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Original: English **No. ICC-02/05-01/20 OA8**
Date: 1 November 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 document

Judgment
on the appeal of Mr Abd-Al-Rahman against the Pre-Trial Chamber II's "Decision on the Defence '*Exception d'incompétence*' (ICC-02/05-01/20-302)"

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

The Office of the Prosecutor
Mr Karim A. A. Khan, Prosecutor
Ms Helen Brady

Counsel for the Defence
Mr Cyril Laucci

Legal Representatives of Victims
Ms Natalie von Wistinghausen
Mr Nasser Mohamed Amin Abdalla

The Office of Public Counsel for Victims
Ms Paolina Massidda

REGISTRY

Registrar
Mr Peter Lewis

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against the decision of Pre-Trial Chamber II entitled "Decision on the Defence '*Exception d'incompétence*' (ICC-02/05-01/20-302)" of 17 May 2021 (ICC-02/05-01/20-391),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

The "Decision on the Defence '*Exception d'incompétence*' (ICC-02/05-01/20-302)" is confirmed.

REASONS

I. KEY FINDING

1. In order to extend to an accused the guarantee of legality consistent with human rights norms, the principle of *nullum crimen sine lege* generally requires that a court may exercise jurisdiction only over an individual who could have reasonably expected to face prosecution under national or international law.

II. INTRODUCTION

2. The Defence brought a challenge to the jurisdiction of the Court before Pre-Trial Chamber II (hereinafter: the "Pre-Trial Chamber"), pursuant to article 19(2)(a) of the Statute. In particular, the challenge called into question the trigger of the Court's jurisdiction following the UN Security Council's referral of the *Situation in Darfur, Sudan* to the Court under article 13(b) of the Statute. The Pre-Trial Chamber rejected the Defence's challenge, finding that the Court's jurisdiction is being exercised lawfully in this case.

3. The Defence raises four grounds of appeal, each with several alleged underlying errors. The Defence takes issue with the Pre-Trial Chamber's interpretation of the

language of the referral, and the compatibility of the referral with the Statute. Moreover, the Defence argues that the Court's exercise of jurisdiction violates the principle of *nullum crimen sine lege* because Sudan was not a Party to the Statute at the time that the alleged crimes took place. Below, the Appeals Chamber will rule on this issue by reviewing the Pre-Trial Chamber's interpretation of the scope of the principle of *nullum crimen sine lege* in the Statute in light of human rights norms.

III. PROCEDURAL HISTORY

A. Proceedings before Pre-Trial Chambers I and II

4. On 31 March 2005, by resolution (hereinafter: "Resolution 1593"), the UN Security Council referred to the Prosecutor the *Situation in Darfur, Sudan*, as of 1 July 2002, pursuant to article 13(b) of the Statute.[1]

5. On 27 April 2007, Pre-Trial Chamber I issued a warrant of arrest against Mr Abd-Al-Rahman for crimes against humanity and war crimes allegedly committed during a non-international armed conflict in Sudan between August 2003 and March 2004.[2]

6. On 9 June 2020, Mr Abd-Al-Rahman surrendered himself to the Court and appeared before the current Pre-Trial Chamber (Pre-Trial Chamber II) on 15 June 2020.[3]

7. On 15 March 2021, the Defence submitted its application challenging the jurisdiction of the Court in the present case, pursuant to article 19(2)(a) of the Statute[4] (hereinafter: "Jurisdictional Challenge").

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[1] United Nations, Security Council, Resolution 1593, S/RES/1593 (2005).
[2] Decision on the Prosecution Application under Article 58(7) of the Statute, ICC-02/05-01/07-1-Corr; Warrant of arrest for Ali Kushayb, ICC-02/05-01/07-3-Corr. *See also* Second warrant of arrest for Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb"), 11 June 2020, ICC-02/05-01/07-74-Red.
[3] Decision on the Defence "*Exception d'incompétence*" (ICC-02/05-01/20-302), 17 May 2021, ICC-02/05-01/20-391, para. 3.
[4] *Exception d'incompétence*, ICC-02/05-01/20-302. *See also* Prosecution's response to the Defence challenge to the Court's jurisdiction (ICC-02/05-01/20-302), 16 April 2021, ICC-02/05-01/20-347; Submissions on behalf of Victims on the Defence's challenge to the Court's Jurisdiction ("*Exception d'incompétence*" ICC-02/05-01/20-302), 16 April 2021, ICC-02/05-01/20-348; Response on behalf of the Victims to the Defence *Exception d'incompétence* (ICC-02/05-01/20-302), 16 April 2021, ICC-02/05-01/20-351.

8. On 17 May 2021, the Pre-Trial Chamber issued its decision on the Defence's Jurisdictional Challenge[5] (hereinafter: "Impugned Decision"). In the Impugned Decision, the Pre-Trial Chamber rejected the Jurisdictional Challenge and affirmed that the Court had jurisdiction over the present case.

9. On 9 July 2021, the Pre-Trial Chamber confirmed the charges against Mr Abd-Al-Rahman[6] (hereinafter: "Confirmation Decision").

B. Proceedings before the Appeals Chamber

10. On 22 May 2021, the Defence appealed the Impugned Decision and on 7 June 2021, the Defence filed the appeal brief[7] (hereinafter: "Appeal Brief").

11. On 29 June 2021, the Prosecutor responded to the Appeal Brief[8] (hereinafter: "Prosecutor's Response"). Pursuant to an order of the Appeals Chamber,[9] on 21 July 2021 the Office of Public Counsel for Victims (hereinafter: "OPCV") and the Legal Representatives of Victims (hereinafter: "LRV") filed observations in the appeal[10] (hereinafter: "OPCV's Observations" and "LRV's Observations", respectively), and on 4 August 2021, the Defence filed a response to those observations[11] (hereinafter: "Defence's Consolidated Response"). The Prosecutor did not file a response to the observations of the victims.

IV. STANDARD OF REVIEW

12. In the present appeal, the Defence alleges errors of law and fact. Regarding errors of law, the Appeals Chamber has previously held

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[5] Decision on the Defence "*Exception d'incompétence*" (ICC-02/05-01/20-302), ICC-02/05-01/20-391.
[6] Decision on the confirmation of charges against Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb"), ICC-02/05-01/20-433.
[7] Appeal Brief against Decision ICC-02/05-01/20-391 Rejecting the "Exception d'incompétence", ICC-02/05-01/20-418-tENG.
[8] Prosecution's Response to the Defence Appeal against the "Decision on the Defence '*Exception d'incompétence*'", ICC-02/05-01/20-427.
[9] Order on the submission of observations, 25 June 2021, ICC-02/05-01/20-424.
[10] Submissions on behalf of Victims on the Defence Appeal against the "Decision on the Defence '*Exception d'incompétence*'" (ICC-02/05-01/20-391), ICC-02/05-01/20-441; 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, ICC-02/05-01/20-442.
[11] Consolidated Response to the Observations Filed in Connection with the OA8 Appeal, ICC-02/05-01/20-447-tENG (English translation registered on 23 September 2021). *See also* Decision on the Defence's request for extension of time, 14 July 2021, ICC-02/05-01/20-435.

> [that it] will not defer to the relevant Chamber's legal interpretation of the law, but will arrive at its own conclusions as to the appropriate law and determine whether or not the first instance Chamber misinterpreted the law.[12]

The Appeals Chamber has further held that if a chamber commits such an error, the Appeals Chamber will only intervene if the error materially affected the decision being appealed.[13] A decision is "materially affected by an error of law" if the 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".[14]

13. Regarding alleged errors of fact, the Appeals Chamber will not interfere with the factual findings of a chamber unless it is shown that the chamber committed a clear error, namely, misappreciated the facts, took into account irrelevant facts or failed to take into account relevant facts.[15] Regarding the misappreciation of facts, the Appeals Chamber will not disturb a pre-trial or trial chamber's evaluation of the facts just because the Appeals Chamber might have come to a different conclusion.[16] It will

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[12] *The Prosecutor v. Bosco Ntaganda*, Judgment on the appeal of Mr Bosco Ntaganda against the "Decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9", 22 March 2016, ICC-01/04-02/06-1225 (OA2), para. 33; *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Judgment on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V(A) of 19 August 2015 entitled "Decision on Prosecution Request for Admission of Prior Recorded Testimony", 12 February 2016, ICC-01/09-01/11-2024 (OA10), para. 20; *The Prosecutor v. Uhuru Muigai Kenyatta*, Judgment on the Prosecutor's appeal against Trial Chamber V(B)'s "Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute", 19 August 2015, ICC-01/09-02/11-1032 (OA5), para. 23. *See also*, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Mohamed Ag Mahmoud*, Judgment on the appeal of Mr Al Hassan against the decision of Pre-Trial Chamber I entitled 'Décision relative à l'exception d'irrecevabilité pour insuffisance de gravité de l'affaire soulevée par la défense', 19 February 2020, ICC-01/12-01/18-601-Red (OA) (hereinafter: "*Al Hassan* OA Judgment"), para. 38.

[13] *Al Hassan* OA Judgment, para. 38; *The Prosecutor v. Simone Gbagbo*, Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled "Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo", 27 May 2015, ICC-02/11-01/12-75-Red (OA) (hereinafter: "*S. Gbagbo* Admissibility OA Judgment"), para. 40.

[14] *Al Hassan* OA Judgment, para. 38; *S. Gbagbo* Admissibility OA Judgment, para. 41.

[15] *S. Gbagbo* Admissibility OA Judgment, para. 38; *The Prosecutor v. Mathieu Ngudjolo Chui*, Judgment on the Prosecutor's appeal against the decision of Trial Chamber II entitled "Judgment pursuant to article 74 of the Statute", 27 February 2015, ICC-01/04-02/12-271 (A) (hereinafter: "*Ngudjolo* A Judgment"), para. 22; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment In the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release, 9 June 2008, ICC-01/04-01/07-572 (OA4), para. 25.

[16] *S. Gbagbo* Admissibility OA Judgment, para. 38; *Ngudjolo* A Judgment, para. 22; *The Prosecutor v. Callixte Mbarushimana*, Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled "Decision on the 'Defence Request for Interim Release", 14 July 2011, ICC-01/04-01/10-283 (OA) (hereinafter: "*Mbarushimana* OA Judgment"), para. 17.

interfere only where it cannot discern how the chamber's conclusion could have reasonably been reached from the evidence before it.[17]

14. For all alleged errors, the appellant has to set out the alleged error in the appeal brief and "indicate, with sufficient precision, how [the] alleged error would have materially affected the impugned decision".[18]

15. The analysis and determination of the issues arising from the grounds of appeal will be guided by the standard of review set out above.

V. MERITS

A. First ground of appeal – the meaning of "situation" in article 13 of the Statute

1. Relevant part of the Impugned Decision

16. In the Impugned Decision, the Pre-Trial Chamber recalled the Defence's argument that Darfur, as opposed to Sudan as a whole, does not constitute a "situation" that could be referred to the Court pursuant to article 13(b) of the Statute.[19] It observed, referring to the decision of Pre-Trial Chamber I in *The Prosecutor v. Callixte Mbarushimana*, that a situation is "generally defined in terms of temporal, territorial and in some cases personal parameters".[20] On this basis, it determined that

> […] the territorial scope of a State, on the one hand, and the territorial scope of a situation as the subject matter of a referral to the Court, on the other hand, do not necessarily overlap. It is therefore possible to envisage a situation both extending beyond, and restricted to a specific area located within, the territory of one State, as well as several situations within the territorial boundaries of one and the same State.[21]

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[17] *S. Gbagbo* Admissibility OA Judgment, para. 38; *Ngudjolo* A Judgment, para. 22; *Mbarushimana* OA Judgment, para. 17.
[18] *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Judgment on the appeal of the Prosecutor against Trial Chamber I's decision on the no case to answer motions, 31 March 2021, ICC-02/11-01/15-1400 (A), para. 74; *The Prosecutor v. Joseph Kony et al.*, Judgment on the appeal of the Defence against the "Decision on the admissibility of the case under article 19 (1) of the Statute" of 10 March 2009, 16 September 2009, ICC-02/04-01/05-408 (OA3), para. 48.
[19] Impugned Decision, para. 11.
[20] Impugned Decision, para. 25, *referring to* Pre-Trial Chamber I, *Situation in the Democratic Republic of the Congo*, Decision on the Applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 17 January 2006 (English corrigendum registered on 22 March 2006), ICC-01/04-101-tEN-Corr, para. 65.
[21] Impugned Decision, para. 26.

17. Therefore, the Pre-Trial Chamber concluded that it was "unnecessary" for it to address the Defence's argument about the legal status of Darfur at the relevant time, and that "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".[22]

2. *The Defence's submissions before the Appeals Chamber*

18. The Defence alleges three errors under its first ground of appeal challenging the Pre-Trial Chamber's interpretation of a "situation" in the context of article 13 of the Statute. First, the Defence alleges that the Pre-Trial Chamber committed an error of fact in failing to appreciate that crimes within the Court's jurisdiction occurred not only in Darfur but in the rest of the territory of Sudan as well.[23] Second, the Defence alleges that the Pre-Trial Chamber committed an error of fact in interpreting the submissions of the Defence as proposing that a "situation" referred to the Court must encompass a geographic area corresponding to the territory of a State.[24] Third, the Defence alleges that the Pre-Trial Chamber erred in law in finding that a "situation" may be defined by "the scope of the criminal action allegedly committed within it", thus confusing the term "situation" with "case".[25]

19. Finally, the Defence argues that the latter error of law also constitutes a "denial of justice" to the extent that the Pre-Trial Chamber rejected arguments without examining them and without reasons.[26]

3. *The Prosecutor's submissions before the Appeals Chamber*

20. The Prosecutor responds that the Defence takes parts of the Impugned Decision out of context and that the decision did not make findings as to whether crimes were committed in other parts of Sudan.[27] He argues that, on appeal, the Defence mischaracterises its position leading to the Impugned Decision and misrepresents the Impugned Decision in arguing that it conflates "situation" with "case".[28] He then argues that the geographical parameters of this situation do not conflict with the Statute or the

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[22] Impugned Decision, para. 27.
[23] Appeal Brief, para. 6.
[24] Appeal Brief, para. 7.
[25] Appeal Brief, para. 8.
[26] Appeal Brief, para. 9.
[27] Prosecutor's Response, paras 6-7.
[28] Prosecutor's Response, paras 8-9.

Prosecutor's duties under it and are fully consistent with the intention of the drafters.[29] The Prosecutor argues that the Defence's submissions regarding the purported drafters' intention do not support its proposition that this situation should encompass the territory of Sudan.[30]

4. Observations of the victims and the Defence's response thereto

21. The OPCV argues that the Pre-Trial Chamber i) did not make any finding on the occurrence of crimes within the Court's jurisdiction in other regions of Sudan, as it was not required to do so; and ii) correctly addressed the Defence's submissions on the relation between a "situation" and a State's territory, and properly found that the term "situation" is different from "State".[31]

22. The LRV argue that the Defence fails to make clear why the Pre-Trial Chamber should focus on other crimes or cite Security Council resolutions concerning other conflicts in Sudan, which have no relevance to the Court's jurisdiction to hear the case against Mr Abd-Al-Rahman.[32] They further argue that the Pre-Trial Chamber did not distort the Defence's arguments about the term "situation" and, in any event, the Pre-Trial Chamber's conclusion that a situation does not have any qualification addresses both versions of the Defence's argument.[33] Finally, they contend that the Defence has not demonstrated a "denial of justice", as it misconstrues the Impugned Decision as regards the distinction between a "case" and a "situation".[34]

23. The Defence responds to both victims' observations and argues that they are of no value because they do not respond to the Defence's exact argument.[35]

5. Determination by the Appeals Chamber

24. The Appeals Chamber will address the third alleged error under the first ground of appeal first. This alleged error raises the question of how a "situation" should be interpreted, and the questions raised under the other alleged errors flow from this definition.

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[29] Prosecutor's Response, para. 10.
[30] Prosecutor's Response, para. 11.
[31] OPCV's Observations, paras 15-19.
[32] LRV's Observations, para. 10.
[33] LRV's Observations, para. 11.
[34] LRV's Observations, para. 12.
[35] Defence's Consolidated Response, para. 15.

25. In respect of the third alleged error, the Appeals Chamber finds that the Defence has not demonstrated that the Pre-Trial Chamber misinterpreted the legal definition of a "situation" for the purposes of article 13 of the Statute. The Appeals Chamber notes that the word "situation" is not defined in the Statute, and a review of the language in articles 13 and 14 of the Statute reveals that the word is used loosely, specifically with a view to extending enough flexibility to the Prosecutor to investigate independently and impartially.[36] In practice, the referral of a "situation" under article 13 of the Statute, whether from a State or from the Security Council, has involved the referral of a situation of crisis or armed conflict from which the Prosecutor may select and investigate potential cases.[37] The use of the word "situation" in article 13 of the Statute and not "State" indicates that the two concepts are not synonymous. Furthermore, the occurrence of the word "case" in the context of the Prosecutor's decision to investigate in articles 53 and 54 of the Statute indicates that the "case" may have a different legal meaning from that of the "situation", with the latter finding mention in the context of the triggers of the Court's jurisdiction.

26. In the Impugned Decision, the Pre-Trial Chamber explained that a "[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'".[38] It recalled the Court's prior jurisprudence holding that a situation is "generally defined in terms of temporal, territorial and in some cases personal parameters".[39] It explained that the territorial scope of a "situation" may be greater or smaller than the territory of one State in which potential cases are located.[40] The Appeals Chamber finds that the Defence has not demonstrated an error

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[36] *See* Prosecutor's Response, para. 11, *referring to* 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* (2016), p. 695.
[37] *E.g.*, Pre-Trial Chamber II, *The Prosecutor v. Joseph Kony et al.*, Decision to Convene a Status Conference on the Investigation in the Situation in Uganda in Relation to the Application of Article 53, 2 December 2005, ICC-02/04-01/05-68, paras 4-5; Pre-Trial Chamber I, *The Prosecutor v. Callixte Mbarushimana*, Decision on the "Defence Challenge to the Jurisdiction of the Court", 26 October 2011, ICC-01/04-01/10-451, para. 27.
[38] Impugned Decision, para. 25.
[39] Impugned Decision, para. 25 *referring to* Pre-Trial Chamber I, *Situation in the Democratic Republic of the Congo*, Decision on the Applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 17 January 2006 (English corrigendum registered on 22 March 2006), ICC-01/04-101-tEN-Corr, para. 65.
[40] Impugned Decision, para. 26.

in how the Pre-Trial Chamber described a "situation", and it is clear that the Pre-Trial Chamber did not conflate the definition of a "situation" with that of a "case".

27. In respect of the first alleged error, the Appeals Chamber finds that the Defence's argument that the Pre-Trial Chamber considered that only Darfur was affected by the commission of crimes under article 5 of the Statute represents a misinterpretation of the Impugned Decision.[41] In fact, the purpose of the discussion in the section of the Impugned Decision referred to by the Defence was to explain that a "situation" that is the subject of a referral can be defined by a set of parameters set out in the referral rather than by political boundaries.[42] The Appeals Chamber does not consider that this finding in any way denies the suffering of victims of crimes in other regions of Sudan. In any event, the Appeals Chamber notes that the Defence has not established how this issue touches upon the Court's jurisdiction. Accordingly, the Appeals Chamber is not persuaded by the Defence's argument in this regard.

28. In respect of the second alleged error, the Appeals Chamber considers that the Defence must refer the Appeals Chamber to the section of the Impugned Decision where the Pre-Trial Chamber made factual findings in order to demonstrate a factual error. However, the Defence only argues that the Pre-Trial Chamber misinterpreted the Defence's submissions about how a "situation" should be defined. Even if this were true, the section of the Impugned Decision in which the Pre-Trial Chamber recalls the Defence's submissions in this regard does not contain factual findings. As the Defence does not explain how this alleged misinterpretation results in an erroneous factual finding, the Appeals Chamber is not in a position to rule on this alleged error. The argument is therefore rejected.

29. The Defence's first ground of appeal is rejected.

B. Second ground of appeal – compatibility of Resolution 1593 with articles 13(b) and 115(b) of the Statute

1. Relevant part of the Impugned Decision

30. In the Impugned Decision, the Pre-Trial Chamber recalled the Defence's argument that paragraph 7 of Resolution 1593, stating that expenses incurred in

[41] Appeal Brief, para. 6.
[42] Impugned Decision, paras 25-27.

connection with the referral shall be borne by States that are party to the Statute and not by the UN, would be in violation both of article 115(b) of the Statute, stating *inter alia* that expenses related to a referral by the UN Security Council shall in particular be provided by the UN, and of article 13 of the Statute, requiring that the Court's exercise of jurisdiction be in accordance with the provisions of the Statute.[43] The Pre-Trial Chamber considered "the purported link between [these arguments] and the matter of jurisdiction" to be weak, and that the Defence had "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".[44]

31. The Pre-Trial Chamber also observed that the Defence advanced the same arguments in earlier litigation before that Chamber and before the Presidency, and expressed regret that the Defence would, "yet again, try and have a previously rejected argument considered under a different angle".[45]

2. The Defence's submissions before the Appeals Chamber

32. The Defence alleges two errors under its second ground of appeal. First, the Defence argues that the Pre-Trial Chamber committed an error of fact in failing to appreciate that the Defence limited its submissions to challenging the legality of Resolution 1593.[46] Second, the Defence alleges that the Pre-Trial Chamber committed an error of law in refusing to exercise its competence to rule on the jurisdiction of the Court as a result of an alleged violation of article 115 of the Statute.[47]

33. The Defence also argues that the latter error of law constitutes a "denial of justice" to the extent that the Pre-Trial Chamber rejected arguments without examining them and without reasons.[48]

3. The Prosecutor's submissions before the Appeals Chamber

34. The Prosecutor argues that the Pre-Trial Chamber dismissed the Defence's arguments about the alleged violation of article 115(b) of the Statute not because they

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[43] Impugned Decision, para. 11.
[44] Impugned Decision, para. 29.
[45] Impugned Decision, paras 28-29.
[46] Appeal Brief, para. 13.
[47] Appeal Brief, para. 14.
[48] Appeal Brief, para. 15.

were duplicative of earlier proceedings but "because the Defence had not demonstrated that these arguments raised a jurisdictional question".[49] He maintains that the arguments under this and the third ground of appeal are all "unrelated to the four aspects of the Court's jurisdiction", and he refers to the four "accepted jurisdictional grounds" in the Court's jurisprudence: territorial (*ratio loci*), subject matter (*ratione materiae*), personal (*ratione personae*), and temporal (*ratione temporis*).[50] He then distinguishes the aspects of Resolution 1593 dealing with jurisdiction from those challenged by the Defence, which deal only with the financing of the Court.[51]

35. Finally, the Prosecutor responds that it is only "desirable" that the UN contribute financially to the Court's activities, and that in any event Resolution 1593 "did not forbid UN funding for the ASP", generally.[52]

4. Observations of the victims and the Defence's response thereto

36. The OPCV submits that the Pre-Trial Chamber did in fact address the different angles under which the Defence raised the issue of the financial contribution of the UN to the investigation and prosecution of cases arising from the *Situation in Darfur, Sudan*[53] and correctly determined that the issue was not related to jurisdiction.[54] Also, the OPCV points out that "the release of funds is regulated by the terms of the UN-ICC Agreement and is subjected to separate arrangements".[55]

37. The LRV argue that the Pre-trial Chamber specifically addressed the Defence's argument about article 115 of the Statute and concluded that it was irrelevant because 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.[56] The LRV also argue that the Defence misinterprets the Impugned Decision, and that the Pre-Trial Chamber "did not find that it did not have the power to review article 115".[57]

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[49] Prosecutor's Response, paras 14, 18.
[50] Prosecutor's Response, para. 14, fn 45.
[51] Prosecutor's Response, para. 15.
[52] Prosecutor's Response, para. 16.
[53] OPCV's Observations, para. 22.
[54] OPCV's Observations, para. 22.
[55] OPCV's Observations, para. 23.
[56] LRV's Observations, para. 17.
[57] LRV's Observations, para. 19.

38. The Defence responds to both victims groups and argues that the victims refuse to consider the relationship between the conditions in article 115(b) of the Statute and the exercise of jurisdiction of the Court and respect for the rights of the Defence.[58] The Defence argues that the Court's funding arrangements have a direct impact on the exercise of jurisdiction and of its judicial functions.[59]

5. Determination by the Appeals Chamber

39. As regards the first error alleged under the Defence's second ground, the Appeals Chamber finds that the Pre-Trial Chamber did not misunderstand the nature of the Defence's submissions. That is, the Pre-Trial Chamber correctly recalled that the Defence had submitted that paragraph 7 of Resolution 1593 was incompatible with article 115(b) of the Statute, thus removing the basis for the jurisdiction of the Court. This is apparent in the observation of the Pre-Trial Chamber that the Defence was reiterating previous submissions but this time "under a different angle",[60] suggesting that the same argument was presented this time as a challenge to jurisdiction. The Chamber also made clear its view that the link between these submissions and a jurisdictional matter was weak. Therefore, the Defence's arguments in this regard are rejected.

40. As regards the Defence's second alleged error under the second ground, the Appeals Chamber observes at the outset that there is no dispute that the Impugned Decision itself is a "decision with respect to jurisdiction" within the meaning of articles 19(6) and 82(1)(a) of the Statute.[61] It follows that the appeal, brought under article

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[58] Defence's Consolidated Response, para. 18.
[59] Defence's Consolidated Response, para. 20.
[60] Impugned Decision, para. 29.
[61] The Appeals Chamber recognises that only a "decision with respect to jurisdiction or admissibility" can be appealed under article 82(1)(a) of the Statute. The Appeals Chamber has in the past had the opportunity to explain what may constitute a "decision with respect to jurisdiction" in the context of the admissibility of an appeal under article 82(1)(a) of the Statute (*see Situation in the Republic of Kenya*, Decision on the admissibility of the "Appeal of the Government of Kenya against the 'Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to article 93(10) of the Statute and rule 194 of the rules of Procedure and Evidence'", 10 August 2011, ICC-01/09-78 (OA), para. 16; *The Prosecutor v. Bosco Ntaganda*, Judgment on the appeal of Mr Bosco Ntaganda against the "Decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9", 22 March 2016, ICC-01/04-02/06-1225 (OA2), paras 19-20). Nevertheless, the Appeals Chamber does not understand the Prosecutor to argue that the Impugned Decision is not itself a decision with respect to jurisdiction. Rather, the Appeals Chamber interprets the Prosecutor's Response as challenging only the relationship between certain arguments in the Appeal Brief and the question of

82(1)(a) of the Statute, is properly before the Appeals Chamber. However, the Prosecutor challenges the link between the Defence's arguments under its second ground of appeal and the question of the Court's jurisdiction.[62] He argues that

> 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) infringes article 115(b) of the Statute, does not raise a jurisdictional question within article 19(2) and (4) of the Statute.[63]

The Prosecutor also argues that the Pre-Trial Chamber itself determined that the Defence had not demonstrated the requisite link between its arguments relating to an alleged violation of article 115(b) of the Statute and a matter relating to the jurisdiction of the Court.[64]

41. The Appeals Chamber considers that the Prosecutor's argument about whether the second ground of appeal properly raises a jurisdictional question is relevant to whether granting the second ground of appeal could have any effect on the outcome of the Impugned Decision, which confirms the Court's jurisdiction in this case. Therefore, the Appeals Chamber will address this issue before the substantive issues raised in the Appeal Brief.

42. The Appeals Chamber has been called upon, in the past, to determine what defines a challenge to the "jurisdiction" of the Court. In its jurisprudence, the Appeals Chamber has recognised that there are four aspects of "jurisdiction" expressed in the Statute: subject matter jurisdiction (*ratione materiae*), jurisdiction over persons (*ratione personae*), territorial jurisdiction (*ratione loci*), and temporal jurisdiction (*ratione temporis*).[65] Where it has not been satisfied that the issues raised in an appeal

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jurisdiction. Therefore, the issue as to whether the Impugned Decision is itself a "decision with respect to jurisdiction" in the context of article 82(1)(a) of the Statute does not arise.

[62] Prosecutor's Response, para. 14.

[63] Prosecutor's Response, para. 15.

[64] Prosecutor's Response, para. 14.

[65] *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772 (OA4) (hereinafter: "*Lubanga* OA4 Judgment"), paras 21-22.

of a decision on jurisdiction are appropriate for determination under the rubric of article 82(1)(a) of the Statute, the Appeals Chamber has found the appeal to be inadmissible.[66]

43. In essence, under its second ground of appeal, the Defence argues that the UN is not meeting its funding obligations under article 115 of the Statute as regards the *Situation in Darfur, Sudan*. As argued by the Prosecutor, the Appeals Chamber finds that the funding obligation in article 115(b) of the Statute, which in any event is expressly conditioned on the "approval of the General Assembly", relates to the financing of the activities of the Court arising from a referral by the Security Council. This does not bear any relationship with the four aspects of the Court's jurisdiction set out above. Rather, the Appeals Chamber considers that the core provisions relating to the Court's jurisdiction reside elsewhere in Part 2 of the Statute, entitled "Jurisdiction, admissibility and applicable law".[67]

44. Indeed, in order to draw any link between the Defence's arguments and the Court's jurisdiction, the Appeals Chamber must first accept the premise advanced by the Defence that the impugned paragraph of Resolution 1593 dealing with the expenses incurred in the *Situation in Darfur, Sudan*, which allegedly violates article 115(b) of the Statute, could invalidate the referral as a whole; with the result that the Court would not have jurisdiction to adjudicate this case.

45. The Appeals Chamber considers that it has a duty to verify that, at each stage of the proceedings, the Court has jurisdiction over the case before it.[68] In particular, the

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[66] *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Decision on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Pre-Trial Chamber II of 23 January 2012 entitled "Decision on the Confirmation of Charges Pursuant to article 61(7)(a) and (b) of the Rome Statute", 24 May 2012, ICC-01/09-01/11-414 (OA3 OA4), paras 29-34; *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Decision on the appeal of Mr Francis Kirimi Muthaura and Mr Uhuru Muigai Kenyatta against the decision of Pre-Trial Chamber II of 23 January 2012 entitled "Decision on the Confirmation of Charges Pursuant to article 61(7)(a) and (b) of the Rome Statute", 24 May 2012, ICC-01/09-02/11-425 (OA4), paras 33-39.

[67] The Appeals Chamber recognises that articles 22-24, located in Part 3 of the Statute, may also be considered in jurisdictional challenges to the extent that the issue of what law can apply to a matter is affected by issues of legality. *See* ICTY, Appeals Chamber, *The Prosecutor v. Milutinović et al*., IT-99-37-AR72, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction - Joint Criminal Enterprise, 21 May 2003 (hereinafter: "*Milutinović et al.* Decision on jurisdiction"), paras 9-11.

[68] *See, e.g.*, Pre-Trial Chamber I, *Situation in the State of Palestine*, Decision on the "Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine", 5 February 2021, ICC-01/18-143, (hereinafter: "Palestine Decision on jurisdiction") paras 55-57, 73 and fn. 243

Appeals Chamber considers that it may, depending on the circumstances, be called upon to examine whether a referral is invalid due to the materiality of an impugned paragraph in a Security Council resolution.[69] However, the instant appeal is not such a case. The Appeals Chamber does not agree with the premise that the alleged non-compliance with the Statute of paragraph 7 of Resolution 1593 could on its own annul the resolution as a whole. Indeed, the Appeals Chamber finds that Resolution 1593 represents a clear and unambiguous submission to the Court's jurisdiction of violations of international humanitarian law and human rights law in Darfur. Even if, *arguendo*, the text of paragraph 7 is not consistent with the Statute, that inconsistency would not strike at the heart of the resolution to such a degree that it would be appropriate, under the circumstances, to completely discard the objective of Resolution 1593 as intended.

46. Therefore, the Appeals Chamber finds that the Defence has not established that the alleged incompatibility of paragraph 7 with the Statute could somehow undermine the Court's jurisdiction over this case. Nor has the Defence provided any explanation as to why the entirety of Resolution 1593 should be discarded to remedy the alleged illegality of one of its secondary provisions.[70] Rather, the Defence's argument under its second ground of appeal only superficially calls into question the jurisdiction of the Court and, on closer inspection, is not sufficiently grounded in one of the four aspects

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[69] It is recalled that, in addition to its primary jurisdiction, a court or tribunal with international legal personality will typically have the competence to determine matters that are incidental to its own primary jurisdiction over a case (*e.g.* Pre-Trial Chamber I, *Request under regulation 46(3) of the Regulations of the Court*, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", 6 September 2018, ICC-RoC46(3)-01/18-37, paras 30-33). This competence, described as "inherent" jurisdiction (*la compétence de la compétence* in French or *Kompetenz-Kompetenz* in German), has been invoked even where not expressly provided by statute, but where a tribunal faces a challenge to the legality of its establishment by the UN Security Council (*see* ICTY, Appeals Chamber, *The Prosecutor v. Duško Tadić aka "Dule"*, IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras 18-19, 22; *see also* STL, Appeals Chamber, Decision on the Defence Appeals Against the Trial Chamber's "Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal", 24 October 2012, Separate and Partially Dissenting Opinion of Judge Baragwanath, paras 52-70).

[70] For commentary on the appropriate response of the Court to circumspect aspects of a Security Council referral, *see* D. R. 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* (2015) p. 38, *referring to* C. Stahn, "The Ambiguities of Security Council Resolution 1422 (2002)", *14 European Journal of International Law 85* (2003), pp. 1, 87 and J. Trahan, "The Relationship Between the International Criminal Court and the U.N. Security Council: Parameters and Best Practices", *24 Criminal Law Forum 417* (2013), fn 172.

of the Court's jurisdiction so as to warrant the consideration of its merits. Accordingly, the second alleged error under the Defence's second ground of appeal is dismissed.

47. The Defence's second ground of appeal is rejected.

C. Third ground of appeal – the effect of Resolution 2559 on Resolution 1593

1. Relevant part of the Impugned Decision

48. In the Impugned Decision, the Pre-Trial Chamber recalled the argument of the Defence that UN Security Council Resolution 2559 (2020),[71] which terminated the mandate of the African Union-United Nations Hybrid Operation in Darfur ("UNAMID") (hereinafter: "Resolution 2559"), would have resulted in invalidating Resolution 1593.[72] Further, the Defence argued that Resolution 2559 would have violated articles 2 and 87(6) of the Statute, respectively referring to the agreement governing the relationship between the Court and the UN and providing that the Court must be able to rely on the cooperation of an international organisation such as the UN.[73]

49. Against these arguments, the Pre-Trial Chamber analysed some of the more pertinent aspects of Resolution 2559 as follows:

> (i) neither the Referral, nor Resolution 1593 are mentioned in Resolution 2559; (ii) the Preamble of Resolution 2559, far from making Resolution 1593 obsolete, explicitly reaffirms '*all its previous resolutions* […] concerning the situation in Sudan' (emphasis added); and (iii) through Resolution 2559, the UNSC, by urging 'the Government of Sudan to fully and swiftly implement the national Plan for Civilian Protection and to protect civilians in Darfur in accordance with international human rights law and international humanitarian law', reaffirms its determination to pursue the aim of protecting civilians in Sudan, notwithstanding the end of the mandate of the UNAMID and including through the United Nations Integrated Transition Assistance Mission in Sudan (the 'UNITAMS'), which counts among its objectives to '[a]ssist, advise and support the Government of Sudan to establish a secure and stable environment […] by providing effective support to national and local authorities on civilian protection […] in the conflict-affected areas [and] supporting the Government of Sudan in implementing the National Plan for Civilian Protection (S/2020/429)'.[74]

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[71] United Nations, Security Council, Resolution 2559, 22 December 2020, S/RES/2559 (2020).
[72] Impugned Decision, para. 11.
[73] Impugned Decision, para. 11.
[74] Impugned Decision, para. 32 (footnotes omitted).

50. Moreover, the Pre-Trial Chamber considered the Statute as a whole, including article 127, and found that the "very idea that the effect of an act triggering the jurisdiction of the Court could be simply taken away by a subsequent act […] runs counter to fundamental and critical features of the system governing the exercise of the Court's jurisdiction".[75] Finally, the Pre-Trial Chamber considered the limited powers of the Security Council to mitigate the effect of an existing referral, as set out in article 16 of the Statute.[76] On this basis, the Pre-Trial Chamber found that the arguments of the Defence were unsupported.

2. The Defence's submissions before the Appeals Chamber

51. The Defence alleges two errors under the third ground of appeal. First, the Defence alleges that the Pre-Trial Chamber committed an error of fact in failing to appreciate its argument that the end of logistical and security support to the Court in Sudan was incompatible with article 2 of the Statute and the UN-ICC Agreement, and that, as a result, the Court is no longer in a position to exercise jurisdiction.[77] Second, the Defence alleges that this alleged error of fact gives rise to an error of law by preventing the Pre-Trial Chamber from considering the impact of the alleged violation of article 2 of the Statute on the validity of the referral effected by Resolution 1593.[78]

52. The Defence also argues that the latter error of law constitutes a "denial of justice" to the extent that the Pre-Trial Chamber rejected arguments without examining them and without reasons.[79]

3. The Prosecutor's submissions before the Appeals Chamber

53. The Prosecutor maintains that the Pre-Trial Chamber did not mischaracterise the Defence's arguments but instead correctly found that the arguments about UNAMID's withdrawal did not raise a jurisdictional question.[80] Furthermore, the Prosecutor argues

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[75] Impugned Decision, para. 33.
[76] Impugned Decision, para. 34.
[77] Appeal Brief, para. 18.
[78] Appeal Brief, para. 19.
[79] Appeal Brief, para. 20.
[80] Prosecutor's Response, para. 20.

that the Defence misinterprets the UN's role in the Court's activities as provided by the UN-ICC Relationship Agreement.[81]

4. Observations of the victims and the Defence's response thereto

54. The OPCV argues that the Pre-Trial Chamber did not misinterpret the Defence's arguments concerning Resolution 2559.[82] The OPCV argues that, "as for financial arrangements, cooperation agreements between the ICC and the UN are the result of subsidiary negotiations which fall outside the scope of both article 13(b) of the Statute and of the relevant Security Council resolutions".[83] It argues that the lack of cooperation would not have any effect on the referral's validity.[84]

55. The LRV argue that the Pre-Trial Chamber did not mischaracterise the Defence's arguments.[85] They also submit that "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".[86]

56. The Defence responds to both victims groups and argues that they do not address the *chapeau* of article 13 of the Statute, which requires that the Court exercise its jurisdiction "in accordance with the provisions of this Statute".[87] The Defence further argues that the relationship between the Court and the UN is part of the legal framework defined by the Statute, which the Court's jurisdiction depends upon.[88]

5. Determination by the Appeals Chamber

57. As with the Defence's second ground of appeal, the Appeals Chamber notes that the Prosecutor challenges the link between the Defence's third ground of appeal and a matter touching upon the jurisdiction of the Court. Indeed, the Appeals Chamber observes that the Defence appears to allege that the Pre-Trial Chamber committed an error of law in failing to consider its submissions "regarding the impact of the violation of article 2 of the Statute on the validity of the referral effected by Resolution 1593".[89]

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[81] Prosecutor's Response, para. 22.
[82] OPCV's Observations, paras 28-29.
[83] OPCV's Observations, para. 31.
[84] OPCV's Observations, para. 32.
[85] LRV's Observations, para. 23.
[86] LRV's Observations, para. 23.
[87] Defence's Consolidated Response, para. 22.
[88] Defence's Consolidated Response, para. 23.
[89] Appeal Brief, para. 19.

However, on appeal the Defence does not make any attempt to explain why the purported violation of article 2 of the Statute – dealing with the relationship between the Court and the United Nations – by a Security Council resolution subsequent to Resolution 1593, would result in the invalidity of the Security Council's referral to the Court of the *Situation in Darfur, Sudan*. For the same reasons expressed under the second ground of appeal, the Appeals Chamber finds that the Defence has not demonstrated how this alleged error of law relates to the jurisdiction of the Court. Therefore, the third ground of appeal is rejected.

58. Finally, the Appeals Chamber observes that the Defence argues that the errors of law alleged under the first, second, and third grounds of appeal also result in a "denial of justice" because the Defence's arguments were dismissed for no reason.[90] As the Appeals Chamber has not found that the Pre-Trial Chamber erred in law under those grounds of appeal, it follows that there is no "denial of justice" as argued by the Defence.

D. Fourth ground of appeal – the application of the principles of *nullum crimen sine lege* and non-retroactivity *ratione personae* of criminal law

1. Relevant part of the Impugned Decision

59. In the Impugned Decision, the Pre-Trial Chamber recalled the argument of the Defence that the Court's jurisdiction in this case is restricted to crimes that, at the time of their commission, were defined as crimes either in Sudan's domestic law or in international treaty and/or customary law applicable in Sudan.[91] The Pre-Trial Chamber determined that article 22(1) of the Statute 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".[92] The Pre-Trial Chamber concluded as follows:

> The case against Mr Abd-Al-Rahman was brought by the Prosecutor before the Court on the basis of provisions detailing the prohibited conduct, which existed and were in force at the time of all of the events underlying the charges. The

[90] Appeal Brief, paras 9, 15, 20.
[91] Impugned Decision, paras 12, 37.
[92] Impugned Decision, para. 39.

> Chamber is satisfied that, under these circumstances, no violation of the principle of legality or non-retroactivity of criminal law can be detected.[93]

60. Finally, the Pre-Trial Chamber reasoned that the Defence's reading of the Statute "would result in restricting [the scope of a Security Council referral] to such an extent as to call into question the very *raison d'être* of that particular triggering mechanism".[94] For these reasons, the Pre-Trial Chamber declined to enter into the question of whether the charges against Mr Abd-Al-Rahman were criminalised at the relevant time by either Sudan's national law or as a matter of customary international law.[95]

2. *The Defence's submissions before the Appeals Chamber*

61. The Defence challenges the Pre-Trial Chamber's determination regarding the principle of legality by alleging three errors. First, the Defence alleges that the Pre-Trial Chamber committed an error of fact in erroneously finding that the Defence's submissions proposed a cumulative test for jurisdiction under the Statute, requiring both that Sudan was a Party to the Statute at the time of the alleged crimes and that the alleged crimes were criminalised under the national law of Sudan or under international law applicable in Sudan.[96] Second, the Defence alleges that the Pre-Trial Chamber erred in law and fact in its finding that non-retroactivity *ratione personae* in article 24(1) of the Statute was satisfied in light of the fact that the alleged crimes occurred between August 2003 and March 2004, after the entry into force of the Statute.[97] The Defence maintains that since Sudan is not a Party to the Statute, and has not deposited its instrument of ratification, acceptance, approval or accession thereto in accordance with article 126(2) of the Statute, "the Statute of the Court did not enter into force for Sudan on 1 July 2002 or on any subsequent date".[98] Third, the Defence alleges that the Pre-Trial Chamber committed an error of law because its interpretation of articles 22(1) and 24(1) of the Statute is at odds with the interpretative rule set out in article 21(3) of the Statute, requiring consistency with human rights norms.[99]

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[93] Impugned Decision, para. 40.
[94] Impugned Decision, para. 41.
[95] Impugned Decision, para. 42.
[96] Appeal Brief, para. 23.
[97] Appeal Brief, para. 24.
[98] Appeal Brief, para. 24.
[99] Appeal Brief, paras 25-26.

62. Finally, the Defence alleges that the error of law results in a "denial of justice" because the Pre-Trial Chamber dismissed the Defence's arguments "out of hand and, therefore, for no reason".[100]

3. *The Prosecutor's submissions before the Appeals Chamber*

63. The Prosecutor argues that the Defence's argument that the Pre-Trial Chamber erred in fact by failing to correctly paraphrase its arguments must be dismissed *in limine*.[101] Moreover, the Prosecutor argues that "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".[102] He describes the circumstances under which a national of a State not party to the Statute may be subject to the Court's jurisdiction.[103] He argues that, as all UN member states have consented to the UN Security Council's Chapter VII powers, the principle of legality is not violated here.[104] He refers to the example of *ad hoc* tribunals, and argues that the existence of a body capable of exercising jurisdiction over crimes may not be known at the time of the commission of the crimes.[105]

64. The Prosecutor submits that the Statute gives express notice that a person may become subject to the Court's jurisdiction, in the circumstances described in articles 12(3) and 13(b) of the Statute.[106] Furthermore, the Prosecutor argues that 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.[107]

65. The Prosecutor submits that the charges fall within the temporal jurisdiction of the Court, and do not violate article 24(1) of the Statute.[108] He stresses that article 11(1) of the Statute sets out the absolute temporal limitation for the Court's jurisdiction, and article 11(2) of the Statute restricts the Court's jurisdiction to crimes committed after the Statute entered into force "for that State".[109] He also maintains that the Defence's

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[100] Appeal Brief, para. 27.
[101] Prosecutor's Response, para. 26.
[102] Prosecutor's Response, para. 30.
[103] Prosecutor's Response, para. 31.
[104] Prosecutor's Response, para. 32.
[105] Prosecutor's Response, para. 33.
[106] Prosecutor's Response, para. 34.
[107] Prosecutor's Response, para. 35.
[108] Prosecutor's Response, paras 36-45.
[109] Prosecutor's Response, paras 38-39.

arguments about article 126(2) of the Statute are misplaced because that provision does not apply to States not party to the Statute and does not relate to the principle of non-retroactivity in article 24(2) of the Statute.[110]

66. Finally, the Prosecutor argues that the charges do not violate the principle of *nullum crimen sine lege*.[111] He argues that the requirement in article 22(1) of the Statute is only that 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 under the Court's jurisdiction.[112]

4. Observations of the victims and the Defence's response thereto

67. The OPCV submits that the Pre-Trial Chamber's reference to the entry into force of the Statute "clearly referred to the Court's jurisdiction *ratione temporis* under articles 11, 22 and 24 of the Statute, *i.e.* 1 July 2002; and not, as argued by the Defence, to the entry into force of the Statute in the State of Sudan".[113] The OPCV also argues that only a referral to the Court from the Security Council in accordance with the statutory framework of the Court is required for the proper exercise of jurisdiction.[114]

68. Finally, the OPCV further submits that in the context of referrals from the Security Council, the entry into force of the Statute in a specific State, as well as the State's consent, is irrelevant for the purposes of jurisdiction.[115] The OPCV argues that the drafters' intentions are clear in delegating ample discretion to the Security Council when referring a given situation to the Court.[116] As long as the Court exercises its power on the basis of written pre-existing criminal norms approved by the States that are party to the Statute, defining prohibited conduct and setting out the related sentence, which cannot be interpreted by analogy, the principle of legality would be satisfied.[117]

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[110] Prosecutor's Response, paras 40-43.
[111] Prosecutor's Response, paras 46-50.
[112] Prosecutor's Response, para. 49.
[113] OPCV's Observations, para. 37 (footnote omitted).
[114] OPCV's Observations, para. 38.
[115] OPCV's Observations, paras 41-42.
[116] OPCV's Observations, paras 43-47.
[117] OPCV's Observations, para. 48.

69. The LRV argue first that the Pre-Trial Chamber does not mischaracterise the Defence's submissions.[118] Second, article 24 of the Statute merely requires the Court not to adjudicate crimes committed before the Statute entered into force on 1 July 2002.[119] Third, the Defence has not shown why the Pre-Trial Chamber erred when it concluded that the entry into force of the Statute provided sufficient notice that a defendant from a State that is not a Party to the Statute could be prosecuted for crimes defined in the Statute.[120] Alternatively, they argue that the crimes were part of customary international law at the relevant time.[121]

70. The Defence responds to the victims groups by arguing that they do not address its specific submissions about article 126(2) of the Statute.[122] The Defence submits that the claim that the crimes listed in the charges are criminalised in customary international law is not "founded on any precise showing that the way the said offences are defined in customary international law satisfies the principle of legality".[123]

5. *Determination by the Appeals Chamber*

(a) First alleged error

71. As regards the alleged error of fact, the Appeals Chamber finds that the Pre-Trial Chamber did not misapprehend the Defence's arguments. It is clear that the Pre-Trial Chamber recalled the Defence's argument about the requirement that the "charged events took place after the entry into force of the Statute" as a precursor to its finding that the crimes must have taken place after the Statute became effective as set out in article 11(1) of the Statute.[124] The Appeals Chamber finds that the Impugned Decision does not present any confusion about whether the Defence had suggested that the Statute must have been in force *vis-à-vis* Sudan. The way in which the Pre-Trial Chamber recalled the Defence's argument does not appear to misrepresent the Defence's position in this regard and, in any event, the ultimate finding correctly recalls the *ratione temporis* requirement in the Statute.

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[118] LRV's Observations, para. 27.
[119] LRV's Observations, para. 27.
[120] LRV's Observations, para. 27.
[121] LRV's Observations, para. 27.
[122] Defence's Consolidated Response, para. 25.
[123] Defence's Consolidated Response, para. 29.
[124] Impugned Decision, para. 37.

72. Regardless, in principle, the Appeals Chamber agrees with the Prosecutor that the failure to correctly paraphrase the Defence's arguments cannot without more constitute an error of fact.[125] Even if the Pre-Trial Chamber had misinterpreted the Defence's argument – which the Appeals Chamber has already determined was not the case – the Defence would still need to show that this misinterpretation then led to an erroneous factual finding. As the Defence has not done so in its Appeal Brief, an error of fact as alleged could not be established. These arguments are therefore rejected.

(b) Second alleged error

73. As regards the alleged error of fact and law, the Appeals Chamber finds that the Defence's argument arises from a misinterpretation of the relevant provisions of the Statute.

74. Article 24(1) of the Statute stipulates that "[n]o person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute". The Appeals Chamber observes that article 24(1) of the Statute makes no distinction based upon whether or not a State is a Party to the Statute; it is a jurisdictional clause providing an ultimate historical date applicable to all cases. Its effect is that no person may be prosecuted under the Statute for conduct occurring before 1 July 2002.

75. Article 126(2), contained in Part 13 of the Statute ("Final clauses"), is meant only to designate the date upon which the obligations under the Statute enter into force for States ratifying, accepting, approving, or acceding to the Statute after the 60th State. The Appeals Chamber observes that when a State ratifies, accepts, approves or accedes after the Statute has already entered into force, generally,[126] the Statute enters into force for that particular State after 60 days. However, article 126(2) of the Statute does not have any effect on the Court's jurisdiction over proceedings arising from conduct taking place in States not party to the Statute, and there is no basis for the interpretation advanced by the Defence whereby article 11(1), contained in Part 2 of the Statute ("Jurisdiction, admissibility and applicable law"), must be interpreted in light of article 126 of the Statute for those States. Rather, the Appeals Chamber considers that the

[125] Prosecutor's Response, para. 26.
[126] *See* article 126(1) of the Statute.

Defence takes article 126 of the Statute out of context and its arguments in this regard are rejected.

(c) Third alleged error

76. As regards the alleged error of law, the Appeals Chamber observes at the outset that the Defence takes issue with a section of the Impugned Decision that relates to the principle of legality, and its corollary – the notion of non-retroactivity of criminal law – ,[127] which is reflected in article 22(1) of the Statute. Although the Defence argues on appeal that the Pre-Trial Chamber erred in its application of both articles 22(1) *and* 24(1) of the Statute, the Appeals Chamber notes that the latter provision, together with article 11 of the Statute, governs only the Court's temporal jurisdiction. Therefore, the Defence misinterprets the Impugned Decision as it relates to article 24(1) of the Statute, and the Appeals Chamber will only consider the Defence's argument that the Pre-Trial Chamber's application of article 22(1) of the Statute constitutes an error of law.

77. As regards the Defence's challenge to the legality of the charges, the Appeals Chamber finds that, as further developed below, the principle of *nullum crimen sine lege* is not violated. The situation referred to the Court by virtue of Resolution 1593 captures serious violations of internationally recognised human rights and humanitarian law. The charges subsequently brought by the Prosecutor against Mr Abd-Al-Rahman draw upon norms that were recognised globally, including in Sudan, and were fully ascertainable at the time of the conflict in Darfur. Although the Pre-Trial Chamber erred in its attenuated evaluation of the legality of the charges, the Appeals Chamber finds, unanimously, that there is no reason to interfere with the proceedings against Mr Abd-Al-Rahman. Judge Ibáñez's reasons for reaching this conclusion are expressed separately, below.

78. The Appeals Chamber first observes that Resolution 1593 triggered the Court's exercise of jurisdiction in this case, pursuant to article 13(b) of the Statute. That resolution was adopted by the Security Council following the report of the International Commission of Inquiry on violations of international humanitarian law and human

[127] *See* Appeal Brief, para. 25, *referring to* Impugned Decision, para. 41.

rights law in Darfur.[128] The Commission reported on the internal armed conflict in Darfur involving several parties, including a militia, the *Janjaweed*, acting "under the authority, with the support, complicity or tolerance of the Sudanese State authorities".[129] According to the report, members of the *Janjaweed* militia had engaged in indiscriminate attacks on civilians, the killing of detained and wounded enemy soldiers, destruction of villages, forced displacement, and sexual violence, among other things.[130] The Commission identified the framework of international human rights and humanitarian laws applicable in Sudan at the time,[131] including the laws relating to internal armed conflict.[132] After finding that the violation of those laws was criminalised under international law,[133] the Commission concluded that war crimes and crimes against humanity had been committed by members of the Government forces and the *Janjaweed* militia.[134]

79. It is in this context that the Security Council, acting under Chapter VII of the Charter of the UN in response to a threat to international peace and security, adopted Resolution 1593. The Appeals Chamber further notes that at the time of the conflict in the Darfur region, Sudan had ratified a number of treaties, human rights instruments, and agreements creating obligations in internal armed conflict.[135] In the view of the Appeals Chamber, it is clear that the referral to the Court of the *Situation in Darfur, Sudan* encompassed violations of binding international obligations carrying a risk of individual criminal liability. Thus, the Defence's argument that "the Court could not

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[128] Letter dated 31 January 2005 from the Secretary-General addressed to the President of the Security Council, attaching the Report of the International Commission of Inquiry on Darfur to the Secretary-General, S/2005/60 (1 February 2005) (hereinafter: "Report").
[129] Report, para. 99. *See also* paras 123-126.
[130] Report, para. 237 *et seq.*
[131] Report, paras 143-171.
[132] Report, paras 156-166.
[133] Report, para. 167.
[134] Report, paras 267, 293-295, 298, 300, 319-321, 332, 360, 379, 391, 410-413.
[135] Report, paras 147-153, 154-155, *referring to, inter alia*, International Covenant on Civil and Political Rights, African Charter on Human and People's Rights, and Geneva Conventions I-IV of 1949. The Appeals Chamber further notes that Sudan signed, but did not ratify, the ICC Statute. *See also* "Presidential Decree (48) 2003 on the Creation of the National Commission of IHL", Presidency of the Republic of Sudan, issued on 8 February 2003, which appoints a commission of experts responsible for, *inter alia*, reviewing national legislation with a view to determining whether it is consistent with the state of international humanitarian law, creating mechanisms for the implementation of those international norms in national legislation, and developing awareness of international humanitarian law.

[…] exercise the jurisdiction that the Security Council had intended to refer to it"[136] is unpersuasive.

80. Having said that, the Appeals Chamber observers that the general legal framework of the Statute, including in particular its jurisdictional as well as its complementarity and cooperation regimes, applies also in situations referred to the Court by the Security Council under article 13(b) of the Statute. The Appeals Chamber in its Judgment in the Jordan re al Bashir Appeal previously emphasised that "[t]he chapeau of article 13 stipulates that, *regardless* of how the Court's jurisdiction is triggered, it must be exercised 'in accordance with [the] Statute'. *This means that, also in case of a referral by the UN Security Council, the Court is bound by the provisions of the Statute*".[137] As such, in cases of a referral by the UN Security Council under article 13(b), the Court shall consider and apply the provisions of the Statute.[138]

81. In this appeal, the Defence alleges that the Pre-Trial Chamber erred in adopting an unduly strained interpretation of the *nullum crimen sine lege* principle in light of human rights law.[139] This principle, found in article 22(1) of the Statute, provides as follows:

> 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.

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[136] Appeal Brief, para. 21. *See The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Judgment in the Jordan Referral re Al-Bashir Appeal, 6 May 2019, ICC-02/05-01/09-397-Anx1-Corr (OA2), Joint concurring opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa (hereinafter: "Joint concurring opinion in the *Al Bashir* OA2 Judgment"), para. 271 *et seq.*, discussing the drafting history and legality of Resolution 1593 in more detail.

[137] *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Judgment in the Jordan Referral re Al-Bashir Appeal, 6 May 2019, ICC-02/05-01/09-397-Corr (OA2), para. 135 (emphasis added). *See also* paragraphs 7 and 149.

[138] *Supra* para. 45; article 19(1) of the Statute, stating, in pertinent part, that "[t]he Court shall satisfy itself that it has jurisdiction *in any case* brought before it" (emphasis added). The Appeals Chamber also notes that the Court will determine a challenge to the admissibility of a case notwithstanding that it follows a referral under article 13(b) of the Statute (*e.g. The Prosecutor v. Saif Al-Islam Gaddafi et al.*, Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled "Decision on the admissibility of the case against Saif Al-Islam Gaddafi", 21 May 2014, ICC-01/11-01/11-547-Red (OA4) and Judgment on the appeal of Mr Saif Al-Islam Gaddafi against the decision of Pre-Trial Chamber I entitled 'Decision on the "Admissibility Challenge by Dr. Saif Al Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute"' of 5 April 2019, 9 March 2020, ICC-01/11-01/11-695 (OA8) (hereinafter: "*Gaddafi* OA8 Judgment"). The Appeals Chamber will also consider arguments regarding the application of article 21(3) of the Statute in this context (*Gaddafi* OA8 Judgment, para. 62).

[139] Appeal Brief, para. 25.

82. On its face, the language of this provision requires only that a person's criminal responsibility under the Statute be based upon statutory crimes and no others. Therefore, as the charges against Mr Abd-Al-Rahman relate directly to crimes that were within the jurisdiction *ratione materiae* of the Court when the conduct took place, the Appeals Chamber considers that there is no violation of article 22(1) of the Statute. Article 13(b) of the Statute indicates that the Security Council may refer a situation to the Prosecutor in which "one or more of such crimes appears *to have been committed*" (emphasis added). In other words, the commission of one or more crimes appears to constitute in fact a prerequisite to a Security Council referral.

83. Notwithstanding the above, the Court must apply and interpret the Statute, including the provisions relevant to the exercise of jurisdiction of the Court, in a manner that is consistent with internationally recognised human rights as set out in article 21(3) of the Statute.[140] In this regard, the Appeals Chamber observes that the doctrine of *nullum crimen sine lege* is fundamental in international law.

84. One of the earliest codifications of this principle in a human rights instrument came soon after the Nuremberg trials, namely in article 11(2) of the Universal Declaration of Human Rights (UDHR):

> No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.[141]

Since this codification in the albeit non-binding UDHR, the principle has found expression in the International Covenant on Civil and Political Rights[142] as well as other human rights instruments, in particular the African Charter of Human and Peoples' Rights[143] and the Arab Charter on Human Rights.[144] Scholars describe the prohibition

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[140] *See* *Lubanga* OA4 Judgment, para. 37. *See also* Palestine Decision on jurisdiction, para. 119 *et seq.*
[141] G.A. Res. 217 (III) A, art. 11(2) (10 December 1948).
[142] ICCPR, art. 15, G.A. Res. 2200A (XXI), 21 GAOR Supp. No. 16, p. 52, UN Doc. A/6316, 993 U.N.T.S. 171 (16 December 1966, entered into force 23 March 1976).
[143] OAU Doc. CAB/LEG/67/3/Rev.5, art. 7(2) (27 June 1981).
[144] Arab Charter on Human Rights, art. 15, reprinted in 12 Int'l Hum. Rts. Rep. 893 (2005) (22 May 2004; entered into force 15 March 2008).

of retroactive criminal laws as a fundamental[145] and non-derogable rule of international law,[146] and some suggest it has attained the level of a *jus cogens* norm.[147]

85. The Appeals Chamber notes that, in order to extend to an accused the guarantee of legality consistent with human rights norms, the principle of *nullum crimen sine lege* generally requires that a court may exercise jurisdiction only over an individual who could have reasonably expected to face prosecution under national or international law.[148] Although the precise language of the principle differs across jurisdictions, the Appeals Chamber notes that courts place particular emphasis on the concepts of "foreseeability" and "accessibility".[149] As to foreseeability, the European Court of Human Rights uses the standard of "reasonableness" in assessing the foreseeability of prosecution,[150] taking into account factors such as the "flagrantly unlawful nature" of the crimes charged and the circumstances of the accused.[151] As to accessibility, the relevant laws must have been ascertainable, in the sense that the laws were sufficiently clear and accessible to the accused.[152]

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[145] W. A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2016) (hereinafter: "W. A. Schabas"), p. 540; J. Nicholson, "Strengthening the Effectiveness of International Criminal Law through the Principle of Legality" in *17 International Criminal Law Review 656* (2017), p. 660; B. Broomhall, "Article 22" in O. Triffterer and K. Ambos (eds) *The Rome Statute of the International Criminal Court: A Commentary* (2015, 3rd ed.) (hereinafter: "B. Broomhall"), p. 950.
[146] K. S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (2009) (hereinafter: "K. S. Gallant"), pp. 206-207.
[147] K. S. Gallant, p. 354 *referring to* T. Meron, *War Crimes Law Comes of Age* (1998), p. 244 and S. Lamb, "*Nullum crimen, nulla poena sine lege* in International Criminal Law", in A. Cassese, *et al*. (eds) *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I (2002) (hereinafter: "S. Lamb"), p. 735.
[148] K. S. Gallant, p. 359: "What the current system of international law does require is that the act have at least been foreseeably criminal – reasonable likely to be held criminal – under existing law applicable to the actor when the act is done".
[149] *See* ECtHR, Grand Chamber, *S.W. v. the United Kingdom*, Application No. 20166/92, Judgment of 22 November 1995, para. 35. *See also* ECCC, Supreme Court Chamber, *Case 001*, Appeal Judgement, 3 February 2012, no. F28, para. 97; Supreme Court Chamber, *Case 002/01*, Appeal Judgement, 23 November 2016, no. F36, para. 761.
[150] *See* ECtHR, Grand Chamber, *Korbely v. Hungary*, Application No. 9174/02, Judgment of 19 September 2008, paras 76-77, 94; *Ould Dah v. France*, Application No. 13113/03, Decision of 17 March 2009, p. 19; *Jorgić v. Germany*, Application No. 74613/01, Judgment of 12 July 2007 (hereinafter: "*Jorgić v. Germany*"), paras 109, 113.
[151] *See* ECtHR, *Šimšić v. Bosnia and Herzegovina*, Application No. 51552/10, Decision of 10 April 2012, para. 24; Grand Chamber, *Kononov v. Latvia*, Application No. 36376/04, Judgment of 17 May 2010, paras 235-238; *Jorgić v. Germany*, para. 113. *See also* *Milutinović et al. Decision on jurisdiction*, para. 42: "Although the immorality or appalling character of an act is not a sufficient factor to warrant its criminalisation under customary international law, it may in fact play a role in that respect, insofar as it may refute any claim by the Defence that it did not know of the criminal nature of the acts".
[152] ECtHR, Grand Chamber, *Vasiliauskas v. Lithuania*, Application No. 35343/05, Judgment of 20 October 2015, para. 162. *See also* IACtHR, *Castillo Petruzzi et al. v. Peru*, Judgment (Merits,

86. In the context of this Court, this test is satisfied if the State in which the conduct occurred is a Party to the Statute or the accused is a national of a State that is a Party to the Statute, which describes the prohibited conduct clearly and defines the crimes entering into force in July of 2002.[153] However, for conduct that takes place on the territory of a State that is not a Party to the Statute, it is not enough that the crimes charged can be found in the text of the Statute.[154] In interpreting article 22(1) of the Statute in a manner consistent with human rights law, a chamber must look beyond the Statute to the criminal laws applicable to the suspect or accused at the time the conduct took place and satisfy itself that a reasonable person could have expected, at that moment in time, to find him or herself faced with the crimes charged.

87. In this case, the Appeals Chamber notes that Mr Abd-Al-Rahman is a national of Sudan, and the conduct he is alleged to have engaged in took place in Sudan. As Sudan

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Reparations and Costs), 30 May 1999, Series C. No. 52, para. 121: "Ambiguity in describing crimes creates doubts and the opportunity for abuse of power, particularly when it comes to ascertaining the criminal responsibility of individuals and punishing their criminal behaviour with penalties that exact their toll on the things that are most precious, such as life and liberty"; SCSL, Appeals Chamber, *The Prosecutor v. Sam Hinga Norman et al.*, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Case No. SCSL-04-14-AR72(E), 31 May 2004, Dissenting Opinion of Justice Robertson, p.10, para. 3: "In every case, the question is whether the defendant, at the time of conduct which was not clearly outlawed by national law in the place of its commission, could have ascertained through competent legal advice that it was contrary to international criminal law"; B. Broomhall, p. 956: "[…] the *nullum cimen sine lege* principle under general international law is normally understood to include an element of notice (permitting an accused to have real or constructive knowledge that certain conduct was prohibited before the act alleged against him or her was committed)"; W. N. Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (2006), p. 238: "The essence of the principle of legality, that an individual may not be prosecuted for conduct she could not know was punishable, requires the law to be so clear as to make its consequences foreseeable".

[153] These criteria constitute the preconditions to the exercise of the Court's jurisdiction, which, however, are not applicable in the case of a Security Council referral under article 13(b) of the Statute. As for the inapplicability of article 12(2) to article 13(b) of the Statute, namely in case of a referral by the UN Security Council, *see* Pre-Trial Chamber I, *The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Al Abd-Al-Rahman ("Ali Kushayb")*, Decision on the Prosecution Application under Article 58 (7) of the Statute, 27 April 2007, ICC-02/05-01/07-1-Corr, para. 16; Pre-Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Fourth Decision on Victims' Participation, 12 December 2008, ICC-01/05-01/08-320, para. 59; Pre-Trial Chamber I, *The Prosecutor v. Omar Hassan Ahmad Al Bashir ("Omar Al Bashir")*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC-02/05-01/09-3, para. 36; Pre-Trial Chamber I, *Situation in the Libyan Arab Jamahiriya*, Decision on the "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi And Abdullah Al Senussi", 27 June 2011, ICC-01/11-01/11-1, para. 9.

[154] *See* T. Souza Dias, "The retroactive application of the Rome Statute in cases of Security Council referrals and ad hoc declarations: an appraisal of the existing solutions to an under-discussed problem" in *16 Journal of International Criminal Justice 65* (2018) (hereinafter: "T. Souza Dias"), pp. 69, 74, 88-89, suggesting that the potential violation of the principle of *nullum crimen sine lege* as a result of referrals under article 13(b) and declarations under article 12(3) of the Statute "seems to have gone unnoticed by the drafters of the Rome Statute and by the ICC itself" (footnotes omitted), but that an apparent conflict of norms can be resolved in part by resorting to article 21(3) of the Statute.

was not a Party to the Statute, the crimes in the Statute were not directly applicable to Mr Abd-Al-Rahman at the relevant time. In the Impugned Decision, the Pre-Trial Chamber determined that there was no violation of article 22(1) of the Statute because "[t]he case against Mr Abd-Al-Rahman was brought by the Prosecutor before the Court on the basis of provisions detailing the prohibited conduct, which existed and were in force at the time of all of the events underlying the charges".[155] In the view of the Appeals Chamber, this is a misapplication of article 22(1) of the Statute when examined in light of article 21(3) of the Statute. The Pre-Trial Chamber's conclusion that it is "unnecessary […] to make a determination as to whether and to what extent, at the time of their commission, the conducts charged against Mr Abd-Al-Rahman were criminalised by either Sudan's national law or as a matter of international customary law"[156] runs afoul of human rights norms and constitutes an error of law.

88. Nevertheless, the Appeals Chamber finds that this error does not produce a result that has a material impact on the ultimate finding of the Pre-Trial Chamber: that the Court may exercise jurisdiction in this case. In applying the foreseeability test to this case, the Appeals Chamber finds that Mr Abd-Al-Rahman was reasonably capable of taking steps to comprehend and comply with his obligations under international law, and he was capable of appreciating the attendant penal consequences. According to the Confirmation Decision, Mr Abd-Al-Rahman spent a considerable part of his career as a non-commissioned officer in the military.[157] During the relevant period Mr Abd-Al-Rahman was the head of the *Janjaweed* militia in the Wadi Salih and Mukjar localities.[158] He had command over other deputies of the militia as well as members of the Sudanese Armed Forces.[159] In March of 2002, before the period covered by the charges, the Sudanese Government and the Sudan People's Liberation Movement formally undertook to comply with their obligations under international law, including common article 3 of the 1949 Geneva Conventions, to "take constant care to protect civilians and civilian objects [against attack]".[160] Part of this undertaking was to create

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[155] Impugned Decision, para. 40.
[156] Impugned Decision, para. 42.
[157] Confirmation Decision, para. 79.
[158] Confirmation Decision, paras 69-70.
[159] Confirmation Decision, para. 71.
[160] Agreement between the Government of the Republic of Sudan and the Sudan People's Liberation Movement to Protect Non-Combatant Civilians and Civilian Facilities from Military Attack, 31 March 2002 (unsigned version available at <peacemaker.un.org/sudan-protection-civilans2002>; signed

a body to investigate and report on incidents involving "serious violations" of the parties' obligations including, but not limited to, grave breaches of the 1949 Geneva Conventions.

89. For these reasons, the Appeals Chamber considers that Mr Abd-Al-Rahman was in a position to understand and comply with his obligations in armed conflict under international law. Moreover, the Appeals Chamber recalls its finding above that the referral of the *Situation in Darfur, Sudan* took place in the wake of serious violations of human rights and humanitarian law that were criminalised under international law at the time. As to the crimes with which Mr Abd-Al-Rahman is charged in this case, the Appeals Chamber notes, generally, that the statutory crimes are a product of a concerted effort to codify the developing state of international law so as to provide the clarity that was lacking in the preceding international tribunals.[161] In principle, the Appeals Chamber considers that the crimes under the Statute were intended to be generally representative of the state of customary international law when the Statute was drafted.[162] This weighs heavily in favour of the foreseeability of facing prosecution for

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version referred to in United Nations, General Assembly, Resolution 57/230 Situation of Human Rights in the Sudan, adopted on 18 December 2002 and published on 27 February 2003, A/RES/57/230 (hereinafter: "UNGA Resolution 57/230"), para. 1(b), and "Report to the President of the United States on the Outlook for Peace in Sudan" from John C. Danforth, Special Envoy for Peace (26 April 2002), p. 14, available in the archives of the US Department of State at <https://2001-2009.state.gov>. *See also* Note by the Secretary-General, transmitting the Interim report of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in the Sudan, A/57/326, 20 August 2002, para. 94: "The Special Rapporteur […] encourages all the parties to the conflict to use all their influence to put an immediate end to violations of human rights and international humanitarian law"; UNGA Resolution 57/230, para. 3(b), urging all parties to the conflict in the Sudan "[…] to ensure that those responsible for violations of human rights and international humanitarian law are brought to justice".

[161] *See* W. A. Schabas, p. 545 ("The [ICTY] identifies such violations with regard not only to previous codifications of the laws of armed conflict, but also with reference to customary international law. The very detailed provisions of articles 6, 7, 8, and 8*bis* of *the Rome Statute* provide a marked contrast. It is unarguable that the bulk of its subject-matter provisions correspond to the state of customary law and, in fact, endeavour to codify it"); S. Lamb, p. 750 ("[…] the principle of legality was relied upon by those seeking to have the crimes within the jurisdiction of the Court defined expressly in the Statute, rather than leaving the Court to interpret general international law"); B. Broomhall, p. 950, fn 3.

[162] *See* L. Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* (2014), pp. 343-344 ("[o]n balance, there is evidence in the drafting history of the Rome Statute, including the Final Act of the Rome Conference, State practice of ratifications, reservations, denunciations and revisions, other conduct of States and Non-States Parties, jurisprudence and doctrinal writings that is suggestive of the crimes in the Rome Statute being generally or largely consistent with custom"); M. Cottier, "Article 8. War Crimes" in K. Ambos and O. Triffterer (eds) *The Rome Statute of the International Criminal Court: A Commentary* (2015), p. 309 ("Delegations informally came to broadly agree on two cumulative criteria to select and define the war crimes to be included under the Draft Statute: First, the conduct concerned must amount to a violation of customary international humanitarian law. Secondly, the violation of humanitarian law concerned must be criminalized under customary international law"). *But see* authors acknowledging that some areas of the Statute exceed or deviate from

crimes within the jurisdiction of this Court, even in relation to conduct occurring in a State not party to the Statute.

90. Thus, taking into account the framework of laws applicable to the conflict in Darfur, the undertakings of the parties to the conflict, and the appreciation for those laws and undertakings that would reasonably belong to a commander in the militia, the Appeals Chamber is satisfied that the risk of international criminal liability was acute to such a degree that it was foreseeable to an officer of Mr Abd-Al-Rahman's rank.

91. The Appeals Chamber recognises that only once a link is drawn with the charges in this case can the question of the legality of the charges be definitively answered. However, on appeal, the Defence has not indicated that the Pre-Trial Chamber erred in confirming jurisdiction in respect of any of the specific charges that Mr Abd-Al-Rahman faces. Rather, the Defence's fourth ground of appeal questions the Pre-Trial Chamber's application of article 22(1) of the Statute as a matter of principle. The Appeals Chamber has determined above that Mr Abd-Al-Rahman was in a position to know that his conduct could attract criminal proceedings relating to crimes under international law, which are represented in the Statute. Thus, notwithstanding the Pre-Trial Chamber's error, the Appeals Chamber considers that this error does not itself have any effect on the charges in this case.

92. In light of the above, as there is currently no basis to question the legality of the charges brought under the Statute in this case, the principle of *nullum crimen sine lege* is not violated. Although the Pre-Trial Chamber erred in its interpretation of article 22(1) when examined in light of article 21(3) of the Statute, this error does not materially affect the Impugned Decision. Finally, as the Appeals Chamber has determined that the error of law was not material, it follows that there was no "denial of justice" as argued by the Defence.[163] Thus, for these reasons, the majority of the Appeals Chamber rejects the Defence's fourth ground of appeal.

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customary international law (*e.g.*, A. Cassese *et al.* (rev.) *Cassese's International Criminal Law* (2013), p. 10; W. A. Schabas, "Customary Law or 'Judge-Made' Law: Judicial Creativity at the UN Criminal Tribunals" in J. Doria *et al.* (eds) *The Legal Regime of the International Criminal Court, Essays in Honour of Professor Igor Blishchenko* (2009), pp. 81-82; T. Souza Dias, pp. 70-71).

[163] Appeal Brief, para. 27.

93. While agreeing with the outcome reached by the majority under the fourth ground of appeal, Judge Ibáñez is unable to subscribe to some fundamental aspects of the reasoning of her esteemed colleagues. Judge Ibáñez is of the view that, in its determination of the matter, the majority of the Appeals Chamber conflates two distinct issues: whether the jurisdictional requirements are met in this case, and the question of whether in exercising its jurisdiction the Court may infringe the guarantees afforded to an accused person, including those contemplated by the principle of *nullum crimen sine lege*. She agrees in this regard with the Pre-Trial Chamber's understanding that the Defence "unduly conflates the issue of jurisdiction and the ones relating to the principle of legality and non-retroactivity of criminal law".[164] In the view of Judge Ibáñez, this confusion, which is apparent in paragraphs 82 and 85 of this judgment, may give the wrong impression that the jurisdiction of the Court depends on the observance of the principle of *nullum crimen sine lege*. In her view, the conflation of these two important but distinct issues also leads to internally inconsistent reasoning.

94. In relation to the jurisdictional question, Judge Ibáñez notes that the Rome Statute was adopted on 17 July 1998 and entered into force on 1 July 2002. The Rome Statute describes in detail the crimes within its subject-matter jurisdiction and the applicable penalties. Judge Ibáñez is of the view that the jurisdiction of the Court pre-dates any UN Security Council resolution adopted pursuant to Chapter VII of the UN Charter. In this case, Resolution 1593 only triggered the Court's jurisdiction and set the temporal and territorial parameters of the investigation (the *Situation in Darfur, Sudan* since 1 July 2002). In these circumstances, Judge Ibáñez considers that the jurisdictional pre-requisites for the Court's jurisdiction are met and there is no need to refer to any other source of law.

95. A related but different question is whether in exercising its jurisdiction in the specific case instituted against Mr Abd-Al-Rahman, the Court may be acting in violation of the principle of legality or non-retroactivity of criminal law. Judge Ibáñez agrees that the Pre-Trial Chamber erred when addressing this question but only to the extent that it did not provide sufficient reasoning for its conclusion that "no violation of the principle of legality or non-retroactivity of criminal law can be detected".[165]

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[164] Impugned Decision, para. 38.
[165] Impugned Decision, para. 40.

However, for the reasons that follow, Judge Ibáñez considers that this error had no material impact on the ultimate outcome. The Statute was adopted in 1998 and, according to its article 125, was open for signature first at the headquarters of the Food and Agriculture Organization of the UN, then in Rome and finally at the UN headquarters. The content of the Statute, including in particular the crimes under its jurisdiction and the applicable penalties, has been public since its adoption. Furthermore, Sudan participated in the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.[166] As correctly noted by her esteemed colleagues in a footnote, Judge Ibáñez points out that although Sudan has not ratified the Rome Statute, it did sign it on 8 September 2000.[167] Therefore the law was public and known for Sudan and the accused. In these circumstances, Judge Ibáñez considers that the principle of legality is not violated in these proceedings, nor is any human right of the accused. Given the sufficiency of the Statute to address any possible concerns regarding a potential infringement of the principle of *nullum crimen sine lege*, Judge Ibáñez finds it unnecessary to engage in a discussion as to whether the crimes within the jurisdiction of the Court existed also as customary international law. Nonetheless, and for the sake of argument, she recalls that "the prohibition to commit international crimes which violate the core human rights is also a *ius cogens* norm."[168] For these reasons, any further assessment as to foreseeability or accessibility of the norms is unnecessary.

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[166] *See* Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 17 July 1998, A/CONF.183/10.

[167] UN Treaty Collection, "Rome Statute of the International Criminal Court", Declarations and Reservations (1998), pp. 13, 15 n. 10.

[168] *See* Separate and Concurring Opinion of Judge Luz del Carmen Ibáñez Carranza on the Judgment on the appeal of Mr Saif Al-Islam Gaddafi against the decision of Pre-Trial Chamber I entitled 'Decision on the "Admissibility Challenge by Dr. Saif Al Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute"' of 5 April 2019, 9 March 2020, ICC-01/11-01/11-695-AnxI (OA8), para. 47; Joint concurring opinion in the *Al Bashir* OA2 Judgment, para. 207 *et seq*.

VI. APPROPRIATE RELIEF

96. In an appeal pursuant to article 82(1)(a) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed.[169] In the present case it is appropriate to confirm the Impugned Decision.

Done in both English and French, the English version being authoritative.

Judge Piotr Hofmański
Presiding

Judge Luz del Carmen Ibáñez Carranza

Judge Marc Perrin de Brichambaut

Judge Solomy Balungi Bossa

Judge Gocha Lordkipanidze

Dated this 1st day of November 2021

At The Hague, The Netherlands

[169] *See* Rule 158(1) of the Rules of Procedure and Evidence.