that this illegality *de facto* deprives the Court of any jurisdictional basis on which to prosecute alleged crimes in Sudan – which is not a State Party, which has not accepted the Court's jurisdiction and for which the Statute has, to date, never entered into force pursuant to article 126(2) of the Statute.

116. The Defence also prays the Honourable Pre-Trial Chamber II to determine that, because the Statute was not in force for Sudan at the time of the crimes alleged in the warrants of arrest, articles 7 and 8 of the Statute are not applicable by virtue of the general principles of legality – *nullum crimen sine lege* – and of non-retroactivity of criminal offences, enshrined in articles 22(1) and 24(1) of the Statute, and that no alternative source of law, whether it be Sudanese national law, the international conventions in force for Sudan or the “general principles of law recognized by the community of nations”, is capable of curing this deficiency in a manner that satisfies the requirements of legality, strict construction and non-retroactivity of criminal offences, enshrined in articles 22(1), 22(2) and 24(1) of the Statute, thereby depriving the Court of the ability to exercise the jurisdiction vested in it by Security Council [Resolution 1593](#), if that resolution is even valid.

117. At the time of the conclusion and submission of this Challenge, Mr Ali Muhammad Ali Abd-Al-Rahman and his Defence are aware of the consequences it may have on the rights of the victims of the crimes alleged in the warrants of arrest should the Honourable Pre-Trial Chamber II uphold it. The proposals put forth by the Defence with a view to the Court’s consideration of Additional Principles of Reparations¹⁴⁸ could have pre-empted or counterbalanced these consequences. Although they were dismissed *in limine* without an examination of the merits – and without even being translated into a working language understood by some of the Judges to whom they were submitted – the Defence expresses its hope that the new circumstance created by this Challenge and the Honourable Pre-Trial Chamber II’s determination thereon can be viewed as a new circumstance clearing the way for consideration of the proposed Additional Principles – this time on the merits and as to their virtues. The Defence is not making a formal request at this stage on that matter, however, and instead invites the Legal Representatives of Victims appointed in the instant case to take up its proposals and to adopt them as their own, for the benefit of

¹⁴⁸ [ICC-02/05-01/20-98](#).

the victims they represent, as they have done in the past.¹⁴⁹ For its part, the Defence for Mr Ali Muhammad Ali Abd-Al-Rahman will support any initiative to that end.

**FOR THESE REASONS, LEAD COUNSEL HUMBL Y PRAYS THE HONOURABLE
PRE-TRIAL CHAMBER II:**

- 1/ TO UPHOLD** this Challenge pursuant to article 19(2)(a) of the Statute;
- 2/ TO HOLD** Security Council [Resolution 1593](#) to be illegal in respect of articles 13(b), 115(b) and/or 2 of the Statute and to rule that its illegality deprives the Court of jurisdiction to prosecute the crimes committed on the territory of Sudan;
- 3/ TO HOLD** that the crimes alleged in the warrants of arrest under articles 7 and 8 of the Statute cannot be alleged against Mr Ali Muhammad Ali Abd-Al-Rahman and that the Court cannot exercise the jurisdiction vested in it by Security Council [Resolution 1593](#) over those crimes, in accordance with the general principles of criminal law enshrined at articles 22(1), 22(2) and 24(1) of the Statute: the principle of legality (*nullum crimen sine lege*), the principle of strict construction and the principle of non-retroactivity *ratione personae* of criminal offences; **AND**
- 4/ Accordingly, TO HOLD THAT THE COURT HAS NO JURISDICTION** to prosecute Mr Ali Muhammad Ali Abd-Al-Rahman.

[signed]

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

Dated this 15 March 2021,

At The Hague, Netherlands

¹⁴⁹ [ICC-01/05-01/08-3649](#).