

The Admissibility of a Case before the International Criminal Court: An Analysis of Jurisdiction and Complementarity.

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I, the undersigned, hereby declare that the work contained in this thesis is my own original work and that I have not previously in its entirety or in part submitted it at any university for a degree.

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ABSTRACT

The permanent International Criminal Court (ICC) will come into operation after the 60th ratification of the Rome Statute of the International Criminal Court of 1998. The ICC will have jurisdiction over the most serious international crimes, namely war crimes, genocide and crimes against humanity. The focus of this thesis is the difficulties surrounding the admissibility of a case before the ICC. There are basically two legs to this analysis: jurisdiction and complementarity.

Jurisdiction of the ICC is analysed in historical and theoretical context. This comprises an overview of the international tribunals since the First World War, and more specifically their impact on the development of jurisdiction in international criminal law. Secondly, the thesis is examining the jurisdiction of the ICC in terms of the specific provisions of the Rome Statute. This analysis comprises a detailed analysis of all the provisions of the Rome Statute that have an impact on the exercise of the ICC's jurisdiction.

The relationship between the ICC and national courts is a difficult relationship based on a compromise at the Rome Conference in 1998. The principle underlying this relationship is known as "complementarity". This means that the ICC will only exercise its jurisdiction if a national court is "unwilling" or "unable" to exercise its jurisdiction. A detailed analysis of the different provisions of the Rome Statute, as well as some references to other international tribunals, serve to analyse the impact of complementarity on the eventual ambit of the ICC's jurisdiction.

In conclusion, some suggestions regarding the admissibility of cases and the difficult relationship between the ICC and national courts are made.

OPSOMMING

Die permanente Internasionale Strafhof (ISH) sal met sy werksaamhede begin na die 60ste ratifikasie van die Statuut van Rome van 1998. Die ISH sal jurisdiksie uitoefen oor die ernstigste internasionale misdade, tewete oorlogsmisdade, volksmoord en misdade teen die mensdom. Hierdie tesis fokus op die probleme rondom die toelaatbaarheid van 'n saak voor die ISH. Hierdie ontleding het basies twee bene: jurisdiksie en komplementariteit.

Die jurisdiksie van die ISH word in historiese en teoretiese konteks ontleed. Dit behels 'n oorsig van die internasionale tribunale sedert die Eerste Wêreldoorlog, en meer spesifiek die impak wat hierdie tribunale op die ontwikkeling van jurisdiksie in die internasionale strafreg gehad het. In die tweede plek word jurisdiksie ontleed aan die hand van die spesifieke bepalings van die Statuut van Rome. Hierdie ontleding behels 'n gedetailleerde ontleding van al die bepalings van die Statuut van Rome wat 'n impak het op die uitoefening van die ISH se jurisdiksie.

Die verhouding tussen die ISH en nasionale howe is 'n komplekse verhouding, gebaseer op 'n kompromie wat by die Rome Konferensie van 1998 aangegaan is. Die beginsel onderliggend aan hierdie verhouding staan bekend as "komplementariteit". Dit beteken dat die ISH slegs sy jurisdiksie sal uitoefen indien 'n nasionale hof "onwillig" of "nie in staat is" om jurisdiksie uit te oefen nie. 'n Gedetailleerde ontleding van die verskillende bepalings van die Statuut van Rome, sowel as verwysings na ander internasionale tribunale, dien om die impak van komplementariteit op die omvang van die ISH se jurisdiksie, te ontleed.

Ten slotte word sekere voorstelle aangaande die toelaatbaarheid van sake en die verhouding tussen die ISH en nasionale howe gemaak.

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Introduction

In December 1997 the General Assembly decided to convene the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, to be held in Rome, Italy, from June 15 to July 17, 1998, to finalise and adopt a text of agreement for the establishment of a permanent international criminal court.¹ With the adoption of the Statute of Rome on 17 July 1998 by an overwhelming majority of the participating states², international criminal law was launched into a new era.

Although the establishment of a permanent international criminal court had seemed to be an impossible task over the years, it was, considering the increasing pressure of international globalisation, just a question of time before the International Criminal Court, based on the Statute of Rome, was created. The tendency towards centralism and the closely interlinked international relationships forced nations increasingly to reorganise international criminal law - to establish a point of orientation on an international level in terms of which states could measure their actions. Besides, it became clear that war as means of solving political conflicts is inefficient and engenders even more discord between the opposing states. The establishment of the International Criminal Court emphasises that 'peace through law' is the only solution for a new world order and gives hope that the most serious crimes of international concern no longer will remain unpunishable. During the negotiations in Rome one of the most controversial issues was the question of the sovereignty of states and to what extent the International Criminal Court would interfere in

¹ See: General Assembly Resolution 160/52 entitled Establishment of an International Criminal Court, United Nations General Assembly Official Records, Fifty-second Session, Supplement No. 32 A/52/32 (1997)

national concerns. However, it must be borne in mind that the real 'sovereign' in international criminal law is the individual human being and his/her protection should be the only pertinent question. In terms of Paragraph 2 to 4 of the Preamble of the Statute of Rome³ the International Criminal Court was established,

"[M]indful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,
Recognizing that such grave crimes threaten the peace, security and well-being of the world,
Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished, and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,".

The question as to whether these ideals emphasised in the Preamble will and can be fulfilled depends strongly on the measures that the United Nations Diplomatic Conference of Plenipotentiaries gave the International Criminal Court to implement the principles of the Preamble. Central to the ability of the Court to ensure that the basic concerns of the Preamble are addressed are the questions as to the circumstances under which the Court may exercise its jurisdiction and the issues of the admissibility of a case before the International Criminal Court. These issues combined with the 'Principle of Complementarity' will be the focus of the research.

² 120 votes in favour, 7 against and 21 abstentions

³ Rome Statute of the International Criminal Court (1998) reprinted in van den Wyngaert *International Criminal Law A Collection of International and European Instruments* 2 ed (2000) 139-197

The research is divided in three chapters, a conclusion and an appendix. The first chapter can be seen as a part of the introduction as it gives the necessary background information. The following two chapters are closely related to each other as jurisdiction, the principle of complementarity and the admissibility of a case according to the Statute of Rome cannot be discussed separately.

The first chapter is subdivided into two main parts: a historical and a theoretical part. The first part gives a rough overview of the history of the International Criminal Court's establishment. This is presented chronologically as far as possible. The history of the International Criminal Court is practically the history of international criminal law, therefore only sweeping historical events are highlighted for consideration. As a certain amount of theoretical background information is necessary to understand the context of the International Criminal Court's jurisdiction and related issues, the second part of the chapter deals with general jurisdictional principles in the field of international criminal law. Besides the jurisdiction, the two ad hoc Tribunals and the Military Tribunal of Nuremberg will be examined as comparisons to the International Criminal Court will be made throughout the research.

The focus of the second chapter will be on the jurisdiction of the International Criminal Court as it is based on the Rome Statute. The structure of this chapter on the different jurisdictional issues is based, as far as possible, on the sequence required to bring a case before the International Criminal Court. The problems and conflicts are discussed under each point and possible solutions are brought to light. However, one has to keep in mind that the International Criminal Court has not started its work yet. As the Statute of Rome is strongly influenced by Anglo-American law with its case law system, the given

solutions are just prognoses as to how the Court may decide on the different issues. A main point under this chapter will be the jurisdiction of the Court over the nationals of a Non-party state and how this jurisdiction can be justified by means of international criminal law.

The third chapter focuses on the admissibility of a case before the International Criminal Court. As this issue is closely related to the principle of complementarity, the relationship with national courts will be the topic of consideration and the difference between the ad hoc Tribunals and the International Criminal Court will be exposed. The chapter is divided into three main parts. The first deals with the provisions of Article 17 where the different preconditions of admissibility will be discussed. The question of a fitting definition according to the different preconditions of Article 17 will also be broached. Moreover, the principle of *ne bis in idem* as a special aspect of admissibility will be emphasised. Secondly, the preliminary rulings regarding admissibility as they are spelled out in Article 18 will be considered. The position of the examination of Article 18 in the research is justified by the fact that it is not clear if Article 18 represents a necessary obligation for a state before initiating a challenge to the jurisdiction of the Court or admissibility of a case under Article 19. Finally, the right of challenges to the jurisdiction of the court and the admissibility of a case is discussed.

In the conclusion, the main problems of the International Criminal Court regarding the jurisdiction and the admissibility of a case are emphasised and a critical forecast of the future work of the Court is given. In the appendix three diagrams are added, presenting the jurisdiction of the International Criminal Court, the relationship of the Court to the national courts, and how to bring a case before the International Criminal Court.

Chapter One: Historical and Theoretical Background

To understand the problems and conflicts which revolve around the exercise of jurisdiction of the International Criminal Court, based on the Statute of Rome, it becomes necessary to give an overview of its origin and a theoretical description of jurisdiction in international criminal law.

1 Historical Overview

The establishment of an international criminal court seemed to be an unsolvable task for the international community in the last century. It entailed dealing with the question of sovereignty, in giving up part of a nation's criminal jurisdiction, and was therefore always a highly sensitive political issue. Despite the political obstacles in the way of an international criminal court, the question of its establishment was always present in the intergovernmental arena. Several attempts to establish an international criminal court were made and especially the five international investigative commissions⁴ and the four international criminal *ad hoc* tribunals⁵ since 1919 represent the consistent will of nations to bring war criminals to justice.

⁴ 1. The Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties (1919); 2. The United Nations War Crimes Commission (1943) (UNWCC); 3. The Far Eastern Commission (1946) (FEC); 4. The Yugoslavia Commission of Experts (1992); 5. The Rwanda Commission of Experts (1994)

⁵ 1. The International Military Tribunal to Prosecute the Major War Criminals of the European Theatre (1945) (IMT); 2. The International Military Tribunal to Prosecute the Major War Criminals of the Far East (1946) (IMTEF); 3. The International Criminal Tribunal for the Former Yugoslavia (1993) (ICTFY); 4. The International Criminal Tribunal of Rwanda (1994) (ICTR)

1.1 The First World War

The first real steps⁶ towards the establishment of an international criminal court were taken at the end of the First World War. On 25 January 1919 a Preliminary Peace Conference commenced, during which a Commission on Responsibility of the Authors of the War and on the Enforcement of Penalties was established by the victorious Allies. The majority of the Commission wanted to establish an international criminal court, which would be able to prosecute and punish especially the high-ranking officials and the head of the State of Germany, Kaiser Wilhelm II. The representatives of the United States and Japan had strong reservations about the establishment of a permanent international criminal institution which could condemn the "criminal actions" of officials, even the head of a state, committed during a military intervention. Finally, the Parties of the Commission reached a compromise in Article 227 of the Treaty of Versailles⁷, which stipulated the establishment of an ad hoc international criminal tribunal that only prosecuted the German Kaiser "for a supreme offence against international morality and the sanctity of treaties"⁸. In its Articles 228 and 229 the Treaty of Versailles provided for the prosecution of German military personnel accused of violating the laws and customs of war before Allied Military Tribunals or before the Military Courts of any of the Allies. Although Germany signed the Treaty of Versailles, almost none of the perpetrators were convicted.

⁶ The Court of Breisach, Germany in 1474, which tried and convicted Peter von Hagenbach for violating "the law of God and man" is often mentioned in the literature as the first international criminal court.

⁷ Treaty of Versailles (excerpts) (28 June 1919), reprinted in van den Wyngaert *International Criminal Law A Collection of International and European Instruments* 2ed (2000) 53-53

⁸ Art. 227 Treaty of Versailles (*supra* 7)

Kaiser Wilhelm II found refuge in the Netherlands and Germany simply refused to hand over most of the war criminals.⁹

After the Treaty of Versailles, the next discussion on the set up of an international criminal court took place at the League of Nations. On 13 February 1920 the Council of the League appointed an Advisory Committee of Jurists to discuss the establishment of a permanent Court of International Justice.¹⁰ The proposal for a High Court of International Justice, as discussed by the Committee of Jurists, did not define the crimes for which offenders would be prosecuted. This would be left to the Court itself. The failure to define the crimes in the proposal was seen as a violation of the principle *nullum crimen sine lege* by several members of the Committee.¹¹ Furthermore, the proposal was not supported by the Legal Committee of Nations, resulting in the closure of the discussion on an international criminal court at an intergovernmental level.

Until 1934 the possibility of an international criminal court existed only on an academic level. The International Law Association, for example, explored the establishment of an international criminal court during different conferences. Due to the assassination of King Alexander of Yugoslavia and the French Minister of Foreign Affairs, Barthou, in Marseille on 9 October 1934, the question of an international criminal court was brought back into the international political arena. France launched an initiative in the League of Nations to establish an International Terrorism Convention, in conjunction with

⁹ Von Hebel *An International Criminal Court - A Historical Perspective* in von Hebel et al (eds) *Reflections on the International Criminal Court* (1999) 13-16

¹⁰ Von Hebel (*supra* 9) 16

¹¹ Von Hebel (*supra* 9) 17

the establishment of an international criminal court, which finally also failed due to lack of sufficient support from other nations.¹²

1.2 The Second World War

During the Second World War already the Allied Powers discussed the question of how to prosecute German officials for atrocities. They finally announced their intentions in the Declaration of St. James in 1942. In stipulating the establishment of the United Nations War Crimes Commission¹³, the Declaration of St. James was the first step leading to the International Military Tribunal at Nuremberg. On 1 November 1943 Roosevelt, Churchill and Stalin met in Moscow and issued a declaration known as the Moscow Declaration to constitute the jurisdictional basis for various later trials of the European Axis.

1.2.1 The International Military Tribunal of Nuremberg

After the capitulation of the German Reich on 8 May 1945, the Allies finally realised the full extent of the atrocities of the Nazis and accelerated the establishment of an International Military Tribunal. The International Military Tribunal at Nuremberg was a watershed event in the progression of the International Criminal Court from the drawing-board to concrete reality. The negotiations for an effective Statute of an International Military Tribunal took place in London between the 26 June and 8 August 1945. Finally the International Military Tribunal was constituted by the Nuremberg Charter, which

¹² Von Hebel (*supra* 9) 17

¹³ The UNWCC was established to investigate and obtain evidence of war crimes.

was an annex of an international agreement¹⁴ known as the London Accord and signed by the four Allied powers, namely France, the United Kingdom, the Soviet Union and the United States of America.

The thirteen articles of the Nuremberg Charter addressed the tribunal's composition, rules of procedure, jurisdiction and the law to be applied. According to Article 6 of the Charter of the International Military Tribunal, the Tribunal had jurisdiction over crimes against peace, war crimes and crimes against humanity. The significant feature of Article 6 was the inclusion of two crimes that had not previously been articulated in international criminal law: crimes against humanity and crimes against peace. These two new classes of crimes made it possible to bring to justice German high officials who might otherwise have been beyond the reach of conviction, but whose actions so shocked the human conscience that they warranted particular sanction.

During the sessions of the Tribunal most of the defendants' objections dealt with the question as to whether the Tribunal had jurisdiction and which law was to be applied. The powerful argument of the defendants regarding the jurisdiction of the Tribunal revolved around the question of the sovereignty of the state and whether the law could be applied using the principle *nullum crimen sine lege*.¹⁵ To this day the question of legitimacy is still being discussed at an academic

¹⁴ The Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis (1945), Charter of the International Military Tribunal, reprinted in van den Wyngaert *International Criminal Law A Collection of International and European Instruments* 2ed (2000) 55-61

¹⁵ Sadat *The Evolution of the ICC: From The Hague to Rome and Back Again* in Sewall, Karsen (eds) *The United States and the International Criminal Court National Security and International Law* (2000) 31-35

level.¹⁶ However, the Nuremberg Judgment has been understood to affirm the idea that initiating a war as a measure of solving interstate conflict is morally, legally and politically wrong.

1.2.2 The International Military Tribunal for the Far East

In relation to the war in the Far East the idea of punishing the perpetrators for their crimes came rather late. On 26 July 1945, two weeks before the conclusion of the London Conference, the four Allied powers signed the Potsdam Declaration announcing their intention to prosecute senior Japanese officials for their war crimes. According to this Declaration, "[s]tern justice shall be meted out to all war criminals"¹⁷ in Japan.

The International Military Tribunal for the Far East was constituted in the Tokyo Charter¹⁸, which largely had the same character as the Charter of the Nuremberg Tribunal. The International Military Tribunal for the Far East started its work on 29 April 1946. An important difference between Nuremberg and Tokyo was that the Tokyo Tribunal aimed predominantly at the prosecution of perpetrators of the crime against peace.¹⁹

¹⁶ Roggeman *Die Internationalen Strafgerichtshöfe Einführung Rechtsgrundlagen Dokumente Ergänzungsband: Das Statut von Rom Mit einer Einführung* 2ed (1998) 5-6; Jeschek *Lehrbuch des Strafrechts Allgemeiner Teil* 4th (1988) 104-108

¹⁷ Röling *The Tokyo Trial and Beyond Reflections of a Peacemonger* Cassese (ed) 1-2

¹⁸ Charter of the International Military Tribunal for the Far East (1946) reprinted in van den Wyngaert *International Criminal Law A Collection of International and European Instruments* 2ed (2000) 63-67

¹⁹ Von Hebel (*supra* 9) 22

To this day the Tokyo Trials have been severely criticised: the legal categories of the crimes against peace and humanity have been described as *ex post facto* legislation on the part of the London Conference, in the sense that these crimes did not exist in international law prior to 1945.²⁰ Furthermore, the criticism was that the Tokyo Trials were substantially unfair as an American answer for the treacherous attack on Pearl Harbour.²¹

1.3 The Period of the Cold War

After the Second World War the United Nations considered the establishment of a permanent international criminal court in connection with the formulation and adoption of the Genocide Convention²² in 1946. Although the Genocide Convention was adopted relatively quickly, efforts to create the International Criminal Tribunal, which was stipulated in Article VI of the Genocide Convention, failed. Indeed, the reference to an international penal tribunal now found in Article VI of the Genocide Convention had been deleted from earlier drafts and was restored only after extensive debate.²³ The establishment of an international criminal court was rejected due to the fact that it would violate national sovereignty. Besides which, it was criticised because the functioning of such an institution could not be effective as long as no international criminal law and international enforcement mechanisms existed.

As a resolution accompanying the adoption of the Genocide Convention, the United Nations General Assembly invited the newly

²⁰ Röling (*supra* 17) 5

²¹ Sadat (*supra* 15) 34; Roggemann (*supra* 16) 6

²² Convention on the Prevention and Suppression of the Crime of Genocide (1948) reprinted in van den Wyngaert *International Criminal Law A Collection of International and European Instruments* 2ed (2000) 411-412

established International Law Commission to examine the possibility of the establishment of an international judicial institution, which would be able to prosecute and punish "war criminals". The commission was deeply divided on this subject.²⁴ But a majority concluded that the establishment of an international criminal court is desirable and possible. By resolution 489 (V) of 12 December 1950, the Sixth Committee appointed a special committee of experts to prepare drafts for an International Criminal Court.²⁵ In 1954 the International Law Commission adopted the Draft Code of Offences against the Peace and Security of Mankind.²⁶ From 1954 to 1989 the discussion on the establishment of an International Criminal Court almost came to a halt because of foreign policy difficulties in the era of the Cold War.

1.4 The Time from 1989 to the Foundation of the International Criminal Court

With the decline of the Soviet Union in 1991 and the end of the Cold War, discussions on an International Criminal Court resumed. In 1991 the International Law Commission adopted the draft Code of Crimes against the Peace and Security of Mankind²⁷. At the request of Trinidad and Tobago in 1989 the question of establishing an International Criminal Court was placed back on the political agenda of the United Nations. The International Law Commission was asked

²³ Sadat (*supra* 15) 36

²⁴ Sadat (*supra* 15) 36; Von Hebel (*supra* 9) 24

²⁵ Von Hebel (*supra* 9) 25

²⁶ Draft Code of Offences against the Peace and Security of Mankind (excrepts) (1954) reprinted in van den Wyngaert *International Criminal Law A Collection of International and European Instruments* 2ed (2000) 205-206

by the Assembly of the United Nations to discuss the establishment of an International Criminal Court at its next session.²⁸

1.4.1 The International Criminal Tribunal for Yugoslavia

During the course of 1991 the armed conflict between the republics of Yugoslavia started. Because of the atrocities committed during the first year of the conflict, the Security Council adopted Resolution 780 on 6 October 1992, which stipulated the establishment of a Commission of Experts to investigate and gather evidence of violations of the Geneva Conventions and international humanitarian law. On 22 February 1993 the Security Council adopted Resolution 808, which stipulated the establishment of an International Criminal Tribunal.

The Tribunal, being established by the Security Council acting under Chapter VII, was therefore a subsidiary organ of the Security Council. It officially came into legal existence on 25 May 1993 in The Hague and was subsequently named the International Criminal Tribunal for the Former Yugoslavia.²⁹

Article 1 of the Statute of the International Tribunal for the Former Yugoslavia³⁰ stipulated that the Tribunal "shall have the power to prosecute persons responsible for serious violations of international

²⁷ Draft Code of Crimes against the Peace and Security of Mankind (1991) reprinted in van den Wyngaert *International Criminal Law A Collection of International and European Instruments* 2ed (2000) 207-214

²⁸ Von Hebel (*supra* 9) 27

²⁹ Bassiouni "From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court" 1997 *HHRJ* 11-43

humanitarian law". An obvious distinction from other ad hoc tribunals, such as the International Military Tribunal at Nuremberg or the International Military Tribunal for the Far East, is that the prosecution was not limited to some offenders, but to all those who violated international humanitarian law, irrespective of which side they took in this conflict.³¹

1.4.2 The International Criminal Tribunal for Rwanda

In July 1994 the Security Council passed Resolution 935 establishing a commission of experts to investigate violations of international humanitarian law committed during the Rwanda civil war. On 8 November 1994 the Security Council created an ad hoc Tribunal under Chapter VII.

More than half a million civilians had already lost their lives during the civil war in Rwanda.³² The Statute of the International Criminal Tribunal for Rwanda³³ was largely based on the Statute of the International Criminal Tribunal for the Former Yugoslavia. However, in contrast to the Statute of the International Criminal Tribunal for the Former Yugoslavia, the Statute for the Rwanda Tribunal was predicated on the assumption that the conflict was not an international armed conflict but a civil war. The offences against the Geneva Conventions and violations of the laws or customs of war,

³⁰ Statute of the International Tribunal for the Former Yugoslavia (1993) reprinted van den Wyngaert *International Criminal Law A Collection of International and European Instruments* 2ed (2000) 73-81

³¹ Bassiouni (*supra* 29) 43

³² Von Hebel (*supra* 9) 31

³³ The Statute of the International Criminal Tribunal for Rwanda (1994) reprinted in van den Wyngaert *International Criminal Law A Collection of International and European Instruments* 2ed (2000) 129-137

listed in Article 2 and 3 of the Yugoslavia Statute, lacking in the Statute for Rwanda, indicate that the Security Council considered the armed conflict in Yugoslavia as of international scope.³⁴

Article 7 of the Statute of the International Criminal Tribunal for Rwanda stipulated temporary jurisdiction beginning on the 1 January 1994 and ending on 31 December 1994. That means that only crimes committed during that period fall under the jurisdiction of the Tribunal.

1.4.3 The Establishment of an International Criminal Court

After the establishment of the International Criminal Tribunal for the Former Yugoslavia, the International Law Commission met in 1993 to discuss the question of an International Criminal Court again. Obviously the creation of the International Criminal Tribunal for the Former Yugoslavia had an influence on the progress of establishing an International Criminal Court. The International Law Commission managed to recommend a draft Statute of the International Criminal Court to the General Assembly in 1994. The Draft Statute was the basis upon which the General Assembly in 1994 established the Ad Hoc Committee on the Establishment of an International Criminal Court, and then in 1995 the Preparatory Committee for the Establishment of an International Criminal Court.³⁵ The Preparatory Committee met several times from 1995 to 1997 to fulfil their mandate of reviewing major substantive and administrative issues arising out of the draft Statute for an International Criminal Tribunal.³⁶

³⁴ Meron "International Criminalization of Internal Atrocities" 1995 *AJIL* 555-556

³⁵ Bassiouni (*supra* 29) 57

Despite the difficulty of the work of the Preparatory Committee, on 15 June 1998 the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court was opened in Rome by the Secretary-General of the United Nations, Kofi Annan. Over five weeks the participants of the Conference discussed the issues of the establishment of an International Criminal Court. The most politically sensitive aspects during the Conference were the definition of the crimes, the jurisdictional system and the principle of complementarity.³⁷

On 18 July 1998 the Statute of the International Criminal Court was adopted in Rome by a non-recorded vote with 120 in favour, seven against and 21 abstentions. Thereafter it was opened for signature. In terms of Article 126 the Rome Statute will "enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession". To date 139 parties have signed and 32 parties have ratified the Statute of Rome.³⁸

³⁶ Von Hebel (*supra* 9) 33

³⁷ Roggemann (*supra* 16) 11

³⁸ Ratification Status as of 21 May 2001, www.un.org/law/icc/statute/status.html

2 Jurisdiction in the field of International Criminal Law

Jurisdiction can be defined very generally as the power of a state³⁹ to affect the rights of persons, whether by legislation, executive decree or by judgment of a court.⁴⁰ Accordingly, jurisdiction is an aspect or a consequence of sovereignty.⁴¹ In the simplest terms, sovereignty is the right of a state to do within its own territory anything that it wishes to do.⁴²

There are three different areas matching the three branches of government in which jurisdiction can be categorised: legislative jurisdiction, executive jurisdiction and judicial jurisdiction. With respect to jurisdiction in criminal law matters, legislative and judicial jurisdiction are the main areas of consideration.

Jurisdiction in the field of international criminal law firstly refers to the question of whether or not an act which was committed abroad, or by a foreigner, or which has resulted in an injury to a foreign interest, is subject to the domestic criminal power of the prosecuting state.⁴³ So far it can be said that the question of jurisdiction in international criminal law appears if an offence with a foreign element is concerned. Secondly, it refers to the question of whether and under which circumstances 'international criminal tribunals and courts' can exercise their jurisdiction (without violating the sovereignty of states).

³⁹ As well as the power of a legitimized international institution

⁴⁰ Cameron *The Protective Principle of International Criminal Jurisdiction* (1994) 1-3

⁴¹ Cameron (*supra* 40) 3

⁴² M'Wendwa *Sovereignty and International Criminal Law Volume I Crimes and Punishment* in Bassiouni, Nanda (eds) *A Treatise on International Criminal Law* (1973) 94-94

⁴³ Jeschek (*supra* 16) 145

As to the first question, a distinction must be drawn between common law states and civil law states. The common law states have acknowledged only territorial jurisdiction in contrast to the civil law states, which have various forms of extra-territorial jurisdiction.⁴⁴

2.1 Jurisdiction over offences with a foreign element

As a consequence of the different legal systems⁴⁵, states have developed and apply different types of rules regulating the spatial scope of their respective criminal laws. However, these rules have a large number of underlying similarities and therefore can be categorised into a number of different principles. These principles are called *Principles of International Criminal Law*.⁴⁶

As far as criminal jurisdiction is concerned, there are basically four variables: the place where the offence was committed, the character of the offender, the character of the victim, and the character of the offence. These variables can, however, be expressed in more than four principles, and the authorities differ slightly as to how many different principles there are and the exact scope of each of them. According to the literature⁴⁷, the jurisdictional claims of states can now be divided into eight general principles.

⁴⁴ Gilbert *Crimes sans Frontiers: Jurisdictional Problems in English Law* in Dugart, Wyngaert (eds) *International Criminal Law and Procedure* (1996) 101-102

⁴⁵ The Common Law System and the Civil Law System

⁴⁶ Jeschek (*supra*) 141

⁴⁷ Eser *Vorbemerkung zu den Paragraphen 3-7 (sog. Internationales Strafrecht)* in Schönke et al *Strafgesetzbuch Kommentar* 25th (1997) 61-64

2.1.1 The Principle of Territoriality

The principle of territoriality is a consequence of the sovereignty of a state over its territory. A state⁴⁸ can apply the national law on all acts committed within its boundaries (jurisdiction *ratione loci*) irrespective of the nationality of the offender or victim (jurisdiction *ratione personae*), the offence (jurisdiction *ratione materiae*), or time of the offence (jurisdiction *ratione temporis*).

The principle of territoriality is the basis of the jurisdiction in criminal law (*Basis des Strafanwendungsrechts*) and expresses the exclusive sovereignty of the state within its own boundaries.⁴⁹ Despite the fact that the principle of territoriality seems to be very simple to apply, unanswered questions arise where certain elements of crimes are committed beyond the borders, or where the result of a crime is sustained in more than one country. So far the principle of territorial jurisdiction shows glaring weaknesses and needs to be complemented by other principles.⁵⁰ However, according to justice and to the principle of judicial economy (*Grundsatz der Prozeßökonomie*), the principle of territoriality is the most efficient because the gathering of evidence at the scene of the crime is expected to produce the best results.

⁴⁸ State in this sense means: territory, nationals and governmental power

⁴⁹ Oehler *Internationales Strafrecht* (1973) 151-152

⁵⁰ Bemmelen *Reflections and Observations on International Criminal Law* in Bassiouni, Nanda (eds) *A Treatise on International Criminal Law Volume I Crimes and Punishment* (1973) 77-80

2.1.2 The Flag Principle

Closely related to the principle of territoriality is the flag principle. This means that all crimes committed on vessels or on aircrafts fall under the competence of the state under which flag the vessel is travelling or in which state the aircraft is legally registered. This is irrespective of whether the offender is a non-national or whether the vessel or aircraft was located in another sovereign territory at the time of the crime.⁵¹

2.1.3 The Active Personality Principle

Only nationals or domiciled people fall under the competence of the active personality principle. Therefore, the most important issue of the active personality principle is the nationality of the offender. According to the active personality principle, national criminal law has to be applied if a national is the offender, irrespective of in which state the result of a crime is sustained, or where different elements of the crime have been committed.⁵²

Almost all European states which apply the civil law system exercise the active personality principle jurisdiction, partly or mainly because there are legal or even constitutional barriers⁵³ to extraditing their own nationals.⁵⁴ But even states which just use the principle of

⁵¹ Jeschek (*supra* 16) 150

⁵² Eser (*supra* 47) 64

⁵³ For example Article 16 of the German Constitution, which was changed on the 27 October 2000 to make the ratification of the Statute of Rome possible. Until now the surrender of a German national to a foreign court was prohibited under constitutional law.

⁵⁴ Cameron (*supra* 40) 67

territoriality, such as the United Kingdom, tend to apply the active personality principle to people who spend a long time abroad, such as diplomats or military personnel, because they enjoy immunity in the *locus delictus* and therefore cannot be punished.⁵⁵

2.1.4 The Protective Principle

All states reserve the right, directly or indirectly, to prosecute persons whose crimes damage the vital interests of a state. So far this extraterritorial principle is concerned with offences committed beyond the boundaries of the state, as otherwise the territorial principle would apply and, as its name indicates, its *ratio* is bound up with the nature of the interest protected.⁵⁶ The principle is justified because the intention of the offence against a state sets up a relationship with the criminal law system of that state whose interests have been affected. Therefore, the principle can be characterised in simple terms as a 'right of self defence' of the state concerned.

2.1.5 The Passive Personality Principle

The passive personality principle can be seen as a part or aspect of the protective principle. Where to dispose the passive personality principle depends on the range of the definition of the valid interests of a state (*inländische Rechtsgüter*).⁵⁷ It purports to give extra-territorial jurisdiction to a state whenever one of its nationals, outside

⁵⁵ Cameron (*supra* 40) 67

⁵⁶ Feller *Jurisdiction over Offenses with a Foreign Element* in Bassiouni, Nanda (eds) *A Treatise on International Criminal Law Volume II Jurisdiction and Cooperation* (1973) 5-26

⁵⁷ Jeschek (*supra* 16) 151

the territory of that state, is a victim of the offence. Thus, nationals are entitled to enjoy the active protection of their states wherever they may be and in the face of offences likely to injure them.

2.1.6 The Principle of Universality

The principle of universality means that the municipal criminal law can also be applied to crimes committed in a foreign state by a foreigner or a national, even though the protective, active or passive personality principle would not be applicable.

The first widely accepted crime of universal jurisdiction was piracy. For over three centuries states have exercised their jurisdiction over piratical acts on the high seas, even when neither the pirates nor their victims were nationals of the prosecuting state. Piracy's nature and consequences explain why it was subject to universal jurisdiction. Piracy often consists of heinous acts of violence or depredation committed indiscriminately against the vessels and nationals of numerous states.

In the aftermath of the atrocities of the Second World War the international community extended universal jurisdiction to war crimes and crimes against humanity. During the Second World War the greater number of war criminals were tried primarily by the national courts of the Allies rather than by the various international tribunals. They justified their jurisdiction alongside the protective and the passive personality principles, with the principles of universality.⁵⁸

⁵⁸ Meron (*supra* 34) 568

However, this far-reaching jurisdiction must be limited and can only be claimed if a criminal threat to undermine the very foundations of the enlightened international community as a whole exists.⁵⁹ It is now widely accepted, but still the subject of much discussion and debate, that breaches (irrespective if grave or non-grave) of the four Geneva Conventions on the Law of Armed Conflict of 1949 and crimes against humanity as core crimes of international criminal law, granting universal jurisdiction.⁶⁰ A state can have jurisdiction over crimes codified in these conventions even though they were committed outside its boundaries and the offender has no connection with the state claiming its jurisdiction. Therefore, the principle is only based on customary international law and conventions and represents an important issue considering the prosecution and punishment of persons for war crimes and crimes against humanity.⁶¹ This is because the international community agrees that the core crimes should not go unpunished.

Since the Rome Statute of the International Criminal Court provides for the principle of complementarity, the primary responsibility of prosecution of core crimes lies in the hands of the national criminal law systems. In the case (not yet decided) of the International Court of Justice, *Congo versus Belgium*, the Declaration of Judge Van den Wyngaert according to the principle of universality was that, "[i]n the absence of supranational enforcement mechanisms, national criminal prosecution before domestic courts is the only means to enforce international criminal law. States have not only a moral but also a legal obligation under international law to ensure that they are able to

⁵⁹ Jeschek (*supra* 16) 152

⁶⁰ Meron (*supra* 34) 569

⁶¹ Oehler (*supra* 49) 501

prosecute international core crimes domestically."⁶² This means that states not only have the right to apply their jurisdiction over core crimes, but even more the duty to do so.

2.1.7 The Representation Principle

The idea of this form of extraterritorial jurisdiction is that the state asserts competence in stepping "into the shoes" with a more pressing claim to prosecute. This may be as a result of a request from this latter state, possibly under the European Convention on the Transfer of Proceedings in Criminal Matters⁶³ or as a result of a refusal to extradite. In the second instance, the state will take over the prosecution of the fugitive, either voluntarily or by virtue of an obligation in some multilateral, anti-terrorist convention.⁶⁴ The deeper sense of the principle is that an offender cannot remain unpunished because of a failing extradition, irrespective of its reasons. Modern nations are interested in the punishment of offenders who were caught in a state, but not extradited to the state that normally has jurisdiction over them.

Drawing a line between the principle of universality and the principle of representation can sometimes be very complicated. Even in Articles 9 and 10 of the Draft Convention on Jurisdiction with Respect

⁶² Congo v. Belgium "Order Provisional Measure - 8 December 2000" Declaration of Judge van den Wyngaert, www.icj-cij.org/icjwww/widocket/icobe/icobeorders/icob_order_declaration-wyngaert_20001208.htm

⁶³ European Convention on the Transfer of Proceedings in Criminal Matters (1972) reprinted in van den Wyngaert *International Criminal Law A Collection of International and European Instruments* 2ed (2000) 1019-1030

⁶⁴ Gilbert (*supra* 44) 109

to Crime⁶⁵, the distinction between these two principles is not clearly emphasised. However, the distinctions are that the principle of representation is not founded on treaties or conventions and always retreats (steps) behind the extradition (*Prinzip der Subsidiarität*). Furthermore, the principle of universality is independent of the question of extradition and is only based on treaties and conventions.⁶⁶

2.2 Jurisdiction of International Criminal Courts

Among the post-Second World War humanitarian law instruments, only the Genocide Convention⁶⁷ in Article VI and the Apartheid Convention⁶⁸ in Article V refer directly to an international criminal tribunal. These instruments are the only international law sources providing concurrent jurisdiction between a state and an international body. In the absence of a permanent international criminal court, jurisdiction over war crimes or other international crimes has been exercised either through domestic prosecution or international criminal (military) tribunals.

In question are the features of the jurisdiction of the international military and criminal tribunals. Since there is a similarity between the Nuremberg and the Tokyo Trials, the question of the jurisdiction of the

⁶⁵ Draft Convention on Jurisdiction with Respect to Crime (1935) reprinted in Mueller, Wise (eds) *International Criminal Law* (1965) 41-46

⁶⁶ Oehler (*supra* 49) 501

⁶⁷ Convention on the Prevention and Suppression of the Crime of Genocide (1948) reprinted in van den Wyngaert *International Criminal Law A Collection of International and European Instruments* 2ed (2000) 411-412

⁶⁸ International Convention on the Supression and Punishment of the Crime of Apartheid (1973) reprinted in van den Wyngaert *International Criminal Law A Collection of International and European Instruments* 2ed (2000) 415-419

International Military Tribunal for the Far East will not be discussed further.

2.2.1 The Jurisdiction of the International Military Tribunal at Nuremberg

It was mainly the domestic courts of the Allies that carried out the prosecution and punishment of the German perpetrators. The exercise of jurisdiction for those various trials after the Second World War was based on the Declaration of Moscow Conference on 1 November 1943. It stipulated that:

"[T]hose German officers and men and members of the Nazi party who have been responsible for, or have taken a consenting part in the above atrocities, massacres and executions, will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free government which will be created therein [...] without prejudice to the case of the major criminals, whose offenses have no particular geographical localization and who will be punished by the joint decision of the Governments of the Allies."

The first part of the declaration constitutes the jurisdictional basis of the Allies' domestic trials. The principle of territoriality doubtless justifies the jurisdiction of national courts where the geographical location of the crime committed is clear. Therefore, a further jurisdictional basis, as can be seen in the Moscow declaration, was actually redundant. Hence, it can be said that the first part of the declaration was to make sure in the first place that the perpetrators

had to be extradited to those states where they committed their crimes.

The second part of the declaration stipulated that the war crimes that did not fit within the traditional principles⁶⁹ of jurisdiction had to be punished too. The intention that every perpetrator had to be prosecuted was declared. How to exercise jurisdiction over war crimes where the *locus delicti* was not clear was finally decided in the London Accord⁷⁰ on 8 August, which provided through the Nuremberg Charter⁷¹ the establishment of an International Military Tribunal.

The jurisdiction of the International Military Tribunal was constituted in Article 6 of the Nuremberg Charter, stipulating that the "Tribunal [...] shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes."

During the trials, the validity of the Charter was always in question and thereby the jurisdiction of the Tribunal, because of the application of *ex post facto* laws. The Tribunal held in its judgment that it was bound to the Charter and that the jurisdictional basis of the International Military Tribunal as provided in the Charter could not be challenged.⁷² The reason for that, at least, was that the drawing up of the Charter was the exercise of the sovereign legislative power by the

⁶⁹ The principle of territoriality and the active personality principle

⁷⁰ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (1945) reprinted in Mueller, Wise (eds) *International Criminal Law* (1965) 227-238

⁷¹ Charter of the International Military Tribunal (*supra*) 55-61

⁷² Simons *The Jurisdictional Bases of the International Military Tribunal at Nuremberg* in Ginsburgs, Kudriavtsev (eds) *The Nuremberg Trail and International Law* (1990) 39-43

countries to which the German Reich unconditionally surrendered and the undoubted right of these countries to legislate for the occupied territories and therefore had been recognized by the civilized world.⁷³

The unconditional surrender signed by the representatives of the legitimate government of Germany may be interpreted as a transfer of Germany's sovereignty to the victorious powers. Since the German territory together with its population had been placed under the sovereignty of the occupying states, the whole legislative and executive power formerly exercised by the German government had been taken over without any restriction by the governments of the Allies.⁷⁴

2.2.2 The Jurisdiction of the International Criminal Tribunal for the Former Yugoslavia

As mentioned above, the International Criminal Tribunal for the Former Yugoslavia was established under Chapter VII of the United Nations Charter and therefore presents a subsidiary organ of the Security Council⁷⁵. The jurisdiction of such an organ is binding on all member states of the United Nations.⁷⁶

⁷³ Simons (*supra* 72) 43

⁷⁴ Kelsen "The Legal Status of Germany according to the Declaration of Berlin" *American Journal of International Law* 1945 518-524

⁷⁵ In distinction to the IMT which was constituted in the London Accord signed by the four Allied Powers.

⁷⁶ The question of the legality of the creation of the Tribunal by the Security Council is not really a jurisdictional issue. However it is obviously a preliminary issue that conditions all aspects of jurisdiction. The legality of the Tribunal will not further be discussed, as it is now widely accepted (cf *Prosecuter v Dusko Tadic a/k/a "Dule"* (1995) IT-94-1-AR72)

According to Articles 1 to 5, the International Criminal Tribunal for the Former Yugoslavia shall have jurisdiction over grave breaches of the Geneva Conventions, violations of the laws or customs of war, genocide and crimes against humanity. In Article 8 the jurisdictional power is geographically limited to the territory of the former Socialist Republic of Yugoslavia and temporally for crimes committed after 1 January 1991.

The Tribunal shall have concurrent jurisdiction over national courts, as Article 9 paragraph 1 provides. Recalling the principle of universality, national courts can exercise their jurisdiction over certain crimes in international law. This means a state can prosecute and punish a perpetrator in such cases whenever he is arrested in its territory.

The creation of an international tribunal raises the question of whether its jurisdiction should be exclusive or concurrent with the jurisdiction conferred on all states for crimes under universal jurisdiction. The International Criminal Tribunal for the Former Yugoslavia is vested with concurrent jurisdiction. This means that the national criminal courts can exercise their jurisdiction parallel the Tribunal. In vesting the Tribunal with concurrent jurisdiction, the Security Council did suppose that it could not handle all crimes within its jurisdiction on its own and therefore recognised concurrent jurisdiction in national courts to ensure that the Tribunal won't be overwhelmed with cases and become paralysed through pressure of work.⁷⁷

⁷⁷ Wedgwood *National Courts and the Prosecution of War Crimes* in McDonald, Swaak-Goldman (eds) *Substantive and Procedural Aspects of International Criminal Law - The Experience of International Criminal Courts Volume I Commentary* (2000) 391-401

Article 9, para. (2), however, stipulates that the Tribunal has primary jurisdiction over national courts, because it can at any stage of the procedure request the national court to defer its competence. Article 9, para. (2) therefore solves the question of which jurisdiction should prevail in the case of a conflict between a national court and the Tribunal.

The power of the Tribunal to exercise primary jurisdiction over national courts was used by the Tribunal to obtain jurisdiction over Omarska camp-guard, Dusko Tadic. A prosecution was originally brought forward in German national courts. The Tadic deferral occurred at a time when the International Criminal Tribunal had no other defendants in custody, and prevented that enterprise from becoming dispirited.⁷⁸

In the case *Prosecutor versus Tadic*⁷⁹, the defendant's argument, according to the primary jurisdiction of the Tribunal, was, that Article 9, para. (2) has no basis in international law because only the domestic criminal courts can have primary jurisdiction over nationals. The Trial Chamber's opinion was that this question refers to the legality of the establishment of the Tribunal and therefore fell beyond its competence.

The Appeal Chamber accepted the standing of Tadic to challenge the jurisdiction of the court, but rejected the arguments of the accused and favoured the primary jurisdiction of the Tribunal. The problem of

⁷⁸ Wedgwood (*supra* 77) 403

⁷⁹ *Prosecutor v Dusko Tadic A/K/A "Dule"* (1995) IT-94-1-T and *Prosecuter v Dusko Tadic a/k/a "Dule"* (1995) IT-94-1-AR72 reprinted in Klip, Sluiter (eds) *Annotated Leading Cases of the International Criminal Tribunals - The International Tribunal for the Former Yugoslavia* (1999) 14-139

the Tribunal's concurrent jurisdiction with the possibility to defer national jurisdiction is that there might be encroachment on a state's sovereignty. A violation of sovereignty in case of a Tribunal established by the Security Council of the United Nations under Chapter VII of the Charter of the United Nations can, however, be denied. The reason is that the establishment of the Tribunal was the exercise of the sovereign legislative power by the Security Council. In becoming a party to the United Nations the states also accepted the legislative powers and the jurisdiction of the Security Council. Accordingly, it can be said that, regarding decisions of the Security Council, the members of the United Nations partly lose their claim of sovereignty.

2.2.3 The Jurisdiction of the International Criminal Tribunal for Rwanda

Under Article 7 of the Rwanda Tribunal Statute the jurisdiction of the Rwanda Tribunal is limited to crimes committed in the territory of Rwanda or in neighbouring states to crimes committed by nationals of Rwanda. The restriction on the competence of the Rwanda Tribunal is the result of its limited mandate as a subsidiary organ of the Security Council.⁸⁰ Article 7 of the Rwanda Tribunal Statute also limits the temporal jurisdiction of the Tribunal to crimes committed between 1 January 1994 and 31 December 1994.

The International Criminal Tribunal for Rwanda has, like the International Tribunal for the Former Yugoslavia, concurrent jurisdiction with the national courts. However, Art 8, para. (2) stipulates that the Tribunal shall have primacy over the national

courts in the sense that it can at any stage of the procedure request the national court to defer its competence. Like Article 9, para. (2) of the Statute for the Tribunal of the Former Yugoslavia, this therefore resolves the question as to which jurisdiction should prevail if a conflict between national courts and the Tribunal should arise.

Concurrent jurisdiction and the right of primacy in the International Criminal Tribunal for Rwanda have led to anomalies arguably inconsistent with an equal standard of justice, because of the differences in punishment available in the international and national courts. The maximum possible sentence of the Rwanda Tribunal is life imprisonment. Rwandan national Courts can impose a death penalty and have done so after abbreviated trials lacking defence council.⁸¹

⁸⁰ Morris, Scharf *The International Criminal Tribunal for Rwanda* 291

⁸¹ Wedgwood (*supra* 77) 403

Chapter Two: The Jurisdiction of the International Criminal Court

The establishment of an International Criminal Court, as decided on 17 July 1998 by the Diplomatic Conference of Plenipotentiaries, is obviously a great step towards attaining justice in international law. However, recalling the fact that establishing a permanent International Criminal Court also entails possible criminal responsibility for officials of a state - even for the head of a state - and therefore presents a highly sensitive political area, the realisation of justice through an International Criminal Court must be awaited in critical anticipation. The euphoria about an International Criminal Court is understandable, but the issue of whether the Court will ever be able to fulfil its tasks efficiently raises questions of jurisdiction⁸², complementarity and the admissibility of a case. Although these three features are discrete, they are intimately related to each other according to the Rome Statute and therefore must be partly discussed together.

Articles 1 and 11 to 19 of the Rome Statute form the jurisdictional backbone of the court and present the main obstacles that have to overcome before a situation can be considered as an admissible case before the International Criminal Court.

Article 1 of the Rome Statute summarises a common set of principles on issues of the Court's jurisdiction. The first part of Article 1 of the

⁸² Jurisdiction under the Statute must be understood in its broad meaning. It includes not only the Competence of the Chambers of the Court, but also the competence of the prosecutor to initiate an investigation, whether a complaint is referred by a State or initiated by the Prosecutor.

Rome Statute stipulates that the Court can only exercise its jurisdiction over natural persons and further limits the subject-matter jurisdiction of the International Criminal Court. The Court "shall have power to exercise its jurisdiction over persons (only) for the most serious crimes of international concern". These crimes are spelled out in Article 5 and defined in Articles 6, 7 and 8. The second part of Article 1 emphasises the relationship to the national criminal jurisdiction, as it shall be complementary.

1 Ratification of the Statute

The first precondition for the exercise of the International Criminal Court's jurisdiction is that the Statute of Rome enters into force. As Article 126, para. (1) stipulates, the Statute will enter into force on the first day of the month after the sixtieth day following the date of the deposit of the sixtieth instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations. After the Statute has entered into force, it will bind states that still want to become parties pursuant to Article 126, para. (2), on the first day of the month after the sixtieth day following such a state's instrument of ratification, acceptance, approval or accession.

"Ratification", "acceptance", "approval" and "accession" in the sense of Article 126 means in each case the international act whereby a state establishes its consent to be bound by a treaty⁸³. Pursuant to Article 125 of the Rome Statute, the Statute was open for signature

⁸³ Article 2 (1) (b) of the Vienna Convention on the Law of Treaties reprinted in Brownlie (ed) *Basic Documents in International Law* (1995) 388-425

until 31 December 2000. To date 139 states have signed and 32 have already ratified the Rome Statute.⁸⁴

Although the signature of a treaty may under certain circumstances constitute a means of manifesting its acceptance⁸⁵, Article 125 of the Rome Statute specifies that this is to be only a preliminary step, necessarily to be followed by a deposit of instruments of ratification, acceptance or approval.⁸⁶ The signature obviously indicates an intention to become a state party of the Rome Statute, but does not lead to any further legal consequences, according to the Statute.

However, pursuant to Article 18 of the Vienna Convention on the Law of Treaties, a signatory state is obliged not to defeat the object and purpose of a treaty prior to its entry into force. Above all, the signature of the Statute manifests the state's intent to prepare for ratification, acceptance or approval, a step that will almost invariably require changes to its domestic legislation. Most states will need to adopt implementing legislation or to make other adjustments in their national law before ratifying. This process could take years, even after the political decision to ratify the Statute has been made. Until sixty states have ratified the Statute, the International Criminal Court will not come into legal existence and therefore cannot exercise its jurisdiction.

⁸⁴ www.un.org/law/icc/statute/status.html (Ratification Status as of 21 May 2001)

⁸⁵ The Vienna Convention of Law Treaties (1969) Art. 11-12

⁸⁶ Schabas "Follow up to Rome: Preparing for Entry into Force of the International Criminal Court Statute" *HRLJ* 1999 157-157

2 Jurisdiction *ratione temporis*

The jurisdiction of the Court is temporally limited. Article 11, para. (2) of the Rome Statute stipulates that "the Court has jurisdiction only with respect to crimes committed after the entry into force of the statute". This means that the Court does not have any retroactive jurisdiction. The Court's jurisdiction cannot be exercised if the crime was committed before the Statute entered into force. Although it is recognised in international law⁸⁷, Article 11 prohibits the retrospective assumption of jurisdiction by the Court over conduct that was criminal at the time that it was committed.

The jurisdiction *ratione temporis* must be distinguished from the principle *nullum crimen sine lege*, because it just limits the jurisdiction of the Court temporally. The crimes the Statute spells out in its Article 5 already existed before the Rome Statute was accepted. So far there could be a prosecution which would not violate the principle *nullum crimen sine lege*, but still be prevented from being prosecuted before the Court under Article 11 of the Rome Statute.⁸⁸ Article 11, para. (2) stipulates, that "if a state becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that state". However, the state can accept by declaration under Article 12, para. (3) ad hoc the Court's jurisdiction over crimes committed before the Statute enters into force in respect to that state.

⁸⁷ Schröder *Verantwortlichkeit, Völkerstrafrecht, Streitbeilegung und Sanktionen* in Vitzthum (ed) *Völkerrecht* (2001) 545-572

⁸⁸ Williams *Article 11 Jurisdiction *ratione temporis** in Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* (1999) 323-324

The temporal limitation of the Court's jurisdiction was necessary to gain wide support among states.

3 The Exercise of the International Criminal Court's jurisdiction

Article 12 of the Rome Statute names the preconditions under which the Court may exercise its jurisdiction. As it represents a compromise between the different views of the states during the establishment of the International Criminal Court and as it was one of the most controversial issues of the Rome Conference, its structure is complicated and far from being perfect.⁸⁹

All the various proposals according to the jurisdictional issue which were brought up over the years establishing the International Criminal Court were put before the Committee of the Whole during the Rome Conference.

According to the structure of the Court's jurisdiction, there were four proposals of importance which more or less formed the compromise in Article 12.⁹⁰

The proposal submitted by Germany provided that the Court's jurisdiction could be exercised over any suspect regardless of whether the territorial state, custodial state or any other state concerned was a party to the Statute. The proposal was predicated on the assumption that there existed universal jurisdiction under international law for the crimes within the jurisdiction of the Court, and

⁸⁹ Williams *Article 12 Preconditions to the Exercise of Jurisdiction* in Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* (1999) 329-341

⁹⁰ Williams (*supra* 89) 333

concluded that the Court should be in the same position to exercise jurisdiction as states themselves.⁹¹

The Korean proposal stipulated that, by becoming a party, a state thereby accepts the jurisdiction of the court. The jurisdictional *nexus* was that any one or more of four state parties involved have consented to the Court exercising jurisdiction over a case: either the territorial state, the state of nationality of the accused and the victim or the custodial state.⁹² This proposal attracted a great deal of interest, even from those who would have preferred the German proposal for universal jurisdiction.⁹³

The United States considered as fundamental that, if the Security Council does not trigger the Court's jurisdiction, the consent of the territorial state and of the state where the accused is a national of must be given.⁹⁴

The state 'opt-in' proposal required an actual second consent other than being a party to the Statute. This means that the Court is allowed to exercise its jurisdiction if either the custodial state, the territorial state, the state that had requested extradition of the person from the custodial state, (unless the request was rejected), the state of the nationality of the accused or the state of the nationality of the victim consented to the Court's jurisdiction.⁹⁵

⁹¹ Proposal of Germany U.N. Doc. A/AC.249/1998DP.2 (1998)

⁹² Proposal of the Republic of Korea U.N. Doc. A/CONF.183/C.1/L.6 (1998)

⁹³ Williams(*supra* 89) 335

⁹⁴ Proposal of the United States of America U.N. Doc. A/CONF.183/C.1/L.70 (1998)

⁹⁵ Williams (*supra* 89) 337

The structure of Article 12 partly shows elements of the different proposals.

Article 12, para. (1) forms a "basic provision" of the Court's jurisdiction, as it stipulates the acceptance of jurisdiction by becoming a party to the Statute⁹⁶. According to Article 12, para. (2), (a) and (b), the Court has jurisdiction over all crimes, spelled out in Article 5, if one of them was committed on the territory of a state party or the accused is a national of a state party. Furthermore, a state which is not a party to the Statute can accept the exercise of the court's jurisdiction by declaration. According to the first two alternatives, the Court has automatic or inherent jurisdiction.⁹⁷ According to the latter alternative, the jurisdiction of the Court arises from the ad hoc declaration of the state.

Article 12, paragraph (2) refers to Article 13, para. (a) and (c) and must be read together. Accordingly, the Court can exercise its jurisdiction with respect to a crime referred to in Article 5, if a situation is referred to the Prosecutor by a state party or the Prosecutor has initiated an investigation on his own in accordance with Article 15. However, in those cases indispensable preconditions for the Court's jurisdiction are that the jurisdiction was accepted by the state on which territory the crime was committed or accepted by the state of which the accused is a national.

Article 12, para. (2) refers to Article 13, para. (a) and (c) and not to (b). As a consequence the acceptance of the Court's jurisdiction by a state is only necessary if a state party refers the situation to the Prosecutor or the Prosecutor has initiated an investigation *proprio*

⁹⁶ See: Chapter Two, 1

motu. The question as to whether the Court may exercise its jurisdiction should be answered by checking firstly how the situation was referred to the Prosecutor (provisions of Article 13) and secondly if the state involved has accepted the jurisdiction of the Court (provisions of Article 12). This is because, if a situation was referred to the prosecutor pursuant to Article 13, para. (b) by the Security Council, the acceptance of a state is not necessary.⁹⁸

3.1 Referral by the Security Council

Article 13, para. (b) stipulates that, if the Security Council has determined pursuant to Chapter VII of the Charter of the United Nations that there is a threat to the peace, breach of the peace or an act of aggression, it may refer such a situation to the Prosecutor. This provision, in effect, acknowledges the primacy afforded to the Security Council in maintaining international peace and security. The Security Council has always had a wide range of powers under the Charter to determine and respond to threats to international peace.⁹⁹ According to Article 13, para. (b), the referral must be under Chapter VII and is therefore subject to the exercise of the veto power of the permanent members of the Security Council¹⁰⁰. It is important to note that, as already mentioned, if the Security Council has referred a situation to the Prosecutor, the Court may exercise its jurisdiction without the acceptance of a state. In case of a referral by the Security

⁹⁷ Williams (*supra* 89) 339

⁹⁸ Williams *Article 13 Exercise of Jurisdiction* in Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* (1999) 343-350

⁹⁹ McCormack, Robertson "Jurisdictional Aspects of the Rome Statute for the New International Criminal Court" *MULR* 1999 635-640

¹⁰⁰ McGoldrick "The permanent International Court: an end to the culture of impunity?" *CLR* 1999 627-642

Council, Article 12 is not a precondition for the International Criminal Court to exercise its jurisdiction.

If a state on whose territory a crime within the Court's jurisdiction was committed by one of its nationals is not a party to the Statute, the International Criminal Court is normally unable to act. The only way for the Court to apply its jurisdiction is for the referral to initiate an investigation to come from the Security Council of the United Nations. Pursuant to Article 13, para. (b), the acceptance of the state in question is not required in such a situation. Article 13, para. (b) is the strongest means of the Statute to enable the International Criminal Court to apply its jurisdiction.

However, in contrast to the two ad hoc Tribunals, which have the possibility to defer national jurisdiction, the International Criminal Court is bound to the principle of complementarity, even if the referral comes from the Security Council. An interpretation of Article 18 and 17 may lead to the conclusion that the principle of complementarity is not to be applied if the referral to investigate or prosecute is initiated by the Security Council under Chapter VII of the Charter of the United Nations pursuant to Article 13, para. (b). However, the principle of complementarity is also located in the Preamble and Article 1 and is therefore binding on all acts of the Court.

An exception to the principle of complementarity in case of a referral by the Security Council is located in Article 16 of the Statute. Pursuant to that provision, the investigation and prosecution of a state which has jurisdiction can be deferred for a period of twelve months if the deferral is included in the resolution adopted under Chapter VII of the Charter of the United Nations. The deferral can be renewed for

another twelve months under a new resolution of the Security Council.

3.2 Referral by a State Party

Article 13, para. (a) stipulates that the Court may exercise its jurisdiction if a state party refers the situation to the Prosecutor. Therefore, only state parties can trigger the jurisdiction of the Court with respect to the crimes named in Article 5. Non-state parties can not refer ad hoc a situation to the Prosecutor. This right belongs only to state parties. Every state that is a party to the Statute can without restriction refer a situation to the Prosecutor, irrespective whether it is involved in the situation or not.

One will have to wait to see to what extent state parties will use their right to refer a situation to the Court. As the experience of human rights treaties has demonstrated, mechanisms which provide for state-based complaint procedures have been greatly under-utilised, because states are hesitant to initiate proceedings against other states or their nationals due to the political and diplomatic ramifications of doing so.¹⁰¹ There is little indication that the Rome Statute's provision for state-based complaints will experience greater popularity. It seems much more likely that most of the Court's work will come through referrals by the Security Council rather than by a state party.

3.3 Investigations initiated by the Prosecutor

According to Article 13, para. (c), the Prosecutor can initiate an investigation in accordance with Article 15. The *proprio motu* power is essential to the effective functioning and independence of the

¹⁰¹ McCormack, Robertson (*supra* 99) 642

Court.¹⁰² Therefore, the prosecutor is empowered under the Statute to receive information on potential crimes from a variety of sources, including state organs of the United Nations, intergovernmental and non-governmental organisations and other reliable sources.¹⁰³ The concept of an independent prosecutor was viewed critically by several states. Such delegations expressed concern about the potential for abuse of the prosecutor's power and the instigation of politically motivated complaints. These concerns resulted in a number of provisions being incorporated into the Statute that should minimise the possibility of a misuse of Article 13, para. (c). According to Article 15, para. (3), the Prosecutor must obtain the authorisation of the Pre-Trial Chamber before proceeding with an investigation. The Pre-Trial Chamber is obliged to determine that there is a reasonable basis to proceed and that the case falls within the jurisdiction of the Court.¹⁰⁴ The potential for the Prosecutor to act independently with the authorisation of the Pre-Trial Chamber will help assuage concerns about the inherently political considerations of the Security Council as well as of individual states.¹⁰⁵

If the jurisdiction is triggered either by a referral of a party state or by the prosecutor, the Court may only exercise its jurisdiction in contrast to a referral by the Security Council under the preconditions of Article 12.

¹⁰² Williams (*supra* 98) 350

¹⁰³ See: Art. 15 (2) Statute of Rome

¹⁰⁴ See: Art. 15 (4) Statute of Rome

¹⁰⁵ McCromack, Robertson (*supra* 99) 643

3.2.1 The Acceptance of the Territorial State

Article 12, para. (2) (a) stipulates that in case of a referral by a party state or by the Prosecutor, the state of the territory on which the conduct in question occurred must have accepted the jurisdiction of the Court. Article 12, para. (2) (a) is closely related to the principle of territorial jurisdiction. The territorial jurisdiction is a manifestation of state sovereignty.¹⁰⁶ A state has plenary jurisdiction over persons, property and conduct occurring in its territory, subject only to the obligations or limitations imposed by international law. This is the universally accepted working rule in international criminal law and can be found in bilateral extradition treaties and multilateral conventions.¹⁰⁷ In becoming a party to the Statute, a state delegates part of its jurisdiction to the Court. If a crime within the jurisdiction of the International Criminal Court occurs on the territory of a state party, the Court can under certain preconditions (Article 17) exercise its jurisdiction 'in the name' of the territorial state.

3.2.2 The Acceptance of the Nationality of the Accused

Article 12, para. (2) (b) stipulates that the Court may exercise its jurisdiction if the state of which the accused is a national has accepted the jurisdiction of the Court. This provision is therefore related to the active personality principle. According to the article, the acceptance of a state party is only necessary if the situation was referred to the Prosecutor through a state party or the Prosecutor initiated an investigation on his own motion. Article 12, para. (2) (b)

¹⁰⁶ See: Chapter One, 2.1.1

¹⁰⁷ Williams (*supra* 89) 340

contains the active personality principle. The active personality principle justifies extraterritorial jurisdiction and is mainly applied by the civil law countries.¹⁰⁸ As under the acceptance of the territorial state, the state of nationality transfers part of its ability to exercise its jurisdiction over its nationals to the International Criminal Court. The delegation of the jurisdiction becomes legal with the ratification of the Statute and thereby affects the national legislative, executive and judicial branches.

3.2.3 Acceptance by a Non-Party State

Article 12, para. (3) provides the option for states to declare their acceptance of the Court's jurisdiction with respect to the crime in question. Such a state is then obligated to cooperate with the Court in accordance with Part Nine of the Rome Statute.

The question is whether Article 12, para. (3) is in compliance with the law of treaties in giving a retroactive application of jurisdiction.¹⁰⁹ Article 11 is contradictory to Article 12, para. (3). As has been mentioned, Article 11 prohibits the retrospective assumption of jurisdiction by the Court over conduct that was criminal at the time that it was committed. In contrast, Article 12, para. (3) allows the court, in case of an acceptance by declaration, to exercise its jurisdiction over conduct, although the jurisdictional power of the Court over that crime did not exist at the time it was committed. Article 12, para. (3) could therefore violate Article 28 of the Vienna Convention on the Law of Treaties, which stipulates that treaties are not given retroactive application "[t]o any act or fact which took place

¹⁰⁸ See: Chapter One, 2.1.3

¹⁰⁹ Williams (*supra* 89) 341

or any situation which ceased to exist before the date of the entry into the force of the treaty with respect to that party".

However, the acceptance of the Court's jurisdiction according to Article 12, para. (3) will always be declared voluntarily by a state and regardless of the Statute as a treaty. Accordingly, the Vienna Convention on the Law of Treaties cannot be applied to a declaration according to Article 12, paragraph (3).

3.2.4 Universal Jurisdiction

Article 12 requires either the acceptance of the state where the crime was committed or the acceptance of the state of which the accused is a national. Recalling the principle of universal jurisdiction, it has been established in customary and conventional international law that certain crimes are against the universal interest, offend against universal public policy and are universally condemned. Moreover, the tendency according to universal jurisdiction seems to be that states not only have the right to prosecute the crimes concerned but more than that are obliged by international law to do so.¹¹⁰

All the crimes spelled out under Article 5 are crimes which trigger the universal jurisdiction. This means that if a crime according to Article 5 was committed, every state can apply its jurisdiction irrespective of an acceptance of the state where the crime was committed or of which the accused is a national.

The question arises as to whether a single state is empowered through the principle of universality to prosecute such crimes and can

therefore apply its jurisdiction; must the International Criminal Court established by the international community not then have the right to apply its jurisdiction through the principle of universality.

It is nothing new in the history of international law for a group of states to set up a tribunal to prosecute perpetrators, justified by universal jurisdiction. This happened when the United States agreed with France, Great Britain, and the Soviet Union, but not with Germany, to establish the International Military Tribunal at Nuremberg.¹¹¹

However, Article 12 denies that the principle of universality is applicable to the International Criminal Court in requiring the different acceptances of the Court's jurisdiction by the states. The requirement of the consent of state parties would be unnecessary if the principle of universality would be applicable through the International Criminal Court.

Accordingly, it might have been said that universal jurisdiction (the principle of universality) is a legal figure which strongly depends on political dynamics. After the Second World War universal jurisdiction was widely accepted by the victorious Allies to prosecute the German Nazis and could be delegated to a collective international court based on a treaty. However, during the establishment of a permanent international criminal court, the reach of universal jurisdiction was limited because of foreign policy considerations of the United States, although they were one of the leading powers in the prosecution and punishment after the Second World War.

¹¹⁰ See: Chapter One, 2.1.6

3.2.5 Jurisdiction over a National of a Non-Party State

Article 12, para. (2) stipulates that "the Court may exercise its jurisdiction if one or more of the following states (the territorial state and the state of nationality) are Parties to this Statute". Consequently, the state on the territory of which the crime in question occurred or the state of which the accused is a national must have accepted the jurisdiction of the Court.

It is obvious that there might be cases in which nationals of non-party states commit crimes, spelled out in Article 5, on a territory of a state party. Under consideration here is whether the Court can exercise its jurisdiction over nationals of the non-party state if the crime was committed on the territory of a state party. The possibility of such a scenario was the reason for the United States voting against the Rome Statute.¹¹²

The question arises as to whether the Rome Statute allows the Court to exercise its jurisdiction over a national of a non-party state and, if it does, what legal basis justifies the International Criminal Court to exercise its jurisdiction in such a case? The law of international treaties might prohibit the exercise of the Court's jurisdiction over nationals of a non-party state. If Article 12 justifies the exercise of jurisdiction over a national of a non-party state, it might infringe Article 34 of the Vienna Convention on the Law of Treaties, which stipulates that "a treaty does not create either obligations or rights for a third state without its consent". If the Court would be empowered through

¹¹¹ See: Chapter One, 1.2.1 and 2.2.1

¹¹² Scharf *The ICC's Jurisdiction over Nationals of Non-Party States* in Sewall, Kaysen (eds) *The United States and the International Criminal Court* (2000) 213-213

the Statute to exercise its jurisdiction in such cases, the Rome Statute could have the same effect on a non-party state as it has on a party state. However, the question is whether the exercise of jurisdiction means "creating obligations" in the sense of Article 34 of the Vienna Convention on the Law of Treaties. If a state is bound to a treaty, it has certain obligations, which are constituted in the treaty. According to the Rome Statute, the parties are (for example) obligated to provide funding, extradite persons or provide evidence. These are duties mentioned in the Statute that a party state has to fulfil. In contrast to that, the exercise of jurisdiction over a person cannot be defined as an obligation of the treaty.¹¹³ This is because the "exercise of jurisdiction" is a result of the Statute of Rome not only as a multilateral treaty, but also as the constitution of the International Criminal Court. The duty to cooperate with the International Criminal Court, for instance, represents a pure obligation in the sense of the Vienna Convention on the Law of Treaties. However, the exercise of jurisdiction over a national of a non-party state does not oblige the state and consequently means not "creating obligations" in the sense of Article 34 of the Vienna Convention on the Law of Treaties. It is a misconception that the Statute binds non-party states. They are not obligated to cooperate. A violation of Article 34 of the Vienna Convention on the Law of Treaties must be denied.

Yet if Article 12, with its possibility of exercising jurisdiction over a national of non-party state, does not violate the Vienna Convention on the Law of Treaties, there must be a legal basis in international law that allows the Court to apply its jurisdiction in such a case.

¹¹³ Scharf (*supra* 112) 220

The International Criminal Court could legitimise its jurisdiction over nationals of a non-party state with the principle of universal jurisdiction.

After the Rome Statute was signed by the majority of the states, the United States of America stood for the position that the International Criminal Court cannot exercise its jurisdiction on the basis of the principle of universality over nationals of a non-party state. The main arguments of the United States were: firstly, universal jurisdiction cannot be delegated to an international court based on a collective international treaty; secondly, some of the crimes within the subject-matter jurisdiction are not recognised as crimes of universal jurisdiction; and thirdly, Article 12 rejects universal jurisdiction by requiring the consent of the state of the perpetrator's nationality or the state in whose territory the offence took place.¹¹⁴

The question as to whether universal jurisdiction can be delegated to an international court, on the basis of a collective treaty, was already broached.¹¹⁵ During the Nuremberg Trials the German defendants could not claim that the Tribunal lacked jurisdiction over crimes that any state could prosecute because each state creating or agreeing to the competence of the Tribunal had "done together what any one of them might have done singly".¹¹⁶ Indeed they could create such a tribunal with or without the consent of Germany, and the tribunal could and did prosecute German nationals even when the accused had not committed crimes within the territory of the Allies. Therefore, the transfer of part of the universal jurisdictional competence of a

¹¹⁴ Scharf (*supra* 112) 213

¹¹⁵ See: Chapter Two, 3.2.4

¹¹⁶ Paust "The Reach of ICC Jurisdiction over Non-Signatory Nationals" *VJTL* 2000 1-4

state to the International Criminal Court is possible and in compliance with international law.¹¹⁷ If single states cannot delegate universal jurisdictional competence to an international court, it then would be very difficult to explain the legitimacy of the International Military Tribunal at Nuremberg and the International Military Tribunal for the Far East.

The question, then, is whether all crimes within the subject-matter jurisdiction of the Court in fact enjoy universal jurisdiction under customary international law. The Statute of Rome was understood not to create new substantive law, but only to include crimes which were already prohibited under international law.¹¹⁸ The jurisdiction of the International Criminal Court is limited to the most serious crimes of concern to the international community as a whole.¹¹⁹ The four crimes spelled out in Article 5 - the crime of genocide, crimes against humanity, war crimes and the crime of aggression - are recognised as crimes of universal jurisdiction under customary international law by most states and commentators.¹²⁰ That is, even without complete accord on the exact definition of each offence, the delegations to the Rome Diplomatic Conference generally seemed confident of the possibility of defining their scope of purposes of the Court's universal jurisdiction.¹²¹ This was not different from what the Allies did in 1945 when they enumerated the first definitions of crimes against humanity in the Charter of Nuremberg or what the international community did in 1958 when it established the first codified definition of piracy in the

¹¹⁷ Paust (*supra* 116) 5

¹¹⁸ Scharf (*supra* 112) 217

¹¹⁹ McGoldrick (*supra* 100) 633

¹²⁰ Scharf (*supra* 112) 217

¹²¹ Scharf (*supra* 112) 217

Law of the Sea Convention¹²². Both were subsequently viewed as codification of customary law.¹²³ Therefore it can be said that the crimes within the subject-matter jurisdiction of the International Criminal Court are recognized as crimes which trigger universal jurisdiction.

Although universal jurisdiction seems to be applicable for the International Criminal Court, Article 12 obviously does reject it. The fact that Article 12, para. (2) (a) and (b) requires the acceptance of the territorial state or the state of the accused as precondition to the exercise of the Court's jurisdiction clearly denies universal jurisdiction. It lies in the nature of universal jurisdiction, that courts may exercise their jurisdiction over crimes without the acceptance of the state where the crime was committed or the accused is a national. The requirement of the consent of the state on whose territory the crime was committed would be unnecessary if the Court's basis for jurisdiction was universality. Also the rejection of the German and Korean proposal¹²⁴ during the Conference of Rome substantiates that the International Criminal Court should not have universal jurisdiction.

Therefore, jurisdiction over the nationals of a non-party state cannot be justified in terms universal jurisdiction due to the Rome Statute, which is a compromise that does not allow the Court to apply the principle of universality.

¹²² Convention on the High Seas (1958) reprinted in Mueller, Wise (eds) *International Criminal Law* (1965) 215-217

¹²³ Scharf (*supra* 112) 217

¹²⁴ The German and the Korean proposal according to the jurisdiction of International Criminal Court predetermine that the International Criminal Court should have universal jurisdiction over the core crimes. See: Chapter Two, 3

However, the Court may exercise its jurisdiction over a national of a non-party state on the basis of the principle of territoriality. It is doubtless accepted in international law that a state can exercise its jurisdiction over the nationals of other states without the consent of the latter if the crime was committed within its boundaries. The decisive question is whether a state can delegate its territorial jurisdiction to an international court. The principle of territoriality is a consequence of the sovereignty of a state over its territory. A state can apply national law on all acts committed within its boundaries irrespective of the nationality of the offender or victim.¹²⁵ If a state ratifies the Statute of Rome, the treaty becomes part of national law, upon its ratification (transformation into national law). Consequently waiving sovereignty in delegating territorial jurisdiction is constituted in national law.

Besides, the principle of territoriality was also a basis for the Nuremberg Tribunal's jurisdiction. In the *Einsatzgruppen* trial, the CCL 10 Tribunal indicated that its jurisdiction and that of the Nuremberg Tribunal were based on a mixture of the universal jurisdiction and the principle of territoriality:

"In spite of all that has been said in this and other cases, no one would be so bold as to suggest that what occurred between Germany and Russia from June 1941 to May 1945 was anything but war and, being war, that Russia would not have the right to try the alleged violators of the rules of war on her territory and against her people. And if Russia may do

¹²⁵ See: Chapter One, 2.1.1

this alone, certainly she may concur with other nations who affirm that right."¹²⁶

The principle of territoriality was delegated during the prosecution of the German perpetrators to the International Military Tribunal at Nuremberg. The Nuremberg Trials demonstrate that the principle of territoriality as the principle of universality can be transferred to an international body. Hence to delegate part of the territorial jurisdiction to the International Criminal Court is possible without violating the rules of international law.

Hence jurisdiction over a national of a non-party state is possible. The legal basis of such a far-reaching jurisdiction of the International Criminal Court can, however, not be seen in the principle of universality. Due to Article 12, which obviously prohibits the application of universal jurisdiction, it is only justified through a transfer of the domestic courts' territorial jurisdiction to the International Criminal Court.

3.2.6 Conflicts of International Obligations

After advocating for the appliance of the International Criminal Court's jurisdiction over nationals of a non-party state, another problem arises. Whenever a third state¹²⁷ has concluded a treaty with a state party whereby the latter state either waives its criminal jurisdiction over crimes committed on its territory by nationals of the former state or undertakes to extradite those nationals to the other state. In such a case a conflict between the different inconsistent international

¹²⁶ United States v. Otto Ohlendorf reprinted in (extracts) Scharf (*supra* 112) 229

obligations obviously arises. The Statute of Rome only partly takes into account and makes provisions for such situations. Article 90, para. 4 to 6 envisages the possibility that extradition may be requested, under an international treaty, by a state not party to a state party, and this request for extradition will be in conflict with a request for surrender from the International Criminal Court. For such cases the Statute does not impose upon state parties the obligation to give priority to the Court's request for surrender from the International Criminal Court. Article 90, para. (6) simply lists a set of factors that the requested state must take into account when deciding on the matter.

This regulation would seem to be questionable on three grounds: first, it does not take into account the possibility that under its national legislation the requested state may be obliged to waive its jurisdiction without even triggering the extradition process; secondly, it does not envisage the case of a requested state, that while not a party to the Statute has accepted the Court's jurisdiction *ad hoc*; thirdly, it does not impose upon the requested state the obligation to give priority to the Court's request for surrender.

3.2.7 Conflicts between Article 12 and Article 11

Article 11, para. (1) of the Rome Statute stipulates that the Court will only have jurisdiction with respect to crimes committed after it has come into force. Article 11, para. (2) stipulates if a state becomes a party to the Statute after it has come into force, the Court only has jurisdiction over crimes committed after the Statute has come into force for that state, unless that state has made a declaration under

¹²⁷ A third state is state that is no party to the Statute

Article 12, para. (3). The relationship between Article 11, para. (2) and Article 12, para. (2) is unclear. Under Article 12 the consent of either the territorial state or the state of nationality of the accused suffices for the Court to exercise its jurisdiction. A similar conflict of jurisdiction over nationals of a non-party state occurs. There may be cases in which the Court, under Article 12, will have jurisdiction over a crime due to the consent of the state where the crime was committed, even though the state of nationality of the accused has become party to the Statute after it has come into force but is not in force for it. The question is whether this conflict can be solved as the conflict of the jurisdiction over a national of a non-party state.

It might be said that if the Court can exercise its jurisdiction over a national of a non-party state, then the Court must be able to do so over a national of a state which already became a party to the Statute but is not in force for it.

However, the conflict of the jurisdiction over a national of a non-party state and the conflict between Article 11 and Article 12 must be distinguished and should not be compared to one another. The problem of jurisdiction over the national of a non-party state is a question of jurisdiction *ratione loci*, while the conflict between Article 11 and Article 12 is a question of jurisdiction *ratione temporis*. Therefore it cannot be said that in such a case the Court may exercise its jurisdiction, just because the exercise of jurisdiction over a national of a non-party state is possible.

Article 12, para. (2) clearly emphasises that the temporal jurisdiction for such a state party begins after the Statute has come into force. Further Article 11, para. (2) became part of the Statute to encourage acceptance by states. Accordingly, it can be said that as long as the

Court does not have temporal jurisdiction under Article 11, para. (2), it cannot exercise its jurisdiction, even if the crime was committed within the territory of a state party.

3.2.8 Relationship between Article 12 and Article 124

Another aspect of the Court's jurisdictional competence, only in respect of war crimes, is the capacity of party states to elect to exclude the Court from dealing with war crimes alleged to have been committed either on their territory or by any of their nationals. Whereas in the case of both genocide and crimes against humanity the Court will exercise automatic jurisdiction over party states, Article 124 encapsulates an exception from this general approach in respect of war crimes spelled out in Article 8. Therefore the opting-out provision in Article 124 stipulates that a state party may declare that, for a period of seven years after the Statute has come into force, it will not accept the jurisdiction of the Court in relation to crimes under Article 8, if they were committed within its territory or by its nationals. It seems that the "or" in Article 124 was not meant to be exclusive, since the drafters would have used an 'either/or' formula. Thus a state might also cumulatively exclude both: those war crimes committed by its nationals and those committed on its territory.¹²⁸

Obviously there might be situations where a national of a state party which opted out of the Statute under Article 124 committed a war

¹²⁸ Zimmermann *Article 124 Transnational Provision* in Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* (1999) 1281-1284

crime on the territory of a state which has accepted the Court's jurisdiction.¹²⁹

The question then arises whether the Court can exercise its jurisdiction over nationals of a party state which has opted out of the Statute under Article 124, and the war crime was committed on the territory of a state that has unconditionally accepted the jurisdiction of the Court. This conflict is similar to the conflict of the jurisdiction over a national of a non-party state and the problems that arise with the relationship between Article 11 and Article 12. However, it must be said that the limitation on the Court's jurisdiction incorporated in Article 124 was intentional (a part of the package which assembled an overwhelming majority in support of the Statute). The idea of the transnational provision in Article 124 was not contained in the Draft Statute but only appeared during the last few days of the Conference in Rome in order to secure the acceptance of the Statute by certain states.¹³⁰ Its effect should not be wiped out or substantially reduced by another provision in the Statute. If other instruments of the Statute do not resolve the incongruity, then it should be construed narrowly as intended by the negotiators.¹³¹

If it was clear that the Court could exercise its jurisdiction in such cases, Article 124 would not provide the possibility to opt out of the Statute according to its nationals. Moreover Article 124 would only provide the alternative to object to the jurisdiction of the Court, if a crime under Article 8 were committed on its territory. Hence the text of Article 124 would be: "*...it does not accept the jurisdiction of the*

¹²⁹ Arsanjani *Reflections on the Jurisdiction and Trigger Mechanism of the International Criminal Court* in von Hebel et al (eds) *Reflections on the International Criminal Court* (1999) 57-64

¹³⁰ Zimmermann (*supra* 128) 1281

¹³¹ Arsanjani (*supra* 129) 65

Court (...) when a crime is alleged to have been committed on its territory." However, the intention of the negotiators of Article 124 was that crimes committed by nationals of a party state also fall under Article 124.

Accordingly it can be said that any such opting-out completely bars the exercise of jurisdiction by the Court in regard to alleged war crimes committed either by nationals or on the territory of the state which has made the declaration under Article 124.¹³² The Court cannot exercise its jurisdiction over a national of a party state if it opted out of the Statute under Article 124.

However, declarations made under Article 124 are only relevant when the Court is exercising its jurisdiction by virtue of a state referral or when the prosecutor is acting *proprio motu*. If the situation is referred to the Court by the Security Council, any such declarations are irrelevant, since Article 12 (2) stipulates that the acceptance of the jurisdiction of the Court by either the home state of the suspect or the state on the territory of which the crime has been committed is superfluous.¹³³

Another closely related question is how the withdrawal or expiry affects the jurisdiction of the International Criminal Court. According to the wording of Article 124, it could be possible that the Court might be empowered to exercise its jurisdiction over a war crime committed in the declaration's period but after the Statute came into force if the declaration is somehow terminated.¹³⁴ Article 11 makes no reference

¹³² Zimmermann (*supra* 128) 1282

¹³³ Zimmermann (*supra* 128) 1283

¹³⁴ Wilmshurst *Jurisdiction of the Court* in Lee (ed) *The International Criminal Court The Making of the Rome Statute Issues, Negotiations, Results* (1999) 127-140

to Article 124 and therefore emphasises the possibility. However, the failure of a reference in Article 11 originates from the fact that Article 124 was added to the Statute at the very last stage of the negotiations.¹³⁵ Again it must be said that Article 124 was added to the Statute in order to satisfy the majority of delegations during the Rome Conference. Hence Article 124 must be read in a narrow sense. If a state has opted out under Article 124, the Court's jurisdiction is barred for a period of seven years. In case of expiry or withdrawal the Court cannot exercise its jurisdiction over war crimes covered by the declaration until its termination.

¹³⁵ Wilmshurst (*supra* 134) 141

Chapter Three: The Admissibility of a Case before the International Criminal Court

The issue of the admissibility of a case before the International Criminal Court is one of the most important issues affecting the future work of the Court. Whether the Court ever becomes a 'real' Court and not just a 'ghost institution' mostly depends, besides the jurisdictional issue, on the provisions of admissibility of a case before it.

The Statute of Rome is, on the one hand, irrefutably a great step towards international justice but, on the other hand, it is still a compromise between more than 160 governments and numerous non-governmental organisations. The question is whether the main task of the International Criminal Court - complementing the national judicial systems and ensuring that persons committing the most serious crimes of international concern are brought to justice - can be fulfilled with the means provided by the Statute of Rome.

Admissibility criteria and procedures are spelled out in Article 17 and 18 and are applied in conjunction with the double jeopardy principles of Article 20. Besides that, as a related area under consideration, there is Article 19 and its provisions to challenge the jurisdiction of the Court and the admissibility of a case before it.

The Statute establishes a "presumption"¹³⁶ (*Tatbestand*) of inadmissibility whenever a state is exercising, or has exercised, its national jurisdiction over a case. Therefore the most general and effective jurisdictional limit on the International Criminal Court lies in

¹³⁶ "Presumption" in this context means more the elements of a rule

its relationship to national Courts. It is because of the complementary relationship of the Court to the national judicial systems that Article 17 of the Statute does not emphasise when a case is admissible, but only determines when it is not. Hence it once more stresses the cautious policy of the negotiators in Rome in the context of national jurisdiction.

The aim of the Statute is not to negate or encroach onto state sovereignty, but to complement national criminal systems and thereby close 'judicial gaps' on an international level. Article 17 provides safeguards that preserve national interests and judicial integrity on a domestic level.¹³⁷ Referring to Article 1 and Paragraph 10 of the Preamble, Article 17 emphasises the two fundamental principles: the first dealing only with the most serious crimes of international concern and the second the principle of complementarity.¹³⁸ Complementarity as a feature of the Statute defines the relationship of the International Criminal Court to the national criminal systems.

1 The Composition of the International Criminal Court

Before discussing the principle of complementarity and examining the admissibility of a case before the International Criminal Court, it is necessary to give a broad overview of the International Criminal Court's composition.

¹³⁷ Williams *Article 17 Issues of Admissibility* in Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* (1999) 383-384

¹³⁸ McGoldrick (*supra* 100) 643

The international Criminal Court consists of the judicial, the investigatory and prosecutorial¹³⁹, and the administrative branches¹⁴⁰. Pursuant to Article 34, the judicial branch is composed of the Presidency, the Appeals Division, a Trial Division and a Pre-Trial Division.

The Assembly of the state parties elects the eighteen judges for a nine-year term. The candidates must have established competence in criminal proceedings or in the relevant areas of international law. There is a minimum requirement of nine judges: four with competency in criminal proceedings and five with competence in the relevant areas of international law.¹⁴¹ Besides that, the judges shall be chosen from among persons of high moral character, impartiality and integrity.

In the Appeals Division sit the president and four other judges. All of them participate in the Appeals Chamber. Not fewer than six judges have to be in the Trial Division. The trial chamber consists of three judges. In the Pre-Trial Division there are to be not fewer than six judges. A pre-trial chamber has either three judges or a single judge. Judges assigned to the appeals division can only serve in that division.¹⁴²

The Office of the Prosecutor is composed of the Prosecutor and is an independent and separate organ of the International Criminal

¹³⁹ The Office of the Prosecutor

¹⁴⁰ The Registry

¹⁴¹ See: Art. 36 Statute of Rome

¹⁴² Ambos "Der neue Internationale Strafgerichtshof - Ein Überblick" NJW 1998 3743-3744

Court.¹⁴³ There can be one or more deputy prosecutors. They are also elected by the Assembly of the state parties.

2 Complementarity and the Relationship between the International Criminal Court and National Courts

One fundamental question in establishing the International Criminal Court was the role that the institution would play in relation to the national courts. It was a politically and legally sensitive issue for the negotiators in Rome.¹⁴⁴ According to Article 1 and Paragraph 10 of the Preamble of the Statute, the Court shall be complementary to the national criminal justice system. The principle of complementarity as it is spelled out in Article 1 and Paragraph 10 of the Preamble is precisely described in Articles 12 through 15, 17 and 18. According to these provisions, the principle of complementarity is one of most the important principles of the Statute and basically means that the Court may exercise its jurisdiction only when national jurisdiction is unable or unwilling to exercise it. This means that the International Criminal Court's role in investigating and prosecuting the crimes falling within its mandate is secondary to that of the states. One should be aware of the fact that without the principle of complementarity, the establishment of the International Criminal Court hardly would have been possible. In the attempts in the history of setting up a permanent international criminal institution, the main obstacle was how to get national sovereignty and international prosecution into a harmonious relationship.

¹⁴³ Ambos (*supra* 142) 3744

The choice of "complementarity" was therefore, of course, a conscious and intentional one. The decision by the international community of states to negotiate a Statute for a new permanent international criminal court, while undertaken with an acute sense of the historical significance of such an institution, was never intended to override state sovereignty. The real question in Rome was one of demarcation - where to draw the line on the guarantee of national court primacy - and of determination - who would decide on which side of that line a particular case fell.¹⁴⁵

Because of the principle of complementarity the Court is not intended to replace national courts, but to operate when national courts are unwilling or unable to operate. It was the understanding of the majority of participating states during the Conference that states had a vital interest in remaining responsible and accountable for prosecuting violations of their laws, and national systems are expected to be maintained to enforce adherence to international standards.¹⁴⁶

Consequently the issue of whether the International Criminal Court should be fitted with primary or complementary jurisdiction was a controversial one during the negotiations in Rome.¹⁴⁷ Some states and most of the non-governmental organisations stood for a strong international criminal court.¹⁴⁸ The International Criminal Tribunal for the Former Yugoslavia advocated indirectly for an International Criminal Court with primary jurisdiction over national courts. It said:

¹⁴⁴ Holmes *The Principle of Complementarity* in Lee (ed) *The International Criminal Court The Making of the Rome Statute Issues, Negotiations, Results* (1999) 41-41

¹⁴⁵ Roggemann (*supra* 16) 10

¹⁴⁶ Arsanjani (*supra* 129) 68

¹⁴⁷ Holmes (*supra* 144) 42

"[I]ndeed, when an international criminal tribunal such as the present one is created, it must be endowed with primacy over national courts. Otherwise, human nature being what it is, there would be perennial danger of international crimes being characterized as 'ordinary crimes' [...], or proceedings being 'designed to shield the accused', or cases not being diligently prosecuted [...]. If not effectively countered by the principle of primacy, any one of those stratagems might be used to defeat the very purpose of creation of an international criminal jurisdiction, to the benefit of the very people whom it has been designed to prosecute."¹⁴⁹

However, it must be said, that an International Criminal Court with primacy jurisdiction never would have become reality. Due to the principle of complementarity the Statute of Rome was finally able to satisfy the majority of the party states in Rome. Beside that, primacy might be the better solution for international criminal tribunals, established under Chapter VII of the Charter of the United Nations, but there are also good reasons for a complementary jurisdiction of a permanent international criminal institution.

According to the Statute, states have a primary role and a prior right of jurisdiction (unless the Security Council refers a situation to the Court.¹⁵⁰). This is as it should be, because in deference to the principle of national sovereignty, states have a right or even a duty to

¹⁴⁸ Holmes (*supra* 144) 42

¹⁴⁹ Prosecutor v. Tadic (Case No. IT-94-1-AR72) (*supra* 79) 56

¹⁵⁰ Due to the principle of complementarity as the strongest feature of the Statute, the Court must defer to national jurisdiction if its investigation and prosecution correspond with the standard set up in the Statute. Theoretically even if the case is referred to the Court by the Security Council. However, this theoretic construction will barely become reality. See: Chapter Two, 3.1

try offences that take place on their territory or otherwise fall within their jurisdiction.¹⁵¹ Moreover, state criminal justice systems are generally better developed than the international system and are likely to be faster and more efficient.¹⁵² This is because the actors at a national level work within the context of an established legal system, the applicable law is reasonably certain and developed, the rules of procedure and evidence are clear and the penalties are clearly defined and readily enforceable, and the language problem is minimal.¹⁵³ Finally it is a matter of fact that the International Criminal Court depends on an effective and supportive prosecution of crimes within its jurisdiction by national courts. It would be flooded with cases and become ineffective if international crimes were not also investigated and prosecuted on a domestic level.¹⁵⁴

However, the record of national prosecutions of violators of such international norms as the grave breaches of the Geneva conventions is disappointing, even when the obligations to prosecute or extradite are unequivocal.¹⁵⁵ A lack of resources, evidence and, above all, political will has stood in the way. Moreover, there are instances when states, because of their complicity in the crimes in question, have not been willing or able to investigate or institute proceedings in particular situations to a level of competence that satisfies the demands of international justice. It was for these reasons that the International Criminal Court was established to complement states' efforts and to ensure that crimes of concern to the international community as a whole are adequately prosecuted. There is a good chance that the

¹⁵¹ Cassese "The Statute of the International Criminal Court: Some Preliminary Reflections" EJIL 1999 144-158

¹⁵² Williams (*supra* 137) 384

¹⁵³ Nsereko "The International Criminal Court: Jurisdictional and Related Issues" CLF 1999 87-114

¹⁵⁴ Cassese (*supra* 151) 158

principle of complementarity helps to remedy the defect of national prosecution for crimes triggering universal jurisdiction. This is because states would rather prosecute the criminals concerned within their range of influence than give up that possibility and thereby lose their predominance in respect of the case. Moreover, this effect is supported by the growing tendency of the International Court of Justice according to develop the concept of universal jurisdiction. Although the case *Congo versus Belgium* has not been decided yet, it seems to be the inclination of the International Court of Justice that applying universal jurisdiction becomes not only a right of states but more a duty.¹⁵⁶

Nonetheless, one must be aware that the principle of complementarity can also be abused to shield perpetrators from being punished for their crimes. Regarding the crimes against humanity and genocide, the abuse of the principle of complementarity is more likely. This is because these crimes are normally are committed with the help and assistance, or the connivance or consent, of national authorities.¹⁵⁷ In these situations the officials of a state rather tend to pretend to undertake investigations, trials prosecution to protect the allegedly responsible persons.¹⁵⁸

The danger of abuse increases due to the fact that the principle of complementarity also applies to third states.¹⁵⁹ Article 18 obliges the Prosecutor to "notify all states parties and those states which, taking into account the information available, would normally exercise

¹⁵⁵ Nsereko (*supra* 153) 115

¹⁵⁶ Congo v. Belgium (*supra* 52)

¹⁵⁷ Cassese (*supra* 151) 159

¹⁵⁸ Cassese (*supra* 151) 159

¹⁵⁹ The question if Art. 18 (1) also applies to third states will be discussed beneath. See: Chapter Three, 5

jurisdiction over the crimes concerned" that he/she commence an investigation pursuant to Article 13, para. (a) or initiate an investigation *proprio motu*. Moreover, although there is no need for a notification, if the Prosecutor is initiating an investigation pursuant to Article 13, para. (b), the state which normally has jurisdiction over the crime forming the object of the referral is obliged to inform the Prosecutor that it is investigating or prosecuting the case.¹⁶⁰ All these various possibilities under which third states may claim jurisdiction may invoke the principle of complementarity and therefore may oblige the prosecutor to defer to the state's authorities.¹⁶¹ Although Article 17 provides safeguards against abuse of the principle of complementarity, one has to be aware that the delicate and fragile structure of a complementary jurisdiction at an international level can be an invitation for misuse.

3 The Jurisdictional Difference between the International Criminal Tribunal and the Ad-hoc Tribunals

In order to point out the jurisdictional differences between the International Criminal Court and the two ad hoc Tribunals, it is necessary to look at the different natures of these organisations. Both the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda are subsidiary organs of the Security Council of the United Nations, created by virtue of Chapter VII of the Charter of the United Nations and therefore vested with certain inherent powers. But the International Criminal Court will be treaty based and under the supervision of an Assembly of state parties with only indirect links to the Security Council and more limited

¹⁶⁰ Cassese (*supra* 151) 159

¹⁶¹ Cassese (*supra* 151) 159

enforcement powers.¹⁶² It is one thing for the Security Council of the United Nations to establish Tribunals with primary jurisdiction over national courts pursuant to the Council's enforcement powers under Chapter VII of the Charter of the United Nations. However, it is altogether a different thing for the states of the international community to negotiate the terms of a multilateral treaty dealing with this sensitive issue of jurisdictional relationship.¹⁶³

The Statutes of the ad hoc Tribunals provide concurrent jurisdiction with national courts and primacy so far that they may at any stage request national courts to defer to the competence of the Tribunals. In contrast, the International Criminal Court complements the national criminal system and therefore has no primacy, unless the Security Council refers a situation to the Court. However, the primacy of jurisdiction under a referral of the Security Council has to be distinguished from the possibility of the two ad hoc Tribunals to defer national jurisdiction. In the case of the International Criminal Court, the Security Council must, pursuant to Article 16 of the Statute, adopt the deferral of national jurisdiction in a resolution under Chapter VII of the Charter of the United Nations. This deferral is limited for a period of twelve months and can be renewed under the same conditions. In contrast, the power of the ad hoc Tribunals to apply primary jurisdiction over national courts is laid down in their Statutes and has no temporal limitation.

4 The Admissibility of a Case according to Article 17

¹⁶² May *The Relationship between the International Criminal Court and the International Criminal Tribunal for the Former Yugoslavia* in von Hebel et al (eds) *Reflections on the International Criminal Court* 155-155

Article 17 of the Statute forms the backbone of the admissibility of a case before the International Criminal Court. It is divided into three paragraphs. The first paragraph determines under which circumstances a case is considered as inadmissible. The second and the third paragraphs of Article 17 provide guidelines on how to define "unwillingness" and "inability".

Article 17, para. (1) provides for four different alternatives on which the Court shall determine a case as inadmissible:

First, the case is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is unwilling or unable genuinely to carry out the investigations or prosecution. Second, the case has been investigated by a state, which has jurisdiction over it and the state has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the state genuinely to prosecute. Fourth, the person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under Article 20, para. (3). Fourth, the case is not of sufficient gravity to justify further action by the Court.

In contrast to Article 12, the term "Court" is used in Article 17 in a narrow sense, which means that the Office of the Prosecutor is not included.¹⁶³ However, Article 17 is of course an important guideline for the Prosecutor in initiating an investigation or prosecution. First the Prosecutor will have to determine that the case would be admissible under Article 17.¹⁶⁵ He/she shall notify all state parties that

¹⁶³ McCormack, Robertson (*supra* 99) 645

¹⁶⁴ Arsanjani (*supra* 129) 68

¹⁶⁵ See: Art. 53 (1) (b) Statute of Rome

an investigation has been initiated.¹⁶⁶ From that moment until the commencement of the trial the states can undertake steps to block the investigation or prosecution.

At the commencement of the proceedings in every case the Court must satisfy itself that it has jurisdiction.¹⁶⁷ It may act on its own instance or on an objection to or challenge of its jurisdiction by an accused person, a state that has jurisdiction over the case, the state where the crime was committed, or the state of nationality of the accused.¹⁶⁸ The only grounds on which the Court's jurisdiction may be challenged is where a state, having jurisdiction, is exercising or has exercised jurisdiction in the case, or that the *ne bis in idem* or *minimis non curat lex* rules apply to the case.

Where a state that has jurisdiction claims that it is exercising or has exercised jurisdiction in the case, the Court must defer to that state, unless it is proven to its satisfaction that the state is unwilling or unable to genuinely carry out the investigations or prosecutions.¹⁶⁹

The first two alternatives of Article 17, para. (1) are combined with exceptions. A case is inadmissible unless the investigation or prosecution of that state, which has jurisdiction, is or was not affected by "unwillingness" or "inability". To determine these exceptions Article 17 provides in para. (3) and (4) for certain guidelines.

¹⁶⁶ See: Art. 18 (1) Statute of Rome

¹⁶⁷ See: Art. 19 (1) Statute of Rome

¹⁶⁸ See: Art. 19 (2) Statute of Rome

¹⁶⁹ See: Art. 17 (1) (a), (b) Statute of Rome

4.1 "Unwillingness" as an Exception to Inadmissibility

Article 17, para. (2) provides for guidelines to determine if a state is unwilling genuinely to carry out the investigation or prosecution, or if the decision not to prosecute the person concerned resulted from unwillingness.

The difficulty during the creation of the Statute of finding a fitting definition for "unwillingness" was that such a definition always would be directed at the national judicial systems. "[M]any delegations were sensitive to the potential for the Court to function as a kind of court of appeal, passing judgments on decisions and proceedings of national judicial systems."¹⁷⁰ Hence, the problem was to find objective criteria on which the Court should base its determination. To solve this problem the phrase "in accordance with the norms of due process recognized by international law" was added in the Chapeau of Article 17.¹⁷¹ "[I]t was thought that this paragraph, which dealt with proceedings not being conducted impartially or independently, was the natural place for including objective criteria"¹⁷²

Accordingly, in order to determine unwillingness the Court is empowered to have regard to the principles of due process recognised by international law. Central to these principles is fairness to the accused person, who must be protected from "victor's justice", and to the victims whose rights must be vindicated.¹⁷³

¹⁷⁰ Holmes (*supra* 144) 49

¹⁷¹ See: Art. 17 (2) Statute of Rome

¹⁷² Holmes (*supra* 144) 49

The Court may also question the motive behind a state's decision to initiate proceedings and determine whether this was done for the purpose of shielding the person concerned from criminal liability.¹⁷⁴ The intention of a state to shield a person from criminal liability must be devious.¹⁷⁵ Therefore it might well be difficult for the Prosecutor to prove this intent on the part of the state.

In situations where there have been unjustified delays in the proceedings, the Court has to determine whether or not this is evidence of a state's unwillingness to bring the person concerned to justice.¹⁷⁶ To determine an unjustified delay in the proceedings seems to be a difficult task. The Prosecutor must prove that the delay in the proceedings is inconsistent with intent to bring the person concerned to justice. Because of terms and deadlines in legal proceedings, it is not unusual that a case can take years until the verdict is reached. Moreover, the duration of proceedings can vary from country to country. The question arises under which circumstances proceedings suffer under an "unjustified delay" in the sense of Article 17, para (2) (b). This provision does not limit the element "unjustified delay" only to situations caused by authorities whose intention is to shield the person concerned from criminal liability. Due to the lack of such a limitation (missing mental element = *fehlendes subjektives Tatbestandsmerkmal*), the element "unjustified delay" could open the possibility for the Court to exercise jurisdiction, although the domestic criminal law systems are working genuinely. This does not correspond with the notion of the principle of complementarity.

¹⁷³ Morris *Complementarity and Conflict: States, Victims, and the ICC* in Sewall, Karsen (eds) *The United States and the International Criminal Court National Security and International Law* (2000) 195-196

¹⁷⁴ See: Art. 17 (2) (a) Statute of Rome

¹⁷⁵ Williams (*supra* 137) 393

¹⁷⁶ See: Art. 17 (2) (b) Statute of Rome

Besides, the Court may also have to inquire into the independence and impartiality of those that the state has entrusted with the conduct of the proceedings and the manner which they have gone about their tasks, both at the investigation and trial stages.¹⁷⁷ If under certain circumstances there are grounds to suggest lack of transparency, the appearance or likelihood of bias, or other factors to indicate real partiality towards the accused, all this will be evidence that the Court may use to pronounce on the state's unwillingness to genuinely bring lawbreakers to justice. The lack of impartiality was originally put under the heading of inability, in the sense that the state cannot provide an impartial trial.¹⁷⁸ But there might be defective proceedings, where the trial is not a sham and the state usually provides an effective criminal law system. Therefore the lack of impartiality was put under a separate paragraph in Article 17.

It is difficult to define exactly the different provisions of Article 17, para. (2). Even the newly published Commentary on the Rome Statute¹⁷⁹ gives no clear definition under which circumstances a trial is considered as impartial or the proceedings are initiated to shield a person from criminal responsibility. It is necessary to wait until the International Criminal Court starts its work and the first sentences according to Article 17, para. (2) are delivered. Article 17, para. (2) will certainly be an important keystone over which the defendants will argue with the Prosecutor.

¹⁷⁷ See: Art. 17 (2) (c) Statute of Rome

¹⁷⁸ Williams (*supra* 137) 394

¹⁷⁹ *Commentary on the Rome Statute of the International Criminal Court* Triffterer (ed) (1999)

4.2 "Inability" as an Exception of Inadmissibility

In determining a state's inability to carry out the investigations or prosecution, the Court may consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the state is unable to obtain the accused or the evidence or otherwise unable to carry out its proceedings. This provision spelled out in Article 17, para. (3) was enacted to take account of situations such as that in Somalia, lacking a central government, or is in a state of chaos because of a civil war, natural disasters or other events leading to public disorder.¹⁸⁰

Wars or armed conflicts usually result in the substantial or total collapse of judicial systems in the countries affected, justifying action by the International Criminal Court. It is generally submitted that any act or omission in the course of an investigation or trial that so falls below the international minimum standard of justice as to result in denial of justice should cast doubt on a state's genuine commitment to bringing a suspect to justice.

It seems to be quite difficult for the Court to determine if a state is unable to obtain the accused or the necessary evidence and testimony or otherwise is unable to carry out the proceedings because of a total or substantial collapse or unavailability of its national judicial system. The International Criminal Court can determine the admissibility of a case according to Article 17, para. (3), if a state's legal and administrative structures have completely broken down. The admissibility of a case in other situations must be achieved in terms of Article 17, para. (2).

¹⁸⁰ Arsanjani (*supra* 129) 70

According to the wording of Article 17, para. (3), the inability to obtain an accused or key evidence and testimony could be a result of the partial or total collapse of a state's judicial system. During the negotiations some delegations were concerned that combining these two criteria could limit the Court's ability to act. The reason for these concerns was that there might be cases where the evidence or the accused are obtained carefully, but other aspects of the proceedings are strongly affected by a substantial or total collapse. Due to these concerns, the phrase "or otherwise unable to carry out its proceedings" was added.¹⁸¹

Furthermore it can be said that the third alternative of Article 17, para. (3), "unavailability of its national judicial system", is a general provision that emphasises situations which do not fall under the first two alternatives. This is because a national judicial system also becomes unavailable if there is a total or substantial collapse, affecting the acquisition of evidence, the accused and testimony.

4.3 Conflicts regarding "Unwillingness" and "Inability"

Because of the "Unwillingness" and "Inability" in Article 17, the question of the burden of proof arises. The Statute does not give any indications as to who has to provide the proof that a state is unwilling or unable to carry out the prosecution or proceedings. Article 17, in connection with the Preamble and Article 1, clearly suggests that the drafters of the Statute had the intention that a state's jurisdiction should take precedence over the jurisdiction of the International

¹⁸¹ Holmes (*supra* 144) 49

Criminal Court, unless it can be shown that a state is unwilling or unable to investigate or prosecute.

The person who alleges that a state is unwilling or unable to investigate or prosecute must bear the burden of proof of this assertion (is forced by the principle 'who alleges must prove'). It will invariably be the Prosecutor in his efforts to assert the jurisdiction of the International Criminal Court who must bear the burden of proof. The difficulty of providing the proof that a state is unwilling or unable to prosecute or investigate in a certain situation is obvious. This is due to the fact that nearly all of the information about the status of the state's law system, its proceedings and possibilities of investigation and prosecution is in the hands of the state's authorities and not in hands of the International Criminal Court's Prosecutor. Especially if the suspects are officials, access to important information will be blocked by the state and it has to wait until the International Criminal Court starts its work to see if the Prosecutor ever will be able to bear this burden effectively. The problem of gathering evidence by international criminal institutions is not unknown.¹⁸² The difficulties of the International Criminal Tribunals of the Former Yugoslavia and Rwanda in gathering evidence emphasises obstacles the International Criminal Court will have to overcome in the future and the onerous burden of the Prosecutor in providing proof.

It was probably because of the lessons of the two ad hoc Criminal Tribunals that, during the negotiations on the treaty, suggestions were made that the burden of proof should partly be carried by the states. However, it still would be much easier for the state, which holds all

¹⁸² Wäpsi "Die Arbeit der Internationalen Strafgerichtshöfe für das ehemalige Jugoslawien und Ruanda: Herausforderungen für die Anklage im internationalen Umfeld" NJW 2000 2449-2453

the information, to prove its willingness or ability than for the Prosecutor to prove the contrary.

Another important point is that it is politically offensive to require the Prosecutor to present affirmative and damaging evidence attacking a state's judicial process or its good faith in instituting proceedings. There has to be a strong and independent prosecutor, who in the worst case is able to present evidence that, for instance, the United States of America or France is unwilling or unable to carry out a prosecution or investigation. It is no secret that the United States of America finally signed the Statute of Rome due to the fact that, if the International Criminal Court starts its work, the influence on the Court in providing judges or prosecutors is easier for a state party than for a non-party state.¹⁸³

Another significant issue that is related to the "inability" of a state's judicial system is the question of domestic penal legislation. If a state does not have penal legislation over the crimes within the Court's subject-matter jurisdiction, it won't be very difficult for the International Criminal Court to determine a case as admissible. This is because, if a state has not criminalised the crimes spelled out in the Statute, it cannot prosecute and therefore is with certainty "unable genuinely" to carry out proceedings in the sense of Article 17.¹⁸⁴ "[T]he Rome Statute makes it clear that states' judicial authorities have the primary responsibility of prosecuting and punishing international crimes. This should be their normal task, and the ICC can only deal with cases where national judicial systems do not prove to be up to this assignment [...]"¹⁸⁵

¹⁸³ Scharf (*supra* 112) 215

¹⁸⁴ MacCormack, Robertson (*supra* 99) 645

¹⁸⁵ Cassese (*supra* 151) 158

To avoid the International Criminal Court simply overriding the domestic jurisdiction due to a lacuna in the domestic penal legislation, the party states are eager to provide a domestic 'international criminal code book' covering the crimes of the Statute before the International Criminal Court starts its work. Hence it can be said that the complementary function of the International Criminal Court's jurisdiction becomes an accelerator for the standard of international criminal law at a domestic level.

Closely related to the issue of admissibility according to Article 17 is the question of amnesties and pardons that states sometimes grant to perpetrators for crimes within the International Criminal Court's jurisdiction. The granting of such amnesties or pardons could render a case before the International Criminal Court admissible. Although the issue of amnesties and pardons was strongly discussed during the negotiation in Rome, the Statute is silent on this point.¹⁸⁶ Only Article 53 with its broad range was intended to include complaints about individuals who may have been exempt under amnesty law.¹⁸⁷ However, Article 53 says nothing about the admissibility of a case if there was an amnesty or pardon; it only emphasises under what circumstances the Prosecutor can initiate an investigation.

In order to consider a case under Article 17 as admissible if there were pardons and amnesties, it must be distinguished from the situation where a state gives a blanket amnesty or if there was a careful, prior investigation. This is because a blanket amnesty without a prior investigation can already be seen as evidence of a state's

¹⁸⁶ Holmes (*supra* 144) 77

¹⁸⁷ Arsanjani (*supra* 129) 75

unwillingness or inability in the sense of Article 17.¹⁸⁸ No state has to disclose the reasons for declining the prosecution of certain cases. But if it does, the declining to prosecute must serve the interests of peace and national reconciliation.¹⁸⁹

The difficulty in judging if an amnesty or pardon makes a case admissible is deciding where to draw the line between the sovereign wisdom of a state in declining the prosecution and the abuse of amnesty law. Nevertheless, the International Criminal Court should take a flexible stance when dealing with such cases. It must try not to encroach on the "mature" decision of a State in giving amnesty or pardon and minimise the possibilities of abuse.

4.4 'Ne bis in idem' as a special Aspect of Inadmissibility

The principle of *ne bis in idem* is a result of the different ways of applying national jurisdiction over crimes with a foreign element. Due to the principle of territoriality, the active personality principle and the principle of universality, criminals can be prosecuted and punished twice by different sovereign states.¹⁹⁰ To protect a person who has already been prosecuted and punished by a court from being prosecuted again and punished by another court, the internationally recognised principle of *ne bis in idem*¹⁹¹ prohibits such a scenario under certain circumstances. Moreover, it also serves the interests of judicial economy, as well by saving resources and court facilities.¹⁹²

¹⁸⁸ Nsereko (*supra*) 119

¹⁸⁹ Nsereko (*supra* 153) 119

¹⁹⁰ Oehler (*supra* 49) 458

¹⁹¹ Art. 14 of the International Covenant on Civil and Political Rights reprinted in Brownlie *Basic Documents in International Law* (1995) 276-306

¹⁹² Tallgren *Article 20 Ne bis in idem* in Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* (1999) 419-421

The Statutes of the two ad hoc Tribunals for the former Yugoslavia and Rwanda had a great influence on the creation of the *ne bis in idem* principle in the Statute of Rome. However, because of their territorial and temporally limited jurisdiction and especially because of the concurrent jurisdiction - with the possibility of primacy - Article 20 of the Statute became decisively different.¹⁹³ Article 10, para. (2) (a) of the Statute of the International Criminal Tribunal for the Former Yugoslavia was also proposed and discussed by different delegations as an exception to the *ne bis in idem* principle in the Statute of Rome, but later completely deleted by the negotiators.¹⁹⁴

Article 17 para. (1) (c) provides the principle of *ne bis in idem* as a reason to consider a case as inadmissible. A case should be inadmissible where the person in question has already been tried for the conduct that is the subject of the complaint and the Court is not permitted under Article 20, para. (3).¹⁹⁵ In principle a case is inadmissible if the person concerned has already been tried by another court for the same conduct. The exception is spelled out in Article 20 para. (3) and can basically be seen as a safeguard protecting the principle *ne bis in idem* from being abused.

Due to the fact that Article 17, para. (1) (c) refers to Article 20, para. (3), the Court has to determine a case as admissible in respect of the provision of Article 20, para. (3). The principle of *ne bis in idem*, as a general principle of criminal law, became a special precondition of admissibility in the Statute. This is why the principle is finally spelled out under the second part of the Statute: "Jurisdiction, Admissibility

¹⁹³ Tallgren (*supra* 192) 420

¹⁹⁴ Tallgren (*supra* 192) 430

¹⁹⁵ Williams (*supra* 137) 393

and Applicable Law".¹⁹⁶ Actually, the right place for it would be part three of the Statute: "General Principles of Criminal Law". The reason for this 'unusual' location of the *ne bis in idem* principle lies in the nature of complementarity. The national courts have primary jurisdiction and the International Criminal Court is only allowed to intervene if the standard set up by the Statute is not achieved by the national judicial systems. This is what the complementarity is about. The jurisdiction of the International Criminal Court was added to an existing national jurisdictional system, and the relationship between the national courts and the International Criminal Court is not comparable to the relationship between the different national Courts. For those reasons during the creation of the Statute the principle of *ne bis in idem* was from early on closely linked to the issue of jurisdiction and admissibility.¹⁹⁷ The principle of *ne bis in idem* can be viewed as the last safeguard in allocating the tasks of national and international criminal justice to the notion of complementarity.

4.4.1 The Preconditions of Article 20 para. (3) (a) and (b)

Pursuant to Article 17, para. (1) (c), a case can only be determined as inadmissible by the Court if the precondition of the exception of the *ne bis in idem* principle spelled out in Article 20, para (3) is not given. Article 20, para (3) focuses on the "proceedings of another court". In contrast to Article 20, para. (2) referring to "convicted or acquitted by the Court", it would be sufficient according to Article 20, para (3) if national authorities initiate a *bona fide* prosecution to bar the International Criminal Court from determining a case admissible.

¹⁹⁶ In the compilation of all the proposals, the principle of *ne bis in idem* appears firstly as Article D under "General Principles of Criminal Law and secondly as Article 42 under Trial.

However, a national decision not to proceed because of insufficient prosecution would not serve the interests of justice and therefore would not be able to bar the Court's jurisdiction. This was referred to as an interpretation in conformity with the notion of complementarity. "[F]rom the wording of Article 20, para. (3) it is clear that such a national decision, not amounting a conviction or acquittal, must be subject to the same criteria the negligence of which will lead to the application of the exception."¹⁹⁸

Pursuant to Article 20, para. (3) (a), the accused person can be prosecuted by the International Criminal Court if the proceedings in the other court were for the purpose of "shielding that person from criminal responsibility" for crimes within the jurisdiction of the International Criminal Court. The wording is partly the same as in Article 17, para. (2) (a). This exception of the *ne bis in idem* principle concerns mainly sham trials, for instance, for genocide, which is finally charged as an assault.

Another exception to the principle of *ne bis in idem* is spelled out in Article 20, para. (3) (b). Pursuant to that alternative, the *ne bis in idem* must be denied if the proceedings were not conducted independently or impartially in accordance with the norms of due process recognised by international law. The wording of that paragraph is similar to Article 17, para (2) (c). This alternative encompasses cases where the proceedings are efficient and the prosecution proper. However, the members of the Court have a present opinion of the outcome of the trial.¹⁹⁹

¹⁹⁷ Tallgren (*supra* 192) 420

¹⁹⁸ Tallgren (*supra* 192) 431

¹⁹⁹ Tallgren (*supra* 192) 432

The difference between Article 17, para. (2) (a) and (c) is that, in the case of the latter, the accused person will be acquitted because of the biased opinion of the judges, whereas in the situation of a sham trial in the sense of Article 17, para. (2) (a), the accused person will be charged, but the seriousness of the charge compared to the offence is disproportionately small.

According to that exception of *ne bis in idem* an interesting question is whether the opposite situation is also envisaged in this provision. An example would be if a person was charged by a court for a crime he did not commit, the proceedings were efficient but the outcome of the case was the result of the biased opinion of the courts' members. The question would be whether the International Criminal Court would be able in such a situation to determine a case as admissible according to Article 17, para (1) (c) in connection with Article 20, para (3) (b). The wording of Article 20, para (3) (b) probably also encloses this situation.

4.4.2 The relationship between Article 17, para. (2) and Article 20, para. (3)

Article 20, para. (3) was the most controversial part of the *ne bis in idem* principle. This is because it provides criteria judging the standard of proceedings in a national trial. If the standard of the proceedings on a national level does not correspond with the provisions of Article 20, para. (3), the Court can determine a case as admissible over Article 17, para. (1) (c). This includes an indication of the primacy of the International Criminal Court. Article 17 does the same. As has already been mentioned, the wording of Article 20, para. (3) (a) and (b) is nearly identical to the wording of Article 17,

para. (2) (a) and (c). The question is if there can be situations where the case is taken over by the International Criminal Court because of Article 17, para. (1) (c) in accordance with Article 20, para. (3) (a) and/or (b).

It can be said that because of the general character of *ne bis in idem* and because of the position in the context of Article 17, that Article 17, para. (1) (c) steps behind (*subsidiär*) Article 17, para. (1) (a) and (b). Accordingly, the Court firstly has to look if a case is inadmissible pursuant to Article 17, para. (1) (a) and (b) and examine its exceptions. If the Court comes to the conclusion that the case is inadmissible, then there might be the possibility to achieve admissibility in terms of Article 17, para. (1) (c) in accordance with Article 20, para. (3) (a) and (b). However, due to the fact that the wording of the definition of "unwillingness" in Article 17, para. (2) (a) and (c) and Article 20, para. (3) (a) and (b) is similar, every case which is determined as inadmissible pursuant to Article 17, para. (1) (a) and (b) cannot become admissible over the exceptions of *ne bis in idem*. It can only become admissible if the trial was held before the Statute came into force. However, in such cases the Court does not have jurisdiction because of Article 11, para. (1) and (2).

4.5 Sufficient Gravity of a Case

The fourth and the final ground on which the International Criminal Court has to determine if a case is admissible or not is the gravity of the case. According to this paragraph, one has to refer to the preamble, para. 3 and 4.²⁰⁰ The notion of complementarity entails that only the most serious crimes of concern to the international

community can be punished by the International Criminal Court. Article 17, para. (1) (d) therefore intends to underpin the Preamble and Article 1 in accordance with Article 5 because, if the crime in question is not one of the most serious crimes of international concern, spelled out in Article 5, the Court would not have jurisdiction and the question of admissibility would never be elevated by the Court.

Moreover, the term "sufficient gravity" ensures that the International Criminal Court's interest in investigation and prosecution is limited to those perpetrators who bear the greatest responsibility for atrocities. These are military and other leaders.²⁰¹

"[I]ts placement here as an admissibility issue maintains the distinction between justiciability under articles 5 through 9, and the Court's exercise of jurisdiction as a policy matter (although complementarity jurisdiction per se does not directly address the question of the Court's choice whom to prosecute from among defendants)."²⁰²

5 Preliminary Ruling on Admissibility at Initiation of a Case

The preliminary rulings of the Statute²⁰³ regarding admissibility is a reinforcement of the principle of complementarity and furthermore a result of the primacy of the national courts.²⁰⁴

²⁰⁰ Williams (*supra* 137) 393

²⁰¹ Phillips "The international Criminal Court Statute: Jurisdiction and Admissibility" CLF 1999 62-78

²⁰² Phillips (*supra* 201) 78

²⁰³ See: Art. 18 Statute of Rome

²⁰⁴ Arsanjani (*supra* 129) 70

5.1 The Purpose and Scope of Article 18

Article 18 serves different purposes. Firstly, it emphasises that the state parties have the right and duty to investigate and prosecute crimes within the jurisdiction of the International Criminal Court. Article 18 therefore underlines the right of the parties to the Statute to act in the first place.²⁰⁵ Secondly, it enables the states to use their rights in a practical sense and to fulfil their duties properly without any interference from the International Criminal Court. Thirdly, the provision restrains an overly zealous Prosecutor and ensures that he/she is accountable for his/her actions to some superior authority.²⁰⁶ This is necessary because of the independent position of the Office of the Prosecutor in the composition of the International Criminal Court and because of his/her *proprio motu* powers. Fourthly, due to the early involvement of the Pre-Trial Chamber, the Prosecutor is protected from "[u]nfounded accusations of bias and from political manipulations on the part of some powerful states".²⁰⁷

The Prosecutor has to comply the provisions of Article 18 only if the referral to investigate a certain situation was initiated either by a state party pursuant to Article 13, para. (a) or if the Prosecutor acts on his/her own motion (*proprio muto*) pursuant to Article 13, para. (c) in connection with Article 15. If a situation is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations, Article 18 is not to be applied. Due to the fact that the Security Council of the United Nations has primacy in matters involving international peace and security, there is no need for further

²⁰⁵ Nsereko *Article 18 Preliminary rulings regarding admissibility* in Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* (1999) 395-397

²⁰⁶ Arsanjani (*supra* 129) 70

²⁰⁷ Nsereko (*supra* 205) 397

authorisation from the Pre-Trial Chamber. The decisions of the Security Council bind all states. Judicial repression is one of the measures of the Security Council to keep or restore international peace and security.²⁰⁸

If a situation is referred to the Prosecutor by a state and the Prosecutor has to determine that there is a reasonable basis to commence an investigation, or the Prosecutor is acting *proprio motu*, he/she has to notify all state parties. Besides this, the Prosecutor has to inform those states which would normally exercise jurisdiction over the crimes concerned. The Prosecutor has the right to inform states on a confidential basis and limit the information provided to them, if it is necessary "to protect persons, prevent destruction of evidence or prevent the absconding of persons".

To commence the investigation the Prosecutor needs a reasonable basis. Therefore, a state that referred a situation to the Prosecutor must also provide credible information to support him/her in determining whether there is indeed substance in the allegations, justifying further action by the Prosecutor.²⁰⁹

Within one month after the state has received notification of the commencement of investigation, the state may inform the Court that it is investigating or has investigated the crimes concerned. Moreover, that state can request the Prosecutor to defer to the state's investigation. Due to the principle of complementarity, the "request" in Article 18, para. (2) is more a demand than a request.²¹⁰ If the state does not respond to the notification or does not use its right to

²⁰⁸ Nsereko (*supra* 205) 398

²⁰⁹ Nsereko (*supra* 205) 399

²¹⁰ Nsereko (*supra* 205) 401

request the deferral, the Prosecutor may go ahead with his/her investigation.

In the case of a request to defer the investigation to the state's authorities, the Prosecutor can request the Pre-Trial Chamber to authorise further investigation.

The ruling of the Pre-Trial Chamber regarding the deferral of a case may be appealed to the Appeals Chamber either by the Prosecutor or the state against which the ruling is made. Such an appeal shall be heard on an expedited basis in accordance with Article 82. An appeal by a state against a preliminary ruling of the Pre-Trial Chamber under Article 18, does not preclude the right of that state to challenge the admissibility of a case on the basis of additional significant facts or change of circumstances.²¹¹

If the Prosecutor defers the investigation to the requesting state, Article 18, para. (3) and (5) gives him/her measures to control the proceedings of the state's investigation.

5.2 The Obligation to Notify Third States

According to the notification pursuant to Article 18, para. (1), the question arises if the Prosecutor is also obliged to inform non-party states. The answer to that question partly depends on the clarification of the term "and those States which, [...] would normally exercise jurisdiction over the crimes concerned". A possible construction of the clause would depend on the use of the term "and" in Article 18 para. (1). If it is understood in a restrictive way, the notification could be

²¹¹ Asanjani (*supra* 129) 71

limited only to those state parties, which would normally exercise jurisdiction.²¹²

However, this construction has to be rejected due to the possibility of third states, pursuant to Article 12, para. (3), declaring ad hoc the acceptance of the International Criminal Court's jurisdiction. If such an ad hoc declaration is involved, the Prosecutor must obviously notify that state about the commencement of the investigation. The Prosecutor, however, would only be obliged to inform a non-party state if the term "and" is understood in an additive and not in a restrictive sense.

Moreover, the wording of Article 18, para. (1) seems to include the obligation of the Prosecutor to notify third states if they, "would normally exercise jurisdiction over the crimes concerned". By reason of the Prosecutor's duty to inform all state parties pursuant to the first alternative, the second alternative to notify states which "would normally exercise jurisdiction over the crimes concerned" would be superfluous if only state parties should be informed. The obligation of the Prosecutor to notify state parties is already contained in the first alternative.

The purpose of Article 18 is to reinforce the principle of complementarity and to control the Prosecutor. According to non-party states, there is no need to reinforce the principle of complementarity or to control the Prosecutor due to the fact that the Statute does not oblige non-party states and the jurisdiction of the International Criminal Court normally does not stand in concurrence or any relationship to the national court's jurisdiction of non-party

²¹² Nsereko (*supra* 205) 399

states. Only in the case of "jurisdiction over nationals of a non-party state"²¹³ is the relationship between national courts of non-party states and the International Criminal Court in question.

Moreover, the clarification of Article 18, para. (5) might emphasise the fact that a notification of a non-party state is not necessary, because it makes certain that only "States Parties shall respond to such requests without undue delay". If non-party states were included, the provision of Article 18, para. (5) would also provide an alternative for those states which are not a party to the Statute.²¹⁴ However, the Statute of Rome is also a multilateral international treaty.²¹⁵ Hence, it cannot bind or oblige states which did not become a party to the Statute. A clause that obliges a non-party state would be ineffectual pursuant to the principles of international law treaties.

In conclusion, it can be said, that the Prosecutor is only obliged to notify third states about the commencement of the investigation in two different cases: first, when the Prosecutor investigates against a national of a non-party state, who committed a crime on the territory of a party state; Secondly, when a third state declares the acceptance of the International Criminal Court's jurisdiction *ad hoc* and the investigation is aimed against a national of such a state. In both cases, the third state would normally, due to the active personality principle, exercise its jurisdiction.

²¹³ See: Chapter Two, 3.2.5

²¹⁴ Nsereko (*supra* 205) 399

²¹⁵ Cassese (*supra* 151) 145

5.3 The Authorization of the Pre-Trial Chamber

The Statute provides in Article 18 that there are no grounds on which the Pre-Trial Chamber can authorise further action by the Prosecutor if the state concerned requested a deferral of the investigation. The question is under which circumstances the Pre-Trial Chamber can authorise the Prosecutor to proceed with the investigation, although the state has requested a deferral.

The principle of complementarity is a fundamental feature of the International Criminal Court and cannot be overridden by the Pre-Trial Chamber. Hence, the question arises whether the provisions of Article 17 have to be applied by the Pre-Trial Chamber regarding the authorisation of the Prosecutor's investigation in the case of a deferral. Due to the primacy of national jurisdiction and the non-intention of the International Criminal Court of encroaching on the sovereignty of the state party, the preconditions for authorising further action by the Prosecutor must be as restrictive as the preconditions for admissibility.

However, it also has to be considered that the investigation, as the first step towards a trial, must be flexible to be effective. The suspicion of a situation (*begründeter Tatverdacht*) mentioned in Article 17 must be sufficient to commence with an investigation. If the grounds on which the Pre-Trial Chamber can authorise further action by the Prosecutor were as restrictive as in Article 17, the risk of a Prosecutor becoming functionally paralysed would be dangerously high. The two contrary interests - on the one hand, the primacy of national jurisdiction and, on the other hand, the effectiveness of investigation and prosecution - have to be brought into accord.

Hence, according to the authorisation of the Pre-Trial Chamber, the provisions of Article 17 have not to be applied in the restrictive way that the Court has to apply them in determining a case as admissible. Nevertheless, the basic idea (*Auslegungsregel* of Article 18, para (2)) of Article 17 has always been considered by the Pre-Trial Chamber as authorising the Prosecutor to commence with the investigation.

6 Challenges to the Jurisdiction of the ICC and Admissibility of a Case

The preconditions of how and by whom the jurisdiction of the International Criminal Court or the admissibility of a case can be challenged are addressed in Article 19. Pursuant to Article 19, para. (1), the Court shall satisfy itself that it has jurisdiction in any case brought before it and may on its own motion determine if a case is admissible in accordance with Article 17.

The term "case" in Article 19, para. (1) is to be understood in a more narrow sense than the term "situation" in the Articles 13, 14 and 18. "[T]he concept of a 'case' would seem to imply that an individual or individuals had been or were targeted as the result of an investigation of a 'situation'".²¹⁶

The fact that the duty of the Court to satisfy itself that it has jurisdiction is limited on cases "brought before it" is striking. According to the determination of admissibility in Article 19, para.(1), such a limitation is failing. This leads to the conclusion that the Court can

²¹⁶ Hall *Article 19 Challenges to the jurisdiction of the Court or the admissibility of a case* in Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* (1999) 406-407

theoretically determine if the case is admissible in accordance with Article 17 in advance and is not obliged to wait until the case is brought before it. However, the Court normally would wait until the admissibility is challenged in order to determine if a case is admissible or not.²¹⁷ The fact that the challenges to the jurisdiction of the Court and the admissibility of a case are codified in the same article of the Rome Statute emphasises the close relationship between admissibility and jurisdiction and how both features melt together in the principle of complementarity.

6.1 The Right to make Challenges

Article 19, para. (2) provides for the provisions of who can challenge the Court's jurisdiction and/or the admissibility of a case. Pursuant to that provision, the Court's jurisdiction and/or the admissibility of a case can be challenged either by the accused or the person under a warrant of arrest or summons to appear before the Court. Furthermore, a challenge can be mounted by a state that has jurisdiction over a case on the ground that it is investigating or prosecuting or already has investigated or prosecuted. Finally, a challenge can be mounted by a state whose acceptance of the Court's jurisdiction is required as a precondition for the Court to exercise jurisdiction under Article 12.

The burden of proof according to the challenge to jurisdiction or inadmissibility has to be carried by the challenging state or individual. This is as it should be due to the fact that the states, in principle, are advent to the necessary information.²¹⁸

²¹⁷ Hall (*supra* 216) 408

²¹⁸ Hall (*supra* 216) 409

6.1.1 Challenges to Admissibility

The fact that a state has already challenged the admissibility of an investigation under Article 18 and this challenge was rejected by the Pre-Trial Chamber does not lead to an inability to challenge the admissibility of the case again under Article 19. However, in such a case Article 18, para (7) requires additional significant facts or a significant change of circumstances to justify another challenge under Article 19.

Under Article 19, the admissibility of a case can only be challenged on the grounds mentioned in Article 17. The striking difference between Article 18, para. (2) and a challenge to the admissibility of a case under Article 19, is that Article 18, para. (2) does not list the grounds on which the Pre-Trial Chamber can authorise further action by the Prosecutor.²¹⁹

If Article 18, para (7) is interpreted as a requiring preliminary provision for a state, in order to mount a challenge under Article 19, then states are essentially precluded from contesting a Security Council referral under Article 19. If Article 18 para. (7) is read limited to a state's access to a repeated challenge then this is not the case. Regardless of one's interpretation of Article 18, para. (7), there are no provisions for a state to challenge the Prosecutor's investigation of a Security Council referred situation on admissibility grounds. It would appear under Article 19 that a state may only challenge such a referral at the stage where a case had been brought.

²¹⁹ See: Chapter Three, 5.3

6.1.2 Challenges to Jurisdiction

Due to the fact that "jurisdiction" is not defined in Article 19, the range of the term "jurisdiction" is in question. Pursuant to Article 19, para. (1) the Court shall satisfy itself that it has jurisdiction. This implies that the Court itself is also empowered to define the range of "jurisdiction". Without doubt the jurisdictional issues spelled out in the Statute are covered by this term. Hence the jurisdiction *ratione loci*, *ratione materiae*, *ratione personae* and *ratione temporis* are grounds on which a challenge can be made.

However, the question arises whether the validity of the International Criminal Court's establishment and its competence are a part of the term "jurisdiction" and can therefore also be challenged under Article 19. To grant the highest standard of fairness, 'jurisdiction', especially in international law, must be understood in a broad sense. In the case *Prosecutor versus Tadic*, the Appeals Chamber stated:

"[A] narrow concept of jurisdiction may, perhaps, be warranted in a national context but not in international law. International law, because it lacks a centralized structure, does not provide for an integrated judicial system operating an orderly division of labour among a number of tribunals, where certain aspects or components of jurisdiction as a power could be centralized in one of them but not in the others. In international law, every tribunal is a self contained-system [...]. This is incompatible with a narrow concept of jurisdiction, which presupposes a certain division of labour. Of course, the constitutive instrument of an international tribunal can limit some of its jurisdictional powers, but only to the extent to which such limitations does not jeopardize its 'judicial character' [...]. Such limitations cannot, however, be

presumed and, in any case, they cannot be deduced from the concept of jurisdiction itself."²²⁰

According to the opinion of the Appeals Chamber of the International Criminal Tribunal of the Former Yugoslavia, the establishment and the competence of an international criminal institution falls under the term jurisdiction and hence can also be challenged. However, one has to wait until the International Criminal Court starts its work to see whether the International Criminal Court would follow the opinion of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia.

6.1.3 Challenge by the Accused or a Sought Person

Pursuant to Article 19, para. (2) (a) a challenge can be mounted by an "accused". The Statute does not provide a definition for the term "accused" but "[i]t would be consistent with the structure of the *Statute* and the approach of the *Rules of Procedure and Evidence of the ICTY and ICTR* to define an accused for the purposes of Article 19 as a person identified in 'the document containing the charges' referred to in article 61 para. 3 (a), as of the moment the document is provided to the Pre-Trial Chamber, whether *in camera* pursuant to a sealed indictment or publicly, rather than at the stage the charges are confirmed in accordance with article 61 para. 7 (a), and to consider the person as an accused under the *Statute* until the charges are not confirmed or the person is acquitted or convicted."²²¹

²²⁰ Prosecutor v. Tadic (Case No. IT-94-1-AR72) (*supra* 79) 39

²²¹ Hall (*supra*216) 409

As for an accused, Article 19 provides the right to mount a challenge for a person for whom a warrant of arrest or a summons to appear has been issued under Article 58. A person for whom a warrant of arrest is issued by the Pre-Trial Chamber is, pursuant to Article 58, para. (1), a person for whom there are reasonable grounds to believe that he/she committed a crime within the jurisdiction of the Court and the arrest of that person appears necessary. A person for whom a summons is issued by the Pre-Trial Chamber is in accordance with Article 58, para. (7) somebody where a warrant of arrest is not necessary to ensure the appearance of that person before the Court.

In contrast to Article 18, individuals are empowered under Article 19 to mount challenges. Article 18 enables only states to challenge the admissibility of the Prosecutor's investigation, whereas Article 19 provides the means also to the accused or sought person and not only to states. This emphasises that Article 18, para. (7) cannot be read as a preliminary ruling for a challenge under Article 19. But in view of the principle of judicial economy (*Prozeßökonomie*) and wide effective judicial protection (*effectiver Rechtsschutz*), it is questionable why the person mentioned in Article 19, para (2) (a) is not empowered to challenge the investigation of the Prosecutor.

A state's challenge to the investigation of the Prosecutor under Article 18 concerns the validity of the investigation. Therefore, states have the possibility to influence the proceedings before a "situation" becomes a "case". If a "situation" has already become a "case", the validity of any act of the Prosecutor cannot be affected anymore.²²² Hence the person concerned has no measures to act against the Prosecutor's investigation.

²²² See: Art. 19 (9) Statute of Rome

However, recalling the fact that Article 18 deals with "situations" and Article 19 with "cases", it lies in the nature of the different stages of the procedure that at the time where the admissibility of an investigation can be challenged under Article 18, no accused or sought person in the sense of Article 19 is involved. The fact that the Statute actually provides states with two rights to challenge the admissibility of a "case" and/or "situation", and only one possibility for the person concerned to challenge only the admissibility of a "case", ensues from the principle of complementarity and from the Statute as an international multilateral treaty.

Article 18 enforces the principle of complementarity and therefore concerns states more than individuals. However, it theoretically opens the possibility that an inadmissible investigation can be lead against the person concerned without giving that person any legal right to protect himself against such a situation. This problem does not arise as long as the investigation proceeds secretly, but as soon as it becomes public an investigation by the Prosecutor of the International Criminal Court can damage anybody's reputation. Especially during struggles for political power in unstable countries, the initiation of an investigation can be used as a political measure against the opponent.

6.1.4 Challenge by a State with Jurisdiction

Pursuant to Article 19, para. (2) (b) a state which has jurisdiction over a case can mount a challenge to the Court's jurisdiction or to the admissibility of a case on the grounds that it is investigating or prosecuting or has already investigated or prosecuted the crime concerned. Since all states are empowered under international law

due to the principle of universality to potentially apply their jurisdiction over the crimes within the International Criminal Court's jurisdiction, it is likely that Article 19, para. (2) (b) meant only to include those states which had provided their own courts with jurisdiction under national law over the case whether under the principle of territoriality, the active or passive personality principle or the principle of universality.²²³

Article 19, para. (2) (b) can be read so that it limits the grounds on which a challenge can be mounted by a state on the basis that the state is investigating or prosecuting or already has investigated or prosecuted. This could mean that pursuant to that provision only challenges to the admissibility of a case and not to the jurisdiction of the Court can be made by states which have jurisdiction. However, the Chapeau of that provision emphasises that challenges can be made to the jurisdiction of the Court or to the admissibility of a case. It could depend on the clause "to the admissibility of a case [...] or challenges to the jurisdiction" if the states mentioned in Article 19, para. (2) (b) are limited to challenges only to the admissibility of a case. The "or" can be understood exclusively, in the sense of 'either/or' but also inclusively in the sense of 'or/and'. According to Article 19 para. (2) (b) the "or" in the Chapeau must also be read in the sense of 'or/and'. This is because subparagraphs (a) and (b) of that provision do not include any limitations and allow both kinds of challenges. A state which has jurisdiction is also able to challenge the jurisdiction of the International Criminal Court. If the intention of Article 19, para. (2) (b) would be to limit the challenges of a state which has jurisdiction only to the admissibility of a case, then the Chapeau of para. (2) would not include the possibility of challenges to

²²³ Hall (*supra* 216) 410

the admissibility and to the jurisdiction. Para. (2) as Chapeau for the subparagraphs (a) through (c) is part of every subparagraph and must be read together with them.

It is also conceivable that the limitation in Article 19, para. (2) (b) does not refer to the basis of the challenges, but simply intends to limit the right to challenge to those states which are investigating or prosecuting or has investigated or prosecuted the crime concerned.²²⁴ This seems to be the right interpretation as there is no reason for the Statute to limit the challenges of states which have jurisdiction only to those concerning the admissibility. However, states could obtain in an underhand way the right to challenge due to the fact that it is easy for a state to initiate an investigation. The right to challenge could be abused to sabotage the proceedings of the International Criminal Court.

6.1.5 Challenge by a State whose Acceptance of Jurisdiction is required

Finally, Article 19, para. (2) (c) emphasises that states from which the acceptance of jurisdiction is required under Article 12 have the right to challenge the court's jurisdiction or the admissibility of a case.

However, if a situation is referred to the Prosecutor by the Security Council pursuant to Article 13, para. (b), the state's acceptance of jurisdiction is not required. Consequently, a case can never be challenged under Article 19, para. (2) (c) if the referral to initiate an investigation comes from the Security Council.

Pursuant to Article 12, the acceptance of jurisdiction is required of the state on which territory (including aircraft and vessels) the crime was committed or the state of nationality. These are the states which can challenge the admissibility of a case or the Court's jurisdiction under Article 19, para. (2) (c).

It is notable that neither Article 19, para. (2) (b) nor (c) limits the right of challenges to party states. Hence, non-party states can, if they fulfil the preconditions of these provisions, mount a challenge to the jurisdiction or admissibility.

6.2 General Remarks according to the Challenges

The persons or states mentioned in Article 19, para. (2) may make challenges to the admissibility or jurisdiction, in principle, only once and prior to or at the commencement of the trial. Challenges to the admissibility of a case may be brought with the leave of the Court at a later stage on the ground that the person concerned has already been tried for the same conduct and the Court is barred under the principle of *ne bis in idem* contained in Article 20, para. (3) from trying the person again.

Prior to the confirmation of charges, the Pre-Trial Chamber will address the challenges to admissibility or jurisdiction of the Court. Otherwise, the Trial Chamber will deal with them. Decisions regarding admissibility or jurisdiction may be appealed to the Appeals Chamber. If the challenge is made by a state, the Prosecutor is obliged to suspend investigation until the Court has made a decision on the

²²⁴ Hall (*supra* 216) 411

matter in accordance with Article 17, which deals exclusively with admissibility.

Conclusion

The birth of the International Criminal Court was not an easy one in view of all the historical events and the controversial academic debates influencing the Statute of Rome. A lot of work on a political and academic level was necessary to enable the community of nations to establish a permanent international criminal institution as it is now codified in the Statute of Rome. The Statute of Rome presents in many ways a compromise between the negotiating states due to the fact that, on the one hand, it spells out the material and procedural law for the International Criminal Court and, on the other hand, represents a multilateral international treaty. Like every statute, this one has strengths and weaknesses; however, it is a great step towards justice and a great step forward in the development of international criminal law. The problems around the jurisdiction of the International Criminal Court have largely been described throughout this research. Many of these problems will maybe be solved as soon as the Judges of the International Criminal Court have given their first verdict. The discussions and debates according to the Statute of the International Criminal Court, which can be found in books, journals and commentaries, are more or less just academic. How efficient the Statute will be in bringing international perpetrators to justice remains to be seen once the Court starts its work. Especially for an institution working on an international level, the difference between theoretical concept and practical realisation can be enormous and the influence of issues and matters which have nothing to do with justice cannot be underestimated. The higher the level on which a legal question occurs, the more political becomes the solution. However, it has to be mentioned that it is almost a miracle that the international community, fifty-six years after the last world war, has managed to establish an

international institution which is able and has the means to secure peace in bringing perpetrators to justice.

Regarding the jurisdiction of the International Criminal Court, the Statute has several weaknesses. Firstly there is the complicated structure of Article 12 in accordance with Article 13 and the fact that the Court strongly depends on the Security Council, especially if core crimes are committed on the territory of non-party states. Secondly, there is the fact that the International Criminal Court is unable to apply the widely accepted principle of universality. Thirdly, the Statute does not give a solution on how to deal with international obligations between state parties and third states. Fourthly, there is the imprecise relationship between Article 12 and Article 11, as it is silent on the point whether the Court shall have jurisdiction over crimes committed on the territory of a state party by a national of a state for which the Statute is not in force. Finally, there is the Transnational Provision as a possibility for state parties to opt-out of the Court's jurisdiction with reference to war crimes.

The structure of Article 12, which spells out the preconditions to exercise the jurisdiction of the Court, is far from being perfect. Its relationship to Article 13 is complicated as the preconditions of Article 12 are not necessary if a situation is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations. Article 13, para. (b) is the strongest means of the Statute as it does not require the acceptance of the Court's jurisdiction by any state involved. However, the referral must be adopted by the Security Council in a resolution under Chapter VII of the Charter of the United Nations and therefore is subject to the exercise of the veto power of the permanent members of the Security Council. This emphasises the

strong dependence of the International Criminal Court on the Security Council.

The referral of a situation under Article 13 para (a) by a state party requires the acceptance of either the state of nationality or the territorial state. The difficulty is that this can lead to political and diplomatic ramifications if a state party refers a situation to the Court, stating that a crime within the jurisdiction of the Court was committed on the territory or by a national of another state. The question for the future work of the International Criminal Court therefore is, if the state parties excessively use their right to refer situations, occurring in other states, to the Court.

The Statute is further unclear with reference to the exercise of jurisdiction in relation to non-party states. The problem is that the International Criminal Court is not able to apply universal jurisdiction leads to some difficulties in how the jurisdiction over a national of a non-party state can be justified. As Article 12 clearly rejects universal jurisdiction, jurisdiction over a national of a non-party state who committed a crime on the territory of a state party can only be justified on the basis of the delegation of territorial jurisdictional power to the International Criminal Court. Accordingly, the International Criminal Court in such cases acts in the name of the party state on which territory the alleged crime was committed.

The opt-out clause for war crimes in Article 124 was added to the Statute at the very last stage of the negotiations in Rome, but finally helped to gain the support of the majority of the participating states. However, pursuant to that provision the International Criminal Court cannot exercise its jurisdiction over war crimes committed in a period of seven years if the territorial state or state of nationality opted out

under Article 124. The only way to mount such a case before the International Criminal Court is for the Security Council to refer the situation to the Court. This shows again that the International Criminal Court strongly depends on the Security Council.

The main strength of the Statute according to the exercise of jurisdiction is the achievement of a strong Prosecutor, who is able to initiate investigations on his/her own motion. Although the acceptance of the state of nationality or of the territorial state is necessary if the Prosecutor initiates an investigation *proprio motu* and the commencement of the investigation depends on the decision of the Pre-Trial Chamber, the Prosecutor of the International Criminal Court has effective means to fulfil his/her tasks. Besides, with the controlling mechanism of Article 15, the participating states guaranteed once again the successful adoption of the Statute. Notably, there is no specification as to the source of information used by the Prosecutor to exercise his/her prerogative. This opens the door for an active role for other United Nations organs, international organisations and non-governmental organisations.

The principle of complementarity is one of the cornerstones on which the Statute of Rome is built. The admissibility of cases before the International Criminal Court depends on the question as to whether the Court is allowed in certain situations to complement the national jurisdiction. It was never the intention of the negotiators in Rome to create a supra-agency for international crimes. The International Criminal Court is intended only to complement national judicial systems. One of the most positive effects triggered by the principle of complementarity is that national judicial systems are indirectly forced to raise the standard of their substantive and procedural criminal law to an international level regarding the prosecution of core crimes. The

principle of complementarity can therefore be seen as an effective means to eliminate lacuna regarding core crimes on an international level. In providing the principle of complementarity the Statute of Rome takes into account that prosecution at national level is often the better solution regarding judicial efficiency and justice. This is because the gathering of evidence at the *locus delicti* seems to be more effective and the language differences are usually limited. Furthermore, the danger that the International Criminal Court is flooded with cases and becomes paralysed is minimised, as national courts will take over most of the cases.

Pursuant to Article 17 a case is admissible if national courts are unable or unwilling to act, the person concerned already has been tried or the case is not of sufficient gravity. Although Article 17, para (2) and (3) provide for guidelines on how to determine "inability" or "unwillingness", the definitions are not clear and the danger of abuse is high. Especially the fact that the burden of proof has to be carried normally by the Prosecutor is a weakness of the Statute. The crimes within the jurisdiction of the International Criminal Court are mainly committed by or with the assistance of state authorities. But these are the persons who in principle hold all the information about the status and standards of the judicial system of the state concerned. It will be difficult for the Prosecutor to prove the "inability" or "unwillingness" of a state if the crime was committed by or under the auspices of that state's authorities.

The same difficulty occurs under the principle *ne bis in idem*. The Prosecutor has in principle to prove that the trial was a sham or initiated to shield the person from criminal responsibility, although the person concerned may be an authority normally with access to all key information. Furthermore, it is unclear, according to the principle of

ne bis in idem, how Article 17, para (2) and Article 20, para (3) relate to one another. Due to the similar wording of these two provisions, the question arises if a case can be considered as admissible under the principle of *ne bis in idem* or if all cases are already covered under Article 17, para (2) and Article 20, para (3) therefore becomes superfluous.

Another weakness closely related to the admissibility of a case is that the Statute is silent on the point of how to deal with pardons and amnesties. One will have to wait and see how the International Criminal Court will apply the Statute on pardons and amnesties.

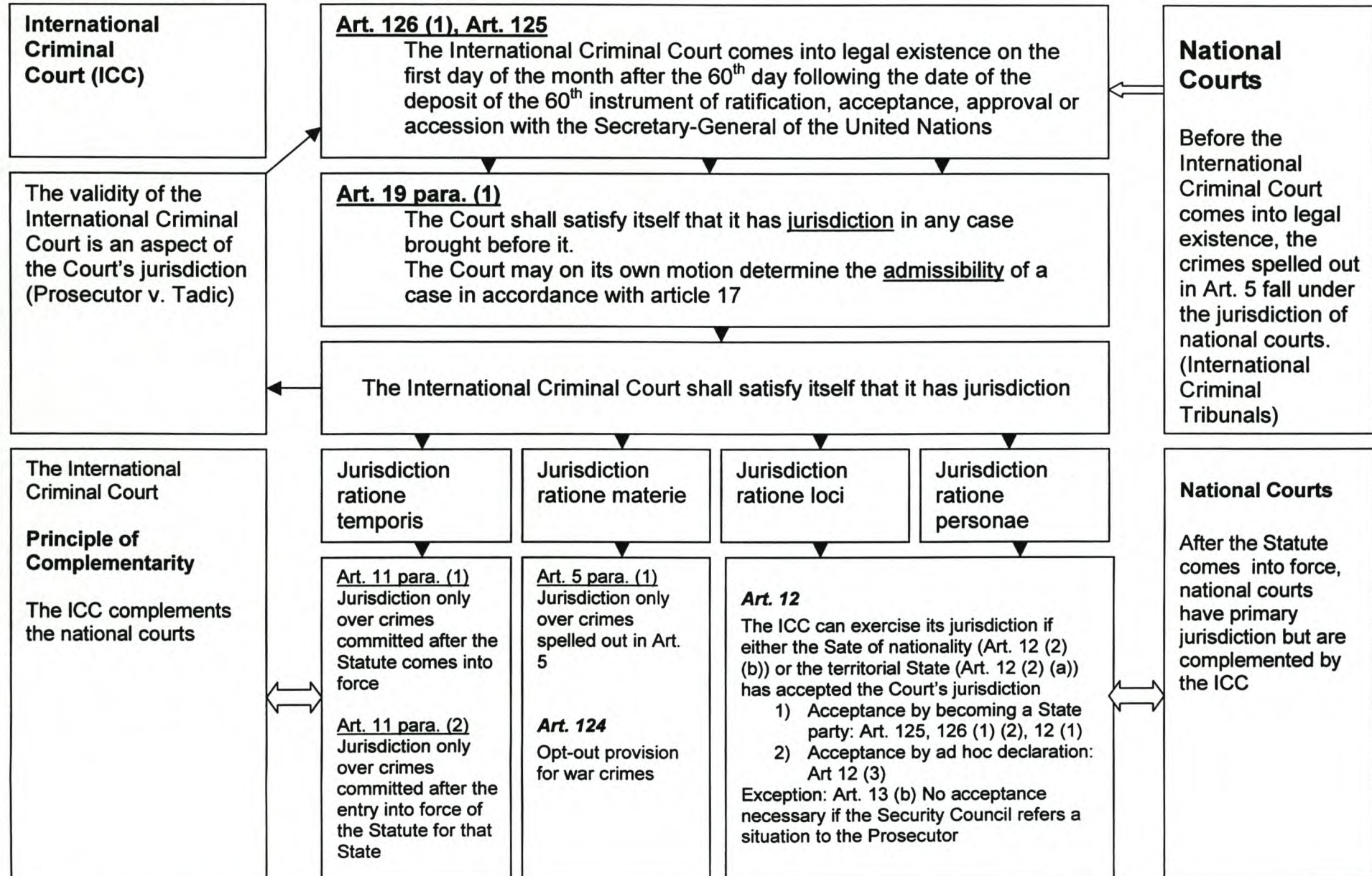
According to Article 18, it is unclear if the Prosecutor has to notify third states about the commencement of the proceedings. However, if a state declares ad hoc that it accepts the jurisdiction of the International Criminal Court, the Prosecutor is obliged to notify this state. Furthermore, if the Court exercises its jurisdiction over a national of a non-party state, a notification is a precondition to commence with the proceedings. Another obscurity has to do with the circumstances under which the Pre-Trial Chamber can authorise further steps of the Prosecutor if a state requests a deferral of the investigation. Obviously Article 17 will be a guideline for the Pre-Trial Chamber to decide in such a case.

According to Article 19, which deals with the question of challenges to the jurisdiction of the Court and the admissibility of a case, it is notable that the Court can determine the admissibility of a case in advance. The Court does not have to wait until the case is brought before it. In contrast, the determination of the Court's jurisdiction over a case is limited to cases brought before the Court. However, in respect of judicial efficiency, the Court will wait in both situations until

one of them is challenged in order to determine if it has jurisdiction or a case is admissible.

In view of all the weaknesses and strengths of the Statute of Rome, it can be said that the International Criminal Court has the necessary means to fulfil its tasks and to work according to the ideals expressed in the Preamble. However, it is an international institution which strongly depends on the support of the different nations. Hopefully the Statute will gain more parties and the state parties will recognise that the Statute of Rome and its International Criminal Court represents an enormous possibility for the entire world community to replace war, atrocities and injustice with peace and justice.

. The Jurisdiction of the International Criminal Court



I. The Relationship between the International Criminal Court and the National Courts

The Principle of Complementarity

National Courts

The principle of complementarity forces the national courts indirectly to raise their standards regarding the investigation and prosecution of "core crimes".

Art. 19 (1)

The ICC may on its own motion determine if a case is admissible

Art. 17 (1) (a)

A case is inadmissible if its being investigated or prosecuted by a State which has jurisdiction.

Art. 17 (1) (a)

A case becomes admissible if the State is unwilling or unable genuinely to carry out the investigation or prosecution.

Art. 17 (1) (b)

A case is inadmissible if it has been investigated by a State, which has jurisdiction over it and has decided not to prosecute the person concerned.

Art. 17 (1) (b)

A case becomes admissible if the decision not to prosecute resulted from unwillingness or inability.

Art. 17 (1) (c)

A case is inadmissible if the person concerned has already been tried for the conduct, which is subject of the complaint

Art. 17 (1) (c), 20 (3) (a) (c)

A case becomes admissible if the trial was for the purpose of shielding the person concerned or was not impartially or not independently.

Art. 17 (1) (d)

A case is inadmissible due to insufficient gravity.

The International Criminal Court

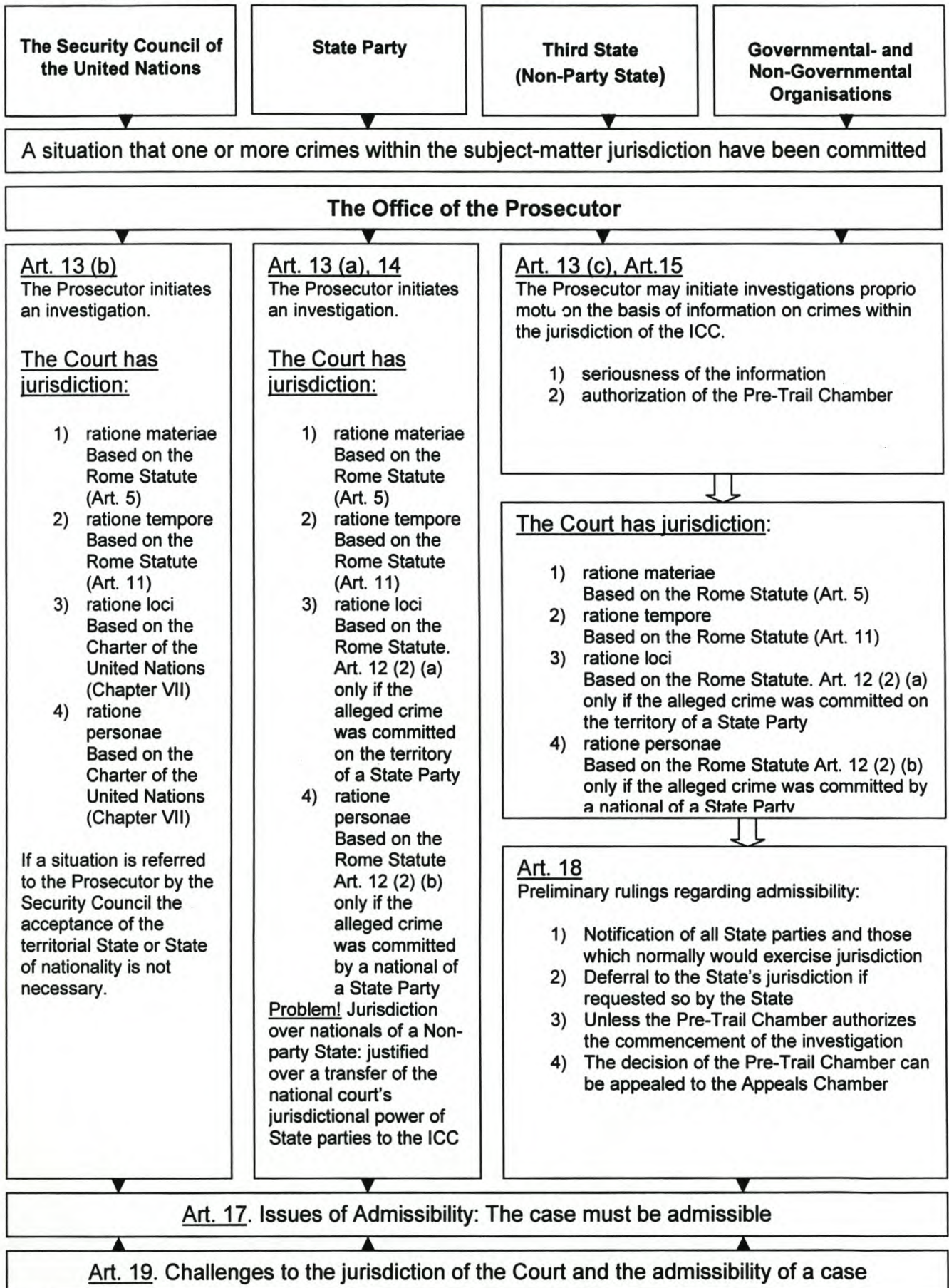
The standard of "unwillingness":

- 1) Art. 17 (2) (a)
The proceedings were for the purpose to shield the person concerned from criminal responsibility.
- 2) Art. 17 (2) (b)
There has been an unjustified delay in the proceedings with intention not to bring the person concerned to justice.
- 3) Art. 17 (2) (c)
The proceedings are/were not conducted independently or impartially.

The standard of "inability":

Art. 17 (3)
A State is unable to obtain the accused or the necessary evidence and testimony or is otherwise unable to carry out its proceedings, due to a total or substantial collapse or unavailability of its national judicial system.

III. Bringing a case to the International Criminal Court



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