
Jakob Pichon, Internationaler Strafgerichtshof und Sicherheitsrat der Vereinten Nationen

Summary

International Criminal Court and United Nations Security Council. The Role of the Security Council in the Prosecution of International Crimes by the International Criminal Court

Outline of the thesis

This thesis deals with the relationship between the International Criminal Court (ICC) and the United Nations Security Council (UNSC). Its first part after the introduction analyzes this relationship from the point of view of the Rome Statute of the ICC (Rome Statute). In this context those stipulations are examined which play a role for the relationship between the ICC and the UNSC, especially Art. 5 (2) (crime of aggression), Art. 13 lit. b) (so-called referral), Art. 16 (so-called deferral) and Art. 87 (cooperation) Rome Statute. After briefly examining the Relationship Agreement between the ICC and the United Nations (Relationship Agreement) those measures are presented and scrutinized as regards their compatibility with the Rome Statute that have shaped the relationship between ICC and UNSC in the past, especially UNSC resolutions 1422 (2002), 1487 (2003), 1497 (2003) and 1593 (2005).

The second part examines the interrelationship of the ICC and the UNSC from the perspective of the United Nations Charter (UNC). Therefore this part analyzes the powers and limits of the UNSC under the UNC. Consequently, this thesis, in due consideration of the principle of judicial independence, provides answers to the question what legal consequences UNSC measures have on the ICC, including the point whether the UNSC can legally bind the ICC as an international organization. Following that, the rights and obligations included in the Rome Statute are studied with regard to their compatibility with the UNC.

The closing third part is devoted to the issue whether and to what extent the ICC is competent to review UNSC measures. Based on the results of the prior analysis, the thesis finally evaluates those UNSC resolutions presented in the first part.

Conclusions of the thesis

The Rome Statute can only be a voluntary basis for UNSC action, since this multilateral treaty adopted outside the United Nations (UN) cannot limit the chapter VII powers of the UNSC.

If the UNSC decides to act beyond the Rome Statute powers it nevertheless does not act *legibus solutus*. *Limits to the UNSC* are *ius cogens*, the principle of proportionality, as well as purposes and principles of the UN, among them especially human rights as shaped by the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. As concerns the relationship between ICC and UNSC, the principle of judicial independence is a limit to the UNSC of special importance.

Lawful UNSC measures are binding also for the ICC and subject to Art. 103 UNC. Therefore, as long as a UNSC measure finds a valid legal basis beyond the Rome Statute and is adopted within the UNSC limits, its incompatibility with the Rome Statute is irrelevant. The UNSC measure thus has priority over conflicting Rome Statute obligations of the ICC and its Member States.

Evidently unlawful measures and those which have been declared unlawful by a competent court do not bind the ICC. Evidently unlawful measures are, e.g., clear breaches of *ius cogens* and non-derogable rights, the latter – comprising judicial independence – being particularly important for the interrelationship of ICC and UNSC. Art. 103 UNC is not applicable to non-binding measures of the UNSC.

Whether an unlawful measure of the UNSC is non-binding *in toto* or only in part must be decided on a case-by-case basis.

The *Relationship Agreement* by and large only concretizes the Rome Statute as concerns procedural questions and does not bind the UNSC under Chapter VII UNC.

These general considerations lead to the following results for the rights and obligations of the UNSC on the basis of the Rome Statute:

Regarding its right of *referral* the UNSC is already on the basis of the Rome Statute authorized to temporal and local, but not personal restrictions or those restrictions concerning the catalogue of crimes of Art. 5 (1) Rome Statute. Restrictions which are not allowed under the Rome Statute are, however, possible on the ground of the UNSC's powers under Chapter VII UNC. These powers also allow the UNSC to *subsequently* restrict a referral with regard to temporal, local and personal aspects and with regard to the catalogue of crimes under Art. 5 (1) Rome Statute.

Whereas the Rome Statute does not allow the UNSC to add personal expansions to referrals, such expansions are possible under the UNC. The UNSC can allow the ICC to expand the catalogue of crimes of Art. 5 (1) Rome Statute or to prosecute crimes committed before the Rome Statute entered into force. However, the Rome Statute prevents the ICC from making use of this possibility.

Subsequent expansions with regard to temporal and local aspects are possible on the basis of the Rome Statute alone.

Declarations under Art. 124 Rome Statute can – already on the basis of the Rome Statute – be overruled in the context of UNSC referrals.

The UNSC is not obliged to respect the complementarity principle. Whereas the complementarity principle is applicable in the framework of UNSC referrals, the UNSC can cancel the effects of this principle by obliging the UN Member States to abstain from their own prosecutions.

On the basis of the UNC, the UNSC is generally allowed to withdraw its referrals. In case of an abatement of an original threat to peace, the UNSC would even be obliged to such a withdrawal which would, however, have no impact on ongoing investigations of the ICC.

With regard to third State actors, Art. 27 (2) Rome Statute comprises only functional, but not personal immunity. However, in the context of UNSC referrals, personal immunity also has no effect before the ICC. Therefore, the Sudanese President sought to be tried by the ICC cannot successfully plead immunity. However, States can challenge requests of cooperation by the ICC with regard to third-State actors by relying on their personal immunity as long as those States are not obliged to cooperate with the ICC by a UNSC resolution. According to resolution 1593 only those States which participate in the Darfur conflict are obliged in such a way.

Third-State actors can be prosecuted by the ICC only on the grounds of crimes accepted under customary international law.

For UNSC measures in the context of the right to *deferral* it is not necessary that the investigations of the ICC themselves constitute a threat to peace. On the contrary, it is sufficient that the underlying situation presents such a threat to peace.

UNSC deferrals can generally – as long as they do not lead to an unlawful permanent deferral in the concrete case – be prolonged on a discretionary basis. They bind only the ICC and are possible also in those situations based upon UNSC referrals. Whereas the Rome Statute limits the scope of deferrals to concrete cases, the UNC also gives the UNSC the right to – even indefinitely – defer an abstract situation.

A deferral has no effect on preliminary examinations of the prosecutor and measures for the protection of victims and witnesses. Investigations presenting a unique opportunity to take testimony or a statement from a witness or to examine, collect or test evidence would normally fall under the scope of Art. 16 Rome Statute. The independence of the ICC, however, requires a limit of the deferral in this regard. A deferral can include the release of the accused.

The ICC may only ask States for *cooperation* if the latter are Member States of the Rome Statute, if they have concluded a respective agreement, or if the UNSC has already requested them to cooperate. If the States do not cooperate, the ICC may only call the UNSC for help if the UNSC had referred the respective situation to the ICC and if this situation concerns either a Member State or a State which had concluded a cooperation agreement with the ICC. This restriction can, however, be overruled by the UNSC requesting the prosecutor to periodically inform the UNSC about ongoing investigations. If the ICC asks the UNSC in a lawful manner for cooperation it lies within the discretion of the latter whether and how to react. The UNSC can also oblige States and other parties to a conflict without a previous request for cooperation by the ICC. Such an obligation does not, however, comprise the obligation to conclude a cooperation agreement with the ICC. Moreover, only those parties are obliged which are expressly named in the respective UNSC resolution.

The Rome Statute itself does not answer the question in what manner the UNSC should participate in the prosecution of the *crime of aggression* before the ICC. Art. 121 (5) Rome Statute is applicable to the adoption of the new crime. In the context of a UNSC referral, the restrictions by Art. 121 (5) Rome Statute concerning the jurisdiction of the ICC are not relevant. It would be advisable to place the amendments concerning the crime of aggression in an Additional Protocol.

All options which have been proposed by the Special Working Group for the Crime of Aggression concerning the continuation of investigations of the ICC are compatible with public international law. This would not however be the case for the binding nature of a UNSC statement determining an act of aggression.

The determination of the UNSC that there is no act of aggression does not seem to be possible under the UNC. Nevertheless, the UNSC is – in the context of a deferral – also entitled to permanently defer investigations concerning the crime of aggression, as long as no actual investigations are affected.

The ICC is – due to the lack of legal standing – not entitled to submit the question whether the UNSC acts *intra* or *ultra vires* to the International Court of Justice. Similarly, the ICC has no competence to review UNSC resolutions itself except for evidently unlawful UNSC measures. The latter can by way of implicit *judicial review* be declared inapplicable *inter partes*, but not null and void *erga omnes*.

On the basis of these considerations, the ICC is authorized to declare inapplicable *UNSC resolution 1422/1487* since the UNSC did not determine a threat to peace. On the contrary, due to the lack of evident unlawfulness *resolutions 1497 und 1593* must be fully applied by the ICC.