

Original: **English**No.: **ICC-02/05-01/20**Date: **23 March 2023****THE APPEALS CHAMBER**

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

SITUATION IN DARFUR, SUDAN

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

Public

Public redacted version of “Prosecution’s response to the Defence request to reconsider the Appeal Judgment on jurisdiction”, 22 March 2023, ICC-02/05-01/20-908-Conf

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INTRODUCTION

1. On 15 March 2021, Mr Abd-Al-Rahman filed his first jurisdictional challenge in the case, arguing, based on several reasons, that the Court lacked jurisdiction over the crimes alleged against him.¹ In particular, he argued that the Court lacked jurisdiction because the Statute did not apply to Sudan (as a non-State Party) at the relevant time, and the relevant crimes were not criminalised in the laws of Sudan or in customary international law—thus purportedly violating the principle of legality under article 22(1) of the Statute.² Pre-Trial Chamber II dismissed the challenge.³ It found *inter alia* that Mr Abd-Al-Rahman had conflated the issue of jurisdiction and those relating to the principles of legality and non-retroactivity of criminal law, and that, in any event, there was no violation of these principles.⁴

2. Mr Abd-Al-Rahman appealed this Decision.⁵ In rejecting his appeal, the Appeals Chamber, by majority, found that—regarding the principle of legality and given Sudan’s status as a non-State Party—the Pre-Trial Chamber had legally erred when it found that it did not need to consider Sudan’s laws or customary international law in assessing whether Mr Abd-Al-Rahman could have reasonably expected prosecution.⁶ But the error was harmless: the Court could exercise jurisdiction.⁷ Significantly, the Appeals Chamber held that Mr Abd-Al-Rahman was in a position to know that his conduct could attract criminal proceedings relating to crimes under international law represented in the Statute.⁸ Judge Ibáñez agreed with the outcome, but found that the Statute was sufficient to assess any alleged violation of the principle of legality.⁹ The Appeals Chamber also found that there was no basis, at the time, to question the legality of specific charges, as Mr Abd-Al-Rahman had not argued that point.¹⁰ His arguments were limited to the Pre-Trial Chamber’s application of article 22(1) as a matter of principle.¹¹

3. Mr Abd-Al-Rahman now requests the Appeals Chamber to reconsider aspects of its earlier decision applying the principle of legality.¹² He argues that following the Prosecution

¹ ICC-02/05-01/20-302 (“[First Jurisdictional Challenge](#)”).

² [First Jurisdictional Challenge](#), paras. 101, 114; ICC-02/05-01/20-391 (“[Decision](#)”), para. 37; ICC-02/05-01/20-347 (“[Prosecution Response](#)”), paras. 8-39.

³ [Decision](#), p. 18.

⁴ [Decision](#), paras. 38, 40.

⁵ ICC-02/05-01/20-418 OA8 (“[Appeal](#)”).

⁶ ICC-02/05-01/20-503 OA8 (“[Jurisdiction AD](#)”), paras. 81-87; *see* ICC-02/05-01/20-427 (“[Prosecution Appeal Response](#)”), paras. 24-50.

⁷ [Jurisdiction AD](#), para. 88.

⁸ [Jurisdiction AD](#), paras. 88-91.

⁹ [Jurisdiction AD](#), paras. 93-95.

¹⁰ [Jurisdiction AD](#), paras. 91-92.

¹¹ [Jurisdiction AD](#), para. 91.

¹² ICC-02/05-01/20-898-Red OA8 (“[Reconsideration Request](#)” or “[Request](#)”), para. 1, referring to [Jurisdiction AD](#), paras. 1, 85-91.

case, in his view, there is no evidence on several aspects, which could affect the Appeals Chamber's conclusion that he was in a position to know that his conduct could attract criminal proceedings for crimes represented in the Statute, and could have reasonably expected prosecution.¹³ On the basis of these purported new facts, Mr Abd-Al-Rahman claims that the Appeals Chamber must reconsider its finding that the Court has jurisdiction and must terminate the proceedings against him.¹⁴

4. The Prosecution respectfully requests the Appeals Chamber to dismiss the Request. Regardless of whether, and in what circumstances, the reconsideration of interlocutory appeal decisions is allowed,¹⁵ there is no basis to reconsider the Jurisdiction AD. *First*, with respect to jurisdictional issues, article 19(4) of the Statute allows a party to bring a second jurisdictional challenge at trial exceptionally and *only* with the leave of the relevant Trial Chamber.¹⁶ If Mr Abd-Al-Rahman wishes to challenge aspects of the Jurisdiction AD through alleged new facts, in principle article 19(4) is the correct procedural channel, and not reconsideration. Doing so is subject to the Trial Chamber's leave. The Trial Chamber (should it grant leave) is the correct forum to hear any second jurisdictional challenge, and not the Appeals Chamber. *Second*, Mr Abd-Al-Rahman incorrectly asks the Appeals Chamber to assume the function of a trier of fact and to evaluate the evidence in the case *before* the Trial Chamber has assessed it.¹⁷ *Third*, while Mr Abd-Al-Rahman argues that alleged new facts have led to a change in the circumstances, he fails to show that this is the case.¹⁸ He merely repeats several issues that the Pre-Trial Chamber ruled upon when it confirmed the charges, and he repeats arguments from the earlier jurisdictional challenge.¹⁹ He also refers to the evidentiary record inaccurately at times. Finally, following the Trial Chamber's guidance, these arguments are best made at the conclusion of trial, when the Chamber can consider them in its article 74 judgment.²⁰ As such, there is no prejudice to Mr Abd-Al-Rahman if this Request is rejected.

¹³ [Reconsideration Request](#), para. 5 (requesting reconsideration of paras. 1, 85-91 of Jurisdiction AD).

¹⁴ [Reconsideration Request](#), para. 32.

¹⁵ ICC-02/11-01/15-1355-Red OA14 ("[Gbagbo Reconsideration AD](#)"), para. 57, relating to a request to reconsider an appeal decision on conditional release and where it was stated "[w]ithout prejudice to the question of whether, and under which circumstances, the Appeals Chamber would reconsider judgments that have been issued pursuant to rule 158(1) of the Rules...". See, with respect to procedural decisions, ICC-02/11-01/11-266 OA2 ("[Gbagbo Page Limits AD](#)"), paras. 12, 15; ICC-01/04-01/10-505 OA4 ("[Mbarushimana Time Limits AD](#)"), para. 10.

¹⁶ Article 19(4), Statute.

¹⁷ [Reconsideration Request](#), paras. 17-31.

¹⁸ [Reconsideration Request](#), para. 5.

¹⁹ ICC-02/05-01/20-433-Corr ("[Confirmation Decision](#)"), paras. 74-84; [First Jurisdictional Challenge](#), paras. 53-114; [Prosecution Response](#), paras. 8-39; [Appeal](#), paras. 21-27.

²⁰ ICC-02/05-01/20-900 ("[NCTA Leave Decision](#)"), para. 8.

LEVEL OF CONFIDENTIALITY

5. Given the classification of the Defence filing, and since it refers to confidential information, the Prosecution files this response confidentially (regulation 23*bis* (2), Regulations of the Court). It will also file a public redacted version.

SUBMISSIONS

A. There is no basis to reconsider the Jurisdiction AD

6. Mr Abd-Al-Rahman asks the Appeals Chamber to reconsider aspects of its decision on the interlocutory appeal challenging jurisdiction in this case.²¹ The Appeals Chamber has yet to find affirmatively on the parameters of its reconsideration of interlocutory appeal decisions (rendered under rule 158 of the Rules).²² In *Gbagbo*, where this issue was examined recently, the Appeals Chamber dismissed the Defence request to reconsider an appeal decision on conditional release—without prejudice to the larger question of whether it would, and under what circumstances, reconsider judgements issued under rule 158 of the Rules.²³ Even assuming *arguendo* that interlocutory appeal decisions under rule 158 could be reconsidered in some limited circumstances, such reconsideration—consistent with the general approach to reconsideration—must be exceptional.²⁴ Mr Abd-Al-Rahman acknowledges as much, without saying what standard should apply.²⁵

7. Regardless of whether interlocutory appeal decisions can be reconsidered, there is no basis to consider Mr Abd-Al-Rahman’s request to reconsider the Jurisdiction AD. *First*, on

²¹ [Reconsideration Request](#), paras. 1-33.

²² [Gbagbo Reconsideration AD](#), para. 57. Rule 158 of the Rules applies *inter alia* to article 82(1)(a) appeals on jurisdiction. For reconsideration of procedural decisions, see [Gbagbo Page Limits AD](#), paras. 12, 15; [Mbarushimana Time Limits AD](#), para. 10.

²³ [Gbagbo Reconsideration AD](#), paras. 56-61; ICC-02/11-01/15-1299 OA14 (“[Gbagbo Conduct of Appeal AD](#)”), para. 1 (asking the parties to submit on whether (i) the Appeals Chamber may reconsider judgements under rule 158 of the Rules of Procedure and Evidence; and (ii) If so, what is the standard that applies); [ICC-02/11-01/15-T-237-Red2-ENG](#) OA14, 38:7-39:22 (where the Prosecution argued that reconsideration of a judgement under rule 158 was unwarranted when the Appeals Chamber could review the conditional release under article 60(3) of the Statute to prevent an injustice).

²⁴ ICC-01/04-01/07-3833 (“[Katanga Article 108 Decision](#)”), para. 25.

²⁵ [Reconsideration Request](#), paras. 3-5. See, for instance, [Katanga Article 108 Decision](#), para. 25 (Reconsideration of a decision is an exceptional measure only if a clear error of reasoning or if necessary to prevent an injustice); *Prosecutor v. Šešelj*, Decision on Motion for Reconsideration of the “Decision on the Interlocutory Appeal concerning Jurisdiction” dated 31 August 2004, 15 June 2006 (“[Šešelj Reconsideration Decision](#)”), paras. 27-28 (only a “clear error” or an “injustice” will prompt reconsideration of a decision); *Prosecutor v. Kajelijeli*, ICTR-98-44A-A, Judgement, 23 May 2005 (“[Kajelijeli AJ](#)”), para. 203 (the Appeals Chamber may reconsider a previous interlocutory decision if a “clear error of reasoning” has been demonstrated or if it is necessary to do so “to prevent an injustice”); *Prosecutor v. Nuon Chea & Khieu Samphan*, 002/19-09-2007-ECCC/SC, Decision on Nuon Chea’s Request for Reconsideration of the Decision of 21 October 2015 on Requests for Additional Evidence, 11 February 2016 (“[Nuon Chea Additional Evidence Reconsideration Decision](#)”), p. 3.

jurisdictional matters—article 19(4) of the Statute, which allows a party to file a second jurisdictional challenge at trial with the Trial Chamber’s leave, is the appropriate procedural vehicle before the Trial Chamber, and not the remedy of reconsideration before the Appeals Chamber. Article 19(4) gives a party a forum to challenge jurisdictional matters, including to raise purported new facts, but recognises that a second jurisdictional challenge at trial is exceptional and can be made *only* with the Trial Chamber’s leave.²⁶ If reconsideration of the Jurisdiction AD were considered and allowed, this could alter the delicate balance and allocation of responsibility between different Chambers, as intended in the Statute.²⁷ It could also deprive a party the right to appeal any second jurisdictional decision on this issue under article 82(1)(a) of the Statute, should the Trial Chamber grant leave for such a challenge to be brought and decide it.

8. *Second*, Mr Abd-Al-Rahman’s request to the Appeals Chamber to reconsider its earlier decision is misplaced, given the evidentiary nature of his arguments. In support of his Request, Mr Abd-Al-Rahman argues that there are “new facts” on five different elements, which require the Appeals Chamber to revisit its earlier decision.²⁸ But rather than justifying the exceptional measure of reconsideration, Mr Abd-Al-Rahman merely asks the Appeals Chamber to assess the evidence on the trial record and enter factual conclusions—*before* the Trial Chamber has had an opportunity to do so.²⁹ This is incorrect and amounts to asking the Appeals Chamber to assume the Trial Chamber’s functions of assessing the reliability and credibility of evidence midway during the trial, and to conduct a trial *de novo* at this stage.³⁰ It further confirms that

²⁶ Article 19(4), Statute; ICC-01/04-02/06-1707 (“[Ntaganda Article 19\(4\) Decision](#)”), paras. 22-23; ICC-02/04-01/15-1476 (“[Ongwen Charging Defects Decision](#)”), para. 34; ICC-02/04-01/15-1562 OA4 (“[Ongwen Charging Defects AD](#)”), para. 155; Nsereko/Ventura, ‘Article 19’ in Ambos (Ed.), *The Rome Statute of the International Criminal Court: a Commentary*, 4th ed., (München: Verlag C.H.Beck oHG, 2022), p. 1068 (mn. 60)-p. 1072 (mn. 69). *Contra* [Reconsideration Request](#), para. 8.

²⁷ See [Šešelj Reconsideration Decision](#), paras. 9, 20 (dismissing the request to reconsider the interlocutory appeal decision since the Appeals Chamber had resolved the legal question in the interlocutory appeal and leaving the Trial Chamber to make the factual determination); [Kajelijeli AJ](#), paras 202-207 (reconsideration of interlocutory decisions is exceptional, and dismissing requests to reconsider jurisdictional issues raised previously before the Appeals Chamber)

²⁸ [Reconsideration Request](#), paras. 16-33 (First Element: Mr Abd-Al-Rahman did not receive training, including on international humanitarian law principles; Second Element: Mr Abd-Al-Rahman had authority (as *Agid-al-Ogada*) over the *Janjaweed* militia and some elements of the Sudanese armed forces; Third Element: the Agreement of March 2002 between the Sudanese Government and the SPLM; Fourth Element: Customary international law did not apply directly in Sudan’s internal law, and was not accessible to Mr Abd-Al-Rahman; Fifth Element: Refusals to follow orders were punished by Sudanese law, including with death).

²⁹ [Reconsideration Request](#), paras. 16-33.

³⁰ ICC-02/11-01/15-1400 A (“[Gbagbo AJ](#)”), para. 69 (“...the Statute has vested the trial chamber with the specific function of conducting the trial. As part of that function and in light of the principle of immediacy, the trial chamber has the primary responsibility to determine the reliability and credibility of the evidence received in the course of the trial and then comprehensively assess the weight of the evidence. In turn, this entails that the trial chamber has the primary responsibility to evaluate the connections and fairly resolve any inconsistencies between the items of evidence received at trial.”); ICC-01/04-02/06-2666-Red A A2 (“[Ntaganda AJ](#)”), para. 40.

the Trial Chamber is the forum to raise these arguments. Significantly in this case, the Trial Chamber dismissed Mr Abd-Al-Rahman's attempt to include these arguments within the currently ongoing motion for acquittal procedure, and stated that the Defence could make legal submissions on these issues at the end of trial.³¹

9. *Third*, Mr Abd-Al-Rahman fails to show that alleged new facts have led to a change in the circumstances or that reconsideration is required in these circumstances. Mr Abd-Al-Rahman merely repeats arguments (made in a different context) that the Pre-Trial Chamber ruled upon when it confirmed the charges, and for which, no leave to appeal was granted.³² He also repeats arguments he has previously made before the Pre-Trial Chamber in the first jurisdictional challenge, and before the Appeals Chamber in the earlier appeal.³³ He also takes issue with the Appeals Chamber's conclusions, showing neither error nor injustice.³⁴ In particular, his submissions continue to relate to the application of the principle of legality in principle, a matter the Appeals Chamber has already addressed. In *Gbagbo*, the Appeals Chamber dismissed similarly repetitive arguments, finding them irrelevant for the purposes of reconsideration.³⁵ Moreover, Mr Abd-Al-Rahman's reference to the evidentiary record is, at times, inaccurate.³⁶

B. There is no prejudice

10. If the Appeals Chamber were to reject the Request, Mr Abd-Al-Rahman may make legal submissions at the end of trial, for the Trial Chamber to consider them in its article 74 judgement.³⁷ He will suffer no prejudice. Indeed, given the evidentiary nature of his arguments, the present procedural stage of this case and the interests of judicial economy, this would be the

³¹ [NCTA Leave Decision](#), para. 8.

³² Compare [Reconsideration Request](#), paras. 27-31 (arguing that Mr Abd-Al-Rahman had a low level of education, no training in international humanitarian law, and that Sudanese law made it a capital offence to support the rebels) with [Confirmation Decision](#), paras. 74-84; ICC-02/05-01/20-517 ("[Confirmation ALA Decision](#)"), paras. 38-39, p. 21.

³³ [First Jurisdictional Challenge](#), paras. 53-114; [Prosecution Response](#), paras. 8-39; [Appeal](#), paras. 21-27; see [Nuon Chea Additional Evidence Reconsideration Decision](#), p. 3 (reconsideration is not an additional avenue to re-litigate issues that have been addressed).

³⁴ [Reconsideration Request](#), paras. 16-33; [Jurisdiction AD](#), paras. 88-91.

³⁵ [Gbagbo Reconsideration AD](#), para. 59.

³⁶ For instance, compare [Reconsideration Request](#), para. 17 ("Le fait que Mr Abd-Al-Rahman ait passé une période considérable de sa vie en qualité d'assistant médical au sein des forces armées Soudanaises jusqu'au début ou milieu des années 1990 fait l'objet d'un accord entre le BdP et la Défense et n'est donc pas contesté") with ICC-02/05-01/20-504-AnxA ("[Agreed Facts](#)"), [Agreed Facts](#) 9 ("A certificate from the Council of Medical Assistance and Technical Professions states that Mr Ali Muhammed Ali qualified as a medical assistant in 1984 [DAR-D31-0001-0001, translation at DAR-D31-0001-0005]") and 10 ("Mr Ali Muhammed Ali Abd-Al-Rahman retired from the Sudanese Armed Forces in around the early to middle 1990s. Mr Ali Muhammed Ali Abd-Al-Rahman was formerly part of the Medical Corps of the Sudanese Armed Forces."); compare footnote 30 with [REDACTED].

³⁷ [NCTA Leave Decision](#), para. 8; see [Ongwen Charging Defects AD](#), para. 158 (dismissing the jurisdictional challenges against forced marriage and indirect co-perpetration, and allowing Ongwen to challenge the legal interpretation in closing submissions).

appropriate course of action. The Trial Chamber would be best placed to first consider them at the time it holistically evaluates all the evidence on the record, followed by the Appeals Chamber's consideration in the article 81 final appeal, if any, in this case.

CONCLUSION

11. For all the reasons above, the Prosecution respectfully asks the Appeals Chamber to dismiss the Request. Mr Abd-Al-Rahman fails to show that the exceptional remedy of reconsideration applies in these circumstances, much less that it is justified.



Karim A. A. Khan KC
Prosecutor

Dated this 23rd day of March 2023

At The Hague, The Netherlands