

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

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【Research Note】

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Chapter 3 Examination of the Preparatory Work of the Statute (Continued)

Section 2 Analysis of the Relevant Discussions Conducted in the Preparatory Work of the Statute (Continued)

2. Discussions on the State-Consent Requirements and Legal Basis for the Proposed ICC's Exercise of Jurisdiction

(A) Exercise of Jurisdiction in the Cases of the State Parties' Referral or Prosecutor's Initiative

As mentioned in Chapter 1, according to the Statute, the territorial state's or nationality state's acceptance is required for the ICC to exercise its jurisdiction in the cases where a state party refers a situation to the Prosecutor (hereinafter referred to as "the cases of the state parties' referral") or in the ones where the Prosecutor takes the initiative on the launch of an investigation (hereinafter referred to as "the cases of the Prosecutor's initiative"). These preconditions to the ICC's exercise of jurisdiction were first proposed in the Bureau's Draft Statute¹³⁶ towards the end of the Rome Conference. However, the Chairman of the CoW, who was one of the members of the Bureau¹³⁷, did not say anything about the legal basis for the proposed ICC's exercise of jurisdiction when drawing attention to the Bureau's Draft Statute at the CoW's 42nd meeting (on 17 July)¹³⁸. Nor does any statement made by states during the same meeting and the 9th plenary meeting (on 17 and 18 July) indicate what legal basis has been given for the ICC's exercise of jurisdiction¹³⁹. Therefore, it is necessary to trace the relevant preparatory work of the

136 See note 119.

137 See note 114 and accompanying text.

138 U.N. Doc. A/CONF. 183/13 (Vol. II), p. 360, para. 5 (Kirsch, the Chairman).

139 For the verbatim record of these meetings, see *ibid.*, pp. 121-129, 360-362.

Statute further back in order to find more information on this matter.

In the Bureau's Proposal, two separate provisions were included regarding the state-consent requirements for the proposed ICC's exercise of jurisdiction in the cases of the state parties' referral or Prosecutor's initiative. One of them is pertinent to the crime of genocide, and the other to crimes against humanity and war crimes¹⁴⁰. The former provision, Article 7, paragraph 1, stipulated the following:

1. In the case of article 6 (a) or (c), the Court may exercise its jurisdiction with respect to the crime of genocide if one or more of the following States have accepted jurisdiction in accordance with article 7 bis or ter:
 - (a) The State on the territory of which the act or omission 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 that has custody of the accused/suspect with respect to the crime;
 - (c) The State of which the accused/suspect of the crime is a national; or
 - (d) The State of which the victim is a national¹⁴¹.

On the other hand, the latter provision, Article 7, paragraph 2, provided three options for the preconditions to the proposed ICC's exercise of jurisdiction¹⁴². Among these options "Option 1" laid down the same preconditions as paragraph 1 quoted above, and many states expressed support for paragraph 1 and "Option 1" for paragraph 2 during the debate at the CoW's 33rd meeting (on 13 July) to the 36th meeting (on the same day) where the Bureau's Proposal was used as the basis for debate¹⁴³. Moreover, the states which expressed support for "Option 1" for paragraph 2 without referring to paragraph

140 The treatment of the crime of aggression in the Rome Conference will be explained in the next chapter.

141 U.N. Doc. A/CONF. 183/13 (Vol. III), p. 216.

142 *Ibid.*, p. 216.

143 U.N. A/CONF. 183/13 (Vol. II), p. 325, para. 71 (Germany), p. 326, para. 84 (Croatia), p. 327, para. 6 (Sweden), p. 328, para. 12 (Trinidad and Tobago), p. 329, para. 23 (New Zealand), p. 329, para. 29 (Netherlands), p. 329, para. 35 (Spain), p. 330, para. 39 (Belgium), p. 331, para. 55 (South Africa, speaking on behalf of the member States of the Southern African Development Community), p. 332, para. 77 (Jordan), p. 332, para. 86 (Thailand), p. 332, para. 89 (Brazil), p. 333, para. 99 (Poland), p. 334, para. 116 (Austria), p. 335, para. 4 (Egypt), p. 336, para. 16 (Italy), p. 336, para. 21 (Burundi), p. 338, para. 38 (Finland), p. 339, para. 51 (Liechtenstein), p. 341, para. 66 (Canada), p. 341, para. 69 (Denmark), p. 341, para. 71 (Mozambique), p. 342, para. 73 (Portugal), p. 342, para. 76 (Estonia), p. 342, para. 77 (Romania), p. 343, para. 82 (Ireland), p. 344, para. 4 (Norway), p. 346, para. 28 (Slovenia), p. 347, para. 37 (Costa Rica), p. 347, para. 40 (Bosnia and Herzegovina), p. 348, para. 48 (Slovakia).

It should be noted, however, that, among these states, Slovenia, and Bosnia and Herzegovina also made proposals of partial amendments to Article 7 of the Bureau's Proposal, while Egypt expressed opposition to the Prosecutor's initiative on the launch of an investigation. *Ibid.*, p. 335, para. 6 (Egypt), p. 346, para. 28 (Slovenia), p. 347, para. 42 (Bosnia and Herzegovina).

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1 can be said to have accepted the latter paragraph without opposition^{144,145}.

From the aforementioned, it can be seen that, when preparing the Bureau's Draft Statute, the Bureau deleted the subparagraphs (b) and (d) from Article 7, paragraph 1 and "Option 1" for paragraph 2, of the Bureau's Proposal which had been supported by a large number of states¹⁴⁶, in order to reach a compromise. However, the Coordinator who introduced Article 7, paragraphs 1 and 2, of the Bureau's Proposal at the CoW's 33rd meeting (on 13 July) did not say anything about the legal basis for the proposed ICC's exercise of jurisdiction¹⁴⁷. On the contrary, during the debate conducted afterwards, Spain, Poland, Austria and Slovenia stated that paragraph 1 and "Option 1" for paragraph 2 had originally been proposed by the Republic of Korea¹⁴⁸. Likewise, Italy supported "the provision of alternative jurisdictional links indicated in option 1 for article 7, paragraph 2", using the phrase "jurisdictional link" which had been employed by the Republic of Korea^{149,150}. Moreover, without referring to Article 7 of the Bureau's Proposal, Azerbaijan said that "the approach proposed by the Republic of Korea represented a realistic compromise"¹⁵¹, and Malta said that it "favoured uniformity for all the core crimes, along the lines of the proposal by the Republic of Korea"¹⁵². Therefore, after the examination of the Bureau's Discussion Paper, the Korean Proposal needs to be examined very closely to find out what the Republic of Korea thought about the legal basis for the pro-

144 *Ibid.*, p. 321, para. 20 (Switzerland), p. 325, para. 66 (Ghana), p. 334, para. 113 (Mexico), p. 335, para. 11 (Greece), p. 340, para. 60 (Lithuania), p. 340, para. 62 (Ethiopia), p. 342, para. 72 (Nicaragua), p. 342, para. 78 (Swaziland), p. 342, para. 79 (Solomon Islands), p. 346, para. 34 (Zimbabwe), p. 348, para. 50 (Latvia).

It should be noted, however, that, among these states, Switzerland and Mexico also made proposals of partial amendments to Article 7 of the Bureau's Proposal, while Ethiopia expressed opposition to the Prosecutor's initiative on the launch of an investigation. *Ibid.*, p. 321, para. 20 (Switzerland), p. 334, para. 113 (Mexico), pp. 340-341, paras. 62-63 (Ethiopia).

145 Conversely, Venezuela expressed support for paragraph 1 but preferred "Option 2" for paragraph 2 to "Option 1". *Ibid.*, p. 338, para. 42 (Venezuela).

146 It can be noted in this regard that, in the preparatory work of the Statute, those who the proposed ICC would exercise its jurisdiction over were designated in various ways like "the suspect" or "the accused", but there did not seem to be any discussion over such designations. Therefore, this paper disregards the difference in designation.

147 *Ibid.*, p. 320, para. 9 (von Hebel, Coordinator). The list of Coordinators for the various sections of the draft Statute had been announced at the CoW's 6th meeting (on 18 June). *Ibid.*, p. 170, para. 1 (Kirsch, the Chairman).

148 *Ibid.*, p. 329, para. 35 (Spain), p. 333, para. 99 (Poland), p. 334, para. 116 (Austria), p. 346, para. 28 (Slovenia).

149 *Ibid.*, p. 336, para. 16 (Italy). For the employment of the phrase "jurisdictional link" by the Republic of Korea, see note 168 and accompanying text.

150 Zimbabwe also stated that it "favoured option 1 as being consistent with the principle of universal jurisdiction", but the meaning of this statement is not clear. *Ibid.*, p. 346, para. 34 (Zimbabwe).

151 *Ibid.*, p. 330, para. 42 (Azerbaijan). It should be noted, however, that Azerbaijan expressed opposition to the Prosecutor's initiative on the launch of an investigation. *Ibid.*, p. 330, para. 45 (Azerbaijan).

152 *Ibid.*, pp. 345-346, para. 25 (Malta).

posed ICC's exercise of jurisdiction.

In the Bureau's Discussion Paper, a single provision, Article 7, paragraph 1, was included regarding the state-consent requirements for the proposed ICC's exercise of jurisdiction in the cases of the state parties' referral or Prosecutor's initiative. This provision provided four options for the preconditions to the proposed ICC's exercise of jurisdiction¹⁵³, and many states expressed support for "Option 1" during the debate at the CoW's 29th meeting (on 9 July) to the 31st meeting (on the same day) where the Bureau's Discussion Paper was used as the basis for debate¹⁵⁴. This option stipulated the following:

1. Option 1

In the case of article 6 (a) or (c), the Court may exercise its jurisdiction with respect to a crime referred to in article 5 if one or more of the following States are Parties to the Statute¹⁵⁵, or have accepted jurisdiction in accordance with article 7 ter:

(a) The State on the territory of which the act or omission in question occurred or,

153 U.N. Doc. A/CONF. 183/13 (Vol. III), pp. 208-209.

154 U.N. Doc. A/CONF. 183/13 (Vol. II), p. 296, para. 23 (Trinidad and Tobago), p. 296, para. 28 (Switzerland), p. 297, para. 38 (Argentina), p. 298, para. 60 (Sierra Leone), p. 299, para. 70 (Azerbaijan), p. 299, para. 82 (Australia), p. 299, para. 87 (Netherlands), p. 300, para. 92 (Liechtenstein), p. 301, para. 118 (Chile), p. 301, para. 121 (South Africa, speaking also on behalf of the other member States of the Southern African Development Community (SADC)), p. 301, para. 126 (Namibia), p. 302, para. 131 (Guinea), p. 302, para. 135 (Denmark), p. 302, para. 139 (Malta), p. 302, paras. 143-144 (Romania), p. 302, para. 150 (Swaziland), p. 303, para. 158 (Jordan), p. 303, para. 164 (Republic of Korea), p. 303, para. 170 (Guinea-Bissau), p. 303, para. 175 (United Republic of Tanzania), p. 304, para. 180 (Venezuela), p. 304, para. 185 (Germany), p. 305, para. 8 (Sweden), p. 306, para. 11 (Belgium), p. 306, para. 19 (Portugal), p. 307, para. 23 (Austria), p. 307, para. 27 (Senegal), p. 307, para. 32 (Libyan Arab Jamahiriya), p. 307, para. 43 (Slovenia), p. 308, para. 47 (Slovakia), p. 308, para. 55 (Ireland), p. 308, para. 59 (Ukraine), p. 309, para. 67 (Greece), p. 309, para. 79 (Cameroon), p. 310, para. 84 (Brazil), p. 310, para. 96 (Finland), p. 311, para. 110 (Djibouti), p. 312, para. 114 (Spain), p. 312, para. 120 (Italy), p. 312, para. 125 (Thailand), p. 312, para. 128 (Oman), p. 312, para. 130 (Norway), p. 313, para. 4 (Botswana), p. 313, para. 5 (Togo), p. 314, para. 8 (Czech Republic), p. 314, para. 12 (Poland, speaking also on behalf of Lithuania), pp. 314-315, para. 14 (Ecuador), p. 315, para. 15 (Kuwait), p. 315, para. 16 (Congo), p. 315, para. 23 (Armenia), p. 316, para. 25 (Bosnia and Herzegovina), p. 316, para. 28 (Ethiopia), p. 316, para. 31 (Qatar), p. 316, para. 32 (San Marino), p. 317, para. 33 (Kenya), p. 317, para. 35 (Mexico), p. 317, para. 43 (Hungary).

It should be noted, however, that, among these states, Switzerland, Sweden, Slovenia and Mexico also made proposals of partial amendments to Article 7, paragraph 1, of the Bureau's Discussion Paper, while Azerbaijan, Oman and Ethiopia expressed opposition to the Prosecutor's initiative on the launch of an investigation. *Ibid.*, p. 296, para. 28 (Switzerland), p. 299, para. 71 (Azerbaijan), p. 305, para. 8 (Sweden), p. 307, para. 43 (Slovenia), p. 312, para. 129 (Oman), p. 316, para. 28 (Ethiopia), p. 317, para. 35 (Mexico).

155 Article 7, paragraph 2, of the Bureau's Discussion Paper declared that "[a] State which becomes a Party to the Statute thereby accepts the jurisdiction of the Court with respect to the crimes of ... referred to in article 5". U.N. Doc. A/CONF. 183/13 (Vol. III), p. 209.

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if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

- (b) The State that has custody of the suspect with respect to the crime;
- (c) The State of which the accused of the crime is a national; or
- (d) The State of which the victim is a national¹⁵⁶.

Considering the fact that this option laid down the same preconditions as Article 7, paragraph 1 and "Option 1" for paragraph 2, of the Bureau's Proposal, it can be inferred that all of these stipulations had the same legal basis for the proposed ICC's exercise of jurisdiction. However, the Coordinator who introduced Article 7, paragraph 1, of the Bureau's Discussion Paper at the CoW's 29th meeting (on 9 July) did not say anything about its legal basis¹⁵⁷. On the contrary, during the debate conducted afterwards, the Republic of Korea and Spain stated that "Option 1" for paragraph 1 had originally been proposed by the Republic of Korea¹⁵⁸. Likewise, Italy stated that it "favoured option 1 for article 7, paragraph 1, with its four alternative jurisdictional links", using the phrase "jurisdictional link" which had been employed by the Republic of Korea¹⁵⁹. Moreover, without referring to Article 7 of the Bureau's Discussion Paper, Bangladesh said that it "strongly supported the compromise proposed by the Republic of Korea"¹⁶⁰. Last but not least, Sierra Leone also argued that it "was in favour of including article 7 ter¹⁶¹ since it would allow non-parties to *cede their jurisdiction to the Court*" [emphasis added]¹⁶². This argument is not detailed but seems to have the same theoretical framework as the ones presented by some scholars who regard (part of) the ICC's exercise of jurisdiction as the exercise of state jurisdiction through the ICC¹⁶³, and so it is necessary to ascertain what theoretical framework the Korean Proposal had with regard to the legal basis for the proposed ICC's exercise of jurisdiction.

In the Korean Proposal, a single provision, Article 8, was included regarding the state-consent requirements for the proposed ICC's exercise of jurisdiction in the cases of the

156 *Ibid.*, p. 208.

157 U.N. Doc. A/CONF. 183/13 (vol. II), p. 295, paras. 3 (Kourula, Coordinator).

158 *Ibid.*, p. 303, para. 164 (Republic of Korea), p. 312, para. 114 (Spain).

159 *Ibid.*, p. 312, para. 120 (Italy). For the employment of the phrase "jurisdictional link" by the Republic of Korea, see note 168 and accompanying text.

160 *Ibid.*, p. 314, para. 9 (Bangladesh).

161 Article 7 ter of the Bureau's Discussion Paper declared that "[i]f the acceptance of a State that is not a Party to this Statute is required under article 7, paragraph 1, that State may, by declaration lodged with the Registrar, *consent to the exercise of jurisdiction by the Court* with respect to the crime in question" [emphasis added]. U.N. Doc. A/CONF. 183/13 (Vol. III), pp. 209.

162 U.N. Doc. A/CONF. 183/13 (Vol. II), p. 298, para. 62 (Sierra Leone).

163 See section 1 of the previous chapter.

state parties' referral or Prosecutor's initiative. As indicated above, this provision laid down the same preconditions to the proposed ICC's exercise of jurisdiction as Article 7, paragraph 1 and "Option 1" for paragraph 2, of the Bureau's Proposal, and Article 7, "Option 1" for paragraph 1, of the Bureau's Discussion Paper. Quite a few states expressed support for Article 8 of the Korean Proposal during the debate at the CoW's 7th meeting (on 19 June) to the 11th meeting (on 22 June) where Part 2 of the Preparatory Committee's Draft Statute was used as the (main) basis for debate¹⁶⁴. This article stipulated the following:

In the case of article 7, subparagraph (a) or (b), the Court may exercise its jurisdiction with respect to a crime referred to in article 5 if one or more of the following States are Parties to the Statute¹⁶⁵ [, or have accepted jurisdiction in accordance with article 6, paragraph 2¹⁶⁶]:

- (a) The State on the territory of which the act 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 that has custody of the suspect with respect to the crime;
- (c) The State of which the accused of the crime is a national; or
- (d) The State of which the victim is a national¹⁶⁷.

The Republic of Korea explained the reasons for their proposal in the document which contained Article 8 quoted above, and the relevant parts of this explanation, which seem

164 *Ibid.*, p. 187, para. 10 (Spain), p. 188, para. 27 (Slovakia), pp. 188-189, para. 36 (Norway), p. 190, para. 52 (Sierra Leone), p. 190, para. 56 (Netherlands), p. 191, para. 61 (Slovenia), p. 191, para. 65 (Switzerland), pp. 193-194, paras. 8-10 (New Zealand), p. 194, para. 15 (Thailand), p. 194, para. 20 (Italy).

It should be noted, however, that, among these states, Sierra Leone also made proposals of partial amendments to Article 8 of the Korean Proposal, *Ibid.*, p. 190, para. 52 (Sierra Leone).

Moreover, without referring to Article 8 of the Korean Proposal, Sweden said that "[i]t should be sufficient for one out of four categories of States to be a party to the Statute: the territorial State, the custodial State, the State of nationality of the suspect or the State of nationality of the victim", supporting the same preconditions to the proposed ICC's exercise of jurisdiction as the Korean Proposal. *Ibid.*, p. 185, para. 70 (Sweden).

165 Article 6, paragraph 1, of the Korean Proposal declared that "[a] State that becomes a Party to the Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5". U.N. Doc. A/CONF. 183/13 (Vol. III), pp. 228.

166 Article 6, paragraph 2, of the Korean Proposal declared that "[s]ubject to the provisions of the Statute and the conditions of the Rules of Procedure and Evidence, a State that is not a Party to the Statute may, by declaration lodged with the Registrar, accept the jurisdiction of the Court in respect of a particular case, if the acceptance of jurisdiction by that State is required for the exercise of jurisdiction by the Court under article 8". *Ibid.*, pp. 228.

167 *Ibid.*, p. 229.

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to express their thoughts relating to the legal basis for the proposed ICC's exercise of jurisdiction, read as follows:

2. [...] Those who favour the concept of inherent jurisdiction overlook the fact that the proposed Court is a treaty body to be created through the consent of States. It is State consent that justifies the jurisdictional link between the States Parties to the Statute and the Court. Foregoing any precondition to the exercise of jurisdiction would run a risk of rendering the acceptance of the Court's jurisdiction meaningless. In such a case, the Court would likely exercise its jurisdiction over the offenders of the crimes under the Statute, irrespective of whether the interested States had accepted the Court's jurisdiction. Furthermore, the rationale behind the rule of complementarity makes the jurisdictional link based on State consent indispensable¹⁶⁸.

4. The Republic of Korea believes that an appropriate compromise formula on the jurisdiction of the Court should be sought [...]. The core elements of a potentially viable compromise are as follows:
 - (a) [...];
 - (b) For the sake of jurisdictional nexus, there should be a requirement that one or more of the interested States has given its consent to the exercise of jurisdiction by the Court [...]. The interested States should include the territorial State, the custodial State, the State of the nationality of the accused, and the State of the nationality of the victim. Unless one of the four categories of interested States is a party to the Statute, the Court is not able to exercise its jurisdiction over a case in which that State has jurisdictional nexus. Hence, the requirement here is not cumulative, but selective¹⁶⁹.

6. The approach the Republic of Korea proposal has taken is similar to that of the United Kingdom proposal, contained in A/AC.249/WG.3/DP.1. However, there are two fundamental differences between the two proposals:
 - (a) Essentially, while the United Kingdom proposal requires the cumulative consent of the territorial State and the custodial State, the Republic of Korea proposal requires only the consent of one of the four categories of interested States, which is selective. This will give the Court a wider window of opportunity to exercise its jurisdiction;

168 *Ibid.*, pp. 227-228, para. 2.

169 *Ibid.*, p. 228, para. 4.

- (b) The second difference is a conceptual one. The United Kingdom proposal rests on the premise that the Court has universal jurisdiction over the core crimes, while the Republic of Korea proposal presupposes that jurisdiction is conferred upon the Court based on State consent pursuant to the provisions of the Statute. This difference is to be reflected in the approach to a non-State party becoming engaged in the functioning of the Court^{170,171}.

Although these paragraphs did not use completely unambiguous terms like "legal" or "illegal", the following analysis will be carried out on the presumption that they addressed the legal basis for the proposed ICC's exercise of jurisdiction.

Firstly, the term "interested States" was used in all of paragraphs 2, 4 and 6 to mean "the territorial State, the custodial State, the State of the nationality of the accused, and the State of the nationality of the victim", which were the same as the states mentioned in Article 8, subparagraphs (a) to (d), of the Korean Proposal. The question, then, is why one of these "interested States" was needed to give consent in order to legalise the proposed ICC's exercise of jurisdiction.

Secondly, in paragraph 2, the Republic of Korea referred to the "jurisdictional link" which was "based on State consent" and was created "between the States Parties to the Statute and the Court". As mentioned above, Italy also supported the options with four "alternative jurisdictional links" in the later phases of the Rome Conference¹⁷². Moreover, the Netherlands and Switzerland employed the phrase "jurisdictional link" in their respective statements at the CoW's 8th meeting (on 19 June), which read as follows:

[I]f a substantial number of delegations [...] favoured some form of jurisdictional link between the crime committed and an interested State, he [=the speaker] would have great sympathy for the proposal of the Republic of Korea [...]¹⁷³.

The proposals of the Republic of Korea established a good balance [...]. The technique of alternative jurisdictional links was often used in criminal law when the perpetrator of a crime was in a State other than the State where the crime had been committed or his country of origin¹⁷⁴.

170 *Ibid.*, p. 228, para. 6.

171 The Republic of Korea also gave an explanation for their proposal in their statement made at the CoW's 7th meeting (on 19 June), but the one quoted here is more detailed. U.N. Doc. A/CONF. 183/13 (Vol. II), p. 184, paras. 52-54 (Republic of Korea).

172 See notes 149 and 159, and accompanying text.

173 *Ibid.*, p. 190, para. 56 (Netherlands).

174 *Ibid.*, p. 191, para. 65 (Switzerland).

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However, neither of these statements seems to be helpful in understanding the Republic of Korea's explanation. On the one hand, the Netherlands' argument that the jurisdictional link is created "between the crime committed and an interested State" does not appear to be consistent with the Republic of Korea's one that it is created "between the States Parties to the Statute and the Court". On the other hand, Switzerland's contention that "[t]he technique of alternative jurisdictional links was often used in criminal law" is directly relevant to the exercise of jurisdiction by domestic courts, not by the proposed ICC¹⁷⁵. Therefore, although the Republic of Korea argued, in paragraph 2, that "the rationale behind the rule of complementarity makes the jurisdictional link [...] indispensable", it seems impossible from this vague argument alone to ascertain what theoretical framework the Korean Proposal had with regard to the legal basis for the proposed ICC's exercise of jurisdiction.

Thirdly, in paragraph 4, the Republic of Korea employed another phrase "jurisdictional nexus", which did not seem to be used by any other state in the preparatory work of the Statute. Employing this phrase, the Republic of Korea argued that "[f]or the sake of jurisdictional nexus, there should be a requirement that one or more of the interested States has given its consent to the exercise of jurisdiction by the Court", and moreover that "[u]nless one of the four categories of interested States is a party to the Statute, the Court is not able to exercise its jurisdiction over a case in which that State has jurisdictional nexus". However, neither of these arguments seems to have fully clarified what the phrase "jurisdictional nexus" meant, nor why one of the "interested States" was needed to give consent in order to legalise the proposed ICC's exercise of jurisdiction.

Lastly, in paragraph 6, the Republic of Korea contended that their "proposal presupposes that jurisdiction is conferred upon the Court based on State consent pursuant to the provisions of the Statute", and this contention might appear at first sight to be reminiscent of the arguments presented by some scholars who regard (part of) the ICC's exercise of jurisdiction as the exercise of state jurisdiction through the ICC. However, one of these scholars, Scharf, for example, uses the phrase "Conferral of State Jurisdiction"¹⁷⁶, while the Republic of Korea mentioned the conferral of "jurisdiction", not "state jurisdic-

175 See Article 4 of the Statute, which is entitled "Legal status and powers of the Court" and declares the following:

- 1 The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.
- 2 The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.

176 Scharf, *supra* note 24, p. 103. On the other hand, among the scholars who deny the possibility of exercising state jurisdiction through the ICC, Morris states that the Statute "confer[s] upon the ICC jurisdiction

tion". Moreover, in paragraph 4, the Republic of Korea contended that "there should be a requirement that one or more of the interested States *has given its consent to the exercise of jurisdiction by the Court*" [emphasis added], without characterising the proposed ICC's exercise of jurisdiction as the exercise of a kind of state jurisdiction through this court. Likewise, in 1990, the then Special Rapporteur on the Draft Code, Doudou Thiam, submitted to the ILC his eighth report on the Draft Code, where an option for the pre-conditions to the proposed ICC's exercise of jurisdiction¹⁷⁷ was based on the draft statute prepared in 1953 by a UN committee¹⁷⁸, whose article 26, paragraphs 2 and 3, stipulated the following:

- 2 A State may confer jurisdiction upon the Court by convention, by special agreement or by unilateral declaration.
- 3 Conferment [=Conferral] of jurisdiction signifies the right to seize the Court, and the duty to accept its jurisdiction subject to such provisions as the State or States have specified¹⁷⁹.

Therefore, it seems clear that Article 8 of the Korean Proposal provided for the obligation of accepting states to acquiesce in the proposed ICC's exercise of, as one might say, *proper* jurisdiction which was not characterised as the exercise of a kind of state jurisdiction through this court, and an acceptance in accordance with Article 6 thereof¹⁸⁰ constituted consent to the creation of the above-mentioned obligation. Moreover, it can be noted in this regard that, as the Republic of Korea claimed that consent given by one of the "interested States" legalised the proposed ICC's exercise of jurisdiction, Article 8 of the Korean Proposal did not provide for the obligation of any state which did not ac-

over non-party nationals". Morris, *supra* note 59, p. 26. This statement means that the Statute allows the ICC to exercise its jurisdiction over nationals of non-party states (without their consent).

177 This option stipulated the following:

No person shall be tried before the Court unless jurisdiction has been conferred upon the Court by the State in which the crime was committed, or by the State of which such person is a national, or by the State against which the crime was directed, or of which the victims were nationals.

(Yearbook of the International Law Commission, 1990, Vol. II (Part One), p. 37, para. 84)

178 The unabridged official names of this draft statute and UN committee were respectively "the revised draft statute for an international criminal court" (hereinafter referred to as "the 1953 Draft Statute") and "the 1953 Committee on International Criminal Jurisdiction" (hereinafter referred to as "the 1953 UN Committee"). The 1953 UN Committee was appointed by the UN General Assembly Resolution 687 (VII).

179 U.N. Doc. A/2645, p. 24. Furthermore, in the report which contained the 1953 Draft Statute, the 1953 UN Committee claimed that "[u]nless otherwise provided in the instrument, the only duty following from the conferment [=conferral] of jurisdiction would be passively to allow persons to be tried". *Ibid.*, p. 14, para. 95.

180 See notes 165 and 166.

cept the proposed ICC's exercise of jurisdiction in accordance with Article 6 thereof.

To sum up, Article 12 of the Bureau's Draft Statute, which later became Article 12 of the Statute, can be said to originate from Article 8 of the Korean Proposal, which was practically identical to Article 7, "Option 1" for paragraph 1, of the Bureau's Discussion Paper, and Article 7, paragraph 1 and "Option 1" for paragraph 2, of the Bureau's Proposal. Accordingly, it can also be said that all of these stipulations have been based on the same theoretical framework of the legal basis for the (proposed) ICC's exercise of jurisdiction, which means that Article 12 of the Statute provides for the obligation of accepting states to acquiesce in the ICC's exercise of proper jurisdiction which is not characterised as the exercise of a kind of state jurisdiction through the ICC, and an acceptance in accordance with the same article constitutes consent to the creation of the above-mentioned obligation.

This interpretation of Article 12 of the Statute is identical to the one offered by scholars who consider that the consent given in accordance with the same article creates the nationality state's obligation to acquiesce, which abrogates its right and legalises the ICC's exercise of jurisdiction¹⁸¹. Consequently, if the above-cited vague arguments which the Republic of Korea presented using the phrases "jurisdictional link" and "jurisdictional nexus" are invalid¹⁸², the legalisation of the ICC's exercise of jurisdiction requires that all the states whose rights would be violated thereby should give consent. However, as has already been pointed out, the above-mentioned scholars do not provide any evidence supporting their view that only the nationality state has such a right. Moreover, in the preparatory work of the Statute and its immediate aftermath¹⁸³, the issue of whose rights could be violated by the (proposed) ICC's exercise of jurisdiction seems to have been addressed only by one state, China, which stated the following at the 9th plenary meeting of the Rome Conference and during the 53rd regular session of the UN General Assembly held from 1998 to 1999:

Complementarity and State consent should be the legal basis of the Court's jurisdiction. However, the Statute granted universal jurisdiction to the Court over three core crimes, although article 12 had provided that, in exercising its jurisdiction, the Court should obtain the consent of the State where the crime was committed or of which the ac-

181 See subsection 1 of section 2 of the previous chapter.

182 A member of the Japanese delegation to the Rome Conference has expressed his personal view that it is difficult to find a legal explanation for the Korean Proposal. Makoto Matsuda, "The Jurisdiction of the International Criminal Court and the Conditions of its Exercise," *Jurist*, No. 1146 (1998), p. 49 [in Japanese].

183 See note 99 and accompanying text.

cused was a national. However, that did not mean that consent by a State was a *sine qua non* of the Court's jurisdiction. That imposed an obligation upon non-parties and constituted interference in the judicial independence or sovereignty of States, which he [=the speaker] could not accept¹⁸⁴.

[U]nder the current rules of international law, far more States than those in the two categories referred to [=the territorial state and the nationality state] had equal and parallel jurisdiction over the crimes concerned, including States detaining the suspects and States of which the victims were nationals. Article 12 in effect negated the equal jurisdiction of the latter States, thus infringing on their judicial sovereignty. In short, States not parties to the Statute which had jurisdiction over the relevant crimes under current international law would no longer be able to invoke their non-acceptance of the Court's jurisdiction in order to prevent the Court's interference with their judicial sovereignty¹⁸⁵.

However, it seems difficult to accept China's argument that all the states which possess jurisdiction over a case have the "judicial sovereignty" which would be violated by the ICC's exercise of jurisdiction over that case, because the fact that some states are permitted to exercise jurisdiction over a case implies that others are prohibited from doing so, but does not necessarily imply that the ICC is also prohibited from exercising its own jurisdiction over that case. On the contrary, China's contention that Article 12 of the Statute does not require the consent of particular states as "a *sine qua non* of the Court's jurisdiction" is noteworthy, because it indicates that, whichever states have a right which could be violated by the ICC's exercise of jurisdiction, its violation is possible when the ICC exercises its jurisdiction without their consent, whereas if there is no state whose right could be violated thereby, the preconditions laid down in Article 12 are found to be irrelevant to the legality thereof.

In any case, it is clear from the above that, in the preparatory work of the Statute, most states accepted the last-minute compromise over the state-consent requirements for the ICC's exercise of jurisdiction in the cases of the state parties' referral or Prosecutor's initiative without discussing its legal basis adequately, though this compromise might contribute to the formation of new rules of customary international law¹⁸⁶ which would legalise the exercise of jurisdiction by the ICC, and possibly by other international criminal jurisdictions.

184 U.N. Doc. A/CONF. 183/13 (Vol. II), pp. 123-124, para. 37 (China).

185 U.N. Doc. A/C. 6/53/SR. 9, p. 5, para. 33 (China).

186 See e.g., Tullio Treves, "Customary International Law," in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, Vol. 2 (Oxford University Press, 2012), pp. 937-957.