The Relationship between the International Criminal Court and the United Nations Security Council

Von Prof. Daniel D. Ntanda Nsereko, Gaborone (Botswana)

I. Introduction

The relationship between the International Criminal Court (hereinafter “the ICC”) and the United Nations (hereinafter “the UN”) Security Council is informed by the complementary mandates of the Court and of the United Nations. According to the preamble to the Rome Statute, the primary mandate of the ICC is “to put an end” to impunity for the perpetrators of “unimaginable atrocities that deeply shock the conscience of humanity.” These atrocities, which characterised the last century, are “grave crimes that threaten the peace, security and well-being of the world.” The Court attains its objectives through the prosecution and punishment of the perpetrators of these crimes.

By prosecuting and punishing the perpetrators, the Court does not only do justice to the immediate victims of those crimes, but it does also contribute to the cause of peace and justice in the world in two ways: deterring future commission of similar crimes, and averting self-help or retaliatory measures by the victims and their sympathisers. It should be noted that almost invariably, the crimes under the jurisdiction of the Court are committed in the context of war or armed conflict. If the architects of war or conflicts are left to roam the streets and alleys of the globe as if nothing happened, others of their ilk will be encouraged to behave like them and to menace and tyrannise fellow human beings untouched. Victims of such tyranny, in exercise of their inherent right to rebel against injustice, will put up resistance, and an endless cycle of violence and suffering will be set in motion (as happened in Europe during World War II and in the Great African Lakes Region in the 1990s). Justice is thus an antidote to such a cycle of violence.

According to the preamble of the UN, one of the motivating forces behind the formation of the organisation was the determination of the founding fathers “to save succeeding generations from the scourge of war, which twice in [their] lifetime has brought untold sorrow to mankind.” The sorrow they alluded to included indiscriminate destruction of property and human life and the heinous crimes and other barbarities of the Nazi regime. The Security Council is one of the four principal organs of the UN. Under the Charter, it is vested with the “primary responsibility for the maintenance of international peace and security.” In the pursuit of this goal the Council has come to realize that there can be no peace without justice. It is for this reason that, following the Nuremberg precedent, it has in the past set up international tribunals, such as the ICTY, the ICTR and other hybrid bodies to prosecute and punish perpetrators “of the most serious crimes, of concern to the international community.” The deterring effects of such prosecution and punishment and the accompanying appearance of justice help to advance the cause of peace.

Thus both the ICC and the UN Security Council are ultimately concerned with the peace, security and wellbeing of the world. It is therefore not surprising that in the preamble to the Rome Statute, the States Parties reaffirm “the Purposes of the Charter of the United Nations.” And it is equally not surprising that they wanted the Court to be in relationship with the United Nations system without necessarily being dependent or subordinate to it.

In this article we consider the relationship between the ICC and the UN Security Council under three major headings: triggering the jurisdiction of the Court; delaying the Court’s action; and prosecuting the crime of aggression.

II. Triggering the jurisdiction of the Court

One and probably the most important aspect of the relationship between the ICC and the Security Council is the Council’s ability to trigger the Court’s jurisdiction, or to get it seized with a matter. Article 39 of the UN Charter vests in the Security Council’s power to determine whether or not there exists a threat to peace, breach of peace or act of aggression. For purposes of preserving or restoring the peace, the Charter also authorizes the Council to make recommendations to states or to decide on enforcement action against the recalcitrant state. It lists the measures that the Council might recommend to states or decide to take: those that do not involve the use of armed force, and those that involve the use of armed force. The list of measures that involve no force is merely suggestive or illustrative and is not exhaustive. This elastic or flexible rendition of the Council’s mandate has enabled the Council to adopt other measures that it deems appropriate in a given situation. It has enabled it to adopt prosecution and punishment of the perpetrators of international crimes as one of the means of restoring peace and concord in war-ravaged countries and regions.

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1 Article 24.

2 Article 41 of the Charter provides as follows: “The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal telegraphic, radio, and other means of communication, and the severance of diplomatic relations.” [Emphasis added].

3 Article 42 of the Charter provides that “Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.”

4 See Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Prosecutor v. Dusko Tadic, Case No IT-94-1-AR72, Appeals Chamber, 2 October 1995, para. 35.
In establishing the ICTY and the ICTR, the Security Council acted under Chapter VII of the Charter. It considered that the situations in the former Yugoslavia and Rwanda were a threat to peace. It considered that prosecuting the architects of those peace-threatening situations would facilitate reconciliation and help restore and maintain peace in those countries. It has incrementally invoked this mechanism and established other, albeit slightly different in composition, tribunals in Sierra Leone, East Timor and Cambodia to deal with similar situations. One in Burundi is still under discussion. It might establish others when and as need arises – and given man’s proneness to resort to violence, such need will soon or later arise.

However, now that a permanent International Criminal Court is in place, the Security Council need not resort to these ad hoc mechanisms. The Rome Statute makes the Court available to the Security Council, if it wants, for use to enable it to carry out its mandate of maintaining peace globally. If it considers judicial action appropriate, the Council may refer any peace-threatening situation to the Court for such action under Article 13(b) of the Rome Statute. The advantages to the Security Council, to the international community and, ultimately to the taxpayer, of referring a situation to the ICC as opposed to the establishment of ad hoc tribunals are manifold.

First, from the Security Council perspective, a referral to the ICC is cost-effective. You don’t have to spend money and time to construct new court buildings, draft and adopt new statutes and rules of procedure and evidence, elect special judges or appoint a prosecutor and a court bureaucracy. The ICC already has these facilities and personnel in place. It is also expeditious. The judges, prosecutors and a court bureaucracy are in place and are ever in the ready to act as soon as a situation is referred to them.

Secondly, from the point of view of the ICC, the greatest advantage of a Security Council referral is that when it commences its proceedings in respect of any given situation, it does so with the assurance that it is acting on behalf of the international community as a whole and has the support or is supposed to have the support of all states and not only of the States Parties to the Rome Statute. With a referral, you do not have to worry over whether the state on whose territory the situation arose is a State Party of the Rome Statute. You do not have to worry whether the individual perpetrators are nationals of a State Party to the Rome Statute. You also do not have to worry whether a given state has made a declaration under Article 12 (3) accepting the jurisdiction of the Court with respect to the particular crime. Most importantly, under Articles 2 (6) and 25 of the UN Charter, all states, whether or not they are members of the UN or are Parties to the Rome Statute, are bound to accept and to carry out Chapter VII decisions of the Security Council. They are therefore bound to fully co-operate with the ICC and its organs during the investigation and prosecution of cases arising out of the situations referred to the Court, by arresting and handing over to the Prosecutor suspects in respect of whom warrants of arrest have been issued, allow the Prosecutor’s staff on its territory for purposes of carrying out investigations and providing them with all information pertinent to the investigation. Failure on the part of a state to co-operate exposes it to sanctions and other measures that the Security Council may deem appropriate.

Equally important, once the Security Council has made the referral, as it did in 2005 with respect to the Darfur situation,6 the Prosecutor does not have to seek the authorization of the Pre-Trial Chamber to commence investigations or prosecutions, which he would otherwise be obliged to seek under Article 15 of the Statute if he acts proprio motu. He also does not have to defer to national jurisdiction, as he would ordinarily be required to do where a situation is referred to him by a state or where he acts proprio motu. In the Darfur situation the Prosecutor initially deferred to the Sudan’s national jurisdiction under the principle of complementarity. Before seeking the arrest warrants for State Minister Ahmed Harun and Janjaweed militia leader Ali Kushayb in February 2007, the Prosecutor allowed the Sudanese judicial authorities to prove themselves capable of delivering justice in accord with the requisite international standards.7 Lastly, the Prosecutor also does not have to worry about the Council seeking deferral under Article 16 of the Statute. By referring a situation to the ICC, it means that the Council now deems judicial action against the alleged disturbers of the peace to be appropriate.

From the viewpoint of cost, Article 15(b) of the Statute envisages that where the Council refers a situation to the ICC for action, it must also provide or at least contribute to the funds that the Court will incur as a result of the referral. However, clear and reasonable as this may sound, the Council brushed these provisions aside, and in its Resolution 1593

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8 In his first report to the Security Council in 2005, the Prosecutor stated, at page 4, that “In mid-June 2005, after the decision by the Prosecutor to start an investigation, the Government of Sudan provided the OTP with information relating to the establishment of a new specialised tribunal to deal with some individuals considered to have been responsible for crimes committed in Darfur. As part of the ongoing admissibility assessment the OTP will follow the work of the tribunal in order to determine whether it is investigating, or has investigated or prosecuted, the cases of relevance to the ICC, and whether any such proceedings meet the standards of genuineness as defined by Article 17 of the Rome Statute.”
(2005) referring the situation in Darfur to the ICC, specifically provided that:

“None of the expenses incurred in connection with the referral including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily.”

This provision in the Resolution was apparently part of the price that the international community had to pay in order to overcome the United States’ opposition to the referral. That aside, however, it should be pointed out that where, before a referral, the Council has been seized with a situation and, as in the Darfur case, carried out some investigations, the ICC Prosecutor benefits immensely from those investigations. Such investigations help to shorten his own investigation and to reduce the cost involved.

III. Delaying or deferral of ICC action

The Security Council also has power to delay or suspend action of the ICC in a particular matter. Such delay was one of the prices that had to be paid for the acceptance by powerful and influential states at the Rome Conference of Plenipotentiaries of an independent, effective and credible Court, free from Security Council control. The permanent members of the Security Council, particularly the US, favoured the following provision in the International Law Commission Draft:

“No prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or a breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides.”

The basis for this provision was the assumption that the Security Council had exclusive jurisdiction in matters pertaining to the maintenance of international peace and security. Therefore the Court must not entertain cases arising from peace-threatening situations without the authorization of the Council. It was also assumed that for the Court to get involved in such matters without authorization would amount to a meddling in or thwarting of the Council’s political, diplomatic or military initiatives. The provision and the reasoning behind it were rejected by the Rome Conference.

First, the Security Council responsibility under Chapter VII is primary, but not exclusive. Where the Council fails to act, other organs of the International community may act.

Second, as the International Court of Justice has held in a number of cases, the Council and the Court have complementary functions – political and judicial. They may both simultaneously exercise them with respect to the same situation.9

Third, the Security Council is notorious for keeping certain matters on its agenda for an indefinite period of time without doing anything about them. Additionally, it is within the Council’s prerogative to declare any situation to constitute a threat to peace, a breach of the peace or act of aggression under Chapter VII. Therefore, if the Rome Conference accepted the International Law Commission proposal, this would have resulted in the ICC never being able to take on any case arising out of such situations. To appease the permanent members of the Security Council, the Rome Conference adopted the current Article 16, known as the Singapore proposal. It reads:

“No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; the request may be renewed by the Council under the same conditions.”

There are four important points in respect of this provision that are noteworthy:

One, although the Council’s action is billed as a “request”, it is actually a command to the Court to suspend its activities with respect to a matter and to defer to the Security Council’s jurisdiction.

Two, the request must be made by way of a resolution; to be adopted the resolution requires the affirmative concurrence of all permanent members of the Council present and voting; it is subject to the veto and, therefore, as we shall see, it is not easy to adopt. This is the consolation of the provision.

Three, according to its context, Article 16 aims at suspending ICC action in cases arising out of specific or particular situations which the Security Council may be seized with. The article recognized the Council’s primary responsibility in the area of maintaining peace and allows it to act first, Recht des ersten Zugriffs. Untimely or precipitous investigations or prosecutions by the Prosecutor might undermine the Council’s diplomatic or other efforts to normalize a volatile situation.

Four, open-ended as it is, the provision is susceptible to abuse. This is so because the Council does not have to give reasons for its “request” to the Court to stay investigation or prosecution. Those unstated reasons may be purely political or intended to shield political allies from international justice. Also significant, the request may be repeated ad infinitum, and the Court’s action stayed indefinitely. In the meantime, valuable evidence may be destroyed and potential witnesses may disappear.

As was feared, Article 16 was abused a few days after the Rome Statute came into force. It so happened that the mandate of the UN Mission in Bosnia and Herzegovina (UNMIBH) was about to expire. The US, which made significant contributions to the Mission in the form of both human and material resources, threatened to cut off its contributions unless its nationals who were serving or who previously served on the Mission, were granted immunity from prosecution by the ICC for anything they did or omitted to do in relation to the Mission. Anxious not to forfeit the US contri-

Council acting under Chapter VII of the UN Charter is seized that an actual situation that constitutes a threat to or breach of peace exists. The resolution provided that:

“If a case arises involving current or former officials or personnel from a contributing state not a party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, [the ICC] shall for a twelve-month period starting July 2002, not commence or proceed, with investigation or prosecution of any such case, unless the Security Council decides otherwise.”

The resolution also expressed the intention “to renew the request in paragraph 1 under the same conditions each July for further 12-month periods as may be necessary.” The resolution was renewed as a matter of course on 12 July 2003. A similar resolution was also adopted on 1 August 2003 in respect of personnel participating in the UN-Multinational Stabilisation Force for Liberia.

It is submitted that these resolutions amounted to an abuse of Article 16 for the following reasons:

1. The purpose of the resolutions, as stated in their preambles, was to facilitate or to make it easy for member states to contribute to operations established or authorized by the UN Security Council. The facilitation envisaged was the granting of immunity from ICC prosecutions to state officials or personnel in respect of future and non-existing situations. But this is at variance with the purpose of Article 16. The purpose of Article 16 is solely to enable the Security Council to exercise its functions under Chapter VII of the Charter in a particular and existing peace-threatening situation.

2. By exempting from ICC jurisdiction “current or former officials or personnel from a contributing state not party to the Rome Statute” the resolutions violate the letter and spirit of the Statute. Article 27 of the Statute declares as irrelevant any distinctions based on official capacity. They thus perpetuate impunity which the ICC was established to combat.

3. Before invoking Article 16, it must be shown or alleged that an actual situation that constitutes a threat to or breach of peace, exists and has been so declared and that the Security Council acting under Chapter VII of the UN Charter is seized with such a situation. The resolutions do not do that.

4. The resolutions were in any case not necessary, because individuals serving on UN peacekeeping missions remain under the jurisdiction of their sending states. Whenever a serviceman is alleged to have committed a crime whilst on mission, he is immediately sent home where he is dealt with. As long as the home state is dealing with him, the case will not be admissible before the ICC. It will only be admissible if it were shown that the state concerned was unable or unwilling to investigate or prosecute genuinely or effectively under Article 17.

5. The resolutions merely served to discredit the Security Council as a servile tool of the United States’ foreign policy towards the Court. Luckily, the United States’ attempts to renew Resolution 1422 for a third time in 2004 failed when a majority of the members of the Council, including France, indicated that they would oppose it. Credit also goes to members of civil society who lobbied governments to oppose a renewal of the resolution.

**IV. Prosecuting the crime of aggression**

Regarding aggression, the Rome Statute lists the crime among those that the Court has jurisdiction over. However, it does not define aggression. It assigns that task to the Assembly of States Parties. The Assembly has, in turn, assigned the task to a special Working Group, which will formulate proposals and adoption at a Review Conference. One of the key issues that the Assembly must resolve is the role that the Security Council will play in the process.

The issue of Security Council involvement stems from the binary nature of the definition of aggression. Until recently the terms “aggression”, “war of aggression”, “act of aggression”, “crime of aggression” and “crime against the peace” were used interchangeably to mean one and the same thing. However, the two terms that gained prominence during the discussions at the Preparatory Commission were the “act of aggression” and “crime of aggression.” “Act of aggression” is now used to refer to the conduct of the state. “Crime of aggression”, on the other hand, is used to refer to the role played by individuals in the commission of the “act of aggression.”

According to the current view, then, an act of aggression by a state is a pre-condition that triggers individual criminal responsibility. In this sense, then, it is a predicate wrong or constitutive element of the crime. 12

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10 This part of the article is an adaptation of the author’s earlier piece “Bringing Aggressors to Justice: From Nuremberg to Rome”, 4 University of Botswana Law Journal 2005, 4.

11 See for example the proposal by Bosnia and Herzegovina, New Zealand and Romania. It provides as follows: “1. A person commits the crime of aggression that, being in a position to exercise control over or direct the political or military action of a State intentionally and knowingly orders or participates actively in the planning, preparation, initiation or waging of aggression committed by that State. 2. For the purposes of the exercise of jurisdiction by the Court over the crime of aggression under the Statute, aggression committed by a state means the use of armed force to attack the territorial integrity or political independence of another State in violation of the Charter of the United Nations.” PINICC/2001/WGCA/DP.2, 27 August 2001.

12 Thus, in justifying their proposal before the Preparatory Commission, Bosnia and Herzegovina, New Zealand and Romania explained as follows: “Article 5, paragraph 2, of the Rome Statute requires only that the crime of aggression be defined. However, because aggression by a State is a precondition to the prosecution of an individual for the crime, it is
However, the thorny issue is who determines whether a state has committed an act of aggression? Now, prosecuting aggressors is a judicial function. One would therefore have assumed that such determination is within the Court’s exclusive jurisdiction. This is unfortunately not so. There is a proposal, supported mainly by the US and the other permanent members of the Security Council, which would give the Council a pre-eminent role in the matter.\textsuperscript{13} The aim of the proposal is apparently to enable a permanent member of the Council to prevent the ICC to exercise its jurisdiction over an alleged act of aggression arising out of any situation referred to it. A permanent member would, by exercising its power of veto, be able to protect itself or its allies who engage in otherwise aggressive conduct from censure. This assertion is borne out by Ambassador David Shaffer, the US Chief negotiator, when he said:

\textit{“During the Clinton administration we held the line very effectively to ensure that the drafting of this crime included an acceptable definition and that only the Security Council could trigger it for the Court’s attention.}

\textit{Aggression is the one crime that other nations may seek to charge our globally deployed military with, regardless of the merits. It is a crime that invites political manipulation to serve the interests of whoever regards any projection of military power to be aggressive. It goes to the heart of why we intervene. Yet when truly committed, as during World War II and Iraq’s invasion of Kuwait in 1990, its criminal character is undeniable.”}\textsuperscript{14}

How, then, would the proposal serve to accomplish its proponents’ objectives? It vests in the Security Council the exclusive responsibility to determine whether a state has committed an act of aggression before the Court can come into the picture. According to the proposal, the Court must not exercise its jurisdiction unless and until the Council has made a determination. And when the Court does exercise the jurisdiction, its role must be limited to determining the part played by individuals in the state’s commission of acts of aggression; and, if it finds any individual guilty, to pass sentence on such individual. According to this scheme, if the Council does not act at all, the Court will also not act. However, if the Council acts and makes a determination, either implicating or exonerating a state, the determination is final and is binding on the Court regardless of its soundness in law.

The proposal is apparently based on the admonition in the Rome Statute that the definition and the conditions for the Court’s exercise of jurisdiction must be “consistent with the relevant provisions of the Charter of the United Nations.”\textsuperscript{15}

Now, is the proposal consistent with the Charter? What does the Charter say? Two provisions are most pertinent. The first is Article 24, which vests in the Security Council “primary responsibility for the maintenance of international peace and security.” The other is Article 39, which empowers the Security Council to determine the existence of any threat to peace, breach of the peace, or act of aggression with a view to deciding on enforcement measures against the recalcitrant state.

The proponents of the proposal interpret these provisions to mean that the very mention of the word “aggression” automatically triggers Security Council action. They assert, in effect, that no matter what the context in which the issue of “aggression” arises, it is the Council solely and exclusively that has the power to pronounce on its existence or to deal with it. It is submitted that this is an erroneous reading of the Charter.\textsuperscript{16}

The Council’s powers under the cited provisions of the Charter are primary and not exclusive. They are exclusive only when the Council is determining whether a State has committed an act of aggression for the purpose of and as a necessary prelude to making recommendations or taking coercive enforcement measures against the aggressor state. Short of this circumscribed compass, the provisions do not preclude other organs of the international community from making their own determinations for purposes falling within their respective mandate.\textsuperscript{17} Thus, in the past, when the Council was paralysed by the use of the veto and was unable to act, the General Assembly which has residual powers in the matter of the maintenance of peace was able to act and to diffuse some explosive situations.\textsuperscript{18} Again, in an ICJ case in which the Democratic Republic of the Congo sought, among other things, reparations from Uganda for Uganda’s alleged acts of aggression, no one seriously questioned the competence of the ICJ to entertain the case on the ground that aggression was alleged and that the Security Council had not

\textsuperscript{13} See Report of the Preparatory Commission for the International Criminal Court Addendum, Part II „Proposals for a provision on the crime of aggression.” PCNICC/2002/2 Add.2, 24 July 2002. The report contains the discussion paper proposed by the Coordinator, Part I of which deals with the “definition of the crime of aggression and conditions for the exercise of jurisdiction.”

\textsuperscript{14} See Scheffer, op.cit.

\textsuperscript{15} Article 5(2).

\textsuperscript{16} Nsereko, 71 Nordic Journal of International Law 2002, 497.

\textsuperscript{17} See for example the decision of the International Court of Justice in the Certain Expenses Case of the United Nations Case, (1962) ICJ Reports, 151 (163) when the Court opined thus: “The responsibility conferred [by Article 24] is “primary”, not exclusive. This primary responsibility is conferred upon the Security Council, as stated in Article 24, “in order to ensure prompt and effective action.” To this end, it is the Security Council which is given a power to impose an explicit obligation of compliance if for example it issues an order or command to an aggressor under Chapter VII. It is only the Security Council which can require enforcement by coercive action against an aggressor.”

\textsuperscript{18} See also the Uniting for Peace Resolution, General Assembly Resolution 377 (V), 3 November 1950.
pronounced itself on the allegation. It is submitted that whether or not Uganda committed the alleged acts of aggression was clearly a matter for the ICJ alone to determine.\footnote{There were attempts to oust the jurisdiction of the Court on the ground that the Security Council was still seized of the matter and had passed resolutions on it. The Court thwarted the attempts, holding that there was nothing in the Charter ousting its jurisdiction merely because the Council was simultaneously seized of the matter.}

The Security Council had nothing to do with it, unless, of course the alleged aggression was continuing and there was need for enforcement measures to stop it. Likewise, for purposes of trying and punishing individuals who mastermind acts of aggression, the International Criminal Court should be able to determine for itself whether a State has committed an act of aggression and if so, which individuals should be held criminally responsible for that act and be punished.

There are several other reasons why the Security Council should not be assigned a pre-eminent role in the prosecution of aggression.

The first reason is that the Council tends to be capricious, partial and selective in its approach to the problem. There are many instances when it failed to condemn as aggression a conduct that qualified for such condemnation or to take measures against the aggressor state.\footnote{During the Korean War in 1950 the Council could not adopt a resolution designating any country as aggressor because of the Soviet veto. Following their invasion of the Suez Canal in 1956, Britain and France vetoed the Council’s resolutions that would have condemned them as aggressors. In 1960 the Congo called upon the Security Council “to protect the national territory of the Congo against the present external aggression” by Belgium. Acting under Chapter VII of the UN Charter the Council passed 3 resolutions calling upon Belgium to withdraw from the territory of the Congo, but in none of them did it condemn Belgium as aggressor. See Rifaat, Stockholm Almqvist & Wiksell International, 1979, 208-217. More recently, following a Banyumalenge-led armed rebellion against its government in August 1998, the Congo urged the Security Council “to strongly condemn the invasion of Congolese territory by Rwandan and Ugandan troops” and “to demand that Rwanda and Uganda withdraw their troops immediately from Congolese territory.” (See UN Doc. S/1998/758, 14 August 1998). The Council did not adopt any resolution to that effect. The Council again failed to adopt any resolution condemning Israel as aggressor following her invasion of Egypt, Syria, and Jordan in 1967. Its ultimate Resolution 242 of 22 November 1967 merely required the “Withdrawal of Israeli armed forces from territories occupied in the recent conflict” without naming her as an aggressor. Following the US invasion of Grenada on 25 October 1983 the Council considered a resolution that “deeply deplores the armed intervention in Grenada, which constitutes a flagrant violation of international law and of the independence, sovereignty and territorial integrity of that State.” The US vetoed the resolution which, when subsequently tabled before the General Assembly, was adopted in its entirety, a Permanent Member of the Council or its allies was directly involved in the conduct. Thus, given this record and its current composition, the Council cannot be expected to behave any better in the future.}

The second reason is that the Council is not a court of law. It is a political body, whose decisions are often driven by political rather than legal considerations. It does not have to follow the law. So, even when we have a definition of aggression in place, the Council will not be bound by it, thus rendering futile the efforts to formulate such a definition. In this connection, Judge Schwebel has aptly commented as follows: “While the Security Council is invested with the authority to determine the existence of an act of aggression, it does not act as a court in making such a determination. It may arrive at a determination of aggression – or, as more often is the case, fail to arrive at a determination of aggression – for political rather than legal reasons. However compelling the facts which could give rise to a determination of aggression, the Security Council acts within its rights when it decides that to make such a determination will set back the cause of peace rather than advance it. In short, the Security Council is a political organ, which acts for political reasons. It may take legal considerations into account but, unlike a court, it is not bound to apply them.”\footnote{Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), Merits, (1986) ICJ Reports 14, 290. (Emphasis added).}

The third reason is that in making the determinations, the Council will not follow the rules of natural justice or the due process of law. Individuals who will be tried on the basis of its determinations will not have an opportunity to appear before the Council and to be heard. Nor will they have an opportunity later on to challenge those determinations. Very important, too, given the capricious nature of the Council, the determinations will be uncertain and unpredictable, and contrary to the principle of legality, or nullum crimen sine lege, which is so basic to criminal law. It would be unfair to use them as the basis for trying anyone before the Court.

The last reason is that subjecting the Court’s exercise of its jurisdiction to Security Council determinations will amount to a repudiation of its independence and will rob it of credibility.

For these reasons, therefore, it is urged that the Court be left to make its own determinations, both as to the act of aggression by a state and as to the crime of aggression by...
individuals. Unlike the Security Council, the Court will base its decisions solely on the law and evidence, and will observe the principles of legality, natural justice and the due process of law.\(^{22}\) It is not true, as some have argued, that the Court is not competent to pronounce itself on the conduct of states or on issues of international law and that it is limited to individual conduct and the issues of criminal law. There is no basis for that argument in the Statute; the Statute does not forbid the Court to pass judgment on such conduct for the purpose of assigning individual criminal responsibility. Besides, it is practically impossible to extricate individual from state conduct.

As for the Court’s alleged lack of competence to pronounce itself on issues of international law, it would suffice to point out that the very composition of the Court belies this argument. The Statute requires the Court to have a mix of Judges who are specialists in criminal trials and in international law. This mix envisages that the Court would, in the course of its work, have to pronounce itself on issues of international law that may be pertinent to matters before it. The ad hoc tribunals have on occasion had to do this and have acquired themselves well.\(^{23}\)

It may also be noted in passing that the Nuremberg Charter did not require a separate organ, let alone a political one, to make prior pronouncements as to the existence of a war of aggression before the Tribunal could determine the criminal responsibility of individuals. The Tribunal resolved all the pertinent issues, and did so very well. To argue, as some have argued, that World War II was obviously an aggressive war that needed no legal findings or pronouncements is, to say the least, flippant. What of the many other wars that have plagued our planet since World War II and which, to many, were “obviously aggressive” but have passed uncondemned?

There is also the argument that aggression is a political crime, in the sense that it involves state conduct, and that the Court should be spared from having to deal with political issues. It is submitted that all the crimes currently under the jurisdiction of the ICC are in this sense political. They involve state conduct. They are invariably committed in the name of and for the state as part of state policy. Indeed, some, such as war crimes, must by definition be “committed as part of a plan or policy”, invariably of the government. Additionally, as the roster of the defendants before the Nuremberg and Tokyo tribunals and, currently before the ICTY and ICTR reveals, the crimes are committed by high-ranking state officials and functionaries. More often than not, they are committed by means of the army, police, intelligence and other security agencies and the entire governmental apparatus. It is for these reasons that they are often referred to as “crimes of state”. From this perspective, therefore, there is no justification for considering aggression as involving more state conduct than the other crimes and for curtailing the Court’s jurisdiction over it.

Nonetheless, it is urged that in any case where the Council makes a determination, the Court should treat such a determination with due respect as a matter of courtesy. However, for reasons advanced above, the Court must not feel itself bound by the determination.

Regarding the conditions that should accompany the Court’s exercise of jurisdiction as required under Article 5 of its Statute, it is suggested that the only condition should be compliance with Article 16 of the Statute. When, acting under that article, the Security Council requests the Court not to commence or to proceed with investigation or prosecution in respect of a situation it may be seized of, the Court must comply with the request. This condition is consonant with the Charter of the United Nations. It enables the Council to exercise its primary responsibility assigned to it under the Charter of maintaining international peace and security. It recognizes that the Court’s untimely or precipitous exercise of jurisdiction with respect to alleged acts of aggression may be counterproductive. They may frustrate the Council’s political, diplomatic, military or other efforts aimed at maintaining or restoring the peace. So, let the Council act first. The condition is at the same time in accord with the Rome Statute and affirms the independence and the integrity of the Court.

V. Concluding remarks

The Court’s coming into operation so soon after the adoption of the Rome Statute in 1998 is something that surprised many. Equally, the adoption of Resolution 1422 by the Security Council in 2002 to defer the Court’s action just days after the Statute came into force is an event that the international community did not expect to happen so soon. Nevertheless, its non-renewal in 2004 also brought a sigh of relief and was also a noteworthy non-event. A more pleasant surprise, however, was the referral by the Security Council of the Darfur situation to the Court for investigation and action only within four years of the Court’s existence. These events reveal a dynamic and growing, albeit delicate, relationship between the Court and the Council. They raise optimism that the apparently intractable issue of aggression will also be satisfactorily resolved, that law and power will be put in their rightful places, and the cause of peace will continue to advance.

\(^{22}\) Like the International Court of Justice, the International Criminal Court is duty bound to use “juridical concepts, its criteria [must be] standards of legality and its method […] that of legal proof.” See dissenting Opinion of Judge Weeramantry in the Lockerbie case: Case Concerning Questions of Interpretation and Application of the Montreal Convention Arising out of the Aerial Incident at Lockerbie (Provisional Measures), Libya v. U.K. (1992), ICJ Reports 3, 56.