Chapter 19

The ICC and the Security Council: An Uncomfortable Relationship

Nigel White and Robert Cryer

Introduction

It was foreseeable that when the Rome Statute of 1998 establishing the International Criminal Court (ICC) was adopted the relationship between the UN Security Council and Court was going to be an uncomfortable one. That there was an overlapping competence between these organs was clear since the Council’s understanding of its jurisdiction under Chapter VII of the UN Charter after the end of the Cold War led to an expansion of the concept of “threat to the peace” to include not only international conflicts but also internal matters of “extreme violence.”

Furthermore, it had considered that violations of humanitarian law could, in themselves, constitute threats to the peace, and thus could be the object of Chapter VII action in the form of non-forcible and forcible measures. Non-forcible measures had included the creation in the mid 1990s of international criminal tribunals to deal with serious breaches of international criminal law arising out of the conflicts in the Former Yugoslavia and Rwanda.

By these actions the Council’s competence had developed, some would argue strayed, into matters of international criminal justice. Thus with the coming into being of the ICC with competence over war crimes, crimes against humanity, genocide, and potentially aggression, the relationship between the two institutions had the potential to develop in three ways: in a complementary fashion, where the Council and the Court act in harmony; in a conflictual manner, where they take opposing

3 For example SC Res. 827, 25 May, 1993.
4 Articles 41 and 42 of the UN Charter.
positions or try to usurp the competence of each other; or in an overlapping way, where they pursue their own agendas without regard to the other even though they may be dealing with the same situation.

The Rome Statute itself tried to limit the potential for an uneasy or competing relationship, by allowing the Council to refer cases to the Court in Article 13 of the Statute, if enough votes could be garnered in the Council and the veto of a permanent member could be avoided.\(^7\)

Conversely, Article 16 of the Statute allowed the Council to block the jurisdiction of the Court, thus giving the Council a certain supremacy, but again only if it were able to garner the necessary votes in the Council and avoid a veto from a permanent member. Given the history of the veto power of each of the five permanent members, these relationship provisions, in which the Council has both a power of referral and one of deferral, might have been expected to have had a limited impact on the working of the Court, thus maybe leading to overlap but not intrusion.

This impression was strengthened by the failure in the Preparatory Commission to agree on a definition of aggression necessary to activate the Court’s jurisdiction\(^8\) over a crime that was also clearly within the Council’s competence.\(^9\) This removed a potentially explosive scenario where the Court was investigating an alleged crime of aggression, which the Council was unable to deal with because of the application of the veto by a permanent member allegedly committing or aiding the aggression.\(^10\)

However, expectations that the Council would be deadlocked by the veto on issues of international criminal justice have proved to be premature. With the end of the Cold War, the veto is only one of many political factors operating in the Council and, as this chapter will show, the relationship between the Court and the Council has come into sharp relief due to the politically driven security function of the Council conflicting with the judicial nature of the Court and its concern with justice.

I. The Law of the Charter and the Rome Statute

We have introduced the underlying problem that faced the drafters of the Rome Statute – to calibrate the actions of the two independent international organisations (the UN and the ICC), which have partially overlapping mandates.\(^11\) The UN, of

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7 Article 27(3) of the UN Charter.
8 Article 5(2) Rome Statute.
10 There is also the possibility that the Court may investigate instances of conduct by UN authorised troops that steps outside the mandate – Sarooshi, “Peace and Justice”, 111.