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

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【Research Note】

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Chapter 2 Existing Theories (Continued)

Section 2 Creation of the Nationality State's Obligation to Acquiesce

1. Consent Given in Accordance with Article 12 of the Statute

Regarding the ICC's exercise of jurisdiction over nationals of non-party states in the cases of the territorial state's acceptance, Morris claims that "by conferring upon the ICC jurisdiction over non-party nationals, the ICC Treaty would abrogate the pre-existing rights of non-parties which, in turn, would violate the law of treaties". To explain the above-mentioned "law of treaties", she quotes a passage from the commentary on the final draft of the VCLT which says that "[i]nternational tribunals have been firm in laying down that in principle treaties, whether bilateral or multilateral, neither impose any obligation on States which are not parties to them nor modify in any way their legal rights without their consent"[71], as well as another passage from the award of the Permanent Court of Arbitration on the Island of Palmas Case (1928) which says that "whatever may be the right construction of a treaty, it cannot be interpreted as disposing of the rights of independent third Powers"[72]. Moreover, by rephrasing the above-mentioned "pre-existing rights", she asserts that "[t]he right of a state to be free from the exercise of exorbitant jurisdiction over its nationals cannot be abrogated by a treaty to which it is not a party". Casey and Rivkin, Jr. also give concurrence to her argument described above[73,74].

As witnessed by the fact that Article 34 of the VCLT refers only to the creation of

71 Yearbook of the International Law Commission, 1966, Vol. II, p. 226.
72 Reports of International Arbitral Awards, Vol. II, p. 842. This passage was also quoted by the ILC in the commentary on the final draft of the VCLT as a pronouncement concerning the relationship between treaties and their non-party states. Yearbook of the International Law Commission, 1966, Vol. II, p. 226.
73 Morris, *supra* note 59, pp. 26-27.
74 Casey and Rivkin, Jr., *supra* note 58, p. 68.

obligations and rights, the abrogation of a right is caused by the creation of an obligation[75]. So, "the law of treaties" mentioned by Morris means the rule of general international law whereby a treaty does not create obligations for a non-party state without its consent, and her assumption that the Statute stipulates the abrogation of "[t]he right of a state to be free from the exercise of exorbitant jurisdiction over its nationals"[76] suggests that it provides for the obligation of a state to acquiesce in the ICC's exercise of jurisdiction. Therefore, her argument described in the previous paragraph can be paraphrased as follows: Article 12 of the Statute provides for the obligation of the non-party

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75 The relevant part of the preparatory work of the VCLT can be summarised as follows.
In 1964, the then Special Rapporteur on the law of treaties, Humphrey Waldock, submitted to the ILC his third report on the law of treaties, where draft Article 61, paragraph 1, stipulated the following:

> Except as provided in article 62 and 63, a treaty applies only between the parties and does not
> (a) impose any legal obligations upon States not parties to the treaty or modify in any way their legal rights;
> (b) confer any legal rights upon States not parties to the treaty.
> (Yearbook of the International Law Commission, 1964, Vol. II, p. 17)

However, during the ILC's 733rd meeting held in the same year, its several members suggested that the latter part of subparagraph (a) should not be retained. For example, Antonio de Luna said that "the words 'nor modify in any way their legal rights' should be deleted, because to impose an obligation always meant modifying a right" as well as that "[r]ights could be modified either by being restricted or by being enlarged. Restricting a right was equivalent to imposing an obligation, and enlarging a right was equivalent to conferring a right". *Ibid*., 1964, Vol. I, p. 64, para. 46 (de Luna), p. 65, para. 61 (de Luna). See also *ibid*., 1964, Vol. I, p. 64, para. 50 (Yasseen), p. 64, para. 52 (Ago, the Chairman, speaking as a member of the Commission), p. 65, para. 57 (Rosenne), p. 65, paras. 63-64 (Jiménez de Aréchaga), p. 66, paras. 70-71 (Waldock, Special Rapporteur), p. 66, para. 74 (Ago, the Chairman, speaking as a member of the Commission).
Subsequently, during the ILC's 750th meeting held in the same year, the Drafting Committee proposed the following new text for draft Article 61:

> A treaty applies only between the parties and neither imposes any obligations nor confers any rights upon States not parties to it.
> (*Ibid*., 1964, Vol. I, p. 173, para. 62)

With regard to this text, the Chairman of the Drafting Committee said that "[t]he Drafting Committee considered that that was a concise and exact rendering of the general rule". *Ibid*., 1964, Vol. I, p. 173, para. 63 (Briggs, Chairman of the Drafting Committee).
Lastly, it was during the ILC's 867th meeting held in 1966 that the above-mentioned words "impose" and "confer" were merged into the single word "create" and the draft text identical to Article 34 of the VCLT was proposed. *Ibid*., 1966, Vol. I (Part Two), p. 170, para. 20. When proposing this final text, the Chairman of the Drafting Committee said that "[t]he main change, which the Drafting Committee did not consider affected the essential meaning of the 1964 text, was the omission of the words 'applies only between the parties'". *Ibid*., 1966, Vol. I (Part Two), p. 170, para. 21 (Briggs, Chairman of the Drafting Committee).
It can be said that the abrogation of a right, which Morris refers to, is a kind of the restriction of a right, which de Luna considered equivalent to the imposition of an obligation. Moreover, his view seems to have been accepted in the preparatory work of the VCLT even though the ILC's commentary on its final draft does not offer any explanation about this point.

76 It is obvious from the context of Morris's argument that the above-mentioned claim that "the ICC Treaty would abrogate the pre-existing rights of non-parties" means that the Statute stipulates the abrogation of rights of non-party states.

nationality state to acquiesce in the ICC's exercise of jurisdiction, but, in the cases of the territorial state's acceptance, the right of the nationality state to be free from the ICC's exercise of jurisdiction over its nationals is not abrogated because such an obligation is not created for it without its consent. If this argument is valid, the ICC's exercise of jurisdiction in such cases violates the above-mentioned right and is deemed illegal[77], and the territorial state's acceptance is found to be irrelevant to the legality of the ICC's exercise of jurisdiction.

On the other hand, regarding the ICC's exercise of jurisdiction in the cases of the nationality state's acceptance, Morris, Casey and Rivkin, Jr. claim that the nationality state's consent legalises the ICC's exercise of jurisdiction[78]. It is clear from the context that they, like Scheffer[79], use the word "consent" interchangeably with the acceptance in accordance with Article 12 of the Statute. So, in light of the above analysis of Morris's argument concerning the cases of the territorial state's acceptance, their argument concerning those of the nationality state's acceptance can be paraphrased as follows: Article 12 provides for the obligation of the nationality state to acquiesce in the ICC's exercise of jurisdiction, and, in the cases of its acceptance, its right to be free from the ICC's exercise of jurisdiction over its nationals is abrogated. If this argument is valid, the ICC's exercise of jurisdiction in such cases does not violate any right under international law.

From the aforementioned, it can be seen that, unlike the scholars mentioned in subsections 1 to 4 of the previous section, Morris, Casey and Rivkin, Jr. consider that the consent given in accordance with Article 12 of the Statute creates the nationality state's obligation to acquiesce, which abrogates its right and legalises the ICC's exercise of jurisdiction. This theoretical framework has the common relevance to Article 12 with that of the exercise of state jurisdiction through the ICC[80]. However, in the former framework,

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77 Among the scholars who deny the possibility of exercising state jurisdiction through the ICC (see subsection 5 of the previous section), Wedgwood does not provide any argument from which the illegality of the ICC's exercise of jurisdiction in some cases can be derived directly.

78 Morris, *supra* note 59, p. 14; Casey and Rivkin, Jr., *supra* note 58, p. 72.

79 See section 1 of chapter 1.

80 In connection with the acceptance of the ICC's exercise of jurisdiction in accordance with Article 12, paragraph 3, of the Statute (see section 1 of chapter 1), it can be noted that Article 35 of the VCLT, entitled "Treaties providing for obligations for third States", declares that "[a]n obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation *in writing*" [emphasis added]. However, during the Vienna Conference, when the Republic of Viet-Nam proposed the addition of the words "in writing", the United Kingdom and Brazil contended that it was not consistent with customary international law. United Nations Conference on the Law of Treaties, Second Session, Vienna, 1969, Official Records (1970), pp. 59-60, para. 5 (Republic of Viet-Nam), p. 60, para. 6 (United Kingdom), p. 60, para. 7 (Brazil). So, it is debatable whether customary international law requires non-party states to express their consent in writ-

the ICC's exercise of jurisdiction is not characterised as the exercise of a kind of state jurisdiction through the ICC, so Article 12 does not have to be interpreted according to such a characterisation. Moreover, contrary to the latter framework where only one of the states which originally possessed jurisdiction has to give consent in accordance with Article 12, the former one requires that all the states whose rights would be violated by the ICC's exercise of jurisdiction should give consent. The scholars mentioned in this subsection assume that only the nationality state has such a right, but this groundless assumption is debatable.

2. Consent Given in Accordance with Article 25 of the UN Charter

Furthermore, regarding the ICC's exercise of jurisdiction in the cases of the Security Council's referral, Morris, Casey and Rivkin, Jr. claim that the nationality state's consent given in accordance with Article 25 of the UN Charter legalises the ICC's exercise of jurisdiction[81]. In light of their argument concerning the cases of the nationality state's acceptance which was examined in the previous subsection, their argument concerning those of the Security Council's referral can be paraphrased as follows: On the one hand, the ICC's exercise of jurisdiction in the latter cases does not violate any right under international law because, as in the former ones, the obligation of the nationality state to acquiesce is created. On the other hand, the creation of such an obligation is caused in the latter cases, unlike the former ones, on the bases that the resolution adopted by the Council when it refers a situation to the Prosecutor provides for the said obligation, and that, as a member of the UN, the nationality state has agreed to accept and carry out the decisions of the Council in accordance with the UN Charter[82,83].

As mentioned in subsection 6 of the previous section, if the arguments in its subsec-

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ing, and the phrase "by declaration lodged with the Registrar" in paragraph 3 of Article 12 does not seem to stipulate that such declarations should be made in writing. In any case, all the states (and similar entities) which have accepted the ICC's exercise of jurisdiction in accordance with that paragraph so far (Côte d'Ivoire, Palestine and Ukraine) made their declarations in writing. See https://www.icc-cpi.int/resource-library#referrals (as of November 27, 2018).

81 Morris, *supra* note 59, p. 14; Casey and Rivkin, Jr., *supra* note 58, p. 72.

82 Article 25 of the UN Charter. For the whole text of this article, see note 29.

83 Similarly, with regard to the legal basis for the exercise of jurisdiction by the ICTY and other similar courts and for the ICC's exercise of jurisdiction in the cases of the Security Council's referral, O'Keefe claims that "the Security Council can derogate from international law when acting under chapter VII of the Charter" as well as that "UN member states agree through being parties to the Charter that when acting under chapter VII the Security Council may, without the express consent in any given instance of the member states concerned, take measures in derogation of the rights and obligations of member states under customary and other treaty-based international law". O'Keefe, *supra* note 5, pp. 98, 541. See also Gabriel M. Lentner, *The UN Security Council and the International Criminal Court: The Referral Mechanism in Theory and Practice* (Edward Elgar Publishing, 2018), p. 43.

tions 2 or 4 are valid, the UN Security Council's referral is found to be irrelevant to the legality of the ICC's exercise of jurisdiction. On the contrary, if the argument in this subsection is valid, the fact that the Council decides to refer a situation to the Prosecutor while acting under Chapter VII of the UN Charter, together with the nationality state's consent given in accordance with Article 25 thereof, legalises the ICC's exercise of jurisdiction[84]. However, to support the latter argument, the following four issues need to be explored carefully.

The first is whether the resolutions adopted by the UN Security Council when it refers situations to the Prosecutor are interpreted to provide for the obligation of the nationality states to acquiesce in the ICC's exercise of jurisdiction. It is not apparently obvious that this issue can be answered in the affirmative with respect to such resolutions which have been adopted so far. For example, Resolution 1593 (2005) simply states that the Council "[d]ecides to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court"[85]. It can be noted in relation to this that Morris also considers that the resolutions by which the ICTY and ICTR were established[86] provide for the obligation of nationality states to acquiesce in the exercise of jurisdiction by these courts[87]. On the contrary, Akande, Scharf and Arnaut can be said to think that the same

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84 In the advisory opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (hereinafter referred to as "the Namibia Advisory Opinion") (1971), the ICJ held that Article 25 of the UN Charter applied not only to decisions under its Chapter VII but also to other ones adopted by the UN Security Council. The relevant part of the advisory opinion reads as follows:

> It has been contended that Article 25 of the Charter applies only to enforcement measures adopted under Chapter VII of the Charter. It is not possible to find in the Charter any support for this view. Article 25 is not confined to decisions in regard to enforcement action but applies to "the decisions of the Security Council" adopted in accordance with the Charter. Moreover, that Article is placed, not in Chapter VII, but immediately after Article 24 in that part of the Charter which deals with the functions and powers of the Security Council. If Article 25 had reference solely to decisions of the Security Council concerning enforcement action under Articles 41 and 42 of the Charter, that is to say, if it were only such decisions which had binding effect, then Article 25 would be superfluous, since this effect is secured by Articles 48 and 49 of the Charter.
> (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, pp. 52-53, para. 113)

There has also been controversy among scholars over the scope of application of Article 25 of the UN Charter (see, e.g., Anne Peters, "Article 25," in Simma, Khan, Nolte and Paulus (eds.), *supra* note 5, pp. 793-794), but in any case Article 13 of the Statute requires that situations should be "referred to the Prosecutor by the Security Council *acting under Chapter VII of the Charter of the United Nations*" [emphasis added].

85 See also the UN Security Council Resolution 1970 (2011), which uses the same formula to refer the situation in Libya since 15 February 2011 to the Prosecutor.

86 See notes 32 and 33.

87 See note 62 and accompanying text.

resolutions provide for the obligation of states to acquiesce in the exercise of jurisdiction by the ICTY and ICTR as the exercise of state jurisdiction through these courts[88].

The second issue is whether referrals by the UN Security Council of situations to the Prosecutor conform with Chapter VII of the UN Charter. This issue can be divided into the following two sub-issues: 1) Whether the Council (appropriately) determines a threat to peace, breach of the peace or an act of aggression[89] when making a referral. 2) Whether a referral in question constitutes a measure in Chapter VII[90]. These sub-issues need to be examined with respect to each referral, but the latter one presupposes the affirmative answer to a question related to referral in general, i.e. whether there can be any referrals which constitute measures in Chapter VII. It can be noted in this regard that the Appeals Chamber of the ICTY held in the Tadić Case that the establishment of a court can constitute a measure in Chapter VII[91].

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88 It should be noted, however, that, as mentioned separately in subsections 1 and 2 of the previous section, these scholars offer different arguments as to what kind of state jurisdiction is exercised through the ICTY and ICTR. Firstly, Akande asserts that territorial jurisdiction is exercised through the ICTY though he does not describe what kind of state jurisdiction is exercised through the ICTR. Secondly, Scharf claims that universal jurisdiction is exercised through both of them. Lastly, Arnaut does not describe what kinds of state jurisdiction are exercised through either of them.

89 Article 39 of the UN Charter stipulates the following:

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

90 Article 41 of the UN Charter stipulates the following:

> The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

91 Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Prosecutor v. Duško Tadić a/k/a "Dule", 2 October 1995, paras. 31-40. The particularly relevant part of the decision reads as follows:

> 35. [...] It is evident that the measures set out in Article 41 [=Article 41 of the UN Charter] are merely illustrative examples which obviously do not exclude other measures. All the Article requires is that they do not involve "the use of force." It is a negative definition.
> That the examples do not suggest judicial measures goes some way towards the other argument that the Article does not contemplate institutional measures implemented directly by the United Nations through one of its organs but, as the given examples suggest, only action by Member States, such as economic sanctions (though possibly coordinated through an organ of the Organization). However, as mentioned above, nothing in the Article suggests the limitation of the measures to those implemented by States. The Article only prescribes what these measures cannot be. Beyond that it does not say or suggest what they have to be.
> Moreover, even a simple literal analysis of the Article shows that the first phrase of the first sentence carries a very general prescription which can accommodate both institutional and Member State action. The second phrase can be read as referring particularly to one species of this very large category of measures referred to in the first phrase, but not necessarily the only one, namely, measures undertaken directly by States. It is also clear that the second sentence, starting with "These [measures]" not "Those [measures]", refers to the species mentioned in the second phrase rather than to the "genus" referred to in the first phrase of this sentence.

The third issue is whose rights might be violated by the ICC's exercise of jurisdiction. As mentioned in the previous subsection, although Morris, Casey and Rivkin, Jr. assume that only the nationality state has such a right, their assumption is debatable. It can be pointed out, however, that, in the cases of the Security Council's referral, this issue rarely needs to be faced squarely because obligations of all members of the UN can be created in accordance with Article 25 of the UN Charter.

The fourth issue is whether or not it is possible to create obligations for non-members of the UN which have not accepted the ICC's exercise of jurisdiction in accordance with Article 12 of the Statute, and if it is, how. This issue cannot be completely evaded because, as long as there exist states which are not members of the UN, it is conceivable that some of them have rights which would be violated by the ICC's exercise of jurisdiction and refuse to accept it in accordance with the Statute. It is noteworthy with regard to this that, in view of her argument concerning the ICTY[92], Morris seems to accept the impossibility of creating obligations for such states.

3. Formation of Customary International Law

Lastly, Morris also considers the legalisation of the ICC's exercise of jurisdiction by the formation of customary international law. To be specific, while denying that "customary law supporting ICC jurisdiction over non-party nationals" existed at the time of writing, she admits the possibility that such customary law might be formed[93]. In light of her argument examined in subsections 1 and 2, it can be said that this potential law would oblige the nationality state to acquiesce in the ICC's exercise of jurisdiction.

Although Morris has only the cases of the territorial state's acceptance in mind when discussing the formation of customary international law, it can theoretically legalise the ICC's exercise of jurisdiction in any type of case which is not legal under the existing rules of international law. Moreover, it can create obligations for every state in contrast

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36. Logically, if the Organization can undertake measures which have to be implemented through the intermediary of its Members, it can a fortiori undertake measures which it can implement directly via its organs, if it happens to have the resources to do so. It is only for want of such resources that the United Nations has to act through its Members. But it is of the essence of "collective measures" that they are collectively undertaken. Action by Member States on behalf of the Organization is but a poor substitute *faute de mieux*, or a "second best" for want of the first. This is also the pattern of Article 42 on measures involving the use of armed force.
In sum, the establishment of the International Tribunal falls squarely within the powers of the Security Council under Article 41.
(*Ibid*., paras. 35-36)

92 See note 63.

93 Morris, *supra* note 59, pp. 57-60.

to consent given in accordance with Article 12 of the Statute or Article 25 of the UN Charter.

With regard to the last-mentioned point, however, it is often said that for "persistent objectors" to it, a rule of customary international law is not binding, which means that it does not create obligations for them[94]. Morris also contends that, if the above-mentioned "customary law supporting ICC jurisdiction over non-party nationals" should be formed, "the United States presumably would be in a position to claim persistent objector status with regard to ICC jurisdiction over its nationals"[95], though she does not illustrate the US's persistent objection.

Section 3 Three Crucial Issues Relating to Existing Theories and the Necessity of Examining the Preparatory Work of the Statute

This chapter has summarised the existing theories as to the legal basis for the ICC's exercise of jurisdiction. It can be seen that, although this topic has given rise to various arguments, there does not seem to be any argument which is based on a close examination of the preparatory work of the Statute. However, it is essential to conduct such an examination to settle the following three issues relevant to the existing theories.

The first is how Article 12 of the Statute is interpreted, that is to say, whose and what obligation this article provides for, and what a state consents to exactly when accepting the ICC's exercise of jurisdiction in accordance therewith. It is well known that the rules concerning the interpretation of treaties[96] refers to their preparatory work as a supplementary means of confirming or determining their meaning. On the contrary, Paust, who seems to be the only scholar who addresses the above-mentioned issue, bases his interpretation of Article 12 on the provisions of the Preamble of the Statute such as "it is

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94 See e.g. Olufemi Elias, "Persistent Objector," in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, Vol. 8 (Oxford University Press, 2012), pp. 280-286; James A. Green, *The Persistent Objector Rule in International Law* (Oxford University Press, 2016), pp. 1-282; *id*., "The Persistent Objector Rule in the Work of the International Law Commission on the Identification of Customary International Law," *Italian Yearbook of International Law*, Vol. 27 (2018), pp. 175-188. These scholars and others who write on "persistent objectors" commonly refer to the ICJ's judgment on the Fisheries Case (1951), whose relevant part reads as follows:

> In these circumstances the Court deems it necessary to point out that although the ten-mile rule has been adopted by certain States both in their national law and in their treaties and conventions, and although certain arbitral decisions have applied it as between these States, other States have adopted a different limit. Consequently, the ten-mile rule has not acquired the authority of a general rule of international law. In any event the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she *has always opposed* any attempt to apply it to the Norwegian coast.
> (*Fisheries (United Kingdom v. Norway), Judgment, I.C.J. Reports 1951*, p. 131, with emphasis added)

95 Morris, *supra* note 59, p. 60.

96 See notes 21, 51 and 54.

the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes", as well as the existence of the rules of customary international law permitting the exercise of universal jurisdiction of accepting states through the ICC, but does not carry out a close examination of the preparatory work of the Statute[97]. However, such provisions of the Preamble of the Statute do not seem to be clearly relevant to the legal basis for the ICC's exercise of jurisdiction. Moreover, even if there exist the above-mentioned rules of customary international law, phrases employed in Article 12, such as "the Court may exercise its jurisdiction" and "accept the exercise of jurisdiction by the Court", do not seem to definitively indicate that the ICC's exercise of jurisdiction is characterised as the exercise of universal jurisdiction of accepting states through the ICC. Therefore, his pieces of evidence cannot be considered decisive, and it can be said that a close examination of the preparatory work of the Statute is required.

The second issue is how the relevant UN Security Council resolutions are interpreted, that is to say, whether the resolutions adopted by the Council when it refers situations to the Prosecutor provide for the obligation to acquiesce in the ICC's exercise of jurisdiction, and, if the question can be answered affirmatively, whether it is characterised as the exercise of a kind of state jurisdiction through the ICC. In the Namibia Advisory Opinion, the ICJ held that, when interpreting a UN Security Council resolution, it is necessary to have regard to "the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council"[98].

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97 See subsection 4 of section 1 of this chapter.

98 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 53, para. 114. The ICJ also held the following in the advisory opinion on the Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (2010) (hereinafter referred to as "the Kosovo Advisory Opinion"):

> Before continuing further, the Court must recall several factors relevant in the interpretation of resolutions of the Security Council. While the rules on treaty interpretation embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties may provide guidance, differences between Security Council resolutions and treaties mean that the interpretation of Security Council resolutions also require that other factors be taken into account. Security Council resolutions are issued by a single, collective body and are drafted through a very different process than that used for the conclusion of a treaty. Security Council resolutions are the product of a voting process as provided for in Article 27 of the Charter, and the final text of such resolutions represents the view of the Security Council as a body. Moreover, Security Council resolutions can be binding on all Member States (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 54, para. 116), irrespective of whether they played any part in their formulation. The interpretation of Security Council resolutions may require the Court to analyse statements by representatives of members of the Security Council made at the time of their adoption, other resolutions of the Security Council on the same issue, as well as the subsequent practice of relevant United Nations organs and of States affected by those given resolutions.

With regard to the interpretation of the resolutions adopted by the Council when it referred situations to the Prosecutor, it is unquestionable that the above-mentioned "all circumstances that might assist in determining the legal consequences of the resolution of the Security Council" include the text of Article 13 of the Statute, which provides the basis of such referrals, and its preparatory work which need to be examined when interpreting it.

The third issue is whether the US has been making persistent objections about the ICC's exercise of jurisdiction over the nationals of non-party states in the cases of the territorial state's acceptance since the beginning of the preparatory work of the Statute. It should be noted with regard to this that, although there has been considerable controversy over the validity of the theory of persistent objectors, the examination conducted in this paper will be based on the assumption that it is valid.

As stated in Chapter 1, this paper aims to discuss the legal basis for the ICC's exercise of jurisdiction while viewing this topic as one of the issues demonstrating the current status of general international law concerning the creation of obligations for non-party states. It was also noted there that this approach requires the investigation into the interpretation of Article 12 of the Statute, which is the first issue mentioned above. Hence, in the next chapter, this issue and others relating to the legal basis for the ICC's exercise of jurisdiction will be discussed on the basis of a close examination of the preparatory work of the Statute. In addition, the relevant statements made by states in the UN from the end of the Rome Conference to the coming into force of the Statute will sometimes be referred to for the purpose of supplementing the above-mentioned examination[99].

(*Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 442, para. 94)

See also Michael C. Wood, "The Interpretation of Security Council Resolutions," *Max Planck Yearbook of United Nations Law*, Vol. 2 (1998), pp. 73-95; *id*., "The Interpretation of Security Council Resolutions, Revisited," *Max Planck Yearbook of United Nations Law*, Vol. 20 (2017), pp. 3-35.

99 To be more precise, such statements will be sought from the discussions in the UN General Assembly which were conducted on the agenda items referring to the ICC, and also from the one conducted in the UN Security Council concerning the adoption of Resolution 1422 (2002) (See note 5). On the contrary, no official record of statements was produced with regard to the work of the Preparatory Commission for the International Criminal Court (hereinafter referred to as "the Preparatory Commission"), which had been established and convened according to the final act of the Rome Conference to prepare proposals for practical arrangements for the establishment and coming into operation of the ICC, such as the draft text of its Rules of Procedure and Evidence.