



THE ICC AND UNIVERSAL JURISDICTION

“Ubi lex voluit, dicit; ubi noluit, tacit.”

By John Laughland

The ICC judges are currently considering whether to approve the indictment issued in July 2008 by the ICC Prosecutor against the President of Sudan. Their decision is expected soon.

Sudan is not a signatory state to the ICC Charter and therefore the country would not normally be considered subject to its jurisdiction. However, the situation in Darfur was referred to the ICC Prosecutor by the United Nations Security Council in 2005. In an earlier ruling in 2007, on indictments brought against a Sudanese minister, Ahmed Haroun, and a Sudanese paramilitary commander, Ali Kushayb, the judges confirmed the indictments, claiming that this referral by the Security Council meant that the ICC did have jurisdiction over states which have not signed or ratified its Charter.

It is therefore to be expected that the judges will make the same decision with respect to the indictment of the Sudanese president. But what was the basis of the 2007 ruling and how soundly based is it in the ICC Charter and in law?

Many articles in the ICC Charter emphasise that it is a body which operates on behalf of, and with the consent of, states parties (i.e. states which have signed and ratified the Rome Statute). This consensual nature distinguishes the ICC from the two *ad hoc* tribunals already in existence, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Those tribunals were created by an executive *fiat* in the UN Security Council and without any treaty having been drawn up or ratified.

The consensual approach is underlined throughout the ICC Statute. Article 1 says that the Court is “complementary to national jurisdictions”. This contrasts with the clear statement in Article 9 of the Statute of the ICTY that, “The International Tribunal shall have primacy over national courts” - i.e. the courts of the former Yugoslav states - and with the even more trenchant statement in Article 8 of the Statute of the ICTR that, “The International Tribunal for Rwanda shall have the primacy over the national courts *of all states*” (italics added).

Article 4 of the Rome Statute of the ICC, meanwhile, which is entitled “Legal Status and Powers of the Court”, says

The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other state.

Special agreement is therefore required for jurisdiction over non-signatory states. Further articles in the Statute emphasise this. Article 11 on the temporal jurisdiction of the Court speaks only of jurisdiction over acts committed in States Parties, while

Continued / ...

... / 2

Article 12, entitled “Preconditions to the exercise of jurisdiction”, speaks only of State Parties or of states which have “accepted” the jurisdiction of the Court. Moreover, Article 19 stipulates that the Court must satisfy itself that it has jurisdiction over all cases brought before it.

However, it is Article 13 which the judges used in 2007 to justify their confirmation of the indictment against two Sudanese citizens. Article 13 is entitled “Exercise of jurisdiction” and it lays out three ways in which the ICC may exercise jurisdiction: (a) if a situation is referred to the Prosecutor by a state party; (b) if a situation is referred to the Prosecutor by the Security Council of the United Nations; and (c) if the Prosecutor initiates an investigation himself.

On 27 April 2007, the judges in Pre-Trial Chamber I ruled as follows: Regarding the territorial and personal parameters, the Chamber notes that Sudan is not a State Party to the Statute. However, article 12 (2) does not apply where a situation is referred to the Court by the Security Council acting under Chapter VII of the Charter, pursuant to article 13(b) of the Statute. Thus, the Court may, where a situation is referred to it by the Security Council, exercise jurisdiction over crimes committed in the territory of States which are not Party to the Statute and by nationals of States not Party to the Statute.

Article 12 (2) – the one the judges refer to - reads as follows:

In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3: (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft; (b) The State of which the person accused of the crime is a national.

This means that if a situation is referred to the Prosecutor by a state party, or if he decides to instigate an investigation himself, then the Court may exercise its jurisdiction EITHER if the state where the events occurred has accepted the jurisdiction of the Court OR if the person accused is a national of a state which has accepted its jurisdiction. This means that states which sign the treaty agree not only that what happens in their own country is legitimately a matter of concern for the ICC Prosecutor; they also agree to make their own citizens subject to the ICC’s jurisdiction even when they are abroad. A war crime therefore falls under the jurisdiction of the Court if it is committed by a citizen of a state which has accepted the jurisdiction of the Court, even if the acts occurred on the territory of a state which has not.

It is true that sub-section (b) of Article 13 – situations referred to the Prosecutor by the UN Security Council - is not covered by these provisions in Article 12. They refer only to situations referred by signatory states or to investigations initiated by the Prosecutor. But does this mean that the judges were right to conclude from this that the ICC has jurisdiction over states which have not signed the statute, and over

Continued / ...

... / 3

citizens of non-signatory states?

Article 13 is silent about the exact nature of the jurisdiction triggered by a referral from the Security Council. The judges have used this silence to read a maximalist interpretation into the text. But they could just as easily have ruled that Security Council referrals trigger a more restrictive jurisdiction than referrals from state parties or investigations initiated by the Prosecutor, not a less restrictive one.

It is perfectly feasible that the UN Security Council might refer situations in signatory states to the Prosecutor without any signatory state having done so, and without the Prosecutor having taken the initiative himself. The Council might, for instance, do this in a situation where a signatory state's government refuses to launch an investigation but where the Security Council feels that it is a matter of international concern. This might occur in conditions of internal conflict (civil war).

But let us assume, for the sake of argument, that a situation exists in which acts are being committed by a Sudanese national in Chad (a signatory state). There are plenty of such cross-border conflicts in Africa. It is a truism that a referral by Chad would allow the Sudanese national to be prosecuted, because he was operating on the territory of a signatory state. International law has long recognised the right of states to prosecute foreigners for acts committed on their territory, and the same principle would apply whether the prosecuting authority was Chad or the ICC. But in addition the Rome Statute also allows jurisdiction when the situation has been referred by a third signatory state (the Central African Republic, for example) or when an investigation is initiated by the Prosecutor.

But if Chad had not initiated an investigation (and if a third state and the Prosecutor had not either) and if the matter was referred to the Prosecutor by the UN Security Council, then the UN would be clearly intruding in the name of the international cooperation and peaceful settlement of disputes, references to which abound in the UN Charter. If the situation was one in which Chad and Sudan were at war, then the intrusion would be more politically sensitive than if the Sudanese national were acting alone.

Faced with such a hypothesis, the ICC judges could have interpreted Article 13 to mean that any such judicial interference should be kept to a minimum, even in a situation of international conflict where international law usually kicks in; that the role of the United Nations is to foster peace and to act as a neutral arbitrator, as the UN Charter says; and that jurisdiction could be legitimised only if consent had been given (at least tacitly, by earlier accepting the jurisdiction of the Court) by both parties to the conflict. The judges could have ruled that BOTH the conditions laid down in Article 12 (2) must be fulfilled, whereas in other cases only one of them has to be fulfilled.

The jurisdiction triggered by UN Security Council referral would then have extended only to citizens of signatory states acting in signatory states and would have ruled out prosecutions of Sudanese fighters in Chad in this example. How much more justified the judges would have been in ruling against jurisdiction, therefore, in a situation like the one in Darfur which is not an international conflict but an internal one.

There would have been extremely good legal reasons for this more restrictive ruling

Continued / ...

(and sound political ones too). A discussion of the legal issues follows, but it is important to stress at the outset that it is highly disappointing that the judges dealt with this exceptionally important issue of their own jurisdiction in such a cursory way. They gave no substantial reasons or legal justifications for their decision. Their slapdash or high-handed approach contrasts with the ample and intelligent discussion of their own jurisdiction handed down by the judges at the International Military Tribunal in Germany. The Nuremberg judges spent some time explaining the source of their jurisdiction, and they read the terms of their own Charter very restrictively indeed.

First, it is an important principle of law that judges are not supposed to read things into a statute which are not there. This principle is known by the legal maxim quoted above in Latin: "*Ubi lex voluit, dicit; ubi noluit, tacit.*" This means that if the law means something, it says it; if it does not mean something, it does not say it. Nowhere in the ICC Charter does it say that the Court has jurisdiction over states which have not accepted that jurisdiction. Therefore the judges should not have concluded that it does.

Second, it is an important and widely accepted principle of international law (and of law generally) that treaties (like contracts) should be interpreted with the utmost good faith in the sense they were meant. Did the signatory states of the ICC intend to override the principle of national sovereignty and non-interference in the internal affairs of other states, a principle enshrined in the UN Charter and recalled in the ICC Charter's Preamble? It is one thing for states to agree to pool some of their powers on a voluntary basis, and have them exercised by a body to which they delegate powers. It is quite another thing for an organisation created by states then to claim powers over states which are not parties to it, and which have not given their consent. Even the European Union, one of the most aggressively supranational of all international organisations, does not claim the right to regulate the curvature of cucumbers in Switzerland.

The silence of the Rome Statute on this question is not only a good reason for concluding that the signatory states did not intend this outcome and that the Statute does not provide for it. It is also positively deafening because the Statute contains no fewer than eleven articles, many of them with very numerous paragraphs, dealing with the jurisdiction of the Court, whereas the Statutes of the Yugoslav and Rwanda tribunals – the obvious point of comparison for the ICC judges - contain but three short one-paragraph articles on the subject. If the authors of the Rome Statute had intended to create universal jurisdiction, they would have said it somewhere in their pages and pages of provisions about jurisdiction.

They certainly should have said because it represents a significant departure from many of the accepted principles of international law. Those principles, broadly speaking, are the sovereignty of the state and the principle of non-interference. Whether one agrees with them or not, they are clearly expressed in the ICC Charter itself. Consequently, as judges are under a duty to apply the law as it stands, these considerations should have guided them.

The Charter's Preamble says that crimes must be punished "at the *national* level and by enhancing *international cooperation*"; it recalls that "it is the duty of every *State* to

... / 5

exercise its criminal jurisdiction over those responsible for international crimes”; it recalls the principles and charter of the United Nations “*and in particular* that all States shall refrain from the threat or the use of force against the territorial integrity or political independence of any State ...”; it *emphasises* that, “in this connection nothing in this Statute shall be taken as authorising any State party to intervene in an armed conflict or in the internal affairs of any State”; and finally it again *emphasises* that the ICC established under this Statute “shall be complementary to national criminal jurisdictions.”(Italics added throughout.)

Are these passages compatible with a desire to create an intrusive regime of international judicial interventionism? They are not. By ruling as they have, the ICC judges have regrettably indulged in an *ultra vires* act of judicial activism whose main consequence is to augment their own power.