CASE NOTE

PROSECUTOR V ABD-AL-RAHMAN: HUMAN RIGHTS, CUSTOMARY INTERNATIONAL LAW AND THE ICC'S NON-RETROACTIVITY PROBLEM

ASAD G KIYANI*

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I INTRODUCTION

In their critical analysis of individual criminal responsibility in internal armed conflicts, Antony Anghie and BS Chimni reflect on the background questions that bedevil international criminal tribunals.[1] They point out two dangers attendant in the creation of new law in the domains of international humanitarian law ('IHL') and international criminal law ('ICL'). First, that the institutions applying, interpreting and developing these bodies of law may be of questionable provenance. The establishment of the International Criminal Tribunal for the Former Yugoslavia ('ICTY') and International Criminal Tribunal for Rwanda ('ICTR') by the United Nations Security Council ('UNSC') may have been 'attractive' options, but their creation short-circuited the participatory and negotiated nature of international law.[2] While Anghie and Chimni do not refer to this point, the UNSC's decisions effectively pre-answered the question asked in *Prosecutor v Tadić* ('*Tadić*'):[3] whether the ICTY had the authority to call the defendant to account. It is hard to see how else the Tribunal could have ruled other than that it had been legitimately established and had jurisdiction over the

* LLB (Osgoode), LLM (Cambridge), PhD (UBC). The author is a recipient of the Antonio Cassese Prize for International Criminal Law Studies and the Hessel Yntema Prize from the American Society of Comparative Law. He is an Assistant Professor in the Faculty of Law at the University of Victoria (Canada). Email: akiyani@uvic.ca.

1 Antony Anghie and BS Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts' (2003) 2(1) *Chinese Journal of International Law* 77.

2 Ibid 92–3.

3 *Prosecutor v Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-A, 2 October 1995) ('*Tadić*').

defendant. To do otherwise would have been to rule against not a decision it had made or a party to a case, but its own existence. The Tribunal was a fact on the ground; it could not deny itself and the jurisdictional question in *Tadić* could realistically only be answered one way.

The second danger is that tribunals also interpret international law in ways that can radically reshape what appears to be settled law while also relying on dubious interpretive techniques. The ICTY was further challenged on the basis that it could not try the accused for crimes allegedly committed in internal as opposed to international armed conflicts.[4] For Anghie and Chimni, the decision that the ICTY did have such jurisdiction unsettled fundamental principles of international law and imperilled the *nullum crimen sine lege* rule.[5]

Although Anghie and Chimni do not identify it as such, this second danger was inextricably linked to the first legitimacy issue in *Tadić.* The answer to the *nullum crimen* question was for all intents and purposes presupposed by the answer to the legitimacy question, which was itself resolved by the fact of the Tribunal's creation. Having affirmed the propriety of its own existence, the Appeals Chamber of the ICTY had little choice other than to give itself something to do: decide which individuals were responsible for international crimes committed in that armed conflict. Any other answer would have rendered the reasoning that came before, as well as the Tribunal itself, pointless. Having given itself life, the Appeals Chamber then gave itself purpose.

The recent ICC *Appeals Chamber Decision* on the principle of legality in the case regarding Abd-Al-Rahman[6] bears some connection to these critiques of *Tadić*. It is constrained and compact, a neatly wrapped, low-stakes package of particular interest to those curious about the precise contours of the *nullum crimen* concept. Yet, it is also another jurisprudential Matryoshka doll, in which each decision gives birth to another slightly more circumscribed case resembling its predecessor and always reminding us of its lineage. Making sense of the *Appeals Chamber Decision* requires making sense of its doctrinal analyses and its connection to the existential legacies of *Tadić*.

II THE FIRST THREE GROUNDS OF APPEAL

The defendant Ali Muhammad Abd-Al-Rahman is alleged to have been a leader of the *janjaweed* militias in Darfur and to have committed various international crimes in that conflict. After failing in an interlocutory motion that effectively challenged the Court's jurisdiction over him,[7] Abd-Al-Rahman advanced four delicate grounds of appeal. The first three arguments were dismissed quite matter-

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4 Ibid [65]. For arguments that the conflict was international — and thus the Appeals Chamber decision unnecessary: see, eg, Theodor Meron, 'War Crimes in Yugoslavia and the Development of International Law' (1994) 88(1) *American Journal of International Law* 78; George H Aldrich, 'Jurisdiction of the International Criminal Tribunal for the Former Yugoslavia' (1996) 90(1) *American Journal of International Law* 64.

5 Anghie and Chimni (n 1) 94.

6 *Prosecutor v Abd-Al-Rahman (Judgment on the Appeal against the Pre-Trial Chamber II's 'Decision on the Defence "Exception d'incompétence"')* (International Criminal Court, Appeals Chamber, Case No ICC-02/05–01/20 OA8, 1 November 2021) ('*Appeals Chamber Decision*').

7 *Prosecutor v Abd-Al-Rahman (Decision on the Defence 'Exception d'incompétence')* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-02/05–01/20, 17 May 2021) ('*PTC Decision*').

of-factly.[8] Each of these positions was an optimistic challenge to the jurisdiction of the Court that hinged on both reading the *Rome Statute* in very specific ways that are not obvious from the text, and then overstating the significance of such constrictive readings.[9]

The first position — that the Pre-Trial Chamber ('PTC') had improperly defined 'situation' — was a non-starter according to the Appeals Chamber.[10] According to the defendant, Darfur was not a situation within the meaning of the *Rome Statute*, and therefore could not be referred to the Court.[11] The Appeals Chamber simply noted that this improperly conflated 'situation' with other possible jurisdictional parameters. The use of the word 'situation' in the *Rome Statute* implied that it is distinct from the ideas of 'state' and 'case', which are used elsewhere in the *Rome Statute*.[12] The parameters of a 'situation' might be equivalent to the boundaries of a state but need not be. The conflict in Darfur was thus capable of being referred to the Court.

The second ground of appeal was that para 7 of UNSC *Resolution 1593 (2005)* improperly placed the financial burden associated with the Darfur investigation and prosecution on state parties to the *Rome Statute* rather than the UN, and thus violated art 115(b) of the *Rome Statute*.[13] This violation has been noted before, but even sustained critics of the use of UNSC *Resolution 1593* to assert jurisdiction over Darfur have not flagged the expenses issue as jurisdictional.[14] As the Appeals Chamber noted, this provision does not affect the Court's *ratione loci* (place), *materiae* (subject matter), *personae* (persons) or *temporis* (temporal).[15]

Similar arguments were made in the third ground of appeal, which stated that UNSC *Resolution 2559 (2020)* somehow invalidated UNSC *Resolution 1593*.[16] The former called for the UN–African Union Hybrid Operation in Darfur ('UNAMID') to close down by 31 December 2020.[17] This violated UNSC *Resolution 1593*, the defendant suggested, because that Resolution stated the ICC should be assisted by the UN as per the terms of art 2 of the *Rome Statute* and the *UN-ICC Agreement*.[18] Whether or not such a violation follows from UNSC *Resolution 2559*, there was no reason to believe that the jurisdictional claim flowing from UNSC *Resolution 1593* was somehow negated.[19]

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8 *Appeals Chamber Decision* (n 6) [2]–[3].

9 See ibid [30]–[58].

10 Ibid [92]–[95].

11 Ibid [24]–[29].

12 Ibid [25].

13 Ibid [30]–[33]. See also *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002) art 115(b) ('*Rome Statute*').

14 Asad G Kiyani, 'Al-Bashir & the ICC: The Problem of Head of State Immunity' (2013) 12(3) *Chinese Journal of International Law* 467.

15 *Appeals Chamber Decision* (n 6) [42]–[46].

16 Ibid [48].

17 *Resolution 2559 (2020)*, SC Res 2559, UN SCOR, UN Doc S/RES/2559 (22 December 2020) para 1.

18 *Appeals Chamber Decision* (n 6) [51]. See also International Criminal Court, *Negotiated Relationship Agreement between the International Criminal Court and the United Nations*, Doc No ICC-ASP/3/Res.1 (4 October 2004) ('*UN-1CC Agreement*'); *Rome Statute* (n 13) art 2.

19 *Appeals Chamber Decision* (n 6) [57].

III LEGALITY AND JURISDICTION

The final ground of appeal was more taxing to deal with, due to the PTC's ruling on the issue of the principle of legality and non-retroactivity. The defendant had argued that it was not clear that the prohibitions contained in the *Rome Statute* applied to him given that he was a national of a non-state party and that the alleged conduct took place on the territory of that same non-state party. The PTC responded through a rather blunt approach to legality that did not meaningfully engage with the defendant's underlying argument: that not only does the extraordinary assertion of jurisdiction over the situation in Darfur lead to important questions about the *procedural* dimensions of international criminal law,[20] but it also leads to uncertainty about the *substantive* prohibitions of international criminal law. From the point of view of Abd-Al-Rahman, the material jurisdiction of the Court is unsettled in the absence of consent to the *Rome Statute* by either the state of nationality or territoriality.

In dismissing this fourth ground of appeal, the PTC was careful to note that all the allegations against the accused concerned conduct that took place after the coming into force of the *Rome Statute*.[21] It then stated that there was no *nullum crimen* issue on the basis that the alleged conduct was already criminalised as part of the Court's material jurisdiction.[22] While this was true as a matter of fact — there was correspondence between the substantive allegations against the defendant and the relevant provisions of the *Rome Statute* — it did not resolve the *nullum crimen* issue because it did not address whether those provisions applied to this particular defendant.

Under international law, the principle of legality has fewer elements than it does in some domestic systems.[23] At its core, the international principle prohibits the retroactive application of criminal rules, including substantive prohibitions and penalties.[24] Additional challenges for international criminal tribunals arise when it is considered that modes of liability[25] and the re-characterisation or relabelling of crimes[26] arguably are covered by the principle as well.

In addressing whether the *nulla crimen* principle has been violated, international courts have resorted to the accessibility and foreseeability test. This approach states that the principle is not violated when the content of the law is knowable to the accused and a reasonable person in similar circumstances would know that their actions have criminal consequences.[27]

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20 See below Part IV(A).

21 *PTC Decision* (n 7) [36].

22 Ibid [36]–[42].

23 Talita de Souza Dias, 'Accessibility and Foreseeability in the Application of the Principle of Legality under General International Law: A Time for Revision?' (2019) 19(4) *Human Rights Law Review* 649, 651–2 ('*Accessibility and Foreseeability*').

24 M Cherif Bassiouni, 'Principle of Legality in International and Comparative Criminal Law' in M Cherif Bassiouni (ed), *International Criminal Law: Sources, Subjects and Contents* (Martinus Nijhoff Publishers, 3rd ed, 2008) vol 1, 73, 89, 99; Kenneth S Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge University Press, 2009) 352, 357.

25 de Souza Dias *Accessibility and Foreseeability* (n 23) 653.

26 Talita de Souza Dias, 'Recharacterisation of Crimes and the Principle of Fair Labelling in International Criminal Law' (2018) 18(5) *International Criminal Law Review* 788, 811–12.

27 Gallant (n 24) 22.

The core notion of fair notice to the defendant that certain conduct is criminally prohibited lay at the core of the defendant's fourth ground of appeal in this case.[28] While the PTC was right that the accused could easily have known — and likely did know — the content of the *Rome Statute*, it did not address the crucial additional question of whether the prohibitions in the *Rome Statute* applied to him at the time of the conduct. Awareness and jurisdiction are two completely separate concepts.

Legality in this scenario therefore demands more than a declaration of concordance because Sudan was not a party to the *Rome Statute* and was not theoretically subject to the Court's jurisdiction until — at the earliest — the passage of *Resolution 1593*.[29] What was needed was not an assessment of what the *Rome Statute* said at the time of the alleged crimes but an assessment of what law applied to the defendant at that time.[30] Anything short of that simply presumed that the material jurisdiction provisions of the *Rome Statute* perfectly captured the state of customary international law and domestic Sudanese law at the time of the alleged crimes.

In responding to the defendant, the Appeals Chamber clarified the need to perform a more nuanced assessment of the legality issue that fully acknowledged the status of Sudan as a non-state party to the *Rome Statute*.[31] Legality entails a variety of considerations beyond simply being aware that a particular body of law — such as the *Rome Statute* — exists. It also requires an understanding that specific laws bind or apply to the particular individual. States and individuals that are not aware of the possibility that they may be subject to specific compilations of international law cannot be assumed to have been duly notified simply because institutions whose jurisdiction they have not accepted, prohibitions that they disagree with, and rules and laws that are not reflective of customary international law happen to exist.

This lack of nuance compelled the Appeals Chamber to revisit the conceptualisation of legality. While its approach issued an important corrective to the *PTC Decision*, it also led to curious outcomes and questions on its own merits. It both pushed the notion of legality into a new direction and thereby asked important questions about international criminal law's relationship to human rights law, as well as brought itself back into the ambit of Anghie and Chimni's critique of judicial decision-making by international criminal courts and tribunals. This analysis now considers these issues in turn.

IV EXPLAINING THE PTC'S ERROR ON LEGALITY AND HUMAN RIGHTS

The Appeals Chamber's re-evaluation of the *PTC Decision* on the principle of legality takes on a new dimension. It is shaped by the Court's understanding of human rights law, which itself flows from the requirement in art 21(3) of the *Rome Statute* that the treaty be interpreted in light of relevant human rights norms, in a way that centres the impact on the defendants.[32] Thus the failure of the PTC

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28 See *Appeals Chamber Decision* (n 6) [64].
29 See generally *PTC Decision* (n 7).
30 *Appeals Chamber Decision* (n 6) [86].
31 Ibid [87].
32 Ibid [84].

> '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' runs afoul of human rights norms and constitutes an error of law.[33]

It ought to have been apparent to the PTC that there was a need to clearly identify the state of international criminal law at the time. Examples of major international criminal tribunals addressing such questions by reference to the state of customary international law are abundant. The Nuremberg Tribunal had to resolve this question in respect of war crimes, wars of aggression, invasions and crimes against humanity.[34] For the ICTY, the central question was posed in *Tadić*. The ICTY had to decide whether acts that occurred in non-international armed conflicts were criminalised in the same way as those that occurred in international armed conflicts.[35] The latter was settled law thanks to the post-Second World War military tribunals, but the former was not. As noted above, the answer had to be argued and judicially determined by reference to customary international law.[36] Some of the most important decisions made at the International Criminal Tribunal for Rwanda ('ICTR') centred on sexual violence during armed conflict. The ICTR's determination, that '[s]exual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact', flowed from an analysis of customary international law.[37] This was part of the ICTY and ICTR's important work towards issuing authoritative international law definitions of crimes of sexual violence.[38]

In a significant divergence from the ICTY's assertion that all three forms of joint criminal enterprise liability were part of customary international law,[39] the Extraordinary Criminal Chambers for Cambodia ('ECCC') found that the third form was not part of customary international law at least by 1975.[40] On the question of the status of crimes against humanity, the ECCC found that these were recognised by the time of the Khmer Rouge's crimes via the 1950 Nuremberg

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33 Ibid [87] quoting *PTC Decision* (n 7) [42].

34 Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford University Press, 2011) 124–31.

35 See *Tadić* (n 3).

36 Ibid [98]–[99].

37 *Prosecutor v Akayesu (Judgement)*, (International Criminal Tribunal for Rwanda, Chamber I, Case No ICTR-96-4-T, 2 September 1998) [688].

38 See, eg, Valerie Oosterveld, 'The Legacy of the ICTY and ICTR on Sexual and Gender-Based Violence' in Milena Sterio and Michael P Scharf (eds), *The Legacy of Ad Hoc Tribunals in International Criminal Law: Assessing the ICTY's and the ICTR's Most Significant Legal Accomplishments* (Cambridge University Press, 2019) 197; Kelly D Askin 'Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles' (2003) 21(2) *Berkeley Journal of International Law* 288.

39 *Prosecutor v Tadić (Judgement)*, (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-A, 15 July 1999) [185]–[229]. For a critique of the customary international law analysis used by the Court: see Jens David Ohlin, 'Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise' (2007) 5(1) *Journal of International Criminal Justice* 69, 75–6.

40 See *Prosecutor v Thirith (Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise)* (Extraordinary Chambers in the Courts of Cambodia, Pre-Trial Chamber, Case No 002/19-09-2007-ECCC/OCIJ (PTC38), 20 May 2010) [77]–[83].

Principles.[41] The ECCC then engaged in a sustained analysis of the extent to which subsequent legal developments, primarily through the form of International Law Commission draft codes of crimes, further crystallised into customary international law applicable in Cambodia at the relevant time.[42]

If nothing else, this history ought to have warned the PTC it needed to carefully consider the particular factors at play in Darfur rather than bluntly assert the supremacy and applicability of the *Rome Statute*. Missing these signals from contemporary tribunals led to the need for the Appeals Chamber to step in and ultimately contradict the PTC. In this light, it is worth considering *why* such signals or the more specific need to engage in such analysis might have been overlooked.

A *A Brief Teleological History*

In spite of the Appeals Chamber's clear statement of an error of law, it is hard to fault the decision of the PTC. As noted above, on three of the four grounds of appeal, there is little argument to support the defence's position. As to the fourth, it may have been an error of law, but it was also an error that was in keeping with a logic of jurisdictional confidence that marks the work of previous international criminal tribunals (including those noted above). Each of those tribunals engaged in more considered analyses of their material jurisdiction, but each one also ultimately decided that the defendants before them failed on their jurisdictional challenges.

Futility thus characterises these arguments made by other defendants appearing at other tribunals arguing that the law is either wrongly described or not applicable to them. Futility has also characterised results in other Darfur cases at the ICC. The same jurisdictional assertiveness can be seen in the multiple contradictory, unclear and ultimately poorly justified legal arguments deployed by various PTCs and Appeals Chambers in previous cases regarding Sudan's then-head-of-state Omar Al-Bashir.

Al-Bashir was President of Sudan at the relevant time; that is, when Abd-Al-Rahman was alleged to have engaged in international crimes in Darfur. Al-Bashir himself had been accused of international crimes, including genocide, and an arrest warrant had been issued by the ICC in 2009.[43] It was argued that as the head-of-state of a non-state party to the *Rome Statute*, Al-Bashir could not be put on trial by the ICC.[44] A series of decisions followed, all of which offered a variety of reasons that all concluded Al-Bashir was not protected by immunity.

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41 *Prosecutor v Kaing (Appeal Judgement)*, (Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber, Case No 001/18-07-2007-ECCC/SC, 3 February 2012) [110]–[113].

42 Ibid [116]–[336].

43 *Prosecutor v Al Bashir (Warrant of Arrest)* (International Criminal Court, Pre-Trial Chamber I, ICC-02/05-01/09, 4 March 2009).

44 *Prosecutor v Al Bashir (Decision on the Prosecution's Application for a Warrant of Arrest)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-01/09, 4 March 2009) [41].

Initially, it was simply asserted without explanation that states had an obligation to arrest and surrender Al-Bashir to the ICC.[45] Then, it was stated that customary international law 'creates an exception to Head of State immunity when international courts seek a Head of State's arrest for the commission of international crimes'.[46] The next day, the PTC revisited one of its initial decisions to make the customary international law argument.[47] Several years later, it was asserted — with the legal mechanics not being explained — that immunity did not apply because of *Resolution 1593*.[48] In 2017, PTC II split on the reasoning while agreeing on the result that immunity did not protect Al-Bashir.[49] Two judges repeated the idea that the Security Council resolution affected immunities,[50] whereas the third said that the operation of the *Convention on the Prevention and Punishment of the Crime of Genocide* ('*Genocide Convention*') negated the immunity.[51] That split was reproduced later that year in a decision finding that Jordan had not complied with its obligations under the *Rome Statute* by failing to arrest and surrender Al-Bashir when he travelled to that country.[52]

Jordan appealed this ruling to the Appeals Chamber. In a May 2019 judgment whose legal analysis has been described as 'astoundingly disappointing',[53] 'confusing — and frustrating — on a number of levels'[54] the Appeals Chamber

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45 *Prosecutor v Al Bashir (Decision Informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Recent Visit to the Republic of Chad)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-01/09, 27 August 2010); *Prosecutor v Al Bashir (Decision Informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Presence in the Territory of the Republic of Kenya)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-01/09, 27 August 2010); *Prosecutor v Al Bashir (Decision Informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Recent Visit to Djibouti)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-01/09, 12 May 2011).

46 *Prosecutor v Al Bashir* (*Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-01/09, 12 December 2011) [43].

47 *Prosecutor v Al Bashir (Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-01/09, 13 December 2011).

48 *Prosecutor v Al Bashir (Decision on the Cooperation of the Democratic Republic of the Congo Regarding Arrest and Surrender to the Court)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-02/05-01/09, 9 April 2014) [29].

49 *Prosecutor v Al Bashir (Decision under Article 87(7) of the Rome Statute on the Non-Compliance by South Africa with the Request by the Court for the Arrest and Surrender)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-02/05-01/09, 6 July 2017).

50 Ibid [84]–[85] (Judges Tarfusser and Chung).

51 Ibid [38] (Judge de Brichambaut), discussing *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) ('*Genocide Convention*').

52 *Prosecutor v Al Bashir (Decision under Article 87(7) of the Rome Statute on the Non-Compliance by Jordan with the Request by the Court for the Arrest and Surrender)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-02/05-01/09, 11 December 2017) ('*Jordan*').

53 Astrid Kjeldgaard-Pedersen, 'Is the Quality of the ICC's Legal Reasoning an Obstacle to Its Ability to Deter International Crimes?' (2021) 19(4) *Journal of International Criminal Justice* 939, 951.

54 Ben Batros, 'A Confusing ICC Appeals Judgment on Head-of-State Immunity', *Just Security*, (online, 7 May 2019), <https://www.justsecurity.org/63962/a-confusing-icc-appeals-judgment-on-head-of-state-immunity/>, archived at <https://perma.cc/KMN6-SZ3T>.

again ruled that immunity did not protect Al-Bashir. According to the Appeals Chamber, 'nothing thus turn[ed]' on the fact that 'varied paths of judicial reasoning' were relied upon to 'yield reasonable answers'.[55] Perhaps this is why the Appeals Chamber ultimately adopted all the arguments below it, including the one rooted in the *Genocide Convention*.[56] Many legal issues were left unaddressed,[57] and the legal reasoning employed was methodologically questionable.[58] In this light, where the legal reasoning employed is highly dubious, changes from year to year and is methodologically flawed, it should not be a surprise to see the reasoning that asserts jurisdiction in a separate case stemming from the same conflict is not as rigorous as it could be and overstates the position of the ICC and *Rome Statute* in the hierarchy of international law. That overstatement is explicitly made in the *Jordan Appeal*, where the Appeals Chamber claims that the ICC '[does] not act on behalf of a particular State or States. Rather, international courts act on behalf of the international community as a whole'.[59]

In this light, one could forgive cynical observers, including defendants proposing legitimate arguments against subject-matter jurisdiction, for reading the *Appeals Chamber Decision* on legality as one similarly destined to ensure that jurisdiction can and will be exercised. This is particularly so given the defendant and Al-Bashir were both accused *génocidaires* in Darfur, the same conflict at issue in *Jordan*. This is not to say that the PTC pre-judged the case or acted improperly, but rather to recognise the pervasive teleology at play when serious jurisdictional questions are raised in international criminal courts and tribunals. They largely seem to get their man.

B *Appetite for Jurisdiction*

The relationship between legality and human rights identified by the Appeals Chamber nonetheless has the potential to temper this sense of inevitability by demanding more careful and circumscribed analyses before prosecutions commence. What distinguishes Al-Bashir's case from Abd-Al-Rahman's case is that in the former, the Court is resistant to the idea that when and how a situation is referred will affect the applicability of the *Rome Statute*, whereas in the latter the Court appears to accept that some variation may need to be accepted. The *Appeals Chamber Decision* raises the possibility that the *Rome Statute* cannot be applied *in toto* to every defendant over whom it has personal jurisdiction. Legality may demand more subtlety when retroactivity is at play.

Legality has been expressed and interpreted in a variety of human rights agreements, including the *Universal Declaration of Human Rights*,[60] the

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55 *Prosecutor v Al-Bashir (Judgment in the Jordan Referral)* (International Criminal Court, Appeals Chamber, Case No ICC-02/05-01/09 OA2, 6 May 2019) [97] ('*Jordan Appeal*').

56 Ibid [161].

57 Batros (n 54).

58 Asad Kiyani, 'Elisions and Omissions: Questioning the ICC's Latest Bashir Immunity Ruling', *Just Security* (online, 8 May 2019) <https://www.justsecurity.org/63973/elisions-and-omissions-questioning-the-iccs-latest-bashir-immunity-ruling/>, archived at <https://perma.cc/YE4H-VNWB>.

59 *Jordan Appeal* (n 55) [115].

60 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR , UN Doc A/810 (10 December 1948) art 11(2).

International Covenant on Civil and Political Rights[61] and other regional instruments[62] including the *Arab Charter on Human Rights*[63] and *African Charter of Human and People's Rights*[64] which would presumably be of special relevance to a defendant from Darfur. Yet, strictly speaking, the *Rome Statute* is not a human rights document, and it expresses the principle of legality in attenuated terms that are not fully integrated into the admissibility provisions of the *Rome Statute*. This limited understanding has the potential to produce strange outcomes on the boundaries of the Court's exercise of jurisdiction, perhaps because of an inattention to the implications of developing three modes of referral in the *Rome Statute*, two of which contained clear retroactivity problems.

More than one of the Statute's provisions have been subject to similar debate; in the context of the Darfur situation, Al-Bashir's immunity problem is a prime example. A straightforward reading of the *Rome Statute* makes it clear that states party have waived protections such as head of state immunity, but there is no equally clear way to read immunity in respect of non-states party. A similar lack of clarity surrounds the principle of legality, which otherwise seems very straightforward.

In art 22(1), the *Rome Statute* provides 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'.[65]

This can — and in most cases, should — be read as simply asserting that the Court can only assume jurisdiction over crimes that the *Rome Statute* specifies, because those are the crimes that states party have agreed that the Court may adjudicate. Yet, as soon as the secondary modes of referral are relied upon — the Security Council and the ad hoc declaration of acceptance — art 22(1) becomes inadequate on its own.

No consideration is given here to the possibility that the 'person' referred to here is not otherwise bound by the Court's jurisdiction at the time of the acts. This seems a curious oversight in the drafting of the *Rome Statute* which, if the tortured jurisdictional reasoning in *Jordan* is to be accepted, clearly anticipated the referral of non-states party and thus the application of the Court's jurisdiction to individuals who could not have known of that risk.

This is not solely a problem for those few situations that flow from Security Council referrals. Even if the legality implications of the controversial Security Council referral power are put to one side, the *Rome Statute's* admissibility

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61 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 15.

62 See, eg, *Convention for the Protection of Human Rights and Fundamental Freedoms* opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 7, as amended by *Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature on 11 May 1994, 2061 UNTS 7 (entered into force 1 November 1998) and *Protocol No. 14 to the convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 13 May 2004, 2677–8 UNTS 3 (entered into force 1 June 2010); *American Convention on Human Rights*, signed 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978) art 9.

63 *Arab Charter of Human Rights*, adopted 22 May 2004 (entered into force 15 March 2008) art 15, reproduced in (2005) 12 *International Human Rights Report* 893.

64 *African Charter on Human and Peoples' Rights*, opened for signature 27 June 1981, 1520 UNTS 217 (entered into force 21 October 1986) art 7(2).

65 *Rome Statute* (n 13) art 22(1).

provisions contained other, more obvious, sources of tension. The most important here is the possibility of ad hoc self-referrals under art 12(3) of the *Rome Statute*, which would very clearly put the legality question into play while avoiding the question of the propriety of Security Council referrals.

Greater attention thus needs to be paid to the fact that art 22(1) is not directly integrated into the admissibility scheme of the Court. This exacerbates the problems of the Court's appetite for extending its jurisdiction to self- and Security Council referrals of non-states party. Questions need to be asked because of a lack of careful attention to how the Court's material jurisdiction may vary depending on how its personal jurisdiction has been asserted. As a result, the Appeals Chamber's directions to engage in analyses of the applicable law will be directly relevant in a broad range of cases. There will be a need to apply these analyses in the context of all referrals which are temporally retrospective, particularly those that involve alleged wrongful conduct by citizens of non-state parties who are acting on the territory of non-states party. Anything less than a careful analysis of what domestic and customary international laws bound each individual *at the time of the alleged conduct* will risk violating the human rights-infused principle of legality adopted by the Appeals Chamber.

C *The New Human Rights-Legality Nexus*

Those more minded towards optimism could fairly say that the Appeals Chamber's decision arguably represents a shift in international criminal tribunals' treatment of the principle of legality. Whereas human rights-oriented interpretations of the principle have traditionally acted as brakes on the criminal law process, by affirming a more inflexible rule of non-retroactivity, international criminal courts and tribunals have not been so rigid. By not simply accepting the PTC's declaration that the principle of legality was observed because the *Rome Statute* was knowable, and effectively requiring that the PTC do the work of identifying the content of the applicable substantive law at the time of the charges against the accused, the Appeals Chamber is turning the ICC towards a slightly more unyielding approach that favours the accused. This is an important shift.

Flexibility in respect of legality has been permitted in the past. 'Ambivalence' is one characterisation of the International Military Tribunal's approach to non-retroactivity.[66] As William Schabas argues, the Nuremberg precedent was one of flexibility: while the idea of genocide was in circulation around the time of the Second World War, it is unclear when genocide *became* punishable under international law.[67] Similarly, the idea of 'crimes against humanity' may have been in circulation prior to the end of the war, but it is also clear that 'the drafters of the Nuremberg Charter understood that they were completing an exercise in international lawmaking'.[68] At the same time, that judgment also confirmed that no individual should be convicted only of a crime against humanity by linking

66 Heller (n 34) 125.

67 William Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (Oxford University Press, 2012) 69.

68 Ibid 57.

such crimes to aggressive war.[69] Writing about the retroactivity argument in respect of European criminals, Hans Kelsen noted 'the retroactivity of the law applied to them can hardly be considered as absolutely incompatible with justice'.[70] At the International Military Tribunal for the Far East, Judge Bert Röling described the principle of legality as 'not a principle of justice but a rule of policy…[a]s such, the prohibition of ex post facto law is an expression of political wisdom, not necessarily applicable in present international relations'.[71]

The divergence between the *Tadić* and ECCC decisions noted above is further evidence of dispute and uncertainty about when important modes of liability became law. This may be in keeping with the 'fairly relaxed standard' toward retroactivity employed at the ICTY generally.[72] Similarly, the evolution of sentencing practices also illustrate a degree of flexibility in the practice of international criminal courts and tribunals.[73] In the *Eichmann* decision, the Nuremberg logic was expressly adopted: 'it is indeed difficult to find a more convincing instance of just retroactive legislation than the legislation providing for the punishment of war criminals and criminals against humanity and against the Jewish People'.[74]

The *Appeals Chamber Decision* move to a more rigid approach to legality is thus relatively novel in the context of *international* criminal law, whose appetite for jurisdiction has at times run roughshod over the nuanced questions of law that arise in scenarios where the Security Council referral power or the art 12(3) referral power are relied upon. For these reasons, the decision also has the potential to reframe the broader relationship between international human rights and international criminal law. As Darryl Robinson has argued, there are reasons to be concerned that modern international criminal law institutions have been developed by human rights lawyers rather than criminal lawyers.[75] One consequence of this relationship has been the 'distortion' of fundamental principles of criminal law, leading to a discipline more liberated from rather than constrained by the 'special moral restraints' that criminal lawyers must abide by when protecting the rights of individual defendants.[76] Past practice with respect to legality would seem to give succour to this critique.

Critics applying Robinson's broad understanding might well criticise controversial decisions to assert jurisdiction in cases like *Tadić*, *Jordan* and others as more concerned with human rights law's protection of victims and less concerned with criminal law's protection of fair trials and fair notice. Yet, the

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69 'International Military Tribunal (Nuremberg) Judgment and Sentences: Judgment' (1947) 41(1) *American Journal of International Law* 172, 249. Roger O'Keefe, *International Criminal Law* (Oxford University Press, 2015) 138.

70 Hans Kelsen, 'Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?' (1947) 1(2) *International Law Quarterly* 153, 165.

71 Neil Boister and Robert Cryer (eds), *Documents on the Tokyo International Military Tribunal, Charter, Indictment and Judgments* (Oxford University Press, 2008), 700.

72 Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 4th ed, 2019) 19–20.

73 See Guillaume Endo, '*Nullum Crimen Nulla Poena Sine Lege* Principle and the ICTY and ICTR' (2002) 15(1) *Revue québécoise de droit international* 205.

74 *A-G (Israel)* v *Eichmann* (1968) 36 ILR 5, 42–4 [27] (District Court, Jerusalem).

75 See Darryl Robinson, 'The Identity Crisis of International Criminal Law' (2008) 21(4) *Leiden Journal of International Law* 925.

76 Ibid 928–9.

Appeals Chamber Decision is arguably an example of the inverse of what Robinson described. It is the importation of a human rights informed understanding that protects defendants rather than further enabling the prosecutorial inclinations of international criminal tribunals. In that light, it holds the promise of both an important doctrinal and conceptual shift in approach.

V ON DOING AND NOT DOING CUSTOMARY INTERNATIONAL LAW

The preceding analysis offers a general description of the problems produced by the *PTC Decision*, why those problems might have arisen in this case, how those problems might manifest in the future and how they are best to be resolved. Wrong though it was, the *PTC Decision* on legality in respect of Abd-Al-Rahman is understandable, perhaps even defensible. Two curiosities remain. The first is that if the above is correct, then the 'Key Finding' of the Appeals Chamber is misleading in its brevity. Paragraph 1 of the *Appeals Chamber Decision* states that

> [i]n 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.[77]

The incorporation of human rights norms as an interpretive tool is certainly to be welcomed, given the potential implications of such an approach outlined above. Yet, the 'Key Finding' simply avoids the key jurisdictional question that begat the entire argument. Were it not for the fact that Sudan had never voluntarily accepted the Court's jurisdiction prior to the defendant's alleged conduct, the *nullum crimen* argument would have been a non-starter.

The *nullum crimen* position outlined in its 'Key Finding' fails to explicitly acknowledge this link between the adjudicator and substantive criminal law.[78] *Nullum crimen* should never be an issue at the Court because its jurisdiction is fundamentally prospective;[79] unlike every other major international criminal court or tribunal, the ICC gave clear advance warning to *future* wrongdoers that this law could apply to them as long as they were nationals of states party or acting on the territory of states party. Yet, by tolerating retroactive applications of its law through UNSC referrals,[80] ad hoc declarations under art 12(3)[81] and ex post facto ratifications of the *Rome Statute*,[82] the Court has opened itself up to the same legitimacy challenges faced by its predecessors. Rather than simply applying the law to the facts, the Court must entertain and resolve questions of what the law actually is for every defendant that is in the same position as Al-Bashir or Abd-Al-Rahman: a defendant that could not have known at the time of his alleged criminality that he was subject to the Court's jurisdiction.

The second curiosity is that the Appeals Chamber has decided to trust the PTC to remedy its mistake while also saying the mistake was of no consequence. In

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77 *Appeals Chamber Decision* (n 6) [1].

78 As O'Keefe (n 69) describes it, arts 6, 7, 8 and 8*bis* of the *Rome Statute* (n 13) 'criminalize the commission *by individuals within the Court's jurisdiction* of the crime over which the Court enjoys jurisdiction': at 552–3 (emphasis added).

79 Ibid 55 n 34.

80 See situations in Libya and Darfur.

81 See situations in Côte d'Ivoire and Ukraine.

82 See situation in Palestine.

spite of finding an error of law on the part of the PTC, the Appeals Chamber did not rule in favour of the defendant on this fourth and final ground of appeal.[83] The Appeals Chamber instead stated that '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'.[84] How are these two positions — that the PTC was wrong in law and the defendant fails on his appeal — to be reconciled?

One hint is found in the Appeals Chamber's assertion 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'.[85] According to the Appeals Chamber, since the defendant had not specified which of the charges against him violated the principle of legality, his challenge to the *PTC Decision* was academic in nature: it was about how the PTC understood legality generally, not whether it had wrongly decided that the *nullum crimen* principle was not violated in respect of any particular charge against him.[86] Absent specific argument on this point, the Appeals Chamber was not in a position to draw a line under the *nullum crimen* argument. Rather, there seems to be a clear suggestion that the accused engage in the very detailed task of deciding which of the dozens of counts against him violate this principle because they were not criminalised in either Sudanese domestic law or customary international law at the time of the alleged conduct.[87] In other words, the Appeals Chamber has given notice to the PTC that (1) there may be a live issue here if the defendant chooses to pursue it in more detail, and (2) that it is to be decided through the kinds of exegetical analysis of the evolution of customary international law that all other modern international criminal tribunals have engaged in.

It has been suggested that the Appeals Chamber ought to have taken on this exercise, given its significance for other cases at the Court.[88] While this will certainly be an issue with ramifications beyond this case and even this situation, the pragmatic reason for the Appeals Chamber inaction is fairly clear: the issue had not been fully argued before either the PTC or the Appeals Chamber. Rather than decide on the basis of an incomplete record or delay its ruling by asking the parties to prepare detailed submissions on the point, the Appeals Chamber simply decided the narrow issues before it and directed the PTC to consider the remainder.

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83 *Appeals Chamber Decision* (n 6) [92].

84 Ibid.

85 Ibid [91].

86 Ibid.

87 See ibid.

88 Alexandre Skander Galand, 'The ICC Appeals Judgment on Abd-Al-Rahman Jurisdictional Challenge: A Foreseeable Turn to Substantive Justice?' *EJIL:Talk!* (Blog Post, 22 November 2021) <https://www.ejiltalk.org/the-icc-appeals-judgment-on-abd-al-rahman-jurisdictional-challenge-a-foreseeable-turn-to-substantive-justice/#:~:text=November%2022%2C%202021-,The%20ICC%20Appeals%20Judgment%20on%20Abd%2DAl%2DRahman%20Jurisdictional%20Challenge,Foreseeable%20Turn%20to%20Substantive%20Justice%3F&text=On%201%20November%202021%2C%20the,Tadic%20Interlocutory%20Appeal%20on%20Jurisdiction.>, archived at <https://perma.cc/JA7B-7GS3>; Talita de Souza Dias, 'The Principle of Legality in the ICC's Appeals Judgment on Abd-Al-Rahman's Jurisdictional Challenge: A Follow-up on Merits and Shortcomings' *EJIL:Talk!* (Blog Post, 1 December 2021) <https://www.ejiltalk.org/the-principle-of-legality-in-the-iccs-appeals-judgment-on-abd-al-rahmans-jurisdictional-challenge-a-follow-up-on-merits-and-shortcomings/>, archived at <https://perma.cc/3XNN-AJ4P>.

Forestalling the decision also gives the Court some leeway. By making such a challenge optional, the Appeals Chamber avoided having to decide an issue that might not be raised by the defendant.[89] Assuming that the defendant would go forth with such a challenge, the Appeals Chamber also gave itself the benefit of having not only fulsome submissions by the parties involved, but also the reasons of the PTC. Yet, even if the issue is avoided in this case, it will be raised at some point and arguably should have been raised earlier.[90] The more that the ICC relies on referrals that assert retroactive jurisdiction, the more likely it is that it will have to wade into issues of legitimacy and legality that should have been settled by the Rome Conference. The prosecution of Al-Bashir made this clear in respect of procedural law; the prosecution of Abd-Al-Rahman is making this clear in respect of substantive law.

VI CONCLUSION

In their initial thoughts on individual criminal responsibility in internal armed conflicts, Anghie and Chimni express tentative support for the *Rome Statute* because of the broad participation behind its creation and its explicit statements of the law, including those that govern internal armed conflicts.[91] The current practice of the Court should call that confidence into question, given that it has allowed itself to be drawn into the *Tadić*-like legitimacy debates that swirled around past tribunals.

All this should make observers and officers of the Court reconsider its underlying promise. From the perspective of international justice, the value of the Court was its imagined consistency and even-handedness, the effect of deterrence through permanence and a concomitant guarantee that those who violated the rules of international criminal law would be subject to its coercive rebuttal. From the perspective of international lawyers, there was an additional, distinct promise: the opportunity to narrow the scope of the issues to be adjudicated and to focus on simply applying the law to the facts. The promise was that with the rules pre-determined, with the states pre-consenting, with the law pre-agreed upon, the ICC would avoid the legitimacy pitfall that threatens all international criminal tribunals: not whether the law has been correctly applied, but whether the law — in respect of this defendant and this allegation — is even law and whether the court is even a court at all. While one promise of the ICC was that those were questions of the past, the *Appeals Chamber Decision* — in combination with the Al-Bashir saga — suggests that in at least some circumstances the opposite is true. How the Court deals with these circumstances and the specific issue raised by the Appeals Chamber will go some way toward determining if Anghie and Chimni's cautious optimism about the Court remains warranted, or if their warnings have gone unheeded.

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89 At the time of writing, no such argument has been advanced.

90 See above nn 80–82.

91 Anghie and Chimni (n 1) 94–5.