

The Legal Basis for the Exercise of Jurisdiction
by the International Criminal Court and
the Preparatory Work of the Rome Statute (I)

Yoshiaki KITANO

Journal of International Relations and Comparative Culture
Vol. 16, No. 2 (March 2018)

【Research Note】

The Legal Basis for the Exercise of Jurisdiction by the International Criminal Court and the Preparatory Work of the Rome Statute (I)¹

Yoshiaki KITANO

Chapter 1 Introduction

Section 1 Exercise of Jurisdiction by the ICC and Consent of States: Provisions of the Statute

In 1998, the Rome Statute of the International Criminal Court (hereinafter referred to as "the Statute")² was adopted at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (hereinafter referred to as "the Rome Conference"). Almost 20 years on, the activities of the International Criminal Court (hereinafter referred to as "the ICC") now appear to be well under way, as the Statute came into effect on 1st July 2002 and 11 situations are currently under investigation by the Office of the Prosecutor of the ICC³.

The United States of America, which was opposed to the adoption of the Statute at the Rome Conference, signed it in December 2000. However, in April 2002 (after a change of government), the US stated that it had no intention of becoming a state party to the Statute⁴. In addition, as frequently reported by the media, the US has taken vari-

1 This paper is a revised version of the author's previous article written in Japanese. Yoshiaki Kitano, "Kokusai keiji saibansho ni yoru kankatsuken koushi no kokusai hou jou no konkyoduke: Saibansho kitei no kisou katei no kentou wo chuushin ni [The Legal Basis for the Exercise of Jurisdiction by the International Criminal Court: An Analysis based on the Preparatory Work of the Rome Statute] (I) (II) (III)," *Hogakuronso [Kyoto Law Review]*, Vol. 163, No. 3 (2008), pp. 116-137, Vol. 163, No. 5 (2008), pp. 173-187, Vol. 163, No. 6 (2008), pp. 124-148.

2 *United Nations Treaty Series*, Vol. 2187 (2004). Article 128 of the Statute states that "the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic".

3 See <https://www.icc-cpi.int/pages/situation.aspx> (as of November 28, 2017).

4 It seems that this statement was issued bearing in mind the rule prescribed in Article 18 of the Vienna Convention on the Law of Treaties (hereinafter referred to as "VCLT"). United States (U.S.): Letter to the Secretary-General of the United Nations Regarding the Rome Statute of the International Criminal Court,

ous measures to restrict the activities of the ICC⁵.

-
- International Legal Materials*, Vol. 41, No. 4 (2002), p. 1014. See Curtis A. Bradley, "U.S. Announces Intent Not to Ratify International Criminal Court Treaty," *ASIL Insights* Vol. 7, Iss. 7 (2002), at <https://www.asil.org/insights/volume/7/issue/7/us-announces-intent-not-ratify-international-criminal-court-treaty> (as of November 28, 2017); Konstantinos Magliveras and Dimitris Sourantonis, "Rescinding the Signature of an International Treaty: The United States and the Rome Statute Establishing the International Criminal Court," *Diplomacy & Statecraft*, Vol. 14, Iss. 4 (2003), pp. 21-49; Frédérique Coulée, "Sur un État tiers bien peu discret : les États-Unis confrontés au statut de la Cour pénale internationale," *Annuaire français de droit international*, Vol. 49 (2003), pp. 44-45. For the customary law nature of Article 18 of the VCLT, see Masahiko Asada, "CTBT: Legal Questions Arising from its Non-Entry-Into-Force," *Journal of Conflict and Security Law*, Vol. 7, No. 1 (2002), pp. 98-101.
- 5 Firstly, for the details of the UN Security Council resolutions 1422 (2002) and 1487 (2003) adopted in July 2002 and in June 2003 respectively, see Zsuzsanna Deen-Racsmany, "The ICC, Peacekeepers and Resolution 1422: Will the Court Defer to the Council?," *Netherlands International Law Review*, Vol. 49, Iss. 3 (2002), pp. 353-388; Robert Cryer and Nigel D. White, "The Security Council and the International Criminal Court: Who's Feeling Threatened?," *International Peacekeeping: The Yearbook of International Peace Operations*, Vol. 8 (2003), pp. 143-170; Carsten Stahn, "The Ambiguities of Security Council Resolution 1422 (2002)," *European Journal of International Law*, Vol. 14, No. 1 (2003), pp. 85-104; Salvatore Zappalà, "The Reaction of the US to the Entry into Force of the ICC Statute: Comments on UN SC Resolution 1422 (2002) and Article 98 Agreements," *Journal of International Criminal Justice*, Vol. 1, Iss. 1 (2003), pp. 117-121; Olufemi Elias and Anneliese Quast, "The Relationship between the Security Council and the International Criminal Court in the Light of Resolution 1422 (2002)," *Non-State Actors and International Law*, Vol. 3, Iss. 2 (2003), pp. 165-185; Markus Wagner, "The ICC and its Jurisdiction - Myths, Misperceptions and Realities," *Max Planck Yearbook of United Nations Law*, Vol. 7 (2003), pp. 497-504; Coulée, *supra* note 4, pp. 51-57; Claudia Fritsche, "Security Council Resolution 1422: Peacekeeping and the International Criminal Court," in Jochen Abr. Frowein, Klaus Scharioth, Ingo Winkelmann and Rüdiger Wolfrum (eds.), *Verhandeln für den Frieden - Negotiating for Peace: Liber Amicorum Tono Eitel* (Springer, 2003), pp. 107-120; Andreas Zimmermann, "'Acting under Chapter VII (...)' - Resolution 1422 and Possible Limits of the Powers of the Security Council," in Frowein, Scharioth, Winkelmann and Wolfrum (eds.), *supra* note 5, pp. 253-278; Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford University Press, 2003), p. 180; Neha Jain, "A Separate Law for Peacekeepers: The Clash between the Security Council and the International Criminal Court," *European Journal of International Law*, Vol. 16, No. 2 (2005), pp. 240-254; Roland Adjovi, "Le Conseil de sécurité des Nations unies et la Cour pénale internationale," *African Yearbook of International Law*, Vol. 13 (2005), pp. 202-209; Ioannis Prezas, "La justice pénale internationale à l'épreuve du maintien de la paix : A propos de la relation entre la Cour pénale internationale et le Conseil de sécurité," *Revue belge de droit international*, No. 2006/1 (2006) pp. 88-91; Anne Peters, "Article 24," in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte and Andreas Paulus (eds.), *The Charter of the United Nations: A Commentary*, third edition (Oxford University Press, 2012), p. 785; Nico Krisch, "Article 41," in Simma, Khan, Nolte and Paulus (eds.), *supra* note 5, p. 1321; Juliet Okoth, "Africa, the United Nations Security Council and the International Criminal Court: The Question of Deferrals," in Gerhard Werle, Lovell Fernandez and Moritz Vormbaum (eds.), *Africa and the International Criminal Court* (T.M.C. Asser Press, 2014), pp. 200-202; Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmschurst, *An Introduction to International Criminal Law and Procedure*, third edition (Cambridge University Press, 2014), pp. 174; Deborah Ruiz Verduzco, "The Relationship between the ICC and the United Nations Security Council," in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford University Press, 2015), p. 57; Roger O'Keefe, *International Criminal Law* (Oxford University Press, 2015), pp. 549-550; William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, second edition (Oxford University Press, 2016), pp. 437-441; Nigel D. White, *The Law of International Organisations*, third edition (Manchester University Press, 2017) pp. 39, 152, 253-254; William A. Schabas, *An Introduction to the International Criminal Court*, fifth edition (Cambridge University Press, 2017), pp. 28-29, 165-167; Yassin M. Brunger, "Article 16," in Mark Klamberg (ed.), *Commentary on the Law of the International Criminal Court* (Torkel Opsahl Academic EPublisher, 2017), pp. 201-203; Dame Rosalyn Higgins, Philippa Webb, Dapo Akande, Sandesh Sivakumaran and James Sloan, *Oppenheim's International Law: United Nations* (Oxford University Press,

The Legal Basis for the Exercise of Jurisdiction

According to David Scheffer, former head of the US delegation to the Rome Conference, the US criticises Article 12 of the Statute which permits the ICC to exercise jurisdiction over nationals of non-party states, even when there is no consent of these states or UN Security Council resolution with binding force, arguing that "the Vienna Convention on the Law of Treaties states rather clearly that treaties cannot bind non-party states"⁶.

Article 12 of the Statute, entitled "Preconditions to the exercise of jurisdiction", declares the following:

2017), pp. 1331-1332. Secondly, for the details of the UN Security Council Resolution 1497 (2003) adopted in August 2003, see Salvatore Zappalà, "Are Some Peacekeepers Better Than Others? UN Security Council Resolution 1497 (2003) and the ICC," *Journal of International Criminal Justice*, Vol. 1, Iss. 3 (2003), pp. 671-678; Coulée, *supra* note 4, pp. 57-58; Jain, *supra* note 5, pp. 240-254; Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press, 2007), pp. 110-111; Krisch, *supra* note 5, p. 1321; Okoth, *supra* note 5, p. 201; Cryer, Friman, Robinson and Wilmschurst, *supra* note 5, pp. 174-175; O'Keefe, *supra* note 5, pp. 550-501; Schabas, *supra* note 5 ("An Introduction"), pp. 65-66; Higgins, Webb, Akande, Sivakumaran and Sloan, *supra* note 5, pp. 1331-1332. Thirdly, for the details of the agreements which are claimed to be based on Article 98, paragraph 2, of the Statute and collectively called "Article 98 Agreements", see C. Jayaraj, "The International Criminal Court and the United States: Recent Legal and Policy Issues," *Indian Journal of International Law*, Vol. 42, No. 4 (2002), pp. 504-506; James Crawford, Philippe Sands and Ralph Wilde, Joint Opinion: In the Matter of the Statute of the International Criminal Court and in the Matter of Bilateral Agreements Sought by the United States under Article 98 (2) of the Statute (2003), at <https://www.legal-tools.org/doc/7f2edf/pdf/> (as of November 28, 2017); Zappalà, *supra* note 5 ("The Reaction of the US"), pp. 122-131; Dapo Akande, "The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits," *Journal of International Criminal Justice*, Vol. 1, Iss. 3 (2003), pp. 642-646; Coulée, *supra* note 4, pp. 58-69; Dapo Akande, "International Law Immunities and the International Criminal Court," *American Journal of International Law*, Vol. 98, No. 3 (2004), pp. 426-429; David A. Tallman, "Catch 98 (2): Article 98 Agreements and the Dilemma of Treaty Conflict," *Georgetown Law Journal*, Vol. 92, Iss. 5 (2004), pp. 1033-1056; Markus Benzing, "U.S. Bilateral Non-Surrender Agreements and Article 98 of the Statute of the International Criminal Court: An Exercise in the Law of Treaties," *Max Planck Yearbook of United Nations Law*, Vol. 8 (2004), pp. 190-236; Harmen Van Der Wilt, "Bilateral Agreements between the United States and States Parties to the Rome Statute: Are They Compatible with the Object and Purpose of the Statute?," *Leiden Journal of International Law*, Vol. 18, Iss. 1 (2005), pp. 99-108; David Scheffer, "Article 98 (2) of the Rome Statute: America's Original Intent," *Journal of International Criminal Justice*, Vol. 3, Iss. 2 (2005), pp. 334-353; Adjovi, *supra* note 5, pp. 209-210; Cryer, Friman, Robinson and Wilmschurst, *supra* note 5, pp. 175-176; Robert Cryer "The ICC and its Relationship to Non-States Parties," in Stahn (ed.), *supra* note 5, p. 264; O'Keefe, *supra* note 5, pp. 575-581; Schabas, *supra* note 5 ("The International Criminal Court"), pp. 1349-1352; *id.*, *supra* note 5 ("An Introduction"), pp. 29-30, 65. Note that this paper does not refer to the document symbols of UN General Assembly resolutions and UN Security Council resolutions.

6 Statement by David J. Scheffer, Ambassador-at-Large for War Crimes Issues and Head of the U.S. Delegation to the U.N. Diplomatic Conference on the Establishment of a Permanent International Criminal Court, Before the Committee on Foreign Relations of the U.S. Senate (July 23, 1998), at http://www.iccnw.org/documents/USScheffer_Senate23July98.pdf (as of November 28, 2017); David J. Scheffer, "The United States and the International Criminal Court," *American Journal of International Law*, Vol. 93, No. 1 (1999), pp. 19-20; *id.*, "The International Criminal Court: The Challenge of Jurisdiction," *ASIL Proceedings of the 93rd Annual Meeting* (1999), pp. 68-72; *id.*, "U.S. Policy and the International Criminal Court," *Cornell International Law Journal*, Vol. 32, Iss. 3 (1999), p. 533; *id.*, "Staying the Course with the International Criminal Court," *Cornell International Law Journal*, Vol. 35, Iss. 1 (2001-2002), pp. 64-66. Scheffer was the Ambassador-at-Large for War Crimes Issues from 1997 to 2001 under the Clinton administration.

- 1 A State which becomes a Party⁷ to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5⁸.
- 2 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:
 - (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
 - (b) The State of which the person accused of the crime is a national.
- 3 If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

Also, Article 13 entitled "Exercise of jurisdiction" declares the following:

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

- (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
- (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
- (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

7 Article 2, paragraph 1 (f), of the VCLT asserts that "'contracting State' means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force" and paragraph 1 (g) of the same article provides that "'party' means a State which has consented to be bound by the treaty and for which the treaty is in force".

8 Article 5 of the Statute, entitled "Crimes within the jurisdiction of the Court", states the following:

The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

- (a) The crime of genocide;
- (b) Crimes against humanity;
- (c) War crimes;
- (d) The crime of aggression.

From the content of these articles, it is possible to sum up the conditions of the exercise of jurisdiction by the ICC described in the Statute as follows: 1) When a state party refers a situation to the Prosecutor or the Prosecutor takes an initiative on the launch of an investigation, the sole condition is the acceptance by the state on the territory of which the conduct in question occurred or the state of registration of the vessel or aircraft where the crime was committed (hereinafter referred to as "the territorial state"), or by the state of which the person accused of the crime is a national (hereinafter referred to as "the nationality state")⁹. 2) When the UN Security Council acting under Chapter VII of the Charter of the United Nations refers a situation to the Prosecutor, the ICC does not need to obtain an acceptance from any state to exercise jurisdiction.

Scheffer's use of the word "consent" instead of "acceptance"¹⁰ does not raise any issues in itself¹¹. However, there are different opinions in academia as to what a state consents to exactly when accepting the exercise of jurisdiction by the ICC in accordance with Article 12. This issue is discussed later in this paper.

Whatever the case, it is clear that the Statute allows the ICC to exercise jurisdiction over nationals of a non-party state without its consent or a referral from the UN Security Council when a consent of the territorial state is given in accordance with Article 12.

Section 2 Rules of the Law of Treaties on Creation of Obligations for Non-Party States: Provisional Examination

Article 34 of the VCLT, entitled "General rule regarding third States"¹², declares that "[t]reaty¹³ does not create either obligations or rights for a third State without its con-

9 Article 12 of the Statute uses the expressions "accepts the jurisdiction" (paragraphs 1 and 2) and "accept the exercise of jurisdiction" (paragraph 3). These two expressions can be regarded as synonymous because paragraph 2 of this article refers to states which "have accepted the jurisdiction of the Court in accordance with paragraph 3". Also, the title of Article 12 ("Preconditions to the exercise of jurisdiction") and the text of Article 13 indicate that the former article concerns the exercise of jurisdiction. For these reasons, the author employs the expression "accept the exercise of jurisdiction" in this paper. The French text of the Statute can also be interpreted in a similar way, except that Article 12, paragraph 3, uses the phrase "consentir à ce que la Cour exerce sa compétence à l'égard du crime dont il s'agit", instead of "accepter".

10 See, e.g., Scheffer, *supra* note 6 ("The United States and the International Criminal Court"), p. 18.

11 For a description of the use of the word "consentir" in the French text of the Statute, see note 9.

12 Article 2, paragraph 1 (h), of the VCLT defines "third State" as "a State not a party to the treaty". In this paper, the states which are not parties to a treaty are called "non-party states", except in the case of direct quotation.

13 Article 2, paragraph 1 (a), of the VCLT defines "treaty" as "an international agreement concluded *between States* in written form and governed by international law" [emphasis added]. For further study of this provision, see Philippe Gautier, "Article 2, Convention of 1969," in Olivier Corten and Pierre Klein (eds.), *The Vienna Conventions of the Law of Treaties: A Commentary* (Oxford University Press, 2011), pp. 34-45.

sent". While it has not become a state party to the VCLT, the US did not take issue with the content of this provision at the United Nations Conference on the Law of Treaties (hereinafter referred to as "the Vienna Conference"), where the VCLT was adopted¹⁴.

Regarding the rule that a treaty does not create obligations for a non-party state without its consent, the UN International Law Commission (hereinafter referred to as "the ILC"), which prepared the drafts of the VCLT, mentioned the following in the commentary on its final draft: there was complete agreement among the ILC members that a treaty "never by its own force alone creates obligations for non-parties"¹⁵. The ILC also stated in the same commentary that the rule was "one of the bulwarks of the independence and equality of States"¹⁶. These statements indicate that the ILC thought that the rule had a general scope of application¹⁷ and bore the function of retaining the independence and equality of states.

On the other hand, there is a long history of dialogue on how the relationship between a treaty and its non-party states is regulated in the law of treaties, especially on if and when treaties can create obligations or rights for non-party states without their consent¹⁸. For example, Hersch Lauterpacht claims that, contrary to the above statements of the ILC, the rule denying the imposition of obligations on non-party states is restricted by

Also, for the characterisation of the Statute as an international agreement between states, see Article 125 of the Statute.

On the other hand, for a definition of "treaty" in the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter referred to as "VCLTIO"), see Article 2, paragraph 1 (a), of the VCLTIO, which is not related directly to the study in this paper.

14 United Nations Conference on the Law of Treaties, First Session, Vienna, 1968, Official Records (1969), pp. 191-201, 443-444; United Nations Conference on the Law of Treaties, Second Session, Vienna, 1969, Official Records (1970), pp. 59-72, 157-158.

15 Yearbook of the International Law Commission, 1966, Vol. II, p. 226. A similar perspective can be found in Ian Sinclair, *The Vienna Convention on the Law of Treaties*, second edition (Manchester University Press, 1984), p. 100.

16 Yearbook of the International Law Commission, 1966, Vol. II, p. 227.

17 In this regard, for an explanation of Article 75 of the VCLT concerning the case of an aggressor state, see Christian Tomuschat, "Article 75, Convention of 1969," in Corten and Klein (eds.), *supra* note 13, pp. 1687-1698.

18 See Christine Chinkin, *Third Parties in International Law* (Oxford University Press, 1993), pp. 25-88, 134-144; Paul Reuter, *Introduction au droit des traités*, troisième édition (revue et augmentée par Philippe Cahier) (Presses Universitaires de France, 1995), pp. 93-116; Malgosia Fitzmaurice, "Third Parties and the Law of Treaties," *Max Planck Yearbook of United Nations Law*, Vol. 6 (2002), pp. 37-137; Eric David, "Article 34, Convention of 1969," in Corten and Klein (eds.), *supra* note 13, pp. 887-896; Caroline Laly-Chevalier, "Article 35, Convention of 1969," in Corten and Klein (eds.), *supra* note 13, pp. 902-920; Pierre d'Argent, "Article 36, Convention of 1969," in Corten and Klein (eds.), *supra* note 13, pp. 929-940; Budislav Vukas, "Treaties, Third-Party Effect," in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, Vol. 10 (Oxford University Press, 2012), pp. 31-38.

"the general interest of the international community"¹⁹.

As mentioned in the previous section, according to Scheffer, the US criticises Article 12 of the Statute on the basis of the rule concerning the inability of treaties to create obligations for non-party states without their consent²⁰. So, to date, the legal basis for the exercise of jurisdiction by the ICC has been discussed by a number of experts in international law. In this regard, the US's criticism seems to be made on the assumption that Article 12 lays down an obligation of a non-party state which is the nationality state of the accused and does not give consent in accordance with paragraph 3 thereof. Also, the phrase "the Court may exercise its jurisdiction" in Article 12 can imply the obligation of non-party states to acquiesce in the exercise of jurisdiction by the ICC, which legalises such exercise under international law. In any case, as the Statute does not explicitly describe such an obligation, an in-depth examination into the preparatory work of the Statute is needed²¹.

If most states (except the US) agreed to establish the obligation described above in the drafting process of the Rome Statute, it is probable that they supported the idea that the Statute could create obligations for non-party states without their consent. Or, another possibility is that such creation of obligations was denied and a different legal basis was given for the exercise of jurisdiction by the ICC. If the latter is the case, the US's criticism based on the assumption explained above cannot be valid.

From the above considerations, it would be reasonable to elicit the following research topic: the legal basis for the exercise of jurisdiction by the ICC, which can be discussed as one of the issues demonstrating the current status of general international law concerning the creation of obligations for non-party states. This paper aims to discuss this topic.

The Rome Statute, which was adopted just before the beginning of the 21st century

19 Lassa Oppenheim, *International Law: A Treatise*, Vol. 1, eighth edition (edited by Hersch Lauterpacht) (Longmans, Green & Co., 1955), p. 929. This argument is retained in the 9th edition. Sir Robert Jennings and Sir Arthur Watts (eds.), *Oppenheim's International Law*, Vol. 1, ninth edition (Longman, 1992), p. 1264. More recent works also discuss the relationship between treaties and non-party states in the context of "community interest". Christian Tomuschat, "Obligations Arising for States without or against their Will," *Collected Courses of The Hague Academy of International Law*, Vol. 241 (1993), pp. 244-247, 252-257, 269-273; Bruno Simma, "From Bilateralism to Community Interest in International Law," *Collected Courses of The Hague Academy of International Law*, Vol. 250 (1994), pp. 331-334, 358-364.

20 The statement cited in the previous section that "the Vienna Convention on the Law of Treaties states rather clearly that treaties cannot bind non-party states" (Scheffer, *supra* note 6 ("The International Criminal Court"), p. 70) does not mention the case in which non-party states give consent. However, it is safe to say that the speaker intended to express the same meaning as Article 34 of the VCLT because he referred to the VCLT. See also *id.*, *supra* note 6 ("The United States and the International Criminal Court"), p. 18.

21 See Articles 31 and 32 of the VCLT concerning the interpretation of treaties. For the customary law nature of these articles, see, e.g., *Sovereignty over Palau Ligitan and Palau Sipadan (Indonesia/Malaysia), Judgement, I.C.J. Reports 2002*, pp. 645-646, para. 37.

during a period of rapidly increasing globalization, states that "the ICC has jurisdiction over the most serious crimes of concern to the international community as a whole"²². The question is whether states actually agreed that the Statute could create obligations for non-party states without their consent.

²² Article 5 of the Statute. For the whole text of this article, see note 8.