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THE INTERNATIONAL CRIMINAL COURT:  
STARTING WITH AFRICA?

Ph.D. Thesis Abstract

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## I. Research objectives

After more decades of “travaux préparatoires”, the International Criminal Court is a reality. It is not just a Court, but a system that international criminal justice has created, a system of interaction between states, civil society and international organizations.<sup>1</sup> When I started the research, my aim was to see why international community needs a permanent international criminal body to deal with the most heinous crimes, how states can separate politics of justice and how does this Court work in reality.

We live in a violent world where war crimes, crimes against humanity, genocide and aggressions, are still taking place. All these crimes need a new system to apply to them. The process that started at Nuremberg continues to evolve.<sup>2</sup> Nuremberg was the first multinational criminal tribunal, while the Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR) were the first *ad hoc* international criminal courts.<sup>3</sup> But the development of international criminal law, which “results from a myriad of small or great tragedies”<sup>4</sup>, showed that a permanent international criminal court was strongly needed.

The international law is in a continuous diversification.<sup>5</sup> Human Rights Law, International Humanitarian Law, and International Criminal Law, are all branches of Public International Law. They all converge in protecting the individuals and it is ICC that brings them together. The International Criminal Court is a public international law tool to apply international criminal law in cases of human rights violations in time of both war and peace.

Another aim was to see if the Rome Statute which looked very fine on paper, could be easily implemented in practice, especially as it contents more dispositions without precedent in international law. Thus, I analyzed the articles which I found to present some interest from this point of view, as well as the dispositions with a more problematical content. The work became more fascinating as the Court opened more situations and cases. It was a challenge to see how ICC deals with the dispositions in the Rome Statute and what kind of interpretation gives to them.

Concluding, I wanted to find out if the first permanent international criminal court is indeed a success. The answer will be provided by the forthcoming activity of the Court, once the first trial will take place. Until then, I certainly agree that the International Criminal Court represents a great step on the long way of “putting an end to impunity”.<sup>6</sup>

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<sup>1</sup> As stressed by Mrs. Fatou Bensouda, Deputy Prosecutor of the International Criminal Court, with the occasion of the conference “Fighting Impunity in a Fragmented World – New Challenges for the International Criminal Court”, European University Institute, Florence, 23-24 May 2008.

<sup>2</sup> See William A. Schabas, *International sentencing: From Leipzig (1923) to Arusha (1998)* or M. Cherif Bassiouni, *The Nuremberg Legacy*, in M. Cherif Bassiouni (Ed.), “International Criminal Law”, 2<sup>nd</sup> Ed., Vol. III, *Enforcement*, Transnational Publishers Inc., Ardsley, New York, 1999.

<sup>3</sup> See T. Meron, “War Crimes Law Comes of Age. Essays”, Oxford University Press, 1998 at 198-199.

<sup>4</sup> Antonio Cassese, “International Criminal Law”, Oxford University Press, 2003, preface.

<sup>5</sup> See Géza Herczegh, *L’avenir de l’enseignement du droit international*, in Kovács Péter (Ed.), « Le droit international au tournant du millénaire – l’approche hongroise », Osiris, Budapest, 2000.

<sup>6</sup> Preamble of the Rome Statute.

## II. Methods and sources of research

This thesis compiles the results of several years of research representing countless hours of work. I focused on the analysis of primary sources while also paying attention to the secondary ones. The core of the research was the Rome Statute, “the birth certificate” of the International Criminal Court. The other documents the ICC relies on, The Rules of Evidence and Procedure, as well as The Elements of Crimes, were also closely analyzed. The early jurisprudence of the ICC as well as the case-law of the *ad-hoc* tribunals or the International Court of Justice was also of very much interest for this dissertation.

I could have not written my thesis without closely analyzing the documents of the United Nations and those of the NGOs. Besides documents, monographies, essays collections, articles and newspapers in English, French, Hungarian and Romanian helped me in writing my dissertation.

My research started when I got a full PhD scholarship at Péter Pázmány Catholic University from the Romanian and Hungarian Ministries of Education. Having this scholarship, I had the opportunity to enrich the collections of books of the PhD School by ordering more than twenty monographies and essay collections in international law, international criminal law and international humanitarian law. Another important source of help came from the library of the Central European University in Budapest which offered me a great number of publications.

I extended my research in every library I had the opportunity to be, while participating in international courses, trainings, conferences or simply being in vacation. I collected therefore, data from the libraries of Peace Palace or Grotius Centre for International Legal Studies in The Hague, Law Faculty of the Nottingham and Sheffield Universities, Mihai Eminescu Library from Iasi, Robert Schuman University from Strasbourg, or the Library of the Academy of European Law from Trier.

Part of my research was already shared nationally and internationally through my teaching activity or the special trainings and conferences I participated in or I was invited as a speaker. The most important moment in my research was the day I participated in a hearing in the case against Thomas Lubanga Dyilo, in The Hague, at the International Criminal Court.

### III. Brief summary of the dissertation, scientific results

My dissertation comprises three parts, each of them having more subchapters and sections or subsections, following a logical way from the history of the ICC to what I call ICC in theory and then ICC in practice.

The **Historical Chapter** describes the long way from the idea of a permanent international criminal court to a reality. I pay a special attention to the role of the Romanian jurist Vespasian Pella, President of the International Association of Penal Law and a pioneer of international criminal law. As it was said, “without the International Military Tribunal of Nuremberg, there would be no International Criminal Court”<sup>7</sup>, and therefore, a subchapter is dedicated to the Military Tribunals and their role on the way to international criminal justice. I then move to the *Ad-Hoc* Tribunals underlining their contribution to international criminal law becoming a “rapidly developing part of the international law”<sup>8</sup>. Next I present the preparations for the Rome Conference and the final result: the International Criminal Court. I shortly describe the main characteristics of the Court and how it is organized. It was not my intention to deepen the research on that, as prestigious scholars already did it, so I just wanted the reader to get familiar with ICC in order to understand better the **Second Chapter** in my dissertation concerning the elements of novelty and problematical issues in the Rome Statute.

The first analyzed issue is the **principle of complementarity**, a novelty for the international criminal law. According to this principle, ICC acts as an instance of last resort, states being given priority in exercising criminal jurisdiction over those responsible for international crimes. In case states are “unable” or “unwilling” to conduct investigations or prosecutions, ICC steps in. In order to understand better what complementarity means, a comparison is made with the principle of concurrency contained in the Statutes of the ICTY and ICTR.

Further, some problematical issues which might arise in the implementation of this principle in practice are taken into account, considering each trigger mechanism. Here I bring **my contribution by proposing a new aspect of the principle of complementarity** which was not in the drafters’ attention. In my opinion, when it comes for state-referral, the principle of complementarity implies two aspects: a positive and a negative one. The positive aspect consists in the possibility of a state-party to refer its situation to the ICC, whenever it considers that it is unable to bring to justice the responsible for the gravest crimes. Article 14 of the Rome Statute takes into consideration the positive aspect of the principle of complementarity, prescribing for the right of the state to opt between prosecuting itself and referring the situation to the international jurisdiction. Therefore, the national jurisdiction is given priority over the international one.

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<sup>7</sup> Hans-Peter Kaul, Judge of the International Criminal Court and President of the Pre-Trial Division, *The International Criminal Court: Current Challenges and Perspectives*, in Washington University Global Studies Law Review, Vol. 6, 2007 at 580.

<sup>8</sup> Nico Keijzer preface for E. van Sliedregt, “The Criminal responsibility of Individuals for Violations of International Humanitarian Law”, TMC Asser Press, The Hague, 2003.

The negative aspect of the principle of complementarity consists in the possibility of a state-party to withdraw its previous referral to the ICC. Unlike the ICTY Rule 11 bis, which provides that concurrent jurisdiction may lead to the prevalence of national courts if the Tribunals consider that the case may be tried more appropriately at the national level, such rule does not exist within ICC. In other words, once a trigger mechanism is pulled, there is nothing you can do. If a state-party referred a situation to the ICC based on the complementarity principle, and afterwards it turns out that it is able or willing to bring to justice the responsible or to find out another proper solution for its own situation, the state-party can not take the case back. It seems like the ICC complements the national courts but the national courts do not complement ICC.

This is a critical point for the Rome Statute. The base of the complementarity principle is the will of the states. They are given priority in prosecuting and if they can not exercise this priority, the situation becomes a matter of international jurisdiction. If afterwards, the states want to take the situation back their will does not triumph anymore. The principle of complementarity provides only for the states' priority, not for their primacy in prosecuting.

The subchapter concerning the principle of complementarity ends with some examples of “(un)willingness” or “(in)ability” to prosecute in international law. Attention is paid to the most famous trials (Nuremberg, Eichmann, Barbie, Pinochet, Milosevic, Hussein, Karadzic) in the history of international law.

As it has been suggested, ICC success depends “on the breadth of ratifications outside Europe”<sup>9</sup>, the Court being weakened without the participation of the three permanent members of the Security Council (US, China and Russia)<sup>10</sup>. Wanting to find out what were the reasons the United States invoked for not accepting the ICC' jurisdiction, I dedicated the next section of my dissertation to **the position of the United States towards ICC, as well as that of Romania's**. The reason of choosing Romania, as well, was that being Romanian I was curious to see why my country, a state-party to the Rome Statute was the first to sign an “Article 98” Agreement with the United States. The European Union's position is also taken into account.

One of the reasons the United States did not accept the ICC' jurisdiction was the lack of a definition for **the crime of aggression**, and therefore, I move to another problematical issue in the Rome Statute. Aggression is among the crimes within the jurisdiction of the ICC but as there is no definition for this crime, the Court can not deal with it for the moment. I start with a more than 100 years history of the legal work trying to define the most political crime and then I underline the most difficult issues the drafters encountered. Afterwards, I present the proposals of states and that of the Coordinator of the Special Working Group on the Crime of Aggression. Adapting and combining these proposals, as well as coming with new elements, I also make **a proposal of my own** concerning, the definition of aggression, the conditions under which ICC can exercise its jurisdiction and concerning the elements of crimes:

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<sup>9</sup> Theodor Meron, *The Humanization of International Law*, Martinus Nijhoff Publishers, Leiden, 2006 at 156.

<sup>10</sup> Russia signed the Rome Statute on 13 September 2000 but has not ratified yet the Statute.

*‘An individual who, being in a position effectively to exercise control over or to direct the political or military action of a State, plans, prepares, initiates or executes an act of aggression shall be responsible for the crime of aggression.*

*For the purpose of paragraph 1, “act of aggression” means an act referred to in United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974.*

*If a situation is referred to the Court by the Security Council, and therefore there is a determination as to the existence of an act of aggression by a state, the Court shall proceed with the case.*

*If a situation is referred to the Court by a State-Party, the Prosecutor should first ascertain whether the International Court of Justice has made a finding in proceedings brought under Chapter II of its Statute that an act of aggression has been committed by the State concerned. If such a finding exists the Court shall proceed with the case. If the Prosecutor finds that the International Court of Justice was not seized under Chapter II of its Statute*

*as well as when the Prosecutor proprio motu intends to proceed with an investigation, the Court should ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. If no Security Council determination exists, the Prosecutor shall notify the Security Council of his intention so that the Security Council may take action, as appropriate.*

*Where the Security Council does not make a determination as to the existence of an act of aggression by a state, within six month from the Prosecutor’s notification, the Court shall proceed with the case’.*

*Therefore, an act of aggression, as contained in the 3314/1974 Resolution, has to occur. Then, the perpetrator has to be in a position effectively to exercise control over or to direct the political or military action of the State concerned. The perpetrator has to act intentionally and knowing that the acts of the state represent acts of aggression.*

*The perpetrator may be active in the planning, preparation or execution of the act of aggression, executing himself these acts or ordering them, as the article 25 paragraph 3 concerning individual criminal responsibility for those who order the crimes would apply to the supreme crime, too.*

My proposal concerning the crime of aggression is meant to prove that even if the most political crime may be defined, all you need is the will of states. I strongly recommend that a definition of aggression should be accepted at the Rome Statute Review Conference in 2009 or 2010. In the same time, I hope that my proposal, as well as the ones of other scholars, will lead to including aggression among the crimes in the Criminal Codes from Hungary and Romania.

The last issue I analyze in the second chapter is the one concerning **the victim and witness**’ position within the ICC and ICTY system, as it was said that “there will be no justice without justice for victims”, and that “in order to do justice for victims, the ICC must be empowered to address their rights and needs”<sup>11</sup>. I therefore, pay a special attention to this issue, since for the first time in the history of international law ICC gives

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<sup>11</sup> Statement by Fiona McKay, representing Redress, on behalf of The Victims Rights Working Group, Rome Conference, 17 June 1998.

the victim the right to participate in a trial not only as a witness, but in his or her own name. ICC is also the first international court which can oblige an individual to pay reparation to another individual, as until now this fact was left into the concern of the states and not individuals. In order to underline the novelties the ICC brought to the international procedural criminal law, I divide my analysis in three parts, focusing on the protection regime, the participation in the proceedings and the reparation regime, all of these from a comparative perspective with the ICTY regulations.

After presenting the issues in the Rome Statute which I found to be the most interesting and/or problematic, either from a political, or from a legal point of view, I move to the **Third Chapter** concerning the ICC in practice. I called it symbolically ‘The International Criminal Court – an African Criminal Court?’, as all the four situations the ICC is dealing with are in Africa. All the four situations are analyzed in details. They all follow the same pattern: the history of the conflict is presented, some comments on the trigger mechanism are made, then the measures which ICC took are also laid down, and in the end, the challenges that ICC faces are also presented. When the situation required it, some personal recommendations were made, as in the case of Uganda, where **I propose an application of the negative aspect of the principle of complementarity.**

Every situation presents a different legal challenge for the Court which I underlined in the dissertation. The focus in the Democratic Republic of the Congo is on child soldiers while the one in Central African Republic is on sexual crimes. Uganda is special considering the conflict between peace and justice, while Darfur, the Sudan is challenging as it concerns a state non-party to the Rome Statute, and the first indictment against a President in office.

My dissertation ends with some conclusions and recommendations for the upcoming Rome Statute Review Conference.

To summarize my scientific results and their possible application, apart from a general contribution to the general knowledge of international criminal law, I bring new interpretations in the field.

I propose a new aspect of the principle of complementarity, the negative one, by giving Uganda as an example for the possible implementation.

I also propose a new definition for the crime of aggression as well as the conditions under which ICC may exercise its jurisdiction over the supreme crime. This new definition might be taken into consideration in including this crime in the Romanian and Hungarian Criminal Codes.

My writing offers one of the very few contributions to the legal literature concerning the cases and situation ICC is dealing with, not only in Romania and Hungary, but also internationally. The topic is so new, that I could hardly find information in the doctrine, and when I did, it was almost always concerning one single situation.

My dissertation may be easily used for the purposes of teaching, as I have done for the last two years.

#### IV. List of publications related to the topic of the dissertation

Romania and the International Criminal Court, *Doktori Iskola, Prelegálások V.* Budapest, 2006

The Victims of the Crimes under the Jurisdiction of the International Criminal Court - Some Aspects of Legal Responsibility, *Miskolc Journal of International Law*, Vol. 4. (2007) NO.1.

Crima de agresiune aflată în jurisdicția CPI, (The Crime of Aggression under the Jurisdiction of the ICC, in Romanian), *Gândirea Militară Românească*, No.4 (2007)

Necesitatea politică și juridică a înființării Curții Penale Internaționale, (The political and judicial need for an ICC, in Romanian), *Free Law Journal*, No.3, Vol.3 (2007)

A Nemzetközi Büntetőbíróság hatáskörébe tartozó bűncselekmények áldozatai. Jogi felelősség, *Iustum, Aequum, Salutare Journal*, III. 3. (2007)

The Crime of Aggression under the jurisdiction of the ICC, *Romanian Military Thinking Journal* No.3 (2007).

The Victim and the Witness within ICTY and ICC. A Comparative Perspective, *Free Law Journal* Vol.3 No.4 (2007)

Aggression as an Individual Crime, *Collega*, XI, 2-3 (2007)

The International Criminal Court and the Principle of Complementarity, *Iustum, Aequum, Salutare Journal*, 2, (2008)

Genocide and Other Minority Related Issues in Cases before ICC, in Kovács, Péter (ed.), *International Law and Minority Protection/Droit international et protection des minorités*, Tome III, Collection Studia Iuris Gentium Miskolcensis, Bíbor Kiadó, Budapest, forthcoming.

The International Criminal Court: an African Criminal Court?, *Eyes on the ICC*, forthcoming (2009)

The International Criminal Court - Historical View, *Free Law Journal*, forthcoming

Crima de agresiune – propuneri de lege ferenda, *ProLege*, forthcoming