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THE MOST SIGNIFICANT LEGAL ISSUES OF THE SITUATIONS REFERRED BEFORE THE INTERNATIONAL CRIMINAL COURT BY THE UNITED NATIONS SECURITY COUNCIL

ABSTRACT OF PH.D. THESIS

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Table of Contents

Table of Contents **2**

List of Abbreviations **3**

I. Subject Matter of the Research and Structure of the Ph.D. Thesis **4**

II. Methodology of the Research **9**

III. Summary of the Research **10**

IV. Publications Related to the Ph.D. Thesis **18**

List of Abbreviations

AU	African Union
UNSC	United Nations Security Council
ECCC	Extraordinary Chambers of the Courts of Cambodia
UN	United Nations
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
SCSL	Special Court for Sierra Leone
STL	Special Tribunal for Lebanon

I. Subject Matter of the Research and Structure of the Ph.D. Thesis

The establishment of the International Criminal Court has been one of the most glorious achievements of international law since the formation of the United Nations. The almost mythological mandate of the ICC, that is to fill up the holes on the shield of the culture of impunity, has faced the Court with overwhelming challenges from the beginning of its existence. However, it is noteworthy that the ICC has an extremely important, but not an exclusive role in international criminal justice, so in order to enhance the effective functioning of the Court and to accomplish the desired goal of the international community, i.e. 'to put an end to impunity', the cooperation of other actors and mechanisms are needed, such as *ad hoc* international criminal tribunals, hybrid tribunals or national proceedings initiated even on the basis of universal jurisdiction.[1] Putting the ICC to its right place in the international legal order is more than crucial, as the Court can only be fairly judged if it is not underestimated on the one hand, but not hyped excessively on the other hand.

While one part of the challenges swirling unquenchably around the ICC is characteristic of any international criminal court or tribunal, e.g. peculiarities of evidentiary procedures, high expenditures of international criminal justice, moderate effects of the Court's functioning on peacekeeping and social consolidation, the International Criminal Court has to do well among trials being absolutely its own. The reasons of these specificities can be categorized as follows.

The first category is in connection with the way how the ICC was established, as it is the very first multilateral treaty-based international criminal court. As such, particularities of private law and the law of treaties pervade the whole framework of the Rome Statute,[2] and affects the dynamics of criminal proceedings before the Court. Meanwhile, criminal justice is a true manifestation of public law, i.e. exercising *ius puniendi* as an attribute of State sovereignty can only be efficient when decisions of the courts with jurisdiction are enforced. The 'treaty-based

[1] See Robert CRYER – Håkan FRIMAN – Darryl ROBINSON – Elizabeth WILMSHURST, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge, 2016, 181–200.

[2] Rome Statute of the International Criminal Court, Rome, 17 July 1998. UN Doc. A/CONF. 183/9. Although Hungary signed the Rome Statute and the Hungarian Parliament ratified the treaty, the enactment by law has not taken place for 18 years. On the possible reasons for the lack of enactment see KOVÁCS, Péter, Miért nincs még kihirdetve a Római Statútum? Gondolatok a Római Statútum és az Alaptörvény összeegyeztethetőségének egyszerűségéről, *Állam- és Jogtudomány*, 2019/1., 69–90.

roots', however, are not able to bring to life the institutions of criminal law many times, which is the general reason for the problems of the ICC, describing any case before the Court.

The ancient Roman maxim says *'praetor ius facere non potest'*, and so does the theory on the separation of powers. Notwithstanding, the mandate of international criminal judges does neither encompass legislative power today, international courts and tribunals have a remarkable position when it comes to interpretation of the norms of international criminal law. It has become the 'fine art' of international judges to unfold the definitions and terms of international criminal law subtly and carefully, and in the case of the ICC, to bring to life the treaty-based provisions of the Rome Statute. It goes without saying, the latter challenges the ICC judges over and over again, nevertheless it must also be noted that there is no more suitable and more legitimate way under contemporary international law to create an international criminal court.

In accordance with the abovementioned features, the case-law of international criminal courts and tribunals is granted with a strong emphasis in this Ph.D. thesis, while bearing in mind that the selection of these cases serves only one purpose: to present the most significant legal issues of the situations referred before the ICC by the UNSC. The latter is the other category of the challenges characterizing the Court, which is, at the same time, the *differentia specifica* of the Ph.D. thesis. Namely, the ICC has to overcome more hurdles when a situation is referred before it by the UNSC, as in the mirror of the experience of the last almost two decades, it can be definitely ascertained that non-States Parties were concerned when the UNSC decided to exercise its power under Article 13(b) of the Rome Statute. This is the specific reason for the problems of the Court featuring only situations referred by the UNSC. In these cases, not only making 'treaty-based roots' effective is hard, but also applying these provisions to third States. Even though the imperative of international peace and security under Chapter 7 of the UN Charter[3] overrides the principle of *pacta tertiies nec nocent nec prosunt*, many issues of law enforcement come to the surface in these proceedings before the ICC, let alone the generated political tensions (with regard to that the UNSC is not a legal, but a purely political body). As Africa is said to be the 'favourite customer' of the International Criminal Court, it is worth examining what aftermath UNSC-referred situations have in regional politics, what are the AU's reactions?

[3] Act I of 1956 on the Enactment of the Charter of the United Nations.

Therefore, the aim of the research is to explore the major problems of the situations referred before the ICC by the UNSC, while highlighting the contradiction between the normative provisions laid down under the Rome Statute and the case-by-case application thereof. It must also be noted that this Ph.D. thesis focuses basically on the Court, so the examination of the two international institutions are not detailed with the same extent.

All in all, the subject matter of this research is to analyse the cases arising from the situations referred before the International Criminal Court by the United Nations Security Council from a normative and, sometimes, a political point of view. The examination encompasses the perspectives of the most common criticisms:[4] *(i)* the lack of supporting political will; *(ii)* the lack of universal acceptance; *(iii)* the lack of cooperation; *(iv)* the lack of jurisdiction; as well as *(v)* the lack of funding. The subject of the Ph.D. thesis determines that criminal procedure and not substantive law is in the focus of the research, at the same time, so as to comprehend the complex core issues, it is inevitable to deal with other sub-disciplines of international law, such as the law of international organizations, the law of treaties, international humanitarian law, 'the law of international courts and tribunals' and international human rights.

Maybe it does not seem immodest to declare related to the actuality of the topic that it is scarcely hard to convince the readers. In support of the latter, it can be highlighted that not more than two years have passed since the Kampala amendments came into force on 17 July 2018, or that the latest of the analysed cases was not comprised in the version of the Ph.D. thesis presented on the workshop debate, as it was only delivered on 9 March 2020 after having closed the first manuscript.

As far as the structure of the Ph.D. thesis, it can be divided into four parts and nine chapters. The parts follow one another in a deductive order, departing from the 'first encounter' of the UNSC and international criminal justice, and arriving at the pragmatic issues of the cases unfolding from the situations referred before the ICC by the UNSC.

After the introduction, the aim of Chapter 2 'Foundation: The Security Council and International Criminal Justice' is to present the 'premiere' of the UNSC in international

[4] Keynote address by *Navi Pillay* at the *Nuremberg Forum 2019 – The Nuremberg Principles beyond the International Criminal Court: A Common Ground for Accountability* conference in Nuremberg 18 October 2019, organized by the *International Nuremberg Principles Academy* ‹https://www.youtube.com/watch?v=tcgTT4tijlo&list=PL6G1ej5gfwFChH793WlmYSZ-Clt8MnZc1› accessed 21 October 2020.

criminal justice, to outline the powers of the UNSC under the UN Charter, as well as to familiarize the readers with the relationship between the UNSC and the Court through the preparatory work of the ILC, and finally, to demonstrate some theoretical visions on the relationship between the two international actors.

Part II of the Ph.D. thesis starts with Chapter 3, 'Initiation of a Procedure under Article 13(b) of the Rome Statute', herewith the normative analysis of the relationship between the ICC and the UNSC begins. In this Chapter, first and foremost, in-depth interpretation of the related provisions of the Rome Statute takes place, while special attention is given to the first 'pillar' of the ICC–UNSC relationship, i.e. the power of the UNSC to refer a situation before the ICC. Readers can also get acquainted with the circumstances of the referrals of the Darfur[5] and Libya[6] situations, as well as with the social and historical context of these conflicts (besides bearing in mind the sensitive ratio within methodology expected from the works dedicated to international law). In Chapter 3, some practical issues also arise which significance and complexity does not devote them to independent chapters, such as the financing of procedures, the exclusion from jurisdiction of peacekeepers who are nationals of non-State Parties to the Rome Statute or as far as UN Member States are concerned, failing to comply with their obligation to cooperate with the Court. Chapter 4 of the Ph.D. thesis, 'Initiation of a Procedure under Article 15*bis* and Article 15*ter* of the Rome Statute', seeks to scrutinize the jurisdiction of the ICC over the crime of aggression in the mirror of the Kampala amendments, meanwhile concerning the inevitable substantive aspects of the *delictum*, and strongly highlighting procedural matters and the role played by the UNSC in aggression procedures. At this point, aggression procedures are not only analysed in the light of UNSC referrals, but also of the referrals of State Parties and of the ICC's Prosecutor, as in the latter scenarios, the UNSC also gets an important part due to the preliminary determination of the act of aggression. Chapter 5, 'Deferral of Investigation or Prosecution under Article 16 of the Rome Statute' is the last one among chapters of Part II presenting the normative framework of the topic and focuses on deferrals by the UNSC, i.e. the negative 'pillar' of the ICC–UNSC relationship. Moreover, Chapter 5 explores legal quandaries brought about the applications and the 'attempted applications' of Article 16.

[5] See ‹https://www.icc-cpi.int/darfur› accessed 21 October 2020.
[6] See ‹https://www.icc-cpi.int/libya› accessed 21 October 2020.

Chapter 6 of the Ph.D. thesis, 'The International Criminal Court and Third States' opens Part III focusing on practical problems of the ICC–UNSC relationship. This Chapter is a necessary precondition of further 'logical construction', that is a deductive foundation and a problem-chronological step toward understanding the consecutive chapters including specific matters related to non-State Parties (whilst there is no such implication under the Rome Statute, the UNSC has only referred situations of non-State Parties before the ICC so far). Chapter 7 of the Ph.D. thesis, 'Complementarity and Situations Referred before the International Criminal Court by the United Nations Security Council', deals with the unique 'jurisdiction model' of the Rome Statute in the light of the characteristics of procedures initiated by the UNSC, while invoking the situation of Libya to illustrate the Court's jurisdiction regime in action. The concept of this Chapter departs from the extraordinary feature of complementarity within the international legal order, aiming to introduce the relevant case-law of the ICC profoundly, and not to hide those contradictions which can be found in the ICC case-law every now and then, besides pointing out the latest rejoicing achievements of it. The last one of chapters of Part III, 'Cooperation, Enforcement of Arrest Warrants and Procedures Initiated by the UNSC' (Chapter 8), is dedicated to cooperation and non-enforcement of the decisions of the ICC, with special regard to heads of State immunity.

Last but not least, in Part IV ('Summary') consequences and concluding remarks are on display, accompanied by summing up the propositions and the results of the doctoral research.

Therefore, the Ph.D. thesis seeks to provide answers to the following questions: *(i)* how the UNSC is connected with international criminal justice; *(ii)* what are the normative provisions to be applied to the ICC–UNSC relationship; *(iii)* how these normative provisions are enforced, what problems occur in practice; *(iv)* how the ICC–UNSC relationship is interpreted in judicial decisions, what consequences can be drawn; and in the end, *(v)* what political factors affect the ICC–UNSC relationship?

II. Methodology of the Research

The sources of the Ph.D. thesis are comprised of Hungarian and foreign literature, treaties, international judicial decisions, as well as other international instruments. As the topic determines that English sources were primarily available, the Ph.D. thesis also attempts to introduce new concepts into Hungarian jurisprudence or to shade already existing ones. This latter was the most challenging undertaking of the research, as international criminal law and procedure apply such definitions that are completely unfamiliar with the German-Romano legal systems, e.g. ‘referral’, ‘deferral’, ‘admissibility’ or ‘same person / same conduct test’.

The methodology applied in Chapter 2 is multifaceted: it is functionalist on the one hand, with regard to the fact that it strives to outline one of the UNSC’s special roles, i.e. its function in international criminal justice. On the other hand, it is normative, as the Ph.D. thesis departs from the UN Charter (especially Article 39 and Article 41) to interpret this abovementioned role. Chapter 2 also applies historical methodology, since the Ph.D. thesis seeks to explore the roots of the ICC–UNSC relationship in the *travaux préparatoires* of the Rome Statute. In Chapter 3, normative and dogmatic analyses are dominant, mixed with historical methodology when it comes to presenting the situations of Darfur and Libya. Normative and dogmatic methodology are applied in Chapter 4 again, since there has been no case-law related to the crime of aggression so far, and thus case analysis is not on option. Chapter 5 and Chapter 6 still invokes normative and dogmatic methodology, as well as case-law analysis. In Chapter 7, in the one about complementarity, concept analysis, case-law analysis and comparative methodology are conducted, while in Chapter 8 historical, normative and comparative methodology, besides concept and case-law analysis are rather applied. In the latter, not only the case-law of the ICC is presented, but also of other courts and tribunals, such as the ICTY, the SCSL and the ICJ.

III. Summary of the Research

This Ph.D. thesis sought to present the most significant legal issues related to the situations referred before the ICC by the UNSC. Although this topic, which is often discussed among international lawyers and serves an attractive cause for academic debates, promises the enthusiastic researcher a variety of resources at the very first sight, as the work progressing and the questions to be answered becoming more and more sophisticated, this researcher has to face the lack of established public practice behind the legal norms under analysis (Articles 13(b), 15*bis* and 15*ter* and Article 16 of the Rome Statute), as the UNSC refers to them very rarely. Or, on the other hand, even if the UNSC should refer to them, it does not use the relevant provisions as the 'legislative intention' originally meant them to be: it is clear from some practical examples that the UNSC, like in the case of its other powers, uses both international criminal justice and the Court for pursuing political purposes.

The latter is also worrying for the institutional autonomy, independence and impartiality of the ICC, as well as for the requirement of the rule of law, and even if the ICC is only a 'victim' of such UNSC aspirations, it can hardly be relieved of them and the repercussions thereof. E.g. the political waves generated in the *Al Bashir case*[7] by the AU surrounding the non-enforcement of the ICC's arrest warrants, the referral of the Libyan situation before the ICC, the epic-length debates about the incorporation of the crime of aggression into the Rome Statute or the application of Article 16, i.e. the future 'abstract' exemption of non-States Parties' peacekeepers from the Court's jurisdiction.

The propositions of the research are presented here in accordance with the structure of the Ph.D. thesis (in the order of the individual parts and the chapters), in the light of which the following picture emerged in connection with the situations referred before the ICC by the UNSC.

(i) Proposition 1 of the research states that in the case of State participation in the establishment of international criminal courts and tribunals, as well as of State consent given to the exercise of jurisdiction by them, the authority and legitimacy of the criminal judiciary

[7] See ‹https://www.icc-cpi.int/darfur/albashir› accessed 21 October 2020.

forum is less criticized in both case-law and jurisprudence, as fearful concerns on State sovereignty can be ruled out.

It has become a well-known fact in the discipline of international law that the ICC is not the first criminal justice forum with a close relationship with UNSC. Among historical antecedents the ICTY and the ICTR can be mentioned, which were so closely linked to the UNSC that the two tribunals were set up by Resolutions 827 (1993) and 955 (1994), as well as the STL, a 'contemporary', still functioning tribunal, which statute, drafted with the assistance of Lebanon and the UN Secretary-General, was prevented from being ratified by the Lebanese Parliament, and in the end was brought into effect by Resolution 1757 (2007). Comparing these tribunals with other international criminal courts (e.g. SCSL, ECCC), the less the State concerned with the conflict was involved in setting up the judicial forum (see the ICTY), the stronger the voices questioning the legitimacy of the creation of the tribunal will be. *A contrario*, the more the state is involved in setting up the court, the more likely it is willing to cooperate with the international criminal forum in the future. (Even if the State can be involved in the 'activation' of international criminal justice at all, as in many cases this may not be an option, see again the example of the ICTY.)

(ii) According to proposition 2 of the Ph.D. thesis, the most ideal way to establish an international criminal court is to set it up with a treaty.[8]

Although in the light of proposition 1, we can say that the most ideal solution to set up an international criminal court is the 'treaty-method', it is also obvious that calling State leaders and senior State officials to account for mass human rights violations and grave breaches of humanitarian law, as well as their State's accession to a multilateral treaty setting up an international criminal court are not likely to happen. In order to overcome the latter hurdle, Article 13(b) of the Rome Statute has been inserted, namely that the UNSC regardless of the place of the offense or the nationality of the offender, may refer situations before the ICC if there are reasonable grounds to believe that crimes within the jurisdiction *ratione materie* of the Court have been committed after 1 July 2002 (or 17 July 2018 as for aggression).

[8] On drafting the Rome Statute see William SCHABAS, *An Introduction to the International Criminal Court*, Cambridge University Press, Cambridge, 2017, 16–22.

(iii) Proposition 3 of the Ph.D. thesis is that the power of the UNSC to trigger procedures before the ICC is one of the measures not involving the use of armed force under Article 41 of the UN Charter.

When defining the role of the UNSC in international criminal justice, like the UNSC's other powers, the UN Charter shall be applied as a starting-point and the UN Charter shall be interpreted in accordance with the theory of implied powers borrowed from US constitutional law. Bearing this in mind, the underlying legal basis for the relationship between the UNSC and the ICC are Article 39 and Article 41 of the UN Charter. In the light of the latter, the powers of the UNSC under Article 13(b) and Article 15*ter* (1) of the Rome Statute fall within the extending scope of measures not involving the use of armed force under Article 41 of the UN Charter. The 'sanctioning feature' in such cases can be seen in the fact that UNSC 'forces' a treaty regime on a State that have neither ratified, nor approved that treaty. (Although in theory the UNSC could refer the situation of a State Party to the Rome Statute before the ICC, this scenario has never occurred before.)

*(iv) Proposition 4 of the research can be formulated as follows: The Rome Statute places the relationship between the ICC and the UNSC on two pillars, i.e. the UNSC's power to refer a situation before the ICC (Article 13(b) and Article 15*ter*, respectively) and to defer an investigation or a prosecution (Article 16).*

The normative framework for the relationship between the ICC and the UNSC is indirectly defined by the UN Charter, already mentioned above, and directly by the respective provisions of the Rome Statute. The latter places the relationship between the two institutions on two pillars: UNSC's power to refer a situation before the ICC (Article 13(b) and Article 15t*er*, respectively) and to defer an investigation or a prosecution (Article 16). Although the number of real cases under these provisions is small, they hide many problems. The latter is illustrated by the fact that only two situations have been referred before the ICC under Article 13(b) so far (the humanitarian crises in Darfur in 2005 and the Arab Spring in Libya in 2011), and in none of the cases arising from these situations could the ICC deliver a judgment owing to the lack cooperation of Sudan and Libya, as well as States Parties to the Rome Statute. The relevant UNSC resolutions (S/RES/1593[9] (2005) and S/RES/1970[10] (2011)) have limited the possibility

[9] See ‹https://undocs.org/S/RES/1593(2005)› accessed 21 October 2020.
[10] See ‹https://undocs.org/S/RES/1970%20(2011)› accessed 21 October 2020.

of substantive criminal proceedings by excluding funding and jurisdiction, besides omitting provisions requiring other UN member States to cooperate. With regard to the two pillars, it can be established that even though the UNSC has referred two situations before the ICC, it exceeded its powers sometimes or did not exercise them at all at other times, which resulted in predetermining the 'bumpy way' of procedures, and as judicial review does not work for UNSC resolutions, remedies are neither available and there is no way for an international court to determine a UNSC resolution illegal.

(v) Proposition 5 of the Ph.D. thesis is the procedural capacity of the ICC over the crime of aggression forms a sui generis *jurisdictional system in a* sui generis *jurisdictional system.*

This proposition is particularly true of proceedings triggered by States Parties and the prosecutor of the ICC, and which stems from the differences in the temporal, personal and territorial jurisdiction of the Court, as well as the additional preconditions for initiating procedures. However, it is also noteworthy that this *sui generis* jurisdictional system in situations referred before the ICC by the UNSC is less specific than the other two triggering mechanisms, as the UNSC is only bound by the '30 ratifications' rule and the prohibition of non-retroactivity The powers of the UNSC as for the crime of aggression overturn the regime of the Rome Statute again, i.e. treaty provisions take a bow before the imperative of international peace and security. The ICC's jurisdiction over the crime of aggression seems somewhat simpler – at least on the level of abstraction and legal norms – in the UNSC–triggered procedures than State Party referrals and *proprio motu* prosecutions.[11]

(vi) As proposition 6 of the Ph.D. thesis, it can be ascertained that despite the nearly two decades history of the Rome Statute, Article 16 has not yet been applied as the drafters had intended.

As far as Article 16 procedures are concerned, the application in action of this provision is also modest. The UNSC has twice deferred the 'proceedings' before the ICC so far (S/RES/1422 (2002) and S/RES/1487 (2003)), but neither precedent served the real purpose of this provision, as it is known that by deferring the procedure, conflicting states may gain time to promote

[11] On the ICC's specific jurisdictional regime see ÁDÁNY, Tamás Vince, A Nemzetközi Büntetőbíróság joghatósága. Előzmények, tendenciák, előfeltételek, Pázmány Press, Budapest, 2014.

lasting peace. In both cases, the 'Article 16 proceedings' served the political will of the United States in such a way that the requirements for the application of the provision (i.e. the existence of a threat to international peace and security under Article 39 of the UN Charter and the existence of a specific procedure) were not met, so these UNSC resolutions were made in an abstract, *pro futuro* manner. That is, there has been no practice of 'proper' application of Article 16 of the Rome Statute so far.

(vii) Proposition 7 of the doctoral research can be summarized as in case-law States concerned with referrals by the Security Council are non-States Parties to the Rome Statute.

It is important to see with regard to the practical difficulties of the relationship between the ICC and the UNSC that States referred before the ICC under Article 13(b) of the Rome Statute are third States, i.e. States not parties to the Rome Statute. The status of third States in the Rome Statute can be examined from four perspectives. The first of these is the relatively wide range of rights of third States, the objective legal personality of the Court, the depending obligations of third States, as well as the involvement qualifying as non-binding obligation of third States.

(viii) Proposition 8 of the dissertation can be formulated as the probability of admissibility of a case before the ICC is much more likely in situations referred before the Court by the UNSC, as this gives the State concerned less time to initiate genuine criminal proceedings before a national court or to take substantive procedural steps.

The enforcement of complementarity and the admissibility of individual cases appeared as another focal point in the situations referred by the UNSC. More precisely, in the situations triggered by the UNSC as well, since the practical interpretation of complementarity arises in the *ex officio* examination of the jurisdiction of the Court in all cases. In terms of the relationship between the ICC and the UNSC it can be ascertained that under complementarity, the actual admissibility of a case before the ICC, i.e. the unwillingness or inability of national courts and authorities, is much more likely if the UNSC triggers the procedure before the Court due to the shortage of time to initiate a genuine national procedure.

(ix) In the light of proposition 9 of the Ph.D. thesis, the inconsistency found in case-law is one of the attributes of the ICC's jurisprudence, which although suggests legal security

concerns, is necessary as a specific negative consequence of the in-action elaboration of certain concepts due to the novelty of international criminal law.

As far as complementarity concerned, one can also draw conclusions from *Saif Gaddafi* and *Abdullah al-Senussi cases*[12] regarding case-law inconsistencies, which should be seen as an attribute of the field of the 'young' international criminal law. This special feature may raise legal certainty concerns, but is a necessary feature, as it can be assessed as a specific negative consequence of its development.

(x) As proposition 10, it can be established that the conflict of norms between Article 27 and Article 98 (1) of the Rome Statute was only apparent, it was resolved by the Appeals Chamber of the ICC in the Jordan decision[13].

In the course of the research, it became clear that the academics in international (criminal) law is mostly divided on the issues of cooperation, enforcement of arrest warrants in situations referred before the ICC by the UNSC,[14] which complicated by head of State's immunity caused long-standing difficulties in ICC case-law (see the case of *Omar Al Bashir*) due to a seemingly tense conflict of norms between Articles 27 and 98 (1) of the Rome Statute. In all Article 87 (7) proceedings, the ICC has imposed an obligation to enforce arrest warrants on the part of States Parties (such as Malawi, Chad, the Democratic Republic of the Congo, the Republic of South Africa and Jordan), however the Court applied contradicting arguments having done so and failed to establish a consistent judicial case-law. The resolution of the abovementioned conflict of norms was one of the biggest challenges of the ICC, which eventually, was resolved once for all in the Jordan decision by the Appeals Chamber. In this case, the Appeals Chamber succinctly ruled that although Sudan was not a State Party to the Rome Statute, S/RES/1593 (2005) placed the African country in an analogous status as if it were, so Article 27 (substantive,

[12] See on the *Gaddafi case* at ‹https://www.icc-cpi.int/libya/gaddafi› and on the *Al-Senussi case* at ‹https://www.icc-cpi.int/Pages/item.aspx?name=pr1034&ln=en› both accessed 21 October 2020.

[13] Judgment in the Jordan Referral re Al-Bashir Appeal, The prosecutor v. Omar Hassan Ahmad Al-Bashir, ICC-02/05-01/09-397, ICC Appeals Chamber, 6 May 2019 ‹https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/05-01/09-397› accessed 21 October 2020.

[14] See as an example Dov JACOBS, The Frog that Wanted to be an Ox: The ICC's Approach to Immunities and Cooperation, in: Carsten STAHN, *The Law and Practice of the International Criminal Court*, Oxford University Press, Oxford, 2015, 281–304.

as well as procedural abolition of immunity) also applies to cases from the situation of Darfur (and thus there can be no conflict of norms).

(xi) In the end, proposition 11 of the Ph.D. thesis states that as any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court, requesting an advisory opinion from the ICJ in the Al Bashir case *would weaken the credibility and the position of the ICC in the international legal order.*

The *Al Bashir case* has created enormous tensions in regional policy: the AU immediately spoke out for interfering in the continent's internal affairs after the first arrest warrant was issued against the (former) president of Sudan and sought to defer the prosecution under Article 16 of the Rome Statute. The lack of willingness on the part of African States to cooperate is partly the result of political tensions generated by the regional international organization, as the AU sees the appropriate solutions in extending the jurisdiction of the African Court on Human and Peoples' Rights, as well as requesting an advisory opinion from the ICJ. Although the advisory opinions of the ICJ serve as a useful aid in the interpretation of legal norms in international law, in the light of Article 119 (1) of the Rome Statute, it may also arise whether it is fortunate to rule on the matter? In the light of the principle of *compétence de la compétence*, the Statute states that it is the Court having jurisdiction to rule on any judicial matters arising in the case-law, i.e. the ICC shall decide on any dispute related to its own judicial functions. Requesting an advisory opinion from the ICJ, even if its power is 'merely' recommendatory, could potentially reinforce further critical voices suggesting a lack of potential of the ICC and further undermine the ICC's credibility and on the international stage. (It is still noteworthy that the latter would be even more true if the ICJ were to confront what the Appeals Chamber ruled in the Jordan decision.)

On the basis of the conclusions drawn, it can be told on the relationship between the ICC and the UNSC, this power of the UNSC under 13(b) of the Rome Statute as a '*quasi-ad hoc* arm' of the ICC, in the spirit of the legacy left behind by the ICTY and the ICTR, did not produced significant results in terms of putting an end to impunity in the last 15 years.

The main reason for this is to be found in the pervasive political character of the UNSC, which raises two issues. On the one hand, situations before the ICC are selective, as the UNSC takes a kind of *'á la carte'* approach, and external observers may reasonably have the impression that

the UNSC often does not exercise its powers under Article 13(b) of the Rome Statute even though in times when it should.

On the other hand, with regard to the ongoing proceedings in the situations of Darfur and of Libya, the Court has to deal with their challenges as a 'giant without limbs', as the UNSC in its relevant decisions has restricted the jurisdiction of the Court, refused funding, failed to call for States to cooperate, and later on it also failed to 'support' the enforcement of the ICC's arrest warrants and decisions by follow-up resolutions.

Although, in the absence of case-law of 'aggression procedures', i.e. the operation in action of Article 15*bis* and Article 15*ter* of the Rome Statute can only be speculatively assessed, the complexity of these provisions, the multitude of jurisdictional preconditions and the possible political implications of the crime of aggression could let us to draw the conclusion that the likelihood of initiating such a proceeding before the Court is very low in the foreseeable future.

The other pillar of the relationship between the two institutions is the deferral of an investigation or a prosecution, in accordance with Article 16 of the Rome Statute, was also unable to meet the legal policy objectives originally attached to it, as it has so far been invoked by the UNSC only in cases inconsistent with the legislator's original intention.

Based on past practice, even if the UNSC exercises the powers under Article 13(b), it completely abandons the ICC in the criminal proceedings, and the ICC entangles in the web of the normative framework established by the UNSC resolutions and the Rome Statute, as well as political tensions generated by the AU, and as a result, even if the Court were willing to proceed, it is unable.

However, we must also face with reality: if Article 13(b) and Article 16, as necessary preconditions for the birth of the ICC, had not been drafted into the Rome Statute, we would certainly not be able to dispute on a permanent International Criminal Court today.

IV. Publications Related to the Ph.D. Thesis

- BÉRES, Nóra, The Role of the Security Council in International Criminal Justice: A Comparative Analysis of the ICTY and the STL, *Publicationes Universitatis Miskolcinensis, Sectio Juridica et Politica* 2019/2. 123–143. (20);

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