

1 International Criminal Court

2 Appeals Chamber

3 Situation: Darfur, Sudan

4 In the case of The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (Ali

5 Kushayb) - ICC-02/05-01/20

6 Presiding Judge Piotr Hofmański, Judge Luz del Carmen Ibáñez Carranza, Judge

7 Perrin de Brichambaut, Judge Solomy Balungi Bossa and Judge Gocha Lordkipanidze

8 Appeals Judgment - Courtroom 3

9 Monday, 1 November 2021

10 (The hearing starts in open session at 4.01 p.m.)

11 THE COURT USHER: [16:01:43] All rise. The International Criminal Court is now
12 in session. Please be seated.

13 PRESIDING JUDGE HOFMAŃSKI: [16:02:05] Good afternoon.

14 Would the court officer please call the case.

15 THE COURT OFFICER: [16:02:13] Good afternoon, Mr President.

16 This is the situation in Darfur, Sudan, in the case of The Prosecutor versus Ali

17 Muhammad Ali Abd-Al-Rahman ("Ali Kushayb"), case number ICC-02/05-01/20.

18 And for the record, we are in open session.

19 PRESIDING JUDGE HOFMAŃSKI: [16:02:35] Thank you very much.

20 I am Judge Piotr Hofmański, presiding in this appeal arising from the case of the

21 Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman. My fellow judges in this appeal

22 are Judge Luz del Carmen Ibáñez Carranza, Judge Perrin de Brichambaut, Judge

23 Solomy Balungi Bossa and Judge Gocha Lordkipanidze.

24 May I asked parties to introduce themselves for the record please, starting with the

25 Defence.

1 Mr Laucci.

2 MR LAUCCI: [16:03:15](Interpretation) Good afternoon, Mr President. On the
3 Defence side today before you, Mr Iain Edwards, co-counsel from a remote location.
4 We have Ms Nina Guilloux, analyst; Mohamed Manaa, linguistic assistant; Camille
5 Divet also in charge of analysis of evidence; Vanessa Grée, legal officer; and myself,
6 Cyril Laucci, lead counsel.

7 PRESIDING JUDGE HOFMAŃSKI: [16:04:04] (Microphone not activated).

8 MS BRADY: [16:04:07] Good afternoon, your Honour. My name is Helen Brady,
9 I'm the senior appeals counsel for the Prosecution, and I'm here today with appeals
10 counsels, Meritxell Regue, Mr Matthew Cross and Matteo Costi. Thank you.

11 PRESIDING JUDGE HOFMAŃSKI: [16:04:27] Thank you very much.

12 And the Legal Representative of Victims.

13 MS MASSIDDA: [16:04:31] Good afternoon, your Honour. For the victims at the
14 time of the appeal represented by the Office of Public Counsel for victims, I am
15 appearing today, I am Paolina Massidda.

16 I see that the legal representative currently appointed at trial is also connected; so I
17 will give the floor to -- with you leave to Ms Von Wistinghausen to introduce herself.

18 PRESIDING JUDGE HOFMAŃSKI: [16:04:50] Please, do it.

19 MS VON WISTINGHAUSEN: [16:04:51] Yes, good afternoon, Mr President.

20 My name is Natalie von Wistinghausen and I am appearing remotely for the
21 Common Legal Representatives of Victims. Thank you.

22 PRESIDING JUDGE HOFMAŃSKI: [16:05:02] Thank you very much.

23 For the record, I note that Mr Abd-Al-Rahman participates from a remote
24 location -- oh, I'm sorry. Sorry, it was in the notes. He is participating in the
25 courtroom.

1 Today, the Appeals Chamber will deliver its judgment in the appeal of
2 Mr Abd-Al-Rahman against the decision of the Pre-Trial Chamber II, entitled,
3 "Decision on the Defence '*Exception d'incompétence*'".

4 This is a non-authoritative summary of the Appeals Chamber's written judgment in
5 the appeal. The latter will be notified after this hearing.

6 I will now briefly explain the context of this appeal.

7 On 31 March 2021, the United Nations Security Council adopted Resolution 1593,
8 referring to the Prosecutor of the Court the situation in Darfur, Sudan.

9 On 27 April 2007, Pre-Trial Chamber I issued a warrant of arrest against
10 Mr Abd-Al-Rahman for crimes against humanity and war crimes allegedly committed
11 during the armed conflict in Darfur, Sudan, between August 2003 and March 2004.
12 Mr Abd-Al-Rahman surrendered himself to the Court and appeared before Pre-Trial
13 Chamber II on 9 June 2020.

14 On 15 March 2021, the Defence team for Mr Abd-Al-Rahman submitted its
15 application challenging the jurisdiction of the Court in the present case, pursuant to
16 Article 19(2)(a) of the Statute.

17 On 17 May 2021, the Pre-Trial Chamber issued its decision on the Defence's
18 jurisdictional challenge. I will refer to this decision as the impugned decision. In
19 the impugned decision, the Pre-Trial Chamber rejected the jurisdictional challenge
20 and affirmed that the Court had jurisdiction over the present case.

21 The Defence appealed the impugned decision, raising four grounds of appeal, which I
22 will address in a moment. The Prosecutor and the victims' groups opposed the
23 appeal.

24 On 9 July 2021, the Pre-Trial Chamber confirmed the charges. The case was then
25 transferred to Trial Chamber I and the trial was set for 5 April 2022.

1 I will now address the merits of the appeal.

2 Under the first ground of appeal, the Defence challenges the Pre-Trial Chamber's
3 interpretation of the term "situation" in the context of Article 13 of the Statute.

4 First, the Defence alleges that the Pre-Trial Chamber erred in law in finding that
5 a "situation" may be defined by "the scope of the criminal action allegedly committed
6 within it", thus confusing the term "situation" with "case".

7 The Appeals Chamber finds that the Pre-Trial Chamber did not misinterpret the legal
8 definition of a situation. To the contrary, the Appeals Chamber notes that the word
9 situation does not have a fixed definition in the Statute, and a review of the language
10 in Articles 13 and 14 of the Statute reveals that the word is used loosely, specifically
11 with a view to extending enough flexibility to the Prosecutor to investigate
12 independently and impartially.

13 The Pre-Trial Chamber explained that a "situation" is different from a "case".

14 A "situation" is generally defined in terms of temporal, territorial, and, in some cases,
15 personal parameters. The Appeals Chamber finds no error in the reasons given by
16 the Pre-Trial Chamber.

17 Also under the first ground of appeal, the Defence alleges that the Pre-Trial Chamber
18 committed an error of fact in failing to appreciate that crimes within the Court's
19 jurisdiction occurred not only in Darfur, but in the rest of the territory of Sudan as
20 well. The Appeals Chamber is not persuaded by this argument. Rather, the
21 Appeals Chamber finds that the impugned decision does not in any way deny the
22 suffering of victims of crimes in other regions of Sudan.

23 Finally, the Defence alleges that the Pre-Trial Chamber committed an error of fact in
24 interpreting the submissions of the Defence as proposing that a "situation" referred to
25 the Court must encompass a geographic area corresponding to the territory of a State.

1 However, the Defence does not explain how this alleged misinterpretation of its
2 arguments results in an erroneous factual finding. Therefore, the Appeals Chamber
3 rejects this alleged error, and for all of the foregoing reasons, the Appeals Chamber
4 rejects the first ground of appeal.

5 Under the second ground of appeal, the Defence submits that the Pre-Trial Chamber
6 committed an error of fact in failing to appreciate that the Defence limited its
7 submissions to challenging the legality of Resolution 1593. However, the
8 Appeals Chamber is not persuaded that the Pre-Trial Chamber misunderstood the
9 Defence's submissions. The Pre-Trial Chamber made it clear that the link between
10 the Defence's arguments and the matter of jurisdiction was weak.

11 Also under the second ground of appeal, the Defence alleges that the Pre-Trial
12 Chamber committed an error of law in failing to find that an alleged incompatibility
13 of Resolution 1593 with the provisions of the Statute governing the financing of the
14 Court's activities would remove the basis for jurisdiction in this case.

15 The Prosecutor challenges the link between the Defence's submissions and the
16 question of the Court's jurisdiction. The Appeals Chamber considers that the
17 Prosecutor's response is relevant to whether granting the second ground of appeal
18 could have any effect on the outcome of the impugned decision, which confirms the
19 Court's jurisdiction in this case.

20 Indeed, the Appeals Chamber recalls that there are four aspects of jurisdiction
21 expressed in the Statute: Subject matter jurisdiction, personal jurisdiction, territorial
22 jurisdiction, and temporal jurisdiction. The Appeals Chamber finds that the funding
23 obligation of Article 115(b) of the Statute, relating to the financing of the activities of
24 the Court arising from a referral by the Security Council, does not bear any
25 relationship with these four aspects of the Court's jurisdiction.

1 Moreover, in order to draw a link between the Defence's arguments and the Court's
2 jurisdiction, the Appeals Chamber must first accept the premise advanced by the
3 Defence that the alleged incompatibility of a secondary aspect of Resolution 1593 with
4 the Statute could invalidate the referral as a whole. However the Appeals Chamber
5 considers that even if, *arguendo*, the impugned part of the resolution is not consistent
6 with the Statute, that inconsistency would not strike at the heart of the resolution to
7 such a degree that it would be appropriate, under the circumstances, to completely
8 discard the objective of the resolution as intended. Therefore, the Defence has not
9 established an error.

10 For these reasons, the Appeals Chamber rejects the Defence's second ground of
11 appeal.

12 Under the Defence's third ground of appeal, the Defence refers to the recent
13 resolution of the Security Council to end logistical and security support to the Court
14 in Sudan, and submits that this is incompatible with Article 2 of the Statute and the
15 UN-ICC Agreement. As a result, the Defence argues that the Court is no longer in
16 a position to exercise jurisdiction.

17 As with the Defence's second ground of appeal, the Prosecutor challenges the link
18 between the Defence's third ground of appeal and a matter touching upon the
19 jurisdiction of the Court.

20 Indeed, the Appeals Chamber observes that the Defence appears to allege that the
21 Pre-Trial Chamber committed an error of law in failing to consider its submissions
22 "regarding the impact of the violation of Article 2 of the Statute on the validity of the
23 referral effected by Resolution 1593". However, on appeal, the Defence does not
24 make any attempt to explain why the details of the relationship between the Court
25 and the United Nations is relevant to the validity or invalidity of the

1 Security Council's referral to the Court of the situation in Darfur, Sudan.

2 For the same reasons expressed under the second ground of appeal, the

3 Appeals Chamber finds that the Defence has not demonstrated how this alleged error
4 of law relates to the jurisdiction of the Court. Therefore, the third ground of appeal
5 is rejected.

6 Finally, under the fourth ground of appeal, the Defence challenges the Pre-Trial
7 Chamber's determination regarding the principle of legality.

8 First, the Defence alleges that the Pre-Trial Chamber committed an error of fact in
9 erroneously finding that the Defence's submissions proposed a cumulative test for

10 jurisdiction under the Statute, requiring both that Sudan was a party to the Statute at
11 the time of the alleged crimes and that the alleged crimes were criminalised under the
12 national law of Sudan or under international law applicable in this country.

13 However, the Appeals Chamber finds that the Pre-Trial Chamber did not
14 misapprehend the Defence's arguments. The Appeals Chamber finds that the
15 impugned decision does not present any confusion about whether the Defence had
16 suggested that the Statute must have been in force vis-à-vis Sudan. The way in
17 which the Pre-Trial Chamber recalled the Defence's argument does not appear to
18 misrepresent the Defence's position in this regard, and, in any event, the Pre-Trial
19 Chamber's ultimate finding correctly recalls the *ratione temporis* requirement in the
20 Statute.

21 Also under the fourth ground of appeal, the Defence alleges that the Pre-Trial
22 Chamber erred in law and fact in its finding that non-retroactivity *ratione personae* in
23 Article 24(1) of the Statute was satisfied in light of the fact that the alleged crimes
24 occurred between August 2003 and March 2004, after the entry into force of the
25 Statute. The Defence maintains that since Sudan is not a party to the Statute, and has

1 not deposited its instrument of ratification, acceptance, approval or accession thereto
2 in accordance with Article 126(2) of the Statute, the Statute did not enter into force for
3 Sudan on 1 July 2002 or on any subsequent date.

4 The Appeals Chamber finds that the Defence's argument arises from
5 a misinterpretation of the relevant provisions of the Statute. Article 126(2) of the
6 Statute is meant only to designate the date upon which the obligations enter into force
7 for States acceding to the Statute. However, Article 126(2) of the Statute does not
8 have any effect on the Court's jurisdiction over proceedings arising from the conduct
9 taking place in States not party to the Statute, and there is no basis for the
10 interpretation advanced by the Defence whereby Article 11(1) of the Statute must be
11 interpreted in light of Article 126 of the Statute for those States. Rather, the
12 Appeals Chamber considers that the Defence takes Article 126 of the Statute out of
13 context and its arguments in this regard are rejected.

14 Finally, the Defence alleges that the Pre-Trial Chamber committed an error of law
15 because its interpretation of Articles 22(1) and 24(1) of the Statute is at odds with the
16 interpretative rule set out in Article 21(3) of the Statute, requiring consistency with
17 human rights norms.

18 In this regard, the Appeals Chamber first observes that Resolution 1593 was adopted
19 by the Security Council following the report of the International Commission of
20 Inquiry on violations of international humanitarian law and human rights law in
21 Darfur. The Appeals Chamber further notes that at the time of the conflict in the
22 Darfur region, Sudan had ratified a number of treaties, human rights instruments,
23 and agreements creating obligations in internal armed conflict. In the view of the
24 Appeals Chamber, it is clear that the referral to the Court of the situation in Darfur,
25 Sudan, encompasses violations of binding international obligations carrying a risk of

1 individual criminal liability.

2 Having said that, the Appeals Chamber notes that, in this appeal, the Defence alleges
3 that the Pre-Trial Chamber erred in adopting an unduly strained interpretation of the
4 *nullum crimen sine lege* principle in light of the human rights law.

5 This principle, found in Article 22(1) of the Statute, provides as follows:

6 "A person shall not be criminally responsible under this Statute unless the conduct in
7 question constitutes, at the time it takes place, a crime within the jurisdiction of the
8 Court."

9 On its face, the language of this provision requires only that a person's criminal
10 responsibility under the Statute be based upon statutory crimes and no others.

11 However, the Court must apply and interpret the Statute, including the provisions
12 relevant to the exercise of the Court's jurisdiction, in a manner that is consistent with
13 internationally recognised human rights as set out in Article 21(3) of the Statute.

14 In this regard, the Appeals Chamber observes that in order to extend to an accused
15 the guarantee of legality consistent with human rights norms, the principle of *nullum*
16 *crimen sine lege* generally requires that a court may exercise jurisdiction only over an
17 individual who could have reasonably expected to face prosecution under national or
18 international law.

19 In the context of this Court, this test is satisfied if the State in which the conduct
20 occurred is a party of the Statute or the accused is a national of a State that is a party
21 to the Statute, which describes the prohibited conduct clearly and defines the crimes
22 entering into force in July of 2002. However, for conduct that takes place on the
23 territory of a State that is not a party to the Statute, it is not enough that the crimes
24 charged can be found in the text of the Statute. In interpreting Article 22(1) of the
25 Statute in a manner consistent with human rights law, a Chamber must look beyond

1 the Statute to the criminal laws applicable to the suspect or accused at the time the
2 conduct took place and satisfy itself that a reasonable person could have expected, at
3 that moment in time, to find him or herself faced with the crimes charged.

4 In this case, the Appeals Chamber notes that Mr Abd-Al-Rahman is a national of
5 Sudan, and the conduct he is alleged to have engaged in took place in Sudan. As
6 Sudan was not a party to the Statute, the crimes in the Statute were not directly
7 applicable to Mr Abd-Al-Rahman at the relevant time.

8 In the impugned decision, the Pre-Trial Chamber determined that there was no
9 violation of Article 22(1) of the Statute because the case against Mr Abd-Al-Rahman
10 was brought by the Prosecutor on the basis of the provisions detailing the prohibited
11 conduct in the Statute. In the view of the majority of the Appeals Chamber, this is
12 a misapplication of Article 22(1) when examined in light of Article 21(3) of the Statute.
13 The Pre-Trial Chamber's conclusion that it is unnecessary to make a determination as
14 to whether the crimes charged against Mr Abd-Al-Rahman were criminalised by
15 either Sudan's national law or as a matter of international customary law runs afoul of
16 human rights norms and constitutes an error of law.

17 Nevertheless, the Appeals Chamber finds that this error does not produce a result
18 that has a material impact on the ultimate finding of the Pre-Trial Chamber: that the
19 Court may exercise jurisdiction in this case.

20 For the reasons explained in detail in today's written judgment, the Appeals Chamber
21 finds that Mr Abd-Al-Rahman was reasonably capable of taking steps to comprehend
22 and comply with his obligations under international law and he was capable of
23 appreciating the attendant penal consequences.

24 Moreover, as mentioned earlier, the referral of the situation in Darfur, Sudan, took
25 place in the wake of serious violations of human rights and humanitarian law that

1 were criminalised under international law at the time. As to the crimes with which
2 Mr Abd-Al-Rahman is charged in this case, the Appeals Chamber considers that the
3 crimes under the Statute were intended to be generally representative of the state of
4 customary international law when the Statute was drafted. This weighs heavily in
5 favour of the foreseeability of facing prosecution for crimes within the jurisdiction of
6 this Court, even in relation to conduct occurring in a State not party to the Statute.
7 Thus, taking into account the framework of laws applicable to the conflict in Darfur,
8 the undertakings of the parties to the conflict, and the appreciation for those laws and
9 undertakings that would reasonably belong to a commander of the militia, the
10 Appeals Chamber is satisfied that the risk of international criminal liability was acute
11 to such a degree that it was foreseeable to an officer of Mr Abd-Al-Rahman's rank.
12 For these reasons, the Appeals Chamber concludes that the principle of *nullum crimen*
13 *sine lege* is not violated. As a result, although the Pre-Trial Chamber erred in its
14 interpretation of Article 22(1) when examined in light of Article 21(3) of the Statute,
15 this error does not materially affect the impugned decision.
16 Thus, the majority of the Appeals Chamber rejects the fourth ground of appeal.
17 Judge Ibáñez expresses her separate views concerning the fourth ground of appeal in
18 today's judgment. While agreeing with the outcome reached by the majority, in her
19 view, the jurisdiction of the Court over the conduct in this case predates Resolution
20 1593, which only triggered the Court's jurisdiction.
21 Therefore, under these circumstances, Judge Ibáñez considers that the jurisdictional
22 requirements are met and there is no need to refer to any other sources of law.
23 For these reasons -- and for the reasons stated more fully in the written
24 judgment -- the Appeals Chamber unanimously rejects the appeal and confirms the
25 impugned decision.

- 1 And this brings us to the end of the summary of the Appeals Chamber's judgment.
- 2 I would like to thank the court reporters, interpreters and other Registry staff for their
- 3 valuable assistance today in holding this hearing.
- 4 The hearing is adjourned.
- 5 THE COURT USHER: [16:31:22] All rise.
- 6 (The hearing ends in open session at 4.31 p.m.)