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

Date: **7 June 2021**

THE APPEALS CHAMBER

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

SITUATION IN DARFUR, SUDAN

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

Public Document

**Appeal Brief against Decision ICC-02/05-01/20-391
Rejecting the "*Exception d'incompétence*"**

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Introduction

1. The present brief (“Brief”) is filed in support of the OA8 appeal by the Defence for Mr Ali Muhammad Ali Abd-Al-Rahman (“Defence”) against Decision ICC-02/05-01/20-391 (“Decision under Appeal”)¹ rejecting the “*Exception d’incompétence*” (“Jurisdictional Challenge”) submitted by the Defence on 15 March 2021² pursuant to article 19(2) of the Statute of the Court (“Statute”). The brief lends support to the Notice of Appeal (“Notice of Appeal”), registered on 22 May 2021, instituting the OA8 appeal proceedings.³ It was submitted within the 21 days of notification of the Decision under Appeal laid down by regulation 64(2) of the Regulations of the Court (“RoC”). The Defence appeals the Decision on the basis of article 82(1)(a) of the Statute and rule 154 of the Rules of Procedure and Evidence (“RPE”).

Statement of the grounds of appeal

2. In accordance with regulation 64(2) of the RoC, the Defence sets out the following grounds of appeal. Each ground of appeal is addressed in a statement of the supporting factual and legal arguments, which is presented thus: 1/ a recapitulation of the arguments made in the Jurisdictional Challenge, provided solely to rehearse the context of the Decision under Appeal; 2/ a summary of the Decision under Appeal vis-à-vis the issue; 3/ a statement of the error(s) of fact, the error(s) of law and the denial of justice committed. Each ground of appeal is pleaded in the alternative since each ground alone suffices to invalidate the Decision under Appeal in its entirety.

3. The Defence further refers to all of the factual and legal arguments set out in support of its Jurisdictional Challenge and which, on account of the difference in the number of pages allowed – 20 for the present Brief under regulation 37(1) of the RoC versus 60 for the Jurisdictional Challenge under regulation 38(2)(c) of the RoC – could not be restated in full in the present Brief. As stated in the Notice of Appeal,⁴ the Defence prays the Honourable Appeals Chamber, by way of the relief sought pursuant

¹ [ICC-02/05-01/20-391](#).

² [ICC-02/05-01/20-302](#).

³ [ICC-02/05-01/20-406-tENG](#).

⁴ [ICC-02/05-01/20-406-tENG](#), p. 3.

to regulation 64(1)(e) of the RoC, to reverse the Decision under Appeal and grant it all the relief sought at page 57 of the Jurisdictional Challenge⁵ for the reasons set out therein. All of the arguments made in the Jurisdictional Challenge are, therefore, part and parcel of the Defence's arguments underpinning the present OA8 appeal.

1st Ground of appeal - Errors of fact, error of law and denial of justice concerning the 1st limb of the 1st head of jurisdictional challenge which is based on the definition of the word "situation" at article 13 of the Statute

4. **The Challenge:** At paragraphs 17 to 32 of the Jurisdictional Challenge, the Defence argued that [Resolution 1593](#), which referred the Situation in Darfur to the Court in 2005, did not meet the criteria of article 13(b) of the Statute in that the situation referred did not qualify as a "situation" amenable to referral to the Court by the United Nations Security Council pursuant to that article. The Defence argued that the "Situation in Darfur" was restricted to a particular, undefined geographic area in the territory of Sudan – "Darfur" – whereas the Security Council is empowered to refer a "situation" to the jurisdiction of the Court only when acting "under Chapter VII of the Charter of the United Nations". The Defence made the point that 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. In support, the Defence cited the lack of a legal or administrative definition of "Darfur",⁶ the circumstances in which [Resolution 1593](#) was adopted,⁷ and the statements made following its adoption,⁸ as well as the origins of the inclusion of, and the meaning of, the word "situation" during negotiations on article 13 of the Statute,⁹ which ruled out any discretion to limit the "situation" in relation to the "[TRANSLATION] situation under Chapter VII of the Security Council", *viz.* Sudan.¹⁰ The Defence also drew on the practice and previous decisions of the Court on the subject of how "situations" before it are defined.¹¹ The

⁵ [ICC-02/05-01/20-302](#), p. 57.

⁶ [ICC-02/05-01/20-302](#), para. 19.

⁷ [ICC-02/05-01/20-302](#), para. 18.

⁸ [ICC-02/05-01/20-302](#), para. 20.

⁹ [ICC-02/05-01/20-302](#), paras. 22-24.

¹⁰ [ICC-02/05-01/20-302](#), paras. 30-31.

¹¹ [ICC-02/05-01/20-302](#), paras. 27-30.

Defence concluded that the referral effected by [Resolution 1593](#) did not meet the criteria of article 13(b) of the Statute in that the referral did not correspond to the geographic parameters on whose basis the Security Council was acting under Chapter VII of the Charter of the United Nations, that is, the entire Situation in Sudan, at the time the Resolution was adopted. Since the situation referred by [Resolution 1593](#) to the Court did not correspond to the situation of which the Security Council was seized under Chapter VII of the Charter of the United Nations, the referral effected by the Resolution did not, therefore, fulfil the criterion laid down by article 13(b) of the Statute – that the Security Council must be acting under Chapter VII of the Charter of the United Nations – and so no referral had been made to the Court pursuant to article 13(b) of the Statute. In the absence of any other event conferring jurisdiction upon it under articles 13(a) or 13(c), which by virtue of article 12(2) of the Statute do not apply, the Defence moved the Honourable Pre-Trial II Chamber to hold that the Court had no valid basis for exercising its jurisdiction to prosecute the crimes committed in Sudan, and to hold that it lacked jurisdiction under article 19 of the Statute. The Defence refers to paragraphs 17 to 32 of the Jurisdictional Challenge for the particulars of its submissions on this first limb.

5. **The Decision:** At paragraphs 25 to 27, the Decision under Appeal rejects this 1st limb of the 1st head of jurisdictional challenge. In the first place, the Decision under Appeal maintains that the words “State” and “situation” are not synonymous and that the geographic areas which respectively correspond to these two entities do not necessarily overlap.¹² On the strength of that observation, which the Defence does not dispute,¹³ the Decision under Appeal concludes that it is unnecessary to address further the Defence’s arguments on the lack of a legal or administrative definition of “Darfur” “since a situation is defined by **the scope of the criminal action allegedly committed within it**, rather than by pre-determined boundaries established for other purposes”¹⁴ [Emphasis added]. The Decision under Appeal rejects the 1st limb of the

¹² [ICC-02/05-01/20-391](#), para. 26.

¹³ [ICC-02/05-01/20-302](#), para. 29.

¹⁴ [ICC-02/05-01/20-391](#), para. 27.

1st head of jurisdictional challenge solely for this reason, which is affected by a double error of fact and an error of law. By not looking at the other dimensions of the Defence arguments underpinning this 1st limb of the 1st head of jurisdictional challenge, it also commits a denial of justice.

6. **1st Error of fact:** The Decision under Appeal makes a first factual error concerning this point by considering that “Darfur” corresponds to the “scope of the criminal action allegedly committed”. That assertion disregards and, worse still, implicitly denies that crimes defined at article 5 of the Statute were committed in the rest of the territory of Sudan. The Decision under Appeal considers restriction of the referral effected by [Resolution 1593](#) to Darfur alone to be justified by the fact that the crimes which may fall within the subject-matter jurisdiction of the Court – within the meaning of article 5 of the Statute and subject to its temporal, geographic and/or personal jurisdiction – were committed exclusively in “Darfur”, as opposed to in the rest of the territory of Sudan. To so consider is, regrettably, incorrect from a factual point of view, as borne out by the account of the Security Council resolutions adopted on “Sudan” under Chapter VII which paragraph 18 of the Jurisdictional Challenge gives.¹⁵ Internal conflicts in Sudan are many and longstanding and are, for the most part, interwoven with tribal and/or economic dimensions – resource grabbing – which are the critical issues. On numerous occasions before and after [Resolution 1593](#), the Security Council triggered Chapter VII of the UN Charter to determine that those internal conflicts in Sudan posed a threat to international peace and security; footnote 10 of the Jurisdictional Challenge cited just a few such instances. At paragraph 24, the Jurisdictional Challenge further contended that crimes within the subject-matter jurisdiction of the Court, defined at article 5 of the Statute, had been committed in other parts of Sudan. The Decision under Appeal disregards the other Security Council resolutions – which it is careful not to mention – and makes an error of fact by taking the view that only “Darfur”, which in any case is not defined, is affected by the commission of crimes falling within article 5 of the Statute. In so doing,

¹⁵ [ICC-02/05-01/20-302](#), para. 18.

it denies the suffering endured by the victims of such crimes in the other regions of Sudan for the sole purpose of justifying the jurisdiction conferred on the Court as being limited to “Darfur” alone.

7. **2nd Error of fact:** The Decision under Appeal makes a further factual error in construing the Defence submissions as propounding that a “situation” must necessarily encompass a geographic area corresponding to the territory of a State, whereas the Defence was arguing that, when it comes to a referral pursuant to article 13(b) of the Statute, the “situation” referred must correspond to the geographic area of the “situation” under Chapter VII of the Charter. And yet the precise nature and scope of the Defence’s submission in this regard were made abundantly clear at paragraph 23 of the Jurisdictional Challenge.¹⁶ The Decision under Appeal erred in law by misrepresenting the Defence’s argument.

8. **Error of law:** The Decision under Appeal made a further error of law by not affording consideration to the Defence submissions on the etymology and the meaning of the word “situation” in the *travaux préparatoires* of the Court’s Statute adverted to at paragraphs 22 to 24 of the Jurisdictional Challenge.¹⁷ Therein the Defence recalled that the word “matter” in the draft Statute prepared by the International Law Commission¹⁸ had been replaced with the word “situation”,¹⁹ instead of using the word “case”, so as to safeguard the Court’s independence.²⁰ The restriction of the Security Council’s power to referral of a “situation” under Chapter VII of the Charter, rather than to one or more cases directed at individuals or to any other particular “sub-situation” within a “situation” under Chapter VII, constituted an essential guarantee aimed at shielding the judicial independence of the Court from the Security

¹⁶ [ICC-02/05-01/20-302](#), para. 23.

¹⁷ [ICC-02/05-01/20-302](#), paras. 22-24.

¹⁸ 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.”

¹⁹ [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.

²⁰ [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.

Council as political organ. The Decision under Appeal does not look at or make any mention of this second line of argument underpinning the 1st limb of the 1st head of jurisdictional challenge. Instead, it asserts, but is unable to draw on any previous decisions or authority, that a “situation” is defined by “**the scope of the criminal action allegedly committed within it**”.²¹ In so doing, the Decision makes an error of law by relying on a definition of “situation” in the sense of article 13(b) of the Statute that disregards the *travaux préparatoires*, dispenses as a result with the foremost guarantee of the judicial independence of the Court vis-à-vis the United Nations Security Council and is, above all, manifestly erroneous in that the “scope of the criminal action” defines a case, not a situation, as the Court held very early on:

Situations [...] are generally defined in terms of temporal, territorial and in some cases personal parameters [...]. Cases [are defined in terms of] specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects [...].²²

By considering that a “situation” is defined by “**the scope of the criminal action allegedly committed within it**”,²³ the Decision under Appeal therefore makes a manifest error of law in confusing the ambit of a situation with that of a case. This manifest error of law confirms the Defence’s fears about the need to confine the power of the Security Council to referral of a “situation” proper, as opposed to referral of a “case”, so as to safeguard the Court’s independence.²⁴

9. **Denial of justice:** This error of law also constitutes a denial of justice in that the Decision under Appeal dismisses the Defence’s arguments out of hand – on the sole basis, irrelevant and uncontested, of the difference between a State and a situation – and for no reason. The Defence recalls that in its OA5 Judgment the Honourable Appeals Chamber stated that “Chambers of the Court must indicate **with sufficient clarity** the grounds on which they base their decisions. **This duty is an element of the broader right to a fair trial** [...]” [Emphasis added].²⁵ In that Judgment, the

²¹ [ICC-02/05-01/20-391](#), para. 27.

²² [ICC-01/04-101-tEN](#), para. 65; [ICC-01/04-01/06-1-Corr-Red](#), para. 21; [ICC-01/04-02/06-20-Anx2](#), para. 21; [ICC-01/04-01/10-1](#), para. 4.

²³ [ICC-02/05-01/20-391](#), para. 27.

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

²⁵ [ICC-02/05-01/20-236 OA5](#), para. 1.

Honourable Appeals Chamber dismissed the Defence appeal on the basis that the decisions, whose lack of reasoning was challenged, were two oral decisions on “relatively minor” procedural matters.²⁶ By contrast, there is much at stake in the adjudication of the Jurisdictional Challenge and hence the Defence arguments, cast aside and unaddressed by the Decision under Appeal, needed to be examined and be the subject of a fully reasoned decision, irrespective of that decision’s outcome. By dismissing those arguments out of hand and for no reason, the Decision under Appeal runs counter to the Honourable Appeals Chamber’s holding in its OA5 judgment and commits a denial of justice which, on top of the two errors of fact and the error of law previously set out, and thus goes to invalidate the determination made in the Decision under Appeal on the 1st limb of the 1st head of jurisdictional challenge raised on the basis of article 13(b) of the Statute.

2nd Ground of appeal – Error of fact and law and denial of justice concerning the 2nd limb of the 1st head of jurisdictional challenge which is based on the connection between articles 13 and 115(b) of the Statute

10. **The Challenge:** At paragraphs 33 to 43 of the Jurisdictional Challenge, the Defence submitted that [Resolution 1593](#) was further inconsistent with article 13(b) of the Statute in that it decided, at paragraph 7, “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”. The Defence pointed out that, pursuant to the chapeau of article 13 of the Statute, “[t]he Court may exercise its jurisdiction with respect to a crime referred to in article 5” in each of the three scenarios defined in subparagraphs (a), (b) and (c), but must do so “**in accordance with the provisions of this Statute**” [Emphasis added].²⁷ It contended that, like any other article, article 115(b) of the Statute, which provides for the Court to be funded from “[f]unds provided by the United Nations, subject to the approval of the General Assembly, **in particular in relation to the expenses incurred due to**

²⁶ [ICC-02/05-01/20-236 OA5](#), para. 15.

²⁷ [ICC-02/05-01/20-302](#), para. 40.

referrals by the Security Council” [Emphasis added], belongs to the “provisions of this Statute” to which article 13 makes reference and that compliance with article 115(b) is part of the judicial remit of the Honourable Chambers of the Court under articles 39(2)(a) and 119(1).²⁸ The Defence concluded therefrom that the fact that paragraph 7 of [Resolution 1593](#) is inconsistent with article 115(b) of the Statute on two counts – (i) by not funding the Court’s activities in connection with the referral it effects; and (ii) by not raising the matter before the General Assembly of the United Nations²⁹ – entails that [Resolution 1593](#) could not constitute a resolution authorizing the Court to exercise its jurisdiction **“in accordance with the provisions of this Statute”** as article 13(b) of the Statute requires³⁰ and that to regard it as such would in addition violate the right of Mr Ali Muhammad Ali Abd-Al-Rahman, under article 67(1) of the Statute, to a hearing that complies with the provisions of the Statute, article 115(b) included.³¹ The Defence concluded that, given that it is inconsistent with article 115(b) of the Statute, [Resolution 1593](#) could not confer jurisdiction on the Court in connection with the Situation in Darfur or in Sudan and that, absent an alternative head of jurisdiction under article 13(a) or 13(c) – ruled out by article 12(2) of the Statute – the Court therefore lacks jurisdiction to prosecute in Sudan.³² The Defence refers to paragraphs 33 to 43 of the Jurisdictional Challenge for the particulars of its submissions on this 2nd head of jurisdictional challenge.

11. **The Decision:** At paragraphs 28 to 30, the Decision under Appeal rejects from the outset the Defence arguments on this second head of jurisdictional challenge for being redundant given the Defence’s previous requests concerning article 115(b) of the Statute.³³ The Decision under Appeal goes so far as to “strongly censo[r]” the Defence for reiterating arguments on the subject which were previously rejected.³⁴ It is the Defence’s submission that the Decision under Appeal has addressed this 2nd limb of

²⁸ [ICC-02/05-01/20-302](#), paras. 35-37.

²⁹ [ICC-02/05-01/20-302](#), para. 38.

³⁰ [ICC-02/05-01/20-302](#), para. 40.

³¹ [ICC-02/05-01/20-302](#), para. 41.

³² [ICC-02/05-01/20-302](#), para. 43.

³³ [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](#).

³⁴ [ICC-02/05-01/20-391](#), para. 29.

the 1st head of jurisdictional challenge in such a way as to be affected by error of fact and error of law and to constitute a denial of justice.

12. The Defence further submits that the Decision under Appeal’s “censor[ing]” of that argument is inconsistent with and a violation of the independence and freedom of the Defence under article 6(1) of the Code of Professional Conduct for counsel (CPCC) and contributes, with other reasons in the Decision under Appeal, to a perception of partiality and bias on the part of the Honourable Pre-Trial Chamber II against the Defence, which, if established, would violate the right of Mr Ali Muhammad Ali Abd-Al-Rahman to an impartial hearing under article 67(1) of the Statute. Other such reasons in the Decision under Appeal include the one which appears at paragraph 24 and levels an accusation of bad faith at the Defence (“dubious in terms of good faith”) for having drawn conclusions from, without calling into question, the agreement on the facts reached with the Office of the Prosecutor (“OTP”) regarding the non-international character of the ongoing armed conflict in Sudan.³⁵ The Defence does not see how drawing conclusions from that agreement without calling it into question could be cast as bad faith. To discern bad faith where the Defence has done nothing more than draw conclusions, in good faith, from the agreement reached with the OTP contributes, together with the unfounded accusation of redundancy, to a perception of bias and lack of impartiality towards the Defence. For the limited needs of the present appeal, the Defence will confine itself to expressing its disappointment and will not rely on this matter as a ground of appeal; regarding this point, it refers to its oral observations made pursuant to rule 122(3) of the RPE.³⁶

13. **Error of fact:** The rejection of the 2nd limb of the 1st head of jurisdictional challenge is affected by error of fact in that it misapprehends the object, nature, substance and scope of the Defence submissions. Unlike its earlier requests to which the Decision under Appeal refers, the object of the Defence submissions on article 115(b) of the Statute contained in the Jurisdictional Challenge was not to move

³⁵ [ICC-02/05-01/20-391](#), para. 24.

³⁶ [ICC-02/05-01/20-T-007-Red-FRA](#), p. 14, line 19 to p. 18, line 4.

the Court to make a request for the arrears in contributions from the UN under article 115(b) of the Statute in connection with the Situation in Darfur to be paid. The Defence submissions did nothing more than draw conclusions from the aforementioned violation of article 115(b), on two counts, by paragraph 7 of [Resolution 1593](#) as regards its legality vis-à-vis the Statute, and concluded that the resolution could not be a resolution that, under article 13 of the Statute, confers jurisdiction on the Court “in accordance with the provisions of this Statute”. This difference in object (a determination of lack of jurisdiction, not a request for payment of outstanding contributions), in nature (ground for challenging jurisdiction pursuant to article 19(2) of the Statute, not simply a request), in substance (challenge to the Court’s jurisdiction, not a request for funding) and in scope (for jurisdiction to be declined and prosecutions to end, not solely for a violation of the Statute to be found) was made explicit at paragraph 34 of the Jurisdictional Challenge. The Decision under Appeal paid no attention to those differences and seized on the reference to article 115(b) of the Statute – a feature common to the previous requests for payment of outstanding financial contributions and to the 2nd limb of the 1st head of jurisdictional challenge – so as to reject from the outset that 2nd limb out of hand and to censure the Defence. In so doing, it made an error of fact by misapprehending the object, nature, substance and scope of the 2nd limb of the 1st head of jurisdictional challenge.

14. **Error of law:** The Decision under Appeal also made an error of law at paragraph 28 by marking article 115 of the Statute out as a statutory provision which is the preserve of the Assembly of States Parties and outside the judicial remit of the Court.³⁷ The Defence had expressly stated why article 115(b) of the Statute was not excluded from the judicial oversight of legality vis-à-vis the Statute with which the Honourable Chambers are tasked by articles 39(2)(a) and 119(1) of the Statute combined.³⁸ The Decision under Appeal summarily sweeps these arguments aside,

³⁷ [ICC-02/05-01/20-391](#), para. 28.

³⁸ [ICC-02/05-01/20-302](#), paras. 35-37.

leaving them unaddressed, for the following reasons: (i) “the Defence has no legal standing to either evaluate nor provide recommendations regarding the Court’s financial management”; (ii) “there is no basis for the Chamber to engage in the financial matters of the Court”; and (iii) “the judiciary cannot play any role in the budgetary process, let alone in the negotiation of any financial agreements”. These reasons address the earlier Defence requests under article 115(b) for funding from the UN. They are irrelevant to a consideration of the impact of the lack of funding on the legality of [Resolution 1593](#) vis-à-vis article 13 of the Statute and on the jurisdiction of the Court. The Honourable Pre-Trial Chamber II was no longer being asked “to engage in the financial matters of the Court” or to “play any role in the budgetary process”, but rather to discharge its judicial remit under article 19 of the Statute by finding a violation of article 115(b) of the Statute and accordingly drawing conclusions on the legality of [Resolution 1593](#) under article 13 of the Statute and on the jurisdiction of the Court. The article 13 condition that the Court exercise its jurisdiction “in accordance with the provisions of this Statute” and the article 67(1) condition that Mr Ali Muhammad Ali Abd-Al-Rahman be heard “having regard to the provisions of this Statute” permit of no exception regarding article 115(b) of the Statute. By declining to exercise that jurisdiction on the basis that article 115(b) of the Statute fell outside of it, the Decision under Appeal therefore made an error of law.

15. **Denial of justice:** Like the previous error of law invalidating the Decision under Appeal in respect of the 1st head of jurisdictional challenge, this error of law also constitutes a denial of justice in that the Decision under Appeal dismisses the Defence arguments out of hand – for the sole and erroneous reason of their supposed redundancy given the previous Defence requests – and for no reason. By dismissing those arguments out of hand and for no reason, the Decision under Appeal runs counter to the Honourable Appeals Chamber’s holding in its OA5 judgment and commits a denial of justice which, on top of the errors of fact and of law previously set out, thus goes to invalidate the determination made in the Decision under Appeal on

the 2nd limb of the 1st head of jurisdictional challenge raised on the basis of article 115(b) of the Statute.

3rd Ground of appeal – Error of fact and of law and denial of justice concerning the 3rd limb of the 1st head of jurisdictional challenge which is based on the connection between articles 2 and 13 of the Statute

16. **The Challenge:** At paragraphs 44 to 52 of its Jurisdictional Challenge, the Defence submitted that [Resolution 1593](#) ceased to be operative as a result of the withdrawal of the United Nations Mission in Darfur (UNAMID) and its replacement by the United Nations Mission in the Sudan (UNITAMS) – with no mandate to support the Court’s operations³⁹ – which were decided by Resolution 2524 of 3 June 2020⁴⁰ and Resolution 2559 of 22 December 2020⁴¹ and which took effect as at 31 December 2020.⁴² The Defence relied on articles 2 and 87(6) of the Statute and the relevant provisions of the “Negotiated Relationship Agreement between the International Criminal Court and the United Nations” (“[UN-ICC Agreement](#)”), in particular articles 3, 10(1) and 18(1) thereof.⁴³ The Defence argued that, like the violation of article 115(b) of the Statute raised in support of the 2nd limb of the 1st head of jurisdictional challenge, the withdrawal of all UN logistical or security support indispensable to the Court’s operations in Sudan constituted a violation of article 2 of the Statute and the [UN-ICC Agreement](#), entailing *inter alia* that [Resolution 1593](#) could no longer be described as a Security Council resolution allowing the Court to exercise its jurisdiction under article 13 of the Statute “in accordance with the provisions of this Statute”. By the same token as before, the Defence concluded that, absent an alternative head of jurisdiction under article 13(a) or 13(c) – which article 12(2) of the Statute rules out – the Court no longer had jurisdiction to prosecute in Sudan on the basis of [Resolution 1593](#), which no longer met the criteria of article 13 of the Statute.⁴⁴ The Defence refers to paragraphs

³⁹ Security Council Report, [What’s in Blue](#), 3 June 2020.

⁴⁰ United Nations Security Council, [Resolution 2524](#), 3 June 2020.

⁴¹ United Nations Security Council, [Resolution 2559](#), 22 December 2020.

⁴² [ICC-02/05-01/20-302](#), para. 46.

⁴³ [ICC-02/05-01/20-302](#), para. 45.

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

44 to 52 of the Jurisdictional Challenge for the particulars of its submissions on this 3rd limb of the 1st head of jurisdictional challenge.

17. **The Decision:** At paragraphs 31 to 35, the Decision under Appeal gives a bizarre summary of the Defence submissions underpinning this 3rd head of jurisdictional challenge as suggesting that [Resolution 1593](#) was replaced by [Resolution 2559](#), whereas the Defence never made any such submission, be it in the Jurisdictional Challenge or in any other filing.⁴⁵ The Decision under Appeal relies on a quotation from the decision of the Honourable Presidency on the Defence request made pursuant to article 115(b) – “issues concerning the general administration of the Court, including in matters of diplomatic relations, do not give rise to an entitlement to a remedy for parties in the proceedings”⁴⁶ – to decline to entertain the substance of the Defence’s arguments on the 3rd limb of the 1st head of jurisdictional challenge.⁴⁷ The Decision under Appeal confines itself to refuting the idea that the Security Council may cancel a previous referral effected pursuant to article 13(b) of the Statute,⁴⁸ and does so by adverting to the limits which article 16 of the Statute places on the Security Council’s powers to suspend such a referral.⁴⁹ None of these aspects belonged or held the slightest relevance to an examination of the Defence arguments underpinning the 3rd limb of the 1st head of jurisdictional challenge, which were limited to submitting that, as a result of the termination of logistical and security support for the Court’s activities in Sudan, [Resolution 1593](#) no longer met the criterion of article 13 of the Statute relating to the exercise of the jurisdiction of the Court “in accordance with the provisions of this Statute”, specifically article 2 thereof. It is the Defence’s submission that the Decision under Appeal has addressed this 3rd limb of the 1st head of jurisdictional challenge in such a way as to be affected by error of fact and error of law and to constitute a denial of justice.

⁴⁵ [ICC-02/05-01/20-391](#), para. 31.

⁴⁶ [ICC-02/05-01/20-391](#), para. 31, referring to [ICC-02/05-01/20-180](#), para. 4.

⁴⁷ [ICC-02/05-01/20-391](#), para. 32.

⁴⁸ [ICC-02/05-01/20-391](#), para. 33.

⁴⁹ [ICC-02/05-01/20-391](#), para. 34.

18. **Error of fact:** In the first place, the Decision under Appeal makes an error of fact by misapprehending the nature and substance of the Defence submissions underpinning the 3rd head of jurisdictional challenge. At no point did the Defence claim that [Resolution 1593](#) had been “replaced” by [Resolution 2559](#) or by any other instrument, or that the Security Council had deliberately brought the referral of the Situation in Darfur effected by [Resolution 1593](#) to an end. All that the Defence was arguing was that the termination of logistical and security support to the Court’s operations in Sudan was inconsistent with article 2 of the Statute and the [UN-ICC Agreement](#) and that, as a result, the Court was no longer in a position to exercise its jurisdiction over the situation “in accordance with the provisions of this Statute”, and article 2 in particular, as article 13 of the Statute, pursuant to which the referral had been effected, required. By misapprehending the nature of the Defence submission and construing it as arguing that the Security Council had “replaced” [Resolution 1593](#) or had otherwise brought it to an end, the Decision under Appeal therefore committed an error of fact.

19. **Error of law:** This error of fact gave rise to an error of law by preventing the Honourable Pre-Trial Chamber II from considering the Defence’s detailed submissions regarding the impact of the violation of article 2 of the Statute on the validity of the referral effected by [Resolution 1593](#) vis-à-vis the specific criterion of article 13 concerning the exercise of the jurisdiction of the Court “in accordance with the provisions of this Statute” and vis-à-vis the right of Mr Ali Muhammad Ali Abd-Al-Rahman under article 67(1) of the Statute to a hearing “having regard to the provisions of this Statute”.⁵⁰

20. **Denial of justice:** Like the previous errors of law invalidating the Decision under Appeal in respect of the 1st and 2nd limbs of the 1st head of jurisdictional challenge, this error of law also constitutes a denial of justice in that the Decision under Appeal dismisses the Defence arguments out of hand and for no reason. By dismissing those arguments out of hand and for no reason, the Decision under Appeal runs

⁵⁰ [ICC-02/05-01/20-302](#), para. 51.

counter to the Honourable Appeals Chamber's holding in its OA5 judgment and commits a denial of justice which, on top of the errors of fact and of law previously set out, thus goes to invalidate the determination made in the Decision under Appeal on the 3rd limb of the 1st head of jurisdictional challenge raised on the basis of article 2 of the Statute.

4th Ground of appeal – Errors of fact, errors of law and denial of justice concerning the 2nd head of jurisdictional challenge which is based on the connection between articles 13(b), 22(1) and 24(1) of the Statute

21. **The Challenge:** At paragraphs 53 to 114 of its Jurisdictional Challenge, the Defence submitted that the Court could not exercise its jurisdiction over the crimes stated in the charges in that to do so would run counter to the principles which articles 22(1), 22(2) and 24(1) of the Statute respectively enshrine: *nullum crimen sine lege*, strict construction of the definitions of crimes and non-retroactivity *ratione personae* of criminal law. In short, it was the Defence's submission that, absent ratification of the Statute of the Court by Sudan,⁵¹ the sole crimes in the jurisdiction of the Court for which Mr Ali Muhammad Ali Abd-Al-Rahman could be held responsible under articles 22(1) and 24(1) of the Statute were 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.⁵² Following an extensive survey of Sudanese national law,⁵³ the international treaties applicable to Sudan⁵⁴ and customary international law,⁵⁵ the Defence observed that none of those applicable sources of law defined the specific crimes stated in the warrants of arrest.⁵⁶ The Defence accordingly concluded that Mr Ali Muhammad Ali Abd-Al-Rahman could not, under articles 22(1), 22(2) and 24(1) of the Statute, be prosecuted or held potentially responsible – subject to the OTP's evidence – on the basis of those crimes and

⁵¹ [ICC-02/05-01/20-302](#), paras. 66, 73-74.

⁵² [ICC-02/05-01/20-302](#), paras. 75-89.

⁵³ [ICC-02/05-01/20-302](#), paras. 69-70, 91, 103, 106.

⁵⁴ [ICC-02/05-01/20-302](#), paras. 67-68, 92-94, 104-110.

⁵⁵ [ICC-02/05-01/20-302](#), paras. 95-100, 111-113.

⁵⁶ [ICC-02/05-01/20-302](#), paras. 101, 114.

concluded that the Court could not, in respect of him, exercise the jurisdiction that the Security Council had intended to refer to it pursuant to article 13(b) of the Statute.⁵⁷ The Defence refers to paragraphs 53 to 114 of the Jurisdictional Challenge for the particulars of its submissions on this 2nd head of jurisdictional challenge.

22. **The Decision:** At paragraphs 36 to 41, the Decision under Appeal rejects the Defence arguments underpinning this 2nd head of jurisdictional challenge for the sole reason that the Statute had entered into force on 1 July 2002 – *viz.* before the offences of 2003-2004 alleged in the charges –⁵⁸ and sufficed to comply with the principles of *nullum crimen sine lege* and non-retroactivity *ratione personae* enshrined at articles 22(1) and 24(1) of the Statute.⁵⁹ The Decision under Appeal goes on to say that, were the exercise of the jurisdiction accorded under article 13(b) of the Statute by virtue of [Resolution 1593](#) to be made contingent on the crimes in the jurisdiction of the Court being defined in the national or international law applicable to Sudan, article 13(b) of the Statute would be deprived of effectiveness [*effet utile*] vis-à-vis non-party States such as Sudan.⁶⁰ The Decision under Appeal accordingly concludes that it is unnecessary to seek alternative sources of criminal offences to articles 7 and 8 of the Statute in the national or international law applicable to Sudan and, refusing to engage in such an exercise, it rejects the 2nd ground of jurisdictional challenge.⁶¹ It is the Defence's submission that the Decision under Appeal has addressed this 2nd head of jurisdictional challenge in such a way as to be affected by one error of fact and at least two errors of law and to constitute a denial of justice.

23. **Error of fact:** At paragraph 37, the Decision under Appeal makes a first error of fact by misapprehending the Defence submissions that underpin the 2nd head of jurisdictional challenge, summarizing them thus:

The Defence appears to suggest that, in order for the Court's temporal jurisdiction to exist, it would be necessary not only that the charged events took place after the entry into force of the Statute, **but also that**, at the time of their commission, the relevant crimes were

⁵⁷ [ICC-02/05-01/20-302](#), paras. 101, 114.

⁵⁸ [ICC-02/05-01/20-391](#), para. 36.

⁵⁹ [ICC-02/05-01/20-391](#), paras. 37-40.

⁶⁰ [ICC-02/05-01/20-391](#), para. 41.

⁶¹ [ICC-02/05-01/20-391](#), para. 42.

already criminalised and punished as such either by the criminal laws of the State which would ordinarily have jurisdiction, or as a matter of customary international law.⁶²

Thus the Decision under Appeal construes the Defence submissions as requiring a twofold test based on the cumulative conditions of entry into force of the Statute and criminalization under the applicable national or international law. At no point did the Defence claim those two conditions to be cumulative, but alternative instead. Paragraph 88 of the Jurisdictional Challenge makes that plain:

[TRANSLATION] **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.⁶³

The cumulative use of “[TRANSLATION] notwithstanding” and “[TRANSLATION] nonetheless” left no room for ambiguity in the Defence submissions: for the Court to exercise the jurisdiction accorded by [Resolution 1593](#), Sudan had to be a State Party – which it is not – or the crimes stated in the charges had to be offences under national or the international law applicable to Sudan. The two conditions were, therefore, clearly presented as alternative, and not as cumulative, unlike how they are portrayed by the Decision under Appeal which makes a factual error in so doing.

24. **Error of fact and law:** The Decision under Appeal makes a further error of fact and law by accepting at paragraph 36 that the crimes which took place on the territory of Sudan alleged in the charges did so “between August 2003 and March 2004, i.e. after the entry into force of the Statute (jurisdiction *ratione temporis*)” and thus meet the condition of non-retroactivity *ratione personae* at article 24(1) of the Statute.⁶⁴ In 2003-2004, the Statute was in force for States Parties. So the Defence expressly pointed out at paragraph 65 of the Jurisdictional Challenge:

[TRANSLATION] 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

⁶² [ICC-02/05-01/20-391](#), para. 37.

⁶³ [ICC-02/05-01/20-302](#), para. 88.

⁶⁴ [ICC-02/05-01/20-391](#), para. 36.

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.”⁶⁵

Sudan is not a State Party. It was not one at the time of the offences alleged in the charges. Sudan therefore comes within the category of “[TRANSLATION] States that were not parties as at 1 July 2002”, in respect of which entry into force is governed by article 126(2) of the Statute. Since the event required by article 126(2) of the Statute for the Statute to enter into force for Sudan never materialized, the Statute of the Court did not enter into force for Sudan on 1 July 2002 or on any subsequent date. The Decision under Appeal fails to address that particular Defence argument founded on article 126(2) of the Statute, to which it does not even refer. Thus the Decision under Appeal makes an error of fact and law at paragraph 36 by taking 1 July 2002 as the date of entry into force of the Statute, whereas, at the time of writing, the Statute of the Court has never entered into force for Sudan.

25. **Error of law:** The Decision under Appeal makes a further error of law at paragraph 41 in seeing tension between article 13(b) of the Statute and the principles of *nullum crimen sine lege* and non-retroactivity *ratione personae* enshrined at articles 22(1) and 24(1) of the Statute. As the Decision under Appeal puts it,

the Defence’s reading of the relevant statutory provisions, to the effect that a UNSC referral would only be compliant with the principle of legality and non-retroactivity of criminal law to the extent that it covers conducts already adequately criminalised either by the relevant State or States, or as a matter of customary international law at the time of their commission, **would result in restricting its scope to such an extent as to call into question the very raison d’être of that particular triggering mechanism.**⁶⁶ [Emphasis added].

The Defence addressed the point in express and detailed terms at paragraphs 79 to 82 of its Jurisdictional Challenge, ruling out any tension between article 13(b) and articles 22(1) and 24(1) of the Statute and underscoring their congruence:

79. [TRANSLATION] [...] 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. [...] 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,

⁶⁵ [ICC-02/05-01/20-302](#), para. 65.

⁶⁶ [ICC-02/05-01/20-391](#), para. 41.

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 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 in a position 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 at 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,⁶⁷ the offence must have been proscribed as criminal under national law or the international law applicable at the material time.

26. Thus the Decision under Appeal made an error of law by disregarding the fact that article 13 was confined to conferring jurisdiction on the Court to prosecute “in accordance with the provisions of this Statute”, which include articles 22(1) and 24(1). There is nothing extraordinary about requiring that, in accordance with articles 22(1) and 24(1) of the Statute, the crimes prosecuted on the basis of a Security Council referral were, at the material time, offences applicable to the person charged. The aim is simply to ensure that the basic human rights guarantees which those provisions enshrine are respected. That condition is wholly consonant with the condition which the chapeau of article 13 lays down: the jurisdiction of the Court conferred by article 13(b) must be exercised “in accordance with the provisions of this Statute”. It does not in any way detract from the effectiveness [*effet utile*] of article 13(b) of the Statute, insofar as national law, international treaties and customary international law are traditionally accepted sources of definitions of criminal offences. The Defence noted that that condition would, in any case, have been no impediment to the prosecution of those war crimes defined at article 8(2)(a) of the Statute, even absent ratification by Sudan.⁶⁸ Prosecution of the other crimes alleged in the charges, absent, in violation of articles 22(1) and 24(1) of the Statute, an applicable criminal offence, on

⁶⁷ United Nations, [Treaty Collection, Chap. IV.4](#), “Sudan”.

⁶⁸ [ICC-02/05-01/20-302](#), para. 107.

the sole basis of the Security Council referral effected by [Resolution 1593](#) is ruled out by the fact that article 13 of the Statute is confined to specifying the conditions of exercise of the jurisdiction of the Court “in accordance with the provisions of this Statute”, which provisions include articles 22(1), 24(1) and the right of Mr Ali Muhammad Ali Abd-Al-Rahman under article 67(1) of the Statute to a hearing “having regard to the provisions of this Statute”. The referral of a situation by the Security Council under article 13(b) of the Statute permits of no exception to these basic guarantees. Quite the contrary: it enables the Court to exercise its jurisdiction, including over crimes committed on the territory and/or by nationals of a non-party State, such as Sudan, in accordance with basic human rights and fair trial guarantees. The Decision under Appeal therefore made an error of law by not affording consideration to the crucial connection between articles 13, 22(1) and 24(1) of the Statute and by refusing to explore the alternative sources for the criminal offences stated in the charges capable of satisfying the principles of *nullum crimen sine lege* and non-retroactivity *ratione personae* enshrined at articles 22(1) and 24(1) of the Statute.

27. **Denial of justice:** Like the previous errors of law invalidating the Decision under Appeal in respect of the 1st, 2nd and 3rd limbs of the 1st head of jurisdictional challenge, this error of law also constitutes a denial of justice in that the Decision under Appeal dismisses the Defence arguments on the lack of alternative criminal offences applicable to the crimes stated in the charges out of hand and, therefore, for no reason. By dismissing those arguments out of hand and for no reason, the Decision under Appeal runs counter to the Honourable Appeals Chamber’s holding in its OA5 judgment and commits a denial of justice which, on top of the errors of fact and of law previously set out, thus goes to invalidate the determination made in the Decision under Appeal on the 2nd head of jurisdictional challenge raised on the basis of articles 22(1) and 24(1) of the Statute.

FOR THESE REASONS, LEAD COUNSEL HUMBLY PRAYS THE HONOURABLE APPEALS CHAMBER:

1/ TO REVERSE the Decision under Appeal;

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 7 June 2021

At The Hague, Netherlands