

Situations Referred to the International Criminal Court by the United Nations Security Council – “ad hoc Tribunalisation” of the Court and its Dangers

Tamás Lattmann

Senior researcher at the Institute of International Relations (Prague); associate professor at the National University of Public Service (Budapest)

The study examines the possibility created by the Rome Statute, the founding and governing document of the International Criminal Court, according to which the United Nations Security Council has the option to refer situations to the court by a legally binding resolution acting under Chapter VII of the United Nations Charter. This is possible, regardless of the fact that the state concerned is a party to the Statute or not. According to the author’s conclusion – although only limited number of such situations could yet be examined – this legal possibility is currently far from being a success story. It is still important to emphasize that while it can be a really useful tool from the perspective of international politics, it may pose a serious threat to the future of the court.

Keywords: International Criminal Court, ICC, United Nations, Security Council, referral, complementarity, ad hoc tribunal, Chapter VII, Sudan, Darfur, Bashir, Libya, Gaddafi, immunity.

Different types of international criminal judicial fora have appeared and become active during the last 25 years. The examination of those and their relationship to states – the classic subjects of international law – or state sovereignty can lead to interesting questions. How is international criminal justice (which is based on transferred competence by sovereign states to international level) relate to domestic criminal justice (exercised directly by state sovereignty) and in what direction is international criminal justice developing?

The possibility of the Security Council to refer specific situations to the court without any consent of the state concerned, regardless of the fact if that state had earlier ratified the Statute or not,¹ is a very interesting attempt to step up against impunity, with circumventing state sovereignty, if it is used to provide protection for somebody responsible for the gravest crimes, embodied in the Statute. Similarly, there is an additional option to suspend any ongoing case in front of the Court by the Security Council, using the same method.²

The first situation like that – connected to the conflict in Sudan and the Darfur region – have led only to disappointment and also had a role in the African disappointment in the Court. With only one situation at the table it was not possible yet to foresee the future of this legal solution in the Statute, or where the International Criminal Court is going to head in connection with that.

¹ *Rome Statute of the International Criminal Court*. Rome, 17/07/1998, UNTS vol. 2187. Art. 13 Para (b).

² *Ibid.* Art. 16.

The initial feelings have not been optimistic, rather quite critical and anxious. Of course, there are understandable political reasons for creating this option in the Statute, and in specific situations it may become politically useful. At the same time, there is also a clear danger arising. These tools in the hands of the Security Council do not necessarily serve the idea of international peace and justice, and especially not the dogmatic purity of international criminal justice. Those are rather bargaining tools for specific situations, in which some actors of international politics could be deterred from committing further violations and/or forced to the negotiation table with the threat of the referral or the promise of a future suspension. Although this may be understood and to some extent accepted as a sad fact and a reality of international politics, unfortunately the worries still persist, given that the events since the first situation have not helped to dispel any doubts.

1. Comments related to referrals by the Security Council

According to my opinion, one of the most important characteristics of the International Criminal Court is that its possible procedures represent a balance between state sovereignty and the international need for criminal justice, which may strengthen international rule of law. But the possibility of a referral by the Security Council can make the weight of politics heavily overweight, which otherwise had been a dominant characteristic of the *ad hoc* tribunals, which had been created by the Council on a case by case basis, had they been needed, and had the necessary political compromise been present. I believe that this was one of the weakest point in the ICC Statute system, which poses the danger of the court turning into an *ad hoc* judicial forum like the Yugoslavia or the Rwanda Tribunal, which will raise several questions.

The first such problem is hypothetical in its nature. A Security Council referral under Chapter VII of the UN Charter means the application of politically motivated legitimate coercion. I believe that this problem is also well reflected in the fact that the possibility of the Council to “move” the court persists not only in respect of referrals, but also of suspension of actual cases in front of the judges.

In a case like this, what happens is that UN Security Council agrees somehow in a political interests-forged compromise, which takes the form of coercion, being exceptional under the current system of international law, though legitimate under the UN Charter. Legally this may be possible, but it attracts all kind of political problems. Such as the disappearance of one of the most important advantages, which the International Criminal Court offers opposed to *ad hoc* tribunals: the capacity to act based on the enhanced amount of co-operation of member states as a permanent international organization established by an international treaty. In the latter cases, in spite of the international legal obligation of the state(s) concerned to cooperate, it is usually depending primarily on political considerations, as it can very clearly be seen with cases of the Yugoslavia Tribunal. With its referral, the Security Council turns the International Criminal Court practically into an *ad hoc* tribunal (hence the term “*ad hoc* tribunalisation”), as those gain competence and legitimacy of its procedures and their existence from the powers of the Security Council – similarly to the International Criminal Court in a situation like that. From this moment, the most important advantage arising from the characteristics of the court is lost, because of the absence of compromise, which functions as the fundamental connective element of international law that organises the relation of the sovereigns. The highest advantage of the court that is lost here, the exemption from politics.

The second concern is purely political-financial in nature, but in terms of international relations is far from irrelevant. When the Security Council decides to set up an *ad hoc* tribunal, it must also consider its potential costs. The various UN *ad hoc* tribunals’ high balance sheet total budget has been accepted by the UN General Assembly biannually during the last decade, as they have been part of the UN general

budget.³ This solution has sparked serious controversy within the organization, and the debate around the issue has constantly got a sharper tone as a growing number of member states has echoed significantly growing criticism regarding to terms of cost and the effectiveness of the various judicial fora maintained by those funds.⁴ For example, relevant donors like Germany and Japan have expressed their dissatisfaction by sharply criticizing the ad hoc tribunals in the General Assembly⁵ and at the same time increasing their contributions to the International Criminal Court, where the main decision-making body of the organization, the so-called Assembly of States Parties is in charge of finances, rather than the United Nations. In the case of a referral of the Security Council to the International Criminal Court, a weird situation arises: it charges the expense of “international justice” it deems necessary to apply instead of the UN budget to the states party to the ICC Statute. Among the five permanent Security Council members this means only two, France and Britain, and among the non-permanent ten members a varying number of member states, but not necessarily any majority. The question arises: to what extent is it acceptable that the funds provided by the community of the currently 124 member states are used for the commitments of a body in which these states do not all have an effective decision-making position, and how long will this be tolerated by them.

During the last years the Security Council luckily has not made referrals a widely used tool, as to the one such existing situation (Sudan) only one more (Libya) has been referred to the Court. But already these two situations have highlighted at least three types of problems with Security Council referrals. The continuous deterioration of the situation in Syria has constantly kept the possibility of a new referral on the agenda, and according to many NGOs and some states, the situation in Iraq may also require the application of this option, especially with regard to the activities of the Daesh terrorist organisation (Islamic State).⁶ Before decision is made on these situations, it is useful to examine and evaluate the situations that are already in process.

2. Referral no. 1: Sudan and the Darfur Region – an Expected Failure

The first situation referred to the International Criminal Court by the Security Council was the situation in Sudan, in 2005.⁷ After examining the situation, five actual cases have been initiated in front of the International Criminal Court, out of which the most well-known is the indictment against the president of Sudan, Omar Hassan Ahmad Al Bashir, and the following proceeding.⁸ It had started with some difficulty, since two arrest warrants got accepted: first, the prosecution did not succeed in getting the warrant for the crime of genocide approved by the pre-trial chamber of the court, only for the second time. Additionally, the indictment included five counts of crimes against humanity, two counts of war crimes and three counts of genocide.

³ For example, the budget for the International Tribunal for Yugoslavia has been around 180 million USD in the 2014-2015 period, with a steep fall from the 250 million USD in the 2012-2013 period, which has already been 36 million USD less than of the 2010-2011 biannual period. This is the result of the lowering of the costs with the completion of the activities of the tribunal itself. Source of data: *The Cost of Justice*. ICTY, available online: <http://www.icty.org/sid/325> (30 August 2016).

⁴ William A. Schabas: *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*. Cambridge University Press, 2006. p. 622.

⁵ For arguments against the criticism related to the high costs of the Yugoslavia Tribunal, see: David Wippman: *The Costs of International Justice*. *The American Journal of International Law* Vol. 100, No. 4 (Oct 2006), pp. 861-881.

⁶ *Report of the Office of the United Nations High Commissioner for Human Rights on the human rights situation in Iraq in the light of abuses committed by the so-called Islamic State in Iraq and the Levant and associated groups*. 13 March 2015, Geneva. A/HRC/28/18.

⁷ S/RES/1593, 31 March 2005.

⁸ *The Prosecutor v. Omar Hassan Ahmad Al Bashir*. Case No. ICC-02/05-01/09.

Evaluating the result of the proceedings of the International Criminal Court and the activities of the international community with the Darfur referral, it is safe to say that we face a failure. More importantly, this is a somewhat expected failure: the series of events following were more or less in line with what could have been expected by everyone when during the drafting of the Statute, at the part, where the states provided the Security Council the option of referral. The substantial point of this situation is that there is a state, its high-ranking leaders or politicians against whom international legal has to be enforced by the tools of criminal law. In a case like this it is only natural to calculate with the possibility that this will not succeed immediately, but it is possible with time. The most well-known examples to this are Slobodan Milosevic and Charles Taylor, who, at the peak of their power did not seem to fear any international criminal forum. But the picture with Sudan unfortunately predicts a different outcome.

An important prerequisite for this solution to be successful is an effective political isolation, which could reduce the political playing field significantly for the actor wanted by the International Criminal Court, or his/her political supporters. But in the case of Sudan, it just seemingly does not work: President Al Bashir was placed on the main seat on the Arabic League Summit in Doha, right after the arrest warrant had been issued. Not much later, during the meeting of the African Union in Sirte, Libya, where the UN Secretary-General Ban Ki-Moon has also been invited, the organizers seated them at the same table at the gala dinner. It is hard to imagine a more obvious slap in the face for the international community and the International Criminal Court. Another well visible sign of failure was in 2011, during an official state visit by Al Bashir in Peking, where he could march in front of a decorative military line after arrival, where those soldiers were clearly not there to arrest the politician wanted by the International Criminal Court for genocide. One could argue, that the situation has improved a bit in 2012, when the Republic of Malawi, the state responsible for organizing the 19th African Union Summit, rather stepped back from the task when had to face the potential political difficulties caused by the visit of Al Bashir: as a state party the Statute of the International Criminal Court, he would have been under the obligation to make the arrest and extradite the Sudanese president, which would have been hard to imagine given the realities of contemporary African politics.

The serious nature of this problem is show by the fact that the court has started to declare non-compliance issues. The first one of these was with the same Republic of Malawi, who was found responsible for not arresting the Sudanese president during his visit on 14 October 2011, in a decision made on 12 December 2011 by the Pre-Trial chamber I.⁹

At the same time, the same chamber has also decided that the Republic of Chad (which is also party to the Rome Statute) also has failed to fulfil its obligation to arrest and surrender Al Bashir during his visit on 7 and 8 August 2011,¹⁰ then later again on 23 March 2012.¹¹ Chad also been found in violation of the Statute on 26 March 2013, when Pre-Trial chamber II has issued a new decision related to its repeated

⁹ *Ibid.* Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir. ICC-02/05-01/09-139, 12 December 2011.

¹⁰ *Ibid.* Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir. 13 December 2011.

¹¹ *Ibid.* Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir. ICC-02/05-01/09-140-tENG, 23 March 2012.

breach of obligation, this time when Omar Al Bashir has visited the country during 16-17 February 2013.¹²

Sometime later, on 9 April 2014, Pre-Trial Chamber II has found the same breach of obligation with the Democratic Republic of the Congo (also a party to the Rome Statute), when the Sudanese president had been visiting the country during 26-27 February 2014.¹³

Nearly one year later, on 9 March 2015, Pre-Trial Chamber II has also come to a conclusion finally with the Republic of Sudan as well: it has declared that the state has failed to cooperate with the Court by not arresting and surrendering the president, Omar Al Bashir to the International Criminal Court over all the years that have passed.¹⁴

All the decisions have been transmitted to the UN Security Council and to the Assembly of the States Parties to take the necessary measures as they deem appropriate, and other cases have followed them ever since. So we could argue: back to politics. The really disturbing element of the above experience is that all states (except for Sudan) that has been found in violation of the Rome Statute are parties to it, so their obligations have a simpler source: the fact that they had ratified the Statute. Their direct violation has had a complex political reason, and while I do not argue that these definitely would not have existed, had the International Criminal Court had a different base of examining the Darfur/Sudan situation, I am confident that it would have been harder to find excuses for these actions, so they could have had a better chance of being avoided. But now the situation is that more and more African countries are turning against the court, arguing that it is a “court against Africa”, which is definitely a grave political problem for the court, losing credibility, with a growing resistance towards it.¹⁵ You can argue, that the fact of African states now seem to develop their own “African international criminal court” in the form of modifying the African human rights judiciary system is an advancement, even if it is to some extent a sign of opposing the International Criminal Court, I believe that this will not be a successful attempt.¹⁶

In summary, the referral of the Sudan/Darfur region situation has proven to be a failure for the Security Council and the court so far from every angle, and not only related to the present African activities of the court, but also to its future and the whole concept of international criminal justice in the African region.

3. Referral no. 2: Libya – an Unexpected Failure

Compared to the situation in Sudan, the second referral of the Security Council resulted in a somewhat surprising failure, throwing light to more potential problems related to this option. In the case of Libya,

¹² *Ibid.* Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir. ICC-02/05-01/09-151, 26 March 2013.

¹³ *Ibid.* Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court. ICC-02/05-01/09-195, 9 April 2014.

¹⁴ *Ibid.* Decision on the Prosecutor’s Request for a Finding of Non-Compliance against the Republic of the Sudan. ICC-02/05-01/09-227, 9 March 2015.

¹⁵ For an overview, see: Kenneth Roth: *Africa Attacks the International Criminal Court*. The New York Review of Books, 6 February, 2014. Online: <http://www.nybooks.com/articles/2014/02/06/africa-attacks-international-criminal-court/> (30 August 2016); Max du Plessis - Tiyanjana Maluwa - Annie O’Reilly: *Africa and the International Criminal Court*. Chatham House, July 2013. Online: https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/0713pp_iccafrica.pdf (30 August 2016).

¹⁶ Chacha Bhoke Murungu: *Towards a Criminal Chamber in the African Court of Justice and Human Rights*. Journal of International Criminal Justice (2011) 9 (5). p. 1067-1088.

the Security Council has referred the situation to the International Criminal Court with a unanimously adopted resolution made in 2011, which was needed, as Libya – similarly to Sudan – has never ratified the Rome Statute.¹⁷ After examination of the situation, the Prosecutor of the court ended up initiating three cases. One of them has been cancelled since then, as the accused, the former head of state of Libya, Muammar al-Gaddafi, has been killed by a group of rebels. During the proceedings against his captured son, Saif Al-Islam Gaddafi and Abdullah Al Senussi (former head of the military, who was arrested later, in the March of 2012 in Mauritania, and extradited to Libya in September of the same year), both accused of crimes against humanity, no such obstacles have arisen.¹⁸

The process was stopped instead by the capturing rebel group, and later the state, stating that they do not intend to extradite the accused to the International Criminal Court, but they plan to bring them to justice within domestic jurisdiction.

4. The Principle of Complementarity in the Situation of Libya

While the Security Council has referred the situation of Libya to the International Criminal Court, the affected state also wants to punish the person in question, which results in a strange situation, which can be dubbed a “reversed Sudan situation”.

The principle of complementarity, embodied in the Rome Statute,¹⁹ as one of the operational principles of the court means that the Court may only entertain a case, if the given crime is not being tried by the state on the territory of which it had taken place or which has jurisdiction on any other base. The goal of this provision is not only the protection of state sovereignty, but also to strengthen the “ultimate” nature of the Court and the original obligation of states to step up against these crimes.²⁰ The practical applicability of the principle could allow the Libyan authorities to refuse extradition if they are willing and able to bring the accused to justice in Libya. Of course, to defend this legal position, the state has to conduct thorough and fair proceedings with employing serious guarantees, with international observation if needed. The twist is that, according to the relevant rules of Chapter VII of the UN Charter and the Rome Statute, this resolution is legally binding, but we have to interpret this binding force within the framework of the Rome Statute, which describes the principle of complementarity being primary in the functioning of the court in its totality. The referral by the Security Council gives effect to the applicability of the Statute also in relation to a non-party state, but still has to respect complementarity (being part of the Statute), and based on this, taking the criminal proceeding from a state that is willing and able to conduct it, hardly seems to be justifiable or being in conformity with the Statute. As we could see earlier, in the Sudan situation, the willingness of the state has obviously been missing all over the years, which is the big difference between the two situations.

With Libya, the criterion of “ability” can be dubious, as it is not certain, that apart from the obvious willingness and political intent, the state is also able to offer the prerequisites of appropriate proceedings. This can be decided based on the quality of the justice system of Libya in general and to some extent, on the accused individual’s local reputation and the attitude towards him. It is not unreasonable to assume that there is a good chance that instead of a fair trial, the accused would face the courtroom

¹⁷ S/RES/1970 (2011).

¹⁸ *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*. Case No. ICC-01/11-01/11.

¹⁹ *Rome Statute*. Arts. 1, 17, 18, 19.

²⁰ Antonio Cassese: *International Criminal Law*. Oxford University Press, 2003, pp 351-352; Robert Cryer & Hakan Friman & Darryl Robinson & Elizabeth Wilmhurst: *An Introduction to International Criminal Law and Procedure*. Cambridge University Press, 2010, pp. 153-154.

version of his father's murder on the street. According to the Rome Statute, and the uniform interpretation by scholarly literature, domestic judicial proceedings are only deemed to be appropriate if all the needed judicial and human rights guarantees are fulfilled. As the Prosecutor of the court has stated in 2003 in his general comment, competing with state authorities is not a goal of the court, quite the contrary, he has held that conducting as many domestic proceedings as possible is desirable.

What can the court's potential decisions be based on? So far we can evaluate this situation as another failure, since the court was unable to proceed with its prosecution, but this failure is very different from the one in the Sudan/Darfur situation. First of all, it is unexpected, because probably nobody has ever anticipated this, not just in this particular situation, but not even during the drafting of the Rome Statute. By comparing this situation with the one in Sudan, the difference becomes obvious. The latter one is a "simple" line-up, in which there is an antagonist, the leader of the state, whom the court wishes to prosecute, yet he is able to hide in the mantle of the sovereignty of the state – and according to the provisions of international law, it is not easy to strip him of his power. In the Libya situation, the situation is much more complex: state sovereignty did not protect the accused from the prosecution, right on the contrary, it is used to bring him to justice within the state.

I believe that here the logic of the system simply breaks down, I do not think that even the "founding fathers" of the Court were prepared to handle such a situation, while they were designing the system of the operation of the institution. The pre-planned, and every logically pre-imagined scenarios for UN referrals have involved heads of states or other influential political characters to be brought to justice were to hide, to flee, to protect themselves to some extent by the protection of their states, but it has never come up as a potential problem, what if the state itself becomes an obstacle for the prosecution by the court, and not because it wants to protect the accused, but because it wants to exercise its punitive power domestically.

In my opinion this situation brings up very serious questions that have to be decided carefully during the proceedings of this situation. Since this is the first time that the court faces such difficulties, the appropriate reactions have to be defined now. Cooperation with the International Criminal Court is the *sine qua non* of the function of the whole system, and this cannot be different under the current international legal system defined by sovereign states.²¹ The interpretation of the principle of complementarity, a principle that defines the functioning of the International Criminal Court, is a problem worth serious consideration, since it is the main element that separates the International Criminal Court from *ad hoc* tribunals. The burning question: does it have to be applied even in situations referred by the Security Council, or can it be waived in such cases?

I see the latter answer possible only in one case: if the Security Council explicitly states this in its resolution about the referral. But in the case of Libya, the relevant Security Council resolution has only copied the appropriate text from the Statute, and have not mentioned anything about waiving the principle of complementarity. Of course, if such an obligation had been created, it would be contrary to the text of the Statute and contrary to the original concept of the functioning of the institution, which would lead us to another intriguing question: whether or not the Security Council can waive, even on a case by case basis, complementarity from the system of the Rome Statute. This paper will not address this question in details, but after examining the practice of the Security Council, its resolutions and their relationship with international treaties, we can conclude that this is legally possible. But still, it has not happened in the Libya referral, so this theoretical possibility is not relevant here. I would stress that in

²¹ Cassese, p. 356.

my opinion, the Security Council would definitely have to explicitly prescribe it, if it wants to impose such obligations on a state.

The official position of the Court during the discussion of this particular question can be summarized as that the best would be if the court itself decided the question. For this, Libya should extradite the accused individuals, and then challenge the jurisdiction, the admissibility of the case in front of the court. After long discussions, the Libyan government has done the latter, filed in a petition on 1 May 2012 concerning Saif Al-Islam Gaddafi,²² but at the same time they have not gone forth with the extradition. In my opinion, this was not a sign of serious intention, rather an attempt to win some time.

The Pre-Trial Chamber I has examined the challenge to the admissibility based on the principle of complementarity, which has been built on the arguments described above, stating that the International Criminal Court shall not replace domestic criminal justice, and it can operate only if the state concerned is not willing or able genuinely to do so. On 31 May 2013, the chamber rejected the challenge,²³ arguing that the state of Libya is unable genuinely to carry out the prosecution of the accused, and also expressed doubts about the domestic criminal procedure and the possible procedure of the International Criminal Court would cover the same case. This decision was reaffirmed by the Appeals Chamber on 21 May 2014, finally deciding that the case against Saif Al-Islam Gaddafi is admissible in front of the court.²⁴

On the other hand, a different result was concluded in the other case, the one regarding Abdullah Al Senussi, challenging the admissibility of the case, based on the same arguments. It was initiated by Libya on 2 April 2013, and decided on 11 October 2013 by the Pre-Trial Chamber I, concluding that the case is inadmissible before the International Criminal Court as it was under domestic proceedings.²⁵ The chamber has declared that the authorities conducting the proceedings are competent and that Libya is “willing and able” to genuinely carry out the proceedings. The decision was reaffirmed unanimously by the Appeals Chamber on 24 July 2014, declaring the case against Al-Senussi inadmissible, bringing that case to an end.²⁶

The settlement of this question by the court’s interpretation was not an easy task. As it has had to face an issue that had not been accounted for drafting of the Rome Statute, while recognizing that the principle of complementarity was not designed for such a situation. In the end, as we can see from the decisions of the court, it has clearly accepted the applicability of the principle of complementarity in the Senussi case, but its decision in the Gaddafi case can also be interpreted similarly. The difference was not in the substantial interpretation of the role of complementarity but in the factual differences between the two cases, the court being able to argue that the circumstances in the Gaddafi case are different, and for that reason he does not see the ability of a genuine proceeding (e.g. he was not detained by the government, but by a local militia).

Unfortunately these decisions have not been able to settle the situation and give possibility to the International Criminal Court to proceed with the trial. At this moment it seems that politics will once again have to take a vital role, as the court’s final decision about the extradition can only be enforced by political pressure, if at all, and once again, this will not help to future of the court. On 10 December

²² *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*. Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute. 1 May 2012. ICC-01/11-01/11-130.

²³ *Ibid.* Decision on the admissibility of the case against Saif Al-Islam Gaddafi. ICC-01/11-01/11-344-Red, 31 May 2013.

²⁴ *Ibid.* Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled “Decision on the admissibility of the case against Saif Al-Islam Gaddafi”. ICC-01/11-01/11-547-Red, 21 May 2014.

²⁵ *Ibid.* Decision on the admissibility of the case against Abdullah Al-Senussi. ICC-01/11-01/11-466-Red, 11 October 2013.

²⁶ *Ibid.* Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled “Decision on the admissibility of the case against Abdullah Al-Senussi”. ICC-01/11-01/11-565, 24 July 2014.

2014, the Pre-Trial Chamber I has found the responsibility of Libya for the lack of compliance with respect to its earlier decisions about the extradition, and referred the situation to the Security Council for further measures it deems necessary.²⁷ And while the chamber underlined that it understands the situation of the government, it only takes note of the “objective failure” to cooperate, it is surely not considered to be a friendly gesture on the side of the state, and not help future cooperation.

5. The Legal Status of the Employees of the International Criminal Court in a Security Council Referral Situation

The situation of Libya has led to a particularly unique incident, which, given its nature, matches the absurdity of the situation and has brought up new questions about the legal status of the employees of the International Criminal Court in the case of a Security Council referral. An Australian employee of the court, working for the defence unit, has been taken into custody by the militia controlling Zintan after her meeting the confined Gaddafi on 7 June. The Libyan authorities have communicated strange accusations to the UN that included her handing over documents with national security relevance, and that she has kept devices of espionage with herself.²⁸ During the tense situation the Libyan authorities called the court to “cooperate to solve the situation” and to suggest “possible solutions to handle the situation”,²⁹ while the court expressed their “deep regret,” and assured Libya that they “do not wish to risk Libya's national security in any way”.³⁰ After three weeks of captivity, the employees of the court could leave captivity and travel home. While the incident was clearly a mere demonstration of power by the new Libyan government, it has started a lively debate among the practitioners of international law about the diplomatic immunity of the staff of the court.³¹

The incident has led to the generally accepted point of view that the employees of the International Criminal Court enjoy immunity, while question requires some explanation in the case of states non-party to the Rome Statute, raising at least two points to examine.

The first one is, why should a non-party state that legally does not even acknowledge the existence of the court grant immunity to someone from an entity that is non-existent in its eye? The second, more theoretical thinking point is, if we can talk about immunity in case of employees of international organizations without it being based on an international treaty?

The Statute itself vests immunity to the Court’s employees, but refers to “in accordance with the agreement on the privileges and immunities of the Court”,³² which separate treaty has been concluded in 2002.³³ While many states party to the Statute has still not ratified this treaty, I believe that they have to grant immunity even if not ratified the agreement. The latter only details the immunity, which is granted by the Statute itself. But this is only true with states party to the Statute.

²⁷ *The Prosecutor v. Saif Al-Islam Gaddafi*. Decision on the non-compliance by Libya with requests for cooperation by the Court and referring the matter to the United Nations Security Council. ICC-01/11-01/11-577, 10 December 2014.

²⁸ *Libya accuses Australian ICC official of passing secret letter to Gaddafi's son*. The Guardian, 25 June 2012. Online: <http://www.guardian.co.uk/world/2012/jun/25/melinda-taylor-libya-accuse-spying> (30 August 2016).

²⁹ *Libya says it wants ICC's cooperation over detained staff*. Reuters, 16 Jun 2012. Online: <http://www.reuters.com/article/2012/06/16/us-libya-icc-idUSBRE85F0IW20120616> (30 August 2016).

³⁰ *Statement on the detention of four ICC staff members*. Press Release 22/06/2012, ICC-CPI-20120622-PR815.

³¹ For an example, see: Dapo Akande: *The Immunity of the ICC Lawyers and Staff Detained in Libya*. EJIL Talk!, 18 June 2012. Online: <http://www.ejiltalk.org/the-immunity-of-the-icc-lawyers-and-staff-detained-in-libya/> (30 August 2016).

³² *Rome Statute*. Art. 48.

³³ *Agreement on the Privileges and Immunities of the International Criminal Court*. 09/09/2002, UNTS vol. 2271.

I would argue that norms of customary law have not been established in this area, especially considering the fact of the existence of a separate international treaty about the immunity of the International Criminal Court that even many states party to the Statute have not ratified yet. But in the case of a non-party state, the existence of any such customary legal norm seems heavily problematic. Additionally it is important to add, that unfortunately, currently acknowledged customary law also has a problematic relationship with the establishment of international criminal fora. For example, even the study of customary international humanitarian law, published with the contribution of the International Committee of the Red Cross in 2005, does not show any norm of customary law that would refer to international criminal fora, its identified Rule 161 only acknowledges the obligation of the cooperation of states according to the 1949 Geneva Convention, it doesn't even mention any international judicial institutions.³⁴ This makes any argument based on customary law for the case of immunity of employees in front of states non-party to the Statute quite shaky.

In the case of a Security Council referral, once again we have to come back to the argument we have used previously, regarding to complementarity. That a legally binding resolution of the Security Council is able to bring an entire set of new obligations, and based on this, we may conclude that the obligation to grant immunity, based on Article 48 of the Statute is an inseparable element of these obligations. The fact that a separate agreement exists about the immunity is still bothering. This could lead to the disturbing question, that even if states party to the Statute do not acknowledge immunity automatically, why should non-party states do that? This question can be answered two ways. First, arguing, that the agreement only acts to detail out the immunity, but it is granted by the Statute. The second possible answer, or rather a solution to avoid similar incidents in the future is simpler: an explicit provision about this in any future Security Council resolution aimed to refer a situation to the Court will be an adequate solution.

6. Conclusions and the Possible Future

During the past years, the most serious international tensions have been evolved in Syria with the civil war and then the rise of the Daesh terrorist organization, which is active also on the territory of Iraq. From time to time, the suggestion surfaces that the Security Council shall employ the International Criminal Court to step up against the horrific crimes committed by the leaders of Syria or the members of Daesh, which would mean another referral related to the situation in Syria, and/or to the situation in Iraq. In any of those cases, however, all the above issues would come up again as potential problems.

How fortunate it is for the Security Council to impose a political task on the International Criminal Court, or to use it as political tool in its effort to handle a situation? Of course it is a possible political alternative for the Council, but so far it seems like the effectiveness is very doubtful. I believe that if the Security Council systematically refers situations to the International Criminal Court, the future of the court could get very difficult. It has already received serious critiques of political nature, for example because it only deals with African issues while the court is mostly financed by the so-called developed countries, and the political consequence of this could be quite clearly seen with the Sudan/Darfur situation. If the Security Council tries to delegate its own task to the court, it could give rise to other critiques of post-colonialist nature, which could have the consequence that the International Criminal

³⁴ Jean-Marie Henckaerts & Louise Doswald-Beck (eds.): *Customary International Humanitarian Law. Volume I: Rules*. ICRC-Cambridge University Press, 2005, p. 618.

Court would be unable to fulfill the role that the founding states, NGOs, human rights organizations and all other supporters intended for it.

The court needs to be very careful not to turn into a political tool in the hands of the Security Council, for which unfortunately all chances are given. At the same time, the Security Council also has to consider the opportunity of referral with a serious sense of responsibility, and what is even more important, it shall provide for a clear and doubtless legal environment, for example with drafting resolutions which do not leave space for legal uncertainties.