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Hello, this is an introductory video on article 12 of the Rome Statute. This will be kept quite general in its scope given the limited time. Of course, for more details, a review of the relevant provisions throughout these videos, insights can be gained of course from the Triffterer-Ambos, Third Edition of the Rome Statute, and other such texts.

Article 12 is often referred to as one of the most controversial provisions in the Statute. Undoubtedly, you have heard that phrase used throughout these different videos from different commentators. But, for sure, article 12 represented one of those core issues on which the entire edifice of the Rome Statute depended upon. Basically, how would the Court exercise its jurisdiction? What will be the basis upon which this jurisdiction will be triggered? So, the entire treaty framework of the Statute's application hinged largely on this particular issue which ended up being resolved in the form seen in article 12, in terms of setting out those pre-conditions to the exercise of jurisdiction.

If you are interested to know the background, the first draft that came up from the International Law Commission, 1994, foresaw quite a limited, state centric set of parameters for the exercise of the Court's jurisdiction. This was largely one that was premised upon the general notion of state consent, which underlies the general approach of the ILC towards the Statute; and the Court being a facility for states, fundamentally, as well as for the Security Council. So, largely the idea that was set out in the Oslo draft was that for genocide, jurisdiction would become automatic. It was a notion of inherent jurisdiction. Once you become a State Party, you immediately accept the exercise of jurisdiction in relation to genocide, given its particular status as the crime of crimes, as so referred in the commentary of the ILC. But in relation to the other crimes and the ILC Statute foresaw a range of different crimes, including an un-enumerated list of treaty crimes, states when joining the Statute could then opt in, could confirm their acceptance in relation to particular crimes.

So, when the negotiation started for the drafting of the Statute itself among states, very early on this become a key battleground, in terms of division of some to retain this highly state centric and Security Council controled Court; limiting jurisdiction on the basis of state consent, given particularly by the state of nationality of the accused person, [...] or the state on whose territory the crime occurred, etc. And others, who argued - or other states that took the position - that the Court should enjoy a much broader basis for exercise of jurisdiction that was not tied to the consent of a range of particular states. The greater the range of states that need to provide consent,

obviously, the more difficult and cumbersome the procedure would become for activating the Court's jurisdiction.

And so, in this broad spectrum, on the one side, in terms of the most restrictive view, particularly pronounced by the United States who was insisting that jurisdiction really be on the basis of the dual consent, at the minimum, of the state on whose territory the crime occurred as well as the state of nationality of the accused person. And up until the final vote indeed, in Rome, this was the position tabled by the United States.

And then at the other extreme end of the spectrum, [was] a proposal by Germany that jurisdiction be granted to the Court on the basis of universality. The argument put forward by Germany - which gained support from some, but from others was seen as being too expansive - was that, Germany's argument was that: If states can already individually exercise jurisdiction with a basis of universality - meaning that these crimes are condemned by the international community as a whole, all states have an interest in their repression, and even states that don't have a direct link to the crime (meaning that there is no nexus in terms of the crimes occurring on their territory, or against their nationals, or the accused persons being the nationals) - on the basis of universal jurisdiction, given that states can individually already do this, that the ICC should not be in a weaker position to the states.

An option that sought to provide an alternative to the universal jurisdiction notion of Germany was one offered by South Korea. It was, in many ways, a variation along similar lines, but the proposal sought to specify which states particularly must have provided jurisdiction for the Court to be able to proceed. So, South Korea set out a list of four states, any of whom so listed in the alternative, needed to have provided jurisdictional competence to the Court by becoming State Parties in order for the court to exercise jurisdiction. These were [1] the state on whose territory the crime occurred; or [2] the state of nationality of the accused; or [3] the state of nationality of the victim, passive personality jurisdiction; [4] or the state in whose custody the person was, the custodial state. There were a number of other proposals in between, but basically until the very last week of the negotiations in Rome, this issue remained unresolved - this fundamental question upon which the entire machinery of the Court was to be brought into being.

Really, it was only until, indeed the eve of the negotiations, when the Bureau, as part of the final package - and you will have heard about references to the final package throughout these videos, no doubt - the Bureau, unable to resolve the different positions throughout the Statute (there were so many bracketed options that were left in different provisions of the Statute that had been unresolved during the diplomatic process, negotiating process), that the Bureau sought to make its own proposal and presented this as a package to States participating in negotiations in Rome as a take it or leave it set of proposals. By doing so, of course, they raised the stakes in terms of consequences because the consequences of not accepting the package would mean that the negotiation would have broken down, and the unlikelihood or the difficulty of re-convening to continue negotiations at a later date, given that the negotiation had to end at the date specified, in terms of the time that had been set aside in July 1998. But also, as part of that final package, by trying to reach compromises on key areas that have remained unresolved and on upon which positions had already been sought and obtained, the Bureau tried to offer a solution. The solution that we see, of course in article 12, is that there is a disjunctive list. There are two states who must have provided, which must have provided, jurisdiction to the Court by becoming Parties. So, it's the state on whose territory the crime occurred or the state of the nationality of the alleged perpetrator - so, active personality.

Now, after that sort of very quick introduction, maybe I'll just break it down into each of the paragraphs, the three paragraphs of article 12, and just quickly run through the main aspects that need to be brought in mind.

So, paragraph 1 of article 12, reflects this notion that on becoming parties to the Statute, States have automatically accepted the Court's jurisdiction over the listed crimes, the crimes listed in article 5. If you recall earlier that the ILC initially had suggested that when becoming a Party, that was only a first step; and as a second step, the States had to then choose which crimes they accepted creating a kind of *a la carte* model, whereby different states would have agreed to different things. Whereas [it] said that for jurisdictions to be inherent - or if you like automatic - only for genocide but not the others, one of the key decisions that [was] taken before Rome, and then emphasized during Rome, was that this notion of inherent or automatic jurisdiction should be applied across the board to all the crimes. Excuse me, I am wrong. I think the issue of automatic jurisdiction was still under controversy during Rome itself but nonetheless it was one of those issues that was discussed during the Prep Coms leading up to Rome and then consolidated at Rome. So, indeed as you see that when you become a party to the Statute, you automatically accept jurisdiction, the jurisdictional competence of the Court, in relation to the crimes listed in article 5.

Of course, with the amendment now of the Statute, with the inclusion of crimes of aggression, there is a separate regime that has been created for aggression which is different to that seen in article 12. I won't go into that because that's a choice by the legislator and the State Parties. Obviously that *lex specialis* prevails in relation to aggression itself.

Then the last point to make on that is that there is then no need to, there is no discussion about opting in or opting out of the Statute. Opting in to particular crimes, opting out of particular crimes. The only residue of this discussion that remains, which was part of the package proposal put forward by the Bureau during Rome, is that there is still [an] opt out variance that you see in article 124 of the Rome Statute.

This was particularly a proposal that has been put forward by France, so an attempt to try to broaden consensus on the proposal. There will be another commentator discussing article 124, but basically as you can see, if you turn to the provision that there is a seven-year transitional period during which a State on becoming a party can opt out of the Court's jurisdiction with respect to war crimes. That was, as I say, one aspect of those negotiations: an opt in, opt out which survived in features in the Statute.

In relation to paragraph 2, as you can see, this formulation of the Court's jurisdiction, of course, relates to the Court's treaty based jurisdiction. As you know, and as we will discuss in article 13, when the Security Council refers a situation it may do so in relation to the territory of any state - any UN Member State, or arguably any state even if they are not UN Member States, and thereby also irrespective of nationality of the accused - and this is because of the Security Council's powers under the UN Charter, its powers that pre-exist the Rome Statute. The Rome Statute does not create this power or endow it on the Security Council - a treaty couldn't anyway do this to an organ of the United Nations - but these are powers that already derive under the UN Charter and if there is a discussion to be had or arguments to be made about whether or not the Security Council enjoys those powers, those discussions should be located in the UN Charter, not in the Rome Statute. The Rome Statute merely is a procedural instrument which has article 13 that recognizes that the Council has this competence and talks about how it impacts on the exercise of the court's jurisdiction. But we will return to this in article 13.

But the point is that if we set aside the Security Council's triggering of the court's jurisdiction, what is left, of course is jurisdiction that's triggered by a State Party referral or by the prosecutor acting on his or her own initiative *proprio motu*. In terms of this treaty based jurisdiction, one can of course identify the two basis' of territoriality and active personality. Now, in terms of territoriality, this is the most traditional basis of jurisdiction, the ability to exercise jurisdiction over one's territory is also emblematic of the sovereignty of a state, state's competence to regulate matters within its own territory, and all states claim jurisdiction within their own territories as a matter of prescriptive law. We can have a separate discussion about enforcement jurisdiction, whereby a state may cede some aspects of its right to enforce its jurisdiction in relation

to foreign personnel stationed on its territory, such as in a Status of Forces agreement type of arrangement, or in the context of state of diplomatic immunity and again this is touching on the discussion that we are going to have in article 98, so I will see you during that discussion on article 98. But the point is that all states have the competence to regulate criminal jurisdiction within their own territories. As mentioned, one of the most fundamental aspects of sovereignty.

So, the delegation of this power - and this is a separate discussion whether or not the treaty represents delegation by states of their own powers or whether the Court derives its powers through the law of international community as a whole as others have written. So, the point is that the Court's exercise of territorial jurisdiction is based upon one of the most well accepted and traditional basis of jurisdiction. Now, of course, as it says here, this is extended also to crimes committed on aboard a vessel or a craft that is registered to a particular State Party.

Now, matters of territorial jurisdiction are of course not always so straightforward and lots of interesting issues could arise which you could examine and study. The first question is that if the Court is exercising jurisdiction by virtue of territories, territorial jurisdiction, this means that the Court can exercise jurisdictional competence in relation to any person who commits a crime within that state's territory, including foreigners, and including foreigners who are not nationals of State Parties. So, for example, in the situation in Georgia, which is currently at the stage of investigations, the Court's jurisdiction extends, according to the article 15 decision by the Pre-trial Chamber, it extends not only to crimes committed on Georgian territory by Georgian nationals, but also by Russian nationals because there was an armed conflict between Russia and Georgia, even though Russia is not a party to the Statute. So, in that situation the nationals of a non-party state would fall within the jurisdictional scope of the Court because the alleged crimes, the crimes alleged to have been committed on the territory of a State Party. Now of course, no findings of criminal responsibility have been made by the court at this point against any nationals - whether Russians, Georgians or anyone else - but, as a matter of principle, the Court has jurisdiction in relation to all crimes alleged to be committed on that territory.

The same scenario arises in the situation in Afghanistan, which is currently under preliminary examination. There, the allegations are largely dealing with nationals of Afghanistan, but also there is a significant cluster of allegations related to foreigners alleged to be committing crimes on the territory of Afghanistan. I mean, in particular, amongst the potential cases that the Prosecutor's office has identified as being relevant to the scope of the situation includes allegations against nationals of the United States. So, members of the US armed forces and members of the CIA alleged to have committed crimes on the territory of Afghanistan. Again, even though the United States is not a Party to the Statute, these are nationals of non-party states. So, there you can see how the territorial principle would apply. It extends to all persons who may be alleged to have committed crimes.

During the article 98 discussion later on, we can talk about what this means where there is a Status of Forces Agreement, such as in Afghanistan. I want to distinguish between issues of prescriptive jurisdiction and enforcement jurisdiction and how that does or does not impact on the issue of the Court's jurisdiction. The main point being that in article 98, in the case of a SOFA agreement, Status of Forces Agreement, regulates the cooperation duties of the host state, territorial state, towards the Court. It doesn't deprive the Court of jurisdiction. The whole point of article 98 is that the Court is seeking to exercise its jurisdiction and article 98 regulates the cooperation duties in relation to that.

Issues of territorial competence, of course can also become very complicated in the context of disputed territories. So, how do you define and demarcate the territorial scope of the situation? Normally, this won't come up in the abstract. It will come up in the context of specific cases that are brought forward where there is a contestation of whether or not that alleged conduct occurred on the territory of the state for example.

If the proposition is that the Court's jurisdiction is founded upon territoriality. But nonetheless, it could well be that there are contestations of jurisdiction, jurisdictional scope, raised in the article 19 stage by any of a series of litigants:

It could be relevant states, it could be other persons, could be the Prosecutor itself that seeks clarification, could be the pre-trial chamber that doubts the question of jurisdictional scope.

So, in a number of situations currently before the Court, in terms of either investigations or preliminary examinations, there are such disputed territories. Disputed, in terms of the bilateral relationship between states and/or in terms of international law. So, one thinks again of Georgia where there is a *de facto* administration in South Ossetia that has claimed independence from the Georgian state and claims to have become its own state. There is an issue of disputed territory there. [Not so much] at the time of the alleged occurrence of the crimes, but suddenly afterwards. The Court's position on that [so far] has been that South Ossetia is considered to be a part of the State of Georgia, but that's obviously an area that has triggered a controversy, in terms of the reaction by the South Ossetians and particularly by Russia.

There is an issue, similarly, in Ukraine, where there is a potential territorial dispute issue, in terms of the status of Crimea as well as the territories in the east that may be the subject to litigation, or could be hypothetically. Similarly, in relation to Palestine, the pre-examination in relation to the situation in Palestine. It's well-known that there is a disputed territory or territorial claim there, or uncertainty about the extent of the territorial scope of either the occupied territories of Palestine - or however one wishes to characterize the territory in relation to Israel, and its claims and ongoing discussions about bilateral negotiations and so on. So, these are not just hypothetical issues, they currently exist within [...] the Court's reach.

Finally, the only other thing I want to say about territoriality is that a question might arise in terms of somebody who commits the crime or participates in the commission of crimes, who is not present on the territory of the state where the crime occurs. So, this issue raised its head in the *Mbarushimana* case, a case concerning an armed group, the FDLR in the DRC. This particular case was unconfirmed at the confirmation charges stage, but nonetheless, an argument was raised by the defense. This argument wasn't ultimately resolved because the Chamber dismissed it procedurally because it had been raised improperly [as] a new argument during a response to a prosecution response to a defensive jurisdictional challenge, etc. The defense as part of this argument made the point that the suspect, Callixte Mbarushimana, was on the territory of France at the time when the alleged crimes occurred or were committed in the DRC, and that because the situation relates to the situation in the DRC and not the situation in France, therefore his participation fell outside of the territorial scope of the situation.

So, I mean, there is a number of different ways that one can look at this and one first preliminary consideration is to think about whether or not issues of territorial scope even arise when you are talking about the participation of an individual within a common purpose or common plan, or some other type of contribution to crimes that are perpetrated by others physically. So, when dealing with an issue of mode of liability, it is not *per se* required to show that the person to whom the crime, the physical crimes, are imputed is also physically present on the territory.

Certainly, if you look at the *Bemba* case for example, where Jean Pierre Bemba was convicted in relation to crimes committed by subordinates in Central African Republic, the Court did not see the need to first establish whether or not Bemba was physically present on the territory of the CAR when the crimes are committed. I mean, the issue didn't really arise anyway in the same way because the DRC is also a State Party, but basically these issues need not arise in the context of a discussion of modes of liability.

Also we know, [in] a different context, in terms of complementarity case law, in the *Saif Al Islam Gaddafi* case, the Appeals Chamber held that when looking at the relevant conduct in a case involving an individual who is not the physical perpetrator - so in this case, Saif Al Islam Gaddafi

and physical perpetrators who allegedly committed crimes at his behest or following his orders - the Appeals Chamber said that when looking at such a case, the relevant conduct is both that of the physical perpetrators, as well as the crimes that are imputed to the suspect, in this case Saif Al Islam Gaddafi. So, both components constitute the case. When we are looking at where the crimes are committed and the responsibility of an individual who is outside of the territory, the key issue, I think for me is to look into whether or not all the mental or materials elements of the crimes are committed on the territory of the state in question. In the case of physical perpetrators, they are. Then the imputation towards the individuals abroad is a separate question, as I mentioned.

So, then what about a situation where - a different discussion - what about where not all the mental or material elements of the crime are committed on the territory of the State Party? What about where we have a partial commission of the crimes? Now, of course this is the classic discussion about the objective or subjective application of the territorial principle. The classic example being that somebody shoots a gun across a border. So, standing in state 'A' shoots and fires off the weapon and the bullet crosses the border into state 'B' where the victim falls dead. Where is the crime committed and who has jurisdiction? Well, in that situation, as you know from law school, the objective territorial principle states that the state where the result occurred, where the death occurred, the state 'B' can claim jurisdiction on the basis of the objective territorial principle; and also, state 'A' where the crime was commenced or initiated can also claim jurisdiction on the basis of the subjective territorial principle. So, basically any state on whose territory one of the constituent elements of the crimes occurred is able to claim jurisdiction.

Now I realize I'm almost out of time, so I will try to be brief on the active personality principle. This principle regulates the Court's jurisdiction, particularly in situations where this is the sole basis of jurisdiction. This is where it becomes interesting or relevant: there could be a situation, we can take the situation in Iraq because it's one that's currently [under] preliminary examination. Iraq is not a State Party, so there is no jurisdiction by virtue of the territory of Iraq. But at the time when alleged crimes occurred, there were a number of State Parties who had their nationals present in Iraq. A large class of allegations has concerned the conduct of United Kingdom service personnel, UK forces, in relation to allegations of torture, abuse, and detention. So, the reason that the Court can conduct an inquiry, or conduct a preliminary examination, in relation to these allegations is because of the nationality of the alleged perpetrators on the basis of active personality. So, even though the crimes are not occurring on the territory of the State Party, the jurisdiction persists because of the nationality of the suspect.

This type of jurisdiction is also exercised by a number of states, particularly in relation to serious crimes. For example, in the UK if - I believe this is correct - if you engage in sexual offences abroad and when you return back to the UK, you could be prosecuted for what you did abroad because of your nationality. So, this type of jurisdictions is exercised for particularly serious crimes in a number of countries.

An interesting question could arise in terms of dual nationals. Does the Court have to resolve issues of effective nationality, genuineness of the link, and so on, as raised in that famous case before the Permanent Court of International justice? I personally don't think that the dual nationality issue arises in the same way for criminal jurisdiction, and certainly if one looks at the Harvard principles on criminal jurisdiction, or other national codes, states do not believe that they are divested of jurisdiction just because the person holds the nationality of another state. For example, if that same UK national who committed a domestic offense abroad came back and the UK authorities wanted to prosecute that person, that person couldn't say, "But I also have Swiss nationality and I'm claiming that one as my effective link." For states, as long as they have one basis of jurisdiction to assert, they will do so and their right to do so cannot also be nullified or defeated by the existence of another nationality, in that sense. So, I do not think that dual nationality arises in the same way, personally.

Then, another interesting issue could be, is it nationality at the time of the offense or is it nationality at the time of the prosecution? So, the person that commits the crime is a State Party national at the time of the crime, and then afterwards changes nationality. Then the ICC tries to bring a case, and then could they argue that I am no longer a national of the State Party, you have incorrectly brought the case. I don't believe so. I think the Court still has jurisdiction because article 22, which regulates broadly, [which is of relevance according to this criminal principle], refers to whether or not the conduct in question constitutes, at the time it takes its place, a crime within the jurisdiction of the Court. So, I think that helps to answer the question.

Of course, article 12 is looking at the alleged commission of crimes in relation to the moment when the crimes occurred. It's not looking at it prospectively, or any other way. It's not dealing with the prosecution phases, the pre-conditions to the exercise of jurisdiction, and the Court is exercising jurisdiction in relation to a particular conduct occurring at a particular time, not procedurally when that case may end up in Court. So, I think changing nationality afterwards doesn't affect whether or not at the time of the commission of crimes you were a national of the State Party.

By contrast, I don't think that nationality at the time of the prosecution is the correct way to go, because let's say the person is not a State Party national at the time of the commission of crime; or you know, this is the only way the Court would exercise jurisdiction, and at the time they were not subject to the Court's jurisdiction in terms of active personality, and then later on acquired nationality of a State Party. That wouldn't seem to provide a basis on my own personal reading again because of article 22 - at the relevant time, the conduct was not a crime within the jurisdiction of the Courts. At the relevant time the conduct occurred, the Court did not have jurisdictional scope in relation to that individual. But all of these issues are just very prematurely, very preliminarily being discussed and there's been no litigation on them, so interesting to see how it develops.

Then a last few seconds, just to discuss article 12(3). Article 12(3) is again another vestige of this opt-out, opt-in discussion that was going on during the negotiation of, well the drafting of the ILC draft statute, and then negotiations leading up to Rome. This allows for an opt-in to the acceptance of the Court's jurisdiction for states which are not otherwise Parties to the Statute. So, states can do so on an *ad hoc* basis, they can lodge a declaration with the Court, affirming that they accept the exercise of jurisdiction of the Court.

There is some un-elegant wordings in article 12(3), which seems to be a little bit different to how it's worded in 12(1) and (2). It talks about exercising jurisdiction by the Court with respect to the crime in question. So, when the rules are being drafted, another rule, Rule 44 was adopted which clarifies, that basically harmonizes, the wording in the two different regimes. So, it basically says that the Registrar when receiving such a declaration from a state should inform the state that the consequence of the declaration is that, that state has now accepted the jurisdiction of the Court with respect to the crimes referred to in article 5 of relevance in the situation; and then also about the provisions of part 9 applying.

The key issue here is that [it] has the consequence of accepting all the crimes referred to in article 5 which are of relevance to the situation. First of all, [this] mirrors the language in article 12(1), which says that the state thereby accepts, State Parties thereby accept the [jurisdiction] of the Court with respect to crimes referred to in article 5. Of relevance to the situation also denotes that the declaration must be done in a neutral way. The state cannot opt-in to recognizing jurisdiction in relation to war crimes but not crimes against humanity, and so on. It must be done on a neutral basis in relation to all article 5 crimes which may be relevant to an investigation, prosecution and so on. This will prevent opportunistic use of declarations by states.

To date, the Court has indeed received a number of such declarations, such as from Côte d'Ivoire before becoming a Party to the Statute; from Uganda, when it became a State Party, but its entry into force occurs in September of 2002, so it lodged a declaration to apply that back

towards the entry into force of the Statute in July 2002. Palestine also, when becoming a State Party, also lodged a declaration extending the temporal scope of its acceptance of the Court to exercise its jurisdiction by a number of months earlier.

So, of course the only limitation to article 12(3) is that it cannot exceed the temporal scope foreseen in article 11. So, of course, you can only back date to the entry into force of the Statute itself. You don't have to back date it to July 2002, you can also back date it for a shorter period, but the outer limits of how far back you can back date is to the entry into force of the statute. As seen, this mechanism is available both to states, that are not a Party to the Statute, as well as to State Parties that becoming Parties can simultaneously or you know, in conjunction with that, indicate back dating. I forgot to mention that Ukraine has also lodged two such declarations and they are still not a Party to the Statute.

I hope that is useful. I am sorry that I may be spoke too fast. A lot more guidance can, as I said, be found in Triffterer. I also have a chapter in this book on jurisdiction [The Law and Practice of the International Criminal Court, ed. Carsten Stahn.]