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Topic:

The Balance of Power between the International Criminal Court and the Security Council - with a special Focus on the Crime of Aggression

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Declaration

I declare that *The Balance of Power between the International Criminal Court and the Security Council – with a special Focus on the Crime of Aggression*, is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

27 October 2009

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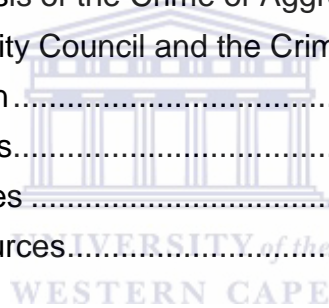
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Abbreviations

ICC	International Criminal Court
ICTR	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994
ICTY	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991
PrepCom	Preparatory Committee on the Establishment of an International Criminal Court
Res.	Resolution
UN	United Nations
UN Doc.	Documents of the United Nations
UN GA	United Nations General Assembly

I Introduction

The relationship between the International Criminal Court (hereinafter referred to as 'ICC' or 'the Court') and the United Nations Security Council has been extensively discussed in academic debate since the early stages of the negotiations leading to the Rome Statute for the establishment of an International Criminal Court.¹ The Rome Statute itself can be described as a carefully balanced legal and political approach to combating impunity.² But is it truly a robust mechanism to fully protect the independence of the Court and to safeguard it from political influence?³

The Rome Statute is a treaty under international law and the International Criminal Court an independent organization under international law. The Security Council is a political organ, it is composed of Member States to the United Nations its mandate is to maintain and restore international peace and security.⁴ In international law there is no definite distinction regarding 'checks and balances' as it

¹ The Rome Statute was adopted on 17 July 1998 and went into effect on 1 July 2002. The ICC began operations in The Hague on 11 March 2003. For a comprehensive summary, see Werle, Gerhard. *Principles of International Criminal Law*. The Hague: TMC Asser Press, (2005) 22 *et seq.*

² Kirsch, Philippe, John T. Holmes, and Mora Johnson. "International Tribunals and Courts." In *The UN Security Council: From the Cold War to the 21st century*, edited by David M. Malone, 281-294. Boulder: Lynne Rienner Publishers, (2004) 287.

³ Song, Sang-Hyun. "The Independence of the ICC and Safeguards Against Political Influence - A paper prepared for the Symposium on the International Criminal Court." *International Centre for Criminal Law Reform and Criminal Justice*. February 3-4, (2007)

<http://www.icclr.law.ubc.ca/Publications/Reports/ICC%20Reports/IndependenceofICC.pdf> (accessed September 23, 2009), 5.

⁴ See: Article 39 of Charter of the United Nations (hereinafter referred to as UN Charter); See: Dinstein, Yoram. *War Aggression and Self-Defence*. 3. Edition. Cambridge: Cambridge University Press, (2008) 279 *et seq.*

is common in domestic legal systems. In the Rome Statute these powers intermingle. In other words, the Rome Statute is a Code of International Crimes giving jurisdiction to the ICC as the judiciary, and it also defines the relationship to the United Nations and the Security Council, the executive on an international level. Taking into account that a clear separation of powers does not exist, it is important to define the balance of powers as laid down in the Rome Statute.

Furthermore the Rome Statute is not only an international treaty, but it allows for an International **Criminal** Court to be established. The Rome Statute is a very powerful treaty. On its basis the ICC may take into custody, convict and punish human beings. It has the right to interfere in basic human rights. Such a powerful institution has to have a strict legal basis. Material elements of crimes as well as procedural matters have to be defined unambiguously and stringent.

Is the balance of power between the Security Council and the ICC strictly defined in the Rome Statute? And should this determined balance of power have any effect on solving the jurisdictional issues regarding the, yet undefined, crime of aggression?

Just recently attention was drawn to issues regarding the relationship between the ICC and the Security Council. In 2005, for the first time, the Security Council by means of a resolution, acting under Chapter VII

of the United Nations Charter⁵, referred a situation to the ICC.⁶ Resolution 1593 entailed discussions on complementarity, the financing scheme of the Court and the overall relationship of the two institutions. In addition to this recent development, the Special Working Group for the Crime of Aggression is preparing its Review Conference 2010, where the main issue to be discussed is the intended role of the Security Council when defining the crime of aggression.

Fletcher and *Ohlin* advocate the theory of the ICC being two courts in one.⁷ Describing that the ICC in consideration of its funding scheme and provisions on complementarity, has to be seen as two separate courts: on the one hand as an independent criminal court and on the other hand, in the case of referrals by the SC, as an organ for restoring peace and security that transcends the classic aims of criminal law to adjudicate individual guilt.⁸ Of interest in that context is also the argument that the ICC is intended to be an instrument which the Council will make use of in fulfilling its task to maintain and restore international peace and security.⁹

Therefore this paper has two aims. Firstly, to define a certain pattern of power between the ICC and the Security Council, and secondly,

⁵ Charter of the United Nations, signed at San Francisco on 26 June 1945 (hereinafter referred to as UN Charter).

⁶ UN-Security Council, Resolution 1593 of 31 March 2005, UN Doc. S/RES/1593 (2005).

⁷ Fletcher, George P., and Jens David Ohlin. "The ICC - Two Courts in One?" *Journal of International Criminal Justice* (2006), 428-433.

⁸ Fletcher, Ohlin (2006), 428.

⁹ Kirsch, Holmes and Johnson (2004), 287.

defining the Security Council's role, according to this power pattern, for the crime of aggression.

The provisions influencing the relationship between the ICC and the Security Council are dealt with in consideration of their development from the 1994 ILC Draft Statute to the Rome Statute. The attention will be drawn to the fact that in the ILC Draft the jurisdictional issues between the ICC and the Security Council were stipulated in one provision, Article 23 ILC Draft while they were split up in the Rome Statute. Therefore, in Chapter III, Articles 2, 5, 13, 16 and 115 of the Rome Statute, which concretely define the relationship of the two institutions, are analyzed by means of legal interpretation and discussed regarding the relevant issues entailed by Resolution 1593. The Relationship Agreement will be taken into account as well. The conclusion of this analysis will try to define a power pattern. Hence, it will be described if the relationship and the balance of power between the ICC and the Security Council is a reoccurring thread which proofs to be a concept in itself in the Rome Statute. In Chapter IV, the history of the crime of aggression is briefly addressed and an overview given on the discussions and preliminary results regarding the role of the Security Council for the exercise of jurisdiction over the crime of aggression. Finally, in Chapter V, in a conclusion, the power pattern of the Rome Statute regarding the balance of power between the ICC and the Security Council is connected with the jurisdictional question of the crime of aggression, namely how the relationship between the Security Council and the ICC in the case of aggression ought to be defined.

II Historical and Legal Background

“The aim of the drafters was to construct a Court that was independent, fair, impartial, effective, representative, and free from political influence.”¹⁰

1. Drafting of the Rome Statute

From today`s perspective the final milestone in the development of international criminal law was the entry into force of the Rome Statute as well as the creation of the ICC.¹¹ How could that agreement be achieved wherein states voluntarily gave up some of their sovereignty? The true benchmark prior to the establishment of the ICC was the 1994 Draft Statute for an International Criminal Court (ILC Draft) prepared by the International Law Commission and submitted to the General Assembly the same year.¹² After the establishment of the International Criminal Tribunal for Yugoslavia¹³ and the International Criminal Tribunal for Rwanda¹⁴ it was fully accepted that the Security Council under Chapter VII of the UN Charter established international *ad hoc*

¹⁰ Cassese, Antonio, *International Law* (2005), 457.

¹¹ Werle (2005), 18.

¹² For a history of prior endeavors regarding an international criminal jurisdiction, see for example, Triffterer, Otto, ed. *Commentary on the Rome Statute of the International Criminal Court*. 2. Edition. Munich: C.H.Beck, (2008), 16 *et seq.*; Werle (2005), 18 *et seq.*; Cassese, Antonio, *International Criminal Law*, Oxford: Oxford University Press (2008), 317 *et seq.*

¹³ Security Council Resolution on the Establishment of the International Tribunal for the Former Yugoslavia, Security Council Res. 827 (1993), UN SCOR, 48th Year, UN Doc. S/RES/827 (1993).

¹⁴ Security Council Resolution on the Establishment of the International Tribunal for Rwanda, Security Council Res. 935, UN SCOR, 49th Year, UN Doc. S/RES/935 (1994); for an overview and evaluation regarding the relationship between the ICTY and the ICTR with the Security Council, see: Kirsch, Holmes and Johnson (2004), 282 *et seq.*

tribunals in order to deal with the committed atrocities.¹⁵ However, after experiencing the costly and time consuming establishment of such *ad hoc* tribunals¹⁶ and the end of the Cold War, the time was ripe for a permanent International Criminal Court.¹⁷ For the first time the political overall conception was in favor of a consistent solution to fight international crimes. In the same year, the General Assembly appointed an *ad hoc* Committee¹⁸ which was later on succeeded by the Preparatory Committee (PrepCom).¹⁹ In the following years the texts of the ILC Draft were revised and an international conference was scheduled. The conference was finally held in Rome from 16 June to 17 July 1998 with the intention to achieve an agreement upon a final statute for an international criminal court. During the preparatory process numerous proposals were submitted on a definition of the crimes, the question of complementarity²⁰, as well as jurisdiction and procedural matters, judicial co-operation, penalties, general principles

¹⁵ Jain, Neha. "European Journal of International Law - A Separate Law for Peacekeepers: The Clash between the Security Council and the International Criminal Court." April (2005) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=908305# (accessed September 15, 2009), 3; Cassese (2008) 329; Lee, Roy S. "Introduction - The Rome Conference and Its Contributions to International Law." In *The International Criminal Court - Issues, Negotiations, Results*, edited by Roy S. Lee, 1-40. The Hague: Kluwer Law International (1999), 6.

¹⁶ Kurth, Michael E. *Das Verhältnis des Internationalen Strafgerichtshofes zum UN-Sicherheitsrat - Unter besonderer Berücksichtigung von Sicherheitsratsresolution 1422 (2002)*. Baden-Baden: Nomos Verlagsgesellschaft (2005), 55; for further reasons advocating an International Criminal Court at the time, see Kurth (2005), 55 *et seq.*; Lee (1999), 5.

¹⁷ Werle (2005), 20; Kirsch, Holmes and Johnson (2004), 286 *et seq.*

¹⁸ UN Doc. A/RES/49/53 (1994).

¹⁹ UN Doc. A/RES/50/46 (1995), participation in the PrepCom was open to all UN member states.

²⁰ The underlying basis of this principle states that national courts enjoy priority in the exercise of jurisdiction, cf.: Cassese (2008), 343; Holmes, John T. „The Principle of Complementarity.“ In *The International Criminal Court - Issues, Negotiations, Results*, edited by Roy S. Lee, 41-78. The Hague: Kluwer Law International (1999), 41-78.

of criminal law and the composition and administration of the court.²¹

Major concerns of many delegations, which remained controversial issues until the very end of the Conference in Rome, were the financing of the court and the question of the court's relationship with the United Nations and the Security Council.²²

2. The role of the Security Council as engraved in the Charter of the United Nations

The UN Charter envisages a genuine mechanism of collective Security.²³ The Security Council is the United Nations organ entrusted with the task of activating and supervising this mechanism.²⁴ Article 24(1) UN Charter stipulates that the member states:

“confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.”

The Security Council is composed of five permanent members (which enjoy the power to veto decisions by the Council), China, France, Russian Federation, United Kingdom and United States, and ten non-permanent members which are elected by the General Assembly for a two year term.²⁵

²¹ Lee (1999), 7.

²² Lee (1999), 9; Bergsmo, Pejic, in: Triffterer, 598 marginal no. 8.

²³ Dinstein (2008), 279.

²⁴ *Ibid*; Bassiouni, M. Cherif, und Benjamin B. Ferencz. „The Crime Against Peace and Aggression: From its Origins to the ICC.“ In *International Criminal Law - Sources, Subjects and Contents*, edited by M. Cherif Bassiouni, 207-242. Martinus Nijhoff Publishers (2008), 217.

²⁵ For more information see the homepage of the Security Council, <http://www.un.org/Docs/sc/index.html> (accessed on 10 October 2009).

Chapter VII of the UN Charter contains the relevant provisions regarding the 'collective security system' (Articles 39-51). Article 39 UN Charter, which will be of further importance in the discussions about the power of the ICC and the Security Council in the Rome Statute, reads:

“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain and restore international peace and security.”

The last words of Article 39 formulate its mandate for the international community – to maintain or restore international peace and security.²⁶

Therefore the Council is mandated with prevention and deterrence goals.²⁷ It is the Council's responsibility to determine the existence of a threat to the peace, a breach of peace or an act of aggression. “Once that determination is made, the door is automatically opened to enforcement measures of a non-military or military kind.”²⁸ This determination has to remain within the limits of the Purposes and Principles of the Charter.²⁹

²⁶ Dinstein (2008), 280.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Prosecutor v. Tadic*, Judgment, ICTY Appeals Chamber, 1995.

3. Development of the Provisions Regulating the Relationship between the Security Council and the International Criminal Court – From the ILC Draft to the Rome Statute

The powers of the Security Council, as envisaged in the ILC Draft were quite extensive.³⁰ Generally speaking the ILC Draft was geared towards Security Council control.³¹ Regarding the relationship between the ICC and the SC, the ILC Draft defined two different basic areas of concern. First, the need for a defined link between the ICC and the Security Council was stressed (see Article 2 ILC Draft³²). and second, in Article 23 ILC Draft, three specific roles for the Security Council in the ICC`s regime were proposed:

- The Security Council could refer matters to the Court pursuant to Chapter VII UN Charter (Article 23 (1) ILC Draft).
- The SC`s right to a prior determination if an act of aggression occurred before the Court could deal with complaints regarding the crime of aggression (Article 23 (2) ILC Draft).
- If a situation is being dealt with by the Security Council under Chapter VII UN Charter, the Court could not

³⁰ Cassese, *International Criminal Law* (2008), 329.

³¹ Williams, Schabas, in: Triffterer, 564 marginal no. 2; Schabas, William A. *An Introduction to the International Criminal Court*. Cambridge: Cambridge University Press (2004), 6.

³² Article 2 ILC Draft: „The President, with approval of the States parties to this Statute may conclude an agreement establishing an appropriate relationship between the Court and the United Nations.”

commence prosecution in the absence of an approval by the Security Council (Article 23 (3) ILC Draft).

The view was widely shared that the Court should be established by means of a multilateral treaty as a judicial organ independent of the SC, in contrast to the *ad hoc* tribunals which had been established by way of a Security Council resolution.³³

a) Article 2 ILC Draft

Article 2 ILC Draft proposed an agreement between the United Nations and the Court to be concluded. Without in depth discussion the wording of the Article 2 ILC Draft was slightly changed during the Preparatory Committees last session. That draft lead with minor changes to the final text of the provision adopted in Article 2 Rome Statute.³⁴ It was left to the Relationship Agreement³⁵ to regulate the Security Council`s and the ICC`s functional cooperation while preserving the Court`s independence as an judicial organ.³⁶

In contrast, Article 23 ILC Draft was highly discussed, since it touched upon some of the most complex and sensitive jurisdictional issues.³⁷

³³ Kurth (2005), 58; UN Doc. A/50/22 (1995), para. 15; for further details see: Marchesi, in: Triffterer, 64 marginal nos. 4 *et seq.*

³⁴ Marchesi, in: Triffterer, 64 marginal nos. 2 and 3.

³⁵ The Negotiated Relationship Agreement between the ICC and the United Nations (hereinafter referred to as Relationship Agreement) finally entered into force on 4 October 2004, UN-Doc. ICC/ASP/3/15.

³⁶ Marchesi, in: Triffterer, 66 marginal nos. 9 *et seq.*

³⁷ Williams, Schabas, in: Triffterer, 563 marginal no. 1.

b) Article 23 (1) ILC Draft

Article 23 (1) ILC Draft, the right of the Council to refer a matter to the ICC under Chapter VII UN Charter, was included with the objective to render the establishment of further *ad hoc* tribunals obsolete.³⁸ In the *Ad Hoc* Committee, several delegations agreed with the ILC Draft's provision to give the Council the power to refer certain matters to the Court.³⁹ India, in contrast, bearing in mind the veto power of the permanent members of the Security Council, was opposed to the Security Council having any specific powers whatsoever in respect to the ICC.⁴⁰

It was accepted by most states that the Security Council should have a referral power but, to keep up the Court's independence⁴¹, no power to refer specific cases against an individual.⁴² In the end at the Rome Conference the term "situation" being the more general term in comparison to "matter" was agreed upon regarding the referral power of the Security Council under Chapter VII UN Charter (compare Article 13

³⁸ Yee, Lionel. "Chapter Four: The International Criminal Court and The Security Council - Articles 13(b) and 16." In *The International Criminal Court - The Making of the Rome Statute: Issues, Negotiations, Results*, edited by Roy S. Lee, 143-152. The Hague: Kluwer Law International (1999) 146; Williams, Schabas, in: Triffterer 564 marginal no. 4; Kurth (2005), 61.

The right of the Council to establish *ad hoc* tribunals under Chapter VII UN Charta was fully accepted and the legitimacy was not to be seriously questioned anymore after the Tadic decision of 1995; see *Prosecutor v. Tadic*, ICTY (Trial Chamber), decision of 10 August 1995, paras. 1 *et seq.*

³⁹ Williams, Schabas, in: Triffterer, 565 marginal no. 8; Wilmshurst, 39.

⁴⁰ Kirsch, Holmes and Johnson (2004), 287; Williams, Schabas, in: Triffterer, 568 marginal no. 13.

⁴¹ Kurth (2005), 65, see also: Berman, Franklin. "The Relationship between the International Criminal Court and the Security Council." In *The International Criminal Court: Challenges to Achieving Justice and Accountability in the 21st Century*, edited by Mark S. Ellis and Richard J. Goldstone, 274-280. New York: IDEBATE Press (2008), 250.

⁴² See: Report of the *Ad Hoc* Committee, UN-Doc. A/50/22 (1995), para. 120.

(b) Rome Statute).⁴³ Additionally it was discussed whether Security Council referrals could confer jurisdiction upon the ICC even in cases where the state concerned was not a party to the Statute or had not accepted the Court's jurisdiction over the crime.⁴⁴ Finally, formal requirements regulating that question were not addressed in Article 13 Rome Statute.⁴⁵

The related question in dispute during the PrepCom was whether entrusting the prosecutor with an independent power to initiate investigations and to trigger the Court's jurisdiction *proprio motu*.⁴⁶ This question is of importance for the relationship of the Council and the Court insofar as such a prosecutorial power would enable independent and only legally motivated investigations, while Security Council or state referrals bring about the suspicion of political motives.⁴⁷ At the last session of the Preparatory Committee in March – April 1998, there was still no agreement as to the role of the prosecutor in initiating investigations.⁴⁸ Finally it was agreed upon was the solution that the prosecutor may open investigation into a situation on his own motion

⁴³ For a list of arguments advocating the SC's right to refer situations, see: Report of the 29th United Nations Issues Conference, 2.

⁴⁴ Yee (1999), 148.

⁴⁵ Dascalopoulou-Livada, Phani. "Chapter 6 - The Principle of Complementarity and Security Council Referrals." In *The International Criminal Court and National Jurisdictions*, edited by Mauro Politi and Frederica Gioia, 57-64. Hampshire: Ashgate, (2008), 58.

⁴⁶ Williams, Schabas, in: Triffterer, 566 marginal nos. 9, 10; *proprio motu* (Latin): "on his own impulse."

⁴⁷ Song (2007), 6.

⁴⁸ Williams, Schabas, in: Triffterer, 567 marginal no. 10.

without a referral if he believes that there are reasonable grounds for such a step.⁴⁹

c) Article 23 (2) ILC Draft

Article 23 (2) ILC Draft dealt with the trigger mechanism regarding acts of aggression. It provided that the Court's jurisdiction was subject to a prior determination of the Security Council asserting that an act of aggression had been committed. Concerns were raised regarding the requirement of such a determination, *inter alia*, stating that the permanent members could always veto a decision to that effect to protect themselves from the Court's jurisdiction.⁵⁰ Eventually, the discussion was put on hold due to the fact that the crime of aggression was included into the Courts jurisdiction but under the condition that the jurisdiction only be exercised after a definition of the crime had been agreed upon.⁵¹ Even though, it was agreed upon one important fact in Article 5 (2) Rome Statute. Article 5 (2) Rome Statute stipulates for the future definition having to be consistent with the relevant provisions of the Charter of the United Nations.⁵²

⁴⁹ Song (2007), 6.

⁵⁰ Regarding the discussions in the PrepCom see for example, UN-Doc. A/CONF.183/10 (1998), Annex I, Resolution F, para. 7.

⁵¹ Yee (1999), 146; During the PrepCom several alternative definitions were discussed without coming to a final compromise, for in depth description see: Bassiouni, Ferencz (2008), 236 *et seq.*

⁵² See also Blokker, Niels. „The Crime of Aggression and the United Nations Security Council.“ *Leiden Journal of International Law*, 2007: 867-894; 876 *et seq.*

d) Article 23 (3) ILC Draft

Article 23 (3) ILC Draft⁵³ states that without an approval of the Council, the Court could not commence prosecution arising out of a threat to or a breach of peace or an act of aggression if it was dealt with by the Security Council under Chapter VII UN Charta. Many ILC members as well as states had objections towards that provision, given that the Security Council would have had the power to block prosecutions only by placing the situation on the agenda. The burden to monitor the SC`s agenda in order to determine whether a prosecution could be initiated was put upon the Court by the ILC Draft. The suggestion made by Article 23 (3) ILC Draft entailed long discussions.⁵⁴ Three basic views were held.⁵⁵ The first group was of the opinion that the Council`s power to block prosecutions had to be maintained and even extended to all situations regardless of whether the Council dealt with it under Chapter VII or not.⁵⁶ The opposing view was that Article 23 (3) ILC Draft should be completely deleted.⁵⁷ Thirdly, the opinion was expressed that some safeguard for the Charter position of the Security Council should be included but stressing that the ILC Draft`s provision was not adequate being too broad and vague.⁵⁸ Most states, however, were opposed to

⁵³ Article 23 (3) ILC Draft reads: “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 breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides.”

⁵⁴ On the diverging views regarding Article 23 (3) ILC Draft Statute see: 1995 *Ad Hoc* Committee Report, paras 125-125 and 1996 PrepCom Report Vol.1, paras 140-144.

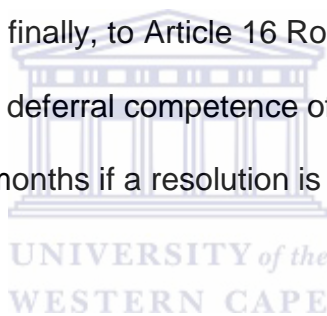
⁵⁵ Report of the *Ad Hoc* Committee, UN-Doc. A/50/22 (1995), paras 124 *et seq.*

⁵⁶ Bergsmo, Pejic, in: Triffterer, 596 marginal no. 3 with further references.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

Article 23 (3) ILC Draft, “as it would compromise the independence of the court, allowing a political body to control a judicial body thereby politicizing the court and undermining its independence and legitimacy. Justice could become a bargaining chip during peace negotiations. Granting this power to the Security Council also implies that justice can *disrupt* Security Council-sponsored peace negotiations, undermining growing international appreciation of the critical role justice plays in solidifying the peace.”⁵⁹ The breakthrough in the negotiations came with a proposal by Singapore in the PrepCom’s session of August 1997 (so called ‘Singapore compromise’⁶⁰), which led to a revision of Article 23 (3) ILC Draft and, finally, to Article 16 Rome Statute. Article 16 Rome Statute, now, is a deferral competence of the Security Council for a period of twelve months if a resolution is adopted under Chapter VII UN Charter



e) The Financing

Finally, it is important to take a glance at the development of the financing scheme of the Court. Today, under Article 115 Rome Statute it is stipulated that the ICC is funded by State Parties and the United Nations. United Nations funding is particularly expected “in relation to the expenses incurred due to referrals by the Security Council.”⁶¹ The issue of the financing mechanism was raised during the PrepCom’s last session in 1998. Three financing options were under discussion: It was

⁵⁹ Report of the 29th UN Issues Conference, 3 *et seq.*

⁶⁰ Yee (1999), 150.

⁶¹ Article 115 (b) Rome Statute.

taken into consideration to finance the Court 1) exclusively through assessed contributions of State Parties; 2) exclusively through the budget of the United Nations; 3) or through a combination of those two sources of capital.⁶² The financial support exclusively through the United Nations fund was problematic as it was not expected that all members to the United Nations would become State Parties to the Statute. Therefore that funding scheme would have raised serious issues about state sovereignty and equity.⁶³ Under the final provision of Article 115 of the Rome Statute, the Security Council can refer situations and the Rome Statute suggests that the budget for those referrals comes from the United Nations. However, the Rome Statute, as an international treaty cannot bind the United Nations.

4. Conclusion of Chapter II

In the next Chapter the aforementioned provisions of the Rome Statute will be analyzed. From now on, it is essential to keep in mind that some of the most important provisions regarding the balance of power between the Security Council and the ICC (Articles 5 (2), 13 (b), 16) originally stem from one and the same article in the ILC Draft (Article 23 ILC Draft). I will interpret the Rome Statute to uncover if there is still a stringent balance of power engraved in the Rome Statute.

⁶² Halff, Tolber, in: Triffterer, 1706 marginal no. 5.

⁶³ Halff, Tolber, in: Triffterer, 1707 marginal no. 5 and 6.

III The Rome Statute and the Security Council

“The success of the International Criminal Court will in practice be determined by a number of relationships. There is its relationship to States Parties; [...] to the UN System in general; and to the UN Security Council in particular. None of these relationships is static; they will develop. [...] far and away the most important of them will prove to be the developing relationship with the Security Council.” (Sir Franklin Berman - head of the delegation of the United Kingdom to the Rome Conference, 1999)⁶⁴

1. The Power of the Security Council as laid down in the Rome Statute

In the following some parts of the Preamble and Articles 2, 5, 13, 14 and 115 Rome Statute will be interpreted. All those provisions regulate, in one way or another, the relationship between the Security Council and the ICC.

Before starting the interpretation a brief overview of the powers of the Security Council as laid down in the United Nations Charter shall be given

The Vienna Convention on the Law of Treaties of 23 May 1969 (hereinafter referred to as Vienna Convention) contains in Articles 31 and 32 the core requirements for the interpretation of international

⁶⁴ Berman (2008), 274.

treaties. The rules therein must be applied interpreting the Rome Statute as they are an expression of customary law⁶⁵

Article 31 (1) states that

“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

In other words, a treaty must be interpreted literally (wording), systematically (other agreements/accords between the parties to the treaty) and teleological (the aim and purpose of the treaty rules and the treaty generally)⁶⁶. Whereas the recourse to preparatory work and the history is only to be seen as a supplementary means of interpretation (Article 32 Vienna Convention).⁶⁷ First, the “ordinary meaning” of the relevant Articles of the Rome Statute, namely Articles 2, 5, 13, 16, 115, needs to be defined. Second, the context of the Articles will be analyzed in relation to other provisions of the Statute. Third, the “object and purpose” of the Rome Statute will be analyzed in context of all the relevant Articles.⁶⁸ In that way one can disclose the power pattern as laid down in the Rome Statute.

⁶⁵ Werle (2005), 54.

⁶⁶ Werle (2005), 55.

⁶⁷ Cassese, *International Law* (2005), 179.

⁶⁸ Kourabas, Michael. "A Vienna Convention Interpretation of the "Interests of Justice" Provision of The Rome Statute, The Legality of Domestic Amnesty Agreements, and the Situation in Northern Uganda: A "Great Qualitative Step Forward" or a Normative Retreat?" *U.C. Davis Journal of International Law and Policy*, Fall 2007: 59-79, 69.

a) Article 2 Rome Statute – Relationship of the Court with the United Nations

“The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf.”

As a preliminary remark just briefly it should be mentioned why Article 2 Rome Statute is necessary. If the Court had been established by an amendment of the UN Charter, it would have been a judicial organ of the United Nations. Had it been established by a resolution of the Security Council or the General Assembly it would have been a subsidiary organ of the Security Council or the General Assembly. The ICC was established by a multilateral treaty. Accordingly it has international legal personality (Article 4 Rome Statute).⁶⁹ That renders the Court an entirely separate institution requiring the creation of a link with the United Nations.⁷⁰

aa. The ordinary meaning and the context of Article 2 Rome Statute

The Court “shall” be brought into “relationship” with the United Nations. The wording “shall” indicates the mandatory character of this provision. It is not in the left to the Court`s discretion whether to enter into such an

⁶⁹ Rückert, in: Triffterer, 121, marginal no. 1 *et seq.*

⁷⁰ Marchesi, in: Triffterer, 65 marginal no. 7.

agreement. "Relationship by an agreement" in itself does not give a hint on the supposed content of the agreement.⁷¹

Taking into account the Relationship Agreement⁷², one must accept that Article 2 Rome Statute was only interpreted as a mandatory provision in regard to the functional relationship between the ICC and the SC. The agreement concerns, *inter alia*, reciprocal representation (article 4), exchange of information (article 5), reports to the UN (article 6), proposals by the Court for matters to be considered for by the United Nations (article 7), personal arrangements (article 8), administrative cooperation (article 9), services and facilities (article 10), access to the United Nations Headquarters (article 11), laissez-passer (article 12) and financial matters (article 13). The Relationship Agreement only deals with certain aspects of the relationship, leaving out crucial aspects such as the coordination between the role of the Security Council and the judicial role of the ICC in maintenance of international peace and security⁷³, those are to be found in the Rome Statute itself (see Articles 5, 13(b), 16)⁷⁴.

bb. Conclusion regarding Article 2 Rome Statute

One first hint on the substantive analysis regarding the relationship between the Court and the Security Council is already to be found at this stage of the present study in Article 2 of the Rome Statute.

⁷¹ See Berman (2008), 279.

⁷² Negotiated Relationship Agreement between the International Criminal Court and the United Nations entered into force on 22 July 2004, ICC-ASP/3/Res.1.

⁷³ Marchesi, in: Triffterer, 63 marginal no. 1.

⁷⁴ Kurth (2005), 61.

Establishing the Court by means of a multilateral treaty renders it an entirely separate institution.⁷⁵ Only for that reason a formal link between those two institutions had to be established. Therefore, it can be concluded that the underlying idea in the first place was to create an independent body, hierarchically not subordinate to the Security Council but rather, metaphorically expressed, being another link in a chain maintaining and restoring peace and justice on an international level. Furthermore, one has to take into account the position of the provision within in the Rome Statute. It is the second provision, indicating the importance of the establishment of such link.

b) Article 5 (1) (d), (2) Rome Statute – Crimes within the jurisdiction of the Court - Aggression

Article 5 (1) (b) Rome Statute gives the Court jurisdiction over the crime of aggression. Article 5 (2) Rome Statute stipulates that:

“The Court shall exercise jurisdiction over the crime of aggression 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.”

aa. The ordinary meaning and the context of Article 5 (2) Rome Statute

The crime of aggression itself is not defined yet as well as the important issue what role the Security Council should play in the pre-

⁷⁵ Marchesi, in: Triffterer, 65 marginal no. 7; Kurth (2005), 59 *et seq.*

determination for the crime of aggression.⁷⁶ However, an act of aggression was defined, under international law, in the annex to UN General Assembly Resolution 3314 of 1974 (the so-called UN Definition of Aggression⁷⁷). This resolution stipulates in Article 1 that an act of aggression is

“[...] the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state.”

The phrase of interest in Article 5 (2) Rome Statute is: “such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.” The provision in question, again⁷⁸, is of a mandatory character. What are “the relevant provisions” mentioned in Article 5 (2) Rome Statute? Some scholars understand the wording of Article 5 (2) Rome Statute to be coded language for the so called “Security Council trigger.”⁷⁹ Under Article 24 UN Charter, the Security Council has primary responsibility for maintaining world peace.⁸⁰ It is common opinion that the precondition refers, in regard of the analyzed relationship, to Article 39 United Nations Charter.⁸¹ Article 39 UN

⁷⁶ Bassiouni, Ferencz (2008), 241; Gaja, Giorgio. "The Respective Roles of the ICC and the Security Council in Determining the Existence of an Aggression." In *The International Criminal Court and the Crime of Aggression*, edited by Mauro Politi and Giuseppe Nesi, 121-124. Hampshire: Ashgate (2004), 121.

⁷⁷ G.A .Res. 3314 (XXIX), UN Doc. A/9631 (1974); see also: Werle (2009) 480.

⁷⁸ Cf. Article 2 Rome Statute.

⁷⁹ Cf. Berman (2008), 278.

⁸⁰ Werle (2009), 494; In Article 24 (1) UN Charter: Member States “confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.”

⁸¹ Yee (1999), 145; Kurth (2005), 89; Hummrich, Martin. *Der völkerrechtliche Straftatbestand der Aggression*. Baden-Baden: Nomos Verlagsgesellschaft (2001), 231.

Charter stipulates the requirements for measures under Chapter VII⁸² and is part of the UN Charter's system of collective security. The Security Council has the power to take measures in accordance with Chapter VII UN Charter, *inter alia*, when an act of aggression takes place. Therefore, it is the Security Council's responsibility, in accordance with the 1974 Definition, to determine whether acts of aggression take place. For that reason, when interpreting Article 5 (2) Rome Statute one can only argue that "consistent with the relevant provisions" refers specifically to Article 39 UN Charter.

bb. Conclusion regarding Article 5 (2) Rome Statute

Interpreting the Rome Statute in a stringent manner, at this point of the paper, does not allow any further discussion on the different points of view regarding the definition of the crime of aggression. So far, it is important to understand exactly what provisions regarding the balance of power between the ICC and the Security Council are already engraved in the Rome Statute. Hence, by referring to the Charter of the United Nations, Article 5 (2) Rome Statute stipulates conditions that need to be fulfilled when defining the crime of aggression, especially the clarification of the relationship to UN Charter.⁸³ Article 5 Rome Statute gives the Court jurisdiction over the "most serious crimes of concern to the international community as a whole" in paragraph 1,

⁸² Article 39 UN Charter: "The Security Council shall determine the existence of any threat of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain and restore international peace and security."

⁸³ Werle (2009), 476.

while in paragraph 2 the role of the United Nations (or as shown above, rather the role of the SC) is mentioned in regard to the crime of aggression. So far it becomes obvious how important the relationship between the ICC and the Security Council was for the drafters of the Rome Statute. In the first 5 Articles the Council is mentioned twice, excluding the preamble.

c) Article 13 (b) of the Rome Statute – Exercise of jurisdiction

“The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: [...]

b) A situation in which one or more crimes appears to have been committed is referred to the prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.”

aa. The ordinary meaning and context of Article 13 (b) Rome Statute

A situation is a conflict that is to be defined by temporal, geographical and personal parameters; it is not a specific case. The situation has to be referred to the Prosecutor. The referral has to be in written when forwarded to the prosecutor according to the Rules of Procedure and Evidence. To act “under Chapter VII of the Charter of the United Nations” necessarily obliges the Council to determine a threat or breach to the world peace according to Article 39 UN Charter.⁸⁴ This enforcement power of the Security Council binds all members of the United Nations. According to Article 12 Rome Statute the Court has

⁸⁴ Cf. Kurth (2005), 65.

jurisdiction if the conduct in question occurred on a state party's territory or if the accused is national to a state that is party to the Rome Statute. By referring a situation to the ICC the Courts jurisdiction can be extended to the territory of a state that is not party to the Rome Statute.⁸⁵ Therefore, Article 13 (b) Rome Statute, on one hand triggers the jurisdiction of the Court and on the other hand, may create jurisdiction "in the case of crimes committed on the territory of a State that has not⁸⁶" signed the Rome Statute. Noteworthy is the creation of the Courts jurisdiction without a need to comply with the requirements of Article 12 Rome Statute. For that reason Article 13 (b) Rome Statute is called fast-track-proceeding.⁸⁷ The Council is obviously assigned a paramount role in the trigger mechanisms⁸⁸.

Even though the Security Council can refer a situation, it does not mean the usual mechanisms provided in the Rome Statute do not apply, and the prosecutor opens investigations automatically.⁸⁹ First, the prosecutor has to determine if there is reasonable basis to proceed and initiate an investigation (Article 53 Rome Statute). According to Article 53 (1) (b) Rome Statute he also has to consider whether "the

⁸⁵ Song (2007), 4; Kirsch, Holmes and Johnson (2004), 288.

⁸⁶ Williams, Schabas, in: Triffterer, 569, marginal no. 16.

⁸⁷ Kurth (2005), 62.

⁸⁸ Elarabay, Nabil. "The Role of the Security Council and the Independence of the International Criminal Court: Some Reflections." In *The Rome Statute of the International Criminal Court - A Challenge to Impunity*, edited by Mauro Politi and Giuseppe Nesi, 43-47. Hampshire: Ashgate Publishers (2001), 45.

⁸⁹ Sarooshi, Dan. "The Peace and Justice Paradox: The International Criminal Court and the UN Security Council." In *The International Criminal Court: Challenges to Achieving Justice and Accountability in the 21st Century*, edited by Mark S. Ellis and Richard J. Goldstone, 249-262. New York: IDEBATE Press (2008), 252 et seq.; Kirsch, Holmes and Johnson (2004), 288.

case is or would be admissible under article 17.”⁹⁰ Additionally, if the prosecutor concludes that there is no reasonable basis to proceed the investigation regarding to Article 17 Rome Statute, the prosecutor has to inform the Security Council (Article 53 (2) (b)). Finally, the Pre-Trial Chamber can determine the admissibility.

bb.The Darfur Situation

On the basis of the Security Council referral regarding the situation in the Darfur region, some general issues relating with Article 13 (b) will be discussed. Starting with the question of admissibility (Article 17 Rome Statute) and if it has to be determined when the Security Council is referring a situation to the ICC.

Some scholars were debating that a Security Council referral would exclude a further admissibility test under Article 17 Rome Statute and that the question intentionally was left open in the Rome Statute⁹¹ In addition it was argued that Article 18 Rome Statute does not mention Article 13 (b) Rome Statute and therefore, one can conclude the prosecutor has to open investigations.⁹² Consequently, one can discuss if the SC`s power to refer situations to the Court enables the Council to

⁹⁰ Further, specific procedural provisions are included in the Relationship Agreement Article 17 (1): “When the Security Council, acting under Chapter VII of the Charter of the United Nations, decides to refer to the Prosecutor pursuant to article 13, paragraph (b), of the Statute, a situation in which one or more of the crimes referred to in article 5 of the Statute appears to have been committed, the Secretary-General shall immediately transmit the written decision of the Security Council to the Prosecutor together with documents and other materials that may be pertinent to the decision of the Council.[...].”

⁹¹ Compare: Schabas (2004), 123, Sarooshi (2008), 252 *et seq.*; Williams, Schabas, in: Triffterer, 570 marginal no. 16.

⁹² Fletcher, Ohlin (2006), 431.

shape the ICC's jurisdiction.⁹³ In that context the Darfur case serves as a very good example regarding the balance of power between the ICC and the Security Council especially regarding jurisdictional and admissibility issues.

- **Complementarity and Admissibility**

In 2005, for the first time, the Darfur situation was referred to the ICC by the Security Council.⁹⁴ Darfur is a region of the Sudan, which is not party to the Rome Statute. The Prosecutor in this case believed that he was required to determine whether the case was admissible pursuant to provisions of Article 17 Rome Statute.⁹⁵ The Rome Statute, in paragraph 10 of its preamble mentions the complementarity of the Court in relation to national jurisdictions. Article 17 Rome Statute refers to paragraph 10 Preamble of the Rome Statute and to Article 1 Rome Statute. Therefore, a referral of the Security Council can be divided into two procedural steps. In a first step the Security Council 'confers

⁹³ See: Scheffer, David. "Staying the Course with the International Criminal Court." Cornell International Law Journal, 2001-2002: 47-90, 48.

⁹⁴ UN-Security Council, Resolution 1593 of 31 March 2005, UN Doc. S/RES/1593 (2005)

⁹⁵ Sharon, Schabas, in: Triffterer, 570 marginal no. 16; The prosecutor, Mr. Moreno Ocampo, stated in UN Doc. S/PV.5216, 2: "In the light of the complementarity regime and article 53(1)(b) of the Statute, I am required to consider whether there could be cases that would be admissible within the situation in Darfur. The Office has studied Sudanese institutions, laws and procedures. We have sought information on any national proceedings that may have been undertaken in relation to crimes in Darfur. We have also analysed the multiple ad hoc mechanisms that were created by Sudanese authorities in 2004 in the context of the conflict in Darfur, including the committees against rape, the special courts and the specialized courts that replaced them, the national commission of inquiry and other ad hoc judicial committees and non-judicial mechanisms. Following that analysis, I determined that there are cases that would be admissible in relation to the Darfur situation. That decision does not represent a determination on the Sudanese legal system as such but is essentially a result of the absence of criminal proceedings related to the cases on which my Office will focus."

jurisdiction' to the Court⁹⁶ deriving from Chapter VII UN Charter, to the Court. The Court then, has jurisdiction over the referred situation, but that does not necessarily prove a case within the situation admissible. Even though one may argue that if the Security Council has the power to stop an investigation (Article 16 Rome Statute) this may also mean that the Council has the power to require an investigation without further review of this decision by the Court⁹⁷ In cases of Security Council referrals the ICC must be seen as successor to the ICTY and the ICTR and therefore such referrals cannot be bound by the Rome Statute's ordinary rules regarding complementarity.⁹⁸ But those arguments cannot convince, due to the fact that in a second step, the prosecutor and eventually the Pre-Trial Chamber, can determine (Article 19 Rome Statute⁹⁹) whether a case is admissible regarding the general provisions of the ICC. Consequently, Article 13 Rome Statute stipulates:

“[first step] The Court may exercise its jurisdiction with respect to a crime referred to in article 5 [second step] in accordance with the provisions of this statute [...]”

As the phrase “in accordance with the provision” clearly indicates, Article 17 Rome Statute, since it is a provision of the Statute, has to be

⁹⁶ Cf.: Yee (1999), 148; Akande, Dapo. "The Legal Nature of Security Council Referrals to the ICC and its impact on Al Bashir's Immunities." *Journal of International Criminal Law*, 2009: 333-352, 341 *et seq.*

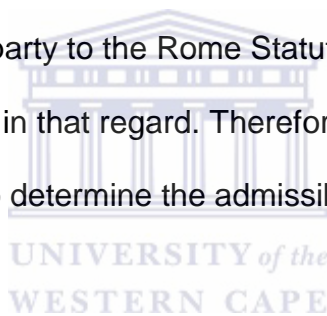
⁹⁷ Fletcher, Ohlin (2006), 432.

⁹⁸ *Ibid.*

⁹⁹ Article 19 Rome Statute: (1) „The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, in its own motion, determine the admissibility of a case in accordance with article 17.”

adhered to whatsoever.¹⁰⁰ In the Darfur case the prosecutor, as proven above, determined the admissibility and Pre-Trial Chamber I took the admissibility issue up in the warrant of arrest against *Ahmad Harun and Ali Kushayb* and in the one against *Omar Hassan Ahmad Al Bashir*.¹⁰¹ The Pre-Trial Chamber did not formally determine the admissibility but in both cases it referred to the admissibility accepting it to be a part of the requirements even for Security Council referrals.¹⁰²

Taking that into account, one cannot argue, the Security Council shapes the ICC's jurisdiction. It does extend its jurisdiction in cases referred to under Article 13 (b) where a the situation is related to a state, that is not party to the Rome Statute, but it does not shape the ICC's jurisdiction in that regard. Therefore, in the Darfur case, the prosecutor had to determine the admissibility and was right in "believing" so.¹⁰³



¹⁰⁰ Fletcher, Ohlin (2006), 431; *Fletcher/Ohlin* also state that under Article 18 Rome Statute referrals were left out and therefore one might argue, for that reason Article 19 Rome Statute does not apply to referrals.

¹⁰¹ See the warrant of arrest against *Ahmad Harun and Ali Kushayb*, ICC-02/05-01/07, 27 April 2007: "CONSIDERING that, on the basis of the evidence and information provided by the Prosecution and without prejudice to any challenge to the admissibility of the case under article 19 (2) (a) and (b) of the Statute and without prejudice to any subsequent determination, the case against Ahmad Harun and Ali Kushayb falls within the jurisdiction of the Court and is admissible;"

and warrant of arrest against *Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, 4 March 2009: "CONSIDERING that, on the basis of the material provided by the Prosecution in support of the Prosecution Application and without prejudice to any subsequent determination that may be made under article 19 of the Statute, the case against Omar Al Bashir falls within the jurisdiction of the Court; CONSIDERING that, on the basis of the material provided by the Prosecution in support of the Prosecution Application, there is no ostensible cause or self-evident factor to impel the Chamber to exercise its discretion under article 19(1) of the Statute to determine at this stage the admissibility of the case against Omar Al Bashir."

¹⁰² *Ibid.*

¹⁰³ See also Cassese, *International Criminal Law* (2008), 344.

- **The jurisdictional exemption**

Another jurisdictional issue concerning the Darfur referral was highly discussed. The Darfur Resolution 1593 states in operative paragraph 6 (hereinafter referred to as paragraph 6) that the Security Council:

“Decides that nationals, current or former officials or personnel from a contributing State outside Sudan which is not party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing state.”

Paragraph 6 of Resolution 1593 developed out of an initiative of the United States.¹⁰⁴ The resolution ultimately excludes all nationals of all jurisdictions which are not party to the Rome Statute and were acting under authorization of the Council or the African Union.¹⁰⁵ The jurisdictional immunity provided in the resolution, is a formal limitation that might be seen contrary to the *ratio* of Article 13 (b) Rome Statute.¹⁰⁶ Prior to adopting the resolution a lot of concerns were raised. Brazil for example saw paragraph 6 as a “legal exception that is inconsistent in international law” and Denmark was concerned about paragraph 6 ‘killing’ the Court’s credibility.¹⁰⁷ Even though, finally, the

¹⁰⁴ Schabas (2004), 28 *et seq.*

¹⁰⁵ Williams, Schabas, in: Triffterer, 571 marginal no. 16. A similar provision was already included in Resolution 1497 regarding Liberia, UN Doc. S/RES/1497 (2003) para. 7.

¹⁰⁶ Kurth, 73.

¹⁰⁷ See UN Doc. S/PV.5158 (2005) Brazil on p. 11, The Phillipines on p. 6, Denmark on p.6.

interest to fight impunity was given more weight and the resolution was adopted and referred to the Court.¹⁰⁸

This raises the question which effect the jurisdictional exemption can have under the Rome Statute.

“Chapter VII measures taken by the Security Council must be in response to a threat to international peace and security, once the Council has made a determination to this effect.”¹⁰⁹ In the past the Security Council has determined quite broadly what constitutes a threat to international peace.¹¹⁰ In the Darfur situation a threat clearly existed. But taking a glance at the drafting history of Article 13 in relation with Article 16 (the deferral right) one sees, that through the change of Article 23(3) ILC Draft, it was intended to allow the Court to function independently.¹¹¹ The drafters had the intention to demonstrate the ICC as an independent institution with little interference by the Security Council.¹¹² Can the Security Council legally bind the ICC with such a resolution?

Nothing in the UN Charter authorizes the Council to act in a manner that modifies another treaty.¹¹³ Therefore, paragraph 6 of Resolution 1593 is incompatible with the Rome Statute, as the Statute does not allow individuals to be exempted from its jurisdiction on basis of a

¹⁰⁸ Kurth (2005), 74.

¹⁰⁹ Jain (2005), 3.

¹¹⁰ *Ibid.*

¹¹¹ See Chapter II; Jain (2005), 4.

¹¹² Jain (2005), 5.

¹¹³ Jain (2005), 3.

referral.¹¹⁴ It is for that reason, as explained in Chapter II, that the Security Council only has competence to refer situations instead of cases.¹¹⁵ In that regard, a parallel to the referral of Uganda can be drawn. Uganda referred its conflict to the ICC in a way as to exclude some individuals of the Courts jurisdiction and the prosecutor responded that no such exception *ratione personae* could be effective.¹¹⁶ But in the Darfur case the prosecutor he had no such objectives.¹¹⁷ The contrary is true; he stated in his press release regarding the opening of investigations that:

“The investigation will be impartial and independent, focusing on the individuals who bear the greatest criminal responsibility for crimes committed in Darfur.”¹¹⁸

International law does not give a clear answer with respect to the consequences of an illegal act by an international organization, or an organ of that organization.¹¹⁹ Therefore the resolution must be interpreted in the light of the UN Charter.¹²⁰ States that are members to the UN and the Rome Statute must respectively fulfill their obligations under the UN Charter and the Rome Statute. Under Article 25 UN

¹¹⁴ Williams, Schabas, in: Triffterer, 571, 572 marginal no. 16; Jain, 7.

¹¹⁵ Williams, Schabas, in: Triffterer, 572 marginal no. 16; Kurth, 74; Bergsmo, Pejic, in: Triffterer, 600 marginal no. 13.

¹¹⁶ *Situation in Uganda* (ICC-02/04-01/05), Decision to Convene a Status Conference on the Investigation in the Situation in Uganda in Relation to the Application of Article 53, 2 December 2005, paras.3-4.

¹¹⁷ Williams, Schabas, in: Triffterer, 572 marginal no. 16.

¹¹⁸ Press Release, 2005, ICC-OTP-0606-104, <http://www2.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2005/the%20prosecutor%20of%20the%20icc%20opens%20investigation%20in%20darfur?lan=en-GB> (accessed on 8 September 2009)

¹¹⁹ Jain (2005), 7; Williams, Schabas, in: Triffterer, 572 marginal no. 16,

¹²⁰ Jain (2005), 7.

Charter a resolution of the Council can bind member states. But the Court itself is not a member to the United Nations; it is an international organization and therefore cannot be bound by a resolution under Article 25 UN Charter.

Regardless of the illegality of paragraph 6 of Resolution 1593, until now, neither was the referral rejected, nor paragraph 6 and there is no perspective it will be rejected in the future. The pre-trial chamber I issued two warrants of arrest¹²¹ and it seems as if the Court so far silently accepted the jurisdictional exemption.

cc. Conclusion – Article 13 (b) Rome Statute

Article 13 (b) Rome Statute impressively demonstrates the thin line between legal and political reasoning. The Darfur referral, on one hand gave the Court jurisdiction over a situation in a state that is not party to the Rome Statute. The prosecutor applied the admissibility test and proved the independence of the office of the prosecutor in that context. Furthermore, through mentioning the admissibility, Pre-Trial Chamber I accepted admissibility and complementarity to be a formal requirement which also plays a role regarding Security Council referrals. On the other hand, it seems, as if the Court, in order to fight impunity, is accepting the jurisdictional exemption within paragraph 6 of Resolution 1593. And it seems as if the veto power in the Security Council controls

¹²¹ See warrant of arrest against *Omar Hassan Ahmad Al Bashir*, 4 March 2009, ICC-02/05-01/09; warrant of arrest against *Ahmad Harun* and *Ali Kushayb*, 27 April 2007, ICC-02/05-01/07.

the referral functions to be exercised by the Council.¹²² The United States did not use their veto but they insisted on paragraph 6. Only the compromise of accepting immunity under paragraph 6 of Resolution 1593 allowed the referral to be forwarded to the Court.

d) Article 16 Rome Statute – Deferral of investigation or prosecution

“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; that request may be renewed by the Council under the same conditions.”

aa. The ordinary meaning and context of Article 16 Rome Statute

The Rome Statute does not define „investigation“ or „prosecution“ but indicates, in consideration of Articles 14, 15 and 55 that “investigation” involves actions that may be taken with respect to a situation and/or individual.¹²³ Investigation may be defined that it

“[...] comprises the totality of investigative actions undertaken by the Prosecutor under the ICC Statute after an investigation has started in order to ensure the confirmation of charges against an individual suspected of having committed crimes within the Court’s jurisdiction.”¹²⁴

¹²² Elarabay (2001), 45.

¹²³ Bergsmo, Pejic, in: Triffterer, 600 marginal no. 11.

¹²⁴ Bergsmo, Pejic, in: Triffterer, 600 marginal no. 12.

“Prosecution” always involves actions taken by the Prosecutor and realistically those actions that are taken against an individual that have been confirmed in accordance with Article 61 Rome Statute. Furthermore, it may be assumed that prosecution ends with the rendering of a final judgment.¹²⁵ Article 16 states that the Security Council in a resolution may request that no prosecution is “commenced” or “proceeded” with. An investigation is commenced if:

“the Prosecutor determines that there is a “reasonable basis to proceed” with an investigation and renders decision to that effect.”¹²⁶

But how gets the Security Council to know that an investigation is commenced? In the Rome Statute there is no provision that obliges the prosecutor to inform the Security Council about the commencement of an investigation but in the early practice of the office of the Prosecutor the opening of investigations was announced through a press release.¹²⁷ If the Council requests that no investigation or prosecution may be commenced or proceeded in a certain case, Article 16 Rome Statute leaves open the procedural and evidentiary issues that may arise.¹²⁸

Additionally, Article 16 Rome Statute requires for a resolution adopted under Chapter VII UN Charter. Having fulfilled these preconditions the investigation or prosecution may be stopped for 12 months. The period

¹²⁵ Bergsmo, Pejic, in: Triffterer, 601 marginal no. 14.

¹²⁶ Bergsmo, Pejic, in: Triffterer, 601 marginal no. 17.

¹²⁷ Bergsmo, Pejic, in: Triffterer, 602 marginal no. 18; regarding the practice of press releases see: <http://www2.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations> (accessed on 9 September 2009).

¹²⁸ For examples see: Bergsmo, Pejic, in: Triffterer, 602 marginal nos. 19, 20.

is renewable and no limit is foreseen regarding the repetitions to renew the request. Article 16 Rome Statute only states that the deferral may be renewed under the same conditions. The wording suggests for a new determination regarding the preconditions under Chapter VII UN Charter (especially Article 39 UN Charter) and that a new deferral would apply for another 12 month period, not a shorter or longer one.¹²⁹

bb. Deferrals in practice – Security Council Resolution 1422 and 1487

The Security Council is acting under Article 24 UN Charter as an agent of the member states of the United Nations in accordance with the purposes and principles of the United Nations. For that reason one can conclude, the Security Council can only act in a manner that is constrained by the norms of international law. Following a brief overview will be given on the deferral resolutions adopted so far, namely Resolution 1422¹³⁰, 1487.¹³¹ They touch upon the jurisdiction of the ICC.

Resolution 1422 was born out of the United States request to grant immunity to US soldiers in Bosnia and Herzegovina from the ICC's jurisdiction for a period of one year.¹³² The United States threatened to veto a renewal for the Council's mission in Bosnia and Herzegovina.¹³³

¹²⁹ Bergsmo, Pejic, in: Triffterer, 603 marginal no 25.

¹³⁰ UN Doc. S/RES/1422 (2002) (hereinafter Resolution 1422).

¹³¹ UN Doc. S/RES/1487 (2003) (hereinafter Resolution 1487).


¹³² Jain (2005), 2.

¹³³ *Ibid.*

Finally Resolution 1422 was adopted as a compromise. In operative paragraph 1 the Council requests:

“consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute [...] shall for a twelve-months period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise.”

Even though the resolution was highly controversial, in 2003, Resolution 1487 was adopted, renewing Resolution 1422 and repeating the request for another 12 month.¹³⁴ The resolution was accepted by the Council even though it was illegal and inconsistent with the Rome Statute.¹³⁵



cc. Conclusion regarding Article 16 Rome Statute

In theory, Article 16 Rome Statute is a well balanced compromise¹³⁶ between the power of the Security Council under Chapter VII and the independence of the Court. The original intention of Article 16 Rome Statute was to release suspect of investigations allow decent peace negotiations.¹³⁷ The practice, on the contrary, proved the Security Council as an organ of the UN to be very powerful and even rather disturbing powerful in the fight against impunity, as proven by

¹³⁴ Bergsmo, Pejic, in: Triffterer, 599 marginal no.10; Jain, 2.

¹³⁵ See Jain (2005), 7; regarding the illegality of the resolutions see the argumentation in Chapter III(c)(bb) –jurisdictional exemption-.

¹³⁶ Kurth (2005), 83.

¹³⁷ Wilmshurst (2001), 40.

Resolutions 1422 and 1487.¹³⁸ Even though one has to take into account that it is not the power of the Security Council in general it is rather the power of some of its permanent member, namely the United States, within that organ that make the organ itself seem quite powerful in relation to the SC.

Another weakness of Article 16 Rome Statute should just briefly be mentioned. The adoption of a resolution under Chapter VII UN Charter does not necessarily entail that action by the Council relating to the case under consideration is underway.¹³⁹ The Council can stop investigations without having to deal with the situation in another way.¹⁴⁰ The ICC has to adhere to the resolution and the Council at the same time has any freedom to act at will.



e) Article 115 Rome Statute – Funds of the Court and the Assembly of State Parties

“The expenses of the Court and the Assembly of State Parties, including its Bureau and subsidiary bodies as provided for in the budget decided by the Assembly of States Parties, shall be provided by the following sources:

- a) Assessed contributions made by States Parties
- b) Funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council.”

¹³⁸ For an evaluation of Resolution 1422, see: Kirsch, Holmes and Johnson, 282.

¹³⁹ Elarabay (2001), 46.

¹⁴⁰ , Delbrück, Jost, und Rüdiger Wolfrum. Völkerrecht. Berlin: De Gruyter Recht (2002), 1154.

aa. Ordinary meaning and context of Article 115 Rome Statute

In the context of an interpretation of Article 115 Rome Statute, in consideration of the balance of power between the ICC and the Security Council, Article 115 (b) is of interest as it mentions referrals by the Security Council. The second source of funds provided for is the United Nations. The phrase “subject to the approval of the General Assembly” appears to have no legal significance in a sense that it states the obvious. But one has to read it in relation with the United Nations Charter and the fact, that the Rome Statute cannot bind the United Nations.¹⁴¹ Therefore one has to understand it rather as a “reflection upon the fact that an agreement cannot create obligations on behalf of third parties.”¹⁴² Interesting is also the wording “in particular” it might be understood as a hint that there might be other situations where the United Nations could be called upon to contribute to the Court’s funds.¹⁴³ Article 115 Rome Statute is mandatory as it uses “shall”. But as explained above the Rome Statute cannot legally bind the UN. What does “shall” in context with Security Council referrals mean? The provision may intend to oblige the Court not to act when a situation is referred without the accordant funding. As “shall” indicates the compelling character of the provision especially in consideration with provisions of the Rome Statute using the same language. Expenses of Security Council referrals are incurred due to the service

¹⁴¹ Halff, Tolber, in: Triffterer, 1712 marginal no. 17.

¹⁴² *Ibid.*

¹⁴³ Halff, Tolbert, in: Triffterer, 1712 marginal no. 18.

of the Court to deal with an Security Council referral.¹⁴⁴ Therefore, it seems more than appropriate that the United Nations should bear the costs of the latter.¹⁴⁵ If the funding is denied, the Court then was obliged to act according to the premiss: "If there is no money available for investigations and trials, there simply will not be any investigations and trials."¹⁴⁶

Again, the Darfur referral can serve as an example for the practice. Operative paragraph 7 of Resolution 1593 (hereinafter referred to as paragraph 7) states, that "none of the expenses incurred in connection with that referral, shall be borne by the United Nations." Paragraph 7 was a further compromise for the United States not to veto the referral.¹⁴⁷ The funding scheme provided for in the Rome Statute was violated. The Statute is not clear about the consequences, whether the prosecutor or the Court may reject a referral on the grounds of absent United Nations funding.¹⁴⁸ According to the mandatory wording of Article 115, theoretically the Court, including the prosecutor, was obliged to deny dealing with the referred situation, as long as the United Nations was not approving the funding.¹⁴⁹ Practically, the Court did not

¹⁴⁴ *Ibid.*

¹⁴⁵ 616; Williams, Schabas, 573 marginal no. 16.

¹⁴⁶ Song (2007), 7.

¹⁴⁷ Williams, Schabas, 573, marginal no. 16.

¹⁴⁸ Reismann, W. Michael. "On Paying the Piper: Financial Responsibility for Security Council Referrals to the International Criminal Court." *The American Journal of International Law*, 2005: 615-618, 616.

¹⁴⁹ Fletcher, Ohlin (2006), 430, suggest that 'it seems' as if a failure to find funding would not provide a legal justification for ignoring the Security Council directive. They fail to take into account the mandatory character of Article 115 (b), which can serve as the legal justification.

touch upon that issue and the Assembly of States Parties bears the expenses, now.¹⁵⁰

bb. Conclusion regarding Article 115 (b) Rome Statute

Article 115 (b) Rome Statute, in its wording, is an adequate provision for balancing the relationship between the Court and the SC. But, as it was proven in practice, through the Darfur referral, it lacks a stringent enforcement. The Security Council decides not to bear the expenses and the Court accepts without protesting. Taking into account that the Security Council is acting on behalf of the United Nations (Article 24 (2) UN Charter) the Court's behavior is completely inscrutable on the subject of the Darfur referral. I suggest reading Article 115 Rome Statute as a mandatory provision, which, in cases of Security Council referrals, does not allow the Court to act without a guaranteed funding by the United Nations.

2. The Object and Purpose of the Rome Statute

The object and purpose of a statute is typically to find in the preamble.¹⁵¹

The Preamble of the Rome Statute states the object and purpose quite clearly. In paragraph 5 it articulates the primary purpose

“Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.”

¹⁵⁰ Fletcher, Ohlin (2006), 430.

¹⁵¹ Article 31 (2) Vienna Convention.

In *Triffterer*'s opinion "all Articles of the Statute and the Court, exercising its jurisdiction on the basis of the Statute, serve the purpose 'to prevent and repress' crimes under international law."¹⁵² Those responsible for the "most serious crimes of concern to the international community as a whole" (paragraph 4 of the Preamble) must be punished. The relationship with the United Nations is mentioned twice; in paragraph 6 of the Preamble in association with the 'Principles and Purposes of the Charter of the United Nations' and especially the ban of the threat or use of force. And in paragraph 9 of the Preamble, although the ICC is an independent institution, it is laid down that the ICC cannot operate detached from the United Nations. Though, the Preamble confirms a determination "to establish an independent permanent ICC."¹⁵³ One can sum up the object and purpose as the aim to fight impunity while not violating the principles and purposes of the world community. Although in many cases the ICC is facing a certain difficulty. On one hand, it is determined to fight impunity and on the other hand, it must make jurisdictional and financial compromises in order to do so.¹⁵⁴

¹⁵² Triffterer, Otto. "The Preventive and Repressive Function of the International Criminal Court." In *The Rome Statute of the International Criminal Court: A Challenge to Impunity*, edited by Mario Politi and Giuseppe Nesi, 143-164. Hampshire: Ashgate Publishers (2001), 164.

¹⁵³ Elaraby (2001), 43.

¹⁵⁴ See the Darfur Resolution 1593 at operative paragraphs 6 and 7.

cc. Conclusion Chapter III – The Role of the Security Council as intended by the Rome Statute

The interpretation of the Rome Statute concerning the role of the Security Council is evidence for a certain power pattern. The relevant and analyzed Articles of the Rome Statute all emphasize the United Nation`s task to maintain and restore peace within the world under Chapter VII of the United Nations Charter. The ICC as an independent institution must adhere to Security Council requests as long as they do not violate the well balanced system of the Rome Statute. The power of both institutions only inter-mingles in specific cases when a threat or breach to international peace occurs which was determined by the Security Council (Articles 13 (b) and 16 Rome Statute). Otherwise, they can act independently. Theoretically, there is a thin line drawn in the provisions of the Rome Statute that is to safeguard the ICC from political influence of the Security Council and the United Nations. Practice, however, has shown a different scheme. The Security Council, which is highly influenced by its permanent members, can refer a situation by excluding a specific group of persons, as well as excluding the relevant funding, and still the ICC is willing to take up proceedings without legally challenging the resolution of the Council. This is the point where the fine line, drawn by the Rome Statute, begins

to disappear, to the Court's disadvantage and its independence and towards a politically influenced Court.¹⁵⁵ To put it in *Sarooshi's* words:

“In the case of the ICC the mandate is relatively clear, the achievement of justice by means of an international criminal process in relation to the crimes within the Court's jurisdiction; while in the case of the Security Council its overriding objective under the UN Charter is the maintenance or restoration of peace and security, which may not include in a particular case the achievement of justice.”¹⁵⁶

However, if one is disregarding the practice, the provisions of the Rome Statute were able to safeguard the Courts independence from the political influence of the Security Council.



¹⁵⁵ Cf. Elarabay (2001), 47.

¹⁵⁶ Sarooshi (2008), 249.

IV Should the 'intended role' of the Security Council as laid down in the Rome Statute influence the definition of the Crime of Aggression?

In Chapter IV the balance of power, as defined in Chapter III, will serve as a guideline for the discussion on the crime of aggression.

Furthermore, by analyzing the influence of the "power pattern" on the crime of aggression, Chapter IV serves as a Conclusion regarding the balance of power between the ICC and the Security Council

1. The Genesis of the Crime of Aggression

In the aftermath of World War II, in the Charter of the International Military Tribunal at Nuremberg¹⁵⁷, for the first time, the crime of aggression was included into an international treaty.¹⁵⁸ Already prior to the Nuremberg Statute there had been early attempts for a ban on war.¹⁵⁹ Thus, the concept was quite new at the time, since war in the 19th and early 20th century was considered a legitimate political tool.¹⁶⁰

¹⁵⁷ The Nuremberg trial was legally based on the Charter of the International Military Tribunal (IMT Charter), which was a result of a negotiating process between the allied powers. The IMT Charter was included as an appendix to the London Agreement signed by the British, French, Soviet, and United States representatives on behalf of their governments on 8 August 1945; Hummrich (2001), 53.

¹⁵⁸ Werle (2005), 481; Petty, Keith A. "Sixty Years in the Making: The Definition of Aggression for the International Criminal Court." *Hastings International & Comparative Law Review*, September 2008: 531-554, 532 *et seq.*

¹⁵⁹ See the Treaty for the Renunciation of War as an Instrument of National Policy of 27 August 1928, the so-called Kellogg-Briand Pact. For an further information on the concept of aggression going as far back as to the writings of Aristotele see: Bassiouni, Ferencz (2008), 207 *et seq.*

¹⁶⁰ Werle (2009), 476; Kurth (2005), 89.

The Nuremberg Charter called the 'crime of aggression' in Article 6 'crime against peace' and defined it as

“the planning, preparing, 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.”

The Nuremberg and Tokyo Trials, as well as the follow-up trials, contributed to the creation of customary international law, criminalizing the perpetration and waging of aggressive war.¹⁶¹ Since then, numerous attempts were made to define aggression, like in 1954 in the International Law Commission's Draft Code of Offences against the Peace and Security of Mankind.¹⁶² Though, a prohibition on the threat or use of force was included in Article 2(4) UN Charter.¹⁶³ In 1974, the General Assembly agreed upon a definition regarding an 'act of aggression'.¹⁶⁴ Under Article 1 of the definition of the United Nations, an act of aggression is “the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state.”¹⁶⁵ But still, an international compromise on the definition of a crime or war of aggression was not agreed upon as the definition of the crime of aggression necessarily needs to differ from the definition of

¹⁶¹ Werle (2009), 483.

¹⁶² Petty (2008), 535; see also the efforts for a definition in: Draft Code of Crimes against the Peace and Security of Mankind of 1991, UN Doc. A/CN.4/435 and 1996, UN Doc. A/CN.4/L.532.

¹⁶³ Article 2(4) UN Charter: “All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.

¹⁶⁴ See *supra* note 70.

¹⁶⁵ Werle (2009), 480.

aggression for the purpose of political determination by the Security Council¹⁶⁶ Especially in regard of the principle of legality a crime needs to be specifically defined and its elements clearly stated.¹⁶⁷

During the PrepCom and the Rome Conference it was not compromised either.¹⁶⁸ The Rome Conference, in its final act, “authorized the Preparatory Commission to prepare a proposal for consideration by the Review Conference.”¹⁶⁹ In 2002, a Special Working Group on the Crime of Aggression for the Assembly of States Parties to the Rome Statute (hereinafter referred to as Special Working Group) was established as a successor to the Preparatory Commission.¹⁷⁰

It was the task of the Preparatory Commission and its successor, the Special Working Group, to prepare an agreement that would cover:

- a definition of the crime of aggression;
- the conditions under which the Court shall exercise jurisdiction with respect to this crime; and
- the elements of this crime.¹⁷¹

The Preparatory Commission laid down its results regarding the crime of aggression in a Discussion Paper¹⁷² (Discussion Paper 2002). The

¹⁶⁶ Bassiouni, Ferencz (2008), 227 *et seq.*

¹⁶⁷ Bassiouni, Ferencz (2008), 227.

¹⁶⁸ Cf. Chapter II(3)(c) and III(1)(b); Blokker (2007), 870-876.

¹⁶⁹ Werle (2009), 492.

¹⁷⁰ Resolution ICC-ASP/1/Res.1.

¹⁷¹ Blokker (2007), 875.

¹⁷² UN Doc. PCNICC/2002/2/Add.2, at 3-5.

Special Working Group, in 2007, after 5 years of substantive work, published another discussion paper (Discussion Paper 2007).¹⁷³

In the following it will be concentrated on the issues concerning the conditions under which the Court shall exercise jurisdiction, since it includes the role of the Security Council, an issue still to be solved.¹⁷⁴

2. The Security Council and the Crime of Aggression

The role of the Security Council regarding the criminal proceedings for the crime of aggression is highly controversial.¹⁷⁵ Hence, the determination of aggression is the most difficult hurdle to overcome.¹⁷⁶

“The complexity is rooted in the fact that it brings together highly political world of the Security Council, dominated by the rule of power and the international justice world of the ICC, governed by the rule of law.”¹⁷⁷ The primary responsibility to maintain world peace is occupied by the Security Council under Article 24 of the UN Charter. Therefore, the opinion was shared that the Council should also enjoy primary responsibility in determining an act of aggression as an element of the crime of aggression. The Court would only be allowed to prosecute after a pre-determination by the Council.¹⁷⁸ Therefore, the question

¹⁷³ UN Doc. ICC-ASP/5/SWGCA/2.

¹⁷⁴ Blokker (2007), 869; Petty (2008), 536.

¹⁷⁵ Werle (2009), 492.

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid.*

¹⁷⁸ Werle (2009), 494.

remains whether “state aggression is a purely political question for the Security Council or whether the Court may act on its own.”¹⁷⁹

In the ILC draft it was absolutely clear that a prior determination by the Council was needed (see Article 23 (3) ILC Draft). Though, in the negotiations process views were diverging as the Security Council was unable to serve as a legal filter; it was a political body that was to decide for its own reasons in each specific case whether or not a state act of aggression would have been committed.¹⁸⁰

In the Special Working Group the view was commonly shared that the Court at least “shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned.”¹⁸¹ The rationale behind those proposals is the Council’s important responsibility under Chapter VII of the UN Charter to maintain and restore international peace and security.¹⁸² Though, the five permanent members of the Security Council do favor the so-called “exclusivity thesis,” which allows only the Council to trigger the Courts jurisdiction regarding the crime of aggression by determining that a state has committed an act of aggression.¹⁸³ The thesis is based on Article 24 UN Charter. But one may argue that ‘primary’ does not mean ‘exclusive’.¹⁸⁴ Additionally, the exclusive right of the Security Council to

¹⁷⁹ Petty (2008), 537.

¹⁸⁰ Blokker (2007), 874.

¹⁸¹ Discussion Paper 2002 and 2007, para. 4.

¹⁸² Blokker (2007), 877.

¹⁸³ Blokker (2007), 878.

¹⁸⁴ The ICJ and the General Assembly, for example, have also rights in that regard, see: Blokker (2007), 879.

trigger the Court's jurisdiction would give the permanent members the possibility to veto every decision that is supposed to be taken to their disadvantage. Furthermore, while the "act of aggression" is more amenable to legal determination, the "threat to the peace" is more of a political concept.¹⁸⁵

One of the latest discussions was in regard of the so-called "red-light" proposal, wherein the Council, similar to Article 16 Rome Statute, would have the right to stop investigations or prosecutions if, in its opinion, no act of aggression took place.¹⁸⁶ Though, the "red-light" proposal was rejected by most parties. "The point was also made that article 2 of the resolution dealt with the first use of armed force by a State, which would *prima facie* be considered an act of aggression. In contrast, the purpose of the Court's proceedings was to determine individual criminal responsibility."¹⁸⁷

It is still under discussion if the Court could take up investigations even if the Council refuses to determine aggression.

Right now, aggression in the draft of the Special Working Group is defined as a certain act of aggression, which needs to be determined

¹⁸⁵ *Prosecutor v. Tadic*, decision of 2 October 1995, Appeals Chamber, para. 29.

¹⁸⁶ Report of the Special Working Group, 2009, ICC-ASP/7/20/Add.1.

¹⁸⁷ Report of the Special Working Group, 2009, 24 *et seq.*

by the Security Council.¹⁸⁸ Broad agreement exists over the Council having the right to this determination.¹⁸⁹ The question remains whether the Court can also act on its own in cases where the Security Council refuses to determine an act of aggression.¹⁹⁰ It is uncertain whether in the end the UN General Assembly or the International Court of Justice will get a right of determination in those cases.¹⁹¹

3. Conclusion

The definition of aggression as foreseen in Article 8 bis of the Draft would hardly be consistent with the balance of power as envisaged by the Rome Statute.¹⁹² As proven above, the Rome Statute provides for a very well balanced relationship between the ICC and the Security Council. Though, in theory this balance is very well structured, the example of the Darfur referral has already shown the political power of the Security Council which can affect the Court regardless of the provisions of the Rome Statute trying to circumvent such influence.

¹⁸⁸ Article 8 bis

Crime of aggression

1. For the purpose of this Statute, "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

2. For the purpose of paragraph 1, "act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression

¹⁸⁹ Werle (2005), 494, Kress, Claus. "The Crime of Aggression before the First Review of the ICC Statute." *Leiden Journal of International Law*, 2007: 851-865, 851.

¹⁹⁰ Petty (2008), 537.

¹⁹¹ Blokker (2007), 890 *et seq.*, Werle (2009), 494.

¹⁹² Petty (2008), 538.

Now, if the definition for the crime of aggression allows for a pre-determination by the Council, the definition does not even theoretically comply with the standards foreseen in the Rome Statute. The politically driven Council was to have the power to decide a legal question. In comparison with the other international crimes provided for in Article 5 Rome Statute which are within the jurisdiction of the Court, aggression would be the only one, which depends completely on a political determination. The Court was to become the over-politicized organ as some scholars already see it today.¹⁹³ Furthermore, one can take into account the argument of *Gaja* as he states:

“One cannot assume that the absence of a finding by the Security Council that aggression occurred necessarily implies that in the Security Council’s view there is no aggression and that therefore conflict would arise with a positive finding by the ICC that an individual has committed a crime of aggression.”¹⁹⁴

Generally speaking, the right to refer a situation and the deferral right in the Rome Statute give the Security Council the power to initiate the prosecutors work or, in case of the deferral, to stop investigations or prosecutions through a resolution. For the crime of aggression, in my opinion, it would be sufficient and in accord with the Rome Statute, if the Council was to have the same powers as it has regarding the further crimes of Article 5 Rome Statute. The right of maintaining and restoring peace does not inter-mingle with a determination of the ICC to investigate a case or prosecute an individual for a crime. If the Council

¹⁹³ Elarabay (2001), 43.

¹⁹⁴ Gaja (2001), 124.

has determined a certain conduct as act of aggression the Court may take up that determination for its own argumentation regarding the crime. That way, the judicial action of the Court would not depend on the willpower of an executive body.¹⁹⁵

Words: 10429



¹⁹⁵ Werle (2009), 495.

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