



What should be the relationship between the International Criminal Court and the United Nations Security Council in the crime of aggression?

Jane VERBITSKY¹

Abstract

In 2009 a Review Conference will give the countries that brought the International Criminal Court into existence an opportunity to decide upon an issue critical for the future functioning of the Court, namely the relationship between the court itself and the United Nations Security Council. Discussions about the relationship between the two institutions will focus on Article 5 of the Rome Statute which grants the International Criminal Court jurisdiction over the most serious crimes – genocide, war crimes, crimes against humanity, and the crime of aggression. In particular, the Assembly of States Parties will have to decide whether there is sufficient international consensus to finally achieve agreement on a definition of aggression that can be incorporated into the Rome Statute and, if so, whether a determination of aggression by the Security Council should be a precondition to the Court's exercise of jurisdiction over this crime. This article examines arguments for and against a prior determination of aggression by the Security Council and other organs of the United Nations as a precondition to the International Criminal Court's exercise of jurisdiction over this crime.

Keywords: *United Nations, International Criminal Court, Security Council, aggression, jurisdiction, Rome Statute, United Nations Charter, Review Conference, sovereignty*

¹ Dr., School of Social Sciences, AUT University, Auckland, New Zealand

INTRODUCTION

For centuries philosophical traditions existed which conceptualized limitations on when and how states could wage war.² However, it was not until the 20th century that these ideas were captured within the framework of a multilateral inter-governmental organization and embedded in its foundation principles. Both the League of Nations and its successor, the United Nations, established benchmark rules for their members about the relationship between states and war. These rules have been supplemented over time by multilateral conventions which have increasingly limited state autonomy in situations of large-scale armed conflict. Where once war was considered an element of statecraft used routinely to further the national interests of states and their rulers, war nowadays has become a more circumscribed undertaking - one which is largely prohibited under international law, is attended by unprecedented critical scrutiny, and whose usage even in the limited instances permitted under international law is beset by regulatory regimes.

Despite significant advances in both the prescription and proscription of state conduct in war, though, one area of action has escaped regulation by international conventions. Although described as “the crime of crimes”³, the “mother of all crimes”,⁴ and the “supreme international crime”⁵, the crime of aggression⁶ has defied attempts by states to agree upon a definition of the crime for which individual criminal responsibility could be prosecuted before a judicial body. The 1998 Rome Statute for the Establishment of an International Criminal Court (the Rome Statute) includes aggression as one of the four crimes under the jurisdiction of the court but no definition of the crime is given in Article 5, the article which confirms ICC jurisdiction over the crime of aggression. Instead, it was decided that a review conference should be held seven years after entry into force of the Rome Statute when there would be an opportunity, conditional upon agreement by states, for amendment to the

² See, for instance, Malcolm Shaw, *International Law*, (4th ed., Cambridge: Cambridge University Press, 1997), pp. 777-781, and William O'Brien, 'The Conduct of Just and Limited War', in David Barash, (ed.), *Approaches to Peace*, (Oxford University Press: Oxford, 2000), pp. 80-85.

³ Caroline Fournet, *International Crimes*, (London: Cameron May, 2006), p. 143.

⁴ Steven Roach, *Politicizing the International Criminal Court*, (Lanham: Rowan & Littlefield Publishers, 2005) p. 146.

⁵ AMUNC 2007: Asia-Pacific Model United Nations Conference, 'The Question of Defining the Crime of Aggression', Sixth Committee of the General Assembly, (The University of Auckland, New Zealand), 2007, p. 4.

⁶ The crime of aggression was historically referred to as “crimes against peace”.

Statute to incorporate a definition of aggression. If agreement on a definition cannot be reached at the review conference in 2009, then aggression will remain an international crime that eludes legal accountability.

The definition of aggression⁷ is not the only problematic issue associated with this crime. What the relationship between the International Criminal Court (ICC) and the United Nations Security Council should be in respect to aggression is the source of debate between the states which have signed the Rome Statute. At the centre of the debate is the question of determining when aggression should be prosecuted by the ICC. Two questions are critical to this debate: Is a determination by the Security Council that an act of aggression has occurred a necessary prerequisite to prosecution of the crime by the ICC?; Or should the ICC be able to prosecute aggression independent of a positive Security Council determination of the matter? Between the polar responses to these questions, two further options have emerged involving other organs of the United Nations. These options suggest that the General Assembly and the International Court of Justice could be asked to, respectively, make a determination or render an advisory opinion about whether an act of aggression has occurred should a positive determination by the Security Council not be forthcoming. In these latter options a finding by either organ that aggression had occurred would substitute for a positive Security Council determination of aggression and act as authorization for the ICC to proceed. As with the definition of aggression, agreement must be reached at the 2009 Review Conference on the pre-conditions, if any, attaching to the jurisdiction of the court over aggression for the ICC to be able to exercise that jurisdiction and undertake prosecution for the crime.

Both issues – the definition of aggression and the relationship between the ICC and the Security Council – have generated heated debates within the Assembly of States Parties and are unlikely to be easily resolved. In large part this is because the two issues are intertwined, and both are politically charged. How the issue of relationship is resolved is likely to affect the definitional issue, and vice versa. In addition, the matter of definition is, typically, a substantive issue, while the matter of the relationship between the two bodies would usually be seen as a procedural and more mechanical one. Normally, the latter would attract less attention and interest than the definition issue. However, in

⁷ On this point see Kevin Jon Heller, 'Retreat from Nuremberg: The Leadership Requirement in Crime of Aggression', *European Journal of International Law*, Vol.18, No.3, 2007, pp. 477-521.

this case nothing is typical or usual. The relationship issue is equally as important as the definitional issue because it involves competing power and authority between two international bodies, both of whom have rightful interests in incidences of aggression. Finally, the two issues also speak to considerations of state sovereignty, national interests, and national security, a litmus test if ever there was one for states' commitment to multilateralism and the rule of law.

This article will focus on the relationship between the ICC and the Security Council in the context of the crime of aggression. It will be suggested that while it would be preferable for the Security Council as the body charged under the United Nations Charter with determining "the existence of any threat to the peace, breach of the peace, or act of aggression"⁸ to make a positive determination of aggression prior to the ICC commencing proceedings, the Security Council's own history suggests that political considerations on its part would likely interfere with the ability of the ICC to undertake prosecutions for the crime of aggression. Given those circumstances, the fact that the ICC is an independent body with a separate existence from the United Nations (UN), the undesirability of permitting other organs of the UN to make a positive determination of aggression as a substitute for a Security Council determination, and the importance of achieving legal accountability for crimes of aggression, it will be argued that the ICC does not require a relationship with the Security Council in which the Court is dependent on a positive finding of aggression by the Council to trigger prosecution. Rather, the ICC as the judicial body specifically established by the global community to deal with the most serious of all international crimes should be able to commence proceedings upon its own cognizance, consistent with the procedures enshrined in the Rome Statute.

THE INTERNATIONAL CRIMINAL COURT

The ICC was established under the Rome Statute of 1998 as the international court that would have jurisdiction over the four gravest crimes known to humanity – genocide, war crimes, crimes against humanity, and the crime of aggression. Upon ratification by the sixtieth state party to the treaty in 2002, the Court came into effect. The number of states who have ratified the treaty now stands at 106.⁹

⁸ Art. 39, Charter of the United Nations. *Charter of the United Nations*, <<http://www.un.org/about/un/charter/contents.htm>> (at August 27, 2007).

⁹ 'The Republic of Madagascar ratifies the Rome Statute of the International Criminal Court', *International Criminal Court: Latest Press Releases* (2008) <<http://www.icc-cpi.int/press/pressr>>

The Court emerged out of a long process. The Nuremberg Tribunal war trials of 1946 established a template for an international tribunal that could prosecute individuals for serious crimes; furthermore the work by the International Law Commission (ILC) in the early 1950s resulted in a draft statute for a permanent international court. Despite these steps, proposals to establish an international court with jurisdiction over the most serious crimes were stymied and the initiative remained moribund until Trinidad and Tobago revived the idea in 1989. Further work by the ILC created the 1996 Draft Code of Offences Against the Peace and Security of Mankind intended to codify international customary criminal law in this area.¹⁰ A month-long Conference of Plenipotentiaries on the Establishment of an International Criminal Court held in Rome in 1998 and enabled a negotiation of a treaty enacting a statute for the Court, and opened the statute for signature by states. Finally, in April 2002 the sixtieth state signatory ratified the treaty, bringing the new international court into existence.¹¹

The Rome Statute empowers the Court to “exercise its jurisdiction over persons for the most serious of international crimes”.¹² Articles 6, 7, and 8 of the Rome Statute define the crimes of genocide, crimes against humanity and war crimes and set out the elements of the crime for each. However, while Article 5 confirms that the Court’s jurisdiction covers the crime of genocide, crimes against humanity, war crimes and the crime of aggression, no agreement was reached at the Rome Conference about a contemporary definition of the crime of aggression or of the pre-conditions, if any, to be fulfilled before the Court can exercise its jurisdiction over this crime. Instead, in Article 5(2) the Court was granted jurisdiction over aggression dependent upon a provision being adopted defining the crime and setting out “the conditions under which the Court shall exercise jurisdiction with respect to this crime.”¹³ The definition is required to be in accordance with Articles 121 and

releases/351.html> (at March 17, 2008).

¹⁰ William Driscoll, Joseph Zompetti & Suzette Zompetti, *Global Politics and the Quest for Justice*, (New York: International Debate Education Association, 2004), pp. 24-25.

¹¹ Donald Wells, *The United Nations: States vs International Law*, (New York: Algora Publishing, 2005), pp. 121-122; Michael Bidiss, ‘From the Nuremberg Charter to the Rome Statute: A Historical Analysis of the Limits of International Criminal Accountability’, in Ramesh Thakur & Peter Malcontent, (eds) *From Sovereign Impunity to International Accountability*, (Tokyo: United Nations University, 2004), pp. 49-50.

¹² Art. 1, Rome Statute of the International Criminal Court. *Rome Statute of the International Criminal Court*, <http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf> (at June 8, 2007).

¹³ Art. 5(2), Rome Statute of the International Criminal Court. *Ibid.*

123 which set out the grounds for amendment of the Rome Statute, and outline the conditions for review of the Statute. Article 123 provides for a review conference to be held seven years after the entry into force of the Rome Statute, and so the earliest opportunity for fulfillment of the Article 5(2) conditions regarding aggression will be in 2009.

THE SECURITY COUNCIL

The Security Council is one of the six principal organs of the United Nations and is charged with certain duties and responsibilities under the United Nations Charter. Article 24(1) of the Charter states that the Council has “primary responsibility for the maintenance of international peace and security”, while Article 39 affirms that the Council “shall determine the existence of any threat to the peace, breach of the peace, or act of aggression”.¹⁴ It is the key organ dealing with issues of war and peace and its superior status in this regard is confirmed in the wording of Article 24(1) which notes that United Nations members “agree that in carrying out its duties under [Article 24] the Security Council acts on their behalf”. The Charter specifically refers to the powers granted the Council under Chapters VI, VII, VIII and XII in respect to disputes “likely to endanger the maintenance of international peace and security”.¹⁵

The Council is made up of five permanent members (P5) and ten non-permanent members, the latter having two year elected terms in office. The P5 consists of the United Kingdom (UK), the United States of America (USA), France, Russia, and China. The P5 were self-selected at the time of the establishment of the United Nations to be the leading states in the organization, acting as global policemen to prevent a recurrence of world war. Consequently, the P5 gave themselves a privileged position on the Security Council and constructed a voting regime that reinforced their status.¹⁶ Decisions on other than procedural matters in the Security Council “are made by an affirmative vote of nine members, including the concurring votes of the five permanent members of the Council.”¹⁷ The P5, therefore, have veto power

¹⁴ *Charter of the United Nations*, <<http://www.un.org/aboutun/charter/contents.htm>> (at August 27, 2007).

¹⁵ Art. 33(1), Charter of the United Nations. *Ibid.*

¹⁶ John Baylis & Steve Smith, eds., *The Globalization of World Politics*, (3rd ed., Oxford: Oxford University Press, 2005); Charles Kegley & Eugene Wittkopf, *World Politics*, (6th ed., New York: St. Martin's Press, 1997).

¹⁷ *United Nations Handbook 2006/07*, (Wellington: Ministry of Foreign Affairs and Trade, 2006), p. 55.

over all significant Council decisions. The veto power has caused considerable concern in recent decades and sparked calls for reform of the Council, but without success.¹⁸

THE CRIME OF AGGRESSION

Although aggression is one of the four most serious international crimes, it has escaped definition in the context of individual responsibility for more than five decades. Individual responsibility for the crime was initiated with Article 6(a) of the Nuremberg Charter which outlined crimes against peace as "...planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing..."¹⁹

The heinous nature of the crime, and its "precedence before any other international crime"²⁰ was emphasized in the Tribunal's judgment. "To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."²¹ Support for these statements was given by the UN General Assembly in 1946 when it affirmed the "principles of international law as recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal."²² However, after this time no formal international agreement on a definition of aggression for prosecution of individual actors could be concluded.

Prohibitions on state aggression, though, are to be found in the UN Charter in Articles 1, 2(4), 39 and 51²³, and in two General Assembly resolutions: General Assembly Resolution 2625 (XXV) which states that "A war of

¹⁸ Probably the best known reform agenda was put forward by the Commission for Global Governance. See Commission for Global Governance, *Our Neighbourhood*, (Oxford: Oxford University Press, 1995).

¹⁹ Quoted in Ian Brownlie, *International Law and the Use of Force by States*, (London: Oxford University Press, 1963), p. 195.

²⁰ United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, (New York: William S. Hein & Co., 2006), p. 246.

²¹ *Ibid.*

²² Lyal Sunga, *Individual Responsibility in International Law for Serious Human Rights Violations*, (Dordrecht: Martinus Nijhoff Publishers, 1992), p. 39, fn.56.

²³ The first two articles reinforce the need to suppress aggression by states, the third gives responsibility for determining aggression to the Security Council, and the last article permits states to act in self-defence if an armed attack against them occurs or to act in collective self-defence if another member state of the UN is attacked.

aggression constitutes a crime against the peace for which there is a responsibility under international law²⁴; and in Resolution 3314 (XXIX) which sets out a lengthy definition of aggression.

A key problem in gaining international consensus for a definition of aggression by individuals is that, as Leanza notes, aggression “can be considered as a strongly “politicized” crime, in that the criminal responsibility of the individual/body necessarily depends on the existence of an act of aggression of the State of which the individual is a citizen.”²⁵ Whereas a distinction can be made between the individual and the state in each of the other three crimes over which the ICC has jurisdiction, delineation of the two in the case of aggression is simply not clear cut. The Charter of the Nuremberg Tribunal listed in Article 6(a) some cases as examples or elements of what might constitute aggression. What those examples suggest is that aggression as an individual crime is inextricably linked with aggression as an action by the state in violation of Articles 1 and 33 of the United Nations Charter. This is reinforced by the United Nations General Assembly’s Resolution 3314 of 1974 which “defined aggression as necessarily being the act of a State”.²⁶ Individual criminal responsibility for an act of aggression thus presupposes aggression by the state to which the individual belongs. Herein may lie one of the obstacles impeding definition – fear on the part of some states that if a definition of aggression is included in the Rome Statute, then their military and/or political leaders may at some future point be indicted for the crime of aggression and that the indictment itself, let alone a judgment convicting the accused of the crime, may also strongly indicate guilt on the part of the state.²⁷

²⁴ Quoted in Sunga, p. 40.

²⁵ Umberto Leanza, ‘The Historical Background’, in Mauro Politi & Giuseppe Nesi, (eds), *The International Criminal Court and the Crime of Aggression*, (Aldershot: Ashgate, 2004), p. 12.

²⁶ United Nations (n.d.) *Crimes Within the Court’s Jurisdiction: The Crime of Aggression* The International Criminal Court <<http://www.un.org/icc/crimes.htm>>(at August 28,2007).

²⁷ On this point of aggression as a ‘leadership’ crime see *Press Conference by Chairman of the Working Group on Crime of Aggression*, 31 January 2007, <http://www.un.org/News/briefings/docs/2007/070131_Wenaweser.doc.htm>(at December 1, 2007); the suggested wording in the *Discussion Paper on the Crime of Aggression Proposed by the Chairman*, Annex, Assembly of States Parties, Resumed Fifth Session, (New York: 29 January-1 February 2007), ICC-ASP/5/SWGCA/2, p. 3; and discussion on the leadership clause in *Informal Intersessional Meeting of the Special Working Group on the Crime of Aggression*, (Princeton University, New Jersey: 11-14 June 2007), Assembly of States Parties, ICC-ASP/6/SWGCA/INF.1, p. 3.

Leanza suggests that countries opposed to inclusion of a definition of aggression in the Rome Statute because of fear of prosecution of their leaders have proffered two key arguments to bolster their case: “The inclusion of aggression could lead to a “politicization” of the recourse to the Court, and encourage unjustified reports aimed at propaganda. Moreover, they purported that international law did not provide for a universally accepted definition of aggression, useful above all to ascertain criminal responsibility of the individual.”²⁸

The argument about politicization of the recourse to the court has two aspects: the first focuses on the vexatious mechanisms (“unjustified reports”) that may be used to embarrass hegemony such as the P5; the second on possible incursions by the ICC into what have formerly been perceived as sacrosanct areas of state sovereignty, national interests, and national security.

As Lehto observes, the “essence of the politicization argument is thus a concern about a confusion of mandates; a concern about judicial role and integrity of the ICC; about an encroachment by the Court on the responsibilities of the Security Council – and finally about a necessary distinction between the legal and political spheres.”²⁹

These are serious concerns of some states,³⁰ and the consequences of these concerns could be seen in Rome at the 1998 treaty negotiations. Wells comments that although the Initial draft of the ILC for the Court “stated that the Court would be independent of political pressures, and in particular independent of the Security Council veto”³¹, there was division at the Rome Conference on the definitional issue and the matter of referrals from the Security Council.³² That there was ultimately deference to the P5 stance of containment and control of the ICC can be discerned not only from the

²⁸ Leanza, pp. 12-13.

²⁹ Marja Lehto, ‘The ICC and the Security Council: About the Argument of Politicization’, in Mauro Politi & Giuseppe Nesi, (eds), *The International Criminal Court and the Crime of Aggression*, (Aldershot: Ashgate, 2004), p. 146.

³⁰ Notably the USA, whose attitude is best summed up in the words of Senator Rod Grams: “...the United States must aggressively oppose the court each step of the way, because the treaty establishing an international criminal court is not just bad, but I believe it is also dangerous...Should the court come into existence, we must have a firm policy of non-cooperation, no funding, no acceptance of its jurisdiction, no acknowledgement of its ruling and absolutely no referral cases by the Security Council.” Quoted in Wells, p. 123.

³¹ *Ibid.*

³² Roach, pp. 146-149.

provisions of Article 5(2) of the Rome Statute, but also the insertion in the Statute of an Article which cedes precedence and authority over ICC business to the Security Council.³³ Article 16 requires that the ICC defer investigation or prosecution for twelve 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; that request may be renewed by the Council under the same conditions.”³⁴

This is a very considerable concession as the grounds on which a prosecution can be commenced in the Court are by only one of those three ways: referral by a state party (Article 13(a)); referral by the Security Council (Article 13(b)); or through the Prosecutor’s investigations (Article 13(c)). Even with the latter method the Prosecutor cannot act entirely autonomously, but must, per Article 15 of the Statute, submit what is effectively a prima facie case to the Pre-Trial Chamber for their consideration and authorization to proceed with the investigation. And even then, the principle of complementarity (which makes the ICC a court of “last resort”³⁵) allows a state party to tell the ICC that it will prosecute the matter and so bring the case back to its own national courts.³⁶

What the Article 16 concession does, above all, is to emphasize the overriding and ultimate political power of the Security Council in matters of international peace and security. It reinforces the point made by Lehto about distinctions between the legal and political spheres, and perceived encroachment by the ICC on the Security Council’s area of responsibility. The UN, with its near universal membership and broad mandate, is the long-established supreme political organization for maintaining global peace and security, and the Security Council is the superior organ of the UN for matters of war and peace. The ICC, by contrast, is a newly-established legal body with a much smaller state support base and with a limited and closely defined legal

³³ Geoffrey Robertson says that ‘These provisions were heavily influenced at Rome by the desperate need to keep the US onside.’ Geoffrey Robertson, *Crimes against Humanity*, (3rd ed., London: Penguin, 2006), p. 444.

³⁴ Art. 16, Rome Statute of the International Criminal Court. *Rome Statute of the International Criminal Court*, <http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf> (at June 8, 2007).

³⁵ *About the Court*. <<http://www.icc-cpi.int/about.html>> (at August 1, 2007).

³⁶ Art. 124, Rome Statute of the International Criminal Court. *Rome Statute of the International Criminal Court*, <http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf> (at June 8, 2007).

mandate. The power base of the P5 is in the Security Council and through this vehicle it can utilize certain provisions of the Rome Statute (such as Articles 5(2) and 16) to either facilitate or hinder the ICC in its work. In any political contest between the two, the ICC is likely to end up as the loser, particularly at this early stage of its development when it has had neither the time to build up a reputation for legitimacy and credibility, nor the practical opportunities to show the global community how important its role is in achieving justice at the international level. While this situation will obviously change over time, and the provisions of Article 16 may eventually be modified, at the moment the ICC's presence and authority is a much lesser one than that of the Security Council, and any perceived challenges to the Council by the Court would undoubtedly have a damaging impact on hopes for achieving international consensus over procedural and definitional issues around aggression at the Review Conference in 2009.

JURISDICTION AND OVERLAPPING RESPONSIBILITIES

At the core of the relationship between the ICC and the Security Council is the problem of jurisdiction and overlapping responsibilities. The Rome Statute created a court with inherent jurisdiction over just four core offences. The *rationae loci*, or geographic scope, of the Court's jurisdiction, however, varies depending on which mechanism for referral of cases to the Court is used and, as Magaoto points out, in "cases involving a Security Council referral, the Statute's scope is unbounded by geography."³⁷ Additionally, individuals, not the State, "will be subject to the jurisdiction of the Court"³⁸ including those who are not treaty signatories, challenging the traditional relationship in which individuals are subject-citizens of states. Similarly, the authority to define crimes and punishment, normally a state prerogative, under the Rome Statute is given to the States Parties who have signed the treaty, creating a new international rule-making body which can potentially impact on non-signatory state nationals – in Cryer's words, "...the rules are a ground floor of all international criminal law on the basis not that any custom crystallized at Rome, but that the sources of international law have changed to allow such 'quasi-legislation'."³⁹

³⁷ Jackson Maogoto, *State Sovereignty and International Criminal Law*, (New York: Transnational Publishers, 2003), pp. 240-241.

³⁸ *Idem*, p. 243.

³⁹ Robert Cryer, *Prosecuting International Crimes*, (Cambridge: Cambridge University Press, 2005), p. 179.

Offsetting this is the principle of complementarity which balances some of the concerns about the ICC's ability to intrude on traditional areas of state sovereignty. For example, in Article 17(1)(a) of the Rome Statute a case may be deemed inadmissible if it is being investigated or prosecuted by a state with jurisdiction over it "unless the State is unwilling or unable genuinely to carry out the investigation or prosecution."

Nevertheless, for those states opposed to any incursion on state sovereignty (the leaders of whom are members of the Security Council) any intrusion is unjustifiable. Laughland, for example, is emphatic that "The proliferation of international judicial bodies with pretensions to overrule national sovereignty will lead to politicized "justice" and to arbitrary rule by unfettered powers."⁴⁰ The ICC, then, represents to this group a real and growing threat for criminal "prosecution is inherently tied to notions of national sovereignty and the control over persons and territory which are fundamental to that notion."⁴¹

The dilemma for the Security Council is that while it is the UN organ that formally determines acts of aggression by states, it cannot deny the fact that ICC has a similar responsibility in the area of aggression, albeit in relation to individuals. To denigrate the ICC's responsibility on this issue is to denigrate its own responsibility, and to risk undermining its own legitimacy and credibility as well as the principles upon which the United Nations is based.

The issue of determination of aggression per Article 5(2), then, represents a prime means with which the Council could limit, impede, or otherwise hinder the ICC whilst not being seen to stray from its customary patterns of decision-making in relation to any question of aggression. However, if States Parties at the Review Conference decide that Article 5(2) does not require a positive determination by the Council that an act of aggression has occurred, the ICC will have considerably more freedom to investigate and prosecute the crime than would otherwise be the case.

This is the real danger for the Security Council. It has never before had to engage with a body which, while politically weaker, has potentially enormous power – the power to determine the legal culpability of its political and military leaders in acts of aggression.

⁴⁰ John Laughland, 'The Dangers of the Politicisation of International Justice or Quis Custodiet Ipsos Custodiet', in Herwig Roggemann & Petar Sarcevic, (eds), *National Security and International Criminal Justice* (The Hague: Kluwer Law International, 2002), p. 83.

⁴¹ Maogoto, p. 251.

RELATIONSHIPS BETWEEN THE ICC AND ORGANS OF THE UNITED NATIONS: FOUR OPTIONS

In the preparations for the Review Conference of 2009 four options have emerged as front-runners concerning the relationship between the Security Council and the ICC.⁴²

Option 1: Security Council Prerequisite Determination of Aggression

The relationship between the ICC and the Security Council over aggression in the Rome Statute is potentially a very difficult one. Although Article 5(1) is clear that the Court has jurisdiction over the crime of aggression, that jurisdiction is provisional under Article 5(2) which states that the jurisdiction over aggression comes into effect “once a provision is adopted in accordance with Articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.”⁴³

As noted earlier, Article 39 of the UN Charter gives the Security Council primary responsibility for determining when an act of aggression has occurred. This would seem to imply, when the Rome Statute and the UN Charter are read together, that the Security Council must have a role in any exercise by the ICC of jurisdiction over the crime of aggression. Read in this way, the ICC and the Security Council are twinned in the matter of aggression, the Security Council necessarily having to make a determination that aggression has occurred before the ICC can institute proceedings. In this conceptualization of the relationship, the Security Council determination of aggression must precede action by the ICC. The ICC, then, is dependent upon the Council’s positive determination of aggression before it can exercise jurisdiction. The relationship is one where the Security Council acts as the trigger for ICC action. Hence, without the trigger of a positive Security Council determination, the ICC cannot exercise jurisdiction.

⁴² See, for instance, Report of the Strategic Working Group on Aggression, Annex II.C, Discussion Paper 2 *The Conditions for the Exercise of the Jurisdiction With Respect to the Crime of Aggression*, ICC-ASP/4/32 (The Hague: 28 November-3 December 2005) and Assembly of States Parties, Special Working Group on the Crime of Aggression, *Informal inter-sessional meeting of the Special Working Group on the Crime of Aggression*, ICC-ASP/6/SWGCA/INF.1 (Princeton University, United States: 11-14 June 2007), pp. 4-11.

⁴³ *Rome Statute of the International Criminal Court*, <http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf> (at June 8, 2007).

The relationship here would appear to be a straightforward one with the ICC following the lead of the Security Council. The logic behind this position is that the UN as the largest intergovernmental organization in the world and the one with responsibility for matters of war and peace has in its own Charter ceded primary responsibility for determining aggression to the Council, and the ICC should take its lead from the Council. Such a relationship would ensure that any time the ICC deals with a case of aggression; it would have behind it a prior determination by the Council that aggression had occurred. This would put it in procedural lockstep with the Council, ensuring that there could be no basis for questioning by any member of the global community of the ICC's authority, legitimacy or right to exercise jurisdiction. As well, depending upon what definition of aggression may be arrived at by the Assembly of States Parties, the Council's positive determination of aggression might potentially contribute evidence for a prosecution by the ICC of individual responsibility for the crime of aggression because of the overlapping of state and individual actions in connection with this crime.

Nevertheless, the relationship between the two bodies in this conceptualization is not as straightforward as it first appears. If a positive determination of aggression made by the Council was followed by a successful prosecution of the crime of aggression by the ICC, there would clearly be consistency and congruity between the two bodies. However, if a positive determination by the Council was followed by an unsuccessful prosecution of the crime of aggression by the ICC, then a chasm opens between them. As Goma'a puts it "a finding by the Court that there was no legal nexus between a situation of aggression determined by the Council and the act of the individuals alleged to be implicated in it will undoubtedly put in question that determination, thus putting the ICC directly in conflict with the Security Council."⁴⁴

The Special Working Group on the Crime of Aggression (SWGCA) has raised another concern that predetermination of aggression by the Council "...might undermine the development of an autonomous definition of the crime of aggression, particularly where a body guided by political rather than legal considerations would make such a determination".⁴⁵

⁴⁴ Mohammed Goma'a, 'The Definition of the Crime of Aggression and the ICC Jurisdiction over that Crime', in Mauro Politi & Giuseppe Nesi, (eds), *The International Criminal Court and the Crime of Aggression*, (Aldershot: Ashgate, 2004), p. 75.

⁴⁵ Special Working Group on the Crime of Aggression, *Informal Inter-Sessional Meeting of the Special Working Group on the Crime of Aggression*, Annex II.A, ICC-ASP/5/SWGA/INF.1, (Princeton University, New Jersey: 8-11 June 2006), p. 368.

An additional and too likely problem would occur in a situation where the Council did not make a positive determination that aggression had occurred - for instance, through veto by one of the P5, by inaction, or by failure to collect a majority of member votes – thus preventing the ICC from exercising jurisdiction in the matter. There are good grounds for believing that these scenarios would occur, and occur regularly. According to Gaja, in fifty five years of activity, the Security Council has only once found that aggression has taken place.⁴⁶ Consequently, legal scholars are skeptical of the willingness of the Security Council to find an act of aggression has occurred given that not “even in the glaring cases of the invasion of South Korea by North Korea in 1950 or of Kuwait by Iraq in 1990 did the Council formally determine the existence of an act of aggression, even if it treated the respective attacks practically to the same effect.”⁴⁷

This pattern of decision-making reflects the fact that the Security Council is a political body, not a legal one. As an executive body, its motivations and concerns are very different from that of a judicial body. It is neither neutral nor impartial, nor is it concerned with vital legal elements such as evidence, due process, and natural justice. Rather, its decisions are outcomes of the membership, voting structure, and political interests of the Council, dominated by the P5. The membership and voting structure of the Council were established in 1945 and have not changed since. Although critics charge that the P5 positions on the Council and their veto power are anachronistic (some of the P5, such as the UK and France, are no longer as powerful relatively as they were in 1945, while other countries, such as Japan and India, who are now leading global players and potential superpowers, are not represented among the P5), subject to abuse (the game-playing and reflexive use of the veto for ideological purposes by the USA and the USSR during the Cold War era undermined the credibility and efficacy of the Council), and inequitable (the P5 cannot be said to reflect the global community either in its membership or orientation, both of which are overwhelmingly Western and Global North despite the presence of China), there seems little prospect of reform in the near future, given that reform would require P5 consent to any reform programme.

⁴⁶ Giorgio Gaja, ‘The Respective Roles of the ICC and the Security Council in Determining the Existence of an Aggression’, in Mauro Politi & Giuseppe Nesi, (eds), *The International Criminal Court and the Crime of Aggression*, (Aldershot: Ashgate, 2004), p. 124. This was in 1976 when the Council in Resolution 387 condemned South African aggression against Angola.

⁴⁷ Antonio Yanez-Barnuevo, ‘The Exercise of the International Criminal Court’s Jurisdiction over the Crime of Aggression: Short Term and Long Term Prospects’, in Mauro Politi M. & Giuseppe Nesi, (eds), *The International Criminal Court and the Crime of Aggression*, (Ashgate: Aldershot, 2004), p. 117.

Consequently, the Security Council is likely into the indefinite future to remain an organ of the UN whose decisions mirror the political interests of the P5 hegemony. As its own history demonstrates this is hardly a body which can be trusted to formally recognize and acknowledge an act of aggression when it occurs. Given this background it would not be appropriate to allow the Security Council, through the determination mechanism, power to prevent the ICC exercising jurisdiction over the crime of aggression.

Option 2: General Assembly Prerequisite Determination of Aggression

Another reading of Article 5(2) is that the “relevant provisions” of the UN Charter are not specified, and so are not limited to those articles of the Charter giving primary responsibility for a determination of aggression to the Security Council. Article 10 of the Charter states that the “General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters.”⁴⁸

As Article 1(1) of the Charter specifically mentions “acts of aggression”, questions or issues pertaining to aggression are definitely within the scope of the Charter and are, therefore, open for discussion and recommendation by the General Assembly. Consequently, having the General Assembly make a determination or recommendation that aggression has occurred and that the ICC should proceed in the matter is also a procedure “consistent with the relevant provisions of the Charter of the United Nations.”

This interpretation is consistent with the notion that the Security Council has primary, but not exclusive, right to determine if an act of aggression has taken place. Article 24 of the UN Charter refers to the “primary responsibility” for the maintenance of international peace and security while Article 39 says that the Council “shall determine the existence of any threat to the peace, breach of the peace, or act of aggression”.⁴⁹ In neither article is the Security Council made the sole domain for discussion about, recommendations concerning, or determination of an act of aggression.

⁴⁸ *Charter of the United Nations*, <<http://www.un.org/aboutun/charter/contents.htm>> (at August 27, 2007).

⁴⁹ *Ibid.*

Support for this view comes from the Advisory Opinion of the International Court of Justice in the *Certain Expenses of the United Nations* case.⁵⁰ In this case dealing with the operational and peace-keeping expenses of the organization, “the Court found that under Article 24 the responsibility of the Security Council in the matter was “primary”, not exclusive. The Charter made it abundantly clear that the General Assembly was also to be concerned with international peace and security.”⁵¹

Because aggression is not completely ring-fenced by the Council, the General Assembly has been able on a number of occasions to act in the matter of aggression. In 1950, for instance, the General Assembly adopted Resolution 377 (V), known as the Uniting for Peace Resolution. The resolution provides in Part A for the General Assembly to consider matters relating to the maintenance of international peace and security if the Security Council is not able to undertake its primary responsibility in this area owing to lack of unanimity of the P5.⁵² Its most sustained work on aggression, though, has been the General Assembly Resolution 3314 (XXIX) of 1974 on the definition of aggression which continues to be important to current discussions and debate on the definition of aggression for potential inclusion in the Rome Statute.

While this option uses the General Assembly as the preferred vehicle for a determination of aggression absent one by the Security Council, it is not an inherently preferable one to a positive determination by the Council. The General Assembly is certainly more representative of the global community of states than the Security Council and the voting in this UN organ is on a democratic one state-one vote basis. However, the General Assembly is not without its own voting blocs and biases, and in the end this option still requires UN authorization (through a positive determination of aggression) for the Court to exert jurisdiction. It simply substitutes one UN organ for another in the matter of who gives authorization.

⁵⁰ 1962 International Court of Justice, Lexis 6.

⁵¹ *Ibid.*

⁵² Saeid Mirzaee Yengejeh, ‘Reflections on the Role of the Security Council in Determining an Act of Aggression’, in Mauro Politi & Guiseppe Nesi, (eds), *The International Criminal Court and the Crime of Aggression*, (Ashgate: Aldershot, 2004), p. 129.

Option 3: International Court Of Justice Prerequisite Determination of Aggression

The same argument about the lack of specificity in the Article 5(2) reference to “relevant provisions” of the Charter can also be used to suggest that the International Court of Justice (ICJ) could give an advisory opinion as to whether aggression has occurred prior to the ICC exercising its jurisdiction. In this conceptualization, Articles 92 and 96 of the Charter (which refer, respectively, to the ICJ as the “principal judicial organ of the United Nations”, and permit “the General Assembly or the Security Council” to request the ICJ “to give an advisory opinion on any legal question”⁵³) could be used to refer the question of whether aggression had occurred to this body. In this interpretation, either the General Assembly or the Security Council would refer the question to the ICJ and if the ICJ found that aggression had occurred then the ICC could proceed.

The ICJ certainly has the legal status, authority and competence to give an advisory opinion as to whether an act of aggression by a state has occurred, and the question would fall within the parameters of the Chapter XIV powers of the Court. The Court, additionally, has the gravitas to command respect for its findings, either positive or negative, on the issue of an act of aggression. It has also had experience in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)*,⁵⁴ case of making its own determination of acts of aggression. However, it seems counter-intuitive to establish a permanent international criminal court to deal with individual responsibility for the most serious crimes, and then require it to be able to exercise jurisdiction over the ‘crime of crimes’ only when the court which has supreme international jurisdiction over states’ disputes makes a positive finding that an act of aggression has occurred.

In this conceptualization, the ICC would forever be the junior and subordinate court, unable to exercise jurisdiction until the ICJ found aggression by a state had occurred. There is no wording in either the Rome Statute or the UN Charter which implies that the ICC should be treated as an inferior court to the ICJ, particularly as they deal with different entities – individuals in the case of the ICC, and states in the case of the ICJ. Nor is there any wording in the

⁵³ *Charter of the United Nations*, <<http://www.un.org/aboutun/charter/contents.htm>> (at August 27, 2007).

⁵⁴ 26 November 1984, International Court of Justice (General List No.70).

Charter or the Statute which implies that a finding of state aggression must precede a prosecution for aggression by individuals. As well, the same undesirable scenario of conflict between the ICC and a UN organ could occur with the ICJ as with the Security Council, namely the ICJ giving an advisory opinion that an act of aggression had occurred but the ICC finding that an individual charge of aggression could not be successfully prosecuted. The USA has also raised another concern in relation to this option “because the determination of the existence of an act of aggression is a matter that affects the responsibility of a particular State that it is inappropriate as a subject of a request for an advisory opinion.”⁵⁵ And, finally, the same argument of simply substituting one UN organ for another in providing authorization for the ICC which was advanced against the General Assembly can be rehearsed here.

Option 4: The ICC and Independent Jurisdiction

Still another interpretation of Article 5(2) is that it should be read in conjunction with the Preamble to, and Articles 1, 2, and 4 of the Rome Statute, and the Preamble to, and Article 1(1) and 1(3) of the UN Charter. The Preamble to the Rome Statute speaks of establishing “an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole”.⁵⁶ It reaffirms “the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State”.⁵⁷ Article 2 states that the ICC “shall be brought into a relationship with the United Nations” through an agreement with the Assembly of States Parties that will have to be approved by the Assembly of States Parties and “concluded by the President of the Court on its behalf.”⁵⁸ Article 4(1) affirms that the ICC “shall have international legal personality” and “such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.”⁵⁹

⁵⁵ Crime of Aggression: Statement by the United States (September 26, 2001), <<http://www.state.gov/documents/organization/16461.pdf>>(at September 3, 2007).

⁵⁶ *Rome Statute of the International Criminal Court*, <http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf> (at June 8, 2007).

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

What the foregoing indicates is that the statute which created the ICC is unambiguous that the Court is possessed of the power, authority and capacity to deal with the “most serious” of crimes. The Court is a stand-alone institution and in that capacity it can choose to establish relationships with other institutions. Given the complementary aims and objectives of the UN, it would be surprising if the ICC did *not* establish some kind of working relationship with that institution. However, nothing in the wording of Article 2 suggests that the ICC relationship with the UN is to be a subordinate one.

This interpretation is reinforced by provisions of the UN Charter. The Preamble speaks, *inter alia*, of the determination of the UN to “establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained”.⁶⁰ Article 1(1) bolsters this by enumerating the purposes of the UN, including the “suppression of acts of aggression”, while Article 1(3) talks of achieving “international co-operation in solving problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all”.⁶¹ All of these strands of the Charter are consistent with the notion of the ICC as the specialized global institution dealing with individual responsibility for the four most serious crimes, and as being the institution to which the UN owes a duty to assist in achieving its goal of guaranteeing “lasting respect for and the enforcement of international justice”.

This final interpretation is the polar opposite of the first option and as such is subject to criticism on the grounds that it would lead to a politicization of the Court.⁶² In this perspective a prior determination of aggression is needed to safeguard the integrity and reputation of the Court.

While there is some validity to this criticism, it seems irrational to hold the Court a hostage to prior determination of aggression by another body on this basis alone. The options for a prior determination by another body (Security Council, General Assembly, International Court of Justice) each have significant disadvantages, insufficient, it can be argued, to outweigh this

⁶⁰ *Charter of the United Nations*, <<http://www.un.org/aboutun/charter/contents.htm>> (at August 27, 2007).

⁶¹ *Ibid.*

⁶² *CICC Background Paper on the Crime of Aggression*, ASP 5, Resumed Session, 29 January-1 February 2007 International Criminal Court, <http://www.iccnw.org/documents/Aggression_Background_Paper_ASP5ResumedSession_23Jan07.pdf> (at September 11, 2007).

criticism. As well, this criticism is one less likely to occur in a judicial institution where the norms, values, and ethical behaviour of the actors are different than in a political institution. Overall, the criticism is insufficiently persuasive to derogate from the advantages of the Court being able to investigate and prosecute aggression without the need for a prior determination of aggression.

CONCLUSION

The global community has seen fit to establish a political body and a legal body which both have legitimate interests and rights in the matter of aggression. The contemporary power balance is, however, tilted in favour of the UN Security Council over the ICC. In a sense the ICC is a petitioner, potentially dependent upon the good graces of the P5 as influential actors at the Review Conference⁶³ to flesh out the provisions of Article 5 in a way which allows it maximum latitude to exercise jurisdiction over the crime of aggression. The ICC also needs the P5, as far as possible, to formally recognize and cooperate with the Court, and encourage other states to do the same.

This is not to suggest that the ICC is entirely powerless. It required considerable will and determination on the part of like-minded states to create a permanent international court after proposals for such a body had stultified for more than fifty years. Moreover, the Court was established in the face of opposition from powerful global actors. That argues for a persistent and cohesive bloc of states supporting the ICC. The increasing number of States Parties to the Rome Statute (just over half of all the states in the world) also suggests that there is increasing global support (both among states and within civil society) for the idea of a permanent international court that can provide legal accountability for the worst crimes. The ICC can perhaps be described as an idea whose time has finally come – a court designed to put an end to the “culture of impunity.”⁶⁴

Seen in that context, it seems only logical for such a court to be given autonomy and unfettered jurisdiction over the crime of aggression, so that it can prosecute cases as the need arises. The reality, though, is that the ICC

⁶³ The USA is not a State Party, but its influence will undoubtedly be felt at the conference.

⁶⁴ James Crawford, ‘The Drafting of the Rome Statute’, in Phillippe Sands, (ed), *From Nuremberg to the Hague*, (Cambridge: Cambridge University Press, 2003), p. 109.

must operate in a world in which the rule of law is subject to political authorities. As Maogoto observes, “since there is no international government or international police force, international law depends on the voluntary compliance of states”.⁶⁵

The anarchic nature of the international system means that there is no supra-national body that can compel states to accede to or comply with the ICC. Sovereignty permits states to voluntarily accede to and ratify the Rome Statute, or not, in precisely the same way that states voluntarily enter into membership of the UN or not. Over time it has become the norm for newly independent states to apply for UN membership, and over time a similar automatism in state membership may apply to the ICC. Until then, though, the ICC would benefit from the legitimacy and credibility that the P5 can lend it by cooperating with the Court.

That cooperation will not come easily, however, is a certainty. Of the P5, the USA, the UK, and China have been staunchly opposed to many features of the ICC – indeed, in the case of the Bush administration, to the idea of the Court at all. Nevertheless, on a practical level it would seem expedient for the Court to have some kind of relationship with the Security Council in respect to the exercise of its jurisdiction over aggression. It would facilitate the establishment of international norms about the crime of aggression and its subjection to the rule of law, and would send a clear message to the international community that transgressors would no longer go unpunished.

However, the relationship between the two bodies need not be based on a requirement of positive determination of aggression by the Council. If the Council determines that a matter constitutes a threat to peace, for instance, that confirmation would satisfy the Article 5(2) requirement of the Statute, and be in conformity with Article 39 of the Charter. The lesser threshold (threat to peace) would be more in keeping with the decision-making history and practice in the Security Council, and would eliminate any difficulties over a positive determination of aggression by the Council, followed by an unsuccessful prosecution of aggression by the Court.

Such a relationship would be a purely pragmatic one, however, and would still promote a relationship of dependence on a positive Security Council pronouncement to trigger jurisdiction. All the problems attendant on positive

⁶⁵ Maogoto, p. 237.

determination of aggression by the Council could be replicated even with a lower threshold determination. While it will no doubt be tempting for States Parties to compromise at the Rome Conference and settle for just such a solution, they would be doing the Court a disservice.

If the last five decades of global politics have proved anything, it is that tyrants flourish in a culture of impunity. The United Nations has been either unable or unwilling to deal with aggression at the level of the state, and there has been no ability for the recently established ICC (because of both the lack of a definition of aggression, and lack of formal agreement about the relationship between the Security Council and itself) to deal with aggression at the level of individuals. The void left at international level by that situation has enabled leadership groups to pursue policies of aggression which have created the very conflicts with ensuing atrocities that the United Nations was intended to prevent.

Although the demise of the Cold War brought an end to superpower division in the Security Council, the new era in global politics has not engendered structural change in the Council. Nor, in the years since the implosion of the Soviet Union, has there been evidenced a greater willingness on the part of the Council to address the crime of aggression. Indeed, when members of the P5 themselves are alleged to have committed crimes of aggression, it seems increasingly unlikely that the Security Council can be expected to engage in a robust and non-partisan manner with the issue of aggression.⁶⁶ The dubiousness of this prospect is further exacerbated when the world's sole remaining superpower – one of the most powerful members of the Security Council - demonstrates a “contemptuous attitude toward international law”⁶⁷.

Yet the crime of aggression is too important an issue to be allowed to become moribund because of the failures of the Security Council. It is precisely because aggression is perceived as a primary cause of armed conflict that the United Nations defines as one of its purposes “the suppression of acts of aggression”⁶⁸. And it is precisely because “grave crimes threaten the peace,

⁶⁶ Gethin Chamberlain, ‘Court ‘can envisage’ Blair prosecution’, *Sunday Telegraph*, March 17 2007, <<http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2007/03/18/nirq118.xml>>(at August 30, 2007).

⁶⁷ Michael Byers, *War Law*, (London: Atlantic Books, 2005), p. 146.

⁶⁸ Art 1(1), United Nations Charter. *Charter of the United Nations*, <<http://www.un.org/aboutun/c Charter/contents.htm>> (at August 27, 2007).

security and well being of the world”⁶⁹ that the ICC was established. While it would, in the best of all possible worlds, be preferable for the ICC to have a formal ‘triggering mechanism’ relationship with the Security Council because of their overlapping mandates in respect to the crime of aggression, the real world problems canvassed earlier raise significant doubts about whether a functional relationship of this type would be possible. Despite this, the Security Council’s inability to deal meaningfully with the issue of aggression should not be allowed to hinder or prevent the ICC from being able to initiate a prosecution for aggression. The stakes for humankind are simply too high.

The global community has been presented with the opportunity in 2009 through the review process to bring an end to the culture of impunity. It will not occur, though, unless the ICC is able to function as an independent, neutral court, exercising its own jurisdiction in aggression unhampered by ties to a political body with a tainted history in matters of aggression. It is essential that the ICC gain credibility in the eyes of the global community and it cannot do this when it can only exercise jurisdiction over aggression sporadically, if ever, and on cases pre-selected for it. As with any judicial institution, justice must not only be done, it must be seen to be done, and any relationship with a UN organ in which the ICC is dependent upon it for pre-approval of the existence of aggression undermines the legitimacy and authority of the Court.

In conclusion, there should not, therefore, be a formal relationship between the Security Council and the International Criminal Court requiring a positive determination of an act of aggression for the ICC to exercise jurisdiction over this crime. Instead, the ICC should be able to investigate and prosecute the crime of aggression on its own inherent jurisdiction and without any pre-conditions. The Assembly of States Parties should deal with the problem of Article 5(2) of the Rome Statute by having the courage of its convictions that an international court is a necessary path to justice and deleting section two of Article 5.

⁶⁹ Preamble, Rome Statute. *Rome Statute of the International Criminal Court*, <http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf> (at June 8, 2007).