

The Situation in Sudan

10.1 REFLECTION: THE SITUATION IN SUDAN

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CONTEXT

In February 2003, violence erupted in Sudan's western Darfur region and quickly evolved into a civil war between the Government of Sudan and several organised armed groups, in particular the Sudanese Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM).¹ Following the 25 April 2003 SLM/A attack on an airport in northern Darfur, the Government of Sudan, led by then-President Omar Al Bashir, issued a general call for the mobilisation of the Janjaweed militia in response.² Sudanese government forces – including the Sudanese armed forces and their allied Janjaweed militia – launched a counter-insurgency campaign in Darfur, a core component of which were unlawful attacks on the civilian population, largely belonging to the Fur, Masalit, and Zaghawa communities, who were perceived to be aligned with one or more of the various armed groups.³

Within a year of the campaign's start, the United Nations estimated that more than 750,000 people were displaced in Darfur and upwards of 110,000 had fled across the border into Chad.⁴ The refugees and internally displaced came bearing accounts of horrific violence against the civilian population.⁵ By December 2003,

¹ J. Flint and A. de Waal, *Darfur: A New History of a Long War* (London: Zed Books, 2008).

² *Prosecutor v. Al Bashir*, Warrant for the Arrest of Omar Hassan Ahmad Al Bashir (ICC-02/05-01/09), 4 March 2009 (hereafter Al Bashir Warrant – First Decision).

³ *Ibid.*

⁴ UN News, 'Sudan: Humanitarian crisis in Darfur deteriorating, U.N. agencies say', 30 March 2004.

⁵ Including accounts of killings, sexual violence, abductions, destruction of food and water sources, burning of villages, looting of private property, and forced displacement. Human

UN Secretary-General Kofi Annan voiced alarm at the ‘reports of widespread abuses against civilians, including killings, rape and the burning and looting of entire villages’.⁶

On 18 September 2004, the UN Security Council adopted Resolution 1564 requesting that the Secretary-General ‘rapidly establish an international commission of inquiry in order immediately to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable’.⁷ The International Commission of Inquiry on Darfur, chaired by Antonio Cassese, began its work in late October 2004. It submitted a full report on its findings to the Secretary-General on 25 January 2005, and found that,

Government forces and militias conducted indiscriminate attacks, including killing of civilians, torture, enforced disappearances, destruction of villages, rape, and other forms of sexual violence, pillaging and forced displacement, throughout Darfur. These acts were conducted on a widespread and systematic basis, and therefore may amount to crimes against humanity. The extensive destruction and displacement have resulted in a loss of livelihood and means of survival for countless women, men, and children. In addition to the large-scale attacks, many people have been arrested and detained, and many have been held incommunicado for prolonged periods and tortured. The vast majority of the victims of all of these violations have been from the Fur, Zaghawa, Massalit, Jebel, Aranga and other so-called ‘African’ tribes.⁸

The Report’s findings that the Sudanese government forces and militias had committed acts that may have amounted to multiple crimes against humanity and war crimes were overshadowed in media reports by the fact that the Commission did not make a finding of genocide due to insufficient information on the specific intent required for the crime.⁹

Rights Watch, *Darfur in Flames: Atrocities in Western Sudan* 16(5) (A), April 2004, 13–35; Amnesty International, ‘Darfur: “Too many people killed for no reason”’, 3 February 2004 (HRW, *Darfur in Flames*) 9–25.

⁶ UN News, ‘Annan alarmed at reports of widespread abuses of civilians in Darfur, Sudan’, 9 December 2003.

⁷ UN Security Council, S/RES/1564 (2004), 18 September 2004, § 12.

⁸ Report of the International Commission of Inquiry on Darfur to the Secretary-General, Pursuant to Security Council Resolution 1564 (2004) of 18 September 2004, UN Doc. S/2005/60, 1 February 2005, 3 (hereafter Commission’s Final Report).

⁹ Commission’s Final Report, *supra* note 8, at 4; W. Hoge, ‘UN finds crimes, not genocide in Darfur’, *New York Times*, 1 February 2005; C. Lynch, ‘UN panel finds no genocide in Darfur but urges tribunals’, *Washington Post*, 1 February 2005; E. MacAskill, ‘Sudan’s Darfur crimes not genocide, says UN Report’, *Guardian* (UK), 1 February 2005. For a critical analysis of the Commission’s finding, see D. Luban, ‘Calling Genocide by Its Rightful Name: Lemkin’s Word, Darfur, and the UN Report’ 7(1) *Chicago Journal of International Law* (2006), Article 14, 303–320.

THE DARFUR CASES

On 31 March 2005, the Security Council, through its Resolution 1593 and acting under its Chapter VII powers, referred the situation in Darfur to the ICC and required Sudan to give its full cooperation.¹⁰ This marked the first time that the Security Council had successfully referred a situation to the ICC. It would also be the first ICC investigation on the territory of a non-state party to the Rome Statute.

The Office of the Prosecutor, then under Luis Ocampo, opened its investigation on 1 June 2005,¹¹ focusing on allegations of genocide, war crimes, and crimes against humanity committed in Darfur, Sudan, since 1 July 2002. Since April 2007, the ICC has issued summons to appear and/or warrants for arrest for seven men alleged to bear responsibility for various crimes committed in Darfur: Omar Hassan Ahmad Al Bashir; Ali Muhammad Ali Abd-Al-Rahman; Ahmad Harun;¹² Abdel Raheem Muhammad Hussein;¹³ Bahr Idriss Abu Garda;¹⁴ Abdallah Banda Abakaer Nourain;¹⁵ and Saleh Mohammed Jerbo Janus.¹⁶

¹⁰ UN Security Resolution 1593, S/Res/1593 (2005), 31 March 2005; UN News, 'Security Council refers situation in Darfur, Sudan, to Prosecutor of International Criminal Court', 31 March 2005.

¹¹ International Criminal Court, 'The Prosecutor of the ICC opens investigation in Darfur', 6 June 2005.

¹² In April 2007, the Pre-Trial Chamber found reasonable grounds to believe that Mr Harun, in his role as Minister of State for the Interior, was criminally responsible for commission of crimes against humanity and war crimes between August 2003 and March 2004 in predominantly Fur localities in West Darfur. Following the April 2019 coup, Mr Harun was arrested by local authorities in Sudan, where he is believed to remain in custody. As he has not been transferred to the seat of the Court, his case remains at the pre-trial stage. *Prosecutor v. Harun and Abd-Al-Rahman*, Warrant for the Arrest of Ahmad Harun (ICC-02/05-01/07), 27 April 2007.

¹³ On 1 March 2012, the Pre-Trial Chamber held there were reasonable grounds to believe that Mr Hussein, while Minister of the Interior and the Sudanese President's Special Representative in Darfur, was responsible for crimes against humanity and war crimes relating to attacks on civilians in predominantly Fur localities in West Darfur during 2003 and 2004. Arrested after the April 2019 coup d'état, Mr Hussein is believed to be in custody in Sudan. Mr Hussein's case remains at the pre-trial stage. *Prosecutor v. Hussein*, Warrant of Arrest for Abdel Raheem Muhammad Hussein (ICC-02/05-01/12), 1 March 2012.

¹⁴ The Chamber did not confirm charges – comprising three counts of war crimes arising from a JEM attack on an African Union Mission base, Military Group Site (MGS) Haskanita, in North Darfur on 29 September 2007 – and later rejected the Prosecutor's application to appeal the decision. The case is considered closed, barring presentation of new evidence by the prosecution. *Prosecutor v. Abu Garda*, Decision on the 'Prosecution's Application for Leave to Appeal the "Decision on the Confirmation of Charges"' (ICC-02/05-02/09-267), 23 April 2010.

¹⁵ On 7 March 2011, Pre-Trial Chamber I confirmed war crimes charges against Mr Banda relating to the 2007 attack on Military Group Site (MGS) Haskanita and committed Mr Banda to trial. On 11 September 2014, the Chamber issued an arrest warrant to ensure his presence at trial. Mr Banda remains at large, with his trial postponed until his arrest and transfer to the Court. *Prosecutor v. Banda*, Warrant of Arrest for Abdallah Banda Abakaer Nourain (ICC-02/05-03/09-606), 11 September 2014.

¹⁶ While war crimes charges against Mr Jerbo – related to the 2007 attack on MGS Haskanita – were confirmed, the Chamber terminated the trial proceedings in October 2013, based on

Prosecutor v. Omar Hassan Ahmad Al Bashir

In its 2009 Decision on the Prosecution's Application for a Warrant of Arrest (First Decision), Pre-Trial Chamber I determined there were reasonable grounds to believe that around April 2003, along with other top political and military leaders of the Sudanese government, Mr Al Bashir – then President of the Republic of Sudan and the commander-in-chief of the Sudanese armed forces – established a common plan to carry out a counter-insurgency campaign against armed groups opposing the government, and that a core component of the campaign was the unlawful attack on that part of the civilian population of Darfur belonging largely to the Fur, Masalit, and Zaghawa groups; and he used the 'apparatus' of the Sudanese state to direct hundreds of attacks against the Fur, Masalit, and Zaghawa civilian population taking no direct part in hostilities.¹⁷ In issuing the warrant, the Chamber held that there were reasonable grounds to believe that Mr Al Bashir was criminally responsible for the war crimes of attacking civilians and pillage, arising from various attacks taking place between August 2003 and May 2008 on specified localities,¹⁸ and the crimes against humanity of murder, extermination, forcible transfer, and rape arising from attacks on named localities in West and South Darfur in various periods between August/September 2003 and May 2008.

In its second decision regarding the warrant of arrest (Second Decision), issued on 12 July 2010, the Pre-Trial Chamber held that there were reasonable grounds to believe that Mr Al Bashir was criminally responsible for the commission of the three counts of genocide against the Fur, Masalit, and Zaghawa ethnic groups.¹⁹ Following his overthrow in the 2019 coup d'état, Al Bashir was arrested by local authorities and is currently in Sudanese custody. As he has not been transferred to the seat of the Court, his case remains at the pre-trial stage.

Ali Muhammad Ali Abd-Al-Rahman (Ali Kushayb)

Mr Abd-Al-Rahman is alleged to be a senior leader in the Janjaweed militia in Wadi Salih area of West Darfur, a member of the Popular Defence Forces, and commander of thousands of militia/Janjaweed from August 2003 to March 2004.²⁰

evidence that pointed to Mr Jerbo's death on 19 April 2013. *Prosecutor v. Banda*, Public redacted Decision terminating the proceedings against Mr Jerbo (ICC-02/05-03/09-512-Red), 4 October 2013.

¹⁷ Al Bashir Warrant – First Decision, *supra* note 2.

¹⁸ Namely, Kodoom village; Bindisi town; Mukjar town; Arawala town; Shattaya town and its surrounding villages; Kailek; towns and villages in Buram locality; Muhajerlya; Saraf Jidad; Silea; Sirba; Abu Suruj; civilian centres in Jebel Moon; and Shegeg Karo.

¹⁹ *Prosecutor v. Al Bashir*, Second Warrant for the Arrest of Omar Hassan Ahmad Al Bashir (ICC-02/05-01/09), 12 July 2010 (hereafter Al Bashir – Warrant Second Decision).

²⁰ *Prosecutor v. Abd-Al-Rahman*, Prosecutor's Application under Article 58 (7), 27 February 2007 (ICC-02/05-55-US-Exp) (public redacted version notified on the same day, ICC-02/05-56).

On 27 April 2007, Pre-Trial Chamber I granted the Prosecutor's application under Article 58(7) of the Statute²¹ and decided²² to issue a warrant of arrest against Mr Abd-Al-Rahman for crimes against humanity and war crimes allegedly committed in the localities of Kodoom, Bindisi, Mukjar, Arawala, and their surrounding areas in Darfur, Sudan, between August 2003 and March 2004.²³ On 16 January 2018, Pre-Trial Chamber II granted the Prosecutor's application to amend the first warrant,²⁴ issuing a second warrant of arrest for crimes against humanity and war crimes allegedly committed in the locality of Deleig and surrounding areas in Darfur, Sudan, on or about 5–7 March 2004.²⁵

Mr Abd-Al-Rahman is charged with thirty-one counts of war crimes and crimes against humanity – including murder, rape, forcible transfer, torture, persecution, pillage, cruel treatment, intentionally directing attacks against the civilian population, destruction of property, and outrages upon personal dignity – committed in 2003 and 2004 in four villages in West Darfur. He is charged with directing attacks, and also mobilising, recruiting, arming, and providing supplies to Janjaweed militia under his command.

On 9 June 2020, Mr Abd-Al-Rahman voluntarily surrendered himself in the Central African Republic and was transferred into ICC custody. In June 2020, as ordered by the Chamber,²⁶ Mr Abd-Al-Rahman made his first appearance before the single judge,²⁷ during which his case was severed from his co-defendant Mr Harun's case. Pre-Trial Chamber II confirmed all thirty-one charges on 9 July 2021. Mr Abd-Al-Rahman's trial commenced on 5 April 2022 and is ongoing at the time of writing.

FEMINIST REIMAGININGS OF SELECT JUDGMENTS AND DECISIONS

Our authors have engaged in the feminist reimagining of four judgments: two from the *Al Bashir* case and two from the *Abd-Al-Rahman* case.

²¹ *Ibid.*

²² *Prosecutor v. Abd-Al-Rahman*, Decision on the Prosecution Application under Article 58(7) of the Statute (ICC-02/05-01/07-1-Corr).

²³ *Prosecutor v. Abd-Al-Rahman*, Warrant of Arrest for Ali Kushayb (ICC-02/05-01/07-3-Corr), 27 April 2007 (hereafter *Abd-Al-Rahman – First Warrant*).

²⁴ *Prosecutor v. Abd-Al-Rahman*, Prosecution's application pursuant to Article 58(6) of the Rome Statute to amend the warrant of arrest for Ali Muhammad Ali Abd-Al-Rahman (Ali Kushayb) by adding new crimes (ICC-02/05-01/07-73-Secret-Exp), 3 November 2017 (confidential redacted and public redacted versions notified on 26 June 2020, ICC-02/05-01/20-6-Conf-Red and ICC-02/05-01/20-6-Red2).

²⁵ *Prosecutor v. Abd-Al-Rahman*, Second warrant of arrest for Ali Muhammad Ali Abd-Al-Rahman (Ali Kushayb) (ICC-02/05-01/07-74-Secret-Exp) (public redacted version notified on 11 June 2020, ICC-02/05-01/07-74-Red) (hereafter *Abd-Al-Rahman – Second Warrant*).

²⁶ *Prosecutor v. Abd-Al-Rahman*, Decision on the convening of a hearing for the initial appearance of Mr Ali Kushayb (ICC-02/05-01/07-82), 11 June 2020.

²⁷ *Prosecutor v. Abd-Al-Rahman*, Transcript of hearing of Initial Appearance (ICC-02/05-01/20-T-001-ENG), June 2020 (hereafter *Initial Appearance*).

Prosecutor v. Al Bashir, *Second Decision on the Prosecutor's Application for a Warrant of Arrest*

Judge Akila Radhakrishnan and Judge Grant Shubin deliver their reimagining of the ICC Pre-Trial Chamber's Second Decision on the Prosecutor's Application for a Warrant of Arrest, issued in 2010 against Sudan's then president in respect of his responsibility for the alleged genocide in Darfur against the Fur, Masalit, and Zaghawa peoples.

While the Pre-Trial Chamber's Second Decision explored the evidence adduced by the prosecution in support of the material elements of each of the alleged counts of genocide being met, their examination's approach to the victims was gender-blind and ageless, often referring to victims as 'people' or 'civilians'²⁸ – apart from sexual violence, where only women were highlighted as victims.²⁹ The original Second Decision, in the absence of an intersectional approach, did not grapple with how the gendered and age-disaggregated commission of genocide, by design, was more likely to specifically target and/or impact on victims who are routinely less visible in documentation and jurisprudence, such as children and women, as well as deepening the annihilative impact of the crime.

Judges Radhakrishnan and Shubin's reimagined decision takes as its starting point the Pre-Trial Chamber's exploration of the specific material elements of each of the three counts of genocide. It illuminates how gendered understandings are woven into the Sudanese government's planning and commission of coordinated acts that make up the continuum of genocidal violence, and how through these gendered annihilative acts the perpetrators maximised the crime's destructive impact on the Fur, Masalit, and Zaghawa ethnic groups.

Alighting first on the count of genocide by killing, the judges delve into the gendered manner of the killings, emphasising that civilians were targeted in specific ways by reason not only of their ethnicity but also of their perceived gender. The Chamber makes the significant choice – given the paucity of information as to the gender and age of the victims within the evidence presented by the prosecution – to include testimony from the UN Darfur Commission report, which charts the targeted killing of men and boys from the three ethnic groups, including the seeking out and killing of young boys being hidden by their families.³⁰ Radhakrishnan and Shubin also highlight how the crime of murder was committed in different ways

²⁸ For example, and with regard to the count of genocide by killing, the Pre-Trial Chamber reviewed the evidence of the murder of 'thousands of civilians belonging primarily to the Fur, Masalit and Zaghawa groups' between April 2003 and 14 July 2008. Al Bashir – Warrant Second Decision, *supra* note 19, § 22.

²⁹ *Ibid.*, § 29.

³⁰ Radhakrishnan and Shubin, Reimagined Decision, para. 10.

against victims of different genders, a facet that is obscured in the original decision's use of the gender-blind term 'civilians'. In one example, the judges, in their reimagining, direct focus to the gendered nature of killing, juxtapositioning the killings of men and boys through gunshot at the onset of an attack, and an attack where the women suffered far slower deaths, having been abducted, transferred to a military garrison, paraded naked, and raped continuously for several days, in the course of which three were killed.³¹

In the second count of genocide by causing serious bodily and mental harm, Judges Radhakrishnan and Shubin explore the legacy of the International Criminal Tribunal for Rwanda (ICTR) *Akayesu* case, in discussing rape and sexual violence as constitutive acts of genocide. While both the prosecution and Chamber refer to the rape of 'thousands of women', the reimagined decision renders visible the experience of girls, highlighting sections of the prosecution's application stating that 'girls as young as five . . . were raped'.³² Also discussed are the particular gender-specific impact on women and girls in society, with the gendered impact layered atop the harm done as a result of pre-existing structural inequalities and practices. In Darfur, that includes not only the physical and psychological damage, but particularly physical damage – including increased risk of fistula – in those who had previously been subjected to female genital mutilation.

As well as exploring the gendering of the third count of genocide, Judges Radhakrishnan and Shubin centre the gendered dimensions of evidencing genocidal intent, unexplored in the original decision. They note that judicial and non-judicial determinations of genocide have largely focused on intent to physically destroy as evidenced through mass killing. They posit that, considering the gendered underpinnings of the acts in question, equally relevant is the intent to biologically destroy, which aims at the target group's regenerative capacity and its ability to ensure long-term survival – and which has specific consequences for women and girls, who are perceived to be the main reproductive agents of the group, in the gendered role of bearers of life.³³

While limited by the gender-blindness of the underpinning evidence, Judges Radhakrishnan and Shubin's reimagined decision underscores that female and male members of targeted groups, by the perpetrators' own design, experience genocide in distinct ways by reason of their gender. In particular, they successfully illuminate how genocidal violence directed at women and girls is fed by existing misogynistic attitudes in society, and the traumatic impacts are magnified by the financial, social, and cultural inequalities to which women and girls are subjected.

³¹ *Ibid.*, §§ 11, 13.

³² *Ibid.*, §§ 20, 22.

³³ *Ibid.*, § 24.

Prosecutor v. Al Bashir, *Judgment in the Jordan Referral of the
Al Bashir Appeal*

Judges Saumya Uma and Ramya Jawahar Kudekallu have handed down their reimagining of the Appeals Chamber's May 2019 judgment in the Jordan referral of the Al Bashir appeal.³⁴

The original judgment addressed the question about the extent to which states are legally obligated to cooperate with the Court, in which the Appeals Chamber decided that Jordan, as a state party to the Rome Statute, had an obligation to arrest and surrender Mr Al Bashir, despite Sudan not being a state party to the Statute and despite Mr Al Bashir then holding the post of President of Sudan. The reimagined judgment focuses on the question of whether Jordan had failed to comply with its Rome Statute obligations, examining the issue of state cooperation and accountability from a feminist analytical perspective.

The original and the reimagined judgments share commonalities. Both confirm the Pre-Trial Chamber's decision, finding that Jordan had failed to comply with its obligations under the Statute by not executing the Court's request for the arrest of Mr Al Bashir and his surrender to the Court while he was on Jordanian territory on 29 March 2017.³⁵ In the underlying reasoning, both judgments concur that there is no customary law recognising head-of-state immunity before an international court, and such immunity cannot be claimed under Article 27(2) of the Rome Statute.³⁶

Further, both judgments agree that parties to the Rome Statute are under an obligation to cooperate fully with the Court in accordance with the Statute, and that this obligation must be 'understood in the context of the Statute as a whole and bearing in mind *its object and purpose*'.³⁷ In this, the original judgment notes that the ICC was established to exercise jurisdiction 'over persons for the most serious crimes of international concern' and its state parties express their determination to 'put an end to impunity for the perpetrators of these crimes'.³⁸ The original judgment states: 'The obligation to cooperate with the Court reinforces the obligation *erga omnes* to prevent, investigate and punish crimes that shock the conscience of humanity, including in particular those under the jurisdiction of the Court and it is this *erga omnes* character that makes the obligation of States Parties to cooperate with the Court so fundamental.'³⁹

Nevertheless, Judges Uma and Kudekallu's reimagined judgment explores, with greater sensitivity and nuance, both how state cooperation impacts on victim

³⁴ *Prosecutor v. Al Bashir*, Judgment in the Jordan Referral of the Al Bashir Appeal (ICC-02/05-01/09 OA2), 6 May 2019 (hereafter Appeals Judgment – Jordan Appeal).

³⁵ *Ibid.*, § 215.

³⁶ *Ibid.*, §§ 102, 113.

³⁷ *Ibid.*, § 121.

³⁸ *Ibid.*

³⁹ *Ibid.*, § 123.

communities, and specifically victims from marginalised communities including women, girls, and those belonging to sexual orientation and gender identity (SOGI) minorities. With great clarity, they emphasise how Jordan's breach of its obligation to cooperate with the Court in failing to arrest and surrender Mr Al Bashir also fails the victims of the alleged crimes, which include multiple war crimes and crimes against humanity as well as the crime of genocide – 'an undesirable outcome that is diametrically opposed to the objectives for which this Court was established'.⁴⁰

In further contrast to the original judgment, Judges Uma and Kudekallu's reimagining explores the intrinsic interconnections between state cooperation with the ICC in arresting and surrendering a suspect to the Court, and ending impunity for ICC crimes, especially crimes of sexual and gender-based violence. As they note, a failure of states to cooperate opens up 'chasms in access to justice for victims', while assisting the accused to take refuge in other jurisdictions. The reimagined judgment further observes that Jordan has also fallen foul of its duty to discharge its state obligations under other conventions that it has ratified, including (but not limited to) the Genocide Convention and/or Torture Convention.

In contrast with the original judgment, Judges Uma and Kudekallu's feminist reimagining confronts the international legal community with the reality that a failure of a state party, here Jordan, to live up to its obligations to arrest and surrender Mr Al Bashir has profound implications for victims' access to justice.

Prosecutor v. Abd-Al-Rahman, *Decision on the Confirmation of Charges*

In this rewritten decision, Judges Lisa Davis and Marina Kumskova consider whether the Chamber had the evidence before it to request, under Article 61(7) of the Rome Statute, the Prosecutor to present evidence on the crime of gender persecution.

In the original Rahman Confirmation of Charges Decision, the Chamber found that the contextual elements of war crimes and crimes against humanity had been proven to the requisite standard.⁴¹ Following an examination of the evidence put forward by the prosecution, and taking into account the submissions by the defence, Office for the Public Counsel for Victims, and legal representatives of victims, the Chamber confirmed the multiple counts of war crimes and crimes against humanity, including persecution as a crime against humanity.⁴²

The charge of persecution concerned targeted attacks on persons in Kodoom, Bindi, and surrounding areas, the population of which were predominantly Fur and who were perceived as belonging to, or being associated with, or supporting the

⁴⁰ Uma and Kudekallu, Reimagined Judgment, § X

⁴¹ Decision on the confirmation of charges against Ali Muhammad Ali Abd-Al-Rahman (Ali Kushayb) (ICC-02/05-01/20-433), 9 July 2021, available at www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_10734.PDF, §§ 67–68.

⁴² *Ibid.*, §§ 54–57.

rebel armed groups. The prosecution asserted that Mr Abd-Al-Rahman targeted these persons on political and ethnic grounds, severely depriving them of fundamental rights, including the rights to life, bodily integrity, private property, freedom of movement and residence, and not to be subjected to rape, torture, or cruel, inhumane, or degrading treatment.

In their reimagined decision on confirmation of charges in the Abd-Al-Rahman case, Judges Davis and Kumskova engage with the question of whether to confirm the charge of persecution on the ground of gender, under Article 7(1)(h) of the Statute. More specifically, they look at the question of whether, drawing from the facts as presented in the prosecution's submissions, the prosecution established substantial grounds to believe that Mr Abd-Al-Rahman committed the crime of gender persecution in Kodoom, Bindisi, and surrounding areas between 15 and 16 August 2003; in Mukjar and surrounding areas between the end of February 2004 and the beginning of March 2004; and in Deleig and surrounding areas between 5 and 7 March 2004.

Judges Davis and Kumskova's judgment explores the gendered dimensions of the attacks on persons from the Fur population, illuminating how the attacks were planned and committed against women and men, girls and boys in specific ways because of the gender roles they were perceived to inhabit. For example, the reimagined decision explores the targeted killing and torture of Fur men and older boys in the attacks on Mukjar and Deleig and highlights that the perpetrators were driven by the view of men as fighters and boys as revenge-seekers, based on entrenched perceptions of the biological and sociological roles of men and boys in that society. Analysing the evidence contained in the prosecution submissions with regard to the rape of Fur women and girls, the reimagined judgment explores the intersection of the perceived marginalised identities of the victims as black women, highlighting the perpetrator's use of forced nudity and often public rapes, as well as the import of the derogatory epithets by which the perpetrators referred to the women, notably as slaves.

The reimagined judgment delves deeper into the gendered design and impact of the crimes. The judges' analysis illuminates how the attacks on Fur men and boys draws from the understanding of males as protectors of the group, while attacks on women and girls pay heed to their role of holders of community honour – often defined in terms of socially enforced control over their sexuality. The attacks on Fur women, girls, men, and boys therefore not only serve to imprint the dominance of the perpetrator group, but also to break the will and destroy the social bonds within the Fur community.

The facts in the case render visible that targeting of the Fur lay at the intersection of race, gender, and political grounds. Indeed, that the underlying facts are present in the prosecution's submission – which is to say, they required no reimagining – underscores the urgent need for the feminist approach that Judges Davis and Kumskova model in their reimagining.

Prosecutor v. Abd-Al-Rahman, *Decision Establishing the Principles on Victims' Representation during the Confirmation of Charges Hearing*

Judge Anushka Sehmi's feminist reimagining of the 2021 Decision establishing the principles on victims' representation during the Confirmation of Charges Hearing in the Abd-Al-Rahman case makes up the fourth and final reimagining of the Darfur cases. The original decision centred on the way that victims from Sudan would participate, and be legally represented, in the Abd-Al-Rahman case.

Judge Sehmi rewrites this decision from a feminist perspective, looking at the importance of consulting with victims on their choice of legal representation. The reimagined decision focuses on what is meant by the need for victims' participation in proceedings to be 'meaningful' – long recognised in ICC jurisprudence – as opposed to 'purely symbolic'.⁴³ The single judge noted that such meaningful participation requires the implementation of strategies that aim at ensuring two-way communication between the affected communities and the Court, most appropriately via the mandates of the Public Information and Outreach Section (PIOS) and the Victims Participation and Reparations Section (VPRS).

The reimagined decision emphasises that the success of victim participation is profoundly dependent on proper outreach and public information activities directed towards victims,⁴⁴ and moves to explore the gendered implications of designing and conducting such outreach through an intersectional lens. This includes, necessarily Judge Sehmi asserts, proactive engagement with women, girls, and non-binary individuals who may qualify as victims in the Abd-Al-Rahman case. The reimagined decision reminds the international legal community that the violations committed in Darfur, and as alleged by the prosecution, were heavily gendered and exacerbated structural gender inequalities, rendering women and girls even more vulnerable to being the victims of sexual and gender-based crimes. In turn, women and girls suffered particularly physical, psychological, financial, and social traumatic impacts as a result of being the victims of alleged crimes, which magnified the entrenched pre-existing structural inequalities.

While the original decision treats victims as a monolithic group (though not always in agreement, at least as regards legal representation), Judge Sehmi takes care to embed an intersectional feminist approach, underscoring that while greater outreach is needed to ensure the meaningful participation of women and girls, strategies aimed at achieving this 'must allow for the full diversity of women, including those of different ethnicities, minority religious or ethnic groups, as well as those from rural or urban backgrounds'.⁴⁵ She further underscores the need for a

⁴³ Sehmi, Reimagined Decision, § 13.

⁴⁴ *Ibid.*, § 19.

⁴⁵ *Ibid.*, § 34.

specific strategy for outreach of child victims, who are so often overlooked in trials which evince an adult-centric understanding of violence and harm.⁴⁶

Judge Sehmi illuminates how structural inequalities may limit the participation of marginalised groups, including women and girls, in the ICC proceedings – whether as a result of having more limited access to education and corresponding higher likelihood of illiteracy; being tasked with childcare; the stigma of sexual violence, with speaking out exacting high social costs; and living in a patriarchal context where men are assumed to be the ones interacting with authority, such as may be the perception of the ICC. The reimagined decision sets out clear practical steps that PIOS and VPRS should take to ensure meaningful gender-sensitive and inclusive participation in the Abd-Al-Rahman proceedings.

On victim representation, the reimagined decision tackles the widely recognised – but rarely officially discussed – matter of the Registry neither having an inclusive approach to obtaining the views of victims, expressly including those from marginalised communities, on their preferred legal representation nor tackling the lack of diversity within the pool of representation offered. Sehmi's single judge asserts the need for a more inclusive approach to recruiting victims' counsel and the importance, given the scale of sexual and gender-based crimes committed against women and girls in Darfur, of counsel having expertise in working with survivors of such crimes.⁴⁷

This reimagined judgment in the Darfur cases underscores that a feminist approach needs not only to inform our understanding of the planning, commission, and impact of alleged crimes, but must flow through the operations of the Court if it is to carve a path to justice that leaves no victims in the shadows.

CONCLUSION: INCLUDING THOSE SO OFTEN OBSCURED IN THE PURSUIT OF JUSTICE

Early documentation of the violations committed in Darfur showed the urgent need for a feminist intersectional approach to the investigation, analysis, and prosecution of the alleged crimes and to understanding the context in which they were committed.

A troubling intersection of gender, race, and age was laid bare as early as the 2004 Human Rights Watch report, which included the testimony of an eighteen-year-old woman who recounted being assaulted by Janjaweed who inserted a knife in her vagina, saying, 'You get this because you are black'.⁴⁸ In its 2009 Request for Warrant in the Al Bashir case the prosecution asserted, 'Perpetrators often verbally

⁴⁶ *Ibid*, § 44.

⁴⁷ *Ibid*, § 57.

⁴⁸ HRW, *Darfur in Flames*, *supra* note 5, 29.

berated the women and girls, calling them slaves, telling them that they would now bear a “free” child, and asserting that they (the perpetrators) are wiping out the non-Arabs’.⁴⁹

The interplay of violence committed against those with intersecting marginalised identities was most visible in the documentation and ensuing discussion of sexual violence committed against Darfurian women and girls. While this arguably shows the progress made on the documentation of sexual violence, it raised questions about the depth of the intersectional approach to investigating other crimes, and whether a feminist intersectional approach would also guide the Court’s own operations, including its outreach to the affected communities.

One of the clear challenges for some authors, as judges, was that they – like the judges delivering the original judgments and decisions – were constrained by the evidence adduced and arguments made by the parties before them. In Judges Radhakrishnan and Shubin’s analysis of genocide, for example, the blindness of the prosecution materials as to the multiple and potentially overlapping identities of the marginalised identities of those described as victims led to moving beyond the materials in front of the Chamber into documentation from non-governmental organisations. However, as Judges Davis and Kumskova show in their exploration of gender persecution, the foundations of a charge of gender persecution existed in the materials, obscured perhaps by the lesser seriousness with which the prosecution and the Chamber seem to approach gender-based targeting, notably, but not solely, of women and girls.

Judge Sehmi’s reimagined decision, focusing on how to achieve meaningful victims’ participation in the proceedings, shows a path very much open to, but not taken, in the original decision. Similarly, Judges Uma and Kudekallu’s reimagined judgment underscores that relatively little effort could have been expended by the original Trial Chamber to open a richer discussion of how state cooperation impacts on victim communities.

A feminist intersectional approach can, indeed, be more radical – calling into question whether the International Criminal Court, and its founding Statute and Rules for Procedure and Evidence, are suitable instruments for achieving a more equal world, with full dignity for marginalised communities, including women and girls who constitute an opposed global majority. This is particularly when questions of criminal accountability, especially in common law systems, writ large focus very narrowly on the question of criminal liability of one of more accused and are without incentive to delve into the underlying multifaceted and often historical roots of why and how individuals cross the line into becoming perpetrators of mass atrocities, and the opacity through which the international justice experiment sees

⁴⁹ Al Bashir Warrant – First Decision, *supra* note 2, § 130.

(and does not see) the victims. Whether genuine progress towards a feminist permanent world court requires a more radical questioning and approach remains a core political and philosophical question with which international justice actors would do well to engage.

All four reimagined judgments and decisions, however, give weight to an arguably far more tantalising viewpoint: that much can be achieved within the current workings of the Court. Each underscores that a feminist intersectional approach could be implemented relatively easily to signal and effect the inclusion of marginalised – and often multiply marginalised – individuals and communities into the Court's work and processes, if there was greater understanding of and commitment to such an approach by those who people the Court, now and in the future.

To be sure, the calls for revolution sit on firm conceptual ground. The reimagined judgments in the Darfur cases, however, make a firm and optimistic case for how a feminist reality can root itself in the processes and outcomes of an evolving International Criminal Court.

10.2 GENOCIDE IN THE AL BASHIR WARRANT

Akila Radhakrishnan and Grant Shubin

In 2009, Pre-Trial Chamber I issued a Warrant of Arrest for Mr Omar Al Bashir, then President of Sudan, for two counts of war crimes and five counts of crimes against humanity.⁵⁰ The Chamber did not authorise charges for the crime of genocide; however, that aspect was later overturned by the Appeals Chamber citing an error of law.⁵¹

In their rewritten decision on the Warrant of Arrest, Akila Radhakrishnan and Grant Shubin apply the correct interpretation of genocide to the decision but engage more thoroughly with how gender was exploited in the alleged committal of the crime. They highlight the gender differentiation used by Government of Sudan forces by exploring the different methods applied to genders, from execution-style killing to rape and sexual slavery, cultural and social humiliation to confinement in unsafe and unhealthy conditions in the displacement camps. In giving voice to the victims, Radhakrishnan and Shubin give an expansive tour of the evidence which was available to the original Chamber and include the crime of genocide in the Warrant of Arrest against Omar Al Bashir.

⁵⁰ Warrant of Arrest, *Al Bashir* (ICC-02/05-01/09-3), Pre-Trial Chamber I, 4 March 2009.

⁵¹ Judgment on the appeal of the Prosecutor against the 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Al Bashir', *Al Bashir* (ICC-02/05-01/09-73), Appeals Chamber, 3 February 2010.

No.: ICC-02/05-01/09
Date: 4 March 2009⁵²

Original: English

PRE-TRIAL CHAMBER I(B)

Before: Judge Akila Radhakrishnan, Presiding Judge
Judge Grant Shubin

SITUATION IN DARFUR, SUDAN
IN THE CASE OF THE PROSECUTOR v. OMAR HASSAN AHMAD AL
BASHIR ('OMAR AL BASHIR')

Public Redacted Version

Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir

BACKGROUND

1. On 14 July 2004 the Prosecutor filed an application under Article 58 of the Rome Statute (the Statute) seeking a warrant for the arrest of Mr Omar Al Bashir (Bashir) for his alleged criminal responsibility in the commission of genocide, crimes against humanity, and war crimes against members of the Fur, Masalit, and Zaghawa groups in Darfur from 2003 to 14 July 2008.

WHETHER THE COMMON REQUIREMENTS UNDER ARTICLE 58(1)
OF THE STATUTE FOR THE ISSUANCE OF A WARRANT OF ARREST
HAVE BEEN MET

*Whether There Are Reasonable Grounds to Believe That at least One of the
Crimes within the Jurisdiction of the Court Referred to in the Prosecution
Application Has Been Committed*

2. The Court observes that under Article 58(1) of the Statute, it shall issue an arrest warrant if the existence of genocidal intent is only one of several reasonable conclusions available on the materials provided by the prosecution.

⁵² Editors' note: Some of the sources cited in this judgment post-date 4 March 2009, but have been retained for pedagogical purposes with an asterisk (*) notation because they are relevant and valuable sources that might assist with subsequent genocide decisions by the ICC and other courts.

Genocide

3. The crime of genocide is defined in Article 6 of the Statute as follows:

For the purpose of this Statute, ‘genocide’ means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (i) Killing members of the group;
- (ii) Causing serious bodily or mental harm to members of the group;
- (iii) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (iv) Imposing measures intended to prevent births within the group;
- (v) Forcibly transferring children of the group to another group.

4. The prosecution submits that there are reasonable grounds to believe that Omar Al Bashir bears criminal responsibility under Article 25(3)(a) of the Statute for the crime of genocide as a result of:

- (i) the killing of members of the Fur, Masalit, and Zaghawa ethnic groups [Article 6(a) – Count 1];
- (ii) causing serious bodily or mental harm to members of the Fur, Masalit, and Zaghawa ethnic groups [Article 6(b) – Count 2]; and
- (iii) deliberately inflicting on the Fur, Masalit, and Zaghawa ethnic groups conditions of life calculated to bring about the groups’ physical destruction [Article 6 (c) – Count 3].

5. Having gone through other elements of genocide elsewhere, the Court here wants to pay specific attention to the gendered manner of the commission of crimes alleged by the Prosecutor.

KILLING MEMBERS OF THE FUR, MASALIT, AND ZAGHAWA ETHNIC GROUPS (ARTICLE 6(A) – COUNT 1)

6. For the purposes of the *actus reus* of genocide by killing, the Court must be convinced that the prosecution has shown to the applicable standard that members of each target group were killed with the intention of destroying the group as such.⁵³

7. Killing is often the privileged genocidal act, and consequently examinations of the commission of genocide largely revolve around the numbers killed. However, genocidal killing is in fact a highly gendered activity, with men and boys targeted for different reasons and killed in different ways than women and girls.

8. Males, particularly men and adolescent boys, are targeted for killing because they occupy gendered roles that genocide’s perpetrators find particularly threatening: those of heads of households, community leaders, political figures,

⁵³ Article 6(a), Elements of Crimes; see Judgment, *Kajelijeli* (ICTR-98-44A-T), Trial Chamber II, 1 December 2003, § 813 (hereafter *Kajelijeli* Trial Judgment); Judgment, *Semanza* (ICTR-97-20-T), Trial Chamber III, 15 May 2003, § 319 (hereafter *Semanza* Trial Judgment).

religious authorities, guardians of the group's identity (particularly so in patrilineal cultures), fighters, and patriarchs. Where women and girls are targeted for genocidal killings, those killings – like the killing of men and boys – tend to reflect the gendered view of the role and uses of females in that society. Assaults on women and girls pay heed to their roles as mothers, wives, daughters, bearers of future life, keepers of the communities' and families' honour, and sources of labour within the home.

9. In genocides, men and boys are also more likely to die 'fast' (but not necessarily less horrific) deaths. They tend to be killed first and, usually, very shortly after being located or captured. These killings are usually presaged by the separation of men and older boys from the rest of the protected group.

10. The attacks against the Fur, Masalit, and Zaghawa groups bear this out, where attacks were characterised by indiscriminate killings, as well as specific targeting of Fur, Masalit, and Zaghawa men of military age. According to the United Nation's Commission of Inquiry on Darfur, witness testimonies reflected in the reports describe attackers with Kalashnikovs and other automatic weapons shooting either indiscriminately or targeting specific people, usually men of military age.⁵⁴ The massacre in Surra is a revealing example of the gendered manner in which Bashir's forces conducted their killings. There, at least 250 people were killed when Bashir's forces attacked in the early hours of the morning.⁵⁵ Initially, they fired mortars at unarmed civilians, shooting indiscriminately with rifles and machine guns.⁵⁶

They entered the homes and killed the men. They gathered the women in the mosque. There were around 10 men hidden with the women. They found those men and killed them inside the mosque. They forced women to take off their *maxi* (large piece of clothing covering the entire body) and if they found that they were holding their young sons under them, they would kill the boys.⁵⁷

11. A similar gendered targeting is seen in the killings in Deleig, where Bashir's forces went from house to house looking for specific individuals, and arrested many men who were subsequently taken to the local police station.⁵⁸ The men were then separated into different groups and certain groups were placed on a truck and transported to the Garsila area.⁵⁹ The truck would come back empty and leave

⁵⁴ *Report of the International Commission of Inquiry on Darfur to the Secretary-General, Pursuant to Security Council Resolution 1564 (2004) of 18 September 2004*, UN Doc. S/2005/60, 1 February 2005, § 269 (hereafter UN COI Final Report).

⁵⁵ *Ibid.*, § 272.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*, § 272.

⁵⁸ *Ibid.*, § 275.

⁵⁹ *Ibid.*

again with a new group of men.⁶⁰ Most of those taken away were executed.⁶¹ In the end, more than 120 men were killed.⁶²

12. The gendered undercurrent to the killings continued after the initial attacks into the context in which members of the Fur, Masalit, and Zaghawa were confined in squalid internally displaced persons (IDP) camps. According to one witness, ‘Young girls can’t leave the camp. We are scared to send them out. They rape them. We can’t send the young men out because they will kill the men.’⁶³

13. This gendered underpinning can also be seen in methods by which killings were carried out against male and female members of the target groups. As described above, in many cases Fur, Masalit, and Zaghawa men were killed by gunshot at the onset of, or during, an attack; women and girls on the other hand were often killed by sexual violence and rape.⁶⁴ For example, take the paradigmatic case in Arawala, where Bashir’s forces captured and detained a group of women at the local military garrison.⁶⁵ Upon arrival at the garrison, the women were stripped naked and ‘inspected’ by a military commander.⁶⁶ ‘The soldiers then raped the women continuously over several days. Three of the women died while they were in captivity.’⁶⁷

14. In a particularly gruesome example of the convergence of gender killing, a Fur baby had also been killed and was lying on his back with his penis cut off and stuffed in his mouth.⁶⁸

15. In sum, the alleged methods of killing tend to display not only the specific targeting of the Fur, Masalit, and Zaghawa groups on the part of Bashir’s forces, but also a deeply engrained misogyny soaked with deeply gendered conceptions of dominance, power, and masculinity. Accordingly, the Court finds that there is a reasonable basis to believe that genocidal acts of killing were committed by Bashir’s forces.

CAUSING SERIOUS BODILY OR MENTAL HARM TO MEMBERS OF THE FUR, MASALIT, AND ZAGHAWA ETHNIC GROUPS (ARTICLE 6(B) – COUNT 2)

16. For the purposes of the *actus reus* of genocide by causing serious bodily and/or mental harm to members of each target group, the Court must be convinced that the Prosecution has shown to the applicable standard that serious bodily or mental harm was inflicted on members of the target groups with the intention of destroying

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ Prosecutor’s Application under Article 58 (ICC-02/05-157-AnxA), § 204, 14 July 2008 (hereafter Prosecutor’s Request for Warrant).

⁶⁴ Notably, in many attacks, women and girls were also victims of killings by gunshot and indiscriminate motor fire and bombings.

⁶⁵ Prosecutor’s Request for Warrant, *supra* note 63, § 219.

⁶⁶ *Ibid.*, § 219.

⁶⁷ *Ibid.*, § 219.

⁶⁸ *Ibid.*, § 113.

the groups as such.⁶⁹ Serious bodily or mental harm ‘must involve harm that goes beyond temporary unhappiness, embarrassment or humiliation. It must be harm that results in a grave and long-term disadvantage to a person’s ability to lead a normal and constructive life’.⁷⁰

17. This second prohibited act, when committed with the requisite intent, can encompass a wide range of non-fatal genocidal acts. The International Criminal Tribunal for Rwanda (ICTR) and International Criminal Tribunal for former Yugoslavia (ICTY) have held that rape and sexual violence; torture and other cruel, inhuman, or degrading treatment or punishment; and deportation and forcible transfer are among the acts that may cause serious bodily or mental harm.⁷¹ This understanding has been confirmed by the International Court of Justice (ICJ).⁷²

Sexual Violence in Darfur

18. Sexual violence, when employed as a genocidal strategy, aims to destroy the victim as an incremental step to annihilating the group, as famously confirmed in the ICTR’s *Akayesu* case.⁷³ It is simultaneously an assault on the victim and on the existence, identity, and cohesiveness of the group.

19. Most genocidal campaigns have explicitly and implicitly sanctioned sexual violence against women and girls of the target group. This includes, for example, the sexual enslavement of Armenian women and girls by the Ottoman Turks⁷⁴ – echoes

⁶⁹ Article 6(b), Elements of Crimes. See Semanza Trial Judgment, *supra* note 53, § 323; see also Judgment, *Musema* (ICTR-96-13-T), Trial Chamber, 27 January 2000, § 165 (hereafter *Musema* Trial Judgment); Judgment, *Rutaganda* (ICTR-96-3), Trial Chamber, 6 December 1999, § 60 (hereafter *Rutaganda* Trial Judgment); Judgment, *Akayesu* (ICTR-96-4-T), Trial Chamber, 2 September 1998, § 521 (hereafter *Akayesu* Trial Judgment).

⁷⁰ Judgment, *Krstić* (IT-98-33), Trial Chamber, 20 December 2004, § 513 (hereafter *Krstić* Trial Judgment).

⁷¹ Semanza Trial Judgment, *supra* note 53, § 320; Judgment, *Ntagerura* (ICTR-99-46-T), Trial Chamber, 24 February 2004, § 664 (hereafter *Ntagerura* Trial Judgment); *Akayesu* Trial Judgment, *supra* note 69, §§ 731–732; Judgment, *Stakić* (IT-97-24-T), Trial Chamber, 31 July 2003, § 516 (hereafter *Stakić* Trial Judgment).

⁷² *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, judgment of 26 February 2007, at 300 (hereafter *Bosnia and Herzegovina v. Serbia and Montenegro* Judgment).

⁷³ *Akayesu* Trial Judgment, *supra* note 69, § 731: ‘Rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole’; § 732: ‘Sexual violence was a step in the process of destruction of the Tutsi group – the destruction of the spirit, of the will to live, and of life itself; see also Judgment, **Karemera* (ICTR-98-44-T), Trial Chamber, 2 February 2012, §§ 1665–1668 (hereafter *Karemera* Trial Judgment).

⁷⁴ *A. Holslag, ‘Exposed Bodies: A Conceptual Approach to Sexual Violence during the Armenian Genocide’ in E. Randall (ed.), *Genocide and Gender in the Twentieth Century: A Comparative Survey* (London: Bloomsbury Academic, 2015) 97–106, at 97–99.

of which reverberate in Rwanda where an estimated 100,000–250,000 women and girls were raped in three months.⁷⁵

20. Violence in Darfur fits these patterns. Bashir's forces conducted a campaign of systematic rape of women and girls, with the frequent sexual mutilation of victims. Countless reports and testimonies indicate thousands of women and girls belonging to the target groups were raped systematically and continuously for five years.⁷⁶ Girls as young as five and women as old as seventy were raped.⁷⁷ Gang rape was a distinctive and pronounced feature of the attacks by Bashir's forces.⁷⁸

21. From the numerous cases of rape and sexual violence allegedly committed by Bashir's forces against Fur, Masalit, and Zaghawa women and girls submitted to and reviewed by the court, a distinctive pattern emerged. First, during attacks on villages there were deliberate aggressions and violence against women and girls, including gang rapes.⁷⁹ Second, women and girls were abducted, held in confinement for several days, and repeatedly raped.⁸⁰ Third, rape and other forms of sexual violence continued during flight and subsequent displacement, including when women left towns and displaced persons' sites to collect wood or water or perform other essential activities.⁸¹ As to this last stage – rape and sexual violence in the context of displacement – one witness testified:

When we see them [Bashir's forces], we run. Some of us succeed in getting away, and some are caught and taken to be raped – gang-raped. Maybe around 20 men rape one woman [...] These things are normal for us here in Darfur. These things happen all the time. I have seen rapes too. It does not matter who sees them raping the women – they don't care. They rape women in front of their mothers and fathers.⁸²

22. As just one example, following the joint attacks by Bashir's forces in the surrounding area, up to 30,000 people were confined in Kailek, southern Darfur, for about fifty days.⁸³ Women and children were separated from the men, physically confined, and eventually transported to a new location.⁸⁴ Here, the women and girls, including some as young as ten years old, were gang raped for protracted periods of time.⁸⁵

⁷⁵ See 'Outreach Programme on the 1994 Genocide against the Tutsi in Rwanda and the United Nations', available at www.un.org/en/preventgenocide/rwanda/supporting-survivors.shtml.

⁷⁶ Prosecutor's Request for Warrant, *supra* note 63, § 121.

⁷⁷ *Ibid.*, § 121.

⁷⁸ *Ibid.*, § 121.

⁷⁹ UN COI Final Report, *supra* note 54, § 334.

⁸⁰ *Ibid.*, § 334.

⁸¹ *Ibid.*, § 334.

⁸² Prosecutor's Request for Warrant, *supra* note 63, § 24.

⁸³ UN COI Final Report, *supra* note 54, § 343.

⁸⁴ *Ibid.*, § 343.

⁸⁵ *Ibid.*, § 343.

23. Cases of rape and sexual violence are often underreported and, as previous prosecutions have demonstrated, it is difficult to assess a total number of victims.⁸⁶ Notably, however, 2.5 years after Bashir's forces began their campaign against the Fur, Masalit, and Zaghawa groups, sources in Darfur were documenting 'new cases of rape on a weekly basis, perpetrated by armed men alleged to be members of the Government armed forces, law enforcement agencies and Janjaweed'.⁸⁷

24. While rape per se meets the severity threshold of, indeed beyond, 'serious bodily or mental harm',⁸⁸ the Court will nevertheless take note of the particular bodily and psychological damage suffered by Fur, Masalit, and Zaghawa women and girls. The prevalence of female genital mutilation (FGM) in Darfur exacerbated the physical damage inflicted during rape, in particular increased incidence of fistula.⁸⁹ According to one witness interviewed by the prosecution, for 'virgins who had FGM and were sexually assaulted, the impact was particularly painful and debilitating'.⁹⁰ A health specialist treating victims in Darfur testified that most of the 'victims exhibited symptoms of post-traumatic stress disorder, including extreme shame, grief, hopelessness, anger and rage, flashbacks, nightmares, and inability to interpret their environment'.⁹¹ These symptoms have been aggravated by the inability to resort to state authorities for help. One victim testified, 'those who rape you wear fatigues and those who protect you wear fatigues. We don't know any more who to run from and who to run to'.⁹²

Torture and Other Cruel, Inhuman, or Degrading Treatment in Darfur

25. Torture and other cruel, inhuman, or degrading treatment can amount to genocidal acts. Torture occurs when someone deliberately causes very serious and cruel physical or mental suffering to another person. This encompasses a wider range of conduct including, for example, beatings, blinding, and mutilations. It also includes acts of sexual violence.⁹³ The findings cited above and describing gang

⁸⁶ Prosecutor's Request for Warrant, *supra* note 63, § 126.

⁸⁷ *Ibid.*, § 124.

⁸⁸ Judgment, *Kunarac, Kovac and Vukovic* (IT-96-23/1-A), Appeals Chamber, 12 June 2001, §§ 150–151 (hereafter *Kunarac, Kovac and Vukovic* Appeal Judgment); see also Judgment, *Delalić et al.* (IT-96-21-T), Trial Chamber, 16 November 1998, § 480 (hereafter *Delalić et al.* Trial Judgment); Judgment, *Furundžija* (IT-97-17/1-A), Appeals Chamber, 21 July 2000, § 114 (hereafter *Furundžija* Appeal Judgment).

⁸⁹ Prosecutor's Request for Warrant, *supra* note 63, § 129.

⁹⁰ *Ibid.*, § 129.

⁹¹ *Ibid.*, § 25.

⁹² *Ibid.*, § 27.

⁹³ *Kunarac, Kovac and Vukovic* Appeal Judgment, *supra* note 88, § 150; Judgment, *Mucić* (IT-96-21-T), Trial Chamber, 16 November 1998, §§ 493, 495 (hereafter *Mucić* Trial Judgment); *Akayesu* Trial Judgment, *supra* note 69, § 731; see also **Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, Pursuant to Human Rights Council Resolutions 43/28 and 45/21 of 19 June 2020*, UN Doc. A/HRC/46/54, 21 January 2021, § 103 'sexual and physical violence, together with the severe mental trauma, which Yazidi women

rapes, rapes, and sexual slavery support a finding that these acts also constitute acts of torture and cruel, inhuman, or degrading treatment against the Fur, Masalit, and Zaghawa groups.

26. Additionally, being forced to witness loved ones or others being killed or ill-treated can in and of itself constitute cruel, inhuman, or degrading treatment.⁹⁴ In Darfur, such forced witnessing took particularly gendered hues when Bashir's forces made mothers witness the murder of their children. According to the UN Commission of Inquiry for Darfur, 'extreme mental torture was inflicted on many mothers who saw their children burn alive after they were snatched from their arms by the Janjaweed and thrown into the fire'.⁹⁵ In one gruesome instance, a mother was repeatedly raped in the vicinity of her baby who cried for three straight days. On the third day a member of Bashir's forces 'grabbed the baby, cut his throat and smashed his head on the floor'.⁹⁶

27. Finally, concerning degrading treatment, international tribunals have qualified forced public nudity as constituting such treatment.⁹⁷ In Darfur, stripping women of their clothes and the use of derogatory language as a means of humiliation and degradation were nearly ubiquitous characteristic in Bashir's forces' abductions and subsequent rape.⁹⁸

28. Accordingly, and in light of all of the foregoing, the Court finds adequate reason to believe that in perpetrating widespread and brutal sexual violence and torture and other cruel, inhuman, and degrading treatment against the Fur, Masalit, and Zaghawa groups, the *actus reus* of the second act of genocide is satisfied.

DELIBERATELY INFLECTING ON THE FUR, MASALIT, AND ZAGHAWA ETHNIC GROUPS CONDITIONS OF LIFE CALCULATED TO BRING ABOUT THE GROUPS' PHYSICAL DESTRUCTION (ARTICLE 6(C) – COUNT 3)

29. For the purposes of the *actus reus* of genocide by deliberately inflicting conditions of life calculated to bring about the group's physical destruction, the Court must be convinced that the prosecution has shown to the applicable standard that Bashir's forces inflicted on the Fur, Masalit, and Zaghawa groups methods of destruction by which the perpetrator does not immediately kill the members of the

and girls over the age of nine experience at the hands of ISIS rises to the level of torture, causing them serious physical and psychological harm'.

⁹⁴ See Inter-American Commission on Human Rights, *Case 11,520 (Mexico)*, Report, 1998, § 76; Inter-American Court of Human Rights, *Caesar v. Trinidad and Tobago*, Judgment, 2005, § 78; ICRC, Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 2nd ed., 2016, § 622.

⁹⁵ UN COI Final Report, *supra* note 54, § 365.

⁹⁶ Prosecutor's Request for Warrant, *supra* note 63, § 139.

⁹⁷ Kunarac, Kovac and Vukovic Trial Judgment, *supra* note 88, §§ 766–774.

⁹⁸ UN COI Final Report, *supra* note 54, § 366.

group, but which, ultimately, seek their physical destruction.⁹⁹ Such methods include, inter alia, ‘subjecting the group to a subsistence diet; failing to provide adequate medical care; systematically expelling members of the group from their homes; and generally creating circumstances that would lead to a slow death such as the lack of proper food, water, shelter, clothing, sanitation, or subjecting members of the group to excessive work or physical exertion’.¹⁰⁰

30. The ICTR Trial Chamber in the *Kayishema* case found that rape could be a method of imposing conditions of life that do not ‘lead immediately to the death of members of the group’.¹⁰¹ Moreover, in the ICJ’s 2015 judgment in *Croatia v. Serbia*, the Court indicated that rape could fall within Article II(c) of the Genocide Convention but noted that in that particular case, ‘it has not been shown that these occurrences [of rape] were on such a scale to have amounted also to inflicting conditions of life on the group that were capable of bringing about its physical destruction in whole or in part’.¹⁰²

31. With the backdrop of other measures imposed by Bashir’s forces to physically destroy the Fur, Masalit, and Zaghawa groups (addressed elsewhere in this decision) – including destroying food, wells, and water-pumping machines, shelter, crops and livestock, physical structures capable of sustaining life or commerce, and denying access to humanitarian relief – the characteristics of Bashir’s forces’ rape in the context of displacement can be viewed as conditions of life calculated to physically destroy the Fur, Masalit, and Zaghawa groups.

32. As a preliminary matter, the displacement of a very large part of the population of Darfur is a fact beyond dispute. Data from refugee camps in Chad and internally displaced persons’ camps within Darfur confirm that virtually the entire population of the target groups has been forcibly displaced.¹⁰³

33. Within the camps, the Fur, Masalit, and Zaghawa continued to be subjected to attacks. There was a complete absence of meaningful government aid, and Bashir’s forces hindered other efforts to bring humanitarian aid to the target groups. Sudan’s Ministry of Humanitarian Affairs works in close association with the

⁹⁹ Akayesu Trial Judgment, *supra* note 69, §§ 505–506.

¹⁰⁰ Judgment, **Tolimir* (IT-05-88/2-A), Trial Chamber, 8 April 2015, §§ 225–226; See also Akayesu Trial Judgment, *supra* note 69, § 506. This definition has been affirmed in the Rutaganda Trial Judgment, *supra* note 69, § 52; Musema Trial Judgment, *supra* note 69, § 157; Stakić Trial Judgment, *supra* note 71, § 517. The ICC Elements of Crimes defines ‘conditions of life’ as including, but not necessarily restricted to, ‘deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes’, Article 6, Elements of Crimes.

¹⁰¹ Judgment, *Kayishema* (ICTR-95-1-T), Trial Chamber, 21 May 1999, § 116, where ICTR Trial Chamber determined that the infliction of rape was also a method of destruction that does not ‘lead immediately to the death of members of the group’.

¹⁰² **Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, judgment of 3 February 2015, at 362–364 (hereafter *Croatia v. Serbia Judgment*).

¹⁰³ Prosecutor’s Request for Warrant, *supra* note 63, §§ 19–22.

government's intelligence and security apparatus and blocked the publication of nutrition surveys, delayed the delivery of aid, expelled relief staff, denied visas and travel permits, and imposed unnecessary bureaucratic requirements on aid workers.¹⁰⁴

34. Importantly, basic amenities like food, water, and firewood were located far from where IDPs were confined. This meant that girls and women had to leave the borders of their camps to collect these essential-for-life resources (because they were less likely to be killed than men or boys), and in the process traverse areas patrolled by Bashir's forces and local militias that Bashir allegedly recruited, armed, and purposefully failed to disarm, which are stationed in the vicinity of the camp.

35. As noted above, rape and other forms of sexual violence were widely reported during these junctures. That is, for more than five years Fur, Masalit, and Zaghawa women and girls were raped continuously and systematically when they ventured from the relative, if still limited, security of IDP camps to collect essentials for life (which the Court notes is a highly gendered responsibility).¹⁰⁵

36. A Masalit woman from Habila, West Darfur testified:

Sometimes we go to collect grass, to sell in the market to buy things we need for our children. They [the Janjaweed] send two people, and the rest of them set up an ambush. They stop their car in a khor or a hill. Some of them act as guards. The two people then approach us and, when we see them, we run. Some of us succeed in getting away, and some are caught and taken to be raped – gang-raped. Maybe around twenty men rape one woman.¹⁰⁶

37. Rapes of women and girls venturing outside displaced person locations for food, water, firewood, or the market to sell goods for their families have reportedly occurred in the Abu Shouk and Kassab camps in northern Darfur, the Ardamata, Azeoni, Garsila, Krinding, Magarsa, Masteri, Mornei, Mukjar, Riyadh, and Sisi camps in western Darfur, and the Al Jeer, Derej, Kalma, Kass, and Otash camps in southern Darfur, among others.¹⁰⁷ Abductions and subsequent sexual slavery were also reported to occur on the borders of the IDP camps.¹⁰⁸

38. A health specialist treating IDPs in Darfur testified that many of the girls who had been raped when they went to get firewood outside IDP camps were repeatedly retraumatized because they had no choice but to revisit the places where they had been raped.¹⁰⁹ According to this witness, the absence of any mental health or

¹⁰⁴ *Ibid.*, § 34.

¹⁰⁵ *Ibid.*, § 24.

¹⁰⁶ *Ibid.*, § 145.

¹⁰⁷ UN COI Final Report, *supra* note 54, § 346.

¹⁰⁸ *Ibid.*, § 342.

¹⁰⁹ Prosecutor's Request for Warrant, *supra* note 63, § 25.

psychosocial support services in the camp was an exacerbating factor that was liable to prolong or worsen the suffering of the victims.¹¹⁰

39. Cases of rape by Bashir's forces surrounding IDP camps instilled fear among women and girls of the target groups, and led to their virtual confinement inside those sites.¹¹¹ In some cases, women and girl IDPs belonging to the target groups were unable to move even a few metres from their camp for fear of being raped.¹¹²

40. According to one witness, residents of the camps are afraid to send men out of the camps for fear of death, and afraid to send women and girls out of the camps for fear of rape.¹¹³ Another witness shared similar experiences: 'We were afraid to use the toilet at night because we were surrounded by the attackers, and they were on the look-out for women to rape.'¹¹⁴ The impact of this sexual violence was amplified by the fact that women and their families depended on the collection of firewood for their livelihood and survival.¹¹⁵

41. It is here where Bashir's forces' rape and sexual violence can be viewed as a condition of life calculated to physically destroy the Fur, Masalit, and Zaghawa groups. The Court is satisfied that by forcing the groups from their homes, confining them to squalid IDP camps, limiting the ingress of essential humanitarian supplies, and then raping the women and girls who are then forced to leave the camps to gather essentials for survival, thereby inflicting massive trauma that in many cases rendered victims unable to leave the camps, the natural and foreseeable outcome of which would be the slow physical destruction of all of the camp's residents, Bashir's forces can reasonably be seen to have committed the third prohibited genocidal act.

INTENT TO DESTROY

42. In order to support the issuance of a warrant, the Court must be satisfied that there are reasonable grounds to believe that the above-alleged genocidal acts occurred with the intent to destroy the Fur, Masalit, or Zaghawa groups, in whole or in part, as such. This means that in order to constitute genocide, 'acts must have been committed against one or more persons because such person or persons were members of a specific group, and specifically, because of their membership in this group'.¹¹⁶ Thus, the victim is targeted not because of their individual identity, but because of their being a member of a national, ethnic, racial, or religious group.

43. Because direct evidence of the special intent to destroy is highly uncommon, courts have inferred the intent to destroy from defendants' conduct, including their statements, as well as 'deeds and utterances considered together, as well as from the

¹¹⁰ *Ibid.*, § 132.

¹¹¹ UN COI Final Report, *supra* note 54, § 347.

¹¹² *Ibid.*, § 396.

¹¹³ Prosecutor's Request for Warrant, *supra* note 63, § 204.

¹¹⁴ UN COI Final Report, *supra* note 54, § 344.

¹¹⁵ *Ibid.*, § 346.

¹¹⁶ Rutaganda Trial Judgment, *supra* note 69, § 60.

general context of the perpetration of other culpable acts systematically directed against the same group'.¹¹⁷ Relevant conduct includes the physical targeting of the group and/or their property, the use of derogatory language towards members of the targeted group, and methodological planning.¹¹⁸ The scale of atrocities committed, their general nature, and the fact of deliberately and systematically targeting victims on account of their membership in a particular group, while excluding members of other groups, are other factors from which one can infer genocidal intent.¹¹⁹

44. The concept of 'destruction' refers to both physical and biological destruction.¹²⁰ To date, judicial and non-judicial determinations of genocide have largely focused on physical destruction through mass killing. However, it should be noted, considering the gendered underpinnings of the acts in question, that equally relevant is the intent to biologically destroy, which aims at the target group's regenerative capacity and its ability to ensure long-term survival.¹²¹ The Genocide Convention itself, as well as the decisions of the ICTY have consistently confirmed that acts intending to bring about biological destruction do fall under its ambit.¹²²

45. The intent must be to physically or biologically destroy a protected group in whole or in part. Concerning what constitutes 'a part' of the protected group, the ICTY and ICTR have made clear that the intended destruction must refer at least to a 'substantial part' of the group.¹²³ While there is no specific threshold or formula for understanding substantiality, courts have frequently looked to three sets of factors: numbers, function, and geography.¹²⁴ Notably, the ICTY's *Krstić* appeals chamber found that '[t]hese considerations, of course, are neither exhaustive nor dispositive. They are only useful guidelines. The applicability of these factors, as well as their relative weight, will vary depending on the circumstances of a particular case'.¹²⁵

¹¹⁷ Judgment, *Gacumbitsi* (ICTR-2001-64-T), Trial Chamber, 17 June 2004, § 252.

¹¹⁸ Kayishema Trial Judgment, *supra* note 102, § 93.

¹¹⁹ Akayesu Trial Judgment, *supra* note 69, § 523; Kajelijeli Trial Judgment, *supra* note 53, §§ 804–805.

¹²⁰ See for example *Krstić* Trial Judgment, *supra* note 70, § 580 (affirmed in *Krstić* Appeals Judgment (IT-98-33-A), Appeals Chamber, 19 April 2004, § 25); *Croatia v. Serbia* Judgment, *supra* note 102, at 136.

¹²¹ *Croatia v. Serbia* Judgment, *supra* note 102, at 136: 'It was accordingly decided to limit the scope of the Convention to the physical or biological destruction of the group . . . [re: act e] this can also entail the intent to destroy the group physically, in whole or in part, since it can have consequences for the group's capacity to renew itself, and hence to ensure its long-term survival.' See also S. Ashraph, 'Beyond Killing: Gender, Genocide, & Obligations under International Law', Global Justice Center (2018), available at www.globaljusticecenter.net/files/Gender-and-Genocide-Whitepaper-FINAL.pdf, at 32–33.

¹²² See for example *Krstić* Trial Judgment, *supra* note 70, § 580 (affirmed in *Krstić* Appeals Judgment, § 25); *Croatia v. Serbia* Judgment, *supra* note 102, at 136.

¹²³ See for example *Krstić* Appeals Judgment, *supra* note 121, § 12; *Bagilishema* Trial Judgment (ICTR-95-1A-T), Trial Chamber I, 7 June 2001, § 64; *Popović* Trial Judgment (IT-05-88-T), Trial Chamber II, 10 June 2010, § 831. See also *Bosnia and Herzegovina v. Serbia and Montenegro* Judgment, *supra* note 72, at 198.

¹²⁴ *Krstić* Appeals Judgment, *supra* note 121, §§ 12–13.

¹²⁵ *Ibid.*, § 14.

This view has also been endorsed by the ICJ in the *Bosnia* case: ‘Much will depend on the Court’s assessment of those and all other relevant factors in any particular case.’¹²⁶ Building on this analysis and giving priority to the numeric requirement, the ICJ in the *Croatia* case further noted that ‘in evaluating whether the allegedly targeted part of a protected group is substantial in relation to the overall group, the Court will take into account the quantitative element as well as evidence regarding the geographic location and prominence of the allegedly targeted part of the group’.¹²⁷

46. While the numerical understanding of substantiality has often been the focus,¹²⁸ geography and function can be highly illustrative of substantiality.¹²⁹ For example, in determining substantiality on the basis of prominence of the targeted part of the group, the *Krstic* court looked at whether the targeted members of the group were essential to the group’s survival or emblematic of the overall group.¹³⁰

47. Indeed, in the case of the Fur, Masalit, and Zaghawa groups, an analysis looking at the intersections of these three factors, in particular through the lens of the widespread perpetration of sexual violence and an intent to destroy, leads to a reasonable basis to believe Bashir and his forces were operating with genocidal intent.

48. An analysis of these three factors weighing the presence of whether a substantial part of the group was targeted for biological destruction would be incomplete without special consideration of the manner and means by which Bashir’s forces sought to destroy different members of the Fur, Masalit, and Zaghawa groups. This necessarily includes taking into consideration the gendered reasons the forces chose certain types of violence for certain members of these groups. Under this light, the forces’ intent to biologically destroy the Fur, Masalit, and Zaghawa groups can be seen through the (1) geographical confinement to IDP camps and subsequent (2) large number of brutal rapes against (3) women and girls – members of the groups charged with ensuring the groups’ regeneration, through obtaining essentials for life as well as through reproduction.

¹²⁶ *Bosnia and Herzegovina v. Serbia and Montenegro Judgment*, *supra* note 72, at 201.

¹²⁷ *Croatia v. Serbia Judgment*, *supra* note 102, at 142.

¹²⁸ See for example: *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Cambodia v. Myanmar)*, verbatim record of 11 December 2019, at 47, where Counsel for Myanmar asserted with respect to arguments on the intent to destroy that ‘does the application specify the number of deaths, the total number of deaths, and compare this with the size of the population that was allegedly attacked’.

¹²⁹ *Bosnia and Herzegovina v. Serbia and Montenegro Judgment*, *supra* note 72, at 198; *Croatia v. Serbia Judgment*, *supra* note 102, at 142; *Krstic Appeals Judgment*, § 12; *Jelisić Trial Judgment (IT-95-10-T)*, Trial Chamber, 14 December 1999, § 82: ‘[Genocidal intent] may also consist of the desired destruction of a more limited number of persons selected for the impact that their disappearance would have upon the survival of the group as such. This would then constitute an intention to destroy the group “selectively”.’

¹³⁰ *Krstic Appeals Judgment*, *supra* note 121, § 12.

49. Taking these factors one by one to then look at them in conjunction, the context of confinement is a highly probative geographical factor. The scale and intensity of attacks on Fur, Masalit, and Zaghawa villages can be viewed as a push factor forcing surviving members of the group into enclosed and squalid conditions within IDP camps devoid of essentials for survival – in effect creating a siege environment where commerce stalled, resupply was forbidden, and resources dwindled.

50. These dire conditions had the highly predictable effect of forcing women and girls to venture outside the confines of the camps to acquire essentials. As noted above, it was the women who left the camps because of their higher likelihood of survival, and the gendered roles ascribed to them. But while women and girls might survive (not be killed) by Bashir's forces outside the camps, they were often raped – which implicates the second factor: the numerical assessment.

51. Rape and other forms of sexual violence in atrocity situations are significantly underreported, owing to the stigma often imposed on survivors. This is no less true in Darfur than anywhere else with evidence of sexual violence of this scale. Additional factors leading to the impossibility of definitively stating a specific quantitative amount relate to the Government of Sudan's refusal to allow humanitarian actors to access the IDP camps, as well as the general denial of the rape and sexual violence occurring in Darfur.¹³¹ However, despite the inability to authoritatively state a specific number, evidence supports the conclusion that many, many thousands of women and girls were raped by Bashir's forces in the context of their confinement. This conclusion is all the more evident when it is recalled that it has been widely reported that systematic rape in the context of confinement occurred in Darfur for more than five years, that Bashir's forces allegedly only raped women and girls belonging to African tribes in Darfur (that is, they did not rape Arab women in Darfur),¹³² and that there were roughly 2.5 million people living in IDP camps at the relevant time, including significant portions of the protected groups.¹³³

52. But a genocidal intent analysis should not be so two-dimensional as to only look at *what numbers* of people were targeted for destruction and *where*. The Court is also compelled to look at what *function* these targeted persons served in the targeted group. In the case of the Fur, Masalit, and Zaghawa women and girls, these members of the groups were serving two essential functions for the groups' continued biological survival.

53. Firstly, and as noted above in the section on the imposition of measures calculated to physically destroy the group, Fur, Masalit, and Zaghawa women and girls were responsible for leaving the relative safety of the IDP camps in efforts to

¹³¹ See Prosecutor's Request for Warrant, *supra* note 63, § 396: 'On 19 March 2007, speaking on the issue of rapes, he said that "It is not in the Sudanese culture or people of Darfur to rape. It doesn't exist. We don't have it".' Al Bashir also insisted that 99 per cent of alleged cases of rape are fabricated in order to place blame on the government.

¹³² UN COI Final Report, *supra* note 54, § 221.

¹³³ Prosecutor's Request for Warrant, *supra* note 63, §§ 23, 24, 34.

obtain essentials for their families. It was on these excursions that they were raped and abducted. Report after report makes clear that Fur, Masalit, and Zaghawa women and girls were raped and abducted when they went to fetch water, when they went to gather firewood for cooking, when they went into towns to attempt to sell items to buy medicine for their families. By raping and abducting into sexual slavery the members of the groups performing these absolutely essential functions, Bashir's forces were creating massive disincentives for these women and girls to continue performing these tasks, to continue exposing themselves to the risks of repeated and brutal rape and sexual violence.

54. In so doing, Bashir's forces created an environment where the Fur, Masalit, and Zaghawa groups were deprived of essentials, which would foreseeably lead to their eventual death and physical destruction. Thus, there is a reasonable basis to believe that in confining large portions of the Fur, Masalit, and Zaghawa groups to IDP camps, then subjecting those responsible for day-to-day survival to brutal sexual violence and sexual slavery, essentially guaranteeing these women and girls would stop leaving the camps and therefore stop obtaining essentials for the groups, that Bashir's forces were acting with the intent to physically destroy the groups.

55. But these day-to-day tasks were not the only functions the Fur, Masalit, and Zaghawa women and girls performed. The sexual violence against them must also be seen against the backdrop of the broader social context in which they lived. That is, as a means of destroying the victim group, sexual violence has been particularly effective when employed in more strongly patriarchal cultures where the protection of female members of the group is believed to be the ultimate responsibility of their male relatives.

56. In this way, sexual violence against a group's female members is also often perpetrated and understood as a means of deliberate attack on the group's men, or more specifically on the gender roles that men are expected to play. Where men are expected to act as protectors of their female relatives and the female members of their particular group more generally, they may interpret the rape of 'their' women as evidence of their own powerlessness, and thus as a cogent assault on their identity as men.¹³⁴

57. This is particularly apparent when perpetrators commit rapes of women and girls publicly, as occurred in Darfur. Rapes were often committed in front of others, including husbands, fathers, mothers, and children of the victims, who were forced to watch and prevented from intervening, amplifying the humiliation wrought on all parties.¹³⁵ These rapes are reported as having been inflicted upon a wide age range, from girls under ten to women of seventy or older.¹³⁶

¹³⁴ S. Ashraph, 'Acts of Annihilation: Understanding the Role of Gender in the Crime of Genocide', *The Cairo Review of Global Affairs* (2004), available at www.thecaireview.com/essays/gender-and-genocide/, at 65.

¹³⁵ T. Gingerich and J. Leaning, 'The Use of Rape as a Weapon of War in the Conflict in Darfur, Sudan' (US Agency for International Development/OTI, 2004) 1–56, at 15, 18.

¹³⁶ *Ibid.*, at 15.

58. Moreover, rapes and episodes of sexual violence were extremely brutal. According to a report prepared by Harvard University's School of Public Health, Bashir's forces 'engaged in vaginal and anal penetration, including penetration with objects. In the course of raping women, the assailants also inflicted beatings, cutting them with knives on the legs in a method similar to that used for branding slaves, and mutilate them sexually'.¹³⁷ Additionally, perpetrators often verbally berated the women and girls, 'calling them slaves, telling them that they would now bear a "free" child, and asserting that they (the perpetrators) are wiping out the non-Arabs'.¹³⁸

59. This system and method of rape left an enduring mark on the groups' social fabric. Individuals, families, and the wider Fur, Masalit, and Zaghawa communities were highly traumatised by the systematic and brutal sexual violence they suffered and witnessed. This trauma carries with it gendered implications.

60. In contexts where women and girls are held up as repositories of the family's honour, such as in the Fur, Masalit, and Zaghawa communities, female survivors of sexual violence are more likely to be cast out by their own community, left unable to marry, abandoned by their husbands. For example, one Zaghawa witness interviewed by the prosecution stated: '[I]n my community sexual violence is emotionally shattering. . . . The impact of rape and sexual violence on the victims is such that those who are not married would have difficulty finding a husband, and the people look at [a rape victim] as though she has a terminal disability'.¹³⁹ Another witness testified, 'in this society if you rape one woman, you have raped the entire tribe'.¹⁴⁰

61. These consequences break down the bonds between members of the targeted communities, reducing social cohesion and diminishing the ability of the protected group to replenish itself through sexual reproduction.¹⁴¹

62. In other words, the rape and sexual violence perpetrated against Fur, Masalit, and Zaghawa women and girls can be seen as an effort to leverage the conservative, cultural norms of those community which equated honour and marriageability with the sexual 'purity' of its female members. In this way, perpetrators used gender norms to maximise the destructive impact of their geographical confinement and numerically massive rape campaign by further facilitating the traumatisation, stigmatisation, and ostracisation of victims, adversely impacting their ability to become or to remain married or contemplate procreative relationships.¹⁴²

63. In sum, the Court finds that there is a reasonable basis to believe that Bashir's forces harboured genocidal intent to biological destroy a substantial part of the Fur, Masalit, and Zaghawa groups in view of the confinement of the target groups, the

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

¹³⁹ Prosecutor's Request for Warrant, *supra* note 63, § 130.

¹⁴⁰ *Ibid.*, § 130.

¹⁴¹ J. Gottschall, 'Explaining Wartime Rape' 41 *Journal of Sex Research* (2004) 129–136, at 131.

¹⁴² Ashraph, *supra* note 134, at 35.

subsequent and massive campaign of rape against those in the groups responsible for their daily survival and longer-term biological regeneration.

64. The Court is reminded that while the crime of genocide is a crime of intention, it does not require that the intended destruction succeed – much less when the question put before the Court in this instance is whether there is a reasonable basis to believe that the requisite intent exists. On the basis of the facts elaborated above, the Court finds that such a reasonable basis does in fact exist.

65. Thus, it is the Court's conclusion that there exists a reasonable basis to believe that the genocidal acts of killing, causing serious mental or physical suffering, and inflicting conditions calculated to physically destroy were committed with the required special intent to destroy the Fur, Masalit, and Zaghawa groups.

Judge Akila Radhakrishnan and Judge Grant Shubin

10.3 STATE COOPERATION AND ACCOUNTABILITY IN THE AL BASHIR JORDAN APPEAL

Saumya Uma and Ramya Jawahar Kudekallu

Then President of Sudan, Mr Omar Al Bashir, visited the Hashemite Kingdom of Jordan in March 2017. The ICC had issued a Warrant of Arrest for Mr Al Bashir on 4 March 2009¹⁴³ and 12 July 2010¹⁴⁴ respectively, and requested Jordan to arrest and surrender Mr Al Bashir during his visit.¹⁴⁵ Jordan refused, stating that head-of-state immunity protected Mr Al Bashir from arrest and that, further, as Sudan was not a state party to the Rome Statute, there was no obligation to arrest.¹⁴⁶

In 2019, the Appeals Chamber decided that Jordan was under an obligation to arrest and surrender Mr Al Bashir because as a state party to the Rome Statute, Jordan had accepted that head-of-state immunity cannot act as a bar to the jurisdiction of the ICC.¹⁴⁷

In this rewritten appeal decision, Saumya Uma and Ramya Jawahar Kudekallu confirm Jordan's obligation to arrest and surrender Mr Al Bashir, but situate this obligation through an examination of how the tolerance and acceptance of immunities, such as head-of-state immunity, increases the likelihood that sexual and gender-based crimes are treated with impunity. They bolster the obligation with a

¹⁴³ Warrant of Arrest, *Al Bashir* (ICC-02/05-01/09-3), Pre-Trial Chamber 1, 4 March 2009.

¹⁴⁴ Second Decision on the Prosecution's Application for a Warrant of Arrest, *Al Bashir* (ICC-02/05-01/09-94), Pre-Trial Chamber I, 12 July 2010.

¹⁴⁵ Public redacted version of Annex 1 to the Report of the Registry on information received regarding Omar Al Bashir's potential travel to the Hashemite Kingdom of Jordan, *Al Bashir* (ICC-02/05-01/09-291-Anxi-Red), Registry, 24 March 2017.

¹⁴⁶ Decision under Article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender of Omar Al Bashir, *Al Bashir* (ICC-02/05-01/09-309), Pre-Trial Chamber II, 11 December 2017, §§ 7–8, 14–19.

¹⁴⁷ *Ibid.*, § 32–34, 39.

close reading of the Statute, the submissions of amici and also consider how accession to international conventions, such as the conventions on torture and genocide, operate to require both state party and non-state party members to assist the ICC, further dismantling the notion that being a non-state party further authorises the lack of obligation.

No. ICC-02/05-01/09 OA2

Date: 6 May 2019

Original: English

THE APPEALS CHAMBER(B)

Before: Judge Saumya UMA
Judge Ramya Jawahar KUDEKALLU

SITUATION IN DARFUR, SUDAN
IN THE CASE OF THE PROSECUTOR v. OMAR HASSAN AHMAD AL BASHIR

Public Document

Judgment in the Jordan Referral re Al Bashir Appeal

The Appeals Chamber of the International Criminal Court

In the appeal of the Hashemite Kingdom of Jordan against the decision of Pre-Trial Chamber II entitled ‘Decision under Article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender o[f] Omar Al Bashir’ of 11 December 2017 (ICC-02/05-01/09-309) (Jordan Referral re Al Bashir Appeal).

After deliberation, based on a unanimous decision, the judges deliver the following judgment.

JUDGMENT

1. Pre-Trial Chamber II found that the Hashemite Kingdom of Jordan (Jordan) had failed to comply with its obligations under the Rome Statute (Statute) by not executing the Court’s request for the arrest of Mr Omar Hassan Ahmad Al Bashir (Mr Al Bashir) and his surrender to the Court when Mr Al Bashir was on Jordanian territory on 29 March 2017. This decision was appealed by Jordan. While the judgment of Pre-Trial Chamber II addressed multiple issues, this decision is confined to addressing and determining one core issue, namely whether Jordan complied with its duty to cooperate with the Court.

2. The Appeals Chamber unanimously concludes that Jordan breached its international obligations under the Statute by failing to comply with the request of the Court to execute the arrest warrant issued by it, when Mr Al Bashir was on Jordanian territory on 29 March 2017. Jordan’s act of recognising head-of-state immunity, and

its non-compliance with the request of this Court to arrest the suspect, affected the effective functioning of the Court in ending impunity for the most serious crimes of international concern. Thus, the Pre-Trial Chamber's decision on this issue is confirmed, for the reasons given below.

- (i) This Court finds that immunity for heads of state as a customary practice does not eclipse or override the jurisdiction of this Court, nor should it interfere or disrupt a consistency required of the Court, which is state cooperation and ending impunity for heinous crimes. Mr Al Bashir is being charged with ten counts on the basis of his individual criminal responsibility under Article 25(3)(a) of the Rome Statute as an indirect (co)perpetrator.
- (ii) These crimes include five counts of crimes against humanity, specifically murder under Article 7(1)(a), extermination under Article 7(1)(b), forcible transfer under Article 7(1)(d), torture under Article 7(1)(f), and rape under Article 7(1)(g) of the Statute.
- (iii) Mr Al Bashir has also been charged with two counts of war crimes, in particular intentionally directing attacks against a civilian population and against individual civilians not taking part in hostilities under Article 8(2)(e)(i)), and pillaging under Article 8(2)(e)(v)
- (iv) In addition to the above, three counts of the crime of genocide, with Mr Al Bashir allegedly committing genocide by killing under Article 6-a, genocide by causing serious bodily or mental harm under Article 6-b, and genocide by deliberately inflicting on each target group conditions of life calculated to bring about the group's physical destruction under Article 6-c.
- (v) Pre-Chamber I considered that there are reasonable grounds to believe that Mr Al Bashir targeted thousands of civilian women belonging primarily to Fur, Masalit, and Zaghawa groups, subjecting them to acts of rape, forcible transfer, and torture.¹⁴⁸

REASONS

Key Findings

3. Customary international law has limits to immunity for heads of state. There is no suggestion in any instruments that immunity of heads of state can prevent or exonerate persons from being prosecuted before an international court for international crimes. The drafters of the Statute would have surely been aware of the immunity accorded to heads of state under customary international law, in the context of ICC crimes within the jurisdiction of the Court through Article 27(2).

¹⁴⁸ *Prosecutor v. Omar Hassan Ahmad Al Bashir* (ICC-02/05-01/09), at § 105

Applicable Law

4. A close reading of Article 21 of the Statute lends credence to this reasoning. Article 21 reads as follows:

Article 21 Applicable law

1. The Court shall apply:
 - a. In the first place, this 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;
 - c. Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of states that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognised norms and standards.

5. Article 21 allows recourse to customary or treaty law *only* if a matter is not addressed by the sources of law enumerated in Article 21(1)(a).¹⁴⁹ Article 21 ranks the applicable sources by prioritising the ICC-specific sources of law. In the present case, it is clear that the Statute has addressed the issue of immunities and rejected them in Article 27. *We believe and hold that customary international law cannot override an explicit statutory provision that has dismantled immunity for heads of state for ICC crimes. This was done in the Statute to facilitate accountability for the perpetration of such crimes by the highest echelons of power.*

State Obligation to Execute an Arrest Warrant Issued by the Court

6. Article 58(1) of the Statute provides for the issuance of a warrant of arrest by the Pre-Trial Chamber, in situations where it concludes that there are reasonable grounds to believe that the suspect has committed an ICC crime and their arrest appears necessary. The issuance of the warrant of arrest is accompanied by the issuance of a summons to appear, in order to compel the attendance of the suspect before the Court.¹⁵⁰ Given that a trial cannot proceed in the absence of the suspect

¹⁴⁹ Request by Professor Nicholas Tsagourias and Dr Michail Vagias for Leave to Submit Observations on the Merits of the Legal Questions Presented in the Hashemite Kingdom of Jordan's Appeal against the Decision under Article 87(7) of the Rome Statute on the Non-Compliance by Jordan with the Request by the Court for the Arrest and Surrender of Omar Al Bashir of 12 March 2018, *Al Bashir* (ICC-02/05-01/09), Appeals Chamber, 29 April 2018, at 4.

¹⁵⁰ UN General Assembly, *Rome Statute of the International Criminal Court* (last amended 2010), 17 July 1998. Article 58(1) of the Rome Statute of the ICC states: 'At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that: (a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and (b) The

before the Court, as per Article 63 of the Statute, the execution of the arrest warrant is of utmost importance so as to ensure that the trial is not rendered infructuous and the effort to ensure accountability of the suspect is not aborted. Jordan had a legal and moral obligation to execute the arrest warrant. This is more so as by acceding to the Statute, Jordan accepted Article 27(2) which paved way for the ICC to exercise its jurisdiction even against heads of states. As submitted by the Prosecutor, this Court agrees that Jordan understood the regime created when ratifying the Statute, including ‘the issue and execution of requests of arrest and surrender of officials of States ... bound by the ... Statute’.¹⁵¹ Jordan’s act of refusal is not merely an unlawful act due to its breach of state parties’ obligations to cooperate with the Court as clearly mandated by the Statute, but also one that undermines rule of law and fails the victims of the alleged ICC crimes.

Irrelevance of Immunity for Heads of State

7. We acknowledge and foreground, with deep concern and trepidation, the ramifications of a sitting head of state’s access to power to potentially continue committing atrocities (including ICC crimes), to threaten victims and potential witnesses and scuttle processes for justice and accountability particularly against vulnerable communities – women, girls, and sexual orientation and gender identity (SOGI) minorities. We conclude that allowing immunity for heads of state could also lead to impunity for crimes against such communities – an undesirable outcome that is diametrically opposite to the objectives for which this Court was established.

8. Article 27 of the Statute is of immense relevance to the present case.

9. Article 27 explicitly states the irrelevance of official capacity as a head of state or government for serious crimes of international concern enumerated in the Statute. This standard has to be concurrent with the cooperation of states broadly while simultaneously pursuing an individual who, very obviously, wields the power, political clout, and has the means to cross state boundaries. State parties ratify the Statute, and are therefore cognisant of the jurisdiction of this Court with respect to the aforesaid crimes. Jordan, as a state party to the Statute, carries the obligation of executing the ICC’s warrant of arrest.

arrest of the person appears necessary: (i) To ensure the person’s appearance at trial; (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings; or (iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.’

¹⁵¹ Prosecution Response to the Hashemite Kingdom of Jordan’s Appeal against the ‘Decision under Article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for arrest and surrender [of] Omar Al Bashir’, *Al Bashir* (ICC-02/05-01/09), Appeals Chamber, 3 April 2018, §§ 7, 15.

Importance of State Cooperation with the Court

10. From the drafting stages of the Statute, state cooperation in the Court's investigative, prosecutorial, and judicial functions was a key principle built into the Statute. Part 9 of the Statute contains aspects of international cooperation and judicial assistance. The focus on state cooperation – an edifice of the Statute – arises from the need to delicately balance states' concerns about infringement of their sovereignty with efforts at ending impunity for ICC crimes globally. As a result, the ICC is a judicial institution with no independent police force, enforcement agency, or prison facilities (only facilities to hold in custody those persons detained under the authority of the ICC). For this reason, the Court relies on the cooperation of its state parties to the Statute and willing states which are not parties to the Statute, and institutions. The obligation of states that are parties to the Statute to cooperate entails not only complying with requests of the ICC for arrest and surrender of the accused; it extends beyond the same and includes persuading other nations that are not state parties to the ICC (such as Sudan, in this instance) to cooperate with the ICC. This is in order to reduce or eliminate safe havens for evading prosecution and escaping accountability.¹⁵² Jordan failed in its duty to fulfil and discharge both these state obligations.

11. Deficiency of cooperation, where war crimes, crimes against humanity and genocide are concerned, opens up chasms in access to justice for victims while assisting accused persons to take refuge in other jurisdictions. This court takes cognisance of the evidence submitted whereby witnesses interviewed by the prosecution, the UN Commission of Inquiry into Darfur (UNCOI), other UN bodies, and numerous NGOs have reported that, since March 2003, thousands of women and girls belonging to the target groups were raped in all three states of Darfur by members of the armed forces and militia/Janjaweed. Girls as young as five and women as old as seventy have been raped.¹⁵³ The importance of the voice and participation of victims has been an evolving key priority for the court.¹⁵⁴ Yet the execution of justice would ring hollow if the Court did not determine with clarity that states too, through the principles of *jus cogens* and *erga omnes*, owe equity to victims and must ensure that their participation is not reduced to being tokenistic.

12. State parties have a legal obligation to cooperate with the ICC at all stages of the trial and its outcome. These include implementation of arrest warrants and surrender of suspects to the ICC for trial. Non-cooperation by state parties is

¹⁵² See also "The International Criminal Court offers new hope for a permanent reduction in the phenomenon of impunity' and the establishment of the ICC is '[u]ndoubtedly the most significant recent development in the international community's long struggle to advance the cause of justice and the Rule of Law', Report of the Secretary-General, 23 August 2004, S/2004/616, § 49.

¹⁵³ *Prosecutor v. Omar Hassan Ahmad Al Bashir* (ICC-02/05-01/09) at § 105.

¹⁵⁴ M. Pena and G. Carayon, 'Is the ICC Making the Most of Victim Participation?' 7(3) *International Journal of Transitional Justice* (2013) 518–535.

addressed in Article 87(7) while non-cooperation with the Court by states not party to the Statute is dealt with in Article 87(5). The issue is not merely about what was agreed upon by the state parties at the Rome Conference, but how to make the provisions on state cooperation with the Court effective and workable in practice. The Court, being a judicial institution, has the discretion to make a judicial finding to the effect of non-cooperation by a state party to the Rome Statute. However, not every situation of non-compliance leads to a finding of non-cooperation; for instance, following Mr Omar Al Bashir's visit to the Federal Republic of Nigeria (Nigeria) in July 2013, Pre-Trial Chamber II requested Nigeria to arrest and surrender him to the Court, without making a finding on the issue of non-cooperation.¹⁵⁵

13. The specific procedural moments of this Court's process are an important factor. The Court has issued multiple warrants of arrest with obligations to multiple states, including those few that have ratified the Statute.¹⁵⁶ It has been over eight years of consistent follow-up by the prosecution to secure the defendant. Since March 2009, the defendant made more than eighty-five trips to more than twenty nation states without deterrence or limits to movements.¹⁵⁷ By failing to meet obligations of arrest and surrender for widespread crimes, particularly gendered in nature, involving sexual violence against populations, the non-cooperation of states retains a dangerous culture of tolerance and encouragement to the most heinous crimes under international law.¹⁵⁸

14. Mr Al Bashir has been freely travelling across the world, making numerous international trips with no fear of being arrested, founded in his confidence of non-cooperation by state parties to the Statute in executing this Court's warrant.¹⁵⁹ It is pertinent to note that the ICC has been addressing the issue of non-cooperation for the past few years, in instances such as *Kenyatta*¹⁶⁰ and *Gaddafi*.¹⁶¹ Further, Jordan is

¹⁵⁵ Decision Regarding Omar Al Bashir's Visit to the Federal Republic of Nigeria, *Al Bashir* (ICC-02/05-01/09), Pre-Trial Chamber II, 15 July 2013.

¹⁵⁶ 'Request to all States Parties to the Rome Statute for the Arrest and Surrender of Omar Al Bashir' (ICC-02/05-01/09-7), 6 March 2009, and 'Supplementary Request to all States Parties to the Rome Statute for the Arrest and Surrender of Omar Al Bashir' (ICC-02/05-01/09-96), 21 July 2010.

¹⁵⁷ *8132nd Meeting Reports of the Secretary-General on the Sudan and South Sudan*, UN Doc. /S/PV.8132, 12 December 2017, at 8.

¹⁵⁸ The Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014, § 75, available at www.icc-cpi.int/sites/default/files/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes-June-2014.pdf.

¹⁵⁹ Nuba Reports, 'Wanted frequent flyer: Sudan's president has made 74 trips across the world in the seven years he's been wanted for war crimes', *QUARTZ Africa*, 4 March 2016, available at <https://qz.com/africa/630571/sudans-president-has-made-74-trips-across-the-world-in-the-seven-years-hes-been-wanted-for-war-crimes/>.

¹⁶⁰ Second decision on prosecution's application for a finding of non-compliance under Article 87 (7) of the Statute, *Kenyatta* (ICC-01/09-02/11), Trial Chamber V9B), 19 September 2016.

¹⁶¹ Decision on the non-compliance by Libya with requests for cooperation by the Court and referring the matter to the United Nations Security Council, *Saif Al-Islam Gaddafi* (ICC-01/11-01/11), Pre-Trial Chamber I, 10 December 2014.

not the first country to refuse to cooperate with the Court with respect to the arrest and surrender of Mr Al Bashir. Other such states include Malawi,¹⁶² Democratic Republic of Congo,¹⁶³ Djibouti,¹⁶⁴ Uganda,¹⁶⁵ Kenya,¹⁶⁶ and Chad.¹⁶⁷ This is a clear indication of the fact that Mr Al Bashir enjoys an unparalleled, de facto impunity for alleged commission of most serious crimes of international concern – that which this court resolves to end.

Relationship between State Cooperation and Ending Impunity for Sexual and Gender-Based Violence

15. There exist intrinsic interlinkages between state cooperation with the ICC in arresting and surrendering a suspect to the court, and ending impunity for ICC crimes, especially crimes of sexual and gender-based violence. Feminist scholars of international law have, time and again, drawn attention to the gendered impact of armed conflict on women.¹⁶⁸ At the Beijing conference on women in 1995, the global community affirmed this by acknowledging that ‘while entire communities suffer the consequences of armed conflict and terrorism, women and girls are particularly affected because of their status in society and their sex’.¹⁶⁹ In General Recommendation 30, the Convention on Elimination of Discrimination Against

¹⁶² *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Corrigendum to the Decision pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir (ICC-02/05-01/09), Pre-Trial Chamber I, 13 December 2011.

¹⁶³ *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court (ICC-02/05-01/09), Pre-Trial Chamber II, 9 April 2014.

¹⁶⁴ *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute (ICC-02/05-01/09), Pre-Trial Chamber II, 11 July 2016.

¹⁶⁵ *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the non-compliance by the Republic of Uganda with the request to arrest and surrender Omar Al Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute (ICC-02/05-01/19), Pre-Trial Chamber II, 11 July 2016.

¹⁶⁶ ICC, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al Bashir’s presence in the territory of the Republic of Kenya (ICC-02/05-01/09), Pre-Trial Chamber I, 27 August 2010.

¹⁶⁷ ICC, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al Bashir’s recent visit to the Republic of Chad (ICC-02/05-01/09), Pre-Trial Chamber I, 27 August 2010.

¹⁶⁸ J. Gardam, ‘Women and the Law of Armed Conflict – Why the Silence? 46(1) *International and Comparative Law Quarterly* (1997) 55–80, at 55, 58; C. Chinkin and H. Charlesworth, *The Boundaries of International Law: A Feminist Analysis* (Manchester: Manchester University Press, 2000) at 250–257; S. Brownmiller, *Against Our Will: Men, Women and Rape* (Harmondsworth: Penguin Books, 1986).

¹⁶⁹ UN Doc. A/CONF. 177/20, 17 October 1995, § 135.

Women (CEDAW) committee too expressed concern about the gendered impact of conflicts.¹⁷⁰ There is emerging research on the sharp rise in violence based on SOGI in countries that are adversely impacted by conflict.¹⁷¹ Suffice it to note, at this juncture, the pervasive nature of ICC crimes against such vulnerable communities in the context of war and conflict, and their adverse and disproportionate impact on women and girls, as well as SOGI minorities. Thus, state parties' non-cooperation in the arrest and surrender of suspects of alleged ICC crimes would result in impunity for ICC crimes, which would have negative ramifications on access to justice for women, girls, and SOGI minorities. Seen in this light, Jordan's non-compliance with the Pre-Trial Chamber's request to arrest and surrender Mr Al Bashir has consequences that are adverse and far-reaching. Jordan's avoidance with respect to the arrest and surrender of the defendant is inconsistent with its obligations under international law, specifically human rights.

Rape as Torture

16. Rape and other forms of sexual violence have been recognised as torture under international law by various courts and tribunals. For instance, in *Aydin v. Turkey*, decided in 1997 by the European Court of Human Rights, the Court found that rape could also constitute a violation of the prohibition of torture, enshrined in Article 3 of the European Convention.¹⁷² In this case, a Turkish police officer had been charged with the rape of a seventeen-year-old Kurdish girl who had been illegally detained. Similarly in *Martí de Mejía v. Perú*, the Inter-American Commission on Human Rights held that rape violated the prohibition against torture, stated in Article 5.¹⁷³ In the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law committed in the Territory of the Former Yugoslavia since 1991 (ICTY), four members of the Bosnian armed forces were prosecuted for rape and sexual violence against Bosnian Serb civilians detained in a prison camp in Čelebići. The trial chamber, in its judgment of 1998, observed that the rape of any person was a 'despicable act which strikes at the very core of human dignity and physical integrity'.¹⁷⁴ It held that acts of

¹⁷⁰ CEDAW/C/GC/30, 1 November 2013, § 2.

¹⁷¹ World Bank, *Sexual Orientation and Gender Identity in Contexts Affected by Fragility, Conflict, and Violence* (Washington, DC: World Bank, 2020), available at <https://openknowledge.worldbank.org/handle/10986/33722> License: CC BY 3.0 IGO; A. Margalit, 'Still a Blind Spot: The Protection of LGBT Persons during Armed Conflict and other Situations of Violence' 100(1–3) *International Review of the Red Cross* (2018) 237–265.

¹⁷² *Aydin v. Turkey* (1998) 25 EHRR 251.

¹⁷³ Case 10.970, Inter-American Commission on Human Rights, Report No. 5/96, OEA/Ser.L/V/II.91 Doc. 7, 1996, at 157.

¹⁷⁴ *Prosecutor v. Zdravko Mucic aka 'Pavo', Hazim Delic, Esad Landzo aka 'Zenga', Zejnil Delalic*, Trial Judgment, IT-96-21-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 16 November 1998.

rape may constitute torture under customary international law.¹⁷⁵ In 2001, the appeals chamber of the ICTY upheld the judgment.¹⁷⁶ This was significant as it was the first judgment of the ICTY holding that rape satisfied the prerequisites of torture. Further, the ICTY stated that it is not required that each act be widespread or systematic, provided that the act forms part of a widespread or systematic attack against a civilian population.¹⁷⁷ A 2014 report that examined the torture of thirty-four women by state security forces in the Democratic Republic of Congo found that rape and sexual violence ought not to be seen in isolation; it must be seen in the broader pattern of widespread torture.¹⁷⁸

17. The resolve to end impunity for sexual and gender-based violence is of utmost importance, particularly due to the historic wrongs committed during Nuremberg and Tokyo tribunals, where a deliberate failure to prosecute persons for crimes committed against women in a systematic manner during World War II was evident.¹⁷⁹ There is an urgent need to ‘right’ the wrongs by ending impunity for ICC crimes. On this ground, too, non-cooperation with the Court for arrest and surrender of suspects, including heads of state, can be neither tolerated nor condoned.

18. Even if some countries are not state parties of the Statute, they have a duty to discharge their state obligations under other conventions that they have ratified, including (but not limited to) the Genocide Convention and/or Torture Convention. For instance, although Sudan is not a state party to the Statute, it acceded to the Genocide Convention on 13 October 2003 and is bound to discharge its state obligations under the same. For those countries that are state parties to the Statute as well as other relevant conventions, they have additional state obligations under multiple conventions, which need to be addressed holistically. For instance, in addition to being a state party to the Statute, Jordan acceded to the Genocide Convention on 3 April 1950, and it acceded to the Torture Convention on

¹⁷⁵ *Ibid.*

¹⁷⁶ *Prosecutor v. Zdravko Mucic aka ‘Pavo’, Hazim Delic, Esad Landzo aka ‘Zenga’, Zejnil Delalic*, Appeal Judgment, IT-96-21-A, 20 February 2001.

¹⁷⁷ *Prosecutor v. Tadić*, Appeal Judgment, IT-94-1-A, 15 July 1999, n. 311 to § 248, citing *The Prosecutor v. Mile Mrksić et al.*, Trial Chamber I, ‘Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence’, IT-95-13-R61, 3 April 1996, § 30: ‘*As long as there is a link with the widespread or systematic attack against a civilian population, a single act could qualify as a crime against humanity. As such, an individual committing a crime against a single victim or a limited number of victims might be recognised as guilty of a crime against humanity if his acts were part of the specific context identified above.’

¹⁷⁸ Freedom from Torture, ‘Rape as Torture in the DRC: Sexual Violence beyond the Conflict Zone’, 2 June 2014, available at <https://reliefweb.int/report/democratic-republic-congo/rape-torture-drc-sexual-violence-beyond-conflict-zone>.

¹⁷⁹ C. J. (Kay) S. Picart, ‘Attempting to Go Beyond Forgetting: the Legacy of the Tokyo IMT and Crimes of Violence against Women’ 7 *University of Pennsylvania East Asia Law Review* (2011) 1–49; N. Buchowska, ‘Violated or Protected. Women’s Rights in Armed Conflicts after the Second World War’ 2(2) *International Comparative Jurisprudence* (2016) 72–80.

13 November 1991. We note that rape and other forms of sexual and gender-based violence constitute torture and, in specific situations, are characterised as genocide, war crimes, and crimes against humanity.¹⁸⁰ Thus, we conclude that Jordan's abject failure to discharge its state obligations are not only under the Statute but also under allied conventions that it is a party to.

19. The Court will engage in the nature of power in relation to immunity enjoyed by the defendant, noting that he had access to ample resources to travel safely, and to stay in several jurisdictions. The Prosecutor has submitted that the Court could consider an agent in executing the Court's arrest warrant, and consequently the enforcement jurisdiction would be that of the Court and not that of the requested state, Jordan.

Victims' Right to Reparative Justice

20. This Court remains committed to a reparative justice approach that centres victim participation in legal proceedings and adjudication with reparations.¹⁸¹ Essentially, such an approach would encompass 'restitution, compensation, rehabilitation, satisfaction (disclosure of the truth) and guarantee of non-repetition'.¹⁸² Beyond individual accountability for international crimes, as well as conviction and punishment of the defendant for the same, the Court is committed to engaging with member states in support of such practices that would reinforce a deliberate intent towards prevention of future crimes.¹⁸³ Additionally, a priority of this Court is to protect and uphold the interests of the victims and affected communities. This would contribute to securing long-term stability in post-conflict societies – an imperative of state parties to the Statute.¹⁸⁴ This approach should be realised so that victims are perceived and treated as 'active agents' rather than 'passive objects' in international criminal justice processes.¹⁸⁵ Such an approach is

¹⁸⁰ *Prosecutor v. Anto Furundzija*. Trial Judgment, IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 December 1998; also *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Trial Judgment, IT-96-23-T & IT-96-23/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 22 February 2001.

¹⁸¹ 'Victims before the ICC: A Guide for the Participation of Victims in the Proceedings of the Court', ICC Booklet, 2016, available at www.icc-cpi.int/NR/rdonlyres/8FF91A2C-5274-4DCB-9CCE-37273C5E9AB4/282477/160910VPRSBookletEnglish.pdf.

¹⁸² C. Evans, *The Right to Reparations in International Law for Victims of Armed Conflict* (Cambridge: Cambridge University Press, 2012) 13–14.

¹⁸³ *Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeal of Mr Jean Pierre Bemba Gombo against Trial Chamber III's Judgment pursuant to Article 74 of the Statute (ICC-01/05-01/08), 8 June 2018.

¹⁸⁴ International Criminal Court, 'Justice is Key to Durable Peace', Statement of the President of the ICC, Judge Silvia Fernandez de Gurmendo, ICC Press Release, 21 September 2015 (ICC-CPI-20150921-PR1152), available at www.icc-cpi.int/Pages/item.aspx?name=pr1152.

¹⁸⁵ C. Garbett, 'From Passive Objects to Active Agents: Changing Conceptions of Victim Identities at the ICTY and ICC' 15(1) *Journal of Human Rights* (2016) 40–59.

also supported by the Office of the Prosecutor, which, in its policy paper on sexual and gender-based crimes, emphasises a gender-inclusive approach to reparations, taking into account the gender-specific impact on, as well as the harm caused to, and suffering of, the victims affected by the crimes for which an individual has been convicted.¹⁸⁶ Additionally, General Recommendation 30 of the CEDAW committee, on women in conflict prevention, conflict, and post-conflict situations, provides a framework of state obligations, including due diligence obligations, prior to, during, and after a conflict.¹⁸⁷ It is pertinent to note that General Recommendation 30 applies to international and internal armed conflict. Jordan is a state party to the CEDAW.

Towards Universal Jurisdiction and a Borderless World

21. This Court further opines that reducing or eliminating safe havens for suspects of ICC crimes is of prime importance, given the heinous nature of such crimes. While the Statute presently does not provide for universal jurisdiction, this Court observes, with satisfaction, the positive movement towards universal jurisdiction for ICC crimes, where an increasing number of national courts are willing to prosecute suspects for serious crimes under international law. In the years 1994–2009, a number of countries, including Australia, Austria, Belgium, Canada, Denmark, France, Finland, Germany, Norway, The Netherlands, Spain, Senegal, Sweden, Switzerland, the United Kingdom, and the United States started to apply the principle of universal jurisdiction in relation to crimes against humanity, torture, or genocide.¹⁸⁸ The principle is premised on the notion that perpetrators of such crimes are *hostes humani generis* (enemies of all mankind), so any country should have the jurisdiction and legal authority to hold the perpetrators accountable, regardless of the country where the crime was allegedly committed or the nationality of the perpetrator or the victims.¹⁸⁹ In 2009, an African Union–European Union Expert Report on the Principle of Universal Jurisdiction emphasised as follows: ‘[T]emporal, geographical, personal and subject-matter limitations on the jurisdiction of international criminal courts and tribunals mean that universal jurisdiction remains a vital element in the fight against impunity.’¹⁹⁰ A 2012 report of Amnesty International notes that a total of 147 states have exercised universal jurisdiction for

¹⁸⁶ The Office of the Prosecutor of the ICC, ‘Policy Paper on Sexual and Gender-Based Crimes’ 3 (2014), § 102.

¹⁸⁷ CEDAW/C/GC/30, 18 October 2013.

¹⁸⁸ Human Rights Watch, ‘Basic Facts on Universal Jurisdiction’, 19 October 2009, available at www.hrw.org/news/2009/10/19/basic-facts-universal-jurisdiction.

¹⁸⁹ J. Greene, ‘Hostis Humani Generis’ 34(4) *Critical Inquiry* (2008) 683–705, available at <https://doi.org/10.1086/592540>.

¹⁹⁰ Council of the European Union, *The AU-EU Expert Report on the Principle of Universal Jurisdiction*, 8672/1/09 REV 1, 16 April 2009, § 28.

one or more crimes in international law.¹⁹¹ We believe that universal jurisdiction for the most serious crimes under international law does not weaken or diminish the ICC's jurisdiction over heinous crimes in any manner whatsoever; to the contrary, it complements and strengthens the philosophy behind the establishment of the ICC, which is to end impunity for ICC crimes.

22. Further, the legal concept and practice of universal jurisdiction reinforces and strengthens the futuristic vision of a borderless world, grounded in principles of freedom and equality, where people can move freely as global citizens, where migrants and refugees face no violations, and where natural resources belong to all human beings across the world.¹⁹² Given that most wars are fought over territories or for control over natural resources, often in the name of state sovereignty and territorial integrity, with sexual and gender-based violence as a logical corollary of such wars, a borderless world would go a long way in preventing wars and their aftermath. A borderless world would also ensure justice and accountability for perpetrators of ICC crimes, as they would have no safe havens through which they could potentially thwart arrest and production before the Court. Drawing inspiration from Gayatri Spivak, the only borders to be respected should be the 'seemingly permeable female body'.¹⁹³ Though this may sound like a feminist utopian dream, we believe that it is the spark of a dream today that lights the path towards its achievement in future.

23. In conclusion, a warrant of arrest, alongside a summons to appear, issued by Pre-Trial Chamber I of this Court against Mr Al Bashir, is intended to ensure accountability of the defendant for the alleged commission of ICC crimes, secure justice for the victims, and thereby end impunity for heinous crimes that may have been perpetrated. Jordan bears the legal and moral obligation to execute the arrest warrant and cooperate with this Court. Such an obligation is not obliterated by head-of-state immunity recognised under customary international law. Since Jordan is a state party to the Rome Statute and is presumed to be fully aware of the provisions of the Rome Statute that it accepted, including Article 27 (irrelevance of official capacity), we conclude that by refusing to execute the arrest warrant, Jordan has deliberately and intentionally failed to discharge its obligations under international criminal law to cooperate with this Court.

Judge Saumya Uma and Judge Ramya Jawahar Kudekallu

¹⁹¹ Amnesty International, 'Universal Jurisdiction: A Preliminary Survey of Legislation around the World – 2012 Update' (2012), available at www.amnesty.org/en/documents/ior53/019/2012/en/.

¹⁹² C. T. Mohanty, *Feminism without Borders: Decolonizing Theory, Practicing Solidarity* (Durham, NC: Duke University Press, 2003) at 1–13. See also M. A. Miyoshi, 'Borderless World? From Colonialism to Transnationalism and the Decline of the Nation-State' 19(4) *Critical Inquiry* (1993) 726–751, available at www.jstor.org/stable/1343904.

¹⁹³ G. C. Spivak, 'A Borderless World?' in R. Braidotti and P. Gilroy (eds.), *Conflicting Humanities* (London: Bloomsbury, 2016) 47–60, at 51.

10.4 VICTIM PARTICIPATION IN THE ABD-AL-RAHMAN CONFIRMATION OF CHARGES

Anushka Sehmi

In 2021, single judge of Pre-Trial Chamber II, Judge Rosario Salvatore Aitala, appointed the Office of Public Counsel for Victims as the common legal representative for all participating victims in the case against Mr Ali Muhammad Ali Abd-al-Rahman (Ali Kushayb).¹⁹⁴ This decision was made without prior consultation with any of the victims, with the single judge citing time constraints and practical limitations.¹⁹⁵

In her rewrite, Anushka Sehmi focuses on the agency of victims, which must be supported to provide meaningful participation. Sehmi uses the governing statutes of the ICC as well as its previous decisions to firmly assert that victims must be consulted with regard to their choice of representative. In using this agency of choice, Sehmi highlights how victims of sexual and gender-based violence may feel more empowered as victims to nominate, knowing that their experiences are to be represented by a person chosen by themselves, thereby ensuring a greater capture of evidence and testimonies. Further, in choosing their own representative, the ICC may avail itself to counsel with specific and necessary subject and socio-cultural expertise which again may ensure greater access to justice for those involved.

No.: ICC-02/05-01/20-259

Date: 18 January 2021

Original: English

PRE-TRIAL CHAMBER II(B)

Before: Judge Anushka SEHMI

SITUATION IN DARFUR, SUDAN

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

Public

Decision Establishing the Principles on Victims' Representations during the
Confirmation of Charges Hearing

Judge Anushka Sehmi, acting on behalf of Pre-Trial Chamber II of the International Criminal Court (the Court), taking into consideration Articles 57(3)

¹⁹⁴ Decision establishing the principles applicable to victims and representation during the Confirmation Hearing, *Abd-Al-Rahman* (ICC-02/05-01/20-259), Pre-Trial Chamber II, 18 January 2021.

¹⁹⁵ *Ibid*, § 35.

(c), 67(1)(c) and (2) and 68(1) and (3) of the Rome Statute (the Statute), Rules 16 and 85–93 of the Rules of Procedure and Evidence (RPE) and Regulations 79, 80, and 86 of the Regulations of the Court (the Regulations), I hereby issue this Decision establishing the principles applicable to victims' participation and representation during the Confirmation of Charges Hearing.

PROCEDURAL HISTORY

1. On 9 June 2020, Mr Ali Muhammad Ali Abd-Al-Rahman (Mr Abd-Al-Rahman) surrendered himself and was transferred to the Detention Centre of the Court. On 15 June 2020, as ordered by the Chamber,¹⁹⁶ Mr Abd-Al-Rahman made his first appearance before the single judge.¹⁹⁷

2. On 9 October 2020, the Registry, through the Victims Participation and Reparations Section (VPRS), submitted a request to modify the standard application form for victim participation in the present case (VPRS Request)¹⁹⁸ and on 4 November 2020, the Chamber granted the VPRS Request.¹⁹⁹

3. On 17 November 2020, the VPRS submitted observations and recommendations on aspects related to the admission process for victims seeking to participate in the proceedings (Registry Observations).²⁰⁰

4. On 11 January 2021, the legal representative of potential victims requested the Chamber to clarify the temporal and geographical scope of the charges and to be provided with guidance in terms of the modalities for legal representation, including access to documents in the case file (Request for Guidance).²⁰¹ On 13 January 2021, the defence responded to the request for clarification from the legal representative.²⁰²

¹⁹⁶ Decision on the convening of a hearing for the initial appearance of Mr Ali Kushayb, *Ali Kushayb*, (ICC-02/05-01/07-82), Pre-Trial Chamber II, 11 June 2020.

¹⁹⁷ T-001, available at www.icc-cpi.int/sites/default/files/Transcripts/CR2020_02436.PDF (hereafter Initial Appearance).

¹⁹⁸ Public Redacted version of Registry Request for Authorization to Use a Modified Standard Application Form to Facilitate Victim Participation in the Case, *Ali Kushayb* (ICC-02/05-01/20-178-Conf), 8 October 2020 (A public redacted version was filed on 2 November 2020, ICC-02/05-01/20-178-Red).

¹⁹⁹ Decision on the Registry's Request for Authorisation to Use a Modified Standard Application Form for Victim Participation, *Ali Kushayb* (ICC-02/05-01/20-198), Pre-Trial Chamber II, 4 November 2020, at 8.

²⁰⁰ Registry Observations on Aspects Related to the Admission of Victims for Participation in the Proceedings, *Ali Kushayb* (ICC-02/05-01/20-203), 17 November 2020.

²⁰¹ Request for Guidance on Modalities for Submissions relating to Applications for Victim Participation, *Ali Kushayb* (ICC-02/05-01/20-251), 11 January 2021 (hereafter Request for Guidance).

²⁰² Observations en Réponse à la Requête, *Ali Kushayb* (ICC-02/05-01/20-255), 13 January 2021.

ANALYSIS

Preliminary Matter

5. The single judge notes that the Request for Guidance was filed by the legal representative on behalf of a number of individuals who have filed applications to participate in the proceedings as victims of crimes that fall within the scope of this case. In this respect, a valid power of attorney has been submitted to the Registry. Consequently, the present decision sets out the applicable principles and modalities of victim participation with respect to the upcoming confirmation of charges hearings.

MEANINGFUL VICTIM PARTICIPATION AS THE CORE
PRINCIPLE GUIDING MODALITIES OF
VICTIM PARTICIPATION

6. In the opinion of the single judge, a discussion of the modalities of victim participation is of little value without elaborating on the concept of *meaningful* victim participation and what it entails in the context of these pre-trial proceedings.

7. Article 68(3) of the Rome Statute provides that:

Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

8. The jurisprudence before this Court emphasises that the participation of victims in proceedings must be ‘meaningful’ as opposed to ‘purely symbolic’.²⁰³ It is the opinion of the single judge that practice before this Court has demonstrated that there are at least three main overarching principles that must be adhered to in

²⁰³ Decision on Victims’ Participation, *Lubanga* (ICC-01/04-01/06-119), Appeals Chamber, 22 January 2008, § 85; Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, *Lubanga* (ICC-01/04-01/06-1432), Appeals Chamber, 11 July 2008, § 97; Order on the Organisation of Common Legal Representation of Victims, *Katanga and Ngudjolo* (ICC-01/04-01/07-1328), Trial Chamber II, 22 July 2009, § 10(a); Decision on the Modalities of Victim Participation at Trial, *Katanga and Ngudjolo* (ICC-01/04-01/07-1788-tENG), Trial Chamber II, 22 January 2010, § 57; Decision on Common Legal Representation of Victims for the Purpose of Trial, *Bemba* (ICC-01/05-01/08-1005), Trial Chamber III, 10 November 2010, § 9(a).

order to ensure that victim participation is meaningful. The first is a gender-sensitive and inclusive approach to victim participation which considers the gendered dynamics of conflict; secondly, effective communication and consultation between victims of conflict and the Court; and lastly, ensuring victim agency in their choice of legal representation.

A Gender-Sensitive and Inclusive Approach to Victim Participation

9. According to the single judge, *meaningful* victim participation must be gender-sensitive and inclusive. The Rome Statute is the first international instrument that expressly includes sexual and gender-based crimes, including rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, and other forms of sexual violence as underlying offences of both war crimes and crimes against humanity. The Statute also prohibits persecution based on gender as a crime against humanity. Sexual and gender-based crimes may also fall under the Court's jurisdiction if they constitute acts of genocide or other acts of crimes against humanity or war crimes. Furthermore, in 2014, the Office of the Prosecutor launched its Policy Paper on Sexual and Gender-Based Crimes, which seeks to help ensure the effective investigation and prosecution of these crimes and enhance access to justice for victims.²⁰⁴

10. Article 21 of the Statute outlines the sources of law that are applicable by the Court, which include treaties and 'principles of international law'. As stated by the Appeals Chamber in relation to Article 21(3), 'the law applicable under the Statute must be interpreted as well as applied in accordance with internationally recognised human rights. Human rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court'.²⁰⁵ According to the single judge, applying best practices from the normative international human rights law framework is particularly important in ensuring gender-sensitive and inclusive victim participation.

11. The right of women to participate in transitional justice processes is guaranteed under a number of human rights instruments and conventions, including the Universal Declaration of Human Rights (UDHR),²⁰⁶ the International Covenant on Civil and Political Rights (ICCPR),²⁰⁷ and the Convention on the Elimination

²⁰⁴ Office of the Prosecutor, 'Policy Paper on Sexual and Gender-Based Crimes' (June 2014), available at www.icc-cpi.int/sites/default/files/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes-June-2014.pdf, at 5–6.

²⁰⁵ Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, *Lubanga* (ICC-01/04-01/06-772), Appeals Chamber, 14 December 2006, § 37.

²⁰⁶ Arts. 2, 6, 7 and 8, Universal Declaration of Human Rights (UDHR) 1948, (UNGA Resolution 217 A), adopted 10 December 1948.

²⁰⁷ Arts. 3 and 25, International Convention on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

of All Forms of Discrimination Against Women (CEDAW).²⁰⁸ This right is premised on the inherent dignity and the equal and inalienable right of all people to participate in political and public life, including people of all genders.

12. In its landmark Resolution 1325 (2000) on Women, Peace and Security, the United Nations Security Council (UNSC) recognised the importance of the equal participation and full involvement of women in maintaining and promoting peace and security.²⁰⁹ In Resolution 2467 (2019), the UNSC specifically called for women's meaningful participation in transitional justice processes.²¹⁰

13. A gender-inclusive and sensitive approach to victim participation must guide the entire process of facilitating the participation of victims in ICC proceedings and their participation through their legal representative/s. Indeed, a gender-inclusive approach to victim participation is especially important as conflict often exacerbates societal gender inequalities, leaving women and girls even more vulnerable to gross human rights violations and sexual and gender-based crimes (SGBC).²¹¹ Thus, the process of victim participation should borrow from human rights law best practices and encourage a gender and women's rights perspective which allows women to exert their agency.

²⁰⁸ Art. 7, Convention on the Elimination of All Forms of Discrimination Against Women, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981). See also General Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-conflict Situations, CEDAW/C/GC/30, 1 November 2013, §§ 46(b) and 81(e); § 46(b) articulates the importance of ensuring 'women's equal representation at all decision making levels in national institutions and mechanisms', including inter alia 'transitional justice mechanisms (judicial and non-judicial)'; § 81(e) emphasises the importance of ensuring that 'women are involved in the design, operation and monitoring of transitional mechanisms at all levels so as to guarantee that their experience of conflict is included, their particular needs and priorities are met and all violations suffered are addressed; and ensure their participation in the design of all reparations programmes'. Sudan has not signed or ratified CEDAW; however it has ratified the ICCPR.

²⁰⁹ SC Res. 1325 (2000). See the Preamble, which confirms the 'important role of women in the prevention and resolution of conflicts and in peace-building' and stresses 'the importance of their equal participation and full involvement in all efforts for the maintenance and promotion of peace and security, and the need to increase their role in decision-making with regard to conflict prevention and resolution'.

²¹⁰ SC Res. 2467 (2019).

²¹¹ See Guidance note of the Secretary-General: United Nations approach to transitional justice, ST/SG(09)/A652, March 2020, at 5, which highlights that 'transitional justice approaches should pay special attention to abuses committed against groups most affected by conflict, particularly women. Gender inequality is one of the most pervasive forms of societal inequality and is often exacerbated by conflict and situations of gross human rights violations. Entrenched forms of gender-based violence also make women and girls particularly vulnerable to conflict-related human rights abuses, including systematic sexual violence which often continues unabated even after conflict ends. The social stigma and trauma associated with reporting such crimes and women's exclusion from public decision-making processes make it particularly challenging for women to engage with transitional justice mechanisms'. Furthermore, during her 2014 Statement to the UNSC, the former Prosecutor Fatou Bensouda emphasised ongoing atrocities in Darfur and their disproportionate impact on women and girls.

14. Furthermore, victim participation in ICC proceedings should aim to address underlying structural causes of gender inequality. For example, UNSC Resolution (2019) states as follows:

Transitional justice processes should seek to address the underlying gender inequality in societies. Redressing such inequality entails addressing the needs and priorities of all women and girls, lesbian, gay, bisexual, transgender, queer and intersex individuals, and survivors of sexual and gender-based violence, including men and boys, as well as guaranteeing their safe and meaningful participation in those processes.²¹²

15. Consequently, addressing the structural causes of gender inequality requires that the Court adopt a ‘transformative’ approach to victim participation. Rees and Chinkin argue that ‘transformative justice’ must have ‘gender relations at its center’.²¹³ In the opinion of the single judge, ‘transformative’ victim participation in the context of ICC proceedings requires a contextual, bottom-up, and locally grounded approach geared towards addressing structural inequalities, including those related to gender, which arguably are some of the root causes of conflict.²¹⁴

16. Furthermore, the idea of transformative justice has been articulated in several UN documents on reparations. For example, the Guidance Note of the Secretary General on Reparations for Conflict-Related Sexual Violence (CRSV) instructs that ‘[R]eparations should strive to be transformative, including in design, implementation and impact’.²¹⁵ In the opinion of the single judge, transformative justice is not only limited to the reparations phase of the proceedings, but also to victim participation.

17. White has articulated an ascending scale of four general forms of participation: nominal; instrumental; representative, and transformative.²¹⁶ In the opinion of the

²¹² United Nations Security Council, *Women, Peace and Security: Report of the Secretary General*, S/2019/800 (9 October 2019), at 20, § 65, available at <https://documents.un.org/doc/undoc/gen/n19/308/37/pdf/n1930837.pdf>.

²¹³ M. Rees and C. Chinkin, ‘Exposing the Gendered Myth of Post Conflict Transition: The Transformative Power of Economic and Social Rights’ 48(4) *New York University Journal of International Law and Politics* (2016) 1211–1226, at 1213.

²¹⁴ S. Robins, ‘Failing Victims? The Limits of Transitional Justice in Addressing the Needs of Victims of Violations’ 11(1) *Human Rights and International Legal Discourse* (2017) 41–58, at 41; P. Gready and S. Robins, ‘From Transitional to Transformative Justice: A New Agenda for Practice’ 8 *International Journal of Transitional Justice* (IJTJ) (2014) 339–343; E. Schmid, *Taking Economic Social and Cultural Rights Seriously in International Criminal Law* (Cambridge: Cambridge University Press, 2015), at 33.

²¹⁵ United Nations, *Guidance Note of the Secretary-General: Reparations for Conflict-Related Sexual Violence*, ST/SG(02)/R425 (2014), at 1, available at <https://digitallibrary.un.org/record/814902?v=pdf>. Other UN documents that refer to a ‘transformational’ approach to justice include CEDAW General Recommendation No. 30, *supra* note 208, §§ 34, 79.

²¹⁶ S. C. White, ‘Depoliticising Development: The Uses and Abuses of Participation’, in J. Pearce (ed.), *Development, NGOs, and Civil Society: Selected Essays from Development in Practice* (Oxford: Oxfam GB, 2000) at 142–155.

single judge, these principles of participation are wholly applicable to victim participation at the ICC and consequently victim participation should aim to be transformative, empowering victims as opposed to those acting on their behalf, and allow them to engage with the Court on their own terms.²¹⁷

18. There exist varied gendered experiences and consequences of conflict, and therefore women's inclusion must be proactively sought throughout the process of facilitating victim participation in order to ensure that it is meaningful. However, meaningful and 'transformative' victim participation should not be tokenistic and performative through the mere numerical inclusion of women; rather, it should aim to ensure that they can communicate their views and concerns and have their input incorporated into any relevant processes. In addition, given that victim communities do not exist in a vacuum and often form part of larger patriarchal social and political structures dominated by men, it is necessary for the Registry to expect some resistance to gender-inclusive victim participation and design strategies that will counter such resistance.

19. Furthermore, it is important to recognise that women are not a monolithic group, and victim participation processes must allow for the full diversity of women, including those of different minority religious or ethnic groups, as well as those from rural or urban backgrounds, to participate in ICC proceedings. In particular, the Registry and their interlocutors must proactively seek to engage with women, girls, and non-binary individuals who may be eligible to participate in ICC proceedings.

20. Steps should be taken at every stage of the victim participation process in order to ensure the participation of marginalised groups or persons depending on the victim's sex or gender identity. It is crucial for the Registry to ensure the inclusion of women and girls who may have a disadvantaged socio-economic status. In line with international human rights standards, the single judge submits that the facilitation of victim participation by VPRS and its intermediaries must be fulfilled without discrimination based on sex, gender identity, ethnicity, race, age, political affiliation, class, marital status, sexual orientation, nationality, religion, and disability, or any other status.

21. In addition to the victim's sex or gender identity, any other intersecting factors, such as a victim's social or political identity, must also be considered in order to prevent any discrimination against them during the facilitation of victim participation. Indeed, discrimination against women can affect them in intersectional ways (including race, ethnicity, age, sexual orientation, and gender identity, amongst others).²¹⁸ Thus, it is necessary for the Registry to remain mindful of intersectional forms of discrimination when facilitating victim participation.

²¹⁷ *Ibid.*, at 144–147.

²¹⁸ See UN Committee on the Elimination of Racial Discrimination (CERD), General Comment 32, Seventy-Fifth Session, August 2009, § 7 on intersectionality.

22. Furthermore, women and girls also face significant structural and cultural inequalities in many contexts within which this Court operates and generally worldwide.²¹⁹ For example, women and girls may face greater obstacles than their male counterparts in having their voices heard in processes that impact their interests.²²⁰ Some of these obstacles may be practical, such as childcare responsibilities or those relating to work, especially in the home.²²¹ In addition, in certain cultures women's voices may generally be marginalised due to traditional, religious, and cultural practices that operate within many contexts, including in Sudan.²²²

23. In addition, women and girl survivors of SGBC may face even greater obstacles to having their voices heard given their trauma or the silencing of their experiences.²²³ Furthermore, in certain communities women may be discouraged from attending school or may be married at a younger age, limiting their educational opportunities.²²⁴ This may have a direct and disproportional impact on their levels of literacy, and consequently their ability to complete victim application forms or adequately convey their views with regard to their choice of legal representation.²²⁵

²¹⁹ Rees and Chinkin, *supra* note 213, at 1216: 'Put simply, an analysis of the structures of power – ownership of and access to land, property and resources, access to tools, education, paid employment, positions of authority in the economy, governance and state institutions, and the media – who has it, who uses it, and how, shows that men dominate power structures. Across all such structures, it is clear that there is an overwhelming dominance of men.'

²²⁰ *Ibid.*

²²¹ For example, 'by law, men are the sole financial providers within the family, and women are the sole caregivers within the family' in Sudan. See L. Tønnessen, 'Women at Work in Sudan: Marital Privilege or Constitutional Right?' 26 *Social Politics* (2019) 223–244, at 223; see also World Bank, 'Sudan', World Bank's Women, Business and the Law Index, 2021, available at <https://wbl.worldbank.org/content/dam/documents/wbl/2021/snapshots/Sudan.pdf>.

²²² See for example, UN Women, Sudan, Country Fact Sheet, available at <https://data.unwomen.org/country/sudan>.

²²³ Rees and Chinkin, *supra* note 213, at 122: 'many women are in a position of vulnerability post conflict caused through the commission of war crimes and crimes against humanity against them, displacement, the continued operation of the predatory political economy, and the constructions of femininity that render them "passive and victims"'. See also CEDAW General Recommendation 30, *supra* note 208; Committee on the Elimination of Discrimination Against Women, Concluding Comments of the Committee on the Elimination of Discrimination against Women: Bosnia and Herzegovina, 37, UN Doc. CEDAW/C/BIH/CO/3 (2 June 2006).

²²⁴ S. S. O. Mohamed, 'Assessment of the Gender Gap in Sudan', UNU-MERIT Working Paper No. 2011-004, 1 January 2011, available at <http://dx.doi.org/10.2139/ssrn.1856543>.

²²⁵ Rees and Chinkin, *supra* note 213, at 1219: '[F]or instance . . . without access to their economic and social entitlements, survivors of and witnesses to wartime atrocities are less likely to be able to participate in court proceedings, or truth commissions, thereby denying access to justice and sustaining perpetrator impunity. The same is true for participation in peace processes and the political, institutional, and social structures for reconstruction. Such participation would be a luxury for those lacking, for instance, adequate food, shelter, and employment. This in turn lessens the likelihood of achieving the sought-after stability and human security post conflict (including food, health, gender, and physical security).'

24. Therefore, it is critical for the Registry to assess whether such obstacles exist and implement strategies in order to ensure the equal participation of women in the victim participation process. This could be through the organisation of ‘women only’ spaces which would allow women to speak more freely, or through separate meetings for survivors of SGBC.

25. Furthermore, women’s meaningful participation in roles of leadership can also actively confront patriarchal power structures and entrench women’s status as equal rights bearers within a community.²²⁶ In relation to VPRS’s intermediaries, the single judge notes that it can be the case that men and male voices are amplified over others, such that men may be more likely to volunteer as intermediaries for VPRS. As such, the single judge submits that VPRS must take steps to ensure that women are given the opportunity to participate in this type of ‘leadership’ role as per the ICC Guidelines on Intermediaries.²²⁷

26. The reason for this is twofold: firstly, it will engender a gender-sensitive and inclusive approach to victim participation if women are afforded such positions of leadership, effectively allowing them to exercise their agency throughout the victim participation process. Secondly, the presence of female intermediaries will possibly make it easier for other female victims or victims of SGBC to give a fuller account of the harm they have suffered. Given that it is often the case that VPRS intermediaries, rather than staff of VPRS, assist victims in the completion of victim application forms, ensuring that victims are comfortable enough to express the totality of the harm they have suffered must be a key consideration in the choice of intermediary. Furthermore, it may be easier for female intermediaries to access networks of victims who may be hesitant to speak to men. In this way, women’s inclusion in leadership positions, such as that of a VPRS intermediary, or the spokesperson for a group of victims, rather than solely as ‘victims, for example of SGBC’, can help cement the role of women in transitional justice processes.

27. The suspect in this case, Mr Al-Rahman, has been charged by the Prosecutor in Counts 8–9 of perpetrating rape as a crime against humanity and a war crime.²²⁸ In Bindisi and the surrounding areas, militia/Janjaweed and Government of Sudan

²²⁶ F. Stewart, ‘The Fourth Domain for Gender Equality: Decision-Making and Power’ in *Achieving Gender Equality, Women’s Empowerment and Strengthening Development Cooperation*, Report by Department of Economic and Social Affairs, Office for ECOSOC Support and Coordination, UN (New York: United Nations, 2010), at 31, available at [www.un.org/en/ecosoc/docs/pdfs/10-50143_\(e\)_\(desa\)dialogues_ecosoc_achieving_gender_equality_women_empowerment.pdf](http://www.un.org/en/ecosoc/docs/pdfs/10-50143_(e)_(desa)dialogues_ecosoc_achieving_gender_equality_women_empowerment.pdf).

²²⁷ ICC, Guidelines Governing the Relations between the Court and Intermediaries: for the Organs and Units of the Court and Counsel working with intermediaries (March 2014), at 7–9, available at www.icc-cpi.int/sites/default/files/GRCI-Eng.pdf.

²²⁸ Public redacted version of Second Corrected Version of Document Containing the Charges, 29 March 2021 (ICC-02/05-01/20-325-Conf-Anx1), 22 April 2021 (ICC-02/05-01/20-325-Conf-Anx1-Corr2), *Ali Kushayb* (ICC-02/05-01/20-325-Anx1-Corr-2-Red), 23 April 2021 (hereafter Document Containing the Charges).

forces allegedly raped at least seventeen women.²²⁹ However, as is often the case in times of conflict, the number of sexual violence survivors may be greater than those stated in official figures.²³⁰ Therefore, it is highly likely that VPRS and their intermediaries will encounter a larger number of victims of SGBC.

28. Although it may be harder to ensure that victims of SGBC come forward and participate in ICC proceedings due to the possibility of stigma and ostracism, the single judge believes that a well-thought-out strategy for victim participation will ensure that victims of any gender will feel comfortable enough to participate in ICC proceedings. At the same time, it is important to remain mindful that although women are disproportionately impacted by SGBC, the Registry should avoid equating ‘woman or girl victims’ with ‘victims of sexual violence’, as this could further victimise women and sideline male and gender-non-binary victims of SGBC.

29. Lastly, special attention must be paid to the participation of child victims in ICC proceedings, including their age, maturity, and the harm that they have suffered, in order to prevent further harm or trauma. Child victims should feel comfortable enough to express their views and concerns freely and the VPRS should implement measures in order to ensure the protection of their rights, especially those girls who may be affected by SGBC. However, at the same time, VPRS and their intermediaries must remain aware of potential violations against men and boys, which tend to result in stigma and silence.²³¹ To this end, the single judge encourages a statistical evaluation of the number of victim application forms received in order to ensure sufficient gender representation. However, it must be borne in mind that gender inclusiveness cannot be solely represented by numbers, but, rather, ‘meaningful’ participation requires that women, girls, and non-binary individuals are able to exert their agency and influence through justice processes, such as victim participation in ICC proceedings. Thus, the single judge stresses that the representation of women and girls should not be limited to the cosmetic and numerical ‘inclusion of women’ but should also ensure that women are heard, and able to exercise their agency.

²²⁹ *Ibid.*, §§ 51–53.

²³⁰ UNSG, Conflict-Related Sexual Violence, Report of the Secretary General, S/2022/272, 29 March 2022.

²³¹ S. Sivakumaran, ‘Sexual Violence against Men in Armed Conflict’ 18(2) *European Journal of International Law* (2007) 253–276, at 267; S. Mouthaan, ‘Sexual Violence against Men and International Law – Criminalising the Unmentionable’ 13(3) *International Law Review* (2013) 665–695, at 691; and see 677 for an in-depth discussion on how international law has a tendency to leave out men as victims, but readily views them as perpetrators; D. Lewis, ‘Unrecognized Victims: Sexual Violence against Men in Conflict Settings under International Law’, 27(1) *Wisconsin International Law Journal* (2009) at 7, citing A. N. Groth, *Men Who Rape: The Psychology of the Offender* 2 (New York: Plenum, 1979).

Effective Communication

30. It has been argued that an essential element of meaningful victim participation is ‘frequent communication and consultation between victims and the Court’.²³² Meaningful participation necessarily requires that victims are not treated as an ‘abstract or symbolic entity, but as individual rights-bearers with opinions’ that are relayed to the Court.²³³

31. The single judge concurs that one of the foundational elements of meaningful victim participation is the implementation of strategies aimed at ensuring consistent two-way communication between affected communities and the Court. Indeed, as highlighted in the previous section, consultation is also an essential element of transitional justice.²³⁴ This function appropriately falls within the mandate of the Public Information and Outreach Section (PIOS) and VPRS.

32. The role of the VPRS in assisting victims in completing victim application forms, as well as collecting application forms is underscored by Regulation 86(g) of the Regulations of the Court (RoC) and Rule 16(1) of the RPE. Regulations 5*bis* and 6 of the Regulations of the Registry outline the Registry’s role in ensuring public dissemination of appropriate, neutral, and timely information concerning the activities of the Court through public information and outreach programmes. Further to this, public information programmes must be aimed at ‘fostering public understanding and support for the work of the Court’.²³⁵

33. Pre-Trial Chamber I in the situation in Palestine²³⁶ called on the Registrar to create an information and communication system between the Court and victims, stating that ‘outreach and public information activities in situation countries are quintessential to foster support, public understanding and confidence in the work of the Court. At the same time, they enable the Court to better understand the concerns and expectations of victims, so that it can respond more effectively and clarify, where necessary, any misconceptions’.²³⁷ Similarly, Pre-Trial Chamber III has stated that, ‘in order to be able to properly exercise their rights, victims should be

²³² A. Sehmi, ‘Now That We Have No Voice, What Will Happen to Us?': Experiences of Victim Participation in the *Kenyatta Case*' 16(3) *Journal of International Criminal Justice* (2018) 571–591, at 580.

²³³ *Ibid.*

²³⁴ See generally, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, UN GA, A/71/567 (2016); and the Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on Participation of victims in transitional justice measures, UN GA A/HRC/34/62 (2016), § 79.

²³⁵ Regulation 5*bis*(2), Regulations of the Registry, available at www.icc-cpi.int/sites/default/files/RegulationsRegistryEng.pdf.

²³⁶ Decision on Information and Outreach for the Victims of the Situation, Situation in the State of Palestine (ICC-01/18-2), Pre-Trial Chamber I, 13 July 2018.

²³⁷ *Ibid.*, § 7.

provided with sufficient and accurate information about the Court's role and activities'.²³⁸

34. The Assembly of States Parties (ASP) has also underscored the importance of providing victims and affected communities with information regarding the activities of the Court, 'in order to put into effect, the unique mandate given to the International Criminal Court towards victims'.²³⁹

35. Furthermore, the ICC's Integrated Strategy for External Relations, Public Information and Outreach has defined outreach as a 'process of establishing sustainable two-way communication between the Court and communities affected by the situations that are subject to investigations. It aims to provide information, promote understanding and support for the Court's work and to provide access to judicial proceedings'.²⁴⁰

36. Consequently, for the Court to properly fulfil its mandate, it is essential that its role and activities are clearly understood by affected communities. Outreach and public information activities are critical not only to engender support for the Court but, more importantly, to establish a two-way form of communication between the Court and affected communities.

37. In the opinion of the single judge, outreach plays an integral role in informing victims of their participatory rights under the Statute. The success of victim participation in ICC proceedings is highly dependent on proper outreach and public information activities directed towards victims by both PIOS and the VPRS. Outreach regarding victim participation ensures that victims are aware of their participatory rights under Article 68(3) of the Statute. Furthermore, it lays the groundwork for the dissemination and collection of victim application forms within affected communities by the VPRS.

38. Therefore, it is crucial for the VPRS and PIOS to work together in order to inform victim communities of their right to participate in ICC proceedings under the Statute; the practicalities of the victim participation process, including the temporal, material, and territorial scope of the case; and respond to relevant questions from victim communities. To this end, the Registry must employ a bottom-up and focused strategy, and enable harmony between victims' needs and institutional

²³⁸ *Ibid.*, § 11; Order on Information and Outreach for the Victims of the Situation, Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, Order on Information and Outreach, 2020 (ICC-01/19-28), Pre-Trial Chamber III, 20 January 2020, § 7.

²³⁹ See, for example, Resolution adopted at the Review Conference in Kampala, RC/Res.2, 8 June 2010, The Impact of the Rome Statute System on Victims and Affected Communities; most recently see ICC-ASP/13/Res.4, 17 December 2014, Resolution on Victims and Affected Communities, Reparations and the Trust Fund for Victims; ICCASP/16/Res. 6, Strengthening the International Criminal Court and the Assembly of States Parties, 14 December 2017, §§ 93–94.

²⁴⁰ ICC, 'Integrated Strategy for External Relations, Public Information and Outreach', available at www.icc-cpi.int/sites/default/files/NR/rdonlyres/425E80BA-1EBC-4423-85C6-D4F2B93C7506/185049/ICCPIDSWBOR0307070402_IS_En.pdf.

responses. Victim participation should be viewed as an ongoing process, entailing dialogue and constant adaptation, in order to ensure that it is meaningful.

39. At the same time, the single judge is cognisant of several obstacles that have prevented PIOS and VPRS from conducting outreach with affected communities and informing eligible victims of their right to participate in these proceedings.

40. Firstly, the Registry has been unable to establish a field presence in Darfur as a result of budgetary constraints and the attendant need to allocate the Court's limited resources across multiple situations and cases.²⁴¹ Consequently, this means that at present there is potentially a huge information vacuum in Darfur regarding the Court's activities and mandate that must be addressed.

41. Secondly, ongoing security concerns in Darfur and the surrounding areas over the past few years has meant that the establishment of a Field Office has faced significant hurdles, apart from those related to budgetary concerns.²⁴² The single judge is aware that the security situation has meant that many victims have left the region and are living either in other parts of Sudan or have left the country entirely and now form part of the Darfurian diaspora.²⁴³

42. Thirdly, the COVID-19 worldwide pandemic has greatly affected the mobility and ability of staff members of the Court to conduct field missions, in Darfur or where members of the Darfurian diaspora may reside, in order to carry out general outreach,²⁴⁴ inform victims of their right to participate, and solicit their views on the choice of their legal representation in proceedings, should they be eligible to participate.²⁴⁵

43. However, the single judge contends that despite these obstacles the Court still has a binding duty to fulfil its mandate to the best of its ability, bearing in mind that

²⁴¹ On 12 December 2014, the former Prosecutor Fatou Bensouda informed the UNSC of the decision to hibernate investigative activities in Darfur due to limited resources of the Court, lack of oversight of the Security Council, and difficulties in bringing the accused individuals to justice. Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005), 12 December 2014, § 4. Louise Arbour, former UN High Commissioner for Human Rights, also called for 'an increased visible presence of the ICC in Sudan', insisting that it 'is possible to conduct serious investigations of human rights during an armed conflict in general, and Darfur in particular, without putting victims at unreasonable risk', Observations of the United Nations High Commissioner for Human Rights Invited in Application of Rule 103 of the Rules of Procedure and Evidence, Situation in Darfur (ICC-02/05-19), Pre-Trial Chamber I, 10 October 2006, § 64.

²⁴² Registry Observations on Aspects Related to the Admission of Victims for Participation in the Proceedings, *Ali Kushayb* (ICC-02/05-01/20-203), 17 November 2020, § 9.

²⁴³ Registry Report on Proof of Identity Documents Available to Victims of the Case, *Ali Kushayb* (ICC-02/05-01/20-211), 24 November 2020.

²⁴⁴ Public Redacted version of Registry Request for Authorization to use a Modified Standard Application Form to Facilitate Victim Participation in the Case, 8 October 2002, ICC-01/05-01/20-178-Conf, *Ali Kushayb* (ICC-02/05-01/20-178-Red), 2 November 2020, § 5.

²⁴⁵ *Ibid*; see also Public redacted version of Registry Observations on the Defence's Réponse à la Requête ICC-02/05-01/20-178 (ICC-02/05-01/20-182-Conf), 26 October 2020, ICC-02/05-01/20-194-Conf, *Ali Kushayb* (ICC-02/05-01/20-194-Red), 29 October 2020, § 39.

in some instances this may necessitate adapting to a new set of circumstances, especially considering the COVID-19 pandemic. Indeed, the Court simply cannot fulfil its mission without ensuring that the affected communities are able to understand the Court's mandate, the judicial proceedings, and their right to participate in proceedings and claim reparations.

44. Consequently, PIOS and VPRS, in consultation with the relevant Registry sections, must consider the feasibility of conducting field missions in Chad, Darfur, or other locations where potential victims reside, in order to commence the process of consulting with victims, providing them with information regarding the application process, disseminating victim application forms either directly or through VPRS intermediaries, and collecting completed victim application forms either manually or electronically.

45. Given the pervasive and unpredictable impact of the COVID-19 pandemic on the operations of the Court, the single judge supports creative solutions that would enable communication between the Court and victim communities. For example, where logistical and security considerations make it difficult to consult with victims directly, VPRS should consider the possibility of consulting victims through secure online platforms, in collaboration with VPRS intermediaries, and in consultation with the relevant security sections within the Court. In addition, given the easing of travel restrictions, PIOS and VPRS should consider the feasibility to travelling to countries where a significant number of the affected Darfurian diaspora reside.

Legal Representation of Victims

46. Lastly, meaningful victim participation is not possible without quality legal representation. It has been argued that the entire system of victim participation at the ICC 'feminizes and infantilizes' victims and they are consistently treated as 'weaker' participants who do not need to be consulted on major decisions that impact on their interests.²⁴⁶ One of these major decisions is victims' choice of legal representation. However, ensuring a meaningful and gender-inclusive system of victim participation will entrench a system of victim participation that seeks to empower victims, and not marginalise them.

47. Consultations with victims must not only be limited to their participation in legal proceedings but should include their views on their choice of legal representative. The system of victim participation at this Court must seek to empower victims, rather than marginalise them; it must ensure that victims are not 'infantilised' and disempowered in these processes; and consequently, victims must be consulted on decisions that impact on their interests. In the opinion of the single judge,

²⁴⁶ C. Schwobel-Patel, 'The "Ideal" Victim of International Criminal Law' 29(3) *European Journal of International Law* (2018) 703–724, at 724.

one of the most important decisions that victims can make is their choice of legal representative/s.

48. As noted by the Pre-Trial Chamber in the Situation in the Republic of Kenya:

[W]hen deciding on the selection of the Common Legal Representative, the Chamber must balance a number of requirements. These requirements include in particular (a) the need to ensure that the participation of victims, through their legal representative, is as meaningful as possible, as opposed to purely symbolic; (b) the purpose of common legal representation, which is not only to represent the views and concerns of the victims, but also to allow victims to follow and understand the development of the trial.²⁴⁷

49. To this, the single judge would add that the process of in-person consultation and engagement with victim communities is arguably the core function of the legal representative and potentially may also have a restorative justice function.²⁴⁸

50. Rule 90(1) of the RPE provides that ‘A victim shall be free to choose a legal representative’. However, given the often large number of victims who are eligible to participate in proceedings, Rule 90(2) provides that ‘the Chamber may, for the purposes of ensuring the effectiveness of the proceedings, request the victims or particular groups of victims, if necessary, with the assistance of the Registry, to choose a common legal representative or representatives’.

51. The single judge notes that the legal representative of potential victims in their Request for Guidance represents 102 individuals who are seeking permission to participate in the confirmation of charges hearings.²⁴⁹ The legal representative in question notes that she ‘has been instructed to represent a number of victim advocacy groups’,²⁵⁰ and through her work with these organisations, she has identified 102 potential survivors who have suffered harm that potentially falls within the scope of the charges in this case.²⁵¹

52. The single judge notes that the process of an appointment of legal representation for victims should be driven by consultation with victims and through an open and transparent recruitment process of counsel, whether the outcome is the Office of Public Counsel for Victims (OPCV) or external counsel. In this respect, the single judge notes with concern two issues in relation to the ongoing practice for appointment of counsel for victims at the Court. Firstly, there has been a tendency to appoint the OPCV as the common legal representative for victims without due

²⁴⁷ Decision on victims’ representation and participation, *Muthaura & Kenyatta* (ICC-01/09/02/11-498), Trial Chamber V, 6 October 2012, § 58.

²⁴⁸ Sehmi, *supra* note 232, at 590–591.

²⁴⁹ Request for Guidance, *supra* note 201.

²⁵⁰ *Ibid.*, § 5.

²⁵¹ *Ibid.*

consideration to victims' views or existing representation.²⁵² Secondly, it has been the case that external counsel who have been able to establish 'first contact', so to speak, with victim communities have the expectation that they will automatically be appointed as common legal representative in their respective cases.²⁵³

53. Both practices are problematic in their own way. The blanket representation of victims by the OPCV in all situations before this Court clearly raises issues of a lack of diversity in representation and perhaps prevents victims from choosing lawyers from their own country, or those with a different set of expertise. This lack of diversity also has an impact on the complementary nature of the Court and the importance of creating/harnessing expertise on victim representation and international criminal law more broadly beyond The Hague through external legal representatives and their support staff.

54. For example, it could be the case that victims would like to be represented by lawyers who are able to speak to them in their own language or be able to establish a permanent field presence in the relevant country. At the same time, there may be groups of victims who would prefer to be represented by the OPCV given their institutional positioning and familiarity with the Court's practices and jurisprudence.

55. With regard to counsel who are 'first on the scene', so to speak, either as a result of them being from the same country or for other reasons, and are able to obtain powers of attorney from victim communities first, the single judge notes that this practice must not be systematised within court procedures such that these lawyers are automatically appointed as common legal representative by virtue of them being the first to have obtained powers of attorney from victims.

56. Victim communities are often traumatised and vulnerable in the aftermath of conflict, and therefore may appoint the lawyer that happens to approach them first. It may be the case that these lawyers are not well versed in international criminal law, or not well suited to represent victims for other reasons – for example, there may exist conflicts of interest or potentially better suited candidates with specific expertise, on SGBC, for example. Thus, it is the opinion of the single judge that all lawyers who are interested in representing victims, including the OPCV, must go through a competitive recruitment process in order to ensure they have the necessary expertise to represent victims in a particular situation country. Furthermore, and more importantly, victims must be consulted on their opinion of the candidates, including those who may already be representing them, in order to ensure that victims are given proper agency in the appointment of a legal representative.

²⁵² Human Rights Watch, 'Who Will Stand for Us?' (2017), at 14, available at www.hrw.org/sites/default/files/report_pdf/ijongweno817_web.pdf.

²⁵³ Legal framework and experience to date on common legal representation, *Ruto & Sang* (ICC-01/09-01/11-243-Anx1), 1 August 2011, at § 8. This remark is not directed at Ms Clooney et al., who have obtained powers of attorney for a number of victims who may or may not fall within the scope of the present case.

57. Thus, taking into consideration the above, the single judge notes that in order to ensure that the system of victim participation at this Court empowers victims, victims must be able to have a choice in the appointment of their counsel, and a fair and transparent recruitment process of victims' counsel must take place in order to ensure that the counsel selected have the necessary expertise in representing victims in international criminal proceedings, such as those before the ICC. Such expertise may include specific language skills; familiarity with the local context; previous expertise in representing victims; expertise in international criminal law; an established practice of working with victims of SGBC; proximity to the local communities; amongst others.

58. Again, the single judge would like to emphasise the importance of ensuring that consultations with victims on their choice of legal representation include the views of women and girls, whether victims of SGBC or not, male victims of SGBC, and other non-binary individuals. Consultations with victims must not be dominated by male voices and there must be room for women and girls, as well as other marginalised and intersecting groups, to have the opportunity to air their views and opinions.

59. Lastly, given the prevalence of SGBC in conflict, whether charged or not, it is the opinion of the single judge that counsel appointed to represent victims will have the necessary expertise with working with victims of SGBC or will endeavour to appoint team members with the necessary expertise.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

ORDERS the Registry, to establish, as soon as practicable, a system of public information and outreach activities relating to victim participation for the benefit of the victims and affected communities in Darfur and report back to the single judge in compliance with the principles established in the present decision.

ORDERS the Registry, in consultation with ICC Security Section, to undertake the feasibility of a mission to South Sudan/Chad to consult with victims, or alternatively arrange meetings with victims in neighbouring states, as well as consider meeting victims who may be in the diaspora.

ORDERS the Registry to facilitate the participation of victims through outreach, liaising with intermediaries, and the dissemination and collection of victim application forms in line with the principles laid out in this Decision.

ORDERS the Registry to consult victims on their choice of legal representation and report back to the Chamber regarding the outcome these consultations, with the view to conducting an open recruitment process in relation to the organisation of common legal representation.

Judge Anushka Sehmi

10.5 GENDER-BASED PERSECUTION IN THE ABD-AL-RAHMAN CONFIRMATION OF CHARGES

Lisa Davis and Marina Kumskova

In 2021, Pre-Trial Chamber II confirmed charges of war crimes and crimes against humanity against Mr Ali Muhammad Ali Abd-Al-Rahman (Ali Kushayb).²⁵⁴ In this rewritten decision, Lisa Davis and Marina Kumskova consider whether the original Chamber had sufficient evidence before it to establish substantial grounds to believe that Mr Abd-Al-Rahman committed the crime against humanity of gender persecution under Article 7(1)(h) of the Rome Statute at the sites of Kodoom, Bindisi, Mukjar, and Deleig, as well as the surrounding areas, and request the Prosecutor, under Article 61(7)(c) of the Rome Statute, to amend its Document Containing Charges.²⁵⁵

Davis and Kumskova dissect the requirements of gender persecution, namely that there was a deprivation of liberty, that there was targeting of a collectivity, that this targeting was on gender grounds and was in connection with any act referred to in Article 7(1) of the Rome Statute, and then use these requirements and available evidence to analyse the evidence presented regarding all incidents in Sudan.

Davis and Kumskova find that the evidence satisfies the threshold that both Fur males and females were the victims of gender persecution, albeit in connection with differing Article 7(1) crimes, ultimately request the prosecution to include the charge of gender persecution in all incidents, and adjourn the confirmation of charges hearing for such a request to be made. Moreover, the rewritten decision suggests that any act of rape, torture, murder, other inhumane acts, or outrages upon personal dignity, if used to target a civilian group by reason of their gender, and if proven by the Court, are enough to find charges of gender persecution.

No.: ICC-02/05-01/20-433

Date: 9 July 2021

Original: English

PRE-TRIAL CHAMBER II (B)

Before: Judge Lisa Davis, Presiding Judge
Judge Marina Kumskova

SITUATION IN DARFUR, SUDAN
IN THE CASE OF

²⁵⁴ Decision on the Confirmation of Charges against Ali Muhammad Ali Abd-Al-Rahman (Ali Kushayb), *Abd-Al-Rahman* (ICC-02/05-01/20-433), Pre-Trial Chamber II, 9 July 2021.

²⁵⁵ Public Redacted Version of Second Corrected Version of Document Containing the Charges, 29 March 2021, ICC-02/05-01/20-325-Conf-Anx1, *Abd-Al-Rahman* (ICC 02/05-01/20-325-Conf-Anx1-Corr2), Pre-Trial Chamber II, 22 April 2021.

**THE PROSECUTOR V. ALI MUHAMMAD ALI ABD-AL-RAHMAN
(‘ALI KUSHAYB’)**

Public

Decision on the Confirmation of Charges against Ali Muhammad Ali Abd-Al-Rahman (Ali Kushayb)

CHARGES

1. This decision on the confirmation of charges in the case against Mr Ali Muhammad Ali Abd-Al-Rahman (Mr Abd-Al-Rahman), also known as Ali Kushayb, a national of the Republic of the Sudan (Sudan), addresses the legal question of whether there is sufficient evidence to establish substantial grounds to believe that Mr Abd-Al-Rahman committed the crime against humanity of gender persecution under Article 7(1)(h) of the Rome Statute (Statute) in Kodoom, Bindisi, and surrounding areas between 15 and 16 August 2003, in Mukjar and surrounding areas between the end of February 2004 and the beginning of March 2004, and in Deleig and surrounding areas between 5 and 7 March 2004.

2. The Chamber adjourns the confirmation of charges hearing and requests the Prosecutor to amend its Document Containing the Charges,²⁵⁶ pursuant to Article 61 (7)(c)(ii) of the Statute. First, the Chamber requests the Prosecutor to consider whether all war crimes and crimes against humanity that Mr Abd-Al-Rahman allegedly committed in Kodoom, Bindisi, and surrounding areas between 15 and 16 August 2003 (Counts 1–10), in Mukjar and surrounding areas between the end of February 2004 and the beginning of March 2004 (Counts 12–20), and in Deleig and surrounding areas between 5 and 7 March 2004 (Counts 22–30) can be separately and cumulatively charged as gender persecution. Second, the Chamber requests the Prosecutor to conduct further investigation with respect to gender persecution in Kodoom, Bindisi, and surrounding areas between 15 and 16 August 2003 (in addition to political and ethnic persecution under Count 11).

3. The Chamber concludes that, in circumstances where a civilian group is targeted on gender grounds by the acts of rape, torture, murder, other inhumane acts, and outrages upon personal dignity, such crimes either separately or cumulatively rise to the level of the crime against humanity of gender persecution under Article 7(1)(h) of the Statute and should be charged as such. In other words, each one of the war crimes or crimes against humanity, if used to target a civilian group by reason of their

²⁵⁶ Public Redacted Version of Second Corrected Version of Document Containing the Charges, 29 March 2021, ICC-02/05-01/20-325-Conf-Anxi, *Abd-Al-Rahman* (ICC02/05-01/20-325-Conf-Anxi-Corr2), Pre-Trial Chamber II, 22 April 2021 (hereafter Second Corrected Version of Document Containing the Charges).

gender, and if proven by the Court, are enough to establish the crime against humanity of gender persecution.

BACKGROUND AND PROCEDURAL HISTORY

4. On 31 March 2005, pursuant to Article 13(b) of the Statute,²⁵⁷ the United Nations Security Council referred to the Prosecutor the situation in Darfur, Sudan, as of 1 July 2002.²⁵⁸

5. In the present decision, the Chamber renders its determination under Article 61 (7)(c) of the Statute as to whether there is sufficient evidence to establish substantial grounds to believe that Mr Abd-Al-Rahman committed the crime against humanity of persecution on the grounds of gender in Darfur, Sudan. The purpose of the confirmation of charges procedure is to ensure that the charges that are supported by ‘sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged’.²⁵⁹ While having carefully considered all of the arguments advanced by the parties and participants as part of its determination, the Chamber will only refer in this decision to those elements which it considers necessary to show the line of reasoning underpinning its conclusions.

CRIME AGAINST HUMANITY OF PERSECUTION

6. For the purposes of the Statute, ‘crimes against humanity’ means any acts enumerated under Article 7(1) of the Statute, including murder, torture, and rape, when committed as part of a widespread or systematic attack against a civilian population, with the perpetrator’s knowledge of the attack. The chapeau elements for crimes against humanity were found to be sufficiently met for all charges in the case against Mr Abd-Al-Rahman and thus are not discussed here.

7. The crime against humanity of gender persecution requires, under the Statute, that (1) the perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights; (2) the perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such; (3) such targeting was based on gender as defined in Article 7(3) of the Statute; and (4) the conduct was committed in connection with any act referred to in Article 7(1) of the Statute or any crime within the jurisdiction of the Court.²⁶⁰ These elements are discussed below. Elements (5) and (6) pertaining to the chapeau elements for crimes against humanity are omitted.

²⁵⁷ Art. 13(b), ICCSt.

²⁵⁸ ICC Statement, ‘Security Council Refers Situation in Darfur to ICC Prosecutor’ (ICC-OTP-20050401-96), 1 April 2005, available at www.icc-cpi.int/news/icc-security-council-refers-situation-darfur-icc-prosecutor (hereafter ICC Statement).

²⁵⁹ Art. 61(5), ICCSt.

²⁶⁰ Art. 7(1)(h), ICCSt.

*The Perpetrator Severely Deprived One or More Persons of
Fundamental Rights*

8. Article 7(2)(g) of the Statute defines ‘persecution’ as ‘the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity’.

9. The Statute also requires, under the fourth element of persecution, a connection between gender persecution and an act under its Article 7(1) or any crime within the jurisdiction of the Court. Since all crimes under the Statute are violations of fundamental rights and all persecutory conduct violates the fundamental right to be free from discrimination, the violation of the right to be free from discrimination in connection with any relevant crime prohibited by the Statute always constitutes a severe deprivation of fundamental rights.²⁶¹

10. The Court also recognises that it is in the interest of justice to consider all human rights violations that cumulatively constitute a severe deprivation of fundamental rights in connection to an act or acts of gender persecution.²⁶² For this reason, the Court considers a broad range of human rights violations.²⁶³

11. The Chamber notes that the Statute should be interpreted and applied in accordance with internationally recognised human rights pursuant to Article 21(3) and may consult ‘applicable treaties’ where ‘appropriate’ under Article 21(1)(b).²⁶⁴ Such rights are enshrined in, for example, the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR) (taken together these are known as the ‘international bill of human rights’); the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention on the Rights of the Child; the International Convention for the Elimination of Racial Discrimination; the Convention on the Rights of Persons with Disabilities; the African Charter on Human and Peoples’ Rights; the American Convention on Human Rights; the

²⁶¹ Office of the Prosecutor, ‘Policy on the Crime of Gender Persecution’, December 2022, available at www.icc-cpi.int/sites/default/files/2022-12/2022-12-07-Policy-on-the-Crime-of-Gender-Persecution.pdf, at § 39.

²⁶² *Ibid.*

²⁶³ Judgment, *Kupreškić* (IT-95-16-T), Trial Chamber, 14 January 2000, § 618; Judgment, *Knojević* (IT-97-25-T), Trial Chamber II, 15 March 2002, § 433.

²⁶⁴ E.g., in *Al Hassan*, the Pre-Trial Chamber identified the following acts as constituting the severe deprivation of fundamental rights: flogging, restrictions on the freedom of movement, detention in inhuman conditions, as well as the control of educational freedoms may constitute severe deprivations of fundamental rights. See Decision on Confirmation of Charges, *Al Hassan* (ICC-01/12-01/18-461-Corr-Red), Pre-Trial Chamber I, 13 November 2019, §§ 665, 683, 684, 690.

European Convention on Human Rights; and other international or regional instruments on international human rights.²⁶⁵

12. The Chamber therefore calls on the Prosecutor to consult applicable treaties and other relevant international or regional human rights law in its analysis of the severe deprivation of fundamental rights in connection to any acts of persecution in its charges against Mr Abd-Al-Rahman.

The Perpetrator Targeted Persons by Reason of the Identity of a Group or Collectivity or Targeted the Group or Collectivity as Such

13. The Statute requires that the perpetrator targets a person or persons either based on ‘the identity of a group or collectivity’ or ‘targeted the group or collectivity’.²⁶⁶

14. The ‘targeted group’ may be, and frequently is, larger than persons who are perceived to exhibit the criteria of the group and must be interpreted broadly.²⁶⁷ In accordance with tribunal jurisprudence, the ‘targeted group’ is *defined by the perpetrator* and may include such victims who, due to their affiliations or sympathies for members of the identity protected under the prohibited grounds for persecution, may become part of the targeted group.²⁶⁸ The targeted group may also be defined as non-members of a specific group, meaning persons targeted for being perceived as non-members of an *accepted* group.²⁶⁹

15. For gender persecution, this means the targeted group may simply be *anyone* who does not exhibit the acceptable gender criteria such as the roles, behaviours, activities, or attributes assigned to groups relevant for discriminatory targeting.²⁷⁰ As the policy on the crime of gender persecution notes, ‘[g]roups targeted for gender persecution include, for example, women, girls, men, boys and LGBTQI+ persons, and subsets of these groups’.²⁷¹

The Perpetrator’s Targeting Was Based on Gender Grounds

16. Under Article 7(3) of the Statute, the term ‘gender’ refers to ‘the two sexes, male and female, within the context of society’.²⁷² The policy explains that ‘gender’ refers to sex characteristics and social constructs and criteria used to define maleness and

²⁶⁵ Office of the Prosecutor, *supra* note 262, at § 37.

²⁶⁶ ICC Statement, *supra* note 258, Art. 7(1)(h)(2).

²⁶⁷ Judgment, *Naletilić & Martinović* (IT-98-34-T), Trial Chamber, 31 March 2003, § 636 (citing Judgment, *Kvočka* (IT-98-30/H-T), Trial Chamber, 2 November 2001, § 195 (footnote omitted)).

²⁶⁸ Judgment, *Ntaganda* (ICC-01/04-02/06), Trial Chamber VI, 8 July 2019, § 1011.

²⁶⁹ Judgment, *Ongwen* (ICC-02/04-01/15-1762-Red), Trial Chamber IX, 4 February 2021, § 2735 (hereafter Ongwen Judgment).

²⁷⁰ Office of the Prosecutor, *supra* note 262, at §§ 42, 45.

²⁷¹ *Ibid.*, at § 5.

²⁷² ICC Statement, *supra* note 258, Art. 7(3).

femaleness, including roles, behaviours, activities and attributes'.²⁷³ The policy further clarifies that 'gender persecution is committed against persons because of sex characteristics and/or because of the social constructs and criteria used to define gender'.²⁷⁴ The Chamber accepts the policy's interpretation of Article 7(3) of the Statute because this interpretation is in accordance with decades of internationally recognised human rights, which is relevant in this Court by virtue of Article 21(3) of the Statute. Accordingly, the inextricable link between 'gender' and 'sex' should not be conflated.

The Conduct Was Committed in Connection with Any Act Referred to in Article 7, Paragraph 1 of the Statute

17. As noted above, the persecutory conduct must be committed *in connection with* any act referred to in Article 7(1) of the Statute (underlying act) and results in the severe deprivation of a victim's fundamental rights.²⁷⁵ The policy notes that,

The threshold for element one of gender persecution is always met when the crime[s] under the Statute are committed with discriminatory intent. This is because all crimes under the Statute are violations of fundamental rights and all persecutory conduct violates the fundamental right to be free from discrimination. Taken together, the violation of the right to be free from discrimination in connection with any relevant crime prohibited by the Statute always constitutes a severe deprivation of fundamental rights.²⁷⁶

18. In addition to satisfying its own elements pursuant to Article 7(1) of the Statute, an underlying act may also trigger other multiple and severe fundamental rights deprivations. As the policy notes, 'fundamental rights deprivations based on discriminatory grounds, should always be considered cumulatively'.²⁷⁷ Identifying these additional deprivations helps to establish sufficient evidence to support the charge of gender persecution, providing a holistic and accurate historical record of atrocities and a clearer pathway to the non-repetition of crimes and sustainable peace.

AMENDED COUNT 11: GENDER PERSECUTION AS A CRIME AGAINST
HUMANITY COMMITTED AGAINST THE FUR MEN AND WOMEN IN
KODOOM, BINDISI, AND SURROUNDING AREAS

19. On 22 April 2021, the prosecution submitted its second corrected version of the Document Containing the Charges,²⁷⁸ charging persecution as a crime against

²⁷³ Office of the Prosecutor, *supra* note 262, at 3.

²⁷⁴ *Ibid.*

²⁷⁵ Ongwen Judgment, *supra* note 269, at §§ 2733, 2738.

²⁷⁶ Office of the Prosecutor, *supra* note 262 at § 39 (footnote omitted).

²⁷⁷ *Ibid.*

²⁷⁸ Public Redacted Version of Second Corrected Version of Document Containing the Charges, *supra* note 256.

humanity on political and ethnic grounds committed in Kodoom, Bindisi, and surrounding areas between 15 and 16 August 2003 for targeting persons perceived as belonging to, or being associated with, or supporting the rebel armed groups (Count 11).²⁷⁹ The Prosecutor did not charge gender as a ground of persecution for Count 11 (Bindisi and surrounds). Nor did the prosecution recognise women and girls as victims of gender persecution for Count 11. Therefore, the Court requests amendments for Count 11 under Article 61(7)(c) to include charges for gender persecution as a crime against humanity by way of the criminal acts listed under Counts 1–10.

20. In Kodoom, Bindisi, and surrounding areas (Counts 1–11), perpetrators tortured and killed Fur men, women, boys, and girls because of their ethnicity, political views and gender. While the militia/Janjaweed and Government of Sudan forces killed fleeing ‘young boys, men, women and children’,²⁸⁰ victims were targeted on the basis of gender. The militia members were specifically instructed to keep men at the checkpoints.²⁸¹ The Fur women were asked about their husbands and often raped²⁸² but not targeted for killing in the same manner as men. In particular, the perpetrators captured fleeing men and women and separated them by their gender.²⁸³ The men in particular were forced to keep their backs turned to their female counterparts and were threatened with death if they failed to obey the order.²⁸⁴

21. Most women were stripped of their clothing and raped, with their clothing stuffed in their mouths.²⁸⁵ Women were often referred to as *khadim* (servants).²⁸⁶ This is according to the perpetrators’ belief that because of Fur women’s gender and their ethnicity this is their prescribed gender role. Often egregious crimes are carried out as punishments for when victims are perceived to deviate from their prescribed gender role.²⁸⁷ Stripping women of their clothes and the use of derogatory language were used as a means of humiliation, and mental torture was also common to many incidents.²⁸⁸ Some of the women were raped in full view and/or hearing of other

²⁷⁹ *Ibid.*, at § 57.

²⁸⁰ *Ibid.*, at § 39.

²⁸¹ Public Redacted Version of Prosecution’s Pre-Confirmation Brief, 16 April 2021, ICC-02/05-01/20-346-Conf-AnxA, *Abd-Al-Rahman* (ICC-02/05-01/20), Pre-Trial Chamber II, 21 May 2021, § 137 (hereafter Public Redacted Version of Prosecution’s Pre-Confirmation Brief).

²⁸² *Ibid.*, § 181.

²⁸³ Public Redacted Version of Second Corrected Version of Document Containing the Charges, *supra* note 256, at § 45.

²⁸⁴ *Ibid.*

²⁸⁵ *Ibid.*, at §§ 48, 51.

²⁸⁶ Public Redacted Version of Prosecution’s Pre-Confirmation Brief, *supra* note 281, at § 181.

²⁸⁷ L. Davis, ‘Reimagining Justice for Gender-Based Crimes at the Margins: New Legal Strategies for Prosecuting ISIS Crimes against Women and LGBTIQ Persons’ 3 *William & Mary Journal of Race, Gender, and Social Justice* (March 2018) 513–558, at 546.

²⁸⁸ *Report to the United Nations Secretary-General*, International Commission on Inquiry on Darfur, 25 January 2005, § 366, available at www.un.org/ruleoflaw/blog/document/report-of-the-international-commission-of-inquiry-on-darfur-to-the-united-nations-secretary-general/ (hereafter *Report to the United Nations Secretary-General*, International Commission on Inquiry on Darfur).

detained persons.²⁸⁹ Fur women were also killed, including when they resisted rape.²⁹⁰ In this context, women were targeted on gender grounds as a punishment for not complying with their presumed roles, behaviours, activities, and attributes assigned to women and not fulfilling their destiny to sexually serve perpetrators who are men. Gender persecution inevitably includes efforts to aggressively reinforce binary gender roles and advance punishment for any transgression.

22. Sexual and gender-based violence also reinforced masculinities and manhood among Government of Sudan forces and militia/Janjaweed. After finding a virgin, some perpetrators fired guns in the air and shouted, 'I have found a virgin woman'.²⁹¹ Mr Abd-Al-Rahman and militia/Janjaweed demonstrated an intent to commit persecution as indicated in his language, such as 'we have taken Tora Bora's wives, praise be to god', while raping women in villages.²⁹² In addition to reinforcing their roles as enslaved persons, women's bodies were being used to reduce their value as the future, attack their own honour and the honour of their husbands, terrorise the population, and ensure control over the population.²⁹³

23. The evidence also shows the gendered nature of crimes in the statements by Government of Sudan forces and militia/Janjaweed about the fact that they will take the 'beautiful' women as wives and the 'ugly' ones will be servants.²⁹⁴ This capitalises on the social pressures faced by women as a result of men's attempt to control their roles and responsibilities in public and domestic settings.

24. Other torturous or inhumane acts committed against men or boys may also rise to the level of gender persecution in Kodoom, Bindisi, and surrounding areas. In detention, men were mistreated and kept in inhumane conditions.²⁹⁵ Specifically, evidence shows that victims were treated so as to show that they are in the power of the perpetrators.²⁹⁶ The militia/Janjaweed and Government of Sudan forces also humiliated, degraded, or otherwise violated the dignity of their victims, amounting to an outrage upon personal dignity.²⁹⁷ Finally, Government of Sudan forces and militia/Janjaweed used pejorative and derogatory language against the Fur men and boys during the course of the attack, uttering epithets such as 'slave' and 'servant', and made derogatory references linked to detainees' skin colour,

²⁸⁹ Public Redacted Version of Second Corrected Version of Document Containing the Charges, *supra* note 256, at §§ 49, 53.

²⁹⁰ *Ibid*, at § 38.

²⁹¹ Public Redacted Version of Prosecution's Pre-Confirmation Brief, *supra* note 281, at § 190.

²⁹² *Ibid*, §§ 136, 190.

²⁹³ *Report to the United Nations Secretary-General*, International Commission on Inquiry on Darfur, *supra* note 288, at § 353.

²⁹⁴ Public Redacted Version of Prosecution's Pre-Confirmation Brief, *supra* note 281, at § 181.

²⁹⁵ Public Redacted Version of Second Corrected Version of Document Containing the Charges, *supra* note 256, at §§ 38, 40.

²⁹⁶ *Ibid*, § 40.

²⁹⁷ *Ibid*, at § 50.

while also stating that the Government of Sudan sent them to kill every Black person.²⁹⁸

25. These multiple intersecting persecutory grounds capture aspects of the targeting that go beyond killing and include other crimes or inhumane acts. Fur men and boys were targeted because of their ethnicity, political beliefs, and gender. Abuses committed against such men and boys, as well as women and girls, for said reasons constitute the grounds of gender persecution. Absent the gendered perception that all Fur men are fighters and supporters of the rebel movements (specifically supporting these movements by joining them in their fighting role), these men would not be subjected to murder, torture, and other criminal acts. Similarly, women would not be raped if not in an attempt to humiliate and destroy communities. Therefore, Fur men, women, boys, and girls were not only targeted with killing because of their ethnicity and political beliefs but also because of their gender.

26. Pursuant to Article 61(7) of the Statute, the Chamber requests the Prosecutor to amend its Document Containing the Charges, so as to charge the acts of rape, torture, other inhumane acts, cruel treatment, outrages upon personal dignity, in addition to murder and attempted murder committed against the Fur men, women, boys, and girls in Kodoom, Bindisi, and surrounding areas between 15 and 16 August 2003 as the crime against humanity of persecution on the grounds of gender.

ADDITIONAL COUNTS 21 AND 31: GENDER PERSECUTION AS A
CRIME AGAINST HUMANITY COMMITTED AGAINST THE FUR MEN
AND WOMEN IN MUKJAR, DELEIG, AND SURROUNDING AREAS

27. On 22 April 2021, the prosecution submitted its second corrected version of the Document Containing the Charges,²⁹⁹ charging persecution as a crime against humanity on political, ethnic, and gender grounds committed against the Fur men and boys in Mukjar and surrounding areas between the end of February 2004 and the beginning of March 2004 and in Deleig and surrounding areas between 5 and 7 March 2004 (Counts 21 and 31).³⁰⁰ Pursuant to Article 61(7)(c) of the Statute, the Chamber further requests the Prosecutor to amend its Document Containing the Charges to include an additional charge of gender persecution for rape, murder, other inhumane acts, and outrages on personal dignity committed against women in Mukjar and surrounding areas between the end of February 2004 and the beginning of March 2004, and in Deleig and surrounding areas between 5 and 7 March 2004. The Chamber recognises both the differential and

²⁹⁸ *Ibid.*, at § 47.

²⁹⁹ *Ibid.*

³⁰⁰ *Ibid.*, at §§ 93, 136.

common impact of such persecutory conduct as rape against men, boys, women, and girls of the Fur tribe.

28. In Mukjar and surrounding areas, rapes have been committed and should be interpreted as an underlying crime of gender persecution.³⁰¹ Similar to the Kodoom and Bindisi incidents, these acts of rape served to subject women and girls to severe deprivation of their fundamental rights, including through mass rape and sexual violence.³⁰² Upon further investigation, the prosecution could establish that the impact could have included humiliation, degrading treatment, or inflicting serious injury to the victim's body or to their mental or physical health. Rape may be committed to enforce a role or because it is the prescribed role, which is a central characteristic of sexual slavery/enslavement.

29. In Mukjar and surrounding areas, the evidence shows that the perpetrators also demonstrated an intent to commit persecution as indicated in their language, such as 'I am going to f*** you today' and subjecting men to beatings.³⁰³ Such language is used to undermine men's status by making them appear feeble, like 'women',³⁰⁴ and can evidence intent to discriminate against both men and women. The policy elaborates on this, explaining that perpetrators may target men and/or women through rape based on gender discrimination:

Perpetrators may target women and girls because they view them as 'chattel' or 'war booty' (based on their belief that women are lesser than men and should be treated like property). At the same time, perpetrators may target men and boys through rape as a strategy to 'feminize' them and/or to invoke the 'indignity' of being treated as a woman or a 'homosexual' (based on their belief that men enjoy a higher standing than women or LGBTQI+ persons).³⁰⁵

30. In Mukjar, Deleig, and surrounding areas, Mr Abd-Al-Rahman also mistreated the detainees, particularly by striking them with an axe or an axe-like object, as well as by whipping them across the back.³⁰⁶ Such physical abuse is an indication of dominance over the Fur men and boys. Perpetrators inflicted the pain and suffering on Fur men and boys to obtain information or a confession. The crimes of torture, other inhumane acts, cruel treatment, and outrages upon personal dignity served to terrorise and intimidate the detained Fur men and boys and constituted the crime of

³⁰¹ Public Redacted Version of Prosecution's Pre-Confirmation Brief, *supra* note 281, at § 50; *Report to the United Nations Secretary-General*, International Commission on Inquiry on Darfur, *supra* note 288, at § 341.

³⁰² *Ibid.*

³⁰³ Public Redacted Version of Prosecution's Pre-Confirmation Brief, *supra* note 281, at §§ 138, 139, 238, 271.

³⁰⁴ Davis, *supra* note 287, at 20.

³⁰⁵ Office of the Prosecutor, *supra* note 262, at § 51.

³⁰⁶ Public Redacted Version of Second Corrected Version of Document Containing the Charges, *supra* note 256, at §§ 79, 80, 85, 123, 129, 147.

persecution on the basis of intersecting political, ethnic, and gender grounds. Such treatment destroys the capacity of men and boys to lead and protect their families and communities by showing dominance, thus violating their manhood and inflicting psychological trauma.

31. In connection with these crimes, Government of Sudan forces and militia/Janjaweed targeted women based on political, ethnic, and gender grounds. Women and girls comprise the majority – if not totality – of rape victims during the selected attacks.³⁰⁷

32. Therefore, the Chamber finds that available evidence appears to establish gender persecution within the jurisdiction of the Court based on the acts of rape, murder, other inhumane acts, and outrages on personal dignity committed against Fur men and women in Mukjar and surrounding areas between the end of February 2004 and the beginning of March 2004, and in Deleig and surrounding areas between 5 and 7 March 2004.

CONCLUSION

33. Not charging rape, torture, murder, other inhumane acts, and outrages upon personal dignity conducted as the crimes against humanity of gender persecution would be a travesty. The Chamber therefore adjourns the confirmation of charges proceeding and requests the Prosecutor to amend the Document Containing the Charges, pursuant to Article 61(7)(c)(ii) of the Statute, to (1) amend Count 11 to specify that the acts of torture, rape, other inhumane acts, cruel treatment, outrages upon personal dignity, murder, and attempted murder committed against men, women, boys, and girls in Kodoom, Bindisi, and surrounding areas between 15 and 16 August 2003 (Counts 1–11) constitute the crime against humanity of gender persecution (as well as intersecting with political and ethnic persecution); (2) amend Counts 21 and 31 to specify that the acts of torture, rape, murder, and other inhumane acts against men, women, boys, and girls in Mukjar and surrounding areas between the end of February 2004 and the beginning of March 2004 (Counts 12–20), as well as in Deleig and surrounding areas between 5 and 7 March 2004 (Counts 22–30), constitute the underlying conduct of the crime against humanity of gender persecution, in addition to political and ethnic persecution.

Judge Lisa Davis and Judge Marina Kumskova

³⁰⁷ Report to the United Nations Secretary-General, International Commission on Inquiry on Darfur, *supra* note 288, at §§ 354–488.