Tendencies of Accountability for Atrocities from the Perspective of the Preconditions to the Exercise of Jurisdiction of the International Criminal Court

Summary of Doctoral Theses

by

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1 Research objectives and grounds

International law is commonly subject to professional and lay criticism based upon the deficiencies of its effectiveness and enforceability. Impunity of atrocities shocking the conciousness of mankind has been a real phenomenon. The reasons thereof are nested primarily in the characteristics of the sanctions of international law and their underlying political relations. Modern international law however attempted to develop ever more efficient solutions for these lacunae: the fundamental tendency emerging is best summarised by a motto of the ICC preparatory works: "to put an end to impunity." The researches leading to the present doctoral dissertation added just one single word to this expression in an attempt to answer one basic question: *how* to put an end to impunity?

Normative expansion of the post-world-war decades has led to manifest legislative progress in a number of regulatory fields – accountability for the most serious violations of international law has not always been a similar success story. Meanwhile *international responsibility of states* has been applied quite a few times, territorially or even personally not effected states has held liable persons through *universal jurisdiction* and also the first *international criminal tribunals* have become operational. The use of force, as a general context to the crimes under international criminal law, has taken place under the auspices of various international organizations. In such cases, issues of attribution and the lack of an international forum having jurisdiction over the responsible individuals as well, have further hampered the chances of accountability.

Thus the ground for impunity is not to be sought in the simple lack of rules: on the contrary, according to my research hypothesis the wide-ranging multiple rules and actors may hold the legal technical reasons for impunity. The focus of this research has been laid upon the analysis of the interconnections of accountability solutions (state responsibility, universal jurisdiction and international criminal tribunals) in order to identify reasons and possible solutions for impunity. As it is the most recent attempt against impunity, complementarity of the International Criminal Court has served as the fix perspective of the research. The jurisdiction and admissibility system of the ICC seems so novel, that its insertion into the traditional international legal framework raises a number of questions.

These questions usually appear in the form of an alleged contradiction between two basic human and legal values: *peace and justice*. Can peace really be achieved by justice, or are there any peace without justice? Recent rules in the aforementioned accountability systems predict a necessary choice between these two values, as traditional international law stands for peace, while for personal criminal responsibility, justice seems more important.

2 Methodology

The reasons of impunity are only partially legal, a great many of these are rather political. The direction of the research has been maintained however almost exclusively on the legal reasons. Background politics, as determining the will of the States gained some relevance however, since the approach of the dissertation intends to follow traditions of voluntarism.

Evaluation of the relations among the accountability systems, as these embody the will of the states taking a legal form, requires a legal approach. The chosen method for the research therefore has been a value-oriented positivist one, resulting in a lawyer's analysis of the normative framework of the relation between justice and peace.

Throughout the research period, as it is usual in international criminal law, neither civil nor common law methods have proven satisfactory in themselves. Nevertheless, as the research subject is part of international and not comparative law, comparison has not been a key means for the preparation of this work. Comparative approach have been still used as a supplementary tool in order to evaluate certain particular issues (*e.g.* the notion of a subpoena).

As a main rule, the research was conducted by written sources. A significant amount of primary sources has become available on-line in the last few years, almost as valuable as access to the actual archives. Without even trying to be comprehensive, some of these sources could be highlighted: the Legal Tools containing the preparatory materials for the ICC, the Nuremberg Trial Proceedings or the Avalon Project of Yale University. Case law databases of various international judicial forums have been also particularly useful.

From the Hungarian libraries the Central European University and Library of the Parliament offered great research facilities. Judge Géza Herczegh donated an excellent collection of books to our Department Library, which became a unique addition to my researches and the source list of this dissertation. Through Heinonline I gained access to a range

of law journals not commonly available in print at the shelves of the mentioned libraries.

Beyond the written sources several conferences should also be mentioned that modified or added to the research work. International Criminal Law Network annual conferences in the Hague have driven my attention to the questions of complementarity; participation at the 2004 ICHR Summer Programme and the subsequent Conference in Galway, conducted by Professor William Schabas has been a tremendous asset for example in the understanding of certain common law concepts relevant in international criminal law; and last but not least a 2008 conference at the European University Institute shed some new light on my views on the relation between international public and criminal law.

3 Research Outcomes and Applicability Thereof

1 – The system of complementarity has not been introduced in a vacuum – it has been taking its place among a number of pre-existing international legal institutions. Generally, the principal and detailed rules of the contemporary system of international criminal law have been greatly developed by the *ad hoc* tribunals. My research was however not attempting a thorough description of these tribunals. Instead, only their impact on future legal development have been examined here, and the rules on the commencement of their procedure, along with the relation to domestic prosecutions. These rules are the predecessors of complementarity, and

hold most important experiences for the understanding thereof.

During the research, one of my working hypotheses on the extent of the primacy of the *ad hoc* tribunals have been partly disproved, partly outdated. Although this primacy still apparently exists, an increasing role of national prosecutions may be witnessed also regarding the competence of the two UN *ad hoc* tribunals. As one of the direct forerunners of complementarity. the examination of a prima facie case can be identified, as conducted by these international forums. On the other hand the tensions surrounding the subpoena issued in the Blaskic case can well illustrate the actual constraints of law enforcement *vis-à-vis* state authorities. The work of the *ad hoc* tribunals also evidence the practical difficulties of the results and symptoms of state authorities being unable or unwilling to genuinely prosecute persons responsible for the serious violations of the fundamental norms of international law.

Another great outcome of the judicial development performed by these tribunals is the clarification of the elements of crimes. Since the Nuremberg and Tokyo trials virtually the complete international human rights and humanitarian law have been changed. Several major concepts of substantive international criminal law including, but not limited to the most important general principles of have also been made by the judges of the *ad hoc* tribunals: in other terms, this means the adoption of international criminal law, as such to the international legal reality of the late 20th , early 21st century.

2 – Examination of accountability in the widest sense must be started with the identification of the subjects of law purportedly sharing responsibility. According to the principle of

personal responsibility "crimes against international law are committed by men, and not by abstract entities and only by punishing individuals who commit such crimes can the provisions of international law be enforced". However this approach at the time of its birth in 1945 opened new roads in international law, as the traditional subject of this law have been the states. By 2001, crimes of states have been removed from the final Draft Articles on State Responsibility, yet the concept itself – a different kind of responsibility for the violations of the most fundamental norms of international law – survived.

Such breaches of fundamental norms in certain cases may entail personal and state responsibility alike. When a wrongful act is attributable to the state while also meeting all the required elements of an international crime, (or in simpler terms: the perpetrator of an international crime acted in an official capacity) there are several forums and procedures seemingly available for accountability. Parallel application of individual and state responsibility reasonably establishes the need for examining the interrelations between the two systems. It may be uphold, that a sentencing judgement against an individual would not form *res judicata* in the question of wrongfulness for a forum on state responsibility, while it may still be classified as a "highly persuasive" evidence. There is no trace in the recent customary or other rules decreasing states responsibility in case of a successful application of personal accountability – even if the authorities of the very same state punished the individual acting in an official capacity on behalf of that state. Such a domestic judgement for an international court rather becomes a highly persuasive evidence of both wrongfulness the act and its attribution to the state. Thus the recent connection between state and individual responsibility effects negatively the most basic form of personal accountability:

trial by the state whose official committed the given crime. Accountability for atrocities committed by abusing peace operations under the auspices of international organizations is further hampered by difficulties related to the attribution of the conduct and the resulting lack of an international jurisdiction over the persons responsible.

Beyond territorial and personal jurisdiction, rules on universal jurisdiction have a long standing history in international law – but the application of these rules has not such a glorious past. Still, those relatively few examples on the application of universal jurisdiction leading back to the fight against piracy, may be well considered successful achievements. Universal jurisdiction as applied against persons not any more sporting any kind of state support, like Nazi criminals after the war, have not raised any issues seriously questioning international legal cornerstones.
The problem with universal jurisdiction does not lie in its application: its source is the lack of application. National authorities have been reluctant to increase their case burden further, particularly so if those cases would require a huge amount of extra workload without offering apparent, if any results. On the other hand universal jurisdiction failed the historical opportunity at the turn of the millennia to become the tool against the impunity of high ranking statesmen, at least that can be derived from the Yerodia and Pinochet judgements. The range of application of universal jurisdiction seems to be narrowed to private persons and to those state officials who does not enjoy any immunities under international law.

This concludes that traditional international legal solutions – state responsibility on the one hand, and universal jurisdiction based individual responsibility on the other – fail to provide a comforting solution against impunity of any per-

sons, regardless of their power positions. The solution therefore may be offered by a new legal technique: international criminal tribunals.

3 – As the dissertation maintains an international legal perspective, criminal legal evaluation of the crimes within the jurisdiction of the tribunals have been omitted. Instead, there is only a brief summary of the distinctive elements of these crimes as regulated by the Rome Statute and the Elements of Crimes of the ICC. This was necessary in any case, as obviously, the commission of any these crimes is a *conditio sine qua non* to any prosecution by the international authorities. The Hungarian rules as of 2010 does not, or only partially reflect the aforementioned major changes in international humanitarian and criminal law, which leads to a number of theoretical and practical issues as well. The recent state of the Hungarian regulation must be amended, because due to those lacunae in the Hungarian legal system, an ordinary judge would not be able to trial most of the cases on crimes within the jurisdiction of the ICC otherwise falling within his procedural competence.

As for the goals of the research, the analysis of the Hungarian rules produced different results than those expected. The dissertation managed to describe the Hungarian regulatory framework, and by a comparison between the Rome Statute and the Hungarian Criminal Code along with Act VII of 1945 on war criminals the differences have been clearly outlined, yet intentionally not detailed. Uncovering the reasons of the legislative halt in the implementation process of the Rome Statute have proven to be *quasi* impossible by the use of publicly accessible materials. Therefore identification of this havoc can be understood as a result of the research, although the reasons thereof remain unknown.

4 – Preconditions to the exercise of jurisdiction at the ICC in their most narrow sense refer to the procedural steps to be taken before an investigation or a subsequent trial may be commenced. The rules regulating these preconditions were genuinely novel, regardless of similar indications at the *ad hoc* tribunals. Even so, the regulatory concept based upon the utmost respect of national sovereignties is a restoration of traditional international legal values in international criminal law. Criminal procedure at the ICC is a measure of last resort – it may only take place if the effected national authorities are unable or unwilling to genuinely prosecute persons responsible for serious violations of certain fundamental norms of international law.

Quite a few criticisms against the ICC are grounded in the misconceptions attached to these preconditions, particularly in certain distorted interpretations of the trigger mechanisms. As "the" preconditions to exercise of jurisdiction (in the terminology of the Rome Statute), the analysis of the international legal surroundings of these trigger mechanisms have received some emphasis in this dissertation.

A core question to practical complementarity will be testing the genuineness of national prosecutions – by a secondary, international body. The synoptic rules on the lack of willingness and ability form an integral part of the Rome Statute, but it remains silent, along with the preparatory materials, on the conditions a national prosecution must meet, if it intends to be "genuine". One notable example mentioned by the Statute is the so-called "shielding", but its actual meaning is missing from the legal tools.

The solution to this problem in my opinion lies in the integration of an international public law understanding of the ICC preconditions. During my researches such an approach

led to the judicial practice of various human rights courts, as these had to answer a very similar problem to this "genuine" ICC issue. In the course of a joint interpretation of the right to life and the right to effective remedies both the European and the Inter-American Courts of Human Rights have developed certain standards, that can be interpreted as qualitative requirements *vis-à-vis* state investigations in cases involving killings allegedly attributable to state officials. According to my best knowledge, the identification of these standards, let alone their application to international criminal legal problems has not been published before. These judgements may predict those conditions, that the Pre-Trial Chamber will probably evaluate in order to identify a genuine national prosecution.

5 – The list of measures protecting national sovereignty is not exhausted by issues of admissibility and jurisdiction, or by the examination before an investigation. State Parties have never wished to create an international forum, burdened inoperative by a tremendous amount of cases. The aim of the Rome Statute is to end impunity – not necessarily by the ICC. The Court itself is just a mere tool thereto, which is capable to prosecute, but its goal may also be achieved by convincing state authorities to make those prosecutions themselves.

The judicial role of the ICC is closely related to international peace and security, which in turn is subject to the "primary responsibility" of the UN Security Council. Thus the Security Council obtained an undoubted position as one of the three triggers of the Court. On the other side of the coin we see the Security Council as a body capable of blocking the ICC procedure, if it considers that prosecution for certain acts hinders the Council's efforts to maintain international peace and security.

There are a number of safety valves to be passed in the course of the procedure, all of which may effectively stop further steps by the ICC. The state may challenge the jurisdiction of the ICC until the trial itself is commenced, if it becomes able to prosecute or due to transitions it already wants to prosecute. In these cases the ICC will refer the case back to the state after a thorough examination of the situations.

Another blocking factor can be the Security Council, as acting under Chapter VII of the UN Charter, it may defer a case from the ICC. This deferral under the Rome Statute meant a 12-months-long suspension period subject to renewal in the same procedure, but when sending the peacekeepers to Liberia, the Security Council extended this meaning in its own resolution.

Moreover, rules of the Rome Statute regulating state co-operation exemplify certain other means, by which a state may create some difficulties or even jeopardise ICC proceedings. Based upon the lessons learnt from the *ad hoc* tribunals, both the Rome Statute and the Rules of Procedure and Evidence consist of rules to avoid this kind of obstruction.

4 List of relevant publications

Book:

- *A fegyveres összeütközések joga (Law of Armed Conflicts)*, eds: Ádány, Tamás Vince– Bartha, Orsolya– Törő, Csaba. [Zrinyi, 2009, Budapest] ISBN 978-963-7060-59-5, 462 p.

Articles:

- *International Relations and the Introduction of an International Criminal Court*
  in: Crossroads, No. 2/2001, Milano
- *Humanitarian Intervention against States Supporting Terrorism*
  in: Terrorisme et droit international Hyperterrorism and International Law; ed: Kovács Péter, Miskolci Egyetemi Kiadó – European Integration Studies, Vol 1. No 1. 2002. Miskolc
- *A terrorizmussal szembeni fegyveres harc* [Armed Attack on Terrorism]
  in: Emlékkönyv Flachbarth Ernő tiszteletére; ed: Szabó Marcel, PPKE JÁK, 2003, Budapest
- *Rebellion or War of Independence? The Case of the Martyrs of Arad*
  in: L'histoire en droit international / History in International Law; ed: Kovács Péter, Bíbor Kiadó, 2004, Miskolc
- *A joghatóság gyakorlásának előfeltételei a Nemzetközi Büntetőbíróságon* [Preconditions to the Exercise of Jurisdiction at the International Criminal Court]
  in: Placet Experiri – Ünnepi tanulmányok Bánrévy Gábor 75. születésnapjára; ed.: Raffai Katalin, PPCU, 2004, Budapest
- *Schabas on genocide - Review of William A. Schabas: Genocide in International Law*
  in: Miskolc Journal of International Law, 2005. Vol 2. No. 1
- *Individual Criminal Liability for the Crimes Committed*

in 1956
in: Miskolc Journal of International Law, 2006. Vol 3. No. 3

- *Collective Rights as Reflected by the Jurisprudence of the ICTY*
  in: Miskolc Journal of International Law, 2008. Vol 5 No. 2
- *Érdemi eljárás: a komplementaritás Achilles-sarka* [Genuine Procedure: The Achilles heel of Complementarity]
  in: Egységesedés és széttagolódás a nemzetközi büntetőjogban, ed.: Kirs Eszter, Bíbor Kiadó, 2009
- *A nemzetközi humanitárius jog szankciói* [Sanctions of International Humanitarian Law] co-author: Baller, Barbara,
  in: Ádány-Bartha-Törő: A fegyveres összeütközések joga (Law of Armed Conflicts), see above
- *Szemelvények: Afrika* [Conflict Profiles: Africa],
  in: Ádány-Bartha-Törő: A fegyveres összeütközések joga (Law of Armed Conflicts), see above
- *A nemzetközi törvényszékek és a Nemzetközi Büntetőbíróság szerepe az egyén felelősségre vonásában* [The Role of International Tribunals and the ICC in Individual Accountability]
  Publication in progress by the Hungarian Ministry of Foreign Affairs
- *A Genuine Test for Genuine Prosecutions*
  Publication in progress by Eleven Publisher, the Netherlands

Selected Applied Works:

- *Records of the International Court of Justice from the Gabcikovo-Nagymaros Case* - CR 97/8, CR 97/10 CR 97/14
  Translations, 1999, Office of the Prime Minister
- *A hátrányos megkölönböztetés tilalma a nemzetközi jogban (Prohibition of Discrimination under International Law)* Ministry of Justice, 2002

Theses:

- *A Bős-Nagymarosi Vízlépcsőrendszerről szóló szerződés értelmezésének stádiumai (Stages of the Interpretation of the Treaty on the Gabcikovo-Nagymaros Barriage System)*
  (Final thesis, 2000, International Law Department, Peter Pazmany Cath. Univ., Budapest)
- *Contemporary Legal Changes in the International Legal System of Peace and Security*
  (Master's Thesis, 2001, Alta Scuola Economia e Relazioni Internazionali, Milano,)
- *Impacts of Complementarity on the International Legal Background to Personal Accountability*
  PhD thesis, PPCU, planned defense: Autumn Semester, 2010

Selected lectures:

- *State Co-operation with International Criminal Tribunals*
  Hungarian Judicial Academy, Budapest, 20/11/2009
- *A nemzetközi törvényszékek és a Nemzetközi*

Büntetőbíróság szerepe az egyén felelősségre vonásában [The Role of International Tribunals and the ICC in Individual Accountability]
60th Anniversary of the Geneva Conventions, Ministry of Foreign Affairs, Budapest, 29/09/2009

- *A humanitárius jog szankciói – a nemzetközi büntetőbíráskodás* [Sanctions of Humanitarian Law – International Criminal Jurisprudence]
  Annual Conference of the Lawyers of the Hungarian Army, Ministry of Defense, Balatonkenese, 23/09/2009
- *Genuine Prosecution of Individuals, and its Possible Impacts on State Responsibility*
  PPCU, Budapest, 23/05/2009
- *Emberi jogi minták a komplementaritásban* [Human Rights Patterns for Complementarity]
  Unity and Division in International Criminal Law, Miskolc 06/05/2009
- *Personal Responsibility for Violations of International Humanitarian Law*
  ICRC, Warshaw, November 2007
- *Az EU részvétele nemzetközi szervezetekben – Működő CFSP és a Nemzetközi Büntetőbíróság* [EU Participation in International Organisations – Functioning CFSP and an International Criminal Court]
  The European Communities and the United Nations, Hungarian UN Society – PPCU, Budapest, May, 2007
- *Individual Criminal Liability for the Crimes Committed in the 1956 Revolution*
  1956, Hungary..., University of Miskolc, March, 2007
- *Nemzetközi büntetőjogi válaszok a kisebbségeket érő legsúlyosabb atrocitásokra* [International Legal Responses to Serious Atrocities Against Minorities]

Minority Protection in International Organisations, EÖKIK, Budapest, 10/12/2004