Why some Doors may be Closed Already: Second Thoughts on a ‘Case-by-Case’ Treatment of Article 12 (3) Declarations

CARSTEN STAHN*

1. Introduction

In his article “How Open Should the Door Be? – Declarations by non-States Parties under Article 12(3) of the Rome Statute of the International Criminal Court”, Steven Freeland suggests a flexible approach towards the treatment of Article 12(3) declarations. Freeland argues that the qualification of a declaration under Article 12(3) of the Rome Statute should be determined “on a case-by-case basis” taking into account the “circumstances” leading to the lodging of a particular declaration. The author submits, in particular, that a declaration by a non-State Party under Article 12(3) should in some cases be treated analogous to a referral. He justifies this case for procedural diversity by alleging a need for further judicial scrutiny in cases where a declaration has been lodged for what he terms “genuine reasons”. In such cases, Freeland proposes a treatment analogous to a referral on two grounds: the alleged need to ensure that the matter receives due attention by the Court, and a perceived necessity to provide “a layer of protection against a decision by the Prosecutor not to proceed on the basis of what may be arbitrary grounds”. Freeland argues that such treatment is closer in line with the “overall object and purpose” of the Statute, namely the will to ensure that “the most serious crimes of concern to the international community as a whole must not go unpunished . . .”.

This call for differentiation is welcome, in particular, in light of the general lack of literature on this particular aspect of the procedure of the ICC. However, Freeland’s approach deserves some further reflection. There are

* Dr. jur. LL.M. (NYU), LL.M. (Cologne-Paris), Associate Legal Advisor, International Criminal Court, Visiting Research Fellow Leiden University. The views are those of the author alone and do not necessarily reflect the views of the International Criminal Court.

1 See in this journal, at 211–241.

2 See para. 4 of the preamble of the ICC Statute.

indications that the drafters of the Statute intended to ‘lock’ some of the ‘doors’, which Freeland seeks to open. Moreover, they may have done so for good reasons, namely to protect the ‘house’ against certain draughts, which might ultimately sow disorder and confusion.

2. Types of Article 12(3) Declarations

Freeland rightly observes that the Statute distinguishes two types of Article 12(3) declarations: declarations made by a State Party after accession to the Statute under Article 11(2) in conjunction with Article 12(3), and declarations by a non-State Party under Article 12(3). The first type of declaration is a declaration by which a State Party may extend the jurisdiction of the Court to crimes committed on its territory before its accession to the Statute. This declaration enables the Court to exercise jurisdiction over criminal conduct, over which it would otherwise lack jurisdiction under Article 11(2). The declaration may be made at the time of accession or at a later stage. It has a supplementary function. The declaration does not by itself constitute a referral or an activation of proprio motu proceedings. It simply broadens the potential scope of jurisdiction of the Court. The procedural treatment of this declaration depends on the subsequent “exercise of jurisdiction” under Article 13. The declaration will be treated as a part or annex of a referral, if that State Party or another State Party has made a referral to the Court pursuant to Article 13(a) in conjunction with Article 14, or as part of proprio motu proceedings, if the Prosecutor initiates an investigation in respect of such crimes in accordance with Article 15.

The situation appears to be slightly different if a non-State Party makes a declaration under Article 12(3). Such a declaration has a different effect. It extends the personal, temporal and territorial scope of the jurisdiction of the ICC to criminal conduct committed on the territory of a non-State Party, over which the Court would otherwise lack jurisdiction under Article 12(2). This type of declaration enables the Prosecutor to “initiate investigations” concerning crimes committed on the territory of a non-State Party on the basis of Article 15, because such “crimes” come “within the jurisdiction of the Court” following the lodging of that declaration.

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4 See also Olásolo, supra note 3, p. 142. This argument is supported by the fact that the declaration is “lodged with the Registrar as opposed to OTP”.
5 See Article 13 (1) (c) in conjunction with Article 15.
6 See Article 12 (3) in conjunction with Article 15 (1) ICC Statute.