

## Article 12

### Preconditions to the exercise of jurisdiction

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.

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.

**Literature:** Ambos, K., 'International Core Crimes, Universal Jurisdiction And § 153 *et seq.* of The German Criminal Procedure Code: A Commentary On The Decisions Of The Federal Prosecutor General And The Stuttgart Higher Regional Court In The Abu Ghraib/Rumsfeld Case', (2007) 18 *CLF* 43; *id.*, 'Prosecuting Guantánamo in Europe: Can and Shall the Masterminds of the "Torture Memos" be Held Criminally Responsible on the Basis of Universal Jurisdiction?' (2009) 42 *CaseWResJIL* 405; Buchan, R., 'The Mavi Marmara Incident And the International Criminal Court', (2014) 25 *CLF* 465; Lauterpacht, H., 'Law of nations and the punishment of war crimes', (1944) 21 *BYbIL* 58; Joyner, C.C., 'Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability', (1996) 59 *LAPE* 153; Kaul, H.P., 'Preconditions to the Exercise of Jurisdiction', in: Cassese A. *et al.*, *The Rome Statute of The International Criminal Court: A Commentary* (Oxford University Press 2002) 583; Kirsch, P. and Holmes, J.T., *The Rome Conference on an International Criminal Court: The Negotiating Process*, (1999) 93 *AJIL* 1; Kress, C. and von Holtzendorff, L., 'The Kampala Compromise on the Crime of Aggression' (2010) 8 *JICJ* 1179; Politi, M., 'The Establishment of an International Criminal Court at a Crossroads: Issues and Prospects After the First Session of the Preparatory Committee', (1997) 13 *Nouvelles Etudes Pénales* 115; *id.*, 'The ICC and the *Crime* of Aggression: A Dream that Came Through and the Reality Ahead', (2012) 10 *JICJ* 267; Scheffer, D. J., 'The United States and the International Criminal Court', (1999) 93 *AJIL* 17; *id.*, 'Fourteenth Waldemar A. Solf Lecture in International Law: A Negotiator's Perspective on the International Criminal Court', (2001) 167 *MillRev* 1; *id.*, 'How to turn the tide using the Rome Statute's temporal jurisdiction', (2004) 2 *JICJ* 26; Stahn, C., 'The "End", the "Beginning off the End" or the "End of the Beginning"? Introducing Debates and Voices on the Crime of "Aggression"', (2010) 23 *LeidenJIL* 875; Zimmermann, A., 'Palestine and the International Criminal Court: *Quo Vadis?* Reach and Limits of Declarations under Article 12(3)', (2013) 11 *JICJ* 303.

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## A. Introduction/General remarks

Article 12 on preconditions for the actual exercise of jurisdiction is fundamental to an effective ICC. The views of States were wide ranging and until the proverbial eleventh hour on 17 July 1998, in Rome, where under the Rules of Procedure of the Conference the text had to be adopted by midnight, article 12 was still a make or break provision. Even after the Conference it retains its notoriety as one of the most controversial, if not the most controversial issues.<sup>1</sup> Article 12 is intimately related to article 5 on crimes within the jurisdiction of the ICC<sup>2</sup>, article 13 on exercise of jurisdiction<sup>3</sup> article 17 on complementarity<sup>4</sup> and article 124 (the transitional provision)<sup>5</sup>. In effect these provisions dealing with the intertwined aspects of jurisdiction 'were the most complex and most sensitive, and for that reason remained subject to many options as long as possible'<sup>6</sup>. They were, beyond doubt, indicative of the necessity to adopt a package deal. The approach taken is firstly that the offence *ratione materiae* is found in the list of core crimes contained in article 5 and defined in articles 6, 7 and 8. Secondly, the preconditions for the ICC exercising jurisdiction in the specific case must be met. Thirdly, the case must be initiated in accordance with the provisions of article 13.

From the ILC Draft Statute<sup>7</sup>, to the Draft Statute prepared by the Preparatory Committee<sup>8</sup> and finally to the negotiations at the Rome Conference<sup>9</sup>, a fundamental issue in all stages of the debate was whether in cases other than where the situation was referred to the Prosecutor by the UN Security Council, acting under Chapter VII of the UN Charter<sup>10</sup>, the ICC would have vested in it inherent jurisdiction to prosecute the crimes listed in article 5 on account of ratification or acceptance of the Statute. Alternatively, would State consent be a precondition and if so for which crimes, on what basis and by which State or States.

### I. The ILC Draft

The 1994 Draft Statute<sup>11</sup> was complicated and geared towards producing a Court that would operate on a restrictive consent basis and with strict Security Council control under article 23. The crimes listed were broader than article 5 of the Rome Statute. Article 21 para. 1 (a) provided for inherent jurisdiction in a case of genocide, with no additional requirement of acceptance<sup>12</sup>. However, article 21 para. 1 (b) stipulated that the Court could exercise its jurisdiction for the other crimes referred to in article 20, namely aggression, war crimes, crimes against humanity and certain treaty crimes<sup>13</sup>, where the complaint was brought in accordance with article 25 para. 2 and the jurisdiction of the Court over the particular crime was accepted, under article 22, by the custodial State and by the State on the

<sup>1</sup> Scheffer (1999) 93 *AJIL* 17, 21.

<sup>2</sup> See A. Zimmermann, *article 5*, mn 10 second edition.

<sup>3</sup> See S. A. Williams/W. A. Schabas, *article 13*, mn 1 second edition.

<sup>4</sup> See S. A. Williams/W. A. Schabas, *article 17*, mn 2 second edition.

<sup>5</sup> See A. Zimmermann, *article 124*, mn 4-7 second edition.

<sup>6</sup> Kirsch and Holmes (1999) 93 *AJIL* 1, 2.

<sup>7</sup> 1994 ILC Draft Statute, 29.

<sup>8</sup> UN Doc.A/CONF.183/2/Add.1 (3 Apr. 1998).

<sup>9</sup> See Bureau Discussion Paper, UN Doc.A/CONF.183/C.1/L.53 (6 July 1998) 11-12 [then article 7] and Bureau Proposal, UN Doc.A/CONF.183/C.1/L.59 (10 July 1998) 10-12 [then articles 7*bis* and 7*ter*].

<sup>10</sup> See article 13 (b).

<sup>11</sup> 1994 ILC Draft Statute.

<sup>12</sup> The complaint was to be brought under article 25 para. 1, 1994 ILC Draft Statute, by a State Party which was also a contracting party to the *Convention on the Prevention and Punishment of the Crime of Genocide*, 78 UNTS 277(1951), as envisaged by article VI.

<sup>13</sup> Article 20 (e) and Annex. Examples included the anti-terror violence conventions such as the 1970 *Hague Convention for the Suppression of Unlawful Seizure of Aircraft*, 860 UNTS 105 and the 1988 *UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, UN Doc.E/CONF.82/15(19 Dec. 1988), reprinted in (1989) 28 *ILM* 497.

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territory of which the act or omission in question occurred, a type of 'ceded jurisdiction'<sup>14</sup>. As well, in a case where the custodial State had received a request<sup>15</sup> under an international agreement from another State to surrender a person for prosecution, unless the request was rejected, the acceptance by the requesting State was required. Under article 22 the ILC Draft detailed the modalities of acceptance by States Parties. It can be classified as an 'opting in' system with States specifying the crimes for which jurisdiction was accepted<sup>16</sup>. The Court did not have inherent jurisdiction, therefore, based on a State ratifying or acceding but needed a special declaration whether at the time of becoming a Party or at a later time. The ILC was of the view that this approach best reflected its general approach to the Court's jurisdiction<sup>17</sup>, that it is based on State consent with the 'Court intervening upon the will of the States concerned, rather than whenever required for protecting the interests of the international community'<sup>18</sup>. Article 23 para. 1 provided for referral by the UN Security Council acting under Chapter VII of the UN Charter for crimes referred to in article 20. With respect to aggression article 23 para. 2 detailed the prerequisite that the Security Council first determine that a State had committed aggression before a complaint of or directly related to an act of aggression could be brought. The consent regime in the ILC Draft was criticized as being 'complicated and cumbersome at best'<sup>19</sup>, and likely 'to cripple the proposed Court at worst'<sup>20</sup>.

## II. The Preparatory Committee's Draft

- 4 In both the *Ad Hoc* Committee<sup>21</sup> set up by the General Assembly to review the ILC 1994 Draft Statute and in the Preparatory Committee established in 1996<sup>22</sup>, the same fundamental questions were raised. In the Preparatory Committee there was widespread, albeit not uniform, agreement that there should be inherent jurisdiction over genocide<sup>23</sup>. However, as in the *Ad Hoc* Committee, there were different views on whether war crimes and crimes against humanity should be so treated<sup>24</sup>.

States supporting inherent jurisdiction for all core crimes underscored the need for it because of the gravity of the crimes. Those opposing stressed State sovereignty, the consensual nature of the Court and the necessity of such to obtain maximum State support. In fact, some States argued that the preconditions of State consent set out in article 21 para. 1 (b) of the ILC Draft should have been more expansive including also the mandatory consent of the States of nationality of the accused and the victim. In the Zutphen Draft Report<sup>25</sup> which was produced to facilitate the last Preparatory Committee session the options on jurisdictional preconditions were contained in articles 6 [21] and 7 [21bis] as produced by the Working Groups of the Preparatory Committee<sup>26</sup>. The articles had square brackets indicating again various alternatives and diverse positions of States.

<sup>14</sup> It must, however, be recalled that the ILC Draft reduced the conditions for the exercise of jurisdiction set out in its earlier 1993 Draft. See Report of the ILC on the Work of its Forty-Fifth Session, 3 May-23 July 1993, UN GAOR, 48<sup>th</sup> Sess., Supp. No. 10, UN Doc. A/48/10. See Crawford (1994) 88 *AJIL* 140; Warbrick (1995) 44 *I&C CompLQ* 466, and Blakesley (1997) 13 *NEP* 177, 204.

<sup>15</sup> Article 21 para. 2.

<sup>16</sup> See 1994 ILC Draft Statute, commentary to article 22, 82. Note that in its 1993 Draft, the ILC Working Group had proposed two alternatives to this article, which were based on 'opting out'. 1994 ILC Draft Statute, 83. Under the 'opting out' approach, the Court's jurisdiction would have been accepted by all States Parties except for those crimes expressly designated.

<sup>17</sup> *Ibid.*, 83.

<sup>18</sup> Politi (1997) 13 *NEP* 149. See the *Ad Hoc* Committee Report.

<sup>19</sup> Sadat and Wexler (1997) 13 *NEP* 163, 173.

<sup>20</sup> *Ibid.*

<sup>21</sup> UN Doc.A/RES/49/53 (9 Dec. 1994).

<sup>22</sup> UN Doc.A/RES/50/46.

<sup>23</sup> 1996 Preparatory Committee I, 29.

<sup>24</sup> Politi, (1997) 13 *NEP* 149-150.

<sup>25</sup> Zutphen Draft.

<sup>26</sup> Preparatory Committee Decisions Aug. 1997, 3.

### III. Rome 1998 – the options

The several options contained in the Draft Statute<sup>27</sup> of the Preparatory Committee as well as other proposals were put before delegations in the Committee of the Whole. These ranged from the proposals on universal jurisdiction by Germany and automatic jurisdiction using broad bases of jurisdiction by South Korea at one end of the spectrum to the restrictive mandatory consent of all interested States proposed by some delegations. The Bureau discussion paper tried to narrow the options and its subsequent proposal likewise did so, while still retaining alternatives<sup>28</sup>. The final package struck a compromise. Nevertheless, the then entrenched positions of some delegations proved to be irreconcilable. The result was that the consensus approach to adoption was thwarted and an unrecorded vote was called for late in plenary on 17 July 1998, the Statute being adopted by 120 votes in favour to 7 against with 21 abstentions. Article 12 as adopted is not as restrictive as it could have been.

#### 1. The German proposal

The German proposal contained in article 9 para. 1, further option of the Draft Statute was based on the rationale that States individually have a legitimate basis at international law to prosecute the crimes listed in article 5 based on universal jurisdiction. It was submitted that the ICC should have the same capacity that contracting States have.

It has been well established in customary and conventional international law that certain crimes are against the universal interest, offend against universal public policy and are universally condemned. Thus, the perpetrators are considered *hostis humanis generis*, enemies of humankind and any State that obtains custody over them has a legitimate ground to prosecute in the interest of all States based on universal jurisdiction over the offence. The State needs no direct connection with the crime<sup>29</sup>. It merges jurisdiction over the person with jurisdiction over the offence<sup>30</sup>. In this way such serious and heinous crimes will not escape justice by falling into a jurisdictional vacuum. There is no requirement that any other States involved through territorial locus of the crime, nationality of the accused or victims must consent. The origins of universal jurisdiction can arguably be traced to international piracy on the high seas<sup>31</sup>, the slave trade<sup>32</sup> and more latterly to war crimes<sup>33</sup>, crimes against

<sup>27</sup> UN Doc.A/CONF.183/2/Add.1, articles 6 (b), 7, 9 (further option) and further option for article 7.

<sup>28</sup> Kirsch and Holmes (1999) 93 *AJIL* 1, 9.

<sup>29</sup> Ambos (2007) 18 *CLF* 43, 54–46; Ambos (2009) 42 *CaseWResJIL* 405, 421 and 443–444; Joyner (1996) 59 *LAPE* 167; Randall (1988) 66 *TexasLRev* 785 and American Law Institute, Restatement (Third) (1987) The Foreign Relations Law of the United States § 404.

<sup>30</sup> Lauterpacht (1944) 21 *BYBIL* 58, 61.

<sup>31</sup> As to the right of every State to seize a pirate ship or aircraft on the high seas or otherwise outside the jurisdiction of any State and arrest the persons on board see article 19 United Nations *Convention on the Law of the Sea*, 1982, UN GAOR, Vol. XVII, 139; (1982) 21 *ILM* 1245, The *SS Lotus Case (France v. Turkey)* (1927), PCIJ Series A, No 10, 70 per Justice Moore and *In re Piracy Jure Gentium*, (1924) A.C. 586 (Sp. Ref. J.C.P.C.).

<sup>32</sup> See Green (1984) *International Law* 179. The assimilation of slave-trader to pirate probably stems from the fact that slave trading was declared by the British Parliament to be piracy (1824), 5 *Geo. IV*, c. 113, ss. 9–10. See *R. v. Zulueta*, 1 Cat. & K. 215, 1 Cox C.C. 20 and *LeLouis* (1817), 2 Dods. 210. There is no indication that the 1926 *Slavery Convention*, 60 LNTS 253, as amended by the *Protocol of 1953*, 182 UNTS 51, or the *Supplementary Convention of 1956*, Canada Treaty Series No. 7 subjected alleged perpetrators to universal jurisdiction. But for rights of visit on the high seas of suspected slave-trading steps see article 110 para. 1 (b) of the *United Nations Convention on the Law of the Sea* 1982. Note Bassiouni and Nanda (1972) 12 *Santa ClaraLRev* 424.

<sup>33</sup> The International Military Tribunal at Nuremberg was established under the *London Charter of 8 Aug. 1945* 82 UNTS 279. The IMT held that the allied powers in signing the Charter had ‘done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law’: (1948) *Trials Of The Major War Criminals* 22 461. See article 6 (b) of the Charter. See also e.g., under Control Council Order No. 10, *Trial of Otto Sandrock and Three Others* (‘The Almelo Trial’) 1 *LRTWC* 35, 42 (1945); the ‘*Hostages Case*’ 8 *LRTWC*, Case No. 47, 43 (1947) and the *Remmele* trial, 15 *LRTWC* 44 (1947). Note also the application of the principle for grave breaches of the four 1949 *Geneva Conventions*:

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humanity<sup>34</sup> and genocide<sup>35</sup>. The International Court of Justice has yet to make a definitive pronouncement on the subject, although the views of several of its judges, which vary considerably, were set out in individual opinions in the *Arrest Warrant* case<sup>36</sup>. The *ad hoc* international criminal tribunals have recognised universal jurisdiction by authorising the transfer of cases to States under this principle<sup>37</sup>. The transfer of cases by the two Tribunals on the basis of universal jurisdiction has been frequently described to the Security Council in the bi-annual reports of the Presidents and Prosecutors, without any objection from members of the Council<sup>38</sup>.

The German proposal attracted strong support from some delegations<sup>39</sup> and from many of the NGOs<sup>40</sup>. The view central to this proposal was that to limit the potential of the ICC by requiring some form of State consent beyond ratification would detract from the effectiveness of the Court and even the rationale and philosophical underpinnings of it. Thus, the impact of the German proposal would have been to give the ICC universal jurisdiction<sup>41</sup> over the

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Article 49 *Geneva Convention (I) for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field*, 75 UNTS 31; article 50 *Geneva Convention (II) for the Amelioration of the Wounded, Sick and Shipwrecked Armed Forces at Sea*, 75 UNTS 85; article 129 *Geneva Convention (III) Relative to the Treatment of Prisoners of War* 75 UNTS 135 and article 146 *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War* 75 UNTS 287; First Add. Prot. of 1977, 1999 Canada Treaty Series No. 2 and article 28 of the 1954 *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict* 249 UNTS 240. There is also national legislation to support universal jurisdiction, as detailed by the ICRC, *Universal Jurisdiction v. State Consent*, Doc. ICRC/NYC (12 Oct. 1997), 2. Domestic prosecutions also evidence the use of universal jurisdiction: see *Polyukhovich v. Commonwealth of Australia* (1991), 172 CLR 501, 562–3, 565 (Aust.H.C.); Note also in a civil claim context the discussion of universal jurisdiction in *Kadić v. Karadžić*, 70 F.3 d 232, 243 (2<sup>nd</sup> cir. 1995).

<sup>34</sup> On account of the grammatical construction of article 6 (c) the Charter the IMT was restricted in its jurisdiction to crimes against humanity connected to the conduct of the war: 1 *Trials Of The Major War criminals* 17 (1947); Secretary General of the United Nations, *Memorandum, The Charter And Judgment Of The Nuremberg Tribunal* 66 (1949). Prosecutions by the Allied Military Tribunals acting under Control Council Order No. 10 were not so restricted. See *Alstoetter et al., The Justices Trial VI LRTWC* 1, 45–46 (1947). Domestic consideration includes *Attorney General of Israel v. Eichmann*, 36 I.L.R. 26 (1961–1962); *Demjanjuk v. Petrovsky*, 776 F. 2 d 571, 582 (1985, U.S. CA. Sixth Cir.) *Fédération nationale des déportés et internés résistants et patriotes et al. v. Barbie* 78 I.L.R. 125, 130 (1983) (Cass.Crim.) and *R. v. Finta* 1 S.C.R. 701 (1994). Note also article 5 para. 2 of the 1984 *Torture Convention*, 1465 UNTS 85.

<sup>35</sup> The 1948 *Genocide Convention* 78 UNTS 277 does not provide for universal jurisdiction, but for jurisdiction by the State where the offence was committed and by an international penal tribunal (article VI). However, the Convention does not prohibit States using other bases of jurisdiction and it has been argued that universal jurisdiction may be exercised on the basis of customary international law. As to what is not prohibited is permitted see the *SS Lotus Case (France v. Turkey)* (1927), PCIJ Series A, No 10, 70. Concerning genocide as a crime under customary international law see *Reservations to the Convention on Genocide (Ad. Op.)* (1951) ICJ Rep. 23; *Attorney-General of Israel v. Eichmann* (1961), 36 ILR 18, 39 (Dist. Ct.); (1962), 36 ILR 277, 304 (Supreme Ct.) and Restatement, (Third) (1987) The Foreign Relations Law of the United States § 404, Reporter's Note on § 404, 256. Note Beresin: Bassiouni (ed.), *International Criminal Law: Crimes* (1986) 271, 275. Further, it is submitted that the interest in the prevention of genocide is an *erga omnes* obligation. See *Barcelona Traction, Light and Power Company Ltd. Case (Prelim. Obj.) (Belgium v. Spain)*, (1970) ICJ Rep. 32; GA Res. 96 I and Joyner (1996) 59 LAPE 167, 168.

<sup>36</sup> *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), Judgment*, [2002] ICJ Reports 3.

<sup>37</sup> Rules of Procedure and Evidence [of the International Criminal Tribunal for the former Yugoslavia], Rule 11bis, paras. (A)(ii) and (iii), as amended 10 June 2004; Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, Rule ii bis, paras. (A)(ii) and (iii), as amended 15 May 2004; *Prosecutor v. Bagaragaza*, No. ICTR-2005-86-11bis, Decision on Prosecutor's Request for Referral of the Indictment to the Kingdom of the Netherlands, Trial Chamber, 13 Apr. 2007.

<sup>38</sup> *E.g.*, UN Doc.S/PV. S/PV.4999, 5, 18–19.

<sup>39</sup> *E.g.*, UN Doc.A/CONF.183/SR.3, para. 21 (Czech Republic), para. 42 (Latvia), para. 76 (Costa Rica); UN Doc.A/CONF.183/SR.4, para. 12 (Albania), paras. 20–21 (Germany); UN Doc.A/CONF.183/SR.6, para. 4 (Belgium), para. 69 (Luxembourg); UN Doc.A/CONF.183/SR.8, para. 18 (Bosnia and Herzegovina), para. 62 (Ecuador).

<sup>40</sup> *E.g.*, ICRC (UN Doc.A/CONF.183/SR.4, para. 70), I Commission of Jurists, Lawyers Committee for Hum. Rts., AI and Hum. Rts. Watch. Also: UN Doc.A/CONF.183/SR.2, para. 119; UN Doc.A/CONF.183/SR.3, para. 123; UN Doc.A/CONF.183/SR.4, para. 70.

<sup>41</sup> Note that Germany also called this 'the German version of automatic jurisdiction'. See statement by H.-P. Kaul, Acting Head of the German Delegation in the Committee of the Whole, 9 July 1998, 1. Thus, Germany



listed crimes with no need for a separate consent of interested States. As Germany indicated<sup>42</sup> the universal principle's application would have eliminated loopholes. For example, if consent of at least the territorial State was necessary and if genocide was committed in State X against nationals of State X and X is not a Party to the Statute and the Security Council does not refer the matter to the ICC<sup>43</sup> the crime would not be cognizable by the Court. Similarly, it is true in the case of internal armed conflicts that the territorial State and State of nationality will often be one and the same. The ICC would only have jurisdiction if that State had long before the conflict become a State Party or if not through political domestic pressures agreed *ad hoc* or again if the Security Council acted under Chapter VII<sup>44</sup>. As well, the restrictions of State consent would mean that even where the custodial State was a Party to the Rome Statute and wanted to surrender the accused to the ICC, the Court would not be able to exercise jurisdiction without the consent of the other involved States.

If the German proposal had been marketable in Rome, the end result would have been the deletion of article 12 [article 7 in the Draft Statute] on preconditions. Related to this issue, it must be emphasized, is the safeguard contained in article 17 on complementarity. The ICC would have only exercised such universal jurisdiction where a national system was unwilling or unable to investigate and/or prosecute effectively. Therefore, the universal principle would not have divested national criminal courts of their primary role in prosecutions of listed crimes.

Clearly, the universal principle would have given the ICC jurisdiction if the core crimes were committed in the territory of any State, Party or non-Party to the Statute. However, non-States Parties would have been under no international legal obligation to cooperate with the Court. Therefore, the second prong of the German proposal contained in article 9 para. 2 further option, was that non-States Parties could accept the obligation to cooperate on an *ad hoc* basis, with respect to any listed crime<sup>45</sup>.

## 2. The Korean proposal

Sensing opposition to the German concept of universal jurisdiction, the Republic of 8  
Korea's proposal<sup>46</sup>, that appeared two days into the Conference on 17 June 1998, provided for so-called automatic jurisdiction. The Korean view was that by becoming a Party a State would be considered to have accepted the jurisdiction of the ICC. The jurisdictional nexus was that any one or more of four involved States Parties have consented to the ICC exercising jurisdiction over a case; either the territorial State, the states of nationality of the accused and the victim or the custodial State. This proposal differed from those below in that it allowed for the selective consent by ratification of one of the four States including the custodial State. In reality there was no difference in philosophy between the German and Korean proposals, as the universal principle is based solely upon the person accused being in the custody of the prosecuting State. The Korean proposal enjoyed wide support<sup>47</sup> but was not acceptable to many States who wanted a second layer of State consent<sup>48</sup>.

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used 'inherent' and 'automatic' in the same way to mean that the ICC should be vested with universal jurisdiction upon ratification by States. This must be contrasted with the term 'automatic' as used in the Korean Proposal, the United Kingdom Proposal, the Bureau Proposal and in the final text of the Statute where although acceptance of the Court's jurisdiction is automatic there are preconditions. However, they did not require a second State consent as did the opt-in and State consent regimes.

<sup>42</sup> Statement by H.-P. Kaul, Acting Head of the German Delegation, Rome Conference, 19 June 1998.

<sup>43</sup> See article 13 (b).

<sup>44</sup> Bertram-Nothnagel, Report to the Union Internationale des Avocats 10 (12 Aug. 1998).

<sup>45</sup> Contrast the Statutes of the ICTY and the ICTR set up by UN Security Resolutions 827 (25 May 1993) and 955 (8 Nov. 1994), acting under Chapter VII of the Charter, which obligate all States to cooperate.

<sup>46</sup> UN Doc.A/CONF.183/C.1/L.6 (18 June 1998). A similar proposal had been made earlier by Sweden: ICRC (UN Doc.A/CONF.183/SR.4, para. 70), I Commission of Jurists, Lawyers Committee for Hum. Rts., AI and Hum. Rts. Watch, 4.

<sup>47</sup> Terra Viva, *Seoul Floats a Compromise on Jurisdiction*, No. 6, 7 (22 June 1998) and The International Criminal Court Monitor, 1 (10 July 1998): 79 % of the States present supported the Korean Proposal.

<sup>48</sup> *Ibid.*

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### 3. The United Kingdom proposal

- 9 The United Kingdom<sup>49</sup>, in further option for article 7 para. 1, provided for jurisdiction by States Parties of the ICC for crimes listed in article 5, with necessarily the same in built safeguard of complementarity. However, in article 7 para. 2 the further requirement was that both the custodial State and the State where the crime occurred consented to the jurisdiction of the ICC by being States Parties. Concern was expressed that to get the cumulative consents would be difficult<sup>50</sup>. On 19 June 1998, the proposal was amended to delete the custodial State<sup>51</sup>.

### 4. The United States proposal

- 10 In cases where the Security Council does not trigger the Court's jurisdiction, the United States supported<sup>52</sup> as fundamental the consent of the territorial State *and* the State of nationality of the accused person, or at a minimum only the consent of the State of nationality<sup>53</sup>. The United States insisted that the ICC have no jurisdiction over the nationals of non-States Parties to the Statute. It was argued that to do so would violate article 34 the 1969 *Vienna Convention on the Law of Treaties*<sup>54</sup>, as treaties cannot be binding on non-Party third States. The position was that it would not be acceptable for United States citizens to be accountable in a Court not accepted by the United States. The United States made it clear that it could not adhere to a text that allowed for United States forces operating abroad to be brought even conceivably before the ICC, even where the United States had not become a Party to the Statute. The United States position was that this would derogate from the ability of the United States to act as a major player in multinational humanitarian and peacekeeping operations. Protection against frivolous and arbitrary charges and other forms of inappropriate investigations and prosecution was called for<sup>55</sup>. Of course, the United States position still left open referral of a situation by the Security Council acting under Chapter VII of the Charter as provided for in article 13 (b) of the Statute, subject of course to the veto of one of the P5. This in the United States view was the only way 'to impose the court's jurisdiction on a non-party state'<sup>56</sup>. In effect this proposal would have resulted in an ICC controlled by the Security Council, a type of permanent *ad hoc* criminal tribunal<sup>57</sup>.

The indispensable requirement of the acceptance of the State of nationality of the accused was not acceptable to the overwhelming majority of States as it was seen as causing a probable paralysis of the ICC. Other States had tried to assuage the United States concerns by stressing the provisions on complementarity contained in article 17 of the Statute and judicial cooperation in article 98 para. 2, that requires consent of the sending State as a precondition for the surrender to the ICC by the 'host' State of persons present in that State pursuant to international agreements. This would have meant that U.S. forces on for example peacekeeping missions or elsewhere abroad under Status of Forces Agreements would not have been amenable to prosecution before the ICC unless the U.S. consented.

<sup>49</sup> UN Doc.A/AC.249/WG.3/DP.1.

<sup>50</sup> See *e.g.*, Lawyers Committee for Hum. Rts., Exercise of ICC Jurisdiction: The Case for Universal Jurisdiction 1 *ICC Briefing Series* 8 (May 1998)5.

<sup>51</sup> ICRC (UN Doc.A/CONF.183/SR.4, para. 70), *ICJ Brief*, 3.

<sup>52</sup> UN Doc.A/CONF.183/C.1/L.70 (14 July 1998).

<sup>53</sup> See testimony of Ambassador D. Scheffer, Head of the United States Delegation in Rome, before the United States Senate Foreign Relations Committee, 23 July 1998.

<sup>54</sup> 1155 *UNTS* 331 (1969).

<sup>55</sup> The passive personality basis of jurisdiction in the Korean proposal would have been a protective deterrent for such forces, giving jurisdictional acceptance to the State of nationality of victims.

<sup>56</sup> Testimony of Ambassador D. Scheffer, Head of the United States Delegation in Rome, before the United States Senate Foreign Relations Committee, 23 July 1998.

<sup>57</sup> Podgers (1998) *ABAJ* Sept 64, 67.

### 5. State ‘opt-in’ and case-by-case proposals

The State ‘opt-in’ proposal in article 6 para. 2, article 7, option 1 and article 9, option 1 of the Draft Statute was markedly different from the previous proposals as it required an actual second consent other than being a Party to the Statute. This declaration of consent over specified crimes could have been placed at the time of ratification or at a later stage. The thrust of the proposal was that before the ICC could assume jurisdiction as many as five States potentially would have had to have consented to the exercise of jurisdiction by the Court over the crime in question: that is the custodial State, the territorial State, the State that had requested extradition of the person from the custodial State, unless the request was rejected, the State of nationality of the accused and the State of nationality of the victim. The ICC would have been less competent under this proposal than States are currently under international law to prosecute domestically, where the consent of other involved States is not necessary<sup>58</sup>.

The case-by-case approach contained in article 7, option 2 of the Draft Statute would have needed the specific consent of the States outlined *above* in the ‘opt-in’ Proposal. Ratification would, therefore have had little meaning in practical reality and States would have been able to render immune from consideration of the Court any individual when it seemed politically desirable. This proposal would have rendered the ICC ineffective in many cases.

In effect, both the opt-in and case-by-case consent proposals would have been jurisdiction ‘à la carte’. This would have resulted in practical terms in a significantly weakened Court with most often the ICC only having jurisdiction when the Security Council referred a situation to it, with the built in Charter problem of the veto power. This would have been particularly so should both proposals have been adopted and States had preferred to follow the case-by-case approach. States as a result could have ratified with no intention of ever allowing cases to go before the Court. This would have resulted in an ineffectual Court in the majority of cases and as well have ‘foment[ed] selectivity and arbitrariness’<sup>59</sup>.

### 6. The Bureau Compromise

The Bureau discussion paper<sup>60</sup> ‘had narrowed the range of options but had deliberately taken a cautious approach’<sup>61</sup>. The Proposal<sup>62</sup> had likewise retained several options. Both of these had dropped the German Proposal<sup>63</sup>. The Bureau Proposal in article 7 para. 1 adopted the Korean Proposal for genocide alone. For war crimes and crimes against humanity, three options were presented in article 7 para. 2: (1) the Korean Proposal, (2) the acceptance by the territorial and custodial States and in (3) the acceptance by the State of nationality of the accused alone. Some States voiced strong objections against the Korean Proposal stating that it was quasi-universal jurisdiction. However, other States pointed out that it would have been in keeping with the ability at international law of the custodial State to prosecute itself for international crimes, *stricto sensu*. They viewed the other options as too restrictive, in particular option 3 based on nationality of the accused. As well, article 7*bis* on acceptance of jurisdiction in both the discussion paper for treaty crimes and possibly for one or more of the core crimes and in Option 2 of the Proposal for crimes against humanity and war crimes was controversial as it replicated the opt-in regime. Article 7*bis* Option 1 reproduced the

<sup>58</sup> Lawyers Committee for Hum. Rts., *Exercise of ICC Jurisdiction: The Case for Universal Jurisdiction 1 ICC Briefing Series 8* (May 1998)5.

<sup>59</sup> Hum. Rts. Watch, *Justice in the Balance: Recommendations for an Effective International Criminal Court 46* (1998).

<sup>60</sup> UN Doc.A/CONF.183/c.1/L.53 (6 July 1998) 11–13.

<sup>61</sup> Kirsch and Holmes (1999) 93 *AJIL*1, 9.

<sup>62</sup> UN Doc.A/CONF.183/C.1/L.59 (10 July 1998) 10–12.

<sup>63</sup> According to The Rome Treaty Conference Monitor, 10 July 1998, 2 ‘23 states displayed their dismay that universal jurisdiction was not reflected’. Note also the reaction of the German Delegation, as expressed in Statement by H.-P. Kaul, Acting Head of the German Delegation, Rome Conference, 19 June 1998.



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automatic jurisdiction over all core crimes by States Parties. Thus, as late as 10 July 1998, with only one week left there was no consensus. The United States and other States emphasized that 'universal jurisdiction or any variant of it' was unacceptable<sup>64</sup>.

The result was the introduction into the final package by the Bureau of a new article on preconditions on 17 July 1998, the present article 12 in the Statute. This article combines State acceptance of jurisdiction with preconditions for the exercise of jurisdiction by the ICC. It allows disjunctively for the acceptance, by being States Parties, of one or more of the territorial State or the State of nationality of the accused. The transitional provision contained in article 124<sup>65</sup> was also part of the compromise to gain the agreement of France to the Statute<sup>66</sup>. It provides that States Parties may opt out of the ICC's war crimes jurisdiction for a period of seven years when the alleged crimes were committed in its territory or by its nationals. States that had lobbied for the opt-in acceptance and the preconditional conjunctive approach or the State of nationality of the accused alone remained opposed. From the outset issues of jurisdiction had been a key concern for the United States<sup>67</sup>. For the United States it was the four words 'one or more of' that caused the ultimate dissent. On this issue the United States proposed an amendment during the last hours of the Conference in the Committee of the Whole<sup>68</sup>. It reads:

'With 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 has accepted jurisdiction in accordance with this article.'

The amendment was resoundingly defeated by a no-action motion<sup>69</sup>, adopted by 113 in favour to 17 against with 25 abstentions.

## B. Analysis and interpretation of elements

### I. Paragraph 1: Jurisdiction over crimes

- 13 States by becoming parties to the Statute accept the jurisdiction of the ICC for the crimes provided in article 5 of the Statute, namely, genocide, crimes against humanity, war crimes and aggression<sup>70</sup>. It follows option 1 of the Bureau Proposal in article 7*bis*. Article 12 para. 1 therefore assumes the position of automatic jurisdiction over the listed crimes, with no possibility to opt out. However, as far as the crime of aggression is concerned, it seems that in 2010 States Parties have established a different jurisdictional regime. On the one hand, should the amendment come into force, the Court would exercise its jurisdiction in accordance with article 12<sup>71</sup>; on the other hand, prior to ratification or acceptance of the Kampala amendment, a State Party might lodge a declaration with the Registrar whereby it would exclude the Court's jurisdiction over any act of aggression it would commit<sup>72</sup>. Nevertheless, by ratifying or accepting the amendment, it would allow the Court to exercise

<sup>64</sup> Kirsch (Nov.-Dec. 1998) *ASIL Newsletter* 1, 8.

<sup>65</sup> See A. Zimmermann, *article 124*, mn 1 second edition.

<sup>66</sup> The United States had earlier argued for a ten year transitional period for war crimes and crimes against humanity. Statement by David Scheffer, US Ambassador at Large for War Crimes Issues, American University, Washington, DC, September 2000.

<sup>67</sup> The Rome Treaty Conference Monitor, 18 July 1998, No. 26, 2.

<sup>68</sup> UN Doc. A/CONF.183/C.1/L.90 (16 July 1998).

<sup>69</sup> Proposed by Norway. Sweden and Denmark spoke for and China and Qatar against. UN Doc.A/CONF.183/C.1/SR.42, paras. 20–31.

<sup>70</sup> RC/Res.6, Annex I.

<sup>71</sup> According to article 15*bis* (4).

<sup>72</sup> As for the uncertainties and possible contrasts with article 121(5) see Cryer et al., *Introduction ICL* (2014) 324.

its jurisdiction in relation to any act of aggression which might occur on its territory, every time such an act is committed by another Party who has ratified the amendment, or, alternatively, by any accepting State under paragraph 3 of article 12, which has not lodged a similar declaration<sup>73</sup>.

## II. Paragraph 2

### 1. Acceptance by States Parties

In cases where pursuant to article 13 (a) or (c), a situation is referred to the Prosecutor by a State Party<sup>74</sup> or where the Prosecutor has initiated an investigation *proprio motu*<sup>75</sup>, State acceptance is necessary<sup>76</sup>. As discussed above, this complex and controversial issue resulted in a compromise put to the Committee of the Whole in the final package. It was an attempt by the Bureau to find a middle ground between the opposite positions of States: between those who had for the most part a preference for universal jurisdiction or a list of alternative States (territorial State, State of nationality of the accused or the victim and the custodial State) where it was sufficient that one had accepted the jurisdiction of the Court by ratifying and those that insisted on either State Party acceptance by the State of nationality of the accused or even the stricter requirement that there be acceptance conjunctively from a list of States as had been proposed in the ILC Draft<sup>77</sup>. Article 12 as adopted by the Conference is the accommodation that was struck. It reduced the preconditions. The jurisdictional nexus is that the territorial State or the State of nationality of the accused are States Parties. These are the two primary bases of jurisdiction over the offence in international criminal law<sup>78</sup> and are universally accepted.

### 2. The different subparagraphs

a) **Territorial jurisdiction.** Territorial jurisdiction is a manifestation of State sovereignty<sup>79</sup>. A State has plenary jurisdiction over persons, property and conduct occurring in its territory,

<sup>73</sup> In accordance with article 121 para. 5. See Kress and von Holtendorff (2010) 8 *JICJ* 1179, 1214. See also Politi (2012) 10 *JICJ* 267, 279.

<sup>74</sup> In accordance with article 14.

<sup>75</sup> In accordance with article 15.

<sup>76</sup> As for the inapplicability of article 12, paragraph 2, to article 13 (b), namely in case of a referral by the UN Security Council, see: *Prosecutor v. Ahmad Muhammad Harun ('Ahmad Harun') and Ali Muhammad Al Abd-Al-Rahman ('Aukushayb')*, No. ICC-02/05-01/07-1-Corr, Decision on the Prosecution Application under Article 58 (7) of the Statute, Pre-Trial Chamber I, 27 April 2007, para. 16; *Prosecutor v. Jean-Pierre Bemba Gombo*, No. ICC-01/05-01/08-320, Fourth Decision on Victims' Participation, Pre-Trial Chamber III, 12 December 2008, para. 59; *Prosecutor v. Omar Hassan Ahmad Al Bashir ('Omar Al Bashir')*, No. ICC-02/05-01/09-3, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 4 March 2009, para. 36; *Situation in the Libyan Arab Jamahiriya*, No. ICC-01/11-01/11-1, Decision on the 'Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi And Abdullah Al Senussi', Pre-Trial Chamber I, 27 June 2011, para. 9. In line with this interpretation of the Statute, according to the Kampala amendment State consent is irrelevant in the case of a UN Security Council's referral pertaining to an alleged crime of aggression. See RC/Res.6, Annex III, Understanding 2.

<sup>77</sup> At the outset of the Conference many delegations including China, France, India, Mexico and several non-aligned States had supported the 'state consent' proposal, requiring consent even from States Parties for each prosecution.

<sup>78</sup> The various UN Conventions dealing with international terrorism use these bases of jurisdiction along with passive personality and the presence of the accused (custodial State) to allow for extradition or prosecution by domestic criminal courts. See e.g., article 6 of the 1979 *International Convention Against the Taking of Hostages*, 1316 UNTS 205 and article 6 of the 1997 *International Convention on the Suppression of Terrorist Bombings*, UN Doc. A/RES/52/164.

<sup>79</sup> *Compania Naviera Vascongado v. Steamship Cristina*, (1938) A.C. 485, 496. The territorial principle has been interpreted in some domestic courts to allow for criminal prosecution when a significant portion of the elements of the crime occur in the State. See, the Canadian case of *Libman v. The Queen*, (1985) 2 Supreme Court Reports 178. The territory of a State includes its land mass, internal waters, the twelve nautical mile territorial sea and the airspace above all of the former. Jurisdiction is recognised at international law as extending to conduct

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subject only to obligations or limitations imposed by international law<sup>80</sup>. This is the universally accepted working rule in international criminal law and can be found in bilateral extradition treaties and multilateral conventions<sup>81</sup>. Thus if a listed crime is committed in State A, a State Party to the ICC Statute, by a national of State B, whether or not State B is a State Party, State A will have enabled the ICC to take jurisdiction, whether the alleged offender is present in State A or in another custodial State Party<sup>82</sup>. The ICC is not, as has been argued by the United States, taking jurisdiction over non-States Parties, in violation of article 34 of the *Vienna Convention on the Law of Treaties*<sup>83</sup>. When an alien commits a crime, whether a domestic common crime or an international crime such as hostage taking, on the territory of another State, a prosecution in the latter State is not dependent on the State of nationality being a Party to the pertinent treaty or otherwise consenting<sup>84</sup>. It is not a case of a non-State Party being bound and the ICC overreaching its jurisdiction, but rather the individual being amenable to the jurisdiction of the ICC where crimes are committed in the territory of a State Party. There is no rule of international law prohibiting the territorial State from voluntarily delegating to the ICC its sovereign ability to prosecute<sup>85</sup>.

At the time of ratification a few States made declarations concerning the territorial scope of the Rome Statute. In contrast with many other multilateral international instruments, there is no specific provision for this in the Statute. The Netherlands made a harmless but reassuring statement to the effect that the Statute applies not only to its European territory but also to the Netherlands Antilles and Aruba. More troublesome was Denmark's declaration that it does not intend the Statute to apply to the Faroe Islands and Greenland<sup>86</sup>. While this was no doubt motivated by admirable sentiments of respect for local autonomy, it had the effect of excluding the reach of the Court from a territory which, on its own, has no right to correct the situation, because neither the Faroe Islands nor Greenland are sovereign States and as a result they cannot accede to the Statute. Were a case to arise, the Court might well take the lead from analogous cases before the European Court of Human Rights<sup>87</sup> and rule the Danish declaration to be an illegal reservation without any effect, in accordance with article 120 of the Statute, thereby recognising jurisdiction over the disputed territories. The ILC Special Rapporteur on the question of reservations has written that

‘a statement by which a State purported to exclude the application of a treaty to a territory meant that it sought “to exclude or to modify” the legal effect which the treaty would normally have, and such a statement therefore constituted, according to the Special Rapporteur, a “true” reservation, *rationae loci*’<sup>88</sup>.

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committed on board maritime vessels and aircraft registered in a State. See *e.g.*, article 6 para. 1 (a) of the *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation* (1988), 27 *ILM* 672. Note Sadat Wexler (1998) 13 *NEP* 25 includes also the State of registration of spacecraft or space stations.

<sup>80</sup> See *e.g.*, *North Atlantic Status of Forces Agreement*, 1951, 1953 Canada Treaty Series No. 13, and the *Agreement Concerning the Jurisdictional Immunities of U.N. Forces Between the United Nations and Cyprus*, 1964, 492 UNTS 57.

<sup>81</sup> Furthermore, international terrorism conventions oblige States parties to amend their domestic law to provide for wide bases of jurisdiction including universality and also utilize the principle of *aut dedere, aut judicare*, obliging States to extradite or prosecute.

<sup>82</sup> Once the preconditions of article 12 para. 2 have been met, other States Parties are obliged to cooperate with the ICC. See Kreß and Prost, *article 86*, mn 2–7 second edition. on the general obligation to cooperate, and Kreß and Prost, *article 89* mn 5–13 on the surrender of persons to the Court.

<sup>83</sup> 1155 UNTS 331 (1969).

<sup>84</sup> Note *United States v. Fawaz Yunis*, 924 F. 2d 1086 (D.C. Cir. 1991). Prosecution was based on the passive personality principle for hijacking and hostage taking. Lebanon, the State of nationality was not a Party to the 1979 *International Convention Against the Taking of Hostages*, 1316 UNTS 205, or the 1970 *Hague Convention for the Suppression of Unlawful Seizure of Aircraft*, 860 UNTS 105.

<sup>85</sup> The argument that such delegation is either illegal or unprecedented has been put forward since the adoption of the Statute, by Scheffer (1999) 32 *Cornell ILJ* 529.

<sup>86</sup> See also the declaration by New Zealand concerning Tokelau.

<sup>87</sup> *Loizidou v. Turkey* (Preliminary Objections), Series A, No. 310.

<sup>88</sup> Report of the ILC on the Work of its Fiftieth Session, 20 Apr.-12 June 1998, 27 July-14 Aug. 1998, UN Doc.A/53/10 and Corr.1, para. 498.

The problem has become largely hypothetical, because Denmark withdrew the declaration in 2006.

According to article 12 para. 2(a) the Court may also exercise its jurisdiction with respect to crimes committed on board a vessel or aircraft, if the State of registration is a State Party to the Statute. It is on the basis of this provision that on 14 May 2013 the Union of the Comoros referred to the Court the situation regarding the 31 May 2010 Israeli interception of a humanitarian aid flotilla bound for the Gaza Strip. While the flotilla was comprised of eight vessels, the Court could have exercised its jurisdiction only over those acts which occurred on board of the Mavi Marmara, the Rachel Corrie, and Eleftheri Mesogios/Sofia, which were registered in the States Parties of Comoros, Cambodia, and Greece, respectively. In this respect, the Court could have acted regardless of the nationality of those allegedly responsible for the commission of the crimes at issue. In November 2014, Prosecutor Fatou Bensouda decided not to proceed to open an investigation as she considered that the situation did not meet the requirement of ‘gravity’<sup>89</sup>.

Moreover, as far as the crime of aggression is concerned, when the Kampala amendments enter into force, the Court will not be able to exercise its jurisdiction over nationals of States not Parties, no matter where these acts might occur<sup>90</sup>. This is an evident departure from the spirit of article 12, whose explicit reference in article 15*bis* para. 4 might find an explanation only if interpreted as aiming to regulate the preconditions to the Court’s exercise of its jurisdiction over aggression committed by nationals of a State Party within the territory of another State Party, or in all cases that might arise after a non-party State’s acceptance of the Court’s jurisdiction under article 12 para. 3.

**b) Nationality of the accused.** The nationality basis of jurisdiction is well entrenched in the domestic law of the majority of States. By virtue of such State practice and *opinio juris* it is a permissive rule derived from international custom that establishes extraterritorial jurisdiction<sup>91</sup>. Civil law jurisdictions provide for its use extensively and relate it to domestic common crimes as well as to crimes against the common interests of States. It is a corollary to their rules concerning the non-extradition of nationals. Common law States, on the other hand, use it for the most part only with regard to crimes prescribed by international law as envisaged in article 5 of the Rome Statute and international treaty crimes such as are contained in the international terrorism conventions<sup>92</sup>. In this context it is universally accepted.

None of the initial prosecutions appear to have been based on nationality of the accused. In the prosecutions concerning the situations in Uganda, the Democratic Republic of Congo, Sudan (Darfur), Kenya, Central African Republic, Côte d’Ivoire, and Libya there are no allegations that the accused persons are nationals of a State Party. Nor did the Security Council give the Court jurisdiction over acts of Sudanese or Libyan nationals committed outside of their own States. It adopted such an approach when the International Criminal Tribunal for Rwanda was established, authorising the international tribunal to prosecute crimes on Rwandan territory and crimes committed by Rwandan nationals in neighbouring States<sup>93</sup>.

The Prosecutor has examined the possibility of cases based on nationality rather than territory. In his first report on communications submitted in accordance with article 15, the Prosecutor noted that there had been several allegations of acts perpetrated by nationals of

<sup>89</sup> Referral under Articles 14 and 12(2)(a) of the Rome Statute arising from the 31 May 2010, Gaza Freedom Flotilla situation 14 May 2013 from Comoros, 14 May 2013; OTP, Situation on Registered Vessels of Comoros, Greece and Cambodia. Article 53(1) Report, 6 November 2014. See also OTP, Situation in the Republic of Korea Article 5 Report, 23 June 2014, paras. 38–40. Cf. Buchan (2014) 25 *CLF* 465, 498.

<sup>90</sup> In accordance with article 15*bis* para. 5.

<sup>91</sup> *The Steamship Lotus (France v. Turkey)* (1927), PCIJ Ser. No. 10.

<sup>92</sup> See e.g., the 1973 *Convention on the Prevention and Punishment of Internationally Protected Persons Including Diplomatic Agents*, 1977 Canada Treaty Ser. No. 43, article 3 para. 1 (b).

<sup>93</sup> UN Doc.S/RES/955 (1994).

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coalition forces during the invasion of Iraq, in 2003<sup>94</sup>. Iraq is not at present a State Party to the Rome Statute. He pursued this in more depth in his second report, in February 2006, and especially in the statement concerning Iraq-related prosecutions. There he indicated that inquiries had been made concerning nationals of States Parties with respect to acts perpetrated on the territory of Iraq<sup>95</sup>. However, on the same occasion the then Prosecutor Moreno Ocampo announced his decision not to seek an authorization to initiate an investigation in relation to the Iraqi situation as the ‘gravity’ requirement appeared not to be met. On 13 May 2014, Prosecutor Bensouda decided to re-open a preliminary examination of the situation in Iraq. In particular, her office will analyse alleged crimes attributed to the armed forces of the United Kingdom deployed in Iraq between 2003 and 2008<sup>96</sup>. Should the Prosecutor decide to open an investigation, the Court’s jurisdiction would then be based on article 12 para. 2(b)<sup>97</sup>. With respect to the crime of aggression, according to article 15*bis* para. 5 the Court cannot exercise its jurisdiction over those acts committed by nationals of States Parties within the territory of a State not Party to the Statute. Therefore, the jurisdictional regime envisaged for the crime of aggression significantly departs from that of article 12 para. 2(b).

An exception to the general principle of jurisdiction over nationals is explicitly set out in the Rome Statute with respect to persons under the age of eighteen at the time of the offence<sup>98</sup>.

### III. Paragraph 3: Acceptance by non-States Parties

- 19 In addition to the territorial and personal jurisdiction that results from ratification of the Statute with respect to a State Party, article 12 para. 3 also contemplates the possibility of a non-party State accepting the jurisdiction of the Court on an *ad hoc* basis. The provision requires such a State to lodge a declaration with the Registrar by which it accepts the exercise of jurisdiction by the Court ‘with respect to the crime in question’. The Statute describes such a State as an ‘accepting State’. The final sentence in article 12 para. 3 says that ‘[t]he accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9’. However, there does not seem to be any consequence should an accepting State fail to cooperate as required<sup>99</sup>.
- 20 Article 12 para. 3 is the residue of a provision in the 1994 ICL Draft Statute by which State consent was contemplated on a case-by-case basis. Article 12 para. 3 allows the Court to exercise jurisdiction if a non-party State makes a declaration ‘with respect to the crime in question’ committed on its territory or by one of its nationals. The reference to ‘crime’ rather than ‘situation’ might have implied that this is not analogous to a referral by a State Party or by the Security Council.<sup>100</sup> The text of article 12 para. 3 could indeed seem ambiguous in this respect. Does this refer to one of the crimes listed in article 5? In other words, are non-party States to make declarations accepting the jurisdiction of the Court with respect to one or more of genocide, crimes against humanity, war crimes, and aggression? Or is the provision to mean the acceptance of jurisdiction with respect to a specific incident or situation<sup>101</sup>?

<sup>94</sup> ‘Communications Received by the office of the Prosecutor of the ICC’, 16 July 2003, 2.

<sup>95</sup> ‘Letter of Prosecutor dated 9 February 2006’ (Iraq).

<sup>96</sup> OTP, Prosecutor of the International Criminal Court, Fatou Bensouda, re-opens the preliminary examination of the situation in Iraq, 13 May 2014.

<sup>97</sup> See OTP, Report on Preliminary Examination Activities 2014, 6 December 2014, paras. 44–45.

<sup>98</sup> Article 26.

<sup>99</sup> On article 12 para. 3, see: Stahn *at al.* (2005) 99 *AJIL* 421; Freeland (2006) 75 *NordicJIL* 211; Stahn (2006) 75 *JIL* 243. See also, *e.g.*, *Prosecutor v. Simone Gbagbo*, ICC-02/11-01/12-47-Red, Decision on Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo, Pre-Trial Chamber I, 11 December 2014, on the occasion of which Pre-Trial Chamber I merely reminded Côte d’Ivoire of its obligation to surrender Simone Gbagbo to the Court.

<sup>100</sup> Scheffer (2004) 2 *JICJ* 26.

<sup>101</sup> Kaul, in: Cassese *at al.* (eds), *The Rome Statute of The International Criminal Court: A Commentary* (2002) 583, 616. Also: Bassiouni, (1999)32 *CornellILLJ* 443, 453–454; Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis and Integrated Text* (2005) 84–85.

To prevent abusive and one-sided use of article 12 para. 3 the ASP has modified its application somewhat. Rule 44 of the Rules of Procedure and Evidence states:

Declaration provided for in article 12 para. 3

1. 'The Registrar, at the request of the Prosecutor, may inquire of a State that is not a Party to the Statute or that has become a Party to the Statute after its entry into force, on a confidential basis, whether it intends to make the declaration provided for in article 12, paragraph 3.
2. When a State lodges, or declares to the Registrar its intent to lodge, a declaration with the Registrar pursuant to article 12, paragraph 3, or when the Registrar acts pursuant to sub-rule 1, the Registrar shall inform the State concerned that the declaration under article 12, paragraph 3, has as a consequence the acceptance of jurisdiction with respect to the crimes referred to in article 5 of relevance to the situation and the provisions of Part 9, and any rules thereunder concerning States Parties, shall apply.'

The provision in the Rules was promoted by the Americans in an attempt to 'fix' what they considered to be perverse consequences of article 12 para. 3<sup>102</sup>. The United States argued that article 12 para. 3 would allow a Saddam Hussein to invoke the jurisdiction of the Court for crimes committed by the United States in Iraq, and yet prevent it from doing the same with atrocities committed by the regime against the people of the country<sup>103</sup>. The Rule means such a one-sided manipulation of the jurisdiction is impossible. Some supporters of the American position have taken the view that reciprocity flows automatically from the logic of a 'sensible reading' of article 12 para. 3 in any event, and that there is no need for a rule to clarify things<sup>104</sup>. Others have claimed that even with the rule 44, the problem persists. According to Jack Goldsmith,

'[t]his vague provision does not, as many have stated, guarantee that Article 12(3) parties will consent to jurisdiction for all crimes related to the consent. But even if it did, the Iraqs of the world could consent under Article 12(3) and simply not show up. Rule 44(3) improves the anomaly of Article 12(3), but does not fix it'<sup>105</sup>.

In any case, the Trial Chamber has noted that

'while States may choose to consent or not to the jurisdiction of the Court through declarations provided for in article 12(3) of the Statute, the scope of such declarations is predetermined by the ICC legal framework. Most notably rule 44 of the Rules explicitly limits the discretion of States in framing the situation that may be investigated by the Court. This rule mandates the Registrar to remind accepting States that "the declaration under article 12, paragraph 3, has as a consequence the acceptance of jurisdiction with respect to the crimes referred to in article 5 of relevance to the situation and the provisions of Part 9, and any rules thereunder concerning States Parties, shall apply" (emphasis added). Rule 44 of the Rules was adopted in order to ensure that States that chose to stay out of the treaty could not use the Court "opportunistically". Indeed, there were concerns that the wording of article 12(3) of the Statute, and specifically the reference to the acceptance of jurisdiction "with respect to the crime in question", would allow the Court to be used as a political tool by States not party to the Statute who could selectively accept the exercise of jurisdiction in respect of certain crimes or certain parties to a conflict'<sup>106</sup>.

Therefore, the Court has made it clear that when States lodge a declaration under para. 3 they cannot give the Court jurisdiction over certain crimes only<sup>107</sup>; rather, with regard to a precise 'situation', they may expressly stipulate in this sense, but always acting in compliance

<sup>102</sup> Scheffer (1999) 93 *AJIL* 17, 18–20.

<sup>103</sup> Scheffer (2001) *MillRev* 167 1, 8.

<sup>104</sup> Wedgwood (1999) 32 *CornellILJ* 535, 541 (1999).

<sup>105</sup> Goldsmith (2003) 70 *UChicagoLRev* 89, fn. 11.

<sup>106</sup> *Prosecutor v. Laurent Koudou Gbagbo*, No. ICC-02/11-01/11-212, Decision on the 'Corrigendum of the challenge to the jurisdiction of the International Criminal Court on the basis of articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute filed by the Defence for President Gbagbo (ICC-02/11-01/11-129)', Pre-Trial Chamber I, 15 August 2012, para. 59. See: Kaul, in: Cassese et al. (eds), *The Rome Statute of The International Criminal Court: A Commentary* (2002) 583, 616. Also: Bassiouni, (1999) 32 *CornellILJ* 443, 453–454; Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis and Integrated Text* (2005) 84–85.

<sup>107</sup> As for the crime of aggression, it is still unclear how article 12 para. 3 could reconcile with article 15bis para. 4 and the possibility of opting out. See Stahn (2010) 23 *LeidenJIL* 875, 880.



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with the legal framework provided by the ICC Statute<sup>108</sup>. Importantly, the Court still needs to investigate the exact content of such a framework<sup>109</sup>. In this respect, it seems that States' discretion might be limited to the sphere of the jurisdiction *ratione temporis*<sup>110</sup>. In particular, States might indicate a starting date or a specific situation for the entire duration of which the Court would have jurisdiction. Even in such cases, however, '[t]he relevant timeframe of the investigation, if authorised, will be determined by the Chamber on the basis of the Prosecutor's Request and the supporting materials, as well as the victims' representations under Article 15 of the Statute<sup>111</sup>'.

Moreover, it should be recalled that a declaration under article 12 para. 3 does not trigger the exercise of jurisdiction, and the Prosecutor is under no obligation with respect to article 53 of the Statute should he or she decide not to proceed<sup>112</sup>. Indeed, '[u]pon receipt of a referral or a declaration pursuant to article 12 para. 3, the Office will open a preliminary examination of the situation at hand. However, it should not be assumed that a referral or an article 12 para. 3 declaration will automatically lead to the opening of an investigation'<sup>113</sup>.

- 21 Declarations under article 12 para. 3 have been lodged on behalf of Côte d'Ivoire, Uganda, Palestine, Egypt, and Ukraine. Côte d'Ivoire signed the Rome Statute on 30 November 1998, but it only ratified it in February 2013. However, on 11 October 2011 Pre-Trial Chamber III authorised the Prosecutor to initiate an investigation with regard to the crimes allegedly committed in conjunction with the elections that took place in November 2010. The jurisdictional basis for such an investigation is a declaration that Côte d'Ivoire lodged on 18 April 2003<sup>114</sup>. Subsequently, Pre-Trial Chamber III broadened the period covered by the investigation, which at first had 28 November 2010 as its starting date, and extended it to those facts that have been unfolding since 19 September 2002, that is, the date indicated in the 2003 declaration<sup>115</sup>. This suggests that declarations lodged under article 12 para. 3 may have both a retroactive and a prospective application<sup>116</sup>. The possibility for a declaration to backdate the Court's jurisdiction with respect to the accepting State seems to find confirma-

<sup>108</sup> See *Prosecutor v. Laurent Koudou Gbagbo*, No. ICC-02/11-01/11-321, Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I on jurisdiction and stay of the proceedings, Appeals Chamber II, 12 December 2012, para. 84.

<sup>109</sup> *Ibid.*, fn 152.

<sup>110</sup> As for the jurisdiction *ratione materiae*, see *Prosecutor v. Laurent Koudou Gbagbo*, note 108, para. 59. Moreover, it is likely that the Court will deem contrary to the spirit of rule 44 any limitations to both the jurisdictions *ratione personae* and *ratione loci*. Compare with Williams and Schabas in the Second edition of this Commentary (2007) 559.

<sup>111</sup> *Situation in the Republic of Cote D'Ivoire*, No. ICC-02/11-14-Corr, Corrigendum to 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire', Pre-Trial Chamber III, 15 November 2011, para. 15.

<sup>112</sup> *Prosecutor v. Laurent Koudou Gbagbo*, note 108, para. 57. See also OTP, Policy Paper on Preliminary Examinations, November 2013, fn. 25; Müller (2010) 8 *JICJ* 1267, 1278.

<sup>113</sup> OTP, Policy Paper on Preliminary Examinations, November 2013, para. 76.

<sup>114</sup> Republic of Côte d'Ivoire, Declaration Accepting the Jurisdiction of the International Criminal Court, 18 April 2003. See *Situation in the Republic of Côte D'Ivoire*, No. ICC-02/11-14, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, Pre-Trial Chamber III, 3 October 2011, para. 15. Note that subsequent to the 2003 declaration, Côte d'Ivoire submitted two letters, in 2010 and 2011. However, both Pre-Trial Chamber I and Appeals Chamber II have made it clear that the Court's jurisdiction is only determined by the first document. See *Prosecutor v. Laurent Koudou Gbagbo*, note 108, para. 66; *Prosecutor V. Laurent Koudou Gbagbo*, ICC-02/11-01/11-321, Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I on jurisdiction and stay of the proceedings, Appeals Chamber II, 12 December 2012, para. 92. Compare with *e.g. Prosecutor v. Laurent Koudou Gbagbo*, No. ICC-02/11-01/11-9-Red, Public redacted version of 'Decision on the Prosecutor's Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo', Pre-Trial Chamber III, 30 November 2011, para. 12.

<sup>115</sup> *Situation in the Republic of Côte D'Ivoire*, No. ICC-02/11-36, Decision on the 'Prosecution's provision of further information regarding potentially relevant crimes committed between 2002 and 2010', Pre-Trial Chamber III, 22 February 2012, para. 37. See Republic of Côte d'Ivoire, Declaration Accepting the Jurisdiction of the International Criminal Court, 18 April 2003. Compare with *Situation in the Republic of Côte D'Ivoire*, note 111, para. 212.

<sup>116</sup> See Zimmermann (2013)11 *JICJ* 303, 311.

tion in the *travaux préparatoires* and in the declaration lodged with the Registrar by Uganda<sup>117</sup>. In support of his application for arrest warrants of leaders of the Lord's Resistance Army, the Prosecutor included a 'Declaration on Temporal Jurisdiction', dated 27 February 2004, whereby the Republic of Uganda accepted the exercise of the Court's jurisdiction for crimes committed following the entry into force of the Statute on 1 July 2002. Because Uganda ratified the Rome Statute on 14 June 2002, it only entered into force with respect to Uganda on 1 September 2002, two months after the entry into force of the Statute itself. As indicated by the Prosecutor in a letter to the President of the Court, article 12 para. 3 was indeed the authority for Uganda's 'Declaration of Temporal Jurisdiction'<sup>118</sup>. Thus, both a State Party and a non-party State can, no matter when a declaration under article 12 para. 3 is lodged, backdate the Court's jurisdiction in its regard to any date after 1 July 2002. Then, it would be up to the Court to judge whether such an extension would be compatible with 'the ICC legal framework'<sup>119</sup>. In this respect, it seems that the Court is likely to uphold a backdated jurisdiction regarding a single, ongoing situation of crisis<sup>120</sup>. These considerations maybe relevant to the debate related to the declaration lodged on 23 January 2009 by Ali Khashan, acting as Minister of Justice of the Government of Palestine. Through such a declaration the Palestinian Authority accepted the Court's jurisdiction for 'acts committed on the territory of Palestine since 1 July 2002'. Following a preliminary examination, on 3 April 2012 the Office of the Prosecutor issued a decision according to which:

'The Office could in the future consider allegations of crimes committed in Palestine, should competent organs of the United Nations or eventually the Assembly of States Parties resolve the legal issue relevant to an assessment of article 12 or should the Security Council, in accordance with article 13(b), make a referral providing jurisdiction'<sup>121</sup>.

Indeed,

'In interpreting and applying article 12 of the Rome Statute, the Office has assessed that it is for the relevant bodies at the United Nations or the Assembly of States Parties to make the legal determination whether Palestine qualifies as a State for the purpose of acceding to the Rome Statute and thereby enabling the exercise of jurisdiction by the Court under article 12(1). The Rome Statute provides no authority for the Office of the Prosecutor to adopt a method to define the term "State" under article 12(3) which would be at variance with that established for the purpose of article 12(1)<sup>122</sup>.

Subsequently, on 29 November 2012 the General Assembly of the United Nations accorded Palestine the status of 'non-member observer State'<sup>123</sup>. Also, on 8 December 2014 for the very first time, Palestine was invited to participate in the ASP as an observer State<sup>124</sup>. On 1 January 2015 Mahmoud Abbas, President of the State of Palestine, lodged a declaration under article 12 para. 3 with the Registrar, whereby accepting the Court's jurisdiction over the crimes allegedly committed within the occupied Palestinian territory, including East Jerusalem, since 13 June 2014<sup>125</sup>. According to such a declaration, this is 'without prejudice to any other declaration the State of Palestine may decide to lodge in the future'. The following day, Palestine also transmitted to the United Nations documents relating to its

<sup>117</sup> Wills (2014)12 *JICJ* 407, 415.

<sup>118</sup> The Prosecutor, Luis Moreno Ocampo, Letter to the President of the International Criminal Court, 17 June 2004, ICC-01/04-1.

<sup>119</sup> See *Prosecutor v. Laurent Koudou Gbagbo*, note 108, para. 59.

<sup>120</sup> *Ibid.*, para. 63.

<sup>121</sup> OTP, Decision on the Situation in Palestine, 3 April 2012, para. 8.

<sup>122</sup> OTP, Decision on the Situation in Palestine, 3 April 2012, para. 6.

<sup>123</sup> UN Doc. A/RES/67/19 (29 November 2012).

<sup>124</sup> See e.g. Sengupta (8 December 2014) *NYTimes* <<http://www.nytimes.com/2014/12/09/world/middleeast/palestinians-become-observers-at-meeting-on-international-criminal-court.html>> accessed 13 December 2014.

<sup>125</sup> Palestine, Declaration Accepting the Jurisdiction of the International Criminal Court, 31 December 2014; ICC, ICC-CPI-20150105-PR1080, Palestine declares acceptance of ICC jurisdiction since 13 June 2014, 5 January 2015; ASP, ICC-ASP-20150107-PR1082, The State of Palestine accedes to the Rome Statute, 7 January 2015.

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accession to the Statute<sup>126</sup>. A few days after the UN Secretary General's acceptance of Palestine's accession to the Statute, on 16 January 2015, the Office of the Prosecutor opened a preliminary examination of the situation in Palestine. Since, in relation to such a state, the Statute was supposed to enter into force only in April 2015, this decision must rely on the declaration lodged pursuant to article 12 para. 3.<sup>127</sup>

On 13 December 2013, lawyers acting on behalf of the Egyptian Freedom and Justice Party sought to accept the Court's jurisdiction pursuant to article 12 para. 3 with respect to alleged crimes committed on the territory of the State of Egypt from 1 June 2013. However, the Office of the Prosecutor concluded that as a matter of international law the applicants lacked the *locus standi* to accept the Court's jurisdiction on behalf of Egypt as they were not in possession of 'full powers'. By applying the legal test of 'effective control,' the Office of the Prosecutor concluded that the head of the Freedom and Justice Party, Dr Morsi, had no longer the legal capacity to incur new international legal obligations on behalf of the State of Egypt. Therefore, on 25 April 2014 the Registrar communicated to the applicants the Prosecutor's decision to disregard the declaration<sup>128</sup>.

Following a declaration lodged with the Registrar on 9 April 2014 by the then acting President of Ukraine, Oleksandr Turchynov<sup>129</sup>, the Office of the Prosecutor announced the initiation of a preliminary examination concerning Ukraine. The declaration in question, which refers *expressis verbis* to a Parliamentary act (*i. e.*, the Declaration of Verkhovna Rada of Ukraine), accepts the Court's jurisdiction over alleged crimes committed within Ukraine's territory from 21 November 2013 to 22 February 2014. As for the compatibility of the Declaration of Verkhovna Rada of Ukraine with the 'legal framework of the Statute', a number of issues might need to be taken into consideration. In particular, such an act makes reference to a specific category of crimes (crimes against humanity), limits the Court's jurisdiction over those senior officials who were at office at the relevant time and, most importantly, indicates the names of Yanukovych Viktor Fedorovych, ex President of Ukraine, Pshonka Viktor Pavlovych, ex Prosecutor-General of Ukraine, and Zakharchenko Vitalii Yuriiiovych, ex Minister of Internal Affairs of Ukraine. Thus, apart from providing a limited temporal jurisdiction, it seems that Ukraine has attempted to restrict the Court's *ratione materiae* and *ratione personae* jurisdiction. In this respect, should the Prosecutor decide to ask for an authorization to initiate an investigation, he or she might consider that by lodging such a declaration Ukraine has agreed to comply with the relevant provisions of the Statute, such as article 5. Indeed, the Prosecutor has already deemed that he is not bound by the wording of a State referral when it is contrary to the principles of the Statute<sup>130</sup>; therefore, there is no reason to believe that he or she would act in a different way in case of a *proprio motu* investigation following a declaration under article 12 para. 3. Rather, it is likely that the Prosecutor will treat this as a mere tool through which a State not Party has conferred jurisdiction to the Court over a 'situation'.

<sup>126</sup> ICC, ICC-CPI-20150105-PR1080, Palestine declares acceptance of ICC jurisdiction since 13 June 2014, 5 January 2015.

<sup>127</sup> ICC, ICC-OTP-20150116-PR1083, The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine, 16 January 2015.

<sup>128</sup> OTP, ICC-OTP-20140508-PR1003, The determination of the Office of the Prosecutor on the communication received in relation to Egypt, 8 May 2014. See also *Request Under Regulation 46(3) of the Regulations of the Court*, No. ICC-RoC46(3)-01/14-3, Decision on the 'Request for review of the Prosecutor's decision of 23 April 2014 not to open a Preliminary Examination concerning alleged crimes committed in the Arab Republic of Egypt, and the Registrar's Decision of 25 April 2014', Pre-Trial Chamber II, 12 September 2014.

<sup>129</sup> Ukraine, Declaration Accepting the Jurisdiction of the International Criminal Court, 9 April 2014.

<sup>130</sup> The Prosecutor, Luis Moreno Ocampo, Letter to the President of the International Criminal Court, 17 June 2004, ICC-01/04-1. Note: *Prosecutor v. Calliste Mbarushimana*, ICC-01/04-01/10-451, Decision on the 'Defence Challenge to the Jurisdiction of the Court', Pre-Trial Chamber I, 26 October 2011, ft 41.

### C. Conclusions

Article 12 is a product of compromise supported by the overwhelming majority of States. 22 It endeavours to satisfy the many interests that were evidenced at the Rome Conference and before. It is far from perfect but was all that was possible at the time. At the time of its adoption, it looked like a serious gap, to the extent that the acceptance of the Statute by the custodial State does not act as a precondition for the exercise of jurisdiction by the ICC<sup>131</sup>. Many believed that it would result in atrocities going unpunished because the territorial State or State of nationality would not be parties or would not consent *ad hoc*, and the UN Security Council would fail to act. The First Edition of this Commentary, published in 1999, said that 'in all probability it may be assumed that the States likely to be the locus of such crimes or whose nationals are suspect will not be among the first to ratify or otherwise agree to be bound by the Statute. Initially at least once the ICC is operative, reliance will have to be on the Security Council'<sup>132</sup>. Many other writers were sharply critical<sup>133</sup>.

That projection was probably too conservative. Many of the first countries to ratify the Statute were themselves the scene of armed conflict, with the attendant atrocities, war crimes and other acts falling within the jurisdiction of the Court. They include, for example, Fiji, Sierra Leone, Colombia, Uganda, Democratic Republic of Congo, Afghanistan, Cambodia, Macedonia and Burundi. These ratifications were unexpected, particularly by those who insisted that the Court should be premised on universal jurisdiction because conflict-afflicted States, primarily in the South, would never join. Obviously, they tend to disprove the arguments that were advanced at Rome by those who were critical of the compromise on jurisdiction in article 12. They suggest that States are ratifying the Statute precisely because they view the Court as a promising and realistic mechanism capable of addressing civil conflict, human rights abuses and war. This is entirely consistent, of course, with the logic of those who have argued over the years that international justice contributes to peace and security.

Indeed, we might ask, in hindsight, whether sixty ratifications would have been achieved so quickly had the broad universal jurisdiction proposal actually been adopted. The problem with the universal jurisdiction approach is that it leaves little incentive for States to join the Court. One way or another, whether or not States ratify the Statute, if the Court is based on universal jurisdiction, crimes committed on their territory are subject to its jurisdiction in any case. On the other hand, under the current regime as set out in article 12, States must ratify the Statute if they wish to send a message of deterrence that war crimes, crimes against humanity, genocide, and possibly aggression in the near future will not go unpunished on their territories. This they seem to be doing, in ever-increasing numbers. In other words, far from dooming the Court to inactivity, the limited jurisdictional scheme of article 12 would appear to have contributed to the rate of ratification.

<sup>131</sup> Lawyers Committee for Hum. Rts., *The Rome Treaty for an ICC: A Brief Summary of the Main Issues*, 2 ICC Briefing Series. 1.

<sup>132</sup> See Williams on Article 12 in the first edition of this Commentary (1999) 341.

<sup>133</sup> Kaul, in: Cassese at al. (eds), *The Rome Statute of The International Criminal Court: A Commentary* (2002) 583, 616. Also, Glasius, *The International Criminal Court* (2006) 61–76.