



FACULTY OF LAW
University of Lund

Caroline Fransson

The principle of
complementarity in the Rome
Statute.

- Security Council referrals-

Master thesis
20 points

Supervisor: Ulf Linderfalk

International Law

Spring semester 2004

Contents

SUMMARY	4
PREFACE	6
ABBREVIATIONS	7
1 INTRODUCTION	8
1.1 The subject	8
1.2 Purpose	9
1.3 Organisation and limitations	10
1.4 Methods and sources	11
2 THE INTERNATIONAL CRIMINAL COURT, AN OVERLOOK	13
2.1 Crimes within ICC's jurisdiction	13
2.1.1 Historic development	13
2.1.2 Relevant regulations in the Rome Statute	14
2.2 Jurisdiction of the ICC	15
2.3 Trigger mechanisms	16
2.3.1 Referral by a State Party	17
2.3.1.1 Procedure of State referral	18
2.3.2 Investigation by the Prosecutor	19
2.3.2.1 Procedure of referrals by the Prosecutor	20
2.4 Analysis	20
3 THE UNITED NATIONS AND THE INTERNATIONAL CRIMINAL COURT	23
3.1 The creation of the International Criminal Court and the role of the United Nations	23
3.1.1 The United Nations influence over the Court	23
3.2 Twofolded cooperation	25
3.2.1 The "Relationship Agreement between the Court and the United Nations"	25
3.3 Mandate of the Security Council	26
3.3.1 Extent of the mandate	26
3.3.2 Reasons for a mandate	27
3.4 Analysis	28

4	REFERRAL BY THE SECURITY COUNCIL	31
4.1	Article 13 of the Rome Statute	31
4.2	Limitations <i>ratione loci</i> and <i>ratione temporis</i> and Security Council referrals	32
4.3	Procedure of Security Council referrals	34
4.4	Opinions of States Parties	34
4.4.1	States failure to prosecute	36
4.4.2	States fears	36
4.5	Analysis	37
5	ADMISSIBILITY, THE PRINCIPLE OF COMPLEMENTARITY	40
5.1	Article 17 of the Rome Statute	40
5.2	"unwilling and unable"	42
5.2.1	Unwillingness	42
5.2.1.1	Purpose of shielding	43
5.2.1.2	Delay	43
5.2.1.3	Independence and impartiality	44
5.2.1.4	Other evidence of unwillingness	44
5.2.2	Inability	44
5.2.3	Alternative ways of accountability and the principle of complementarity	45
5.3	Challenges of admissibility	46
5.4	The inclusion of the principle of complementarity	46
5.4.1	Reasons for the Inclusion	46
5.4.2	Opinions of States	48
5.4.2.1	Fears of discriminatory application	49
5.5	Analysis	49
6	THE PRINCIPLE OF COMPLEMENTARITY AND SECURITY COUNCIL REFERRALS	52
6.1	Effects of Security Council referrals	52
6.2	The principle of complementarity.	52
6.2.1	Direct applicability of the principle of complementarity	53
6.2.2	Alternative ways of applying the principle of complementarity	55
6.3	Consequences of the applicability of the principle of complementarity	56
6.3.1	State sovereignty	58
6.3.1.1	Concerning States Parties to the Rome Statute	59
6.3.1.2	Concerning non Party States to the Rome Statute	60
6.4	Analysis	60
	BIBLIOGRAPHY	65
	TABLE OF CASES	68

Summary

The Rome Statute of the International Criminal Court was adopted July 17, 1998 at the Rome Conference. The Statute entered into force July 1, 2002, after that 60 States had ratified the Statute. The International Criminal Court (ICC) has now established an administration in order to be able to fulfil its mission, its mandate:

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished...

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

The Court has so far not tried any case and thus not had the opportunity to interpret its own Statute. The Rome Statute is a State agreement and the proceedings of the making of the Statute were surrounded by discussions and argumentation among States. The result is the Rome Statute, a statute consisting of compromises that give room for interpretations.

This thesis will consider the principle of complementarity, included in Article 17 of the Rome Statute. This principle is seen as the corner stone of the Statute and provides with the rules regarding the admissibility of cases before the ICC. One of the main purposes of the ICC is to be complementary to national judicial systems, to work as a secondary solution when States are unwilling or unable to genuinely conduct national proceedings regarding alleged perpetrators of the crimes included in the Rome Statute. Furthermore, the importance of the principle of complementarity also is due to from the fact that criminal jurisdiction is one of the fundamentals in State sovereignty, which leads to a reluctance with States to give up the right to exercise that jurisdiction to an international criminal tribunal, such as the ICC.

This thesis will investigate an especially intricate aspect of the principle of complementarity, the principle's applicability in relation to referrals of situations by the Security Council of the United Nations. The Security Council has a mandate under the Rome Statute to refer situations to the ICC that the Council deem a breach or threat to international peace and security and it considers it necessary that the ICC investigates the situation in order to determine whether alleged perpetrators of the crimes included in the Rome Statute should be prosecuted. This aspect is interesting and therefore widely discussed since the Security Council has such an important and powerful role in the international community. It is held by some international legal scholars that because of the position of the Security Council in the international community, the principle of complementarity should not be applied on Security Council referrals; such referrals should be automatically admissible. Scholars of this opinion further hold that the Rome

Statute implies such an order. According to Article 19 of the Statute the ICC:

[m]ay, on its own motion, determine the admissibility of a case in accordance with article 17.

Furthermore, according to Article 18 (1) is the Prosecutor not obliged to inform States Parties and States that would normally exercise jurisdiction over the relevant situation when the Security Council has referred the situation to the ICC. This prevents the States that have started national proceedings to use the right in paragraph 2 of Article 18 to inform the ICC about its proceedings. These rules prove, according to some scholars, that the principle of complementarity need not be regarded on Security Council referrals.

My opinion is that the principle of complementarity should be applied also on referrals from the Security Council and that the ICC is in fact bound under the Rome Statute to apply the principle. The ICC has its own international personality and is in no way bound by the decisions that the Security Council adopts. Thus even if the Council is one of the most powerful organs in the international community its decision to refer a situation to the ICC does not oblige the Court to investigate the relevant situation. Furthermore, Article 19 of the Rome Statute makes no difference between the different trigger mechanisms. Thus, the ICC is never, according to that article, obliged to investigate the admissibility of cases in regard of the principle of complementarity. However, Article 53 states that the Prosecutor must regard the principle before deciding to start an investigation. That article is applicable on referrals from the Security Council as well and proves, together with the purposes and the importance of the principle of complementarity, that the principle indeed must be applied on Security Council referrals.

These different opinions regarding the applicability of the principle of complementarity and the different interpretations made by the Rome Statute will be investigated thoroughly in this thesis.

Preface

I would like to thank everyone who has encouraged and assisted me in my work with this thesis.

I would like to direct special gratitude to my supervisor Ulf Linderfalk for fine assistance and cooperation and Pål Wrange at the Swedish Ministry for Foreign Affairs who suggested the subject for this thesis and who has also assisted me in my work.

Abbreviations

ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
NGO	Non-Governmental Organisation
ILC	International Law Commission
UN-Charter	United Nations Charter
VCLT	Vienna Convention on the Law of Treaties

For sake of simplicity the Prosecutor will be referred to with the masculine form of pronoun, rather than he/her etc.

1 Introduction

1.1 The subject

The International Criminal Court (ICC) is the most recent accomplishment in the international community's fight against impunity. The ICC distinguishes itself from other international criminal tribunals by the fact that it is established by States, as an independent international subject. Other existing international criminal tribunals, as the tribunals for the former Yugoslavia and Rwanda, and the international criminal tribunals in Nuremberg and Tokyo, were established by the United Nations without independent international personality. Further examples of, at least partly, international criminal tribunals are the tribunal established in Sierra Leone and the possible future tribunals in East Timor and Cambodia. These tribunals are not in whole established by the United Nations but only supported by the organisation, they cannot be compared with the ICC. The ICC is supposed to act on a global arena whereas other international criminal tribunals have been established and are being established to deal with crimes within and bring justice to a certain, limited area or situation.

Even though it was the United Nations that started the process of making the Rome Statute and establishing a permanent international criminal tribunal, the ICC and its statute is the result of State agreements. It was States that through negotiations and compromises created the Rome Statute, which is the base for the activities of the Court.

The process of establishing the ICC and its statute was long and difficult with several dissonances between States, followed by lengthy discussions and argumentation. It is easy and perhaps natural to think that when the Rome Statute has been so thoroughly discussed and developed the Statute must be very clear and the interpretations of its articles unquestioned. However, that is not the case. Because of the fact that compromises had to be found to ensure States approval of the Statute, the rules of the Statute are often formulated in a way that makes different interpretations possible. Additionally, since compromises were made, States may favour the interpretation of a rule that is in best conformity with *that* State's view and opinion. Thus, the Rome Statute is not as clear as would be preferable for a statute with the purpose to fight impunity and to promote human rights and world peace.

The principle of complementarity is one of the most important rules included in the Rome Statute. The principle works as an assurance against the Court going beyond its mandate, given to it by the States Parties to the Rome Statute. Probably the most important part of the Court's mandate is namely that the Court is supposed to be complementary to national courts, not a primary court. The principle of complementarity thus assures States of their primary right to express State sovereignty through exercising criminal

jurisdiction. It prevents the ICC from having jurisdiction over cases that are investigated on a national base. The principle is seen as a cornerstone of the Rome Statute, but it is complex and may be understood and interpreted in many ways. The importance and complexity of the principle makes it one of the most interesting parts of the Rome Statute.

The principle of complementarity becomes relevant when a case is brought before the Prosecutor or the Court within the ICC-system. A case can be referred to the ICC by a State Party to the Rome Statute or by the Security Council. Furthermore, the Prosecutor can initiate a case independently. An especially intricate problem that arises concerning the principle of complementarity is its applicability in relation to referrals of a situation by the Security Council. The division of powers between the Security Council and the ICC, two of the most powerful organs in the international community, and the relationship between the rules in the Rome Statute and the UN-Charter is fundamental for an efficient work in the international community to prevent atrocities and impunity for perpetrators. The problem concerning the applicability of the principle of complementarity and Security Council referrals arises because of the exceptional role the Security Council has in the international community, as responsible for the maintenance and the restoring of international peace and security, and its exclusive competence to adopt decisions binding on the member states of the United Nations.

1.2 Purpose

While working with the Rome Statute I have realised the broadness of the Statute, many different interpretations of rules in the Statute are possible. The broadness of the Statute may be positive for interpretations to be made in order to meet new crimes and problems that conflict situations might have at hand in the future. However, problems regarding the interpretations of the Statute may also arise in the future, hindering the efficiency of the ICC.

The interpretation of the Statute is especially problematic and challenging, but because of that also especially interesting. The ICC had not yet had the opportunity to try a case, and thus interpret its own Statute. The rules in the Rome Statute concerning the jurisdiction of the ICC are fundamental for the function of the court and thus interesting to study and interpret. The applicability of the principle of complementarity in regard to referrals of situations to the ICC by the Security Council is a subject surrounded by a lot of questions and many different interpretations by legal scholars, making it an inspiring subject for a thesis.

The possibility for the Security Council to refer situations that the Council considers a threat or breach of international peace and security to the ICC was the trigger mechanism surrounded by the highest amount of scepticism from the States establishing the ICC and its statute. Both aspects of this

thesis, the principle of complementarity and the relationship between the ICC and the United Nations, especially the Security Council, have been debated areas. States have been deeply interested in and concerned about the topic and many different opinions on the matter have existed. The area is unclear and might lead to controversial results in the work of the two organs. Hopefully, this investigation and presentation regarding the different problems concerning the relevant subject will contribute to further discussions.

The purpose of this thesis is to answer the following question;

Is the principle of complementarity in Article 17 of the Rome Statute applicable on situations referred to the ICC by the Security Council?

In order to answer the above mentioned question, an objective description of the relevant rules in the Rome Statute will be made, the different opinions of States concerning the interpretation of those rules, and the different opinions held by the international legal scholars will be presented. My own opinion is that the principle of complementarity is applicable also on situations referred to the Court by the Security Council. Furthermore, it is my opinion that ICC is a great accomplishment in the strive towards peace and the end of impunity for serious crimes such as genocide, war crimes and crimes against humanity. This may influence the presentation in this thesis although I will aim to present all facts objectively and then present my own opinions and interpretations in the analysis.

1.3 Organisation and limitations

A thesis on the applicability of the principle of complementarity in respect of Security Council referrals requires that certain other areas are investigated and presented if the reader is to understand the discussion and outcome regarding the main subject. Furthermore, it is necessary to first of all give an introduction to the ICC and its work. It is fundamental in order to understand the interpretation of specific rules in the Rome Statute that one has basic knowledge of the institution applying the Statute and its purposes. Furthermore, it is important to give the reader an insight of the process of establishing the rules, which is relevant for the interpretations, and the final standpoint that will be made in the thesis. The reasons behind the rules and the different opinions regarding the rules are the grounds of an understandable and reasonable interpretation. Moreover, it is necessary to know the rules regarding other types of referrals to the ICC and the applicability of the principle of complementarity in general since it is otherwise impossible to understand the special situation that is created between the principle and referrals by the Security Council. Thus, an inquiry of the legal situation and an account on the relevant rules and its applicability are, in my opinion, necessary. This is so in order to be able to give an understandable analysis and conclusion regarding the situation.

Concerning this thesis it is not only interesting for the reader, but also necessary in order to gain understanding of the main point of the thesis, to understand the relationship between the United Nations and the ICC. This provides the basis for the relationship between its main organ, the Security Council, and the ICC. For this reason the relevant relationship and the possibility for the Security Council to refer situations will be dealt with separately in part 3 and 4 of the thesis. An investigation of the applicability of the principle of complementarity in respect of Security Council demands a thorough development regarding the principle and the different views demonstrated by States. Such an investigation is presented in part 5 and will improve the understanding of the different interpretations that have been made concerning what role the Security Council has in the work of the ICC. The principle of complementarity regarding Security Council referrals is investigated separately in the last part, part 6, of the thesis.

1.4 Methods and sources

This thesis seeks to investigate the applicability of certain rules in the Rome Statute. The ICC has not yet held any trial. Thus, this thesis discusses possible future considerations regarding the jurisdiction of the ICC, made by the Court within its work. The point of departure is the fundamental importance of investigating serious international crimes as those the ICC has jurisdiction over and that it therefore is of greatest weight that the relation between the Security Council and the Court is good. Additionally, the relationship between the two organs and the interpretations made by the ICC regarding the Rome Statute must be accepted by States and be considered efficient and credible.

In general, interpretations of an international court's statute are based on case law by the court itself. Since the ICC has not yet considered the question investigated in this thesis the interpretations of the relevant rules in the Rome Statute must be made on other basis than practise:

- the preparatory works of the Rome Statute
- the principles and purposes of the concerned statutes
- the wording of the rules
- the opinions announced by States
- the opinions of international legal scholars.

Moreover, the principles and purposes of the different international organs that are considered in the thesis are regarded and do influence the interpretations made. Furthermore, the work by international legal scholars and other international actors will provide a basis for examining the international opinion concerning the rules in the Rome Statute that are investigated in the thesis.

The base regarding what sources should be regarded when interpreting the relevant rules in the Rome Statute is Article 31 of the Vienna Convention on the Law of Treaties.

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.¹

International scholars have had many different opinions on the applicability of the principle of complementarity regarding Security Council referrals and those different opinions will be presented and it will be investigated which opinion is the most adequate interpretation. However, though a useful tool, these sources must be viewed with caution because of the political influence on issues concerning the ICC. Caution must also be used concerning States opinions since such opinions not always reflect States genuine opinions but are affected by political considerations and pressure.

¹ Vienna Convention on the Law of Treaties, [hereinafter VCLT], Article 31 (1)

2 The International Criminal Court, an overlook

The long-held dream of a permanent international criminal court will now be realized. Impunity has been dealt a decisive blow. Those who commit war crimes, genocide or other crimes against humanity will no longer be beyond the reach of justice. Humanity will be able to defend itself – responding to the worst of human nature with one of the greatest achievements: the rule of law.²

The principle of complementarity becomes relevant when a case is brought before the ICC. For the understanding of a thesis on the applicability and complexity of the principle of complementarity it is important to know the basic structures of the ICC and to know how a case finds its “way to court”. This introductory chapter has the purpose to give readers this basic knowledge and understanding of the ICC and the procedure in the Court, in order to ameliorate the understanding of the principle of complementarity and its applicability.

2.1 Crimes within ICC’s jurisdiction

2.1.1 Historic development

In international law numerous treaties and rules concerning the crimes included in the Rome Statute have emerged. International rules have especially developed rapidly after the Second World War and the atrocities that occurred during that conflict which affected the whole world.³

These rules are of course of great importance in showing that certain acts are not acceptable in the international community. States are obliged under international rules to make sure that certain crimes are prohibited and prevent them from being committed.⁴ Furthermore, human rights conventions have confirmed this obligation by creating conventional obligations for States to investigate and prosecute certain acts.

However, international law has not contributed with sanctions and enforcement mechanisms and therefore States have been reluctant to act,

² Statement by Secretary-General Kofi Anan, Rome, Italy, 11 April 2002, Following the 60:th ratification of the Rome Statute

³ Schabas, William A, *An Introduction to the International Criminal Court*, Second Edition, Cambridge University Press, University Press Cambridge 2004, [hereinafter Schabas, *An Introduction to the International Criminal Court*], p. 26-27

⁴ Convention on the Prevention and Punishment of the Crime of Genocide, Article 1 and 6, Convention (IV) relative to the Protection of Civilian Persons in Time of War, Article 146, Schabas, *An Introduction to the International Criminal Court*, p. 27

which has resulted in that few cases concerning the relevant crimes have been tried.⁵ Without international procedures and judicial systems States have not been willing to ensure accountability for the relevant crimes. It is unfortunately often States, military organizations, or its leaders that commit atrocities as war crimes or crimes against humanity. Therefore, it is difficult from a political and diplomatic point of view for a State to act, by investigating or prosecuting alleged perpetrators, against another State or State entity without that State's consent. Moreover, States are naturally reluctant to try its own leaders.⁶

2.1.2 Relevant regulations in the Rome Statute

It is always important, when examining the ICC and its Statute, to hold in mind that the Court was established to have jurisdiction over “the most serious crimes of concern to the international community as a whole”.⁷ This fact pervades the Rome Statute and is important for the interpretation of the Statute.

The crimes included in the jurisdiction of the ICC are genocide, crimes against humanity, war crimes and aggression⁸ since these crimes are seen as the most serious crimes of concern of the international community as a whole.⁹

It is not even intended that the ICC should try all perpetrators of these crimes. It would be impossible for the Court to handle all cases of the relevant crimes committed in a conflict area, which unfortunately are far too many, the Court would be overwhelmed with cases. The ICC lacks both financial resources and time in order to be able to try all cases and perpetrators. Thus, the ICC is primarily supposed to deal with the most serious perpetrators of the relevant crimes. Those perpetrators are leaders, organisers and instigators.¹⁰ These persons are seen as being those who bear the greatest responsibility for crimes that have been committed in a situation referred to the Court.¹¹ This fact is reflected in the Rome Statute, which states that crimes must be of “sufficient gravity” to be admissible.¹²

However, the Court in no way means that other perpetrators than those tried by the ICC should gain impunity for their deeds. On the contrary, the Court

⁵ Lee, Roy S., *The Rome Conference and its contributions to International Law*, Lee, Roy S., *The International Criminal Court The making of the Rome Statute, Issues Negotiations Results*, Edited, [hereinafter Ed. Lee], Kluwer Law International, 1999, p. 1

⁶ *Ibid.*, p. 5

⁷ Rome Statute, Preamble para. 4

⁸ The crime of aggression is however not fully included in the Rome Statute yet, the crime needs to be defined before the Court will be able to try alleged perpetrators of it., Yee, Lionel, *The International Criminal Court and the Security Council: Articles 13 (b) and 16*, Ed. Lee, p. 145, Rome Statute, Article 5 (2)

⁹ Rome Statute, Article 5, Rome Statute, Preamble para. 4

¹⁰ Schabas, *An Introduction to the International Criminal Court*, p. 29

¹¹ *Paper on some policy issues before the Office of the Prosecutor*, ICC-OTP 2003, p. 7

¹² Rome Statute, Article 17 (1) d

is of the opinion that States are obliged to investigate and prosecute such cases themselves.¹³ For this purpose the international community must assist in rebuilding and strengthening the national judicial system in the State concerned so that it can deal with the perpetrators that the ICC will not try.¹⁴

If States do not comply with this obligation, the ICC may take up cases regarded as “less serious” after proving that the State concerned is unwilling or unable, which must be the case according to the principle of complementarity that must be regarded.¹⁵ This might be the case in a situation where the concerned State takes no action to ensure that impunity is not given to perpetrators of the relevant crimes. If a State is seen as unwilling or unable, also crimes committed by low-level perpetrators can be regarded as of sufficient gravity according to Article 17 (1) d of the Rome Statute. The crimes concerned may have made huge damage on the society and many persons might have been victims of the crimes.

This purpose of the ICC, to try the most responsible perpetrators, for the most heinous crimes in the international society, has great significance when examining admissibility and complementarity. It indicates both the importance of making sure such perpetrators are tried and the risk that States might be reluctant to try persons that have leading positions within the State.

2.2 Jurisdiction of the ICC

The jurisdiction of the ICC is in a way based on consent from those who will be subject to it.¹⁶ States have agreed that crimes included in the Rome Statute that are committed within their territory or by their nationals will fall under the jurisdiction of the ICC should the State fail to prosecute.¹⁷ Furthermore, a non Party State may consent to the jurisdiction of the ICC in cases where crimes included in the Rome Statute have been committed on its territory or by its nationals.¹⁸ Such consent is given on an *ad hoc* basis but would of course be of great value for the credibility of the Court. Additionally, as will be presented in part 4.2 below, in cases of Security Council referrals of situations to the ICC the jurisdictional ground for the Court is broadened.

Moreover, crimes under the jurisdiction of the ICC must have been committed after the entry into force of the Rome Statute according to Article 11 (1) of the Statute. This is in accordance with general principles of international criminal law but can be set-aside with consent from the concerned State or, as developed further in part 4.2, if a situation is referred to the ICC by the Security Council.

¹³ Rome Statute, Preamble para. 6

¹⁴ *Paper on some policy issues before the Office of the Prosecutor*, ICC-OTP 2003, p. 7

¹⁵ Rome Statute, Article 17

¹⁶ Schabas, *An Introduction to the International Criminal Court*, p. 67

¹⁷ Rome Statute, Article 12 (2) a, b

¹⁸ Rome Statute, Article 12 (3)

Because of the global character of the ICC it may well have jurisdiction over several cases that need to be handled concurrently. It is important for the functioning of the Court and the effectiveness of the proceedings in such situations that the ICC, and primarily the Office of the Prosecutor, has firm strategies on how to work with concurrent situations or cases with the limited resources that the ICC has.¹⁹ This is exactly the situation at hand for the Office of the Prosecutor at the time of the writing of this thesis, when the first two situations, Uganda and The Democratic Republic of Congo, have been referred to the ICC.

The establishment of the ICC and its statute has sometimes been regarded as having the purpose to reduce the need for ad hoc tribunals.²⁰ At the same time, the fact that the ICC only tries the “most responsible” perpetrators necessitates, as mentioned before, that other judicial means are meant to handle remaining perpetrators.²¹ In situations when the concerned State cannot fulfil its obligation to ensure the investigation and prosecution of alleged perpetrators an ad hoc tribunal established with international assistance may be the most appropriate and efficient way to handle the “less serious” crimes.

2.3 Trigger mechanisms

The activation of the proceedings of a case within the Court’s jurisdiction is a special problem regarding the ICC since the ICC is the first of its kind, the first permanent international criminal tribunal. Earlier criminal tribunals, as Nuremberg, Tokyo, Yugoslavia and Rwanda, have all been established for a particular situation, and have had the mandate to try cases occurring within that situation, and therefore the problem has not arisen.²² In order to ensure the functioning of the ICC States Parties agreed on three ways through which the Court could be given notice on cases possibly falling under its jurisdiction. These are called trigger mechanisms since they trigger the proceedings in the ICC regarding a situation. It was necessary to limit the possibilities to refer cases to the ICC to protect the Court from being overburdened with cases. Furthermore, the ICC should not need to deal with referrals that cannot be seen as serious, which made a limitation of the possibility to refer cases to certain actors necessary.

The trigger mechanisms are closely connected to the principle of complementarity and these two parts of the Rome Statute were developed

¹⁹ *Paper on some policy issues before the Office of the Prosecutor*, ICC-OTP 2003, p. 6

²⁰ Yee, Lionel, *The International Criminal Court and the Security Council: Article 13 (b) and 16*, Ed. Lee, p. 146

²¹ *Paper on some policy issues before the Office of the Prosecutor*, ICC-OTP 2003, p. 7

²² Kirsch, Philippe; Robinson, Darryl, *Referral by State Parties*, Edited, Cassese, Antonio; Gaeta, Paola; Jones, John R.W.D, *The Rome Statute of the International Criminal Court: A commentary*, [hereinafter Ed. Cassese; Gaeta; Jones], Oxford University Press, Oxford New York 2002, p. 619

together since the look of the later in great deal depend on the look of the former.

Three trigger mechanisms are included in the Rome Statute: the referral of a situation by a State Party or the Security Council and the possibility for the prosecutor to independently initiate a case.²³

It is clear from the different mechanisms available that it was not only the intent of the drafters to initiate proceedings concerning specific cases in the ICC through the trigger mechanisms. The intent must be understood as also including the possibility to draw the Courts attention to a situation occurring somewhere, in which crimes under its jurisdiction might be committed. This shows the will in the international community to make sure that conflict situations are noticed and thus considered by the international community and creating reactions. The creation of the ICC is not only important in order to prosecute individuals; its purpose is more to be a tool for the international community when acting for peace and security.²⁴ The purpose of the ICC to promote international peace and security by dealing with a situation instead of individual perpetrators is clear from the wording in Article 13 of the Rome Statute. The Article states that States Parties and the Security Council can refer a “situation” to the Court, not a particular case.²⁵ Moreover, this purpose is clear from the Rome Statute and the fact that only the “most responsible” perpetrators will be tried in the ICC.²⁶ The prosecution of certain individuals is thus not only in order to punish those individuals. The purpose is greater and the goal is to facilitate the work to create peace and security in the area of the situation.

How the term “situation” shall be understood is unclear and left for interpretation by the Court itself. The most suitable interpretation would probably be to refer to events occurring in a certain time and within a certain geographical area, as is done in the already existing international criminal tribunals.²⁷ The referral of situations by the Security Council will be developed further later in this thesis.²⁸

2.3.1 Referral by a State Party

The possibility for States Parties to refer a situation to the ICC is regulated in Article 14 of the Rome Statute. All States Parties can refer a situation if they suspect that crimes included in the Rome Statute are being committed and the State want the Prosecutor to investigate whether alleged perpetrators

²³ Rome Statute, Article 13

²⁴ Kirsch, Philippe; Robinson, Darryl, *Referral by State Parties*, Ed. Cassese; Gaeta; Jones, p. 619

²⁵ Rome Statute, Article 13 (b)

²⁶ Rome Statute, Preamble para. 4 and Article 1

Kirsch, Philippe; Robinson, Darryl, *Referral by State Parties*, Ed. Cassese; Gaeta; Jones, p. 625

²⁸ See part 3

should be charged.²⁹ That all States shall have this possibility might seem obvious since the Rome Statute in its preamble states that the crimes included in the Statute are the concern of the international community as a whole.³⁰ However, this issue was disputed during the preparatory works of the Rome Statute. In the Ad Hoc Committee, some States were of the opinion that only the concerned States should have the possibility to refer a situation, those States being the States on which territory the crimes were committed, which nationals were involved, as victims or perpetrators, or the States having the alleged perpetrators in custody.³¹

States proposing this more limited possibility for States Parties to refer situations to the ICC did so because of concern that some States otherwise could use the possibility of referral for matters of less importance, or simply for revenge against other States.³² However, the fact that only situations can be referred to the Court and not specific cases will, according to Philippe Kirsch and others, probably prevent misuse of the possibility of State referral for reasons other than humanitarian concern.³³

States put the opinion regarding State referral forward in the Preparatory Committee 1996.³⁴ The proposition received the support of the majority of States during the Rome Conference.³⁵

2.3.1.1 Procedure of State referral

When a State Party refers a situation to the ICC it shall attach supporting documentation of the existence of the situation. This will be valuable for the Prosecutor when he starts an evaluation of the referred situation.³⁶ The State however is not required to make a complete criminal investigation of the situation before referring it to the ICC, this would be a too big request to make and would in the worst case result in an unwillingness with States to refer situations to the Court. The fact that States can refer only situations, instead of specific cases, also makes it easier for the States when investigating the relevant situation.³⁷

Additionally, the prosecutor shall evaluate the situation before starting a proceeding before the Court, whether the case would be admissible and

²⁹ Rome Statute, Article 14 (1)

³⁰ Rome Statute, Preamble para. 4, Kirsch, Philippe; Robinson, Darryl, *Referral by State Parties*, Ed. Cassese; Gaeta; Jones, p. 623

³¹ Kirsch, Philippe; Robinson, Darryl, *Referral by State Parties*, Ed. Cassese; Gaeta; Jones, p. 622, Wilmshurst, Elizabeth, *Jurisdiction of the Court*, Ed. Lee, p. 130

³² Kirsch, Philippe; Robinson, Darryl, *Referral by State Parties*, Ed. Cassese; Gaeta; Jones, p. 622

³³ *Ibid*, p. 623

³⁴ Wilmshurst, Elizabeth, *Jurisdiction of the Court*, Ed. Lee, p. 131

³⁵ *Ibid*, p. 134

³⁶ Rome Statute, Article 14 (2)

³⁷ Kirsch, Philippe; Robinson, Darryl, *Referral by State Parties*, Ed. Cassese; Gaeta; Jones, p. 623

whether a proceeding would be in the interest of justice.³⁸ This first evaluation is also a protection against abuse of the trigger mechanism by States, for other reasons than to make sure that perpetrators of the most serious crimes do not go unpunished.³⁹

2.3.2 Investigation by the Prosecutor

Many States considered the possibility for the Prosecutor to bring a case before the ICC as a very important right to include in the Rome Statute. It would prove the impartiality and independence of the Court.⁴⁰ Furthermore it would ensure that cases were investigated even though States Parties or the Security Council, because of political or diplomatic reasons, would not refer the situation to the ICC.⁴¹

However, the right for the Prosecutor to independently initiate a case was the last trigger mechanism to be considered and decided upon. It was not included in the ILC Draft Statute but developed and presented during the Ad Hoc and Preparatory Committees.⁴² The reason for the late consideration was that many States feared that the Prosecutor would not always act independently or objectively, but would be affected and persuaded to act in a certain way by States, the trigger mechanism was therefore highly discussed.⁴³

However, the majority of States and other actors⁴⁴ concerned consider the Prosecutors *proprio motu*⁴⁵ investigations the least political trigger mechanism and additionally, the Prosecutor is controlled in many ways to ensure the independence and impartiality of his work.⁴⁶ The Pre-Trial Chamber ensures that the Prosecutor is investigating a situation only when it is appropriate from objective reasons.⁴⁷

Moreover, the independence of the Prosecutor is ensured through the provisions regarding the election of the Prosecutor and the provisions concerning his handling of a case.⁴⁸ The protective measures to ensure the

³⁸ Rome Statute, Article 53 (1) and (2), see further part 4 on admissibility and complementarity

³⁹ Kirsch, Philippe; Robinson, Darryl, *Referral by State Parties*, Ed. Cassese; Gaeta; Jones, p. 624, Rome Statute, Preamble para. 4

⁴⁰ Kirsch, Philippe; Robinson, Darryl, *Initiation of proceedings by the Prosecutor*, Ed. Cassese; Gaeta; Jones, p. 663

⁴¹ *Ibid*, p. 657

⁴² Fernández de Gurmendi, Silvia A., *The Role of the International Prosecutor*, Ed Lee, p. 176

⁴³ *Ibid*, p. 181

⁴⁴ NGO:s etc.

⁴⁵ “At his or her own motion.”

⁴⁶ Kirsch, Philippe; Robinson, Darryl, *Initiation of proceedings by the Prosecutor*, Ed. Cassese; Gaeta; Jones, p. 664

⁴⁷ See part 2.3.2.1

⁴⁸ Kirsch, Philippe; Robinson, Darryl, *Initiation of proceedings by the Prosecutor*, Ed. Cassese; Gaeta; Jones, p. 663, Rome Statute Articles 42, 46-47, 53-54

independence of the Prosecutor is also a support for the Prosecutor in his work. The fact that the Pre-Trial Chamber will make the final decision of whether a case investigated after the initiative of the Prosecutor should be taken up by the ICC or not also protects the Prosecutor from political pressure from NGO:s or governments.⁴⁹

2.3.2.1 Procedure of referrals by the Prosecutor

The rules concerning an investigation *proprio motu* of the prosecutor are stated in Article 15 of the Rome Statute. The prosecutor shall investigate the information he has received concerning a situation and may ask States and organizations for further, complementary information. He may also hear witnesses and take testimonies.⁵⁰ After having evaluated the information of the situation the Prosecutor may submit a request for authorization of an investigation to the Pre-Trial Chamber, if the Prosecutor believes there is reasonable basis to continue the investigation.⁵¹ The Pre-Trial Chamber shall then consider if there is indeed such a reasonable basis to continue the investigation and if the case appears to fall within the jurisdiction of the ICC.⁵²

If the Prosecutor decides not to proceed with a case or situation, the Prosecutor shall inform those providing him with information. A dismissal by the Prosecutor does not prevent him from considering the situation later on, if new facts are presented.⁵³ The Prosecutor may also present the case to the Pre-Trial Chamber again, even if the Chamber dismissed it the first time.⁵⁴

2.4 Analysis

The ICC will certainly be a very useful tool for the international community in its fight against impunity for perpetrators committing serious international crimes as those included in the Rome Statute. Even though rules and prohibitions concerning the relevant crimes have existed before, we know that it has not stopped atrocities from being committed. Unfortunately it is clear that the strive of the international community and the ambition in many States to make sure that such crimes are not committed has not been enough and may never be. Persons willing to commit the relevant crimes against other human beings are not prevented by rules and moral obligations. Only the real risk of accountability can deter such people. Accountability is further important for the victims and their

⁴⁹ Arsanjani, Mahnoush H., *Reflections on the Jurisdiction and Trigger Mechanisms of the International Criminal Court*, Ed. von Hebel, Herman A.M.; Lammers, Johan G.; Schukking, Jolien, *Reflections on the International Criminal Court*, [hereinafter Ed. Von Hebel; Lammers; Schukking], T.M.C. Asser Press, Netherlands 1999, p. 66

⁵⁰ Rome Statute, Article 15 (2)

⁵¹ Rome Statute, Article 15 (3)

⁵² Rome Statute, Article 15 (4)

⁵³ Rome Statute, Article 15 (6)

⁵⁴ Rome Statute, Article 15 (5)

relatives, which in turn will prevent crimes from being committed in revenge.

The fact that only the “most responsible” perpetrators are to be tried by the ICC makes it perhaps even more important and necessary to have ad hoc tribunals and other special arrangements with support from the international community, in order to ensure accountability for perpetrators that are not tried by the ICC. This is contrary to the thought presented above that the establishment of the ICC would lead to a smaller demand of such judicial institutions. However, the most efficient way to abolish impunity and the procedure that would gain most credibility with victims, and thus promote reconciliation best, is of course that perpetrators are held accountable through national proceedings. Even if financial support and expert assistance will be needed from the international community to make such proceedings possible, that would probably be less expensive for the community than the establishment of international ad hoc judicial institutions.

The three trigger mechanisms to refer cases to the ICC must be seen as an appropriate way of limiting the possibility to refer cases to the ICC and thus the workload of the ICC. States, the Security Council and the Prosecutor will only bring cases to the Court’s attention if it is important for the solution of the dangerous situation that the international community reacts. Furthermore, these three actors have great knowledge to use and will probably only refer situations that are in accordance with the Rome Statute. This will especially reduce the workload of the Prosecutor since he is the one to, first of all, consider the admissibility of the case and if the ICC has jurisdiction.

It is clear from the presentation above regarding the different trigger mechanisms of a situation before the Court that States have a fear of “political or revenge- referrals”. As has been elaborated on, States Parties have tried to avoid such possibilities and create confidence for the trigger mechanisms with all States through rules regulating the procedure of referrals. However, it is fundamental to hold in mind the importance of the principle of complementarity in this regard. This thesis will investigate the meaning and applicability of the principle thoroughly later but the principle will shortly be mentioned here as well. The principle of complementarity will provide a further safety net regarding the fear of misuse of the trigger mechanisms. According to the principle, States shall have the primary responsibility and thus primary jurisdiction to try cases within their national criminal jurisdiction. Thus, if a State has started an investigation concerning a crime, or if an investigation of the ICC would not promote justice, because the case is not of sufficient gravity, the ICC will not conduct an investigation.⁵⁵

⁵⁵ Rome Statute, Article 17 (1) d

Thus, the principle of complementarity is of greatest value when looking at the trigger mechanisms included in the Rome Statute and the reasons of the inclusion. Furthermore, the principle together with the rules regulating the applicability of the trigger mechanisms makes the risk of referrals without objectively justifiable causes minimal.

As has been stated, the exercise of criminal jurisdiction is important for States since it is one of the most fundamental rights that exist under State sovereignty.⁵⁶ Jurisdictional sovereignty is naturally even more important for States when it concerns as serious crimes as those included in the Rome Statute. In most cases the crimes committed has created a state of conflict and insecurity in the State and many of the perpetrators have also had important positions within the affected State.

The criminal jurisdiction of States regarding the crimes included in the Rome Statute is universal. Thus, States have always jurisdiction to try cases including crimes within the jurisdiction of the ICC.⁵⁷ This concern of sovereignty was what made States sceptical about the different trigger mechanisms when establishing the ICC. However, States can freely decide how to exercise their sovereign right of criminal jurisdiction.⁵⁸ And even before the creation of the ICC States have given up their sovereignty when extraditing persons for trial in other States. To transfer jurisdiction to an international court is not more dangerous for State sovereignty.⁵⁹ In my opinion the situation is the contrary. States are the creators of the ICC and the Rome Statute and have thus been able to assure themselves of the independence and credibility of the Court and its proceedings. This assurance does States not have when extraditing suspects to another State for prosecution. States fear of loss of sovereignty through the establishment of the ICC and the trigger mechanisms must in my judgement therefore be seen as exaggerated and unnecessary.

⁵⁶ Lee, Roy S., *The Rome Conference and its contributions to International Law*, Ed. Lee, p. 27

⁵⁷ Schabas, *An Introduction to the International Criminal Court*, p. 27

⁵⁸ Danilenko, Gennady M., *ICC and third States*, Ed. Cassese; Gaeta; Jones, p. 1874

⁵⁹ Bassiouni, Cherif M.; Blakesley, Christopher L., *The need for an International Criminal Court in the new international world order*, *Vanderbilt Journal of Transnational Law*, 1992, p. 161

3 The United Nations and the International Criminal Court

*...for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system...*⁶⁰

3.1 The creation of the International Criminal Court and the role of the United Nations

Even though the General Assembly already in 1948 initiated the International Law Commission (ILC) to investigate the establishment of an international criminal tribunal it was only in 1994 that the Draft Statute of such an international tribunal was presented. From 1948 the project had been postponed until 1990 when the General Assembly initiated the ILC again. After that date the question of an international criminal tribunal got higher priority in the work of the commission.⁶¹

The really hard work in establishing the ICC started after the presentation of the ILC Draft Statute in 1994. This was the awakening point for States, which became interested and concerned about the Court and its purpose, which lead to discussions on a State level.⁶² The culmination was the Rome Conference in July 1998 during which the final adjustments were made to the Statute of the ICC and the States Parties at the conference finally accepted it. Over 160 States participated at the conference and hundreds of NGO's attended. This proves the importance of the ICC and its statute.⁶³ The Rome Statute entered into force July 1 2002 after the 60:th ratification of the Statute.⁶⁴

3.1.1 The United Nations influence over the Court

It was at first discussed that a permanent international criminal tribunal ought to be established as an organ of the United Nations. This would, according to the Ad Hoc Committee, ensure the universality of the court and promote its moral authority and its financial viability.⁶⁵ However, the alternative solution, a multilateral convention, was in the end preferred since

⁶⁰ Rome Statute, Preamble para. 9

⁶¹ Lee, Roy S., *The Rome Conference and its contributions to International Law*, Ed. Lee, p. 2-3

⁶² *Ibid*, p. 3-4

⁶³ Schabas, *An Introduction to the International Criminal Court*, p. 15

⁶⁴ <http://www.icc-cpi.int/basicdocs/romestatute.html>

⁶⁵ Wexler Sadat, Leila, *The proposed permanent International Criminal Court: An Appraisal*, Cornell International Law Journal, 1996, [hereinafter Wexler Sadat, *The proposed International Criminal Court: An Appraisal*], p. 722

it would be too problematic to amend the UN-Charter in order to include the ICC as an organ and to establish the court through a General Assembly resolution.⁶⁶ This closer connection to the United Nations that was proposed in the beginning of the development of the ICC is also evidenced by the proposal put forward by the ILC that the General Assembly would have the right to refer matters to the Court.⁶⁷ As we know from the Rome Statute this provision was never included in the Statute.

The ICC is thus not a part of the United Nations but it is an independent international subject. The Court has "international legal personality" and it has "such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes".⁶⁸ As a consequence of the separation from the United Nations, the UN-Charter does not bind the ICC directly.⁶⁹ However, the Relationship Agreement, which will be discussed in part 3.1.2 below, obliges the ICC and the United Nations to respect each other's statutes.⁷⁰

Furthermore, a good cooperation between the ICC and the United Nations can enhance the effectiveness of the ICC considerably. Since the United Nations probably already will be involved in the area where crimes under the jurisdiction of the ICC occur⁷¹, the organisation can be helpful in the work of the Court.⁷² This help can be realized in facilitation of the search for evidence and the possibility for the personnel of the ICC for secure travel within the relevant area.

Furthermore, the purposes of the ICC are in a great deal concordant with the principles and purposes of the United Nations.⁷³ The ICC aims through its work to promote the maintenance and restoration of international peace and security, the respect for human rights etc. The ICC can contribute positively, hinder potential perpetrators by just existing and thus show that the certain acts are not accepted and will be punished, and it will contribute to reconciliation in the concerned area after crimes have been committed.⁷⁴

⁶⁶ Wexler Sadat, *The proposed permanent International Criminal Court: An Appraisal*, p. 679

⁶⁷ Wexler Sadat, Leila, *Committee report on Jurisdiction, Definition of Crimes and Complementarity*, Denver Journal of International Law and Policy, Winter 1997, para. 29

⁶⁸ Rome Statute, Article 4 (1), the independence is reaffirmed in *Agreement on the Relationship between the Court and the United Nations*, Preamble para. 4

⁶⁹ Condorelli, Luigi; Villalpando, Santiago, *Relationship of the Court with the United Nations*, Ed. Cassese; Gaeta; Jones, p. 221

⁷⁰ *Agreement on the Relationship between the Court and the United Nations*, Article 2

⁷¹ When crimes that are included in the Rome Statute will be committed, the situation is often regarded as a threat against the maintenance of international peace and security (UN-Charter, Article 39) and therefore the Security Council most likely will be handling the situation in some way.

⁷² Condorelli, Luigi; Villalpando, Santiago, *Relationship of the Court with the United Nations*, Ed. Cassese; Gaeta; Jones, p. 222

⁷³ UN-Charter, Article 1

⁷⁴ Condorelli, Luigi; Villalpando, Santiago, *Relationship of the Court with the United Nations*, Ed. Cassese; Gaeta; Jones, p. 221

3.2 Twofolded cooperation

The relationship between the ICC and the United Nations can be seen as consisting of cooperation between the organisations in two separate areas. There are rules regarding practical and administrative cooperation between the organisations and rules regulating the cooperation of the activities of ICC and the United Nations. The first mentioned rules are included in part II of the “Relationship Agreement between the Court and the United Nations”. Only the Agreement’s rules regarding the relationship and cooperation concerning the mandates of the United Nations and the ICC will be presented here.⁷⁵ Those rules are the ones that are relevant for this thesis since they show the division of work between the organisations and thus affect the relationship between the Security Council and the ICC.

3.2.1 The “Relationship Agreement between the Court and the United Nations”

Fundamental in the relationship between the United Nations and the ICC is the “Relationship Agreement between the Court and the United Nations”.⁷⁶ The Agreement has not yet entered into force but when it does it will be an important and useful tool in the cooperation between the two international organisations.⁷⁷ The most important article in the Agreement is Article 2, paragraph 1, which states:

The United Nations recognizes the Court as an independent permanent judicial institution which, in accordance with articles 1 and 4 of the Statute, has international legal personality and such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.

Article 3 of the Agreement states that the ICC and the United Nations shall cooperate in order to facilitate the discharging of their responsibilities.⁷⁸ The Court and the United Nations are working for a peaceful international community⁷⁹ and it can only be seen as positive if these two institutions, systems, can complement each other in the strive towards a better world.⁸⁰ The United Nations undertakes, in Article 15, to cooperate with the ICC and in Article 4 it is stated that the ICC may provide the Security Council with

⁷⁵ Rules regarding such relationship and cooperation are to be found in part I and III of the *Agreement on the Relationship between the Court and the United Nations*

⁷⁶ Rome Statute, Article 2

⁷⁷ The Agreement will enter into force when the United Nations General Assembly and the Assembly of States Parties have approved, according to Article 2 of the Rome Statute. The Assembly of States Parties approved in September 2002, The General Assembly will meet again in September 2004.

⁷⁸ *Agreement on the Relationship between the Court and the United Nations*, Article 3

⁷⁹ Preambles of the UN-Charter and the Rome Statute

⁸⁰ Regarding the relationship between the ICC and the Security Council, see part 3.2

help if that is appropriate.⁸¹ This is a further indication of the ambition of the Court and the United Nations to assist and complement each other.

The agreement between the ICC and the United Nations is important also from another point of view. Not only can the cooperation make the Court more effective through the assistance of the United Nations. The agreement also provides for the legal effect of obliging the United Nations to respect the Rome Statute.⁸² This is an important effect since only States, not organisations, can be parties to the Statute.⁸³ This effect of the agreement is important when considering the possibility for the Security Council to be involved closely in the work of the ICC, on basis of the mandate that will be discussed further below.

3.3 Mandate of the Security Council

3.3.1 Extent of the mandate

In the Draft Statute by the ILC it was proposed that the Security Council should have three specific matters included in its mandate that would affect the work of the ICC. The Council should have the power to decide if a State had committed the crime of aggression before the Court could proceed with such a case. Further the Council should have the power to refer matters to the Court under Chapter VII of the UN-Charter and lastly, the Court would not be able to proceed with a matter under the Council's concern without approval.⁸⁴

The first part of this mandate was never included in the Rome Statute. However, the whole matter concerning ICC's jurisdiction over the crime of aggression has been postponed for future consideration.⁸⁵ The ICC may only proceed with a matter concerning aggression when a definition of the crime has been developed and included in the Rome Statute.⁸⁶ What role the Security Council will have in that process is unclear. However, since the definition of aggression under the Rome Statute shall be consistent with the UN-Charter the Council may come to play an important role, even though it is not expressed in the Rome Statute. This may be the case since the Security Council is the organ that determines the existence of an act of aggression under the UN-Charter, thus it is not only possible but rather it is likely that the Council will indeed play an important role.⁸⁷

⁸¹ *Agreement on the Relationship between the Court and the United Nations*, Articles 4 and 15

⁸² *Agreement on the Relationship between the Court and the United Nations*, Article 2 (3)

⁸³ Condorelli, Luigi; Villalpando, Santiago, *Relationship of the Court with the United Nations*, Ed. Cassese; Gaeta; Jones, p. 223

⁸⁴ ILC Draft Agreement, Article 23

⁸⁵ Yee, Lionel, *The International Criminal Court and the Security Council: Article 13 (b) and 16*, Ed. Lee, p. 145

⁸⁶ Rome Statute Article, 5 (2)

⁸⁷ UN-Charter, Article 39

The second and third parts of the proposed mandate of the Security Council in its cooperation with the ICC were included, although with some adjustments made to the provisions. The Council may refer a situation to the ICC, the wording “situation” was chosen before the wording “matter”, the reasons for the choice of situation before case will be presented in part 4.4.2. Furthermore, the Council may defer a situation from the ICC, but not all situations it is dealing with under Chapter VII of the UN-Charter, as proposed by the ILC. Certain requirements must be fulfilled for the Security Council to have the right to defer a case from ICC’s consideration: the deferral shall be limited to 12 months but may be prolonged, and the decision of the Council shall be taken through a resolution under Chapter VII of the UN-Charter.⁸⁸

3.3.2 Reasons for a mandate

The Security Council can be regarded as one of the most powerful international organs existing. The exclusive position of the Council springs from the fact that the Council is the only organ of the United Nations that may adopt decisions that are binding on member states.⁸⁹ Naturally, actions taken by the Security Council can thus be very restrictive on the sovereignty of States.

One reason for the inclusion of a mandate for the Security Council in respect of the ICC is the power that makes the Council so important and special, the possibility to adopt decisions that are binding on member states of the United Nations.⁹⁰ A further reason for a mandate of the Security Council in the Rome Statute is the fact that the Council is the organ of the United Nations that will act when a threat or breach of the peace occurs.⁹¹ As stated above, the United Nations and the ICC have common purposes and the cooperation between the two institutions will mainly be with the Security Council as the representative of the United Nations, because of its area of responsibility.

However, despite these positive reasons for the inclusion of a mandate of the Security Council regarding the work of the ICC, the opinion exists that the ICC will be seen as more legitimate than the tribunals for the former Yugoslavia and Rwanda since it will be independent and not bound by the Council.⁹²

⁸⁸ Rome Statute, Articles 13 (b) and Article 16. The requirements concerning the deferral of a situation are set out in the latter article.

⁸⁹ UN-Charter, Article 25

⁹⁰ UN-Charter, Article 25

⁹¹ UN-Charter, Article 24 (1) and Chapter VII

⁹² Summers, Mark A., *A fresh look at the jurisdictional provisions of the Statute of the International Criminal Court: The case for scrapping the treaty*, Wisconsin International Law Journal, Winter 2001, [hereinafter Summers, *A fresh look at the jurisdictional provisions of the Statute of the International Criminal Court: The case for scrapping the treaty*], p. 57

3.4 Analysis

It is my opinion that the existence of the ICC is dependent on the United Nations. It was the United Nations that took the initiative to create the Court and even though States were positive towards the creation of a permanent international criminal tribunal, I doubt we would have such an institution without the initiative and supervision by the United Nations.

Additionally, it is fundamental that a good relationship exists between the ICC and the United Nations. The ICC and the United Nations share the interest to maintain international peace and security, to stop hideous crimes from occurring and to fight impunity. The two international institutions also have the same members, all States that have ratified the Rome Statute are also members of the United Nations and this will also be the case with the States that will ratify the Rome Statute in the future. For these States it is fundamental that a good relationship exists between the institutions and that there are no conflicts between the ICC and the United Nations since that might lead to competing obligations for the States.

The Relationship Agreement between the Court and the United Nations is a proof of the institutions intention to cooperate in their future work. However, I do not believe that anyone could imagine these two institutions, with so similar objects and purposes, not cooperating and instead counteracting each other's work. Nevertheless, the agreement is positive, not only as a proof of good intentions, but also in the case of conflict between the ICC and the United Nations, the conflict can then be solved fast and easily. Hopefully no such conflicts will ever occur, providing that the Relationship Agreement achieves its goal.

The fact that the ICC was never established as an organ of the United Nations was in my opinion a wise decision. It is my opinion that it is better for the credibility of the Court that it is an independent institution with its own personality. This will increase States confidence in the Court and its work and thus make it a better tool for justice and the end of impunity. One must remember that even if almost all the worlds States are members of the United Nations, the States do not always agree with the decisions taken by the organisation. Furthermore, the existence of the five permanent members of the Security Council decreases the confidence of that organs work among some States, and thus the confidence of the United Nations as such since the Council must be seen as the most powerful organ within the organisation. States will hopefully feel that they are all equal in the work of the Assembly of States Parties of the ICC and thus not mistrust the Court as certain States do regarding the United Nations.

The mandate of the Security Council is a necessary inclusion in the Rome Statute. I will develop on my thoughts regarding the relationship between the ICC and the Security Council further in my analysis to part 4 and 6 of

this thesis but some issues should also be developed on here. The necessity comes out of the fear of States that the Security Council otherwise could lose power and ability to act because of the establishment of the ICC.

Moreover, the mandate of the Security Council in relation to the ICC will enhance both the Court's and the Council's ability to work for the maintenance and restoration of international peace and security. The ICC can be a tool for the Security Council when acting under Chapter VII of the UN-Charter and the work of the Council can be of great help for the ICC in its investigation of a situation. The United Nations will probably already be *en place* in many situations that come to the concern of the Prosecutor and the Court. Such situations may be seen as a threat or breach of the peace and therefore the United Nations, through the Security Council, may have taken action in order to resolve the situation. The United Nations can in such cases give valuable information to the Prosecutor concerning evidence, witnesses and perpetrators. This will be especially important in situations where the government of the State that is subject of the Prosecutor's investigation do not cooperate with the ICC, or even tries to work against the Prosecutor's efforts. This scenario is not very difficult to imagine since situations that will come under ICC's consideration often will be situations in which internal conflict or disorder is at hand. In many cases the ICC will probably investigate acts of the government itself or acts by persons closely connected to the government and therefore the concerned government might be reluctant to assist the ICC.

The United Nations may also come to play an important role when the ICC wishes to conduct investigations when the organisation is not already *en place*. If the State in question will not assist the ICC help must be found elsewhere. The ICC has no enforcement mechanisms of its own but aim to cooperate with the parties concerned. If such cooperation is not achieved the United Nations may be the subject of ICC's inquiry for assistance. Another possible way for the ICC to act is to ask willing States for assistance. However, my opinion is that it is better for the credibility of the ICC that an organisation such as the United Nations assists the ICC instead of individual States. The reason for this is to prevent the parties concerned from distrusting the ICC because of political concerns regarding the assisting States. If the ICC loses States trust it will experience a decrease in its efficiency and thus disavow its own purpose, to fight impunity, since States will be more reluctant to cooperate with the Court. The Office of the Prosecutor itself has stated that it will not be able to exercise its power without assurances that there are means available that can protect personnel and witnesses and assist in the investigations and arrest of suspects. Such assistance may be given by peacekeepers from the United Nations or other arrangements of the international community.⁹³

Coming back to the mandate of the Security Council, which really is the mandate of the United Nations since the Council should be seen as the

⁹³ *Paper on some policy issues before the Office of the Prosecutor*, ICC-OTP 2003, p. 6

organisation's representative in these issues. It is not only the possibility for the Council to refer situations to the ICC that has been included in the mandate, which will be developed on below. The Council also has the power to stop investigations by the use of its mandate under article 16 of the Rome Statute. If the Council adopts a decision under Chapter VII of the UN-Charter, the ICC is prevented from taking action on a case or situation during one year, a time that may be prolonged through a request of the Security Council. This mandate can of course, if used in the right way, be effective for a good cause and help the international community in the maintenance and restoration of international peace and security. The prevention of investigations and prosecutions might be necessary to reach a peace agreement in the State concerned and may stimulate the cooperation of the State's government. However, the way the Security Council has been using the mandate of article 16 in the past⁹⁴ is in my judgement unacceptable since it is not in compliance with the prerequisites in the relevant article. Article 16 and the right to defer a case cannot be interpreted to include such general deferrals as were made through the relevant resolutions. The wording of the article does not support a language in the deferrals that makes a prolongation of the deferral almost automatic.⁹⁵ Such misuse of the mandate by the Council makes States more restrictive and hostile towards the role of the Security Council in relation to the ICC. In the long run, the credibility of the ICC could even be damaged.

⁹⁴ Security Council Resolution 1422, 12 July 2002 and Resolution 1487, 12 June 2003, stating that peacekeeping soldiers from States not party to the Rome Statute would not fall under the jurisdiction of the ICC. The resolution was however not renewed in 2004, a positive step for the credibility of the Security Council in relation to the ICC.

⁹⁵ VCLT, Article 31 (1)

4 Referral by the Security Council

The most important part of the Security Council's mandate to discuss and evaluate for the purpose of investigating the principle of complementarity is the right for the Council to refer situations to the ICC. As stated before, the trigger mechanisms and the principle of complementarity are closely connected and they interplay. In order to understand the reasons for different interpretations regarding the principle of complementarity and the Security Council it is necessary to know the facts and the circumstances concerning the right for the Council to refer situations to the ICC which will be investigated and developed on in this chapter.

4.1 Article 13 of the Rome Statute

When the Security Council refers a situation to the ICC it must act under Chapter VII of the UN-Charter.⁹⁶ This is the only rule included in the Rome Statute concerning such a referral; further prerequisites for a referral by the Security Council are found in the UN-Charter. The prerequisites were not fully included in the Rome Statute since States did not want to change the powers of the Security Council under the UN-Charter through provisions in the Rome Statute.⁹⁷ The fact that the Security Council can only refer situations to the ICC and not individual cases is in accordance with the UN-Charter since the Council according to Chapter VII of the Charter is to deal with situations, not particular crimes or persons.⁹⁸ Additionally, States thought that the best way to make sure that the ICC would not lose its independence, and to make sure that referrals by the Security Council would not be political, was to let the Council refer situations instead of specific cases. This way it is still up to the ICC to decide whether to prosecute individuals or not.⁹⁹

Since the Security Council must act under Chapter VII of the UN-Charter when referring a situation to the ICC it must consider that situation to be a breach of or a threat to international peace and security. It is thus necessary for the Council to decide to refer the situation to the ICC as a measure to maintain or restore the international peace and security.¹⁰⁰ However, the Security Council has a wide discretionary power when deciding if a situation is a breach of or a threat to international peace and security. Circumstances that may guide the Council in its determination of the

⁹⁶ Rome Statute, Article 13 (b)

⁹⁷ Condorelli, Luigi; Villalpando, Santiago, *Referral and Deferral by the Security Council*, Ed. Cassese; Gaeta; Jones, p. 629-630

⁹⁸ *Ibid*, p. 632

⁹⁹ Yee, Lionel, *The International Criminal Court and the Security Council: Article 13 (b) and 16*, Ed. Lee, p. 147

¹⁰⁰ UN-Charter, Article 39

situation are the gravity of the crimes committed and how national authorities handle the situation.¹⁰¹ The Security Council must not necessarily decide to refer a situation expressly in accordance with Article 41 of the United Nations Charter. It is enough to recommend that the ICC investigate a situation, but it must in all cases be clear that the Council means to use its rights of referral under Article 13 (b) of the Rome Statute.¹⁰²

4.2 Limitations *ratione loci* and *ratione temporis* and Security Council referrals

Decisions adopted by the Security Council under Chapter VII of the UN-Charter are binding on the Member States of the United Nations.¹⁰³ Some scholars are of the opinion that since decisions of the Council are binding on States such decisions are also binding on the ICC. The provisions in Article 12 of the Rome Statute concerning preconditions *ratione loci* and *ratione personae* of the Court's jurisdiction would thus not be applicable.¹⁰⁴ This opinion is correct since it is clear when reading the relevant article that it aims only at situations that are referred by a State Party and at cases that are initiated by the Prosecutor. In the words of Article 12 (2) of the Rome Statute:

In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3.

Furthermore, the ICC would not be bound by the provisions concerning its *ratione temporis*, in respect of a situation where a State has become Party to the Rome Statute after it entered into force¹⁰⁵, when the relevant situation is referred to the Court by the Security Council. This would be the case with one restriction. The principle set out in Article 22 (1) of the Rome Statute, the principle of *nullum crimen sine lege*, must always be respected. Thus, the fact that a crime is committed before the Rome Statute entered into force for the State concerned, or that the relevant State is not even party to the Statute, would not prevent the ICC from exercising its jurisdiction as long as the crime existed at the time it was committed.

According to scholars of this opinion, regarding the *ratione temporis* of the ICC after Security Council, this interpretation is possible since Article 11 (2) of the Rome Statute refers to Article 12 (3) of the Statute, stating that the

¹⁰¹ Condorelli, Luigi; Villalpando, Santiago, *Referral and Deferral by the Security Council*, Ed. Cassese; Gaeta; Jones, p. 631

¹⁰² *Ibid*, p. 633-634

¹⁰³ UN-Charter, Article 25

¹⁰⁴ Condorelli, Luigi; Villalpando, Santiago, *Referral and Deferral by the Security Council*, Ed. Cassese; Gaeta; Jones, p. 634

¹⁰⁵ Rome Statute, Article 11 (2)

ICC may have jurisdiction even before the Rome Statute enters into force in a State if that State has consented to the jurisdiction. In respect to referrals of a situation by the Security Council Article 12 is, as earlier stated, not applicable according to scholars of this opinion, and therefore, since Article 11 refers to Article 12, Article 11, as a whole, is not an object for the jurisdiction of the ICC.¹⁰⁶ One reason for this interpretation that was put forward by its supporters was that this interpretation was most in accordance with the mandatory jurisdiction in the existing International Criminal ad hoc Tribunals.¹⁰⁷

The provisions *ratione loci* and *ratione personae* are not applicable on referrals by the Security Council. This is however the result of direct application of the Rome Statute. Regarding the applicability of the provision *ratione temporis* on referrals by the Security Council the interpretation made by some scholars is not equally clear in the Rome Statute. However after reading Article 11 (2) in the light of Articles 12 (2) and (3) it can be understood that since States consent is not needed when the Security Council refers a situation to the ICC, Article 12(3) can be disregarded in such cases, and Article 11 (2) is thus not really relevant on situations referred to the Court by the Council. However, Article 11 (1) is very clear in its wording and the most natural interpretation from that wording would be that crimes committed before the entry into force of the Rome Statute are never under the jurisdiction of the ICC. Even though scholars believe that the Statute is in some way ambiguous concerning the *ratione temporis* and Security Council referrals it is the belief of some scholars that the purpose of the temporal limitation of the jurisdiction of the ICC is only to hinder retrospective applicability of international criminal law. The purpose is not, according to these scholars, to prevent the ICC from exercising jurisdiction over crimes committed in the past. The Court could, according to scholars of this opinion, exercise such jurisdiction if applying other international rules regarding the crime, valid at the moment of the criminal act. The Rome Statute cannot be applied on crimes committed before its entry into force.¹⁰⁸

Important to have in mind is that decisions by the Security Council are not binding on the ICC. As has been stated, the ICC, the United Nations, and its organs are separate international subjects, existing side by side.¹⁰⁹ The above made interpretations are made entirely from the wording and the purpose of the articles in the Rome Statute, not on the ground that the Security Council is the actor referring a situation. Thus, the applicability of the principle of complementarity is not decided on the fact that the Security Council's decisions are binding, since they only bind States. When

¹⁰⁶ Condorelli, Luigi; Villalpando, Santiago, *Referral and Deferral by the Security Council*, Ed. Cassese; Gaeta; Jones, p. 636

¹⁰⁷ Yee, Lionel, *The International Criminal Court and the Security Council: Article 13 (b) and 16*, Ed. Lee, p. 148

¹⁰⁸ Condorelli, Luigi; Villalpando, Santiago, *Referral and Deferral by the Security Council*, Ed. Cassese; Gaeta; Jones, p. 636, further discussion in part 4.5, the Analysis

¹⁰⁹ See part 2.1.2

discussing the applicability of the principle of complementarity and the Security Council referrals new interpretations of articles in the Rome Statute need to be made, which will be the case in Part 6 of this thesis.

4.3 Procedure of Security Council referrals

The ICC must, before taking up cases from a Security Council-referred situation, conclude that the prerequisites in the Rome Statute concerning referrals by the Council are fulfilled. It must examine whether the Security Council has decided to refer a situation in accordance with Chapter VII of the UN-Charter and whether the Council first has determined a threat to the peace, a breach of the peace or an act of aggression, as laid down in Article 39 of the Charter. Furthermore, the ICC must consider whether the Security Council, when adopting the decision, acted in accordance with the principles and purposes of the United Nations, as it should do according to Article 24 (2) of the Charter.¹¹⁰

When the ICC has determined that the Security Council did act in accordance with the UN-Charter when it referred the relevant situation to the Court, the Court may proceed with the process. It is then for the ICC to investigate the situation and to decide whether the Court should proceed with individual prosecutions or not.¹¹¹

The competence of the ICC to evaluate the decision of the Security Council is clear in the Rome Statute, since the Court should examine its own jurisdiction and the admissibility of a case.¹¹² Furthermore, it was established in the tribunal for the former Yugoslavia, in the *Tadic case*, that a tribunal, when determining its jurisdiction, might consider the legality of a Security Council decision if that is necessary.¹¹³

However, it is the question concerning the ICC's possibility to examine a referral by the Security Council in relation to the principle of complementarity of the Rome Statute that is the final subject to be investigated and developed on in this thesis. I will thus return to this question later on in the thesis.

4.4 Opinions of States Parties

The Security Council's mandate under the UN-Charter is to have the main responsibility to maintain and restore international peace and security. The

¹¹⁰ Condorelli, Luigi; Villalpando, Santiago, *Referral and Deferral by the Security Council*, Ed. Cassese; Gaeta; Jones, p. 641

¹¹¹ Yee, Lionel, *The International Criminal Court and the Security Council: Article 13 (b) and 16*, Ed. Leep. 147

¹¹² Rome Statute, Articles 19 and 53

¹¹³ International Court for the former Yugoslavia, *Prosecutor v. Dusko Tadic a/k/a DULE*, Decision on the defence motion for interlocutory appeal on jurisdiction, Appeals Chamber, 2 October 1995, [hereinafter *Tadic Case*], para. 20-22,

possibility for the Security Council to refer a situation to the ICC must be seen as consistent with that mandate. It would, according to supporters of the Security Council, be absurd if the Security Council had powers to establish ad hoc criminal tribunals but not refer a situation to the permanent criminal tribunal.¹¹⁴

States were of the opinion that the mandate of the Security Council could improve the effectiveness of the ICC.¹¹⁵ The right for the Council to refer a situation to the ICC increases the possibility for the Prosecutor to start a proceeding since it will most certainly be a good basis for the investigation of the Prosecutor and thereby make his work easier.¹¹⁶ Additionally, the Council can bring situations to the consideration of the Court that would otherwise not fall under the jurisdiction of the ICC because of the statute's limitations *ratione loci, personae* and *temporis*.¹¹⁷

Additionally, the mandate of the Security Council under the Rome Statute can many times work as a complement to the Council's powers under the UN-Charter and assist it in its work.¹¹⁸

Since the decision to refer a situation to the Court is binding on the member states to the United Nations¹¹⁹, States are not able to challenge the admissibility of the Court. If doing so, States would act contrary to the UN-Charter.¹²⁰ This may be of great importance for the Court and helpful in making sure there is no impunity for the most serious crimes of concern to the international community.¹²¹

Whether the possibility for States to challenge the ICC's admissibility is really infringed as a consequence of the fact that States are bound by decisions of the Security Council will be discussed further later on in this thesis when I investigate the applicability of the principle of complementarity on Security Council referrals and possible consequences of different interpretations.¹²²

¹¹⁴ Berman, Franklin, *The Relationship between the International Criminal Court and the Security Council*, Ed von Hebel; Lammers; Schukking, p. 174-175

¹¹⁵ Arsanjani, Mahnouch H., *Reflections on the Jurisdiction and Trigger Mechanisms of the International Criminal Court*, Ed. von Hebel; Lammers; Schukking, p. 65

¹¹⁶ Lee, Roy S., *The Rome Conference and its contributions to International Law*, Ed. Lee, p. 35

¹¹⁷ Rome Statute, Article 12 (2), see part 3.2 above

¹¹⁸ Lee, Roy S., *The Rome Conference and its contributions to International Law*, Ed. Lee, p. 35

¹¹⁹ Since the decision must be adopted under Chapter VII of the UN-Charter. Such decisions are according to Article 25 binding.

¹²⁰ UN-Charter, Article 25

¹²¹ Lee, Roy S., *The Rome Conference and its contributions to International Law*, Ed. Lee, p. 35, see also part 1.3.1 above

¹²² See part 6.2.1 below

4.4.1 States failure to prosecute

If the right to refer a situation to the ICC would only rest with States there might be a risk that only a few cases would be tried before the Court. As stated before, States may be reluctant to refer situations occurring in their own territory since State officials often are involved in the crimes that are included in the Rome Statute. Moreover, it would not be fair to trust other States to act. Even though States are obliged under international law to act when certain crimes are committed¹²³ they might not always do that because of political and diplomatic reasons.¹²⁴

When crimes occur on the territory of a non State Party to the Rome Statute the Prosecutor may not initiate a case because of lack of jurisdiction for the ICC. It is neither probable that the State concerned will always refer the situation to the ICC and consent to its jurisdiction in accordance with Article 12 (3) of the Rome Statute. In situations like this a referral by the Security Council of the situation can be of great value in order to ensure that alleged crimes and perpetrators are investigated and punished. This is possible since the ICC need not regard Article 12 (2) in cases of Security Council referrals.¹²⁵

4.4.2 States fears

During the preparatory stage of the Rome Statute States were sceptical about a too broad mandate for the Security Council in relation to the ICC. States feared that a too strong position for the Security Council would disavow the independence and impartiality of the Court, which would result in a lost of credibility for the ICC.¹²⁶ But, since the Council can not refer specific cases, the Court will maintain its independence by having the power to investigate the situation and then decide whether to proceed with individual cases by prosecuting certain alleged perpetrators or not.¹²⁷ Additionally, the powers and the independence of the prosecutor are protected through the referral of a situation since he will be the one proceeding with the investigations.¹²⁸ Thus, it is the belief of many scholars that as soon as the Court has received a situation referred by the Council, the

¹²³ Crimes as genocide, crimes against humanity and war crimes are international crimes under universal jurisdiction. States are obliged to make sure such crimes are not committed, and obliged to prosecute perpetrators if committed. Convention on the Prevention and Punishment of the Crime of Genocide, Article 1 and 6, Convention (IV) relative to the Protection of Civilian Persons in Time of War, Article 146, Schabas, *An Introduction to the International Criminal Court*, p. 27

¹²⁴ Corell, Hans, , *Military Law Review*, Summer 1995, [hereinafter Corell, *Nuremberg and the development of an International Criminal Court*], p. 90

¹²⁵ Rome Statute, Article 12 (2), see part 3.2 above

¹²⁶ Yee, Lionel, *The International Criminal Court and the Security Council: Article 13 (b) and 16*, Ed. Lee, p. 146-147

¹²⁷ Arsanjani, Mahnoush H., *Reflections on the Jurisdiction and Trigger Mechanisms of the International Criminal Court*, Ed. von Hebel; Lammers; Schukking, p. 65

¹²⁸ Berman, Franklin, *The Relationship between the International Criminal Court and the Security Council*, Ed von Hebel; Lammers; Schukking, p. 174

Court will act impartially and independently and in accordance with the Rome Statute.¹²⁹

States were also worried about the mandate of the Security Council because of the five permanent members of the Council and their right to veto any decision in the Council. These five States clearly have more power and there was a fear with other States that they would act to protect themselves and act in their own interest instead of the interest of the international community as a whole.¹³⁰ The fear that there might never be a referral from the Security Council of a situation concerning one of the five permanent members must, according to certain scholars, be seen as valid since those States can use their veto, preventing the necessary decision to be taken by the ICC.¹³¹

Some States considered that the Security Council should not have a mandate to refer situations to the ICC since it has no judicial functions. According to legal scholars, this is however not a valid objection.¹³² It has been established in the *Tadic case* in the Tribunal for the former Yugoslavia that Security Council decisions under Chapter VII of the UN-Charter are valid, even though they might have judicial consequences.¹³³ The referral of a situation can only be considered as having judicial consequences, not being a judicial decision. The Security Council takes, through a referral, a measure to maintain or restore international peace and security. It is the ICC that, by deciding whether to prosecute or not, will take the judicial decisions regarding the situation.

4.5 Analysis

It is important to keep in mind when reading and applying the Rome Statute that the Statute is the result of lengthy discussions between States, with different opinions, that finally ended in a number of compromises. Some States were of the opinion that it was for the United Nations to establish international institutions that could bring perpetrators of atrocities to justice, just as the Security Council had done when establishing the tribunals for the former Yugoslavia and Rwanda. States were also afraid that the Prosecutor was given too much power through the right to initiate *proprio motu* investigations. To ensure these States that investigations in the ICC would not be politically motivated and to make sure that the United Nations would have a role in the process, a mandate for the Security Council in respect to the Court was included. However, as discussed further below, some States Parties were very sceptical about the mandate of the Security Council and in

¹²⁹ Corell, *Nuremberg and the development of an International Criminal Court*, p. 92

¹³⁰ Berman, Franklin, *The Relationship between the International Criminal Court and the Security Council*, Ed von Hebel; Lammers; Schukking, p. 175

¹³¹ Yee, Lionel, *The International Criminal Court and the Security Council: Article 13 (b) and 16*, Ed. Lee, p. 147

¹³² *Ibid*

¹³³ *Tadic Case*, para. 37-38

particular in respect of the consequences the mandate has on the applicability of the Rome Statute.¹³⁴

It is my opinion that the possibility for the Security Council to influence the work of the ICC must be considered as an in general positive thing for the work of the ICC. That the Security Council can refer situations occurring anywhere enlarges the jurisdictional basis for the ICC and makes sure that all situations may be regarded. This ensures in its turn that the fight against impunity will be fought everywhere and that all victims may be assisted by the Court and that reconciliation can be promoted by the ICC everywhere; everyone can be treated alike.

This possibility for the ICC, to be able to act on a global arena, despite the jurisdictional limitations in Article 12 of the Rome Statute, exists since the Security Council can refer situations concerning States that have not ratified the Rome Statute. Furthermore, if the ICC will consider it not bound by the *ratione temporis* in Article 11 (1) of the Rome Statute and situations where crimes were committed before the Statute entered into force will fall under the jurisdiction of the Court the jurisdictional basis will be broadened even more. I must however hold that in my judgement, such an interpretation is would not be credible because of the wording in the relevant article. Additionally, the risk exists that if such interpretation was possible, the ICC would be overwhelmed with “historic cases”.

In my judgement the expansion of the jurisdiction of the ICC is a very important consequence of the mandate for the Security Council. It is my opinion that States that have not ratified the Rome Statute are in many cases the same States where there is a big risk that crimes included in the Statute may be committed. By giving the Security Council the relevant power, the international community clearly demonstrates its determination to end impunity for serious crimes and it shows that States will not be able to avoid its duty under international law to act when serious crimes are committed.

However, it is uncertain whether the Security Council, through referring situations to the ICC, will provide the Court with these positive results of the Council’s mandate to refer cases to the Court. First, there is a risk that the veto power of some States may hinder the Council to refer situations to the ICC. What must be held in mind is that the risk that the ICC will be hindered in its work because of the permanent members protects certain States from investigation does include more than the five permanent members themselves. The permanent members may veto a decision to refer a situation to the ICC if the State concerned is a “friend” of the permanent member and that State does not wish to be investigated by the ICC.

Such cases may very well occur and the concern with certain States about the inclusion of a mandate for the Security Council in the Rome Statute is thus legitimate. Because of these circumstances, the consequence may be

¹³⁴ Regarding the applicability of the Rome Statute, see also chapter 6 below.

that more political reasons are regarded in the process of referring situations to the ICC and that it limits the effectiveness of the Court. However, the ICC may consider a situation even if a referral has been stopped in the Security Council because of a veto from one of the permanent members since the situation may be referred to the ICC by a State or the Prosecutor may decide to take up the case. Thus, the existence of the veto power in the Security Council may sometimes have a negative effect on the activity of the ICC but it will not be decisive for its efficiency. States that are concerned with the risk can show their will to work for a functioning and independent ICC and its determination to end impunity by referring situations to the ICC when the Security Council fails to do so. It is my opinion that the argument put forward shows how important it is for the ICC that there are three trigger mechanisms, and how well they can complement each other. However, States will never take the role and fulfil the responsibility of the Security Council fully since only the Council has the power to provide the ICC with the power to exceed its jurisdiction, by referring situations that are not included in Article 12 of the Rome Statute.

For the moment, the United States is opposing the ICC and its work. In the United States express policy on the Court it is stated that the United States government shall in no way support the Court or its work, neither financially, nor practically. This policy will have as a result that the United States may hinder the Security Council from referring any situation to the Court by using its veto in the voting. Furthermore, one must hold in mind that other permanent members of the Security Council with veto power, such as China and Russia, neither are totally positive towards the ICC. Thus, the role for the Security Council in relation to the work of the ICC will probably be limited until a change in attitude occurs with some of the permanent members of the Council. This can of course be negative for the ICC and its work but in my opinion it most of all damages the credibility of the Security Council with other States. This will in the long run affect the credibility of the United Nations as a whole with States, which in my judgement will force the United Nations, as an organisation, to work towards a change of attitudes with the States that are negative towards the ICC.

5 Admissibility, the principle of complementarity

*As a consequence of complementarity, the number of cases that reach the Court should not be a measure of efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.*¹³⁵

5.1 Article 17 of the Rome Statute

Article 17

Issues of admissibility

1. *Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is admissible where:*
 - (a) *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 investigation or prosecution;*
 - (b) *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;*
 - (c) *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, paragraph 3;*
 - (d) *The case is not of sufficient gravity to justify further action by the Court.*
2. *In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exists, as applicable:*
 - (a) *The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;*
 - (b) *There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;*
 - (c) *The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is*

¹³⁵ Statement by Mr. Louis Moreno-Ocampo, June 16, 2003
Ceremony for the Solemn Undertaking of the Chief Prosecutor (Informal Expert Paper, ICC-OTP 2003, *The principle of complementarity in practice*, p. 3)

inconsistent with an intent to bring the person concerned to justice.

3. *In order to determine inability in a particular case, the Court shall 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 necessary evidence to carry out its proceedings.*¹³⁶

The work of the prosecutor of the ICC is to make sure that the most serious international crimes do not go unpunished and to put an end to impunity.¹³⁷ However, as set out in the preamble and in Article 1 of the Rome Statute, the ICC shall be complementary to national courts.¹³⁸ The consequence of this provision is that if States comply with their international obligations and exercise their jurisdiction over crimes under the Rome Statute the ICC will not have any cases to try.¹³⁹ However, states have in the past, and will most certainly in the future, fail to investigate and prosecute international crimes in a manner that is consistent with international law. In these cases, when States are unable or unwilling to try alleged perpetrators of crimes included in the Rome Statute, the ICC must fulfil its responsibility to repress international crimes. The ICC will thus remain an important subject in the international community when working to reach the abovementioned goals.¹⁴⁰

The reluctance of States to try certain crimes may exist because there is a close nexus between the State and the committed crime and the alleged perpetrator. Furthermore, the State may not have the resources to try the crime in an appropriate manner.¹⁴¹ Moreover, States may be reluctant to try cases because of political or diplomatic reasons.¹⁴²

The ICC is prevented from exercising its jurisdiction if a State is investigating a case or the relevant case has been investigated by a State and that State has decided not to prosecute.¹⁴³ Furthermore, the ICC cannot exercise its jurisdiction over a case if the alleged perpetrator has already been tried for the crime or the case is not of sufficient gravity.¹⁴⁴ However, if the Prosecutor and the Court, when looking at the national proceedings, consider a State unwilling or unable to genuinely carry out proceedings the

¹³⁶ Rome Statute, Article 17

¹³⁷ Rome Statute, Preamble para. 4 and 5

¹³⁸ Rome Statute, Preamble para. 10

¹³⁹ Holmes, John T., *Complementarity: National Courts versus the ICC*, Ed. Cassese; Gaeta; Jones, p. 667

¹⁴⁰ Informal Expert Paper, ICC-OTP 2003, , [hereinafter *The principle of complementarity in practice*], p. 3, para. I.2

¹⁴¹ Holmes, John T., *Complementarity: National Courts versus the ICC*, Ed. Cassese; Gaeta; Jones, p. 667-668

¹⁴² Kirsch, Philippe; Robinson, Darryl, *Initiation of proceedings by the Prosecutor*, Ed. Cassese; Gaeta; Jones, p. 657

¹⁴³ Rome Statute, Article 17 (a) and (b)

¹⁴⁴ Rome Statute, Article 17 (c) and (d)

ICC may take over the responsibility and proceed with an investigation and trial.¹⁴⁵ Sham trials shall not hinder the ICC and the international community to make sure that the most serious crimes of concern to the international community are prosecuted and to end impunity.

It is important to notice that the ICC is not supposed to review decisions by national courts. It is rather to look at the circumstances in the case and of the national proceeding.¹⁴⁶ It is primarily not the result of a national investigation or trial that is decisive, whether the alleged perpetrator was found guilty and punished or not; it is the way in which the national proceeding was conducted that must meet certain prerequisites in order to prevent the ICC from exercising its jurisdiction in regard to the case.¹⁴⁷ If a State's investigation or prosecution does not comply with the prerequisites of the Rome Statute¹⁴⁸ the ICC will proceed with the case.

5.2 "unwilling and unable"

The Office of the Prosecutor has stated that it will only take action "where there is a clear case of failure to take national action". Below follows a presentation of the different criteria the Prosecutor, and in some cases the Court, need to consider in order to determine if a case is admissible in regard of the prerequisites in the principle of complementarity.

5.2.1 Unwillingness

The unwillingness of a State will show when a State is indeed investigating or prosecuting alleged perpetrators but, in reality, the State in fact only works to make it look that way. The investigation or trial is in such cases a sham and the State has no genuine legal interest to investigate or prosecute.¹⁴⁹ When determining the unwillingness of a State to investigate or prosecute an alleged perpetrator the ICC shall consider several aspects in order to make the right decision. The relevant aspects are: whether a State through its proceeding has tried to shield a person from criminal responsibility, if there has been delay in the proceeding or the proceedings were not independent or impartial and thus inconsistent with an intent to bring the alleged perpetrator to justice.¹⁵⁰ When regarding these aspects the ICC shall consider the principles of due process recognized by international law, and whether the national proceedings can be seen as fulfilling those principles or not.¹⁵¹ As States put it during the preparatory work of the

¹⁴⁵ Rome Statute, Article 17 (1) a

¹⁴⁶ Holmes, John T., *Complementarity: National Courts versus the ICC*, Ed. Cassese; Gaeta; Jones, p. 673

¹⁴⁷ Rome Statute, Article 17

¹⁴⁸ Rome Statute, Article 17

¹⁴⁹ Schabas, *An Introduction to the International Criminal Court*, p. 86

¹⁵⁰ Rome Statute, Article 17 (2) a, b, c

¹⁵¹ Rome Statute, Article 17 (2)

Rome Statute: the ICC should consider whether there is a defect in the national proceedings, a defect that would lead to a travesty of justice.¹⁵²

If a State wishes the ICC to abstain from investigating a case because the State itself is already conducting investigation, that State is expected to provide the ICC with information about the national proceedings. This information shall show that the national proceedings are conducted as proceedings normally are in that State and that the proceedings are in accordance with international standards.¹⁵³ As a consequence, the ICC would be prevented from considering the case because of the principle of complementarity.¹⁵⁴

5.2.1.1 Purpose of shielding

Examples of actions by a State that may prove a wish to shield an alleged perpetrator of crimes under the jurisdiction of the ICC from the proceedings of that court are numerous. The State can for example arrange for the testimony of an insider, who will give the answers that the State wants him to give, in order to acquit the alleged perpetrator from accusations.¹⁵⁵ Furthermore, the State can depart from ordinary legal procedures or arrange for a special trial or even a secret trial.¹⁵⁶

Evidence of a State's wish to shield a person from criminal responsibility exist and can be found by the ICC. Such evidence may exist in explicit form, in different documents and correspondence. Furthermore, evidence can be found through hearing witnesses that have facts on the certain case or on the State in general.¹⁵⁷

5.2.1.2 Delay

Delay can prove the unwillingness of a State to investigate or prosecute a certain crime or certain crimes. If the State succeeds in delaying a trial, the case may be forgotten or at least the eyes of the international community might turn elsewhere after a while.

However, not every delay in a proceeding can be seen as an attempt by a State to avoid investigating or prosecuting. Delays can be justified because of the situation in the State and the workload and the ability of the judicial system. Thus, the ICC must consider a delay in comparison with the delay for other cases in the relevant State and in light of the complexity of the relevant case. Is the delay justified because of the situation in the State or

¹⁵² Holmes, John T., *Complementarity: National Courts versus the ICC*, Ed. Cassese; Gaeta; Jones, p. 674

¹⁵³ *Ibid.*, p. 677

¹⁵⁴ Rome Statute, Article 17

¹⁵⁵ *The principle of complementarity in practice.*, Annex 4, p.29

Holmes, John T., *Complementarity: National Courts versus the ICC*, Ed. Cassese; Gaeta; Jones, p. 675

¹⁵⁷ *The principle of complementarity in practice.*, Annex 4, p.29

the case, or does the delay indicate an intent of the State not to deal with the alleged perpetrator in an acceptable manner?¹⁵⁸

5.2.1.3 Independence and impartiality

If the judicial system in a State is not independent or impartial there is of course a great risk that the alleged perpetrator will not be brought to justice in a proper manner. The judicial system must be impartial and independent in respect of the political powers within the State, other States, NGO:s and other national and international subjects, if an investigation or trial shall prevent the ICC from conducting its proceedings, in accordance with the principle of complementarity.¹⁵⁹

When investigating whether a State's proceedings are to be seen as independent and impartial the ICC can control the links between the alleged perpetrator and persons within the judicial system. Moreover the ICC can look for evidence in earlier practice and contacts between concerned persons, both personal contacts and official contacts that might infringe the independence and impartiality of the State's judicial system.¹⁶⁰

5.2.1.4 Other evidence of unwillingness

The examples in Article 17 (2) of the Rome Statute are in no way exhaustive. To be able to make sure that the most serious crimes of concern to the international community do not go unpunished and to end impunity the ICC must be able to regard every act by States and to decide if the State is unwilling to investigate or prosecute a crime. Thus, the ICC must have the power to enlarge the number of indications, as they are made visible to the Court.

Actions that can be seen as evidence of a State's unwillingness to investigate or prosecute are several. The fact that a State does not act even though it has knowledge of a crime or the fact that very few crimes are investigated are two factors that both indicate unwillingness. Furthermore, if investigations are not given enough resources or if they are committed in a too fast or insufficient way, in respect to evidence, witnesses etc., it could be suspected that the State lacks a genuine will to bring the perpetrators to justice. Moreover, unwillingness can also be suspected if a competent person does not investigate the crime or if the charges of the alleged perpetrators are far too vague in respect of the crimes committed.¹⁶¹

5.2.2 Inability

The inability of a State to investigate or prosecute a crime and an alleged perpetrator is much easier to notice and to prove for the ICC than the

¹⁵⁸ *The principle of complementarity in practice.*, Annex 4, p.29

¹⁵⁹ *Ibid*

¹⁶⁰ *Ibid*, Annex 4, p.29-30

¹⁶¹ *Ibid*, Annex 4, p.30

unwillingness of a State. The inability of a State is often a result of a collapse of the judicial system of a State. The collapse may be an outcome of different things, as an internal conflict, occupation of another State etc. The collapse may result in the inability of a State to conduct the proceedings in a manner consistent with international standards, as protecting the rights of the accused, and the correct conduct with evidence and testimony, making the national judicial system unavailable.¹⁶²

Thus, the inability of a State to investigate or prosecute genuinely a case has not necessarily something to do with that States willingness to conduct such investigations and prosecutions.¹⁶³

One fact that can be taken into consideration when deciding upon the ability of a State to investigate or prosecute a crime is the accessibility of staff within the judicial system. Investigating the national penal legislation must also be considered as a way to see if the State can proceed with a criminal investigation. Furthermore, a judicial system may be rendered unable to conduct a criminal investigation or prosecution if the State grants amnesties or immunities for the crimes included in the Rome Statute.¹⁶⁴ Such conduct of the State might indicate unavailability of a national judicial system in the State.¹⁶⁵

5.2.3 Alternative ways of accountability and the principle of complementarity

There was, during the preparatory works, discussions on how the ICC should look at alternative methods of accountability. This question has considerable importance when dealing with the principle of complementarity. States might prefer to have alternative judicial methods in their national systems, like an amnesty provision, and the question would then be what methods the ICC would accept under the principle of complementarity. If the ICC did not accept the methods in question, the concerned State could be seen as unwilling or unable to investigate or prosecute according to Article 17 of the Rome Statute.¹⁶⁶

However, several States contested this possibility for the ICC to decide on the ability of a State to investigate or prosecute. It would give the ICC the power of being a court of appeal and it would of course be very sensitive for a State to have its judicial system investigated by someone else.¹⁶⁷ Not only would the State lose its sovereign right to exercise criminal jurisdiction, the ICC could also be considered as interfering in the internal affairs of the relevant State, by judging the judicial system of the State, a system which

¹⁶² Rome Statute, Article 17 (3)

¹⁶³ Holmes, John T., *Complementarity: National Courts versus the ICC*, Ed. Cassese; Gaeta; Jones, p. 677

¹⁶⁴ *The principle of complementarity in practice.*, Annex 4, p.31

¹⁶⁵ Rome Statute, Article 17 (3)

¹⁶⁶ Schabas, *An Introduction to the International Criminal Court*, p. 87

¹⁶⁷ Holmes, John T. *The Principle of Complementarity*, Ed. Lee, p. 49

administration is a State's internal concern.

The international community accepts certain amnesty provisions and every provision must be considered individually in order to determine whether the State is to be seen as unwilling according to the Rome Statute.

5.3 Challenges of admissibility

The admissibility of a case before the ICC can be challenged. This is a further assurance that States not should loose their right to exercise jurisdiction too easily and on the wrongful grounds.

The provisions in the Rome Statute oblige the ICC, the Prosecutor or a Chamber, to investigate whether a national court has started an investigation or prosecution. In Article 18 it is stated that the Prosecutor shall notify States Parties and States that would normally have jurisdiction if the Prosecutor has decided to investigate a case on his own initiative or a situation referred from a State.¹⁶⁸ States then have one month to inform the ICC that an investigation has been started regarding the crime referred to in the notification.¹⁶⁹ If that is the case, the ICC is prevented from starting a proceeding because of the principle of complementarity.

The right to challenge is regulated in Article 19 of the Rome Statute. The accused or suspect may challenge the admissibility of the case concerning themselves and States having jurisdiction over the case may challenge the admissibility of the ICC if a national investigation or prosecution has been started.¹⁷⁰ Further, a State which consent is needed in order to make the proceedings admissible according to Article 12 of the Statute may challenge the admissibility of a case.¹⁷¹

In the proceeding considering the admissibility the party referring the case to the ICC under Article 13 of the Rome Statute may submit views to the Court.¹⁷²

5.4 The inclusion of the principle of complementarity

5.4.1 Reasons for the Inclusion

The principle of complementarity is one of the most significant differences between the ICC and other international criminal tribunals, such as the

¹⁶⁸ Rome Statute, Article 18 (1)

¹⁶⁹ Rome Statute, Article 18 (2)

¹⁷⁰ Rome Statute, Article 19 (2) a, b

¹⁷¹ Rome Statute, Article 19 (2) c and Article 12 (3)

¹⁷² Rome Statute, Article 19 (3)

Tribunal for the former Yugoslavia and Rwanda. In those situations, a principle recognizing the national courts primacy would not have contributed with much. In the case of Yugoslavia, the authorities were unwilling to investigate and prosecute the alleged perpetrators and in Rwanda, the authorities had no possibility to do so since the judicial system was destroyed through the internal conflict.¹⁷³ In those situations the national courts and the international tribunal have concurrent jurisdiction and the international tribunal prevails if a collision of jurisdiction occurs.¹⁷⁴

Through the inclusion of the principle of complementarity, the ICC ensures the respect for States primary jurisdiction. Additionally, the principle of complementarity limits the number of cases before the ICC. This is an important consequence of the principle since there is clearly a limit on the number of prosecutions and trials the ICC can handle. It is important for the efficiency of the proceedings that the ICC is not overburdened with cases.¹⁷⁵ Moreover, the prosecution of alleged perpetrators is often more suitable to conduct in the concerned State since that State will have the best access to evidence, witnesses and other circumstances regarding the case. National proceedings can thus be more effective and cost less than a proceeding in the ICC.¹⁷⁶

Furthermore, States are obliged under international conventional and customary law to prevent and prosecute many of the crimes included in the Rome Statute such as genocide, war crimes and crimes against humanity.¹⁷⁷ But, as mentioned earlier, the ICC will be a good complement to national jurisdiction, and its existence is necessary to ensure the prosecution of alleged perpetrators when States fail to comply with their international obligation.¹⁷⁸

The principle of complementarity sets up a high threshold for a case to be tried by the Court. This high threshold results in a risk that the Court will have to conduct long proceedings on admissibility instead of trying cases on the merits.¹⁷⁹ However, reasons for the inclusion, the protection of State sovereignty etc., prevail over the risk of lengthy preliminary proceedings on admissibility.

Thus, the principle of complementarity was included in great deal because States were concerned of losing sovereignty, and the right to exercise criminal jurisdiction over cases within their jurisdiction. However, this fear

¹⁷³ Holmes, John T., *Complementarity: National Courts versus the ICC*, Ed. Cassese; Gaeta; Jones, p. 668-669

¹⁷⁴ ICTY Statute, Article 9 (2), ICTR Statute, Article 8 (2)

¹⁷⁵ *The principle of complementarity in practice*, p. 3, para. I.1

¹⁷⁶ *Paper on some policy issues before the Office of the Prosecutor*, ICC-OTP 2003, p. 2

¹⁷⁷ Convention on the Prevention and Punishment of the Crime of Genocide, Article 1 and 6, Convention (IV) relative to the Protection of Civilian Persons in Time of War, Article 146

¹⁷⁸ Holmes, John T., *The Principle of Complementarity*, Ed. Lee, p. 73-74

¹⁷⁹ Holmes, John T., *Complementarity: National Courts versus the ICC*, Ed. Cassese; Gaeta; Jones, p. 675

might have been exaggerated. States have always given up their sovereignty for other States when extraditing persons for trial in other States. To transfer jurisdiction to an international court is no more of a danger to State sovereignty.¹⁸⁰

The fact that the Rome Statute sets up prerequisites of how proceedings must be conducted in national judicial institutions will ensure that national proceedings are genuinely conducted, in accordance with international law and general principles of international criminal law. This effect is not limited to States Parties to the Rome Statute but will occur in every State that wish to ensure its right to investigate and prosecute crimes within its jurisdiction.¹⁸¹ Thus, even third States will make sure that their national judicial system is in accordance with the demands in international criminal law in general and the Rome Statute in particular, with hope that the Security Council will never find it necessary to refer a situation regarding the State to the ICC.¹⁸²

5.4.2 Opinions of States

States believes the principle of complementarity to be a cornerstone in the Rome Statute because of the importance to let States have the first chance to prosecute the relevant crimes. It was seen as important since the crimes would be committed within a State's territory, towards a State's nationals and that concerned State would naturally be interested in prosecuting and ensuring the accountability for the alleged perpetrators.¹⁸³ Additionally, national criminal jurisdiction is one of the most fundamental rights of a sovereign State.¹⁸⁴ Moreover, the sovereign right to exercise criminal jurisdiction is also a responsibility the State has towards its nationals, as a part of its responsibility to ensure national security.

Even if many States found the principle of complementarity important for the respect of the State sovereignty and the right for national judicial systems to have primary jurisdiction, the principle was also considered important for other reasons. Many States and NGO:s thought the principle was important in order to give the ICC jurisdiction over cases even though a

¹⁸⁰ Bassiouni, Cherif M.; Blakesley, Christopher L., *The need for an International Criminal Court in the new international world order*, Vanderbilt Journal of Transnational Law, 1992, p. 161

¹⁸¹ Lattanzi, Flavia, *The International Criminal Court and National Jurisdiction*, Ed. Politi, Mauro; Nesi, Giuseppe, *The Rome Statute of the ICC: A Challenge to impunity*, Ashgate Publishing Company, United Kingdom, 2002, p. 180-182, Danilenko, Gennady M., *ICC Statute and third States*, Ed. Cassese; Gaeta; Jones, p. 1888

¹⁸² Further discussion on the principle of complementarity and referrals by the Security Council in Chapter 6.

¹⁸³ Arsanjani, Mahnoush H., *Reflections on the Jurisdiction and Trigger Mechanisms of the International Criminal Court*, Ed. von Hebel; Lammers; Schukking, p. 68, Shaw, Malcolm N., *International Law*, 5th Edition, Cambridge University Press, United Kingdom 2003, p. 579

¹⁸⁴ Lee, Roy S., *The Rome Conference and its contributions to International Law*, Ed. Lee, p. 27

State had investigated or prosecuted the case. This was fundamental to ensure that the international community, when dealing with the relevant crimes, do not accept sham trials.¹⁸⁵

Thus, by including the principle of complementarity in the Rome Statute, States created an insurance against impunity at the same time as they recognised their own responsibility to exercise criminal jurisdiction concerning the crimes within the Statute.¹⁸⁶

5.4.2.1 Fears of discriminatory application

The principle of complementarity was criticized because of the risk of the principle being discriminatory. The ICC would, by applying the principle of complementarity, favour developed States, with resources to keep a well functioned and effective judicial system, while developing States with developing judicial systems would not get the opportunity to exercise its jurisdiction over cases in the same amount.¹⁸⁷ However, it should be held in mind that the existence of an international criminal tribunal might indeed encourage States to make sure that serious crimes against international law are investigated and prosecuted. States will put more effort and resources in making sure they have a well functioning and fair judicial system. If States fail to do this the rest of the international community will observe it and the ICC will investigate and prosecute instead.¹⁸⁸

The principle of complementarity makes it possible for national and international criminal jurisdiction to exist side by side and was probably necessary for the making of the Rome Statute and the realization of the International Criminal Court.¹⁸⁹

5.5 Analysis

There are, as has been concluded above, technical advantages to try a case in a State directly affected by the crime, primarily the State where the crime has been committed. But there are further advantages of trying a case in a State affected by the alleged committed crime instead of a trial in an international criminal tribunal, such as the ICC. When dealing with as serious crimes as genocide, war crimes and crimes against humanity, which would fall under the jurisdiction of the ICC, it is important to consider the interests of the victims.

The victims of these crimes are often a group of individuals. The interests of these groups are probably best respected if the alleged perpetrators are tried

¹⁸⁵ Holmes, John T., *The Principle of Complementarity*, Ed. Lee, p. 42

¹⁸⁶ *Paper on some policy issues before the Office of the Prosecutor*, ICC-OTP 2003, p. 4

¹⁸⁷ Schabas, *An Introduction to the International Criminal Court*, p. 86-87

¹⁸⁸ Lee, Roy S., *The Rome Conference and its contributions to International Law*, Ed. Lee, p. 6, see also part 4.4.1

¹⁸⁹ Lee, Roy S., *The Rome Conference and its contributions to International Law*, Ed. Lee, p. 28

near the victims, as in the State where the alleged crime was committed. If the trial is held near the victims their special needs and concerns can be regarded in a better way than if the trial is held far away from where the victims live, maybe on another continent. Assistance to victims and witnesses will be needed in trials regarding atrocities as the crimes under the Rome Statute and such assistance can easier and probably also better be given by a State, where the crimes were committed or where the victims are nationals. That State has better awareness of the special needs of its nationals and certain groups of them than the ICC has.

The relevant crimes are often committed in a conflict or other situation that is destructive for the State where they occur and for its nationals, all of them victims in some way. Reconciliation in the State, amongst its nationals, is easier achieved if trials against the responsible are conducted in the area, so that everyone concerned can feel as being a part of the process. Additionally, since trying and punishing the perpetrators of crimes committed in a conflict can provide reconciliation such proceedings may prevent the conflict from reoccurring and thus prevent more atrocities from being committed. Moreover, the ICC has as one of its purposes to act as a deterrent by prosecuting alleged perpetrators of hideous crimes. Such deterrence is naturally more easily achieved if the alleged perpetrators are tried near the State or area where the crimes were committed.

The principle of complementary will reasonably bring positive consequences with it regarding States actions in a conflict or post conflict situation. States wanted the principle to protect their own interest to exercise jurisdiction over the crimes included in the Rome Statute. It must be seen as very positive that States seem eager to make sure that perpetrators of serious international crimes do not go unpunished. States have always ensured the international community that action would be taken if crimes as those included in the Rome Statute were to occur within the jurisdiction of the State. However, it is easy to proclaim high moral standards and legal opinions, it is a totally different thing to act in accordance with those statements. The past has showed far too many cases where States have not done what they are obliged to do under international law¹⁹⁰, to investigate and prosecute certain crimes, despite what States have themselves ensured that they would do.

With the ICC in place as an insurance against impunity and inactivity when a State fails to fulfil its international obligations, States will probably be more active in complying with the relevant obligations. Developed States surely do not want to be branded as unwilling to investigate and prosecute crimes as genocide and crimes against humanity. States will thus be encouraged to make sure that their judicial systems fulfils the demands in the international community and the Rome Statute. Third States should not look at the ICC as an enemy. States should have an interest in making sure

¹⁹⁰ Convention on the Prevention and Punishment of the Crime of Genocide, Article 1 and 6, Convention (IV) relative to the Protection of Civilian Persons in Time of War, Article 146

that atrocities are investigated and prosecuted, the universal jurisdiction that exists regarding the crimes included in the Rome Statute shows that will. States should thus look at the ICC as a good way of ensuring that such atrocities do not go unpunished and see the ICC as a complement to the criminal jurisdiction of the State while the State is developing or rebuilding its judicial system.

However, the principle of complementarity and the procedure it requires in the work of the ICC: investigation by the Prosecutor, the Court and possible challenges of admissibility, can take long time and demand big resources of the ICC. There is thus a risk that the Courts efficiency when dealing with crimes of concern to the international community, as a whole, will be lowered because of this high standard for admissibility.

However, it was considered as necessary to keep the standards high to make sure that the ICC does not interfere with national investigations unless necessary. The right to exercise its jurisdiction is of course of great value to States as it is one of the principal rights under States sovereignty. States thus consider that such time and resources must be allocated to the upholding of the principle, despite the risks of lowering the Courts ability to try alleged perpetrators of serious crimes.

6 The Principle of Complementarity and Security Council referrals

6.1 Effects of Security Council referrals

Decisions adopted by the Security Council are binding on all Member States of the United Nations.¹⁹¹ The decisions are not automatically binding on other international institutions, as the ICC. The ICC is thus not forced to take up cases concerning a situation only because the Security Council refers it to the Court.¹⁹²

According to Article 19 of the Rome Statute the ICC must investigate if it has *jurisdiction* in every case, thus also after a referral of a situation by the Council.¹⁹³ In paragraph three of the article it is further stated that the prosecutor *may* seek a ruling from the Court concerning the admissibility of a case. Thus, Article 19 of the Rome Statute does not oblige the ICC to consider the admissibility of a case coming out of a situation referred by the Security Council.

It is clear from Article 53 of the Rome Statute that the prosecutor when determining whether there is reasonable basis to proceed with a case must investigate and decide if the case would be admissible. This article makes no reference to particular trigger mechanisms and is thus applicable also when the Security Council has referred the situation.¹⁹⁴ If the prosecutor when investigating the case, in accordance with Article 53 of the Rome Statute, finds that there are not enough grounds to proceed with a case because the case would not be admissible under Article 17 of the Rome Statute, the prosecutor shall inform the Security Council if it has referred the relevant situation.¹⁹⁵

6.2 The principle of complementarity.

As is showed in part 6.1, nothing in the Rome Statute implies that the principle of complementarity would not apply concerning situations referred by the Security Council.¹⁹⁶ Furthermore, the fact that the principle of

¹⁹¹ UN-Charter, Article 25

¹⁹² *The principle of complementarity in practice*, p. 21, para. IV.b.68

¹⁹³ Rome Statute, Article 19 (1)

¹⁹⁴ Rome Statute, Article 53 (1) b, Holmes, John T., *Complementarity: National Courts versus the ICC*, Ed. Cassese; Gaeta; Jones, p. 683

¹⁹⁵ Rome Statute, Article 53 (2) b

¹⁹⁶ Part 5.1, Informal Expert Paper, ICC-OTP 2003, *The principle of complementarity in practice*, p. 21, para. IV.b.68

complementarity is one of the cornerstones of the Rome Statute and is enshrined in both the preamble and Article 1 of the Statute indicates that the principle is to be respected in all cases.¹⁹⁷

6.2.1 Direct applicability of the principle of complementarity

However, despite the importance of the principle of complementarity, in Article 19 of the Rome Statute, which deals with the Court's investigation of the jurisdiction and admissibility of a case, it is only stated that the Court *may* determine the admissibility of a case, not that it is obliged to do so.¹⁹⁸

This provision is, as mentioned above, applicable also concerning the admissibility of a case coming out of a situation referred to the ICC by the Security Council. The provision can, according to certain international legal scholars, be seen as implying that only when the admissibility of a case is challenged is the ICC obliged to determine the admissibility of the case under Article 19 of the Statute.¹⁹⁹

Even though the decision of the ICC on admissibility would be challengeable for the accused or States²⁰⁰ even after a referral of a situation of the Security Council, it is difficult to see when such a challenge would have any effect. The accused could use the right to challenge the admissibility but States also members of the United Nations would be bound by the decision of the Security Council and thus have limited possibility to do so. The Security Council could, through a binding decision under Chapter VII of the UN-Charter, force States to accept the jurisdiction and admissibility of the ICC.²⁰¹ States could therefore be hindered to challenge the admissibility of the Court even though they have started a proceeding concerning the relevant case. The Security Council could through such a binding decision demand States to end their national proceedings to give priority to the ICC. The Security Council can further oblige Member States of the United Nations to comply with requests from the ICC, regarding the relevant situation, through binding decisions under Chapter VII of the UN-Charter.²⁰² States are thus obliged to cooperate with the ICC when the Security Council has referred the situation under the Court's consideration.²⁰³ Accordingly, challenges of admissibility from States after a Security Council referral will probably be rare. Additionally, States are bound by the decision of the Security Council even though the ICC has not determined that it has jurisdiction over the relevant case and the case would be admissible. This is a fact since the UN-Charter and the Rome Statute are

¹⁹⁷ Rome Statute, Preamble para. 10, Condorelli, Luigi; Villalpando, Santiago, *Referral and Deferral by the Security Council*, Ed. Cassese; Gaeta; Jones, p. 637

¹⁹⁸ Rome Statute, Article 19 (1)

¹⁹⁹ Arsanjani, Mahnoush H., *Reflections on the Jurisdiction and Trigger Mechanisms of the International Criminal Court*, Ed. von Hebel; Lammers; Schukking, p. 74

²⁰⁰ Rome Statute, Article 19 (2) a-c

²⁰¹ According to Article 25 of the UN-Charter are decisions adopted by the Security Council under Chapter VII binding on States.

²⁰² *The principle of complementarity in practice.*, p. 21-22, para. IV.b.69

²⁰³ Holmes, John T., *The Principle of Complementarity*, Ed. Lee, p. 71-72

completely separate and the Security Council need not consider the Rome Statute when adopting the decision concerned under Chapter VII of the UN-Charter. However, as presented in part 3 of this thesis²⁰⁴, there exists an agreement between the ICC and the United Nations, which states that the organisations should respect each other's statutes. The Security Council would thus hopefully regard the rules in the Rome Statute before adopting a resolution as the above.²⁰⁵

From this study of the relevant rules regarding referrals by the Security Council of the Rome Statute, in its part regarding "Jurisdiction, Admissibility and Applicable law"²⁰⁶, it seems as if the principle of complementarity in Article 17 does not apply to situations referred by the Council.²⁰⁷ As presented above, the ICC would not be obliged to investigate the admissibility of cases from Security Council referrals if no one challenges the admissibility. Because of the above-mentioned problems for States, such challenges would probably be rare, which thus would result in "automatic admissibility" for Security Council referrals. The accused could still challenge the admissibility but that would also be difficult if there is no possibility for the defence to refer to a State that could continue with national proceedings, because of a binding decision of the Security Council.

Furthermore, the ICC is according to Article 18, not obliged to inform States of its investigation when the Security Council has referred the situation.²⁰⁸ States will therefore have less possibility to inform the Court that they are already investigating or prosecuting the case before the ICC initiates its investigation of the relevant situation. However, such information could of course be given to the Court unofficially. Additionally, all States that are parties to the Rome Statute are also members of the United Nations and will thus be informed in the United Nations of the decision of the Security Council to refer a situation to the ICC.²⁰⁹

The fact that notification of ICC's investigation of a case need not be given to States when the Security Council refers the situation to the Court can however be regarded as implying that such cases are always admissible.

²⁰⁴ See part 3.2.1 and part 6.4, the analysis.

²⁰⁵ See further part 6.3

²⁰⁶ Rome Statute Part 2

²⁰⁷ El Zeidy, Mohamed M., , Michigan Journal of International Law, Summer 2002, [hereinafter El Zeidy, *The Principle of Complementarity: A new machinery to implement International Criminal Law*], p. 957

²⁰⁸ Rome Statute, Article 18 (1)

²⁰⁹ UN-Charter, Article 12 (2): *The Secretary-General, with the consent of the Security Council, shall notify the General Assembly at each session of any matters relative to the maintenance of international peace and security which are being dealt with by the Security Council and shall similarly notify the General Assembly, or the Members of the United Nations if the General Assembly is not in session, immediately the Security Council ceases to deal with such matters.*

UN-Charter, Article 15 (1): *The General Assembly shall receive and consider annual and special reports from the Security Council; these reports shall include an account of the measures that the Security Council has decided upon or taken to maintain international peace and security.*

This interpretation is made by several scholars in international law and proves, according to these scholars, that it does not matter if a State has consented to the jurisdiction of the ICC or if a State wishes to exercise national jurisdiction. The ICC would have jurisdiction over cases and those cases would be admissible when coming out of a Security Council referral. The consequence would be that if the Security Council refers a situation, the principle of complementarity does not apply and there would automatically be reasonable basis for the Prosecutor to start an investigation.²¹⁰

It is not only the fact that a notification to States is not needed after a Security Council referral that brings some scholars to be of the opinion that such a referral is always admissible. A further support for this view is to be found in the fact that the Council can neither challenge nor appeal a decision on admissibility of the court. The reason for this might be that it is seen as unnecessary since referrals by the Council are always admissible, the Council would thus never be interested in challenging the admissibility.²¹¹

6.2.2 Alternative ways of applying the principle of complementarity

However, looking in part five of the Rome Statute, “Investigation and Prosecution”, more rules concerning the principle of complementarity and referrals by the Security Council are to be found. In Article 53 it is stated that the Prosecutor, when deciding whether to initiate an investigation or not, should consider if the case is admissible under Article 17 of the Statute. This Article is applicable on all situations that come under the consideration of the Prosecutor, also such situations that have been referred to the ICC by the Security Council.²¹²

If the prosecutor would find that the case is not admissible under Article 17 of the Rome Statute the Prosecutor shall decide that there is not reasonable basis to proceed with the prosecution. The Prosecutor shall in such a case inform the Pre-Trial Chamber and the Party referring the situation under Article 13.²¹³ The Pre-Trial Chamber may after a request by the Party referring the situation under Article 13 of the Rome Statute review the decision of the Prosecutor.²¹⁴

It is thus up to the Prosecutor and not primary the Court to consider the admissibility of a case coming from a situation referred to the ICC by the

²¹⁰ Doherty, Katherine L.; McCormack, Timothy L.H., *"Complementarity" As a catalyst for comprehensive domestic penal legislation*, U.C. Davis Journal of International Law and Policy, Spring 1999, p. 151

²¹¹ Summers, *A fresh look at the jurisdictional provisions of the Statute of the International Criminal Court: The case for scrapping the treaty*, p. 79, Rome Statute Article 19 (2) *e contrario*

²¹² Rome Statute, Article 53 (1) b, Schabas, *An Introduction to the International Criminal Court*, p. 1907

²¹³ Rome Statute, Article 53 (2)

²¹⁴ Rome Statute, Article 53 (3) a

Security Council.²¹⁵ Consequently, the principle of complementarity in Article 17 of the Rome Statute will be respected and applied also when dealing with referrals by the Security Council. However, it will be in an alternative way, by the Prosecutor primarily and by the Court only if the Security Council asks the Court for a review of a decision of the Prosecutor not to continue with the investigation concerning a situation referred by the Security Council.²¹⁶

The ICC could however, in such a case, apply the Rome Statute and find that the case is admissible even though there is a State willing and able to conduct proceedings concerning the case, and thus be able to proceed with the referral by the Security Council. The Court can determine that the State is *de facto* unable to investigate or prosecute genuinely because of the decision by the Security Council.²¹⁷ In fact, the relevant State could also be seen as *de jure* unable since it would be unable because of its obligation under the UN-Charter to respect Security Council decisions.²¹⁸ If the State should proceed with its proceedings it would act contrary to its international obligations, this cannot be the meaning of the Rome Statute, even though the Statute puts up high criteria for a State to be unable.²¹⁹ According to this interpretation of the Rome Statute the ICC could consider such a case as the one developed above admissible.²²⁰

6.3 Consequences of the applicability of the principle of complementarity

Even though the principle of complementarity and the right of the accused to challenge admissibility would still apply, the result could, as showed above, be that the case would be admissible before the ICC since no State would claim jurisdiction over the alleged crime. If States did so they would act contrary to their obligations under the UN-Charter, since a decision by the Security Council is binding.²²¹ The effect would thus be that the Security Council *de facto* could set aside the principle of complementarity.²²²

Even though the Security Council probably will strive towards the goals of the international community, to make sure the most serious crimes of concern to the international community do not go unpunished and to end impunity, it must be considered politically questionable if the Security Council should have the power to set the principle of complementarity

²¹⁵ El Zeidy, *The Principle of Complementarity: A new machinery to implement International Criminal Law*, p. 960

²¹⁶ Rome Statute, Article 53 (3) a

²¹⁷ Condorelli, Luigi; Villalpando, Santiago, *Referral and Deferral by the Security Council*, Ed. Cassese; Gaeta; Jones, p. 639-640

²¹⁸ UN-Charter, Article 25

²¹⁹ Considering the inability of a State, see part 4.1.2.2 and Rome Statute, Article 17 (3)

²²⁰ Rome Statute, Article 17

²²¹ UN-Charter, Article 25

²²² *The principle of complementarity in practice*, p. 21, para. IV.b.69

aside.²²³ However, since the Security Council most certainly will act for the above-mentioned purposes and in the interest of the international community as a whole, it might very well be the case that the Council itself considers the principle of complementarity before referring a situation to the ICC.²²⁴

The ICC is, as stated before, an independent international subject and not bound by the decisions of the Security Council. Thus, even if the Security Council has adopted its decision because it believes a State unwilling or unable to investigate or prosecute genuinely, the decision of the ICC to consider the case would be challengeable.²²⁵ It must however be noticed that the ICC is not obliged to inform States that might have a jurisdictional interest in a case if that case comes from a referral of a situation by the Security Council.²²⁶ However, as stated in part 6.2.1 States will receive information as members of the United Nations.²²⁷ But, problems for States in relation to Security Council decisions may, as stated before,²²⁸ result in less challenges of admissibility of cases, when the ICC is dealing with a referral by the Security Council.²²⁹

Even though the ICC is separate from the Security Council it will probably put great value on considerations concerning a situation made by the Council, as the admissibility of a case before the Court.²³⁰ It is even put forward by some scholars that it would be devastating if the ICC would reject a referral by the Security Council because of admissibility. It would mean that the ICC considered a State's investigation or prosecution to be genuine, even though the Security Council has come to another result. This is an impossible outcome for those who believe infringements in decisions of the Council to be unconstitutional.²³¹ This aspect is important to hold in mind when considering the obligation for the Prosecutor to investigate the admissibility under Article 53 of the Rome Statute. The risk exists, that the Prosecutor believes that the Security Council has already regarded the question of admissibility. This may result in that the upholding of the principle of complementarity will only be a formal possibility when regarding referrals from the Security Council, but will not be regarded in reality.

²²³ *The principle of complementarity in practice.*, p. 21, para. IV.b.69

²²⁴ Condorelli, Luigi; Villalpando, Santiago, *Referral and Deferral by the Security Council*, Ed. Cassese; Gaeta; Jones, p. 639

²²⁵ Holmes, John T., *Complementarity: National Courts versus the ICC*, Ed. Cassese; Gaeta; Jones, p. 683, Rome Statute, Article 19 (2) b

²²⁶ Rome Statute, Article 18

²²⁷ Part 5.2.1 above, note 187

²²⁸ See part 6.2.1

²²⁹ Condorelli, Luigi; Villalpando, Santiago, *Referral and Deferral by the Security Council*, Ed. Cassese; Gaeta; Jones, p. 638

²³⁰ Holmes, John T., *Complementarity: National Courts versus the ICC*, Ed. Cassese; Gaeta; Jones, p. 683

²³¹ Summers, *A fresh look at the jurisdictional provisions of the Statute of the International Criminal Court: The case for scrapping the treaty*, p. 85

If the Prosecutor investigates the admissibility of a situation referred by the Security Council, in accordance with Article 53 of the Rome Statute²³², it has been held by international legal scholars that such investigation might be seen as being contrary to the UN-Charter. The Security Council must consider the relevant situation a threat or breach of international peace and security and it would be contrary to the principles and purposes of the Charter to disregard that determination. However, this is not the case since the ICC is an independent international subject and in no way bound by the decision of the Security Council.²³³

6.3.1 State sovereignty

It has been stated many times before but cannot be stated enough, criminal jurisdiction, the investigation and prosecution of alleged crimes and the enforcement of law, are fundamental parts of a State's exercise of its sovereignty. A state has jurisdiction over cases committed in its territory, by its nationals, against its nationals and against the safety of the State.²³⁴ This sovereign right of States to exercise criminal jurisdiction is what makes States deeply concerned about the trigger mechanisms included in the ICC-system and the relationship between those mechanisms and the principle of complementarity. State sovereignty is also the reason for the fundamental importance of the principle of complementarity.

Since criminal jurisdiction is one of the fundamentals in the sovereignty of States, States are reluctant and restrained in giving up that power. Many reasons for the reluctance can be found. States can, through its exercising of criminal jurisdiction, make sure that criminals are tried and by this show the community that certain behaviour is unacceptable and further, prevent crimes from occurring again since prosecution and punishment acts as a deterrent. Thus, States have an interest in holding perpetrators accountable in order to prove that the State takes its responsibility it has towards its nationals and the international community in upholding its laws.²³⁵ Furthermore, States ensure, through the handling of alleged crimes, that nationals that have become victims of crimes get rehabilitation and that reconciliation is promoted through the trial and the punishment of the perpetrators. States concern of this issue is reflected in the preamble of the Rome Statute and further in the many provisions on the issue of victims and witnesses rights.²³⁶ Thus, by giving up its right to exercise criminal jurisdiction the State may be afraid that it undermines its power and authority towards its nationals and others committing crimes on its territory. Additionally, States cannot ensure the rights of the victims if consenting to

²³² For development on this article, see part 5.2 above.

²³³ El Zeidy, *The Principle of Complementarity: A new machinery to implement International Criminal Law*, p. 960

²³⁴ Lee, Roy S., *The Rome Conference and its contributions to International Law*, Ed. Lee, p. 5

²³⁵ Arsanjani, Mahnoush H., *Reflections on the Jurisdiction and Trigger Mechanisms of the International Criminal Court*, Ed. von Hebel; Lammers; Schukking, p. 68

²³⁶ Rome Statute, Preamble para. 2, Articles 68, 75, 79

another forum's exercise of jurisdiction in cases where the State usually exercises jurisdiction.

A further issue that must be considered in this context, regarding State sovereignty and the principle of complementarity in respect of Security Council referrals, is that if the Security Council can decide on the relevant matter, to refer a case to the ICC and prevent States from taking national action, without acting *ultra vires*. The Council must, when exercising its powers, act in accordance with the principles and purposes of the UN-Charter.²³⁷ A decision that deprives the Member States of the United Nations their right to try certain crimes could be seen as contrary to the sovereign equality of States since crimes under the Rome Statute are crimes with universal jurisdiction and of *jus cogens* character that are followed by an *erga omnes* obligation to prohibit and repress such crimes.²³⁸ At the same time it can be held that the Security Council has the mandate under the UN-Charter to deprive States of certain rights when acting for the maintenance or restoration of international peace and security, which would be the case when the Council refers a situation to the ICC. Thus, since the Security Council by referring a situation to the ICC ensures that crimes of *jus cogens* character are investigated and alleged perpetrators prosecuted, the Council can be seen as taking over that responsibility from the Member States of the United Nations and can thus not be seen as acting contrary to the principles and purposes of the United Nations. Despite the fact that the State sovereignty is infringed.

6.3.1.1 Concerning States Parties to the Rome Statute

States parties to the Rome Statute have consented to the jurisdiction of the ICC over their nationals or when alleged crimes are committed on its territory.²³⁹ Furthermore they have consented to the possibility for the Security Council to refer situations to the ICC, and therefore their sovereignty is not affected by a mere referral by the Security Council.²⁴⁰ However, if the Security Council would refer a situation to the ICC that a State was already investigating or prosecuting and such referrals would be automatically admissible the relevant State would have its sovereign right to exercise criminal jurisdiction limited. Thus, in general State Sovereignty is not affected by Security Council referrals but if the principle of complementarity would not be respected, State sovereignty might be affected.

²³⁷ UN-Charter, 24 (2), Articles 1 and 2

²³⁸ Schabas, *An Introduction to the International Criminal Court*, p. 27

It should be held in mind that there exists different opinions among international scholars regarding *jus cogens* crimes and if they generate an obligation for States to prosecute alleged perpetrators or if they "only" oblige States to prohibit and prevent such crimes. This question is too broad to investigate closer in this thesis but the reader should be informed about this unclarity. The universal jurisdiction that includes the relevant crimes in any event gives States a *right* to prosecute alleged perpetrators.

²³⁹ Rome Statute, Article 12 (2)

²⁴⁰ Rome Statute, Article 13 (b)

As developed in the analysis to this chapter the ICC should apply the principle of complementarity on referrals by the Security Council. It is no different from referrals from States and initiatives by the Prosecutor, and Security Council referrals would thus not be automatically admissible. The result is that States Parties sovereign right to exercise criminal jurisdiction would not be limited if it is conducted in accordance with the prerequisites set out in the principle of complementarity. Would the national investigation or prosecution not be in accordance with the principle, and the ICC therefore would investigate the case, it would neither be a limitation of the State sovereignty since States Parties to the Rome Statute have consented to the ICC making such an evaluation, and “taking over” the case if necessary.²⁴¹

6.3.1.2 Concerning non Party States to the Rome Statute

As presented in part 4.2 above, the Security Council may refer situations occurring in States that are not parties to the Rome Statute and the ICC may still have jurisdiction.²⁴² The sovereignty of such States would in such cases be affected since they would not have the possibility to exercise their criminal jurisdiction, which is an essential part of State sovereignty.²⁴³ Furthermore, States not party to the Rome Statute, but members of the United Nations, may also be obliged to cooperate with the ICC since decisions taken by the Security Council under chapter VII of the United Nations Charter are binding on member states.²⁴⁴

However, if third States do not prosecute and punish perpetrators of the crimes included in the Rome Statute their sovereignty cannot be considered as affected by a Security Council referral to the ICC. The ICC would in such cases only do what all States have the right to do.²⁴⁵ The third States sovereignty would not be affected differently than it would be if another State acted to ensure the prosecution of the alleged perpetrator, by referring to universal jurisdiction. Thus, as in the case of States Parties to the Rome Statute, State sovereignty is only affected if the Security Council refers a situation that could just as well have been tried in the national judicial system. But, if the Security Council refers such a situation to the ICC the principle of complementarity shall prevent the ICC from proceeding with a case.²⁴⁶

6.4 Analysis

As has been proven by this thesis, it is not entirely clear if the principle of complementarity is directly applicable on referrals made to the ICC by the Security Council. A strict interpretation of the rules in the Rome Statute

²⁴¹ Rome Statute, Article 17

²⁴² Part 4.2 above and Rome Statute, Article 12 (2) *e contrario*

²⁴³ Danilenko, Gennady M., *ICC Statute and third States*, Ed. Cassese; Gaeta; Jones, p 1872

²⁴⁴ *Ibid*, p. 1889 and Rome Statute Article 25

²⁴⁵ Schabas, *An Introduction to the International Criminal Court*, p. 27, See also note 242

²⁴⁶ See parts 6.2.2, 6.3 and the Analysis.

concerning the principle and the preparatory procedure of a situation or case in the ICC-system leads to the conclusion that the Court may, through the Pre-trial Chamber apply article 17, containing the principle of complementarity, on referrals by the Security Council. There is, according to the wording of article 19 of the Rome Statute no duty for the Court to do so. However, the Court is, according to the strict interpretation of article 19 presented above, *never obliged* to try a case or a situation according to the principle of complementarity, it *may* do so. Thus, it makes no difference if it is a State, the Prosecutor or the Security Council that introduces a case/situation to the ICC. There is thus no special treatment of referrals by the Security Council in that regard.

Moreover, a situation is first of all introduced to the Prosecutor. The Prosecutor is the one deciding if the situation should be investigated more closely, and after such an investigation, determining if an alleged perpetrator should be prosecuted. The Prosecutor is, according to article 53 of the Rome Statute obliged to consider whether a situation is admissible according to the principle of complementarity in article 17 of the Statute. This obligation for the Prosecutor exists in all cases of referrals, also regarding situations referred by the Security Council.

The conclusion must be that referrals by the Security Council will be regarded in light of the principle of complementarity and not be treated different from other referrals in that matter.

The fact that it is the Prosecutor that is obliged to consider the principle of complementarity primarily, and not the Court itself, is also the case for State referrals. This circumstance is special for the ICC. The ICC is in many ways different from national Courts and one of these differences is the interplay between the Prosecutor and the Court. This interplay in no way jeopardises the independence of the two institutions or the impartiality of the Court in the trial, and thus the right for everyone to a fair trial and to be regarded as innocent until proven guilty. But, the Prosecutor has a greater responsibility and duty than what is the case in national judicial systems. The Prosecutor shall make sure that only the most serious and necessary cases are brought before the Court. This is necessary in order to make sure that the Court is not overburdened with cases so that it is prevented from fulfilling its purpose set out in the preamble of the Rome Statute, to make sure that the most serious crimes of concern do not go unpunished.²⁴⁷

The applicability of the principle of complementarity on referrals from the Security Council is important in order to make sure that the ICC only proceeds with investigation and prosecution where it is necessary, because of the workload, but it is also important from another perspective. As stated before, the Security Council is one of the most powerful international institutions and actors in the international community. Even if the power of

²⁴⁷ Rome Statute, Preamble para. 4

the Council is restricted by the principles and purposes of the UN-Charter²⁴⁸ the principle of complementarity can act as a control mechanism on the decisions of the Council and make sure that the Council respects the sovereign equality of the member states, the sovereign right for States to exercise criminal jurisdiction. This is an important consequence of the applicability of the principle of complementarity since the decisions of the Security Council often are political statements. A decision to refer a situation to the ICC may be taken even though a State has started investigations or prosecutions in relation to a situation. A majority of nine of the fifteen members in the Council might not consider the efforts of the relevant State enough to comply with the willingness or ability required in the Rome Statute. The opinions of nine States is not much and such a decision can easily be taken if the five permanent members have the same political opinion of the concerned State, or political pressure makes a member of the Council unwilling to vote against such a proposal.

If referrals by the Security Council automatically would be admissible it would affect State sovereignty and the rights of the accused. States would be hindered to exercise its jurisdiction and to fulfil its obligations to the international community in the way they deem most appropriate. States can be seen as obliged to ensure the prosecution of the crimes included in the Rome Statute, not only because of that Statute but also because of other Statutes, as the Genocide Convention and the Geneva Conventions. Additionally, the right for States to prosecute these crimes exists in international customary law, universal jurisdiction, and all States should thus have this right, whether they are parties to the Rome Statute or not.

It is also questionable if the rights of the accused would be respected if Security Council referrals were automatically admissible. Even if the possibility for the accused to challenge the admissibility of the case before the ICC, according to the Rome Statute²⁴⁹, would exist *de jure* it would not exist *de facto* since it would have no effect. States would be obliged to restrain their right to investigate or prosecute the case even if they would have wanted to do that and that indeed might have been the best scenario.²⁵⁰ Thus, it would be hard for an accused to have success with a challenge of admissibility, if no other judicial system is investigating the case.

Additionally, a State can be prevented from challenging the admissibility of a case before the ICC, even if that State has started its own proceedings concerning the case, because of the binding decision of the Security Council. Such decisions can be seen as implicitly oblige States not to conduct national proceedings regarding the relevant situation, since the Security Council deems it necessary in order to maintain or restore international peace and security to refer the situation to the consideration of the ICC. The Rome Statute would still bind the ICC and the Prosecutor must

²⁴⁸ The Security Council is according to article 24 (2) of the UN-Charter obliged to act in accordance with the principles and purposes of the Charter.

²⁴⁹ Rome Statute, Article 19 (2) b

²⁵⁰ I refer here to the reasons presented in part 4.2.1.

thus consider the admissibility of all cases, also after a referral of a situation by the Security Council.²⁵¹ The ICC would thus, when determining the admissibility of the case, find that a State has been conducting its own proceedings and is willing and able, according to international standards, to continue with these. Normally the ICC would consider such a case inadmissible because of the principle of complementarity, since there is already a State investigating or prosecuting the case. However, if the ICC considered the case inadmissible in such a case, there would be a judicial vacuum in which impunity could be the result since no one would investigate or prosecute. This would be contrary to both the principles and purposes of the United Nations and the purposes of the Rome Statute, and would certainly not comply with the purposes of the Security Council when adopting the relevant decision. It would thus be an unacceptable outcome.

As has been stated in part 6.2.2, the ICC must, in such cases, consider the case admissible. The ICC would act contrary to its principles and purposes, as expressed in the preamble of the Rome Statute, if it contributed, by applying the Rome Statute, to impunity for perpetrators of serious international crimes. Thus, the ICC must, if a case with this complex of problems comes before the Prosecutor or the Court determine the relevant State unable to continue its proceedings, and thus start its own proceedings.

States have, as developed on further in part 4 above, always during the process of the establishment of the ICC and the Rome Statute been afraid of the independence and power of the Prosecutor and therefore the principle of complementarity received a warm welcome. Despite this positive attitude towards the principle, States and other actors have been concerned about the relationship between the Court and the Security Council and the risk that the Council would loose power if bound by the obligations under the Rome Statute. There were thus many spokesmen for the alternative of the Security Council not being bound by the principle of complementarity when referring a situation to the ICC. These actors put forward the reason that the Security Council must be seen as the most powerful international institution, entrusted with the most important responsibility, the maintenance and restoration of international peace and security. For this reason it would, according to some, be absurd to restrain the powers of the Council by making it bound by the principle of complementarity and thus possibly limit the possibility for the Council to use the ICC in order to maintain or restore international peace and security.

It is my judgement that that there are many reasons for why the principle of complementarity ought to be applicable also on referrals by the Security Council. First of all, the Security Council definitely has one of the most important responsibilities in the United Nations, the maintenance and restoration of international peace and security. With this mandate, the Council is of course one of the most important international actors. However, I am of the opinion that the Council is now getting an actor to

²⁵¹ Rome Statute, Article 53, see part 5.2

share this responsibility with, the ICC. The Court will through its work, investigating and prosecuting crimes that are a threat to international peace and security²⁵², work for the same goals as the Security Council but in another way. The institutions should thus be seen as complementary to each other, not as competing about the powers and responsibilities in the international community.

If this complementarity and cooperation, in order to restore and maintain international peace and security, is to work, the two institutions must respect each other's mandates and statutes. The relationship agreement between the United Nations and the ICC shows that the two organisations have the intention to consider each other's activities and regulations.²⁵³ The Security Council must thus be seen as bound by the principle of complementarity. It is my opinion that if the contrary would be correct it would result in a loss of credibility and independence for the ICC, it could then be seen, not as an institution with its own personality, but only as a tool in the work of the Security Council.

Additionally, in my judgement, there will rarely be a conflict between a referral by the Security Council and the principle of complementarity of the Rome Statute. The Security Council will probably not consider it necessary to adopt a decision under chapter VII of the UN-Charter to refer a situation to the ICC, in order to restore or maintain international peace and security, if the crimes and perpetrators are already being investigated and prosecuted in a State. However, the foundation is of course that the concerned State is conducting the procedure in a correct way, if the State can be seen as both willing and able. Additionally, if the Security Council regards and respects the principle of complementarity there will never be discussions on whether the Council, by referring a situation to the ICC, has acted in accordance with the principles and purposes of the UN-Charter; the problem mentioned in part 6.3.1 above. As stated before, a referral of a situation to the ICC, when the concerned State is unable or unwilling to investigate and prosecute alleged perpetrators of crimes included in the Rome Statute, must be seen as in accordance with the UN-Charter.

*Thus, the ICC has the competence to decide on its jurisdiction and the admissibility of a case, according to the principle of complementarity, also after a referral by the Security Council. The fact is that the Court is required to do so under the Rome Statute.*²⁵⁴

²⁵² This is recognized in para. 3 of the Preamble of the Rome Statute.

²⁵³ *Agreement on the Relationship between the Court and the United Nations*, Article 2 (3)

²⁵⁴ RS Articles 19 and 53

Bibliography

International treaties, conventions and covenants

Charter of the United Nations, San Francisco, 26 June

Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, United Nations Treaty Series, vol. 78, p. 277

Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, 75 United Nations Treaty Series 285

Rome Statute of the International Criminal Court, Rome, 17 July 1998, United Nations Treaty Series, vol. 2187, p.3

Statute of the International Criminal Tribunal of Rwanda, as amended by Resolution 955 (1994), 977 (1995), 978 (1995), 1165 (1998), 1166 (1998), 1329 (2000), 1411 (2002) and 1431 (2002)

Statute of the International Criminal Tribunal for the Former Yugoslavia, as amended by Resolution 827 (1994), 1166 (1998), 1329 (2000), 1411 (2002), 1431 (2002) 1481 (2003)

Vienna Convention on the Law of Treaties, Vienna, 22 May 1969, United Nations Treaty Series, vol. 1155, p. 331

ICC Documents

Paper on some policy issues before the Office of the Prosecutor, ICC-OTP 2003

The principle of complementarity in practice, Informal Expert Paper, ICC-OTP 2003

Agreement on the Relationship between the Court and the United Nations

UN documents

International Law Commission Draft Agreement, 1994, Official Records of the General Assembly, Forty-Ninth Session, Supplement no. 10

Security Council Resolution 1422, 4572nd Meeting, 12 July 2002

Security Council Resolution 1487, 4772nd Meeting, 12 June 2003

Doctrine

Bassiouni, Cherif M.; Blakesley Christopher L., *The need for an International Criminal Court in the new international world order*, Vanderbilt Journal of Transnational Law, 1992

Brown, Bartram S., *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, Yale Journal of International Law, Summer 1998

Cassese, Antonio; Gaeta, Paola; Jones, John R.W.D, *The Rome Statute of the International Criminal Court: A commentary*, Oxford University Press, Oxford New York 2002

Corell, Hans, *Nuremberg and the development of an International Criminal Court*, Military Law Review, Summer 1995

Doherty, Katherine L.; McCormack, Timothy L.H., "*Complementarity*" As a catalyst for comprehensive domestic penal legislation, U.C. Davis Journal of International Law and Policy, Spring 1999

El Zeidy, Mohamed M., *The Principle of Complementarity: A new machinery to implement International Criminal Law*, Michigan Journal of International Law, Summer 2002

Lee, Roy S., *The International Criminal Court The making of the Rome Statute, Issues Negotiations Results*, Edited, Kluwer Law International, 1999

Politi, Mauro; Nesi, Giuseppe, *The Rome Statute of the ICC: A Challenge to impunity*, Ashgate Publishing Company, United Kingdom, 2002

Schabas, William A, *An Introduction to the International Criminal Court*, Second Edition, Cambridge University Press, University Press Cambridge 2004

Shaw, Malcom N., *International Law*, 5th Edition, Cambridge University Press, United Kingdom 2003, p. 579

Summers, Mark A., *A fresh look at the jurisdictional provisions of the Statute of the International Criminal Court: The case for scrapping the treaty*, Wisconsin International Law Journal, Winter 2001

von Hebel, Herman A.M.; Lammers, Johan G., Schukking, Jolien, *Reflections on the International Criminal Court*, T.M.C. Asser Press, Netherlands 1999

Wexler, Sadat Leila, *The proposed permanent International Criminal Court: An Appraisal*, Cornell International Law Journal, 1996

Wexler, Sadat Leila, *Committee report on Jurisdiction, Definition of Crimes and Complementarity*, Denver Journal of International Law and Policy, Winter 1997

Table of Cases

International Court for the former Yugoslavia, *Prosecutor v. Dusko Tadic a/k/a DULE*, Decision on the defence motion for interlocutory appeal on jurisdiction, Appeals Chamber, 2 October 1995, Case no. IT-94-1