

Jurisdiction Challenges Rejected in Al-Rahman case by ICC Appeals Chamber

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By: Dr Joseph Rikhof

On November 1, 2021, the Appeals Chamber (AC) of the ICC upheld on appeal the rejection of several jurisdictional challenges, which was issued by the Pre-Trial Chamber (PTC) on May 17, 2021 (see here for the AC decision and here for the PTC decision) in a case where the Security Council of the United Nations (UNSC) had referred the situation of Darfur to the ICC as a result of resolution 1593. (see here)

Introduction

While the main challenge dealt with principle of *nullum crimen sine lege* or the retroactivity of certain provisions in the *Rome Statute*, there were also several other jurisdictional issues discussed in the judgment.

The *first challenge* dealt with the meaning of the term "situation" in article 13(b) of the Rome Statute, which states:

"the Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: … (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations. (see here)"

The PTC had indicated that a situation is "generally defined in terms of temporal, territorial and in some cases personal parameters." (para 25 of the PTC decision, para 16 of AC decision) and 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." (para 26 of the PTC decision and para 16 of the AC decision). As a result, the PTC had found it not necessary to determine the legal status of Darfur at the relevant time as "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." (para 27 in the PTC decision, para 17 in AC decision) This was contrary to the defence argument that the situation in this case should encompass the entire territory of Sudan. (para 20 of the AC decision)

The AC was of the view that the word "situation" was used to provide the prosecutor with sufficient flexibility to investigate independently and impartially and that "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." (para 25) As a result, it agreed with the scope of the definition used by the PTC and its decision not to address the defence's argument. (para 26)

The *second challenge* addressed the compatibility of UNSC Resolution 1593 with articles 13(b) and 115(b) of the *Rome Statute*. The argument by the defence was that paragraph 7 of that resolution called for State Parties to the *Rome Statute* to be responsible for any expenses related to the referral to the ICC and not the United Nations, which would be in violation of article 115(b), which states that the UN is responsible for such expenses; since the ICC has to operate in accordance with its Statute, this violation would affect its jurisdiction under article 13(b). (para 30 and 32 of the AC decision) This argument was rejected in a summary fashion by the PTC. (paras 11 and 29 of the PTC decision, para 30-31 of the AC decision)

The starting point of the AC in setting out the jurisdiction of the court was that there are four aspects related to this issue in the Rome Statute, namely subject matter jurisdiction; jurisdiction over persons; territorial jurisdiction; and temporal jurisdiction (para 42). The funding obligation in article 115(b) has

no relationship to these four aspects of the jurisdiction since the core provisions with respect to jurisdiction are set out in another part of the *Statute*, namely in articles 5-21. (para 43) While a UNSC resolution referring a case to the ICC should be tested for possible jurisdictional deficiencies, a possible violation in such a resolution related to funding would by itself not sufficient to annul the entire resolution dealing with violations of international humanitarian and human rights law. (paras 44-46)

The *third challenge* called into question whether a subsequent UNSC resolution, which terminated the mandate of the international peacekeeping mission in Darfur, which had been also established under resolution 1593, had as result the invalidation of the entire resolution 1593 (para 48). This was rejected by the PTC based on the reading of the subsequent resolution (UNSC Resolution 2559), which clearly did no call for such an approach (paras 48-50) On appeal this challenge was rejected because the defence did not provide any explanation why a subsequent UNSC resolution, which might affect an earlier UNSC resolution, has any effect on the jurisdiction of the court as discussed in respect to the previous challenge. (para 57)

The *nullum crimen sine lege* argument

This argument is based on two provisions in the *Rome Statute*, namely articles 22(1) and 24(1), which say respectively that “a person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court” and “no person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.”

The defense argument before the Pre-Trial Chamber was that these words mean that it would be necessary not only that the events charged took place after the entry into force of the *Statute*, but also that, at the time of their commission, the relevant crimes were already criminalised and punished as such either by the criminal laws of the state, which would ordinarily have jurisdiction, or as a matter of customary international law. (para 37 of the PTC decision) This argument was dismissed by the PTC again in a cursory manner by saying that the defence conflated the issue of jurisdiction and the principle of non-retroactivity (para 38) and that the *Statute* and the *Elements of Crime document* (see here) provide sufficient information for a potential accused to know which acts might amount to international crimes (para 39), which was also the case in the situation at hand. (para 40)

Before the Appeals Chamber, the defence’s main argument was that this general approach is not sufficient in a situation where a person is a national of a country, which is not a party to the *Rome Statute*, like Sudan, while it also violates the interpretative rule of article 21(3) of the *Statute*, which states that “the application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights … .” (para 61)

The Appeals Chamber decided to only address the issue of retroactivity with respect to article 22(1) as article 24(1) only deals with a subset of jurisdiction, namely temporal jurisdiction rather than jurisdiction as a whole. (para 76) While the AC did not agree with the PTC reasoning it reached the

same conclusion as the PTC in that there was no violation of the principle of retroactivity. (paras 77, 87-88 and 92)

Its starting point in coming to this result was “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.” (para 80) However, it then went on to make a distinction between the application of the Statute to State Parties and non-State Parties in that, for the former the approach used by the PTC, namely that the text of the Statute is sufficient for nationals to know the contents of criminal behaviour is sufficient, but that a further analysis, which is based on human rights law, is needed for nationals of non-State Parties. (para 86) This further analysis requires an examination by the court that “the criminal laws [were] 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.” (para 86)

This formula of what a reasonable person could have expected to know was derived by the AC from international human rights law, specifically the jurisprudence of the European Court of Human Rights, which has interpreted this doctrine of *nullum crimen sine lege* and which has indicated that essential features of this doctrine are the concepts of foreseeability and accessibility. According to the AC, this jurisprudence has interpreted those terms as follows:

“As to foreseeability, the European Court of Human Rights uses the standard of “reasonableness” in assessing the foreseeability of prosecution, taking into account factors such as the “flagrantly unlawful nature” of the crimes charged and the circumstances of the accused. As to accessibility, the relevant laws must have been ascertainable, in the sense that the laws were sufficiently clear and accessible to the accused. (para 85; for a discussion of this jurisprudence, see https://globaljustice.queenslaw.ca/news/the-european-court-of-human-rights-and-international-crimes)”

In applying this test to the case at hand, the AC was of the view that Al-Rahman had reasonably been capable of taking steps to comprehend and comply with his obligations under international law while he had also been capable of appreciating the penal consequences of these obligation because of his lengthy time spent in the Sudanese army, including being a commander, and because of the fact that the Sudanese government had formally undertaken to comply with international law, including the 1949 *Geneva Conventions*, regulating the conduct during armed conflict. (paras 88 and 90-91) In addition, the AC was of the view that:

“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. 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. This

weighs heavily in favour of the foreseeability of facing prosecution for crimes within the jurisdiction of this Court, even in relation to conduct occurring in a State not party to the Statute. (para 89)"

While all judges of the AC agreed that the PTC legal conclusion should be upheld, one judge, Judge Ibáñez, agreed with the PTC that the notions of jurisdiction and non-retroactivity had been unduly conflated by both the defences and her colleagues on the bench (para 93). In her view, the fact the *Rome Statute* came into force in 2002 and had predated any of the UNSC resolutions referring cases to the ICC, including UNSC resolution 1593, the jurisdictional prerequisites were met and that there was no reason to refer any other sources of law. (para 94)

According to her "the 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." (para 95) However, if the issue of legality had to be addressed she agreed again with the PTC that reference to the *Statute* is sufficient since Sudan had participated in the diplomatic conference establishing the ICC and had signed it in 2000, which means that the *Statute* was public and known in Sudan as well as to the accused; this would be sufficient to allay any concern re the principle of *nullum crimen sine lege* without any further discussion of foreseeability or accessibility of knowledge of these crimes. (para 95)

Conclusion

The application of the *Rome Statute* to non-State parties is possible but complicated. This was already clear during the negotiations in Rome in 1998 as well with respect to the provisions related to aggression, which were negotiated in Kampala in 2010 resulting in articles 8bis and especially 15bis reflecting this complicated relationship. (see here while for a discussion see https://globaljustice.queenslaw.ca/news/analysis-activating-the-jurisdiction-of-the-international-criminal-court-over-the-crime-of-aggression and https://globaljustice.queenslaw.ca/news/the-crime-of-aggression-a-political-compromise-resulting-in-an-ambiguous-and-complex-state-of-the-law) It is very useful for the Appeals Chamber to step in and clarify this relationship further as it has done with respect to the issues of immunity of heads of state on non-State parties in the Jordan case (see https://globaljustice.queenslaw.ca/news/obligation-de-cooperation-et-immunites-dans-laffaire-al-bashir-vers-une-infirmation-par-la-chambre-dappel, https://globaljustice.queenslaw.ca/news/no-head-of-state-immunity-for-al-bashir-in-jordan and https://globaljustice.queenslaw.ca/news/immunity-and-impunity-personal-immunities-and-the-international-criminal-court) and now with the issue of jurisdiction for UNSC resolutions as they apply to non-State parties.

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