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An Analysis of the Content of Article 12 of the Rome Statute and the Relationship Between Article 12 and Article 98

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Abstract: This article explores the dilemma for the International Criminal Court of its jurisdiction and cooperation with non-parties, combining normative and empirical analyses. The complementary jurisdiction under Article 12 of the Rome Statute plays a "carrot and stick" role, and the voluntary declaration mechanism of non-parties corresponds with the international law principles, while the vague wording of the text contributes to a certain degree of interpretation, suggesting the Court to adopt a flexible and cautious approach.From the provisional consensual nature between Article 12 and Article 98, the receiving state should be obliged to collaborate with the ICC under international customary law, but in practice, third parties often seek exemptions from the Security Council and conclude bilateral agreements to substantively limit the ICC's jurisdictional cooperation in enforcement under Article 98. Behind the dilemma of jurisdiction and enforcement is the structural contradiction between the demand for "ending impunity" under the humanistic perspective and the respect for state sovereignty under the principle of complementarity. States shall define legal circumvention, while the ICC should improve the initiation mechanism rather than arbitrarily expanding jurisdictional interpretations.

Keywords: jurisdiction, international criminal court, non-parties, international criminal law

1. Introduction

In addition to the systematic monograph on the study of the jurisdiction of the International Criminal Court in specific context, Chinese literature rarely involve the hidden trouble of execution accordance to Article 98, not mention the special linkage between the two articles. Through a large number of foreign literature, the author tries to analyze the difficulties of jurisdiction and enforcement from the perspective of enforcing the jurisdiction of non-parties (Article 12) and the cooperation of enforcement (Article 98), and strives to explore the more harmonious relationship between the jurisdiction and enforcement of non-parties.

As for the context of this article, the first part highlights the significance of the International Criminal Court's jurisdiction; the second part analyzes the connotation of Articles 12 and 98 of the Rome Statute and the relationship between the two; the third part summarizes the structure of international criminal jurisdiction from the perspective of individuality and state sovereignty and finally makes constructive suggestions.

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2. Presentation of the Problem - International Criminal Law in the Context of the Russian-Ukrainian Jurisdictional Impasse

The Russian-Ukrainian jurisdictional impasse involves national sovereignty, territorial integrity, human rights, war crimes, international law. The dilemma not only triggered series of challenges to the international criminal law norms and practice such as occupation, use of force, military intervention in foreign affairs and conflict resolution, but triggered the discussion concerning international criminal jurisdiction, cooperation, judicial procedures and assistance. In general, this embodies the super regional influence of a single country.

Focusing on jurisdiction, international cooperation as well as judicial assistance, it is necessary to explore the jurisdiction of the International Criminal Court (the "ICC"). The Court has a multi-level jurisdiction system, as its investigation and prosecution is designed to function as a supplement to national jurisdiction of war crimes, genocide crimes, crimes against humanity, to ensure that international criminals will not get free without judicial remedies at the national level [1]. ICC also investigated and prosecuted individuals committing international crimes to get fair court trial and due process guarantee. In addition, cases of war crimes require the cooperation and assistance of the international community to obtain evidence and track criminal suspects, and the Court's jurisdiction over non-parties and cooperation with them are worth probing.

3. The Content and Relationship Between the Jurisdiction and Enforcement Provisions from the Perspective of Non-parties

3.1. The Content of Article 12 of the Rome Statute

3.1.1. The Overview of the Jurisdictional Regime of Article 12

As the ICC with the legal personality of an international organization is independent of the United Nations, its main jurisdiction is limited to the crimes of genocide, crimes against humanity, war crimes committed by the Rome Statute (the "Statute") after it came into force on 1 July 2002 [2].

Article 12, providing for the enforcement of jurisdiction, has an inherent correlation between the three clauses. The first paragraph embodies the character of the automatic jurisdiction of the Court, combining "becomes a Party" and "accepts the jurisdiction of the Court". The second paragraph provides for the specific conditions for exercising jurisdiction, but applies to the two initiating mechanisms of the State party or the prosecutor of the investigation, which is, in essence, an extension of territorial jurisdiction. In terms of extension, the territorial foundation is the main jurisdiction link recognized by all domestic legal systems and international conventions concerning genocide, torture, hostage taking and so on, and it is the most solid foundation in international law. It is reasonable to speculate that the non-parties under the third paragraph is included in this paragraph, implying the intention of the ICC to expand its jurisdiction through expanded interpretation, but in practice this expanded interpretation is opposed by the five permanent members. The third paragraph provides for a mechanism for voluntary declarations of non-contracting parties, where non-parties may accept the ICC's jurisdiction over a particular crime by submitting statements. The last one is a supplement to the first two paragraphs. On the one hand, it expands the jurisdiction while entitles non-parties with self-determination. The basis for such jurisdiction is not from the statute, but from a compulsory action under the Council's powers under Chapter VII of the UN Charter. Among them, the second paragraphs and the third one presuppose certain requirements concerning the venue of crimes or the nationality of the accused offender, not only to the state status of the entity that made the declaration, but also to the extension of such national status, including personal jurisdiction and territorial jurisdiction [3].

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From the perspective of theoretical interpretation, it is necessary to clarify the lawfulness and legitimacy of Article 12. First, the statute does not violate the principle of "relative effectiveness of the treaty", thus exercising jurisdiction by the ICC on non-parties is not equal to create obligations for non-parties; second, the enforcement of jurisdiction by the ICC does not equal to the denial of national sovereignty of non-parties. Based on the supplementary principle, the Court provides further preconditions for the exercise of jurisdiction only when the non-parties are "unwilling" or "cannot" jurisdiction. When the ICC exercises jurisdiction under these provisions, the non-parties are not obliged to assist the ICC; finally, the ICC serves the interests of a political institution, but rather to punish the most serious international crimes and uphold international justice [4].

3.1.2. The Normative Analysis of Paragraph 3 of Article 12

Non-parties, under the third paragraph of Article 12, through the mechanism of deferring to the jurisdiction to the Secretary, agree to cooperate with the ICC obligingly, otherwise it will not. The statement extends the individual, time and territorial scope of the jurisdiction to criminal acts committed on the territory of non-contracting parties. Such declarations enable the prosecutor to conduct an investigation under Article 15 into crimes committed in the territory of a non-party, and the Court will be able to enforce jurisdiction over crimes committed, or imposed by its nationals within the territory of that State upon making such declarations [5].

Such declaration of non-parties can be classified further: first, some non-parties submitted domestic crime problems to the ICC statement to accept jurisdiction for international judicial support, such as the situation in Uganda, and the not-accepted Egypt declaration. These differences are caused not only due to different factual circumstances, but also by uncertainties in the expression of the legal text; second, there exists another non-party that voluntarily submit the declaration, such as a Palestinian declaration to ask ICC to investigate the crimes of Israeli nationals on Palestinian territory.

Freeland Steven (Freeland) sought to remedy the alleged procedural loophole by treating a portion of the third paragraph of Article 12 as a surrender, as the pre-trial division may lack information at the early stages of litigation and the possible lack of discretion to review the prosecutor not to proceed. Moreover, Freeland argued that the qualifications of the declaration should be "determined case by case" while considering the circumstances that led to a particular declaration [6].

However, the author thinks this proposition is innovative and worth further analyzing. The goal of Freeland is simple and legal: to ensure that the preliminary hearing chamber is formed immediately after a declaration under the third paragraph of Article 12, so that its role as guardian ad litem can be exercised from an early stage. However, the author wonders whether it is necessary to take such a risk to achieve Freeland's goal. Two assumptions warrant revisiting, whether the first paragraph, as Freeland claims, is indeed a possible lack of "judicial oversight", and whether a case-by-case approach to the declaration of the third paragraph is the appropriate remedy for these issues. This aim should be considered at a smaller cost rather than a case-by-case approach.

The author suggests taking a flexible and prudent approach concerning the last paragraph of Article 12.

The flexibility means that the non-party's declaration mechanism is likely to be used more frequently than originally assumed, and the ICC's legal texts may cause uncertainty about the exact course of procedure to be followed after the declaration.

It is prudent that the office of the prosecutor must carefully "manage" the declaration (and surrender) mechanisms under the Statute, such as the scope of the declaration and the proposed investigation. The initiative of the prosecutor is an important tool for "putting an end to impunity", which is one of the primary goals of the Statute and cannot be ignored. Non-parties have the right to delay the investigation and enquire the jurisdiction. Similarly, the declaration mechanism should not be used as a means to enable non-parties for political, administrative or financial reasons to attempt

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to pass on the general international law obligation of "exercising jurisdiction over persons committing international crimes" to the ICC [7].

In short, Article 12 is the best way to fulfill state obligations under customary international law. It does not breach Article 34 of the Vienna Convention on the Law of the Treaties("VCLT"), but is consistent with Article 38 of the VCLT, and stipulates obligations based on customary international law that include elements of national practice and legal conviction. Through the process and negotiations of Article 12, the Roman Conference reaffirmed the Nuremberg Principles, the principles of the Convention on the Crime of Genocide, and the universal jurisdiction over the three core crimes. As a further compromise, Article 12 did not accept the Korean proposal, largely reducing or even excluding the opportunity for the courts to exercise jurisdiction. However, instead of abandoning the entire programme on the statute, most States choose to accept Article 12 as the lowest means of complying with customary international law, where those guilty should be personally liable and punished [8].

The author believes that, on the one hand the declaration made by non-parties always promote the positive approach of the basic principles of the Rome Statute, in accordance with the core appeal of ending impunity; on the other hand, the ICC always has the inherent power to reject declarations it considers as an abuse, thus limiting the extent to which the receiving State may use this mechanism for political purposes.

3.2. The Content of Article 98 of the Rome Statute

Article 98 constitutes a State's duty to coordinate, namely "cooperation with respect to waiver of immunity and consent to surrender". The first paragraph provides limits on the ICC seeking surrender or assistance, that is, the requested State shall not breach its obligations to a third State under relevant international law. In fact, the principle of individual's responsibility concerning international crimes -- the cornerstone of international criminal law and the legal basis of the Statute, is a compromise on the principle of jurisdictional immunity. Besides, the second paragraph is to dispel doubts of parties that the ICC may affect its other obligations under international law, as there exists a special case of real competition: an overlap between the Court's surrender request and the existing obligation of the requested country to extradite the same person under an international agreement with a third country.

As the ICC has the right to prosecute and trial military personnel, States concerned worry that the existence of Article 98 would place an excessive burden on military discretion. This is why the second paragraph of Article 98 may partly respect agreements such as SOFA, which are drafted and adopted to promote the military action of one country on the territory of another. These military agreements are supposed to ensure the military personnel of a State are protected from standards and procedures that foreign courts may be biased or unfamiliar with, rather than to protect them from jurisdictions against crimes.

It can be said that different countries have different interpretations of Article 98 based on their own interests and positions. Despite the controversy, for the ICC, it is an important step toward its vision of a harmonious international community dedicated to stop and punish core crimes. The supplementary jurisdiction to strengthen the international criminal responsibility triggers the ICC to play the role of "carrot and stick": attracting national court to exercise its domestic and universal jurisdiction, and punish the most serious international crimes; meanwhile, when the national court is not willing or unable to exercise jurisdiction, surrender the suspect to the ICC may be an alternative.

3.3. The Linkage and the Dilemma of Application Between Article 12 and 98

The last paragraph of Article 12 refers to non-parties and, after voluntarily submitting to the jurisdiction, the receiving State is obliged to work together with the Court in accordance with Part IX

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of the statute. This establishes a natural link between Articles 12 and 98. In other words, the expectation of "self-submissions" is that non-parties agreeing to accept court precedent are prepared to cooperate with the courts in the important matters of the production and protection of evidence, protecting and providing access to victims and potential witnesses. Since the declaration involves the nationals and the territory of a country, it is even more important for the recipient State to provide such cooperation to the courts.

The United Nations Security Council resolution 1970 (2011) on Libya "surrender to the International Criminal Court" states that "while confirming that non-parties do not burden the obligations under the Statute. States and relevant regional organizations and other international organizations are urged to fully coordinate with the courts and prosecutors." This shows that out of respect for non-parties, the support of non-parties to the ICC is voluntary rather than an obligation. The cooperation between parties and the ICC remains the "only "treaty obligation, because the Statute cannot break the effectiveness of the VCLT in terms of the number of members, the order of conclusion or the formation of international habits.

However, the author reckons that from the temporary conformity of the Court jurisdiction under the third paragraph of Article 12 and the obligations under Part IX of the Statute, the receiving State will "waive" its sovereign rights (and accept its obligations under non-contracting treaties) only if it agrees to do so. This is also aligned with customary international law relating to third parties' acceptance of their treaty obligations as non-parties.

Further, as part of the declaration process, the receiving State must cooperate with the Court obligingly, which is necessary to promote effective operation of the Court, and the recipient State will usually be willing to provide such cooperation for appropriate action after the declaration. However, in order to smooth the procedure of the Court, the receiving State shall be legally bound to collaborate with the Court under the conditions specified in the statute. In practice, therefore, there are two situations that hinder the cooperation of non-parties according to Article 98. The first is to seek an exemption from the UN Security Council, that is, the non-party among the five permanent members can prevent their nationals from submitting their cases to the ICC by exercising their veto power. This starting mechanism has a congenital defect. The second is that the countries concerned have concluded bilateral immunity agreements, but whether they have the validity of international law is doubtful.

The Court's jurisdiction over the Sudan-Darfur situation is that the Security Council submit the situation of non-parties. The UN Charter, Security Council resolutions and the second paragraph of Article 13 altogether form a logical chain for exercising jurisdiction over non-parties. The legitimacy of the starting mechanism is: There is evidence that Sudan's domestic judicial system completely collapse or actually collapse or does not exist, and there exists improper, not independent, unfair, or deferred proceedings etc.. Accordingly, from the perspective of the international community and equality, even if Sudan is the non-party, the ICC supplementary jurisdiction shall be started to ensure that local human rights get universal attention and protection. This is the first non-party case submitted to the ICC since it began. However, the judicial progress is difficult due to the consent of relevant countries; even if the ICC successfully exercises the jurisdiction, the practical effect may not be expected, and the actual jurisdiction of the ICC will not be synchronized by the expansive interpretation.

Prosecutors are entitled to enforce territorial jurisdiction under Article 12 against non-parties [9]. The self-adjudication of the Court shall be lawful and legitimate, such as imposing restrictions on the functions of the pre-trial chamber as well as accept the review of the appellate body. Furthermore, looking into the Rohingya crisis, the diplomatic isolation of western powerful countries to Myanmar, the sanctions against its senior military officers and the prosecution of its chiefs are also part of the crisis. In general, there exists a subtle seesaw between the explanatory space left in the text and the

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humanistic center. Moreover, it is worth investigating whether the inclusion scope of dependency can be expanded at the level of organizational structure and time.

4. The Underlying Logic and Overarching Design of the Jurisdiction of the International Criminal Court

4.1. The Underlying Logic of International Criminal Jurisdiction System

The axiology of international criminal law is nothing more than summarizing and submitting to the history and reality concerning the international criminal justice. In progress, there exist multiple jurisdictions and the overlapping jurisdiction of international courts as well as tribunals. In a way, this also means that the international community has more selectivity to punish international crimes in the future.

In practice, the Security Council has established the tribunal in order to fully cooperate with non-parties, while the ICC has difficulty in enforcing jurisdiction over non-contracting parties without the "plenipotentiary" of the Council. Because the statute only powers the ICC to authorize such surrenders, the Council does not have to create a new court every time it wishes to exercise its powers in this manner.

All comes down to the underlying logic of the construction of the ICC.

Comparing the differences between the ICC and other jurisdiction mechanisms, it is first clear that it is not a United Nations agency and has no relatively strong binding force on the non-parties than the Security Council. Besides, the character of ICC jurisdiction is to encourage States parties to execute supplementary jurisdiction. The ICC has the right to prosecute the three stipulated crimes. However, it will not be able to pursue the crimes committed in the past or the cases being handled by the national courts.

In the author's view, although the above arguments are put forward according to international law, they have fundamental defects. In essence, it represents a powerful claim of the appropriate distribution of authority in the emerging international criminal jurisdiction system, full of political implication.

4.2. The Overarching Design - The Balance Between Humanization and Sovereignty

As mentioned above, the Sudan-Darfur situation and the Bangladesh-Myanmar situation demonstrate the plight of jurisdiction rules over non-parties and are unwilling to cooperate in their implementation in accordance with Article 98, after submission according to Article 12. Comparing the ICC's jurisdiction over different situations and excluding the influence of special parties, the following factors interfere with the independent jurisdiction of the Court: first, the political standards of the courts to some extent shall follow the principle of "eliminating guilt without punishment", and the cooperation of the third parties under the relativity of the treaty, such as carrying out the arrest warrant. When a State is involved in the situation, there is a conflict between national interests and human rights protection, that is, the subtle game between national sovereignty and the humanistic position of international law.

In short, the author supposes that the appeal for the "the end of guilt without punishment" under the humanistic view and the respect for national sovereignty under the supplementary principle have created the dilemma of jurisdiction and implementation under Article 12 and Article 98. Although scholars at home and abroad have discussed the responsibility of protection, the relationship between national sovereignty, the consistency, the legitimacy of the use of force, combined with Libya, Syria and other cases on the inner mechanism of the perspective, they seldom paid attention to the diversity of humanistic appeal implementation means. It is worth noting that most of these countries are the

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target countries of western countries' military intervention, and scholars cannot explain the factors that lead to the different measures of the international community.

From a national perspective, the exercise of state jurisdiction in good faith to investigate as well as prosecute serious crimes is both necessary and encouraged, and legal space shall be defined to circumvent the jurisdiction over nationals of non-parties at the international level. In practice, since it may pose a certain threat to national security and sovereignty when enforcing the target of punishing crimes, States should improve their domestic legal system and legally evade the international jurisdiction, which to some extent is conducive to the practice of domestic justice by sovereign States. Therefore, not only the core international crimes within the jurisdiction scope of the Court should be clearly stipulated in the domestic criminal law, but also the principle of due process should be recognized under domestic criminal justice system.

From the perspective of the ICC, the resolution submitted by the startup mechanism shall be improved. As the Security Council, based on the aim of Chapter 7 of UN Charter, is entitled to exercise power including canceling the cooperation between the State and the ICC, arresting and surrendering fugitives, and canceling the state heads of state immunity, etc.. Moreover, the ICC shall take independent and effective trials to attract non-parties to ratify the Rome Statute, rather than arbitrarily expand the jurisdictional interpretation. Otherwise, the structural contradiction between Articles 12 and 98 will aggravate.

5. Conclusions

The ICC constitutes a unique and compelling compromise between national legal traditions and international principles [10]. The establishment of the ICC is of great significance in the overall diffuse evolution of international criminal justice. Behind disputes over the structure and scope of jurisdiction are different political positions, and even the game between international humanism and the core demands of national sovereignty. It is therefore understandable why the provisions of the statute and other texts of the ICC are vague and lead to a series of unclear interpretations. The same is true of the declaration mechanism made by non-parties under the third paragraph of Article 12.

From the temporary compatibility between Article 12 and Article 98, as part of the declaration procedure, the receiving State shall be obligated to collaborate with the Court under the international customary law. However in fact, out of concerns about military discretion, the conclusion of the cooperation substantially limits the jurisdiction of the courts under Article 98.

Thus, the structural contradictions between Article 12 and Article 98 is difficult to resolve. Although the jurisdiction under Article 12 is interpreted to be arbitrarily expanded, the expansion of the pre-trial chamber's jurisdiction will not be accompanied by a parallel increase in the level of third-party cooperation with the ICC. The key is the the underlying logic of the ICC is different from other jurisdiction mechanism.

The author makes constructive suggestions from the national and international levels. All States should define the legal evasion space and improve the domestic jurisdiction system; Meanwhile, the ICC should improve the initiation mechanism, especially the Security Council rather than expand the jurisdiction arbitrarily. Moreover, the ICC is expected to attract non-parties to ratify the Rome Statute with the independence and effectiveness of the judicial work.

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