

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

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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)

3. The US's Attitude towards the State-Consent Requirements for the Proposed ICC's Exercise of Jurisdiction

As mentioned in Chapter 1, according to Scheffer, the US criticises Article 12 of the Statute which permits the ICC, in the cases of the state parties' referral or Prosecutor's initiative, to exercise its jurisdiction over nationals of non-party states without their acceptance, by invoking the rule of the law of treaties whereby a treaty does not create obligations for a non-party state without its consent. However, the analysis carried out in sub-subsection (A) of the previous subsection revealed that Article 12 only provided for the obligation of accepting states to acquiesce in the ICC's exercise of proper jurisdiction which was not characterised as the exercise of a kind of state jurisdiction through the ICC. Therefore, it can be said that the above-mentioned criticism, which is based on an incorrect assumption that Article 12 also provides for an obligation of non-accepting states, is invalid.

It should be noted, however, that the ICC's exercise of jurisdiction over nationals of non-party states in accordance with Article 12 of the Statute will be illegal if their rights are violated thereby. Moreover, as indicated in subsection 3 of section 2 of the previous chapter, while such rights can be abrogated by a potential rule of customary international law which would oblige states to acquiesce in the ICC's exercise of jurisdiction, it cannot be binding on persistent objectors. Therefore, in order to ascertain whether the US expressed persistent objection in the preparatory work of the Statute (and in its immediate aftermath²³¹), this subsection will examine its attitude towards the state-consent

231 See note 99 and accompanying text.

requirements for the proposed ICC's (and the ICC's) exercise of jurisdiction.

Firstly, prior to the Rome Conference, the US had not contended that the nationality state's consent or a UN Security Council resolution with binding force should be required for the proposed ICC's exercise of jurisdiction. Furthermore, during the 50th regular session of the UN General Assembly held from 1995 to 1996, the US stated cautiously but explicitly that "[t]he question of consent merited further consideration. *Nationals of a State could be subject to investigation and prosecution when the State itself was not even party to the court*" [emphasis added]²³².

Secondly, between the CoW's 9th meeting (on 22 June) to 33rd meeting (on 13 July) of the Rome Conference, the US repeatedly argued that the nationality state's consent or a UN Security Council resolution with binding force should be required for the proposed ICC's exercise of jurisdiction²³³. For example, at the CoW's 29th meeting (on 9 July), the US stated that "[t]he possibility that the Court might prosecute the officials of a State that was not a party to the treaty or had not submitted to the Court's jurisdiction in other ways was a form of extraterritorial jurisdiction that would be quite unorthodox. His [=the speaker's] delegation therefore [...] strongly supported option 4, which required the prior consent of the State of nationality of the accused if that State was not a party to the treaty. The United States had grave difficulties with establishing a court that presumed to have jurisdiction over the citizens of a State that had not ratified the treaty creating it, except in situations where the Security Council had taken enforcement action under Chapter VII of the Charter of the United Nations, which was binding on all Member States"²³⁴.

Thirdly, at the CoW's 42nd meeting (on 17 July) of the Rome Conference, the US put forward two proposals of amendments to the Bureau's Draft Statute. Their first proposal was that "article 12 on preconditions to the exercise of jurisdiction should be amended by the deletion in paragraph 2 of the words 'one or more of', so that acceptance of jurisdiction by both the State on whose territory the crime had occurred and the State of nationality of the accused would be required"²³⁵. On the other hand, their second proposal called for inserting into the same article a new paragraph which stipulated that "[w]ith

232 U.N. Doc. A/C. 6/50/SR. 27, p. 6, para. 22 (United States of America).

233 U.N. Doc. A/CONF. 183/13 (Vol. II), p. 195, paras. 23-24 (United States of America), p. 297, para. 42 (United States of America), p. 322, para. 27 (United States of America). It can be noted in this regard that, at the CoW's 9th meeting, the US explicitly referred to the rule of the law of treaties whereby a treaty does not create obligations for a non-party state without its consent. *Ibid.*, p. 195, para. 23 (United States of America).

234 *Ibid.*, p. 297, para. 42 (United States of America).

235 *Ibid.*, p. 361, para. 22 (United States of America). See also, U.N. Doc. A/CONF. 183/13 (Vol. III), p. 247.

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respect to States not Party to the Statute, the Court shall have jurisdiction over acts committed in the territory of a State not Party, or committed by officials or agents of a State not Party in the course of official duties and acknowledged by the State as such, only if the State or States in question have accepted jurisdiction in accordance with this article"²³⁶. As mentioned in subsection 2 of the previous section, both of these proposals were rejected²³⁷.

Fourthly, at the 9th plenary meeting (on 17 and 18 July) of the Rome Conference, after the adoption of the Statute²³⁸ the US stated that "he [=the speaker] did not accept the concept of universal jurisdiction as reflected in the Statute of the International Criminal Court, or the application of the treaty to non-parties, their nationals or officials, or to acts committed on their territories. The only way to bring non-parties within the scope of the regime was through the mandatory powers of the Security Council under the Charter of the United Nations. For those reasons, he had voted against the Statute"²³⁹.

Lastly, during the discussions conducted in the UN from the end of the Rome Conference to the coming into force of the Statute, the US expressed, at every regular session of the UN General Assembly, objection to the ICC's exercise of jurisdiction over nationals of non-party states in the cases of the state parties' referral or Prosecutor's initiative²⁴⁰. For example, during the Assembly's 53rd regular session held from 1998 to 1999, the US stated that "[t]he United States had other concerns of principle about the relationship between article 12 and international law. His [=the speaker's] Government's fundamental concern was that, in the absence of a Security Council referral, the Court would be able to assert jurisdiction over non-party nationals"²⁴¹.

Regarding the theory of persistent objectors, it is not quite clear when or how a state has to make objections in order to become a persistent objector to a rule of customary international law. However, for the purposes of this paper, it seems sufficient to note that, when submitting the above-mentioned second proposal towards the end of the Rome Conference, the US admitted the possibility of the proposed ICC exercising its jurisdiction over nationals other than "officials or agents" of non-party states without their ac-

236 *Ibid.*, p. 249. See also, U.N. Doc. A/CONF. 183/13 (Vol. II), p. 361, para. 22 (United States of America).

237 *Ibid.*, p. 362, para. 31.

238 *Ibid.*, p. 121, para. 10.

239 *Ibid.*, p. 123, para. 28 (United States of America).

240 U.N. Doc. A/C. 6/53/SR. 9, p. 8, para. 55 (United States of America); U.N. Doc. A/53/PV. 83, p. 11 (United States of America); U.N. Doc. A/C. 6/54/SR. 13, p. 3, paras. 9, 11 (United States of America); U.N. Doc. A/C. 6/55/SR. 9, p. 5, para. 26 (United States of America); U.N. Doc. A/C. 6/56/SR. 27, p. 8, para. 50 (United States of America); U.N. Doc. A/56/PV. 85, p. 9 (United States of America).

For the same objection expressed by the US during the 5158th meeting of the UN Security Council held in 2005, see note 226.

241 U.N. Doc. A/C. 6/53/SR. 9, p. 8, para. 55 (United States of America).

ceptance or a UN Security Council resolution with binding force. In light of this fact, it can hardly be said that the US has been making persistent objections about the ICC's exercise of jurisdiction over nationals of non-party states.

Chapter 4 Conclusion

The aim of this paper was 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. The results of the examination of the preparatory work of the Statute carried out in the previous chapter can be summarised as follows.

Firstly, it was generally accepted that, under the current law of treaties, the proposed Statute could not create obligations for non-party states without their consent. Moreover, Article 12 of the Statute cannot be interpreted to provide for an obligation of non-accepting states. Therefore, it can be said that, when adopting the Statute, states were not trying to create an obligation for non-party states without their consent, and that it is not appropriate to criticise Article 12 on the basis of the rule of the law of treaties whereby a treaty does not create obligations for a non-party state without its consent.

Secondly, with regard to the legal basis for the ICC's exercise of jurisdiction in the cases of the state parties' referral or Prosecutor's initiative, it must be conceded that most states accepted the last-minute compromise on the state-consent requirements for the proposed ICC's exercise of jurisdiction without discussing its legal basis adequately. Article 12 of the Statute, which originates from Article 8 of the Korean Proposal, can be interpreted to provide 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. However, states barely addressed the related issue of whose rights could be violated by the proposed ICC's exercise of jurisdiction. It can be noted in this regard that, because Article 12 does not require the consent of particular states as an essential precondition to the ICC's exercise of jurisdiction, unless there is no state whose right could be violated thereby it seems impossible for the ICC to avoid the violation of a right altogether.

Thirdly, with regard to the legal basis for the ICC's exercise of jurisdiction in the cases of the Security Council's referral, the Statute's relevant provision, which originates from Article 23, paragraph 1, of the ILC's final Draft Statute, is based on the idea that a decision of the Council under Chapter VII of the UN Charter can serve as a substitute for or replace the acceptance by states in accordance with Article 12 of the Statute.

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Accordingly, it can be argued that, unless there is evidence to the contrary, the resolutions adopted by the Council when it refers situations to the Prosecutor are interpreted to provide for the obligation of (at least) UN member states to acquiesce in the ICC's exercise of proper jurisdiction. However, it should be added that neither states nor the members of the ILC reached agreement on the other three issues relating to the legality of the ICC's exercise of jurisdiction: 1) whose rights could be violated thereby; 2) whether referrals by the Council conform with Chapter VII of the UN Charter; 3) whether or not it is possible to create obligations for non-members of the UN.

Lastly, it seems impossible for the US to become a persistent objector to a potential rule of customary international law which would oblige states to acquiesce in the ICC's exercise of jurisdiction, because the US admitted, towards the end of the Rome Conference, the possibility of the proposed ICC exercising its jurisdiction over some nationals of non-party states without their acceptance or a UN Security Council resolution with binding force.

As described in Chapter 2, in contrast to the above-mentioned results of the author's examination, many of the scholars who have written on the topic of the legal basis for the ICC's exercise of jurisdiction regard (part of) it as the exercise, through the ICC, of jurisdiction which accepting states originally possess²⁴². Therefore, it can be said that what theoretical framework the ICC itself would provide on this topic is a very interesting question, which will be dealt with in the author's next paper²⁴³.

Finally, it should be added that the state-consent requirements for the ICC's exercise

242 It can be noted in this regard that the theoretical framework where state jurisdiction would be exercised through the proposed ICC was sometimes referred to in oral statements or documents presented in the preparatory work of the Statute, which include the ILC's report on the work of its 44th session (see note 127 and accompanying text), Japan's written comment submitted in accordance with the UN General Assembly Resolution 48/31 (see notes 215 and 224, and accompanying text), Germany's oral statement made at the CoW's 7th meeting (on 19 June) of the Rome Conference (see note 194 and accompanying text), and Sierra Leone's oral statement made at the CoW's 29th meeting (on 9 July) of the Rome Conference (see note 162 and accompanying text).

In addition, during the discussions conducted in the UN from the end of the Rome Conference to the coming into force of the Statute, the theoretical framework where territorial jurisdiction of states would be exercised through the ICC was referred to in an oral statement. U.N. Doc. A/C. 6/55/SR. 11, p. 7, para. 47 (International Committee of the Red Cross).

As mentioned in sub-subsection (B) of the subsection 2 of section 2 of the previous chapter, quite a few states expressed support for the German Proposal during the Rome Conference. Moreover, in the preparatory work of the Statute, no state expressed objections to the theoretical framework where state jurisdiction would be exercised through the proposed ICC. Therefore, it seems clear that the German Proposal was not included in the Bureau's Discussion Paper not because its theoretical framework was considered problematic but because its state-consent requirements were not widely accepted.

243 The author has already dealt with this question once during his oral presentation given in Japanese. Yoshiaki Kitano, "The Exercise of Jurisdiction by the International Criminal Court over Nationals of States Non-Party to the Rome Statute: An Analysis of Cases before the Court and Discussions among States," the 2014 Annual Meeting of the Japanese Society of International Law (21 September 2014) [in Japanese].

of jurisdiction over the crime of aggression, which had not been agreed on at the Rome Conference²⁴⁴, were fixed at the Review Conference of the Rome Statute held in Kampala, Uganda, from 31 May to 11 June 2010 (hereinafter referred to as "the Kampala Conference")²⁴⁵. Resolution RC/Res.6 adopted at the Kampala Conference stipulates, inter alia, that two new provisions should be inserted into the Statute in order to establish such requirements. One of them is Article 15 *bis*, which is entitled "Exercise of jurisdiction over the crime of aggression (State referral, *proprio motu*)" and declares the following:

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraphs (a) and (c), subject to the provisions of this article.

[...]

4. The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.

5. In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.

[...]

10. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

The other provision is Article 15 *ter*, which is entitled "Exercise of jurisdiction over

244 As a result of this disagreement, Article 5 of the Statute, whose current provision was quoted in note 8, initially stated the following:

1. 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.
2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

245 No verbatim record of the Kampala Conference was compiled. For the summary of the Kampala Conference's discussions, see its Official Records (RC/11), pp. 1-7.

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the crime of aggression (Security Council referral)" and declares the following:

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraph (b), subject to the provisions of this article.
- [...]
5. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

From the content of these articles, it is possible to sum up the state-consent requirements for the ICC's exercise of jurisdiction over the crime of aggression as follows: 1) in the cases of the state parties' referral or Prosecutor's initiative, the acceptance by both the nationality state and the territorial state is required. 2) in the cases of the Security Council's referral, the acceptance by any particular state is not required. The ICC's jurisdiction over the crime of aggression was activated as of 17 July 2018 after the necessary conditions had been met²⁴⁶.

The fact that the state-consent requirements prescribed in Article 15 *bis* of the Statute are different from those in Article 12 seems to have resulted, at least partly, from the lack of the agreement on the issue of whose rights could be violated by the ICC's exercise of jurisdiction. Therefore, it can be said that how this issue would be addressed by the ICC is also a very interesting question²⁴⁷.

²⁴⁶ See <https://www.icc-cpi.int/Pages/item.aspx?name=pr1350> (as of November 25, 2020).

²⁴⁷ The author is deeply grateful to Jane Lowe (BA (Jt. Hons), MA) for carefully proofreading the manuscript of this paper as a whole. Any remaining errors are the author's responsibility.

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