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International Criminal Court

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No.: **ICC-02/05-01/20**
Date: **29 June 2021**

THE APPEALS CHAMBER

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

SITUATION IN DARFUR, SUDAN

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

Public
Prosecution's Response to the Defence Appeal against the "Decision on the Defence *'Exception d'incompétence'*"

Source: **Office of the Prosecutor**

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Introduction

1. On 17 May 2021, Pre-Trial Chamber II correctly affirmed that the Court has jurisdiction in this situation, and dismissed the jurisdictional challenge lodged on behalf of Mr Abd-Al-Rahman.[1] The appeal against the Chamber's decision must also be dismissed.[2] As with the original Challenge to Jurisdiction, the Defence's four grounds of appeal fundamentally mistake the Court's legal framework and the operation of referrals by the United Nations Security Council ("UNSC" or "UN Security Council"), and the reasoning in the Decision itself.

2. In particular, the Chamber correctly defined the notion of 'situation' under the Statute, and correctly found that the Defence arguments regarding the Court's financing and the purported effect of UNAMID's withdrawal did not raise jurisdictional matters.[3] The Chamber also correctly interpreted articles 22(1) and 24(1) of the Statute, and concluded that the charged crimes are neither inconsistent with the principle of legality nor impermissibly retroactive. To the contrary, by relying exclusively on crimes which have been expressly defined in the Statute for more than 20 years, the Chamber ensured that Mr Abd-Al-Rahman will answer charges which were sufficiently foreseeable and accessible at the time of his alleged conduct.

Submissions

3. The Defence's four grounds of appeal—raising 15 errors of fact, law and procedure—do not identify any error in the Decision. Based on careful reasoning, the Chamber appropriately dismissed non-jurisdictional arguments and correctly defined the legal issues at stake. The Chamber properly appreciated the nature of the Defence arguments, followed relevant jurisprudence, and correctly interpreted the Statute.

4. Nor did the Chamber err because it failed to address all the arguments presented to it. Throughout this appeal, the Defence purports to raise as a procedural error the Chamber's alleged failure to address every submission raised by the Defence in its jurisdictional argument.[4] Even if this were true, this claim should be dismissed *in limine*, because chambers have no such obligation.[5] The Defence cites no authority to the contrary. As the Appeals Chamber recently

[1] *See* ICC-02/05-01/20-391 ("Decision"); ICC-02/05-01/20-302 ("Challenge to Jurisdiction"). For the purposes of this filing Pre-Trial Chamber II is referred to as the "Chamber", and the Defence of Mr Abd-Al-Rahman is referred to as the "Defence".
[2] ICC-02/05-01/20-418 ("Appeal").
[3] UNAMID stands for the United Nations – African Union Hybrid Operation in Darfur.
[4] *See* Appeal, paras. 9, 15, 20, 27.
[5] *See e.g.* IRMCT, *Prosecutor v. Mladić*, MICT-13-56-A, Judgment, 8 June 2021, para. 21 ("the Appeals Chamber has inherent discretion in selecting which submissions merit a detailed reasoned opinion in writing"). Even on

emphasised in this case, it is only necessary that "chambers of the Court […] indicate with sufficient clarity the grounds on which they base their decisions" taking into account "the nature of the decision."[6] While decisions must of course be reasoned in order to guard against arbitrariness,[7] this basic threshold does not permit the parties to dictate precisely how a judicial decision must be formulated.[8] This is consistent with the maxim that the 'judge knows the law' (*iura novit curia*). Moreover, natural consequences will necessarily regulate the sufficiency of judicial reasoning—if a chamber's reasoning is so opaque that it cannot be understood, or fails to address matters which are plainly relevant, then the decision may well be overturned on appeal on the merits of the matter,[9] and is very unlikely to be followed by other chambers.

A. First ground of appeal: the territorial scope of the 'Situation in Darfur' is lawfully defined

5. In its first ground of appeal the Defence argues that the Chamber committed four errors in rejecting the Defence's argument that the UNSC Resolution 1593 unlawfully referred the situation with respect to Darfur, instead of Sudan. Yet the Decision was reasonable and correct. The Defence mischaracterises the Decision and its own arguments before the Pre-Trial Chamber. For the reasons below, the Defence's first ground of appeal should be dismissed.

6. First, the Defence argues that the Chamber erred in fact because it denied (or omitted to acknowledge) that article 5 crimes have been committed in other parts of Sudan.[10] Yet the Chamber did not make such finding. The Defence selectively quotes a sentence from the Decision and takes it out of context.[11] Instead, the Chamber correctly defined the notion of

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evidentiary matters, where the parties have a right to a reasoned opinion, this is significantly circumscribed: *see e.g.* ICC-01/05-01/13-2275-Red A A2 A3 A4 A5 ("*Bemba et al*. Appeal Judgment"), paras. 105 ("a trial chamber is not required to address all the arguments raised by the parties, or every item of evidence relevant to a particular factual finding"), 106 (a chamber has "a degree of discretion as to what to address and what not to address in its reasoning"), 1540; ICTY, *Prosecutor v. Stanišić and Župljanin*, IT-08-91-A, Judgment, 30 June 2016, para. 537 ("a trial chamber cannot be presumed to have ignored a particular piece of evidence simply because it did not mention it in its judgement. Rather, it could be presumed, in the absence of particular circumstances suggesting otherwise, that a trial chamber chose not to rely on [it.] In the Appeals Chamber's view, this reflects a corollary of the overarching principle of deference to the discretion of a trial chamber. The Appeals Chamber therefore concludes that only where it is shown within the substance of a trial chamber's reasoning that clearly relevant evidence has been disregarded, should the Appeals Chamber intervene in order to assess whether that evidence would have changed the factual basis supporting the trial chamber's conclusion.").

[6] ICC-02/05-01/20-236 OA5 ("*Abd-Al-Rahman* Oral Reasoning Appeal Judgment"), paras. 1, 14.

[7] *Abd-Al-Rahman* Oral Reasoning Appeal Judgment, para. 20.

[8] *See* *Abd-Al-Rahman* Oral Reasoning Appeal Judgment, para. 14.

[9] *See also* *Abd-Al-Rahman* Oral Reasoning Appeal Judgment, para. 20.

[10] ICC-02/05-01/20-418 ("Appeal"), para. 6 (supposedly quoting ICC-02/05-01/20-391 ("Decision"), para. 27).

[11] Appeal, para. 6 (selectively quoting (without sourcing) Decision, para. 27). The full sentence reads: "since a situation is defined by the scope of the criminal action allegedly committed within it, rather than by pre-determined boundaries established for other purposes as a matter of administrative or internal law, it is irrelevant to assess the accuracy of that argument for the purposes of this decision".

'situation' in the Statute, and rejected the Defence's overarching argument that the territorial scope of a situation must encompass the entirety of the territory of a State—in this case the State of Sudan. In particular:

- First, the Chamber relied on previous jurisprudence[12] and the text of the Statute[13] to rightly conclude that the term 'situation' under the Statute seeks to identify "a specific set of events in respect of which credible allegations of crimes are made, and […] to define and circumscribe the perimeter of the action of the Court".[14]

- Second, the Chamber observed that the term 'situation' "has its own precise meaning, which differs both from the one of 'case' and from the one of 'territory of a State' or 'State'",[15] and is not defined "by pre-determined boundaries established for other purposes as a matter of administrative or international law".[16]

- Third, because of its (correct) definition of 'situation', the Chamber did not need to address the Defence's argument that Darfur did not legally and administratively exist in 2005 as a matter of internal territorial organisation of the State of Sudan.[17]

7. Accordingly, the Chamber made no findings as to the commission (or not) of crimes in other parts of Sudan. The Defence's arguments regarding the first purported factual error should therefore be dismissed.

8. Second, the Defence argues that the Chamber erred in fact because it misinterpreted its submissions before the Pre-Trial Chamber. The Defence now seems to say that it had not submitted that a 'situation' must coincide with the territory of a State but instead with "*la zone géographique de la 'Situation' relevant du Chapitre VII de la Charte*".[18] This is not accurate. Although the Defence had argued (erroneously) that Sudan was the area of concern to the UN

[12] Decision, para. 27 (referring to ICC-01/04-101-tEN-Corr ("*DRC* Victims Participation Decision"), para. 65; ICC-01/04-01/10-451 ("*Mbarushimana* Jurisdiction Decision"), para. 16).
[13] Decision, para. 26 (finding that "[a]rticle 13 of the Statute adopts the term 'situation' to identify the subject matter of a referral by the UN Security Council acting under Chapter VII of the United Nations Charter, without any further qualification; there is therefore no element indicating or otherwise warranting that a different approach should be taken when construing the term in the particular context of a Security Council referral").
[14] Decision, para. 25. *See also* para. 27 ("a situation is defined by the scope of the criminal action allegedly committed within it").
[15] Decision, paras. 25-26.
[16] Decision, para. 27.
[17] Decision, para. 27.
[18] Appeal, para. 7 (referring to Challenge to Jurisdiction, para. 23).

Security Council in this situation,[19] it had also submitted that the drafting history and Court practice indicated that a 'situation' must encompass the totality of a State territory in the event of a referral (by the UNSC or a State).[20] The Chamber thus addressed the crux of the Defence's argument. Accordingly, the Defence's submissions regarding the second purported factual error must be dismissed.

9. Third, the Defence misrepresents the Decision when it argues that the Chamber erred in law by defining the term 'situation' without relying on prior jurisprudence, and confusing 'situation' with 'case'.[21] To the contrary, the Chamber expressly relied on two prior decisions[22] and expressly distinguished 'situation' from 'case'.[23] Nor does the Defence explain how the Chamber's definition of 'situation'—consistent with prior practice—confuses the two notions.[24] It does not.

10. Nor did the Chamber have to address the Defence's arguments regarding the drafting history, and its unsubstantiated suggestion that the territorial scope of this situation impinges upon the Court's independence, or entails a pre-selection of cases or suspects.[25] As occurred before the Pre-Trial Chamber,[26] the Defence presents no arguments to demonstrate that the territorial parameters in this situation improperly narrow or shape the investigation or are otherwise inconsistent with the Statute—nor does it explain how they prejudiced Mr Abd-Al-Rahman. In any event, the Defence's speculative submissions are incorrect. The geographical parameters of this situation do not conflict with the Statute or the Prosecutor's duties under it and are fully consistent with the intention of the drafters.[27] The geographical scope of this situation defines a well-known situation of violence within Sudan. Indeed, notwithstanding the long-running non-international armed conflict between North and South Sudan, and recurrent spill-overs of violence into neighbouring Chad, the situation of violence in Darfur has been

[19] Challenge to Jurisdiction, paras. 18, 20, 22. The Prosecution responded that the Defence misrepresented the UNSC resolutions and States' statements: ICC-02/05-01/20-347 ("Prosecution Response"), para. 49.
[20] Decision, para. 11(a). *See also* Challenge to Jurisdiction, paras. 23-29.
[21] Appeal, para. 8.
[22] The Chamber relied on—and quoted with approval—decisions from the *DRC* situation and *Mbarushimana* in order to define 'situation': Decision, para. 25 (citing in fn. 17 *DRC* Victims Participation Decision, para. 65; *Mbarushimana* Jurisdiction Decision, para. 16).
[23] Decision, para. 25 (noting that 'situation' "has its own precise meaning, which differs both from the one of 'case' and from the one of 'territory of a State' or 'State'").
[24] *Contra* Appeal, para. 8.
[25] *Contra* Appeal, para. 8.
[26] *See* Prosecution Response, para. 49 (referring to Challenge to Jurisdiction, para. 24).
[27] UNSC Res. 1593 (2005), para. 1 ("Decides to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court"). The Prosecution explained that the personal limitations in the resolution (inapposite to the present case) are not effective: Prosecution Response, paras. 45 (third bullet point), 47.

consistently treated by the UN Security Council as a specific situation of concern.[28] For example, on 8 October 2004, a few months before UNSC Resolution 1593 referred the situation of Darfur to the Court, the then UN Secretary-General set up an International Commission of Inquiry "to examine violations of international humanitarian law and human rights law *in Darfur*, Sudan".[29] The commission's report is recalled in the first paragraph of the Resolution itself.[30] Moreover, the broad temporal parameters (acknowledging the past violence, and providing the Court with an open-ended date for the investigation) ensure that the situation can be properly and impartially investigated. Accordingly, the Defence's arguments regarding the Chamber's purported legal error should be dismissed.

11. Fourth, the Defence argues that the Chamber erred by not addressing the Defence's own interpretation of the drafting history.[31] Yet the Chamber did in fact consider the Defence submissions[32] and, as demonstrated above, provided clear and compelling reasons for reaching its conclusion.[33] In any event, the Defence's submissions regarding the purported drafters' intention do not support its proposition that this situation should encompass the territory of Sudan.[34] By choosing the term 'situation' (which applies equally to all trigger mechanisms and is not unique to UNSC referrals)[35] the drafters sought to ensure the Prosecutor's independence to investigate freely criminal allegations and suspects within a situation in order to comply with their duties under article 54(1)(a) to investigate all relevant facts and evidence and establish the truth.[36] As noted above, the Prosecutor's prerogatives are fully respected in this situation.[37] Accordingly, the Defence arguments should be dismissed.

12. In conclusion, the Chamber correctly defined the notion of 'situation' and dismissed the Defence's arguments regarding the purported invalid referral of the situation in Darfur by

[28] Besides UNSC Resolutions 1769 (2007), 1706 (2006), 1679 (2006), 1627 (2005), 1593 (2005), 1591 (2005), which specifically and solely refer to the Darfur situation, *see also* UNSC Resolutions 1784 (2007), para. 3; 1663 (2006); 1590 (2005), paras. 2, 5, 7, 12, 17; 1564 (2004), paras. 2, 3, 7, 11, 12; 1556 (2004), paras. 1, 2, 5, 7, 12, 14; 1547 (2004), para. 6.
[29] S/2005/60, p. 1 (emphasis added).
[30] UNSC Res. 1593 (2005), preamble, para. 1 (citing S/2005/60).
[31] Appeal, paras. 8-9.
[32] Decision, para. 11(i) (referring to the "intention of the drafters" and the alleged "unwarranted preselection of the crimes and cases").
[33] *See above* para. 6. *See also* *Abd-Al-Rahman* Oral Reasoning Appeal Judgment, para. 14 ("recognizing that whether the reasons given are indeed 'sufficient' will depend invariably on the circumstances").
[34] Challenge to Jurisdiction, paras. 22-23.
[35] *See e.g.* Statute, arts. 13(a)-(b), 14(1), 15(5)-(6).
[36] *See* W. A. Schabas and G. Pecorella, 'Article 13: exercise of jurisdiction,' in O. Triffterer and K. Ambos (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, 3rd Ed. (München/Oxford/Baden Baden: C.H. Beck/Hart/Nomos, 2016), p. 695 (mn. 12).
[37] *See above* para. 10.

UNSC Resolution 1593. But this is not only the Chamber's view.[38] Other chambers of this Court have confirmed the validity of UNSC Resolution 1593 and the Court's jurisdiction. For example, in the *Bashir* case, the Appeals Chamber recently held that "Resolution 1593 gives the Court power to exercise its jurisdiction over the situation in Darfur, Sudan, which it must exercise 'in accordance with [the] Statute'".[39] Likewise, under article 19(1), all chambers which have dealt with cases in the Darfur situation were compelled to consider any potential invalidity of the UN Security Council referral before ruling on any other matters. Had they not been satisfied of the Court's jurisdiction, they would not have issued arrest warrants or declared that Sudan was obliged to cooperate with the Court.[40] The Defence has not shown that all these chambers were mistaken.

B. Second ground of appeal: the Defence's submissions on the Court's financing and article 115(b) did not raise a jurisdictional question.

13. In its second ground of appeal, the Defence argues that the Chamber committed two errors in rejecting the Defence's arguments regarding an alleged violation of article 115(b) of the Statute by UNSC Resolution 1593.[41] The Defence mischaracterises the Decision, which is reasonable and correct. The Defence's second ground of appeal should be dismissed.

14. First, the Defence argues that the Chamber erred in fact because it misunderstood the differences between its Challenge and its prior requests, which had been dismissed by the Chamber and the Presidency.[42] This is incorrect. The Chamber noted the alleged differences but it considered them to be '*in petitum*'.[43] Further, the Chamber did not dismiss the Defence's arguments on that basis, but rather because the Defence had not demonstrated that these arguments raised a jurisdictional question.[44] Indeed, the Defence's arguments under the second and third grounds of appeal are unrelated to the four aspects of the Court's jurisdiction[45] (or to

[38] The same Chamber had itself previously been satisfied of the legality of the referral in recalling Sudan's obligation to cooperate under the UN Charter and the Statute: ICC-02/05-01/12-33, paras. 12-13.
[39] ICC-02/05-01/09-397-Corr OA2 ("*Bashir* Appeal Judgment"), para. 7.
[40] *See e.g.* ICC-02/05-03/09-1-RSC, paras. 1-3 ("*Banda* Second Article 58 Decision"); ICC-02/05-01/07-2-Corr ("*Harun* Arrest Warrant"), p. 2; ICC-02/05-01/12-2 ("*Hussein* Arrest Warrant"), p. 3; ICC-02/05-01/07-57 ("*Harun and Abd-Al-Rahman* Cooperation Decision").
[41] To the extent the Defence also argues that the Chamber erred by not fully addressing Defence arguments, *see above* para. 4.
[42] According to the Defence, while in its prior filings it had asked the Court to request the UN to make up for inexistent past contributions, in the filing before the Pre-Trial Chamber it had asked the Chamber to rule that the Court had no jurisdiction because UNSC Resolution 1593 violated the Statute: *see* Appeal, para. 13.
[43] Decision, para. 29.
[44] Decision, para. 29 (finding that the Defence "fail[ed] 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").
[45] C. K. Hall *et al*., 'Article 19: challenges to the jurisdiction of the Court or the admissibility of a case,' in O. Triffterer and K. Ambos (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, 3rd Ed. (München/Oxford/Baden Baden: C.H. Beck/Hart/Nomos, 2016), p. 864 (mn. 17: "the concept [of jurisdiction] is

the Court's "competence to deal with a criminal cause or matter under the Statute")[46] and should be dismissed on that basis alone.[47]

15. The Defence's submission that the Court does not have jurisdiction in Darfur because paragraph 7 of UNSC Resolution 1593 (stating that the ICC States Parties should bear the costs of the referral)[48] infringes article 115(b) of the Statute,[49] does not raise a jurisdictional question within article 19(2) and (4) of the Statute.[50] Paragraph 7 of UNSC Resolution 1593 potentially affects the budgetary function of the Assembly of States Parties ("ASP"), but not the Court's competence to exercise jurisdiction (and judicial functions) in the situation in Darfur.[51] The Court and the ASP are different organs with different functions: the Court is an international organisation with a judicial function, namely, to exercise jurisdiction over persons for the most serious crimes of international concern in a given territory;[52] by contrast, the ASP is an intergovernmental body responsible for the Court's budget and finances.[53] Accordingly, those aspects of UNSC Resolution 1593 addressing the financing of the Court (para. 7) are distinct from those aspects allowing the Court to exercise its jurisdiction (and judicial functions) in the territory of Darfur (para. 1). The latter does not depend on the former. Thus, even assuming *arguendo* that the UN Security Council inappropriately interfered with the ASP's budgetary

well understood and thus challenges can be made on any of the accepted jurisdictional grounds: territorial (*ratio loci*), subject matter (*ratione materiae*), personal (*ratione personae*) and temporal (*ratione temporis*) grounds. Grounds that fall outside of these parameters are not jurisdictional challenges and stand to be dismissed as such"). *See also* ICC-01/04-01/06-772 OA4 ("*Lubanga* Jurisdiction Appeal Judgment"), paras. 21-22; ICC-02/05-01/20-145 OA3 ("*Abd-Al-Rahman* Appeal Admissibility Decision"), paras. 6, 8.

[46] *Lubanga* Jurisdiction Appeal Judgment, para. 24. *See also* ICC-01/09-01/11-414 OA3 OA4 ("*Ruto and Sang* Confirmation Appeal Judgment"), para. 21; ICC-01/04-02/06-1225 OA2 ("*Ntaganda* First Jurisdiction Appeal Judgment"), para. 39 ("challenges, which would, if successful, eliminate the legal basis for a charge on the facts alleged by the Prosecutor may be considered to be jurisdictional challenges"); *Abd-Al-Rahman* Appeal Admissibility Decision, para. 8.

[47] Prosecution Response, para. 55.

[48] UNSC Res. 1593 (2005), para. 7 ("Recognizes that none of the expenses incurred in connection with the referral including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily").

[49] Statute, art. 115(b) ("The expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, as provided for in the budget decided by the Assembly of States Parties, shall be provided by the following sources: [...] (b) Funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council").

[50] Challenge to Jurisdiction, paras. 33-43.

[51] *Contra* Challenge to Jurisdiction, paras. 35-37 (suggesting that there is a link between this issue and the judicial functions of the Court).

[52] ICC-RoC46(3)-01/18-37 ("*Bangladesh/Myanmar* Article 19(3) Decision"), para. 48 (referring to the objective international personality of the ICC).

[53] ICC-02/05-01/20-101, para. 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*, 3rd Ed. (München/Oxford/Baden Baden: C.H. Beck/Hart/Nomos, 2016) ("Halff *et al.*"), p. 2255 (mn. 7).

authority, this does not mean that it improperly or invalidly referred the situation in Darfur to the Court for the purpose of exercising jurisdiction.

16. Moreover, the Defence is incorrect to argue that UNSC Resolution 1593 violates article 115(b) of the Statute.[54] Although it is desirable, and even logical, that the UN financially contributes to the Court's activities (because, in this regard, the Court acts on behalf of the international community and the UN Security Council has referred two situations),[55] UNSC Resolution 1593 did not forbid UN funding for the ASP. Rather, it stated that the ICC States Parties would fund the Court's investigations or prosecutions *in Darfur*. The absence of UN contributions to the Darfur situation does not mean that article 115(b) is violated because the UN can in principle still contribute to the Court's financing more generally. Nor does article 115(b) impose an obligation on the UN to fund the Court;[56] rather, it regulates the possible sources of the Court's financing. The ASP has itself explicitly addressed this matter and has not indicated that the UN Security Council inappropriately interfered with its responsibilities.[57]

17. Accordingly, the Defence's arguments regarding this purported error of fact should be dismissed.

18. Second, the Defence argues that the Chamber erred in law in paragraph 28 of the Decision by characterising article 115 of the Statute as a provision reserved for the ASP but falling outside the Court's judicial competence, and by refusing to exercise its jurisdiction on the basis of article 115.[58] Yet in paragraph 28 of the Decision, the Chamber merely recalled its previous ruling whereby it had rejected the same Defence arguments so as to explain why it considered the Challenge and the previous requests as 'duplicative' with an 'alleged difference *in petitum*'.[59] But this was not the basis of the Chamber's decision to reject the Defence's arguments on article 115; rather, in the following paragraph, the Chamber observed that the Defence had not demonstrated that these arguments "have an impact on jurisdiction" and

[54] *Contra* Challenge to Jurisdiction, paras. 38-43.
[55] Halff *et al.*, p. 2260 (mn. 18: noting two views justifying the UN's funding of the Court's activities: first, in situations referred by the UNSC the Court renders a service to the UN; second, the Court acts on behalf of the international community).
[56] D. Ruiz Verduzco, 'The relationship between the ICC and the United Nations Security Council,' in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford: OUP, 2015), p. 40 ("Article 115(b) is not and could not constitute an instruction to the United Nations to provide funding to the Court"); Halff *et al.*, p. 2260 (mn. 17).
[57] Halff *et al.*, p. 2261 (mn. 20: referring to the 2011 ASP resolution on the budget "invit[ing] the Court to include this matter in its institutional dialogue with the United Nations and to report thereon to the eleventh session of the Assembly", and noting that the issue of financing has been raised in other fora but with no substantive progress).
[58] Appeal, para. 14.
[59] Decision, para. 28 (quoting ICC-02/05-01/20-101 ("*Abd-Al-Rahman* Article 115(b) Decision"); ICC-02/05-01/20-110 ("*Abd-Al-Rahman* Article 115(b) Certification Decision").

rejected it on that basis. The Chamber thus did not find that article 115 falls beyond its competence. Accordingly, the Defence's arguments regarding this purported error of law should be dismissed.

C. Third ground of appeal: the Defence's submissions regarding UNAMID's withdrawal did not raise a jurisdictional question.

19. In its third ground of appeal the Defence argues that the Chamber erred by dismissing the Defence's arguments that the Court lacked jurisdiction due to the termination of UNAMID's mandate and withdrawal of UN personnel from Darfur.[60] Similar to the previous grounds of appeal, the Defence largely mischaracterises the Decision and its own arguments before the Pre-Trial Chamber. The Chamber's Decision was reasonable and correct. The Defence's third ground of appeal should be dismissed.

20. The Defence argues that the Chamber erred in fact by mischaracterising, and erred in law by failing to address, its argument that the purported end of UN logistical and security support is incompatible with article 2 of the Statute, and the UN-ICC Relationship Agreement.[61] Yet it is the Defence who mischaracterises the Decision. The Chamber correctly characterised[62]—and dismissed—the Defence's arguments because they did not raise any jurisdictional question.[63] The Chamber correctly noted that the Defence made "no serious attempt […] to explain how this [argument] would relate and affect the jurisdictional parameters of the Court's action".[64] It also recalled (and endorsed) the Presidency's dismissal of the same Defence arguments that "issues concerning the general administration of the Court, *including in matters of diplomatic relations*, do not give rise to an entitlement to a remedy for parties in proceedings", and thus have no bearing in the Court's jurisdiction.[65] In light of its conclusion, the Chamber did not need to address the remainder of the Defence's arguments.[66]

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[60] Decision, paras. 31-35.
[61] Appeal, paras. 18-19. *See* Statute, art. 2 ("The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf").
[62] Decision, paras. 11(iii) ("Resolution 2559 would also have violated articles 2 and 87(6) of the Statute, respectively referring to the agreement governing the relationship between the Court and the United Nations and providing that the Court must be able to rely on the cooperation of an international organisation such as the United Nations"), 31 ("perceived inadequacy of the support provided by the State of Sudan and/or the United Nations missions in Sudan").
[63] Decision, para. 31. *See also* Prosecution Response, para. 60.
[64] Decision, para. 31.
[65] Decision, para. 31.
[66] Decision, para. 32.

21. The Chamber nevertheless corrected some of the Defence's submissions and addressed the crux of its position that UNAMID's withdrawal invalidates the Court's jurisdiction in this situation. The Chamber observed that the trigger for the Court's jurisdiction cannot be taken away by a subsequent act[67] and that, in any event, Resolution 2559 (providing for UNAMID's withdrawal) does not mention the ICC referral or the UNSC Resolution 1593, but instead reaffirms all previous resolutions. Moreover, the transitional assistance mission UNITAMS (set up by UNSC Resolution 2524 on 4 June 2020) ensures UN presence in Sudan[68] and nothing precludes the Court from entering into an agreement with UNITAMS should it deem it necessary.

22. Further, the Defence misinterprets the UN's role in the Court's activities as provided by the UN-ICC Relationship Agreement.[69] UN peacekeeping presence in a given territory is not a prerequisite for the Court's exercise of jurisdiction. Nor is UN assistance a prerequisite for the Court's operation in a situation.[70] The UN-ICC Relationship Agreement is a *sui generis* institutional arrangement which provides the general framework for the Court's relationship with the UN.[71] It does not oblige the UN to guarantee safety or provide security to ICC staff anywhere or at any time.[72] As necessary, these general provisions may be developed by more concrete technical agreements taking into account the needs of the Court and the mandate, characteristics and capacity of the relevant peacekeeping operation, if any, and the consent of the State(s) concerned.[73] The Court has adopted memoranda of understanding to regulate these matters within the framework of the UN-ICC Relationship Agreement in four situations. However this has not occurred in the context of the Darfur situation, where the Court has never entered into a memorandum of understanding with UNAMID to facilitate technical cooperation

[67] Decision, para. 33.
[68] Decision, para. 32. UNITAMS stands for United Nations Integrated Transition Assistance Mission in Sudan.
[69] UN-ICC Relationship Agreement.
[70] Article 87(6) of the Statute imposes no such obligation; it only says that the Court "may" request cooperation or assistance from intergovernmental organisations.
[71] P. Ambach, 'Article 2; relationship of the Court with the United Nations,' in O. Triffterer and K. Ambos (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, 3rd Ed. (München/Oxford/Baden Baden: C.H. Beck/Hart/Nomos, 2016) ("Ambach"), pp. 29-30.
[72] Article 3 of the UN-ICC Relationship Agreement, for example, envisages close cooperation between the two organisations "whenever appropriate".
[73] *See generally* Ambach, pp. 34-35.

with the Court.[74] Nor did UNAMID's mandate envisage specific support or cooperation with the ICC.[75]

23. Thus, even if the Chamber did not refer to article 2 of the Statute and the UN-ICC Relationship Agreement, it correctly characterised and addressed the crux of the Defence's submissions. Accordingly, the Defence's submission that the Chamber erred in fact and in law should be dismissed.

D. Fourth ground of appeal: the Pre-Trial Chamber correctly found that the charges are consistent with article 22(1) (*nullum crimen sine lege*) and article 24(1) (non-retroactivity)

24. As the Chamber found, the Defence "unduly conflate[d]" the distinct issues of the Court's jurisdiction and the question of consistency with the "the principle of legality and non-retroactivity of criminal law".[76] Specifically, the Defence suggests that the manner in which the Court's jurisdiction may be triggered necessarily affects the sources of law which must be applied by the Court in order to comply with articles 22(1) and 24(1) of the Statute.[77] This was, and is, incorrect.[78]

25. In its appeal, the Defence continues this misconceived approach. While purporting to identify five errors in the Decision (two errors of fact, two of law, and one alleged procedural error in providing insufficient reasoning),[79] it merely repeats aspects of its unsuccessful submissions at first instance and faults the Chamber for not adopting them uncritically. This is

[74] Memorandum of understanding between the United Nations and the International Criminal Court concerning cooperation between the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) and the International Criminal Court, UNTS II-1292; Memorandum of understanding between the United Nations and the International Criminal Court concerning cooperation between the United Nations Organization Mission in Cote d'Ivoire (UNOCI) and the International Criminal Court, UNTS II-1371; Memorandum of understanding between the United Nations and the International Criminal Court concerning cooperation between the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA) and the International Criminal Court, UNTS II-1374; Memorandum of understanding between the United Nations and the International Criminal Court concerning cooperation between the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA) and the International Criminal Court, UNTS II-1379. *See* Ambach, p. 35 (mn. 4: noting that three MoUs have been entered with UN operations in Ivory Coast, Mali and DRC, as well as a fourth MoU with the UN Office on Drugs and Crime). The Court has also adopted a MoU with MINUSCA in the CAR.

[75] *See* UNSC Res. 2148 (2014). UNAMID's mandate included: (i) protecting civilians, without prejudice to the responsibility of the Government of Sudan; (ii) facilitating the delivery of humanitarian assistance and ensuring the safety of humanitarian personnel; (iii) mediating between the Government of Sudan and non-signatory armed movements on the basis of the Doha Document for Peace in Darfur; and (iii) supporting the mediation of community conflict, including through measures to address its root causes.

[76] Decision, para. 38.

[77] *See* Decision, para. 37.

[78] *See* Decision, para. 42.

[79] *See* Appeal, paras. 23-24 (errors of fact), 24-26 (errors of law), 27 (procedural error).

evident from its attempt to incorporate by reference into this appeal all of its original submissions.[80]

26. Consistent with the basic misconception underlying its claim of procedural error,[81] the Defence's contention that the Chamber erred in fact by failing to correctly paraphrase its arguments must likewise be dismissed *in limine*.[82] While the manner in which a decision is reasoned may on occasion be relevant in *establishing* an error of fact, it does not itself constitute the error of fact—without more, to say that a chamber erred in describing the arguments of the parties is the same as saying that the chamber erred by not addressing all of the arguments of the parties. And, for the reasons above, this does not constitute an error at all.

27. In any event, the Defence simply takes the Chamber's paraphrase out of context. The Chamber accurately described the Defence position *in this case* where the material State is *not* a State Party, such as Sudan.[83] Furthermore, the Defence fails to show that the claimed error materially affects the Decision, insofar as the Defence's preferred understanding of its meaning is precisely the issue with which the Decision engages on the merits. This purely semantic criticism of the Decision cannot succeed.

28. Each of the remaining issues will be addressed further in the following paragraphs, which show that the Chamber erred in neither law nor fact, and that consequently ground 4 of the appeal should be dismissed. In order to assist the Appeals Chamber in placing the Defence submissions in their proper context, the correct legal framework will briefly be outlined first. While the reasoning of the Decision is concisely expressed,[84] it can only properly be understood within this framework.

D.1. The Decision correctly distinguished the procedural basis upon which the Court may exercise jurisdiction in the situation from the objective existence of the law to be applied

29. While the Court must indeed be satisfied that the charged conduct took place within its temporal jurisdiction, and that any charges conform to the *nullum crimen sine lege* principle

[80] Appeal, paras. 3, 21.
[81] *See above* para. 4 (submitting that this claim should be summarily dismissed).
[82] *Contra* Appeal, para. 23.
[83] *See* Decision, para. 37 ("The Defence appears to suggest that, in order for the Court's temporal jurisdiction to exist, it would be necessary not only that the charged events took place after the entry into force of the Statute, but also that, at the time of their commission, the relevant crimes were already criminalised and punished as such either by the criminal laws of the State which would ordinarily have jurisdiction, or as a matter of customary international law"). *Contra* Appeal, para. 23 (describing the Defence's position that, for the Court to act consistently with article 22(1) of the Statute, either Sudan must be a State Party or the charged crimes must be criminalised in domestic or international law applicable to Sudan).
[84] *See* Decision, paras. 36-42.

(also known as the principle of legality), the *ex post facto* referral of a situation to the Court by the UN Security Council does not necessarily make the Court's exercise of jurisdiction impermissibly retroactive within the meaning of article 24(1).[85] Nor does an *ex post facto* referral prevent the Court from charging any statutory crime under article 6, 7, or 8 of the Statute, while fully complying with the principle of legality as set out in article 22(1) of the Statute,[86] and consistent with internationally recognised human rights.[87] These conclusions are implicit in the reasoning of the Decision,[88] and are crucial to its correct interpretation.

30. As the Decision rightly found, article 22(1) ensures that the Court applies only the statutorily defined crimes, and no others—which is the object and purpose of this provision.[89] This serves the principle of legality since it provides the clearest possible notice of the crimes which may be prosecuted by the Court, and their elements.[90] This notice was effective from at least 1 July 2002, *prior* to any conduct which will ever fall within the jurisdiction of the Court.

31. Specifically, the Statute gives notice that a national of a State which is *not* a party to the Statute may still potentially be held responsible for the crimes set out therein in three circumstances:

- if they carry out any relevant conduct on the territory of a State which is a party to the Statute, or;
- if their State of nationality, or the State where they carry out any relevant conduct, were in the future to make a relevant declaration under article 12(3) of the Statute, or;
- if the UN Security Council, acting under chapter VII of the UN Charter, were in the future to refer a relevant situation to the Court under article 13(b).

32. This framework is not inconsistent with the rights of those States which are not party to the Statute (the "*pacta tertiis*" principle), since it remains anchored in State consent. Notably, in the context of UN Security Council referrals (such as in this situation), all UN Member States

[85] *Contra* Appeal, para. 24.
[86] *Contra* Appeal, paras. 25-26.
[87] *See* Statute, art. 21(3).
[88] *Compare e.g.* Decision, para. 36, *with* Decision, para. 39.
[89] *See* Decision, para. 39 ("this provision [article 22(1)] aims at ensuring that the Court 'does not deviate from the intention of the drafters that it should apply the statutorily defined crimes, and no others' and fulfils the crucial need to ensure that any potential accused benefit[s] from the possibility to know in advance which acts and conducts may amount to the crimes provided in the Statute").
[90] *See also* ICC-01/04-01/06-803-tEN ("*Lubanga* Confirmation Decision"), paras. 302-303; ICC-02/05-01/09-3 ("*Bashir* Arrest Warrant"), para. 131.

(including Sudan) have consented to the UN Security Council's plenary chapter VII powers by ratifying the UN Charter.[91] Such powers include the creation of a judicial body, and again this was well established in law prior to 2002. Nor is any absence of relevant domestic law precisely conforming to the crimes in the Statute, or even any contrary indication of domestic law, a factor which can undermine the notice provided by the Statute.[92]

33. The fact that the exercise of the Court's jurisdiction is subject to conditions (which may not be satisfied until after a person has carried out conduct amounting to an article 5 crime) does not detract from the adequacy of the notice as to what kinds of conduct may be liable to criminal sanction if those conditions are met. This is just the same as the position in customary international law, where the existence of a body (such as an *ad hoc* tribunal) capable of exercising jurisdiction over customary international law crimes may not be known at the time of the commission of the alleged crimes.[93] Likewise, in national legal systems, there is commonly no requirement of notice as to which particular national judicial body may exercise jurisdiction, provided this is governed by law.[94]

34. Consequently, neither article 22(1) nor article 24(1) requires that a suspect or accused person was already subject to the Court's jurisdiction *ratione loci* or *ratione personae*—in the sense of either article 12(2)(a) or (b)—at the time of the conduct material to the charges. It is sufficient that the Statute gives express notice to such a person that he or she *may* become subject to the Court's jurisdiction, in the circumstances described in articles 12(3) and 13(b).

35. Furthermore, and in any event, the crimes set out in articles 6, 7, and 8 of the Statute are substantially similar to those in customary international law and (relevantly to this case) the national law of Sudan.[95] Since the principle of legality only requires that a person can appreciate

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[91] Sudan became a UN Member State in 1956. *See also* *Bashir* Appeal Judgment, para. 140. *See further* UNGA Res. 58/318, 20 September 2004 (approving the UN-ICC Relationship Agreement, including a provision confirming that UN Security Council referrals to the ICC are governed by chapter VII of the UN Charter and article 13(b) of the ICC Statute, by consensus of members of the UN General Assembly). *See also* Prosecution Response, para. 19 (recalling that Sudan was initially a signatory of the Statute).

[92] *See e.g.* B. Broomhall, 'Article 22: *nullum crimen sine lege*,' in O. Triffterer and K. Ambos (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, 3rd Ed. (München/Oxford/Baden Baden: C.H. Beck/Hart/Nomos, 2016) ("Broomhall"), pp. 954-955 (mns. 16, 18); W. A. Schabas, *The International Criminal Court: a Commentary on the Rome Statute*, 2nd Ed. (Oxford: OUP, 2016), p. 543.

[93] *See e.g.* UNSC Res. 827 (1993) (creating the ICTY, with jurisdiction over crimes under customary international law committed from 1 January 1991 onwards); UNSC Res. 955 (1994) (creating the ICTR, with jurisdiction over crimes under customary international law committed from 1 January 1994 onwards).

[94] *See also* ECtHR, *Kononov v. Latvia*, Judgment, 36376/04, 17 May 2010 ("*Kononov* Judgment") paras. 241, 243.

[95] *See further* Prosecution Response, paras. 25, 33-37 (recalling that, while the relationship between article 5 crimes and their customary law analogues is not always straightforward, commentators agree that the Statute largely achieved its aim of providing a broad codification, and setting out authorities supporting the existence of customary law analogues for the crimes charged in this case). *See also* ECCC, *Case 001 (KAING Guek Eav alia 'DUCH'),*

the criminality of their *conduct* (and not the precise legal categorisation which may apply),[96] it is immaterial, for the principle of legality, if a prosecution subsequently proceeds domestically under customary or national law, or before the Court under the Statute—provided this is not substantially to the detriment of the accused person. Indeed, it is the logic of complementarity that the precise forum for any trial is not determined in advance. Nor can there be any concern that an accused person is unfairly disadvantaged by prosecution for article 5 crimes before the Court, since no legal regime regards acts such as homicide, sexual violence, torture, arson and theft with any lesser gravity than the Statute. These principles are further consistent with article 32(2) of the Statute, which provides that "[a] mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility."[97]

D.2. The charges fall within the temporal jurisdiction of the Court, and do not violate article 24(1) (non-retroactivity)

36. The Chamber was satisfied that "the present case satisfies all the relevant statutory requirements of jurisdiction", including that "Mr Abd-Al-Rahman is charged with crimes against humanity and war crimes, which are among those provided for in the Statute (jurisdiction *ratione materiae*)" and that his conduct is alleged to have taken place "between August 2003 and March 2002, *i.e.* after the entry into force of the Statute (jurisdiction *ratione temporis*)."[98]

37. The Defence's argument that the Pre-Trial Chamber erred in not finding that, based on article 126(2), the Statute has not entered into force in Sudan for the purpose of article 24 (non-

Appeal Judgment, 001/18-07-2007-ECCC/SC, 3 February 2012 ("*Case 001* Appeal Judgment"), para. 94 ("treaty law and customary international law often mutually support and supplement each other"); ICTY, *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 98.

[96] *See e.g.* ECCC, *Case 001* Appeal Judgment, paras. 96, 234, *Case 002/01 (KHIEU Samphân and NUON Chea)*, Appeal Judgment, 002/19-09-2007-ECCC/SC, 23 November 2016), paras. 762, 765; ICTY, *Prosecutor v. Hadžihasanović and Kubura*, IT-01-47-A, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, para. 34; *Prosecutor v. Ojdanić et al.*, IT-99-37-AR72, Appeal Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction—Joint Criminal Enterprise, 21 May 2003, paras. 21, 37-40, 42; *Prosecutor v. Blagojević and Jokić*, IT-02-60-T, Judgment, 17 January 2005, para. 695 (fn. 2145); ECtHR, *S.W. v. the United Kingdom*, Judgment, 20166/92, 22 November 1995, paras. 35-36; *Kononov* Judgment, para. 236; *Vasiliauskas v. Lithuania*, 35343/05, 20 October 2015, paras. 167-169.

[97] *See* O. Triffterer and J.D. Ohlin, 'Article 32: mistake of fact or mistake of law,' in O. Triffterer and K. Ambos (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, 3rd Ed. (München/Oxford/Baden Baden: C.H. Beck/Hart/Nomos, 2016), p. 1172 (mn. 31: "If a person evaluates 'a particular type of conduct' (correctly) as a crime but believes that this crime does not fall 'within the jurisdiction of the Court', he or she is just mistaken about the competence of the ICC to exercise its jurisdiction. This knowledge is, however, *not* an essential element of the crime nor has it any other importance for establishing, in principle, the criminal responsibility of the suspect. Similarly, in national law an error about which court is competent to prosecute the crime is completely irrelevant", emphasis supplied). *See also* Broomhall, p. 956 (mn. 21).

[98] Decision, para. 36.

retroactivity *ratione personae*)[99] is premised on a misinterpretation of articles 11, 13(b), 24 and 126.

38. Article 11, read in conjunction with article 126, defines the jurisdiction *ratione temporis* of the Court. Article 11(1) sets out the *absolute* temporal limitation for the Court's jurisdiction by providing that the Court has jurisdiction only "with respect to crimes committed after the entry into force of this Statute." Under article 126(1), the Statute "shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification the Statute." The Court thus does not have jurisdiction *ratione temporis* over crimes committed before 1 July 2002, the date in which the Statute entered into force as a whole.

39. For States becoming Party to the Statute "after its entry into force" (i.e. 1 July 2002), article 11(2) restricts the Court's jurisdiction *ratione temporis* to crimes committed *after* the Statute entered into force "for that State". Article 126(2) provides that for the acceding States the Statute shall enter into force 60 days after the deposit of its instrument of ratification, acceptance, approval or accession. Importantly, under article 11(2), States newly acceding to the Statute may accept the exercise of the Court's jurisdiction *ratione temporis* for crimes committed *before* they joined the Statute—but *after* its entry into force under article 11(1)—by means of a declaration under article 12(3). In other words, a State may accept the Court's jurisdiction for crimes committed *before* "the entry into force of th[e] Statute for that State".

40. Neither article 11(2) or article 126(2) address the situation—like the one at hand—where the jurisdiction is triggered by a UNSC referral under article 13(b) over the territory of a *non*-State Party. The Defence's submission that the Pre-Trial Chamber erred in law and fact by allegedly failing to consider article 126(2) in its conclusion[100] is thus misplaced for two reasons: first, article 126(2) does not apply to States which have not become Party to the Statute (like Sudan), and; second, article 126(2) does not relate to the principle of non-retroactivity *ratione personae* in article 24(2).

41. First, article 126(2)—together with article 11(2)—only defines the Court's jurisdiction *ratione temporis* for States Parties which joined the "Statute after its entry into force". Articles 11(2) and 126(2) simply do not apply to *non*-States Parties, like Sudan, when the Court's jurisdiction is triggered by a UN Security Council referral under article 13(b). In this case the Court's jurisdiction *ratione temporis* is defined by the UNSC referral itself within the absolute

[99] Appeal, para. 24.
[100] Appeal, para. 24.

limit imposed under article 11(1) (read in conjunction with article 126(1)). As such, the UNSC can backdate the temporal scope of its referral to 1 July 2002.[101] This may not be uncommon, since referrals may often be prompted by the commission of atrocities that the Court must investigate and prosecute.

42. Second, article 24—and not article 11(2) or article 126(2)—establishes the general principle on non-retroactivity *ratione personae*: "no person shall be criminally responsible under this Statute for conduct prior to the *entry into force of the Statute*". For the purpose of non-retroactivity it is sufficient that the charged crimes were committed after *the Statute* entered into force, in the sense of article 11(1) and 126(1). This is consistent with the UNSC's power to backdate the temporal scope of the referral and the newly acceding States Parties' power to accept the Court's jurisdiction for crimes committed *before* they joined the Statute under articles 11(2) and 12(3). Neither of these scenarios violates—or creates any tension with—the principle of non-retroactivity protected by article 24. Likewise, to the extent that Mr Abd-Al-Rahman is charged with crimes committed after the entry into force of the Statute on 1 July 2002, there is no violation of the principle. Any other interpretation of article 24 would be contradicted by the plain terms of articles 11(2) and 12(3), and the necessary implication of article 13(b) (understood to permit the referral of events which take place prior to UNSC chapter VII action). This is just what the Chamber found, when it noted that the Defence's reading of the relevant provisions would call into question the very *raison d'être* of article 13(b).[102]

43. Accordingly, for the purpose of this case, articles 11(2) and 126(2) are not applicable because Sudan has never sought to accede to the Statute. For the purpose of article 11(1) (jurisdiction *ratione temporis*), the charged crimes must have occurred after the Statute as a whole entered into force (1 July 2002), and otherwise within the temporal scope of UNSC Resolution 1593 as required by article 13(b). For the purpose of article 24 (non-retroactivity *ratione personae*), the charged crimes must have occurred after the entry into force of the Statute on 1 July 2002. The question whether the charged crimes have the necessary quality of law so as to be fairly applied in this case—the question of the principle of legality, under article 22(1)—is a distinct issue, which is ensured by the sole reliance on the crimes as defined by the Statute.

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[101] *See e.g.* W. A. Schabas and G. Pecorella, 'Article 13: exercise of jurisdiction,' in O. Triffterer and K. Ambos (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, 3rd Ed. (München/Oxford/Baden Baden: C.H. Beck/Hart/Nomos, 2016), p. 696 (mn. 16: "the Security Council can backdate the jurisdiction *ratione temporis* to any time after the entry into force of the Statute").
[102] Decision, para. 41.

44. To the extent that the Defence further or alternatively suggests that the Chamber erred in fact—by wrongly considering that Sudan had in some way acceded to the Statute, in the sense of article 126, rather than as a consequence of its obligations under the UN Charter and UNSC Resolution 1593—this argument must also be dismissed. It is clearly contradicted by the Decision, which expressly recalls the Defence's assertions that UNSC Resolution 1593 "constitute[s] the sole trigger of the Court's jurisdiction in the case",[103] and that "Sudan was not a State Party to the Statute at the time of the Referral".[104] The Decision's reference to the "entry into force" of the Statute referred merely to the activation of the Statute as a whole on 1 July 2002.

45. For all these reasons, the Chamber correctly found that the charged crimes between August 2003 and March 2004 were committed after the entry into force of the Statute as a whole, and thus fall within the Court's jurisdiction *ratione temporis* under article 11(1) and do not violate the non-retroactivity principle under article 24(1).[105]

D.3. The Pre-Trial Chamber correctly found that the charges fall within the material jurisdiction of the Court, and do not violate article 22(1) (*nullum crimen sine lege*)

46. As a final observation in dismissing the Defence arguments, the Chamber noted that:

> [T]he Defence's reading of the relevant statutory provisions, to the effect that a UNSC referral would only be compliant with the principle of legality and non-retroactivity of criminal law to the extent that it covers conduct already adequately criminalised either by the relevant State or States, or as a matter of customary international law at the time of their commission, would result in restricting its scope to such an extent as to call into question the very *raison d'être* of that particular triggering mechanism […] preventing this mechanism from operating precisely *vis-à-vis* some of the scenarios which convinced the drafters of the Statute of its necessity […].[106]

47. On this basis, the Defence argues that the Chamber erred in law by failing to give effect to articles 22(1) and 24(1), as required by article 13—which mandates the Court to exercise its jurisdiction "in accordance with the provisions of this Statute".[107] For the Defence, no tension arises between these provisions, since the Court could still exercise its jurisdiction by applying

[103] Decision, para. 11.
[104] Decision, para. 12.
[105] Decision, para. 36.
[106] Decision, para. 41.
[107] Appeal, paras. 25-26.

sources of law other than the Statute—but only to the extent of bringing charges under article 8(2)(a), which the Defence acknowledges to mirror Sudan's obligations under international law at the relevant time.[108] Yet since the Defence misinterprets the Decision, takes the cited passage in isolation and out of context, and mistakes the function of article 22(1), this argument must fail.

48. The Chamber's supplementary reasoning rejecting the Defence's argument must be read together with the relevant analysis in the preceding two paragraphs. These state the Chamber's clear view that article 22(1)—and, indeed, article 24(1)—*are* applicable, but that their requirements are satisfied by confining the charges exclusively to crimes defined under the Statute at the time of their commission.[109] This was one of the significant motivations for creating the Statute in the first place—as a pre-existing legal code, widely publicised and accessible, which defined exhaustively and with specificity those crimes which could be prosecuted before the Court. It also addressed concerns deriving from the practice of the *ad hoc* tribunals about the ambiguity of crimes defined entirely in customary international law.[110] As such, the Chamber clearly *did* apply article 22(1), but merely interpreted its requirements differently from the manner preferred by the Defence.

49. In interpreting article 22(1), the Defence appears to be misled by the requirement that "[a] person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the *jurisdiction* of the Court." But, as noted above, this does not mean that the conditions for the Court's exercise of jurisdiction must already have existed at the time of the alleged conduct; rather, the material conduct must have been a "*crime* within the jurisdiction of the Court"—that is to say one of the crimes expressly set out in the Statute which exclusively constitute the Court's jurisdiction *ratione materiae*, and which have duly entered into force in accordance with articles 11(1) and 126(1). For all the reasons explained above, this requirement is undoubtedly met in this case. Nor does the Defence show any defect in the adequacy of the notice of the charged crimes provided by the Statute, supplemented if necessary by other sources of law.

50. Finally, as a practical matter, the Pre-Trial Chamber was correct that the effect of the Defence's position—which would limit the Court's jurisdiction *ratione materiae* to charges

[108] Appeal, para. 25.
[109] Decision, para. 39. *See also above* para. 30.
[110] This is not to say that, where appropriate, the Statute does not still refer to the content of customary international law on some matters within this overall framework, but this too is *expressly* provided by the Statute: *see e.g.* Statute, arts. 8(2)(b) and (e), 21(1).

under article 8(2)(a) of the Statute,[111] applying only in international armed conflict—would be inconsistent with the obvious intent of the UN Security Council in referring the situation to the Court. The preamble to UNSC Resolution 1593 refers to the report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur, which recalled that "[a]ll the parties to the conflict (the Government of the Sudan, the SLA and the JEM) have recognised that this is an internal [non-international] armed conflict."[112] It likewise found that crimes against humanity might have been committed.[113] In this context, it strains credulity to suggest that the UN Security Council would have referred the situation to the Court if its jurisdiction were restricted only to war crimes committed in a different kind of conflict (not established on the facts), as the Defence contends, and did not include jurisdiction over crimes against humanity.[114]

Conclusion

51. For all the reasons above, the Appeal should be dismissed in its entirety.

Karim A. A. Khan QC
Prosecutor

Dated this 29th day of June 2021
At The Hague, The Netherlands

[111] *See e.g.* Appeal, para. 26.
[112] *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, 25 January 2005 ("International Commission of Inquiry Report"), para. 76.
[113] *See e.g.* International Commission of Inquiry Report, paras. 522, 552.
[114] *But see also above* para. 35, *especially* fn. 95 (recalling that, in any event, there are customary law analogues for the crimes charged in this case).