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

Date: 21 July 2021

**THE APPEALS CHAMBER**

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

**SITUATION IN DARFUR, SUDAN**

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

**Public**

**Victims’ observations on the Defence appeal against the ‘Decision on the Defence  
“Exception d’incompétence” (ICC-02/05-01/20-302)’ and on the Prosecutor’s  
response to the Defence appeal**

**Source:** Legal Representative of the Victims

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

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## I. INTRODUCTION

1. The Legal Representative of the Victims submits these observations pursuant to the Appeals Chamber's order of 25 June 2021 permitting 'victims who filed observations before Pre-Trial Chamber II' to submit observations on the Defence's appeal of the Pre-Trial Chamber's decision dated 17 May 2021 rejecting the Defence request to dismiss the case for lack of jurisdiction.<sup>1</sup>

2. The Legal Representative agrees with the Prosecutor that the Defence's appeal should be rejected. The four alternate grounds put forward by the Defence in support of the appeal are without merit. Contrary to what the Defence suggests in its first three grounds of appeal, Pre-Trial Chamber II did not err in affirming the legality of the United Nations Security Council referral of the situation in Darfur to the Court in its Resolution 1593. And contrary to the Defence's fourth ground of appeal, the Chamber did not err when it rejected the argument that the Court lacks jurisdiction because the crimes that have been charged did not form part of Sudanese or international law at the time of their alleged commission. The Defence's further requests for declaratory relief from the Appeals Chamber are equally without merit and go beyond the confirmation, reversal or amendment of the appealed decision contemplated by rule 158 of the Court's Rules of Procedure and Evidence. As a result, the Defence's appeal should be dismissed in its entirety.

## II. PROCEDURAL HISTORY

3. On 27 April 2007 and 16 January 2018, the Court issued arrest warrants against Mr Abd-Al-Rahman for crimes against humanity and war crimes allegedly committed in Darfur in 2003 and 2004.<sup>2</sup> On 9 June 2020, Mr Abd-Al-Rahman surrendered himself to the Court.

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<sup>1</sup> [ICC-02/05-01/20-424](#), §1 (permitting victims also to submit observations on the Prosecutor's response to the Defence's appeal against the 'Decision on the Defence "Exception d'incompétence" (ICC-02/05-01/20-302)' of 17 May 2021 ([ICC-02/05-01/20-391](#))).

<sup>2</sup> [ICC-02/05-01/07-3-Corr](#); [ICC-02/05-01/07-74-Red](#).

4. On 15 March 2021, the Defence filed a submission arguing that this case should be dismissed based on a lack of jurisdiction ('Jurisdictional Challenge').<sup>3</sup> On 16 April 2021, the Prosecutor, the Office of the Counsel for Victims ('OPCV') and the Legal Representative of the Victims each submitted responses to the Jurisdictional Challenge, arguing that it should be rejected.<sup>4</sup> On 17 May 2021, Pre-Trial Chamber II issued its decision rejecting the Jurisdictional Challenge ('Decision on Jurisdiction').<sup>5</sup>

5. On 22 May 2021, the Defence filed a notice stating that it was appealing the Decision on Jurisdiction in its entirety.<sup>6</sup> On 7 June 2021, the Defence followed up with its appeal brief, raising four alternative grounds of appeal and requesting that the Appeals Chamber annul the Decision on Jurisdiction and dismiss the case for lack of jurisdiction. The Defence also repeated a request for declaratory relief first sought in its Jurisdictional Challenge.<sup>7</sup> On 25 June 2021, the Appeals Chamber issued an order permitting victims who filed observations before the Pre-Trial Chamber to submit observations on the Defence's appeal brief and the Prosecutor's response.<sup>8</sup> Four days later the Prosecutor submitted his response.<sup>9</sup>

### III. SUBMISSIONS

#### A. Standard of review

6. The Defence's appeal is made pursuant to article 82(1)(a) of the Rome Statute, which permits parties to appeal decisions 'with respect to jurisdiction or admissibility' without leave of the Court.<sup>10</sup> The Appeals Chamber has held that its 'function ... in respect of appeals brought under article 82(1)(a) of the Statute is to determine whether

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<sup>3</sup> [ICC-02/05-01/20-302](#).

<sup>4</sup> [ICC-02/05-01/20-347](#); [ICC-02/05-01/20-348](#); [ICC-02/05-01/20-351](#).

<sup>5</sup> [ICC-02/05-01/20-391](#).

<sup>6</sup> [ICC-02/05-01/20-406](#). (The filing was notified to the participants on 24 May 2021.)

<sup>7</sup> [ICC-02/05-01/20-418](#). See also [ICC-02/05-01/20-302](#).

<sup>8</sup> [ICC-02/05-01/20-424](#), §1.

<sup>9</sup> [ICC-02/05-01/20-427](#).

<sup>10</sup> [ICC-02/05-01/20-406](#); [ICC-02/05-01/20-418](#), §1.

the determination on ... the jurisdiction of the Court was in accord with the law.’<sup>11</sup> The party alleging an error must show that it ‘materially affected the impugned decision’,<sup>12</sup> meaning that ‘the Pre-Trial or Trial Chamber would have rendered a decision that is substantially different from the decision that was affected by the error, if it had not made the error.’<sup>13</sup> The Appeals Chamber has also stated that it ‘will not disturb a Pre-Trial or Trial Chamber’s evaluation of the facts’ unless ‘it cannot discern how the Chamber’s conclusion could have reasonably been reached from the evidence before it’.<sup>14</sup>

## **B. Victims’ response to grounds of appeal raised by the Defence**

### ***1. Response to first ground of appeal: Pre-Trial Chamber II did not err in its finding that the Darfur situation constituted a ‘situation’ that could be referred to the Court in accordance with the Rome Statute***

7. The Defence argued in its Jurisdictional Challenge that the Court has no jurisdiction to hear the case against the defendant because the referral pursuant to United Nations Security Resolution 1593 of the ‘situation in Darfur’ to the Court did not meet the requirement of a ‘situation’ under article 13(b) of the Rome Statute.<sup>15</sup> According to the Defence, article 13 of the Statute and Chapter VII of the United Nations Charter permitted only the referral of a situation pertaining to the state of Sudan as a whole.<sup>16</sup>

8. Pre-Trial Chamber II dismissed this argument.<sup>17</sup> It found that the term ‘situation’ should be construed with a view to ‘identifying a specific set of events in

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<sup>11</sup> Appeals Chamber, *Kony et al.*, [ICC-02/04-01/05-408 \(16 September 2009\)](#), §80.

<sup>12</sup> Appeals Chamber, *Bemba*, [ICC-01/05-01/08-962 \(19 October 2010\)](#), §133. See also Appeals Chamber, *Katanga and Ngudjolo*, [ICC-01/04-01/07-1497 \(25 September 2009\)](#), §37.

<sup>13</sup> Appeals Chamber, *Situation in the Democratic Republic of the Congo*, [ICC-01/04-169-US-Exp \(13 July 2006\)](#), §84. See also Appeals Chamber, *Bemba*, [ICC-01/05-01/08-962 \(19 October 2010\)](#), §103.

<sup>14</sup> Appeals Chamber, *Gaddafi and Al-Senussi*, [ICC-01/11-01/11-547 \(21 May 2014\)](#), §93.

<sup>15</sup> [ICC-02/05-01/20-302](#), pp. 6-16. See also [ICC-0/05-01/20-418](#), §4.

<sup>16</sup> [ICC-02/05-01/20-418](#), §4.

<sup>17</sup> [ICC-02/05-01/20-391](#), §§ 25-27.

respect of which credible allegations of crimes are made’ and ‘to define and circumscribe ... the action of the Court’.<sup>18</sup> It noted that article 13 of the Statute ‘adopt[ed] the term “situation” ... without any further qualification’.<sup>19</sup> And it concluded that a situation could therefore validly be ‘restricted to a specific area located within ... the territory of one State’.<sup>20</sup>

9. The Defence submits that this conclusion is tainted by various errors.<sup>21</sup> But the Legal Representative agrees with the Prosecutor<sup>22</sup> that none of these arguments establish grounds for a successful appeal.

10. First, the Defence argues that the Decision on Jurisdiction was based on the conclusion that crimes within the jurisdiction of the Court were only committed in Darfur. This allegedly constitutes an error of fact because it ‘ignores other Security Council resolutions’, which the Chamber ‘refrains from citing’, and the ‘internal conflicts in Sudan’, which are ‘longstanding’ and ‘numerous’.<sup>23</sup> But the Defence fails to make clear why the Pre-Trial Chamber should focus on other crimes or cite United Nations Security Council resolutions concerning other conflicts in Sudan, which have no relevance to the Court’s jurisdiction to hear the case against this defendant. The defendant is charged with crimes alleged to have been committed in Darfur, and these fall squarely within the scope of the referral under Resolution 1593.

11. The Pre-Trial Chamber’s second alleged error was to distort the Defence’s submissions by suggesting that the Defence had argued that ‘the “Situation” must necessarily cover the geographical area corresponding to that of the territory of a State’ when the Defence had in fact contended that it should ‘correspond to the geographical area of a “Situation” under Chapter VII of the United Nations Charter’.<sup>24</sup> Contrary to

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<sup>18</sup> [ICC-02/05-01/20-391](#), §25.

<sup>19</sup> [ICC-02/05-01/20-391](#), §26.

<sup>20</sup> [ICC-02/05-01/20-391](#), §26.

<sup>21</sup> [ICC-02/05-01/20-418](#), §§ 5-9.

<sup>22</sup> See [ICC-02/05-01/20-427](#), §§ 5-12.

<sup>23</sup> [ICC-02/05-01/20-418](#), §6 (unofficial translation).

<sup>24</sup> [ICC-02/05-01/20-418](#), §7 (unofficial translation).

the Defence's assertion, the Pre-Trial Chamber did not distort the Defence's argument, and in any event, the Chamber's conclusion that a situation does not have any 'qualification' addresses both versions of the argument.<sup>25</sup>

12. Third, the Defence alleges that the Pre-Trial Chamber erred by holding that a 'situation' is defined as 'the scope of the criminal action allegedly committed within it', thereby confusing a 'situation' with a 'case'.<sup>26</sup> According to the Defence, this error 'also constitutes a denial of justice' on the ground that the Pre-Trial Chamber dismissed Defence arguments 'without examining them' or 'giving any reasons'.<sup>27</sup> The Defence once more misconstrues the Decision on Jurisdiction, which specifically distinguishes between 'cases' and 'situations'. The Pre-Trial Chamber explicitly held that the term "'situation'" has been devised, included in the Statute, and construed ... to define and circumscribe the perimeter of the action of the Court. As such, it ... differs both from the one of "case" and from the one of "territory of a State" or "State".<sup>28</sup> In addition, the Defence's suggestion that the Security Council's referral of the situation in Darfur – as distinct from Sudan as a whole – undermines the Court's independence is flawed. Under Chapter VII of the Charter, the Security Council can define geographical and temporal parameters of situations referred to the Court under article 13(b) of the Statute.<sup>29</sup>

13. The Defence has therefore failed to show any errors in its first ground of appeal, let alone errors that would have substantially affected the outcome of the Pre-Trial Chamber's decision.

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<sup>25</sup> See [ICC-02/05-01/20-391](#), §26.

<sup>26</sup> [ICC-02/05-01/20-418](#), §8 (citing [ICC-02/05-01/20-391](#), §27). See also [ICC-02/05-01/20-302](#), §§ 23-24.

<sup>27</sup> [ICC-02/05-01/20-418](#), §9 (unofficial translation).

<sup>28</sup> [ICC-02/05-01/20-391](#), §25.

<sup>29</sup> See, e.g., [Resolution 1970 \(2011\)](#) in which the Security Council imposed temporal restrictions when referring the situation in Libya 'since 15 February 2011' to the ICC. The Security Council has also passed resolutions on situations restricted to geographically limited parts of states in a number of contexts. See, e.g., [Resolution 2497 \(2019\)](#) (the situation in Abyei). See also [ICC-02/05-01/20-351](#), §8.

2. *Response to second ground of appeal: Pre-Trial Chamber II did not err in declining to dismiss the case on the basis that Resolution 1593 is incompatible with article 115(b) of the Rome Statute*

14. The second argument in the Defence's Jurisdictional Challenge was that the Court has no jurisdiction because paragraph 7 of Resolution 1593 – stating that the parties to the Rome Statute should bear the costs of the referral – violates article 115(b) of the Statute, which provides that the United Nations is a source of funding for the Court 'in relation to the expenses incurred due to referrals by the Security Council'.<sup>30</sup> According to the Defence, because Resolution 1593 was incompatible with article 115(b), the resolution could not confer jurisdiction on the Court 'in accordance with the provisions' of the Rome Statute, as required by article 13, nor 'having regard to the provisions of this Statute' relating to the rights of the defendant, as required by article 67.<sup>31</sup>

15. The Pre-Trial Chamber dismissed this argument because the Defence failed to explain 'why a matter relating to the financial operation of the Court would have an impact on its jurisdiction' and in line with previous decisions by the Chamber and the Presidency finding that the Defence has no legal standing to raise arguments about the Court's financial management.<sup>32</sup> Indeed, the Pre-Trial Chamber 'strongly censor[ed] the Defence' for raising its argument that Resolution 1593 violated article 115(b) of the Statute 'yet again', albeit 'under a different angle'.<sup>33</sup>

16. The Defence alleges that when dismissing this argument the Pre-Trial Chamber committed a number of errors.<sup>34</sup> The Legal Representative agrees with the Prosecutor<sup>35</sup>

<sup>30</sup> [ICC-02/05-01/20-302](#), pp. 16-21. See also [ICC-02/05-01/20-418](#), §10.

<sup>31</sup> [ICC-02/05-01/20-418](#), §10.

<sup>32</sup> [ICC-02/05-01/20-391](#), §§ 28-30.

<sup>33</sup> [ICC-02/05-01/20-391](#), §29.

<sup>34</sup> [ICC-02/05-01/20-418](#), §§ 10-15.

<sup>35</sup> See [ICC-02/05-01/20-427](#), §§ 13-18.



that this is not the case and that, as a result, the Defence's second ground of appeal should be rejected.

17. First, the Defence contends that the Pre-Trial Chamber committed a factual error because it did not take into account the distinction drawn in the Jurisdictional Challenge between the Defence's argument in earlier filings alleging that the Chamber should order the United Nations to provide funding to the Court and its latest argument that the Court does not have jurisdiction because the lack of funding violates the Statute.<sup>36</sup> But the Chamber specifically addressed the distinction drawn by the Defence and concluded that it was irrelevant since the Defence had failed to 'provide any reasoning as to how or why a matter relating to the financial operation of the Court would have an impact on its jurisdiction'.<sup>37</sup>

18. Second, the Defence argues that the Pre-Trial Chamber 'erred in law ... by singling out Article 115 of the Statute as a provision ... reserved for the Assembly of States Parties and outside the exercise of the Court's ... jurisdiction'.<sup>38</sup> According to the Defence, this error also constitutes a 'denial of justice'.<sup>39</sup> The Defence submits that the requirements under article 13 that the Court should exercise its jurisdiction 'in accordance with the provisions of this Statute' and that the defendant should have his case heard 'having regard to the provisions of this Statute' under article 67 are 'no exception to Article 115(b) of the Statute'.<sup>40</sup> The Defence concluded that the Pre-Trial Chamber should therefore have exercised 'its jurisdiction ... by finding a violation of Article 115(b) of the Statute and drawing the consequences for the legality of Resolution 1593'.<sup>41</sup>

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<sup>36</sup> [ICC-02/05-01/20-418](#), §13.

<sup>37</sup> [ICC-02/05-01/20-391](#), §29.

<sup>38</sup> [ICC-02/05-01/20-418](#), §14 (unofficial translation).

<sup>39</sup> [ICC-02/05-01/20-418](#), §15 (unofficial translation).

<sup>40</sup> [ICC-02/05-01/20-418](#), §14 (unofficial translation).

<sup>41</sup> [ICC-02/05-01/20-418](#), §14 (unofficial translation).

19. This submission is a further attempt to rehash an argument that has been rejected on previous occasions. The Pre-Trial Chamber did not find that it did not have the power to review article 115. It specifically considered whether Resolution 1953 would be incompatible with article 115(b) of the Statute and, citing its earlier rulings and that of the Presidency, found that ‘since “the Court’s statutory framework clearly distinguishes the role of the Court, as a judicial institution” from that of the Assembly of States Parties, “which is responsible for considering and deciding the Court’s budget”, “[t]here is no legal basis for the Chamber to engage in the financial matters of the Court”’.<sup>42</sup> The Defence has not put forward any reason to conclude otherwise. The Court and the United Nations have negotiated an agreement covering their relationship, including financial arrangements.<sup>43</sup> The Assembly of States Parties, distinct from the Court, is responsible for the Court’s budget and finances.<sup>44</sup> And there is nothing in the Statute that would prevent the Court from accepting Security Council referrals even if the United Nations did not cover the expenses of those cases.<sup>45</sup>

20. The Defence’s allegation that there have been errors on the part of the Pre-Trial Chamber that affected the outcome of Chamber’s decision on the Court’s jurisdiction should therefore be rejected.

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<sup>42</sup> [ICC-02/05-01/20-391](#), §28 (citing [ICC-02/05-01/20-101](#), §8 and [ICC-02/05-01/20-110](#), §13). See also [ICC-02/05-01/20-180](#), §§ 4, 6.

<sup>43</sup> Negotiated Relationship Agreement between the International Criminal Court and the United Nations ([‘UN-ICC Relationship Agreement’](#)), art. 13. See also [ICC-02/05-01/20-351](#), §12.

<sup>44</sup> [ICC-02/05-01/20-101](#), §8. See also M. Halff *et al.*, ‘Article 115: Funds of the Court and of the Assembly of States Parties,’ in O. Triffterer and K. Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary*, (2016), p. 2255, §7; [ICC-02/05-01/20-427](#), §15.

<sup>45</sup> See M. H. Arsanjani, ‘Financing’, in A. Cassese *et al.*, (eds), *The Rome Statute of the International Criminal Court: A Commentary (Volume 1)* (2002), pp. 315, 325. See also [ICC-02/05-01/20-351](#), §12.

3. *Response to third ground of appeal: Pre-Trial Chamber II did not err in finding that the adoption of Resolution 2259 had no impact on the Court's jurisdiction*

21. The Defence's third ground of appeal is that the Chamber erred in rejecting its challenge to the Court's jurisdiction as a result of the adoption of United Nations Security Council Resolution 2599, which provided for the withdrawal of a peacekeeping mission in Sudan and its replacement with a mission 'without a mandate to support the operations of the Court'.<sup>46</sup> According to the Defence, the withdrawal violated article 2 of the Rome Statute, which required the Court to be brought into a relationship with the United Nations, and the agreement concluded between the Court and the United Nations pursuant to this provision.<sup>47</sup> The Defence submits that, as a result, the jurisdiction conferred under Resolution 1593 can no longer be exercised 'in accordance with the provisions of this Statute', as required by article 13.<sup>48</sup> In rejecting this argument, the Pre-Trial Chamber noted that the Defence had not established any link between its arguments and the Court's jurisdiction.<sup>49</sup> In addition, the Chamber observed that '[s]pecific mechanisms' had been 'built into the Statute' to guard 'against the risk that, once established, the jurisdiction of the Court could be taken away' and that, '[a]gainst this background', the contention that Resolution 2559 'might have an impact or otherwise affect a previous UNSC referral to the Court' was 'frivolous' and should be dismissed.<sup>50</sup>

22. The Defence submits that the Pre-Trial Chamber's reasoning is 'vitiated by an error of fact' because it mistakenly characterised the Defence submission as an argument that Resolution 2559 'replaced' Resolution 1593.<sup>51</sup> This allegedly led to an

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<sup>46</sup> [ICC-02/05-01/20-418](#), §16 (unofficial translation); [ICC-02/05-01/20-302](#), pp. 21-26.

<sup>47</sup> [ICC-02/05-01/20-418](#), §16 (the Defence also suggests that article 87(6) of the Rome Statute, which permits the Court to ask intergovernmental organisations for cooperation and assistance, may have been violated by the withdrawal).

<sup>48</sup> [ICC-02/05-01/20-418](#), §16.

<sup>49</sup> [ICC-02/05-01/20-391](#), §31.

<sup>50</sup> [ICC-02/05-01/20-391](#), §§ 33-35.

<sup>51</sup> [ICC-02/05-01/20-418](#), §17-18 (unofficial translation).

error of law, which also constituted a ‘denial of justice’, by preventing the Chamber from considering ‘the detailed submissions of the Defence regarding the impact of the violation of Article 2 of the Statute on the validity of the referral made by Resolution 1593’.<sup>52</sup>

23. The Legal Representative agrees with the Prosecutor<sup>53</sup> that this argument is unsubstantiated. First, the Pre-Trial Chamber summarised but did not mischaracterise the Defence’s ‘Third Argument’.<sup>54</sup> Second, the Defence does not make clear why the Chamber erred in finding that the Defence had failed to demonstrate how the termination of a peacekeeping mandate constituted a violation affecting the Court’s jurisdiction. The Chamber rightly concludes that – as with the argument about the purported violation of article 115(b) of the Statute – ‘no serious attempt is made to explain how this would relate [to] and affect the jurisdictional parameters of the Court’s action’.<sup>55</sup> As a result, there is no basis to uphold this ground of appeal.

**4. *Response to fourth ground of appeal: Pre-Trial Chamber II did not err in finding no violation of the principles of nullum crimen sine lege and non-retroactivity under articles 22 and 24 of the Statute***

24. The Defence argued in its Jurisdictional Challenge that exercising jurisdiction in this case would contravene the principles of *nullum crimen sine lege* under article 22 and of non-retroactivity of criminal law under article 24 of the Rome Statute.<sup>56</sup> The Defence has submitted that ‘in the absence of ratification of the Statute of the Court by Sudan, the only crimes within the jurisdiction of the Court’ for which the defendant could be held responsible were those ‘defined in Sudanese national law or, at a minimum, in international law in force and applicable in Sudan at the time of the

<sup>52</sup> [ICC-02/05-01/20-418](#), §19-20 (unofficial translation).

<sup>53</sup> See [ICC-02/05-01/20-427](#), §§ 19-23.

<sup>54</sup> [ICC-02/05-01/20-391](#), §11(iii) (Pre-Trial Chamber II observed that the Defence argued that Resolution 2259 ‘would have ... resulted in invalidating Resolution 1593, in particular by depriving the Court of the logistical and security support essential to the conduct of its activities in Sudan’).

<sup>55</sup> [ICC-02/05-01/20-391](#), §31.

<sup>56</sup> [ICC-02/05-01/20-302](#), pp. 26-55. See also [ICC-02/05-01/20-418](#), §21.

events referred to in the Arrest Warrants'.<sup>57</sup> According to the Defence, neither Sudanese national law nor international law defined the crimes in the arrest warrants and the defendant therefore could not be prosecuted for them.<sup>58</sup>

25. The Pre-Trial Chamber dismissed this argument, finding that 'all the relevant statutory requirements of jurisdiction' were satisfied.<sup>59</sup> In its view, the defendant was charged with crimes 'among those provided for in the Statute (jurisdiction *ratione materiae*)', in relation to alleged events 'within the perimeters of the territory of Darfur, Sudan (jurisdiction *ratione loci*) between August 2003 and March 2004, i.e. after the entry into force of the Statute (jurisdiction *ratione temporis*)'.<sup>60</sup> According to the Chamber, the Defence unduly conflated 'the issue of jurisdiction' with articles 22(1) and 24 of the Statute.<sup>61</sup> It found that article 24(1) merely 'prevents the Court from exercising its jurisdiction *vis-à-vis* acts and conducts carried out prior to the entry into force of the Statute, i.e. before 1 July 2002.'<sup>62</sup> And it concluded that even though Sudan was not a party to the Rome Statute, 'the referral by the UN Security Council was included in the Statute as a tool suitable to potentially broaden the jurisdictional reach of the Court, namely by allowing it to exercise its jurisdiction *vis-à-vis* scenarios where crimes as defined in the Statute would be allegedly committed on the territory of States not party to the Statute'.<sup>63</sup> The Chamber was satisfied that 'no violation of the principle of legality or non-retroactivity of criminal law can be detected'.<sup>64</sup> And it found it unnecessary to consider whether the charged acts were also criminalised under national or customary international law.<sup>65</sup>

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<sup>57</sup> [ICC-02/05-01/20-418](#), §21 (unofficial translation).

<sup>58</sup> [ICC-02/05-01/20-418](#), §21.

<sup>59</sup> [ICC-02/05-01/20-391](#), §36.

<sup>60</sup> [ICC-02/05-01/20-391](#), §36.

<sup>61</sup> [ICC-02/05-01/20-391](#), §38.

<sup>62</sup> [ICC-02/05-01/20-391](#), §39.

<sup>63</sup> [ICC-02/05-01/20-391](#), §41.

<sup>64</sup> [ICC-02/05-01/20-391](#), §40.

<sup>65</sup> [ICC-02/05-01/20-391](#), §42.

26. The Defence alleges various errors with this reasoning.<sup>66</sup> First, it argues that the Pre-Trial Chamber mischaracterised the Defence submission that, for the Court to exercise jurisdiction, ‘either Sudan had to be a State Party ... or that the crimes charged are criminalised under national or international law applicable in Sudan’ at the time of their alleged commission.<sup>67</sup> The Defence submits that it ‘clearly presented’ these two conditions ‘as alternatives’ and that the Pre-Trial Chamber erred when ‘describing them as cumulative’.<sup>68</sup> Second, the Defence alleges that the Pre-Trial Chamber committed an error ‘by taking the date of ... entry into force of the Statute’ to meet ‘the non-retroactivity *ratione personae* requirement of Article 24(1) of the Statute’ since the Statute ‘has never ... entered into force in respect of Sudan’.<sup>69</sup> Third, the Defence suggests that the Pre-Trial Chamber was mistaken in holding that the Defence’s reading of article 13 was unduly narrow. According to the Defence, its reading ‘does not detract from the usefulness of Article 13(b) of the Statute’ and would not prevent prosecutions on the basis of ‘national law, international conventions and international custom’, such as the commission of war crimes in international armed conflict.<sup>70</sup> The Defence concludes on this basis that the Pre-Trial Chamber erred in law ‘by refusing to explore alternative sources’ for the charges, and that this constituted a ‘denial of justice’.<sup>71</sup>

27. The Legal Representative agrees with the Prosecutor<sup>72</sup> that none of these arguments establishes a valid basis for challenging the Pre-Trial Chamber’s ruling. First, the Chamber does not mischaracterise the submissions.<sup>73</sup> Second, as the Chamber

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<sup>66</sup> [ICC-02/05-01/20-418](#), §22.

<sup>67</sup> [ICC-02/05-01/20-418](#), §23 (unofficial translation).

<sup>68</sup> [ICC-02/05-01/20-418](#), §23 (unofficial translation).

<sup>69</sup> [ICC-02/05-01/20-418](#), §24 (unofficial translation).

<sup>70</sup> [ICC-02/05-01/20-418](#), §26 (unofficial translation).

<sup>71</sup> [ICC-02/05-01/20-418](#), §§ 26-27 (unofficial translation).

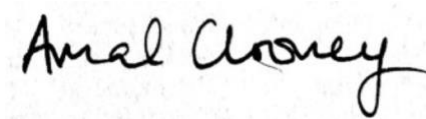
<sup>72</sup> See [ICC-02/05-01/20-427](#), §§ 24-50.

<sup>73</sup> [ICC-02/05-01/20-391](#), §§ 36-37 (Pre-Trial Chamber II observed that the Defence ‘appears to suggest’ that ‘for the Court’s temporal jurisdiction to exist’, the charged events must have taken place ‘after the entry into force of the Statute’ on 1 July 2002 and ‘already [be] criminalised’ under Sudanese or customary international law; when describing the Defence argument, the Pre-Trial Chamber makes no reference to any additional condition that would apply cumulatively and require Sudan to be a state party to the Rome Statute for the Court to exercise jurisdiction).

found, article 24 of the Statute merely requires the Court not to adjudicate crimes committed before the Statute entered into force on 1 July 2002, a requirement that has clearly been satisfied in this case since the charges at issue relate to 2003 and later.<sup>74</sup> Third, the Defence has not shown why the Chamber was wrong to conclude that the entry into force of the Statute provided sufficient notice that a defendant could be prosecuted for crimes defined in the Rome Statute in a non-party state. In addition, as argued by the Legal Representative and the Prosecutor before the Pre-Trial Chamber and by the Prosecutor before this Chamber,<sup>75</sup> the crimes at issue were also part of customary international law at the relevant time and this is an alternative basis to find that the provisions related to *nullum crimen sine lege* in article 22 have been complied with. The Defence has not put forward any reason for concluding that the defendant did not 'benefit from the possibility to know in advance which acts and conducts may amount to the crimes provided in the Statute', and the Defence's allegation that the Court lacks jurisdiction on this basis should be dismissed.<sup>76</sup>

#### IV. CONCLUSION

28. For these reasons, the Legal Representative requests that the Defence's appeal against the Decision on Jurisdiction should be rejected.




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**Ms Amal Clooney**  
**Legal Representative of the Victims**

Dated this 21<sup>st</sup> day of July 2021

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<sup>74</sup> [ICC-02/05-01/20-391](#), §39.

<sup>75</sup> [ICC-02/05-01/20-351](#), §§ 20-27; [ICC-02/05-01/20-347](#), §§ 21-39; [ICC-02/05-01/20-427](#), §35.

<sup>76</sup> [ICC-02/05-01/20-391](#), §39.