The Legal Basis for the Exercise of Jurisdiction
by the International Criminal Court and
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【Research Note】

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Chapter 3 Examination of the Preparatory Work of the Statute

Section 1 Outline of the Preparatory Work of the Statute

This section aims to give a concise outline of the preparatory work of the Statute. Subsection 1 will briefly summarise the relevant work prior to the Rome Conference. Subsection 2 will be devoted to the Rome Conference and focus chiefly on the discussions as to whose consent should be required for the exercise of jurisdiction by the proposed ICC¹⁰⁰, as this work on state-consent requirements included the statements relevant to the legal basis for its exercise of jurisdiction.

1. Work prior to the Rome Conference

The deliberations on the establishment of an international criminal court started in the UN soon after it was established in 1945¹⁰¹. However, they did not continue without interruption, and it can be said that the preparatory work of the Statute was begun in 1990.

As requested by the UN General Assembly Resolution 44/39 adopted in 1989, in 1990 the ILC started the work relevant to the establishment of the proposed ICC, which was conducted as part of the ILC's work on the Draft Code of Crimes against the Peace and Security of Mankind (hereinafter referred to as "the Draft Code"). The Assembly subsequently adopted Resolutions 45/41, 46/54, 47/33 and 48/31 between 1990 and 1993 to

100 In this paper, when dealing with the preparatory work of the Statute, the court whose establishment was proposed therein is referred to as "the proposed ICC" and its statute also "the proposed Statute".

101 The history of such deliberations can also be traced back to the days before the Second World War. See, e.g., Antonio Cassese, "From Nuremberg to Rome: International Military Tribunals to the International Criminal Court," in Cassese, Gaeta and Jones (eds.), *supra* note 49, pp. 3-19.

ask the ILC to continue working on its establishment. Moreover, in the latter two resolutions, states were also invited to submit written comments on this matter¹⁰². The ILC eventually adopted the Draft Statute for an International Criminal Court (hereinafter referred to as "the ILC's final Draft Statute") and the commentary thereupon¹⁰³ in July 1994.

After the adoption of the ILC's final Draft Statute, in December 1994 the UN General Assembly adopted Resolution 49/53 to decide to establish the Ad Hoc Committee on the Establishment of an International Criminal Court (hereinafter referred to "the Ad Hoc Committee"), and to invite states to submit written comments on the ILC's final Draft Statute¹⁰⁴. The Ad Hoc Committee met in April and August 1995 in accordance with the same resolution¹⁰⁵. Noting the work done by the Ad Hoc Committee, in December 1995 the Assembly then adopted Resolution 50/46 to decide to establish the Preparatory Committee on the Establishment of an International Criminal Court (hereinafter referred to as "the Preparatory Committee"). The Preparatory Committee met first between March and August 1996 in accordance with the same resolution, and then again met between February 1997 and April 1998 in accordance with Resolution 51/207 adopted by the Assembly in December 1996¹⁰⁶. In December 1997, The Assembly further adopted Resolution 52/160 to decide to hold the Rome Conference from 15 June to 17 July 1998. The Preparatory Committee managed to adopt the Draft Statute for the International Criminal Court (hereinafter referred to as "the Preparatory Committee's Draft Statute")¹⁰⁷ on 3 April 1998.

2. Work at the Rome Conference, in particular on the State-Consent Requirements for the Proposed ICC's Exercise of Jurisdiction

At the beginning of the Rome Conference, its plenary, after settling organisational matters like the adoption of the draft organization of work¹⁰⁸, heard general statements on substantive matters from states, intergovernmental organisations and non-governmental

102 For the submitted comments, see Yearbook of the International Law Commission, 1993, Vol. II (Part One), pp. 125-143; *ibid.* 1994, Vol. II (Part One), pp. 21-96.

Furthermore, in the UN General Assembly Resolutions 46/54 and 47/33, states were also urged to present in writing their comments and observations on the Draft Code adopted on first reading by the ILC in 1991, and references to the questions of an international criminal jurisdiction can be found in some of the presented comments and observations. See *ibid.*, 1993, Vol. II (Part One), pp. 59-109.

103 *Ibid.*, 1994, Vol. II (Part Two), pp. 26-69.

104 For the submitted comments, see U.N. Doc. A/AC. 244/1 and Add. 1-4.

105 No verbatim record of the Ad Hoc Committee was compiled by the UN. For the summary of the Committee's discussions, see U.N. Doc. A/50/22, pp. 1-48.

106 No verbatim record of the Preparatory Committee was compiled by the UN. For the summary of the Committee's discussions held in 1996, see U.N. Doc. A/51/22, pp. 1-76. No official record of any kind was produced with regard to its discussions held in 1997 or 1998.

107 U.N. Doc. A/CONF. 183/13 (Vol. III), pp. 13-82.

108 U.N. Doc. A/CONF. 183/13 (Vol. II), p. 64, paras. 5-6.

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organisations from its 2nd meeting (on 15 June) to 8th meeting (on 19 June)¹⁰⁹.

On the other hand, the Committee of the Whole (hereinafter referred to as "the CoW"), which "should concentrate on the substantive work" according to the draft organization of work¹¹⁰, discussed the details of the proposed ICC. As to whose consent should be required for its exercise of jurisdiction, the CoW had the first round of debate from its 7th meeting (on 19 June) to 11th meeting (on 22 June)¹¹¹, using Part 2 of the Preparatory Committee's Draft Statute, entitled "Jurisdiction, Admissibility and Applicable Law", as the basis for debate. In the course of this round, quite a few states expressed support for the proposal presented by Germany and included as one of the options in the Preparatory Committee's Draft Statute (hereinafter referred to as "the German Proposal")¹¹², and/or for the proposal submitted by the Republic of Korea during the Rome Conference (hereinafter referred to as "the Korean Proposal")¹¹³.

Furthermore, the Bureau of the CoW, which consisted of its Chairman, three Vice-Chairmen and Rapporteur¹¹⁴, submitted two successive documents entitled respectively "Bureau: discussion paper regarding part 2"¹¹⁵ and "Bureau: proposal regarding part 2"¹¹⁶. The former document (hereinafter referred to as "the Bureau's Discussion Paper") was used from the CoW's 29th meeting (on 9 July) to 31st meeting (on the same day)¹¹⁷ to stimulate the second round of debate as to whose consent should be required for the proposed ICC's exercise of jurisdiction, and the latter one (hereinafter referred to as "the Bureau's Proposal") from its 33rd meeting (on 13 July) to 36th meeting (on the same day)¹¹⁸ to stimulate the third round.

After the above-mentioned three rounds of intense debate were conducted, the Chairman of the CoW, at the beginning of its 42nd meeting (on 17 July), drew attention to the text for the proposed ICC's statute submitted by its Bureau (hereinafter referred to as "the Bureau's Draft Statute")¹¹⁹, and said that "[i]t was the recommendation of the Bureau that the text should be adopted as a complete package"¹²⁰. Although India and the

109 For the verbatim record of these meetings, see *ibid.*, pp. 64-121.

110 For the whole text of the draft organization of work, see U.N. Doc. A/CONF. 183/13 (Vol. III), p. 92.

111 For the verbatim record of these meetings, see U.N. Doc. A/CONF. 183/13 (Vol. II), pp. 180-217.

112 U.N. Doc. A/CONF. 183/13 (Vol. III), p. 24.

113 *Ibid.*, pp. 227-228.

114 See Rule 48 of the rules of procedure for the Rome Conference (See *ibid.*, p. 90).

115 *Ibid.*, pp. 204-212.

116 *Ibid.*, pp. 212-219.

117 For the verbatim record of these meetings, see U.N. Doc. A/CONF. 183/13 (Vol. II), pp. 294-318.

118 For the verbatim record of these meetings, see *ibid.*, pp. 319-348.

119 U.N. Doc. A/CONF. 183/C. 1/L. 76 and Add. 1, Add. 2 and Corr. 1, Add. 3 and 4, Add. 5 and Corr. 1, Add. 6 and Corr. 1, Add. 7 and 8, Add. 9 and Corr. 1 and Add. 10-14, which are not reproduced in U.N. Doc. A/CONF. 183/13.

US put forward their respective proposals of amendments to the Bureau's Draft Statute¹²¹, all of these were rejected¹²². The CoW subsequently adopted the Bureau's Draft Statute¹²³, which was included in its report¹²⁴.

Finally, at the 9th plenary meeting (on 17 and 18 July) held immediately after the CoW's 42nd meeting, the Statute was adopted by 120 votes to 7, with 21 abstentions¹²⁵.

Section 2 Analysis of the Relevant Discussions Conducted in the Preparatory Work of the Statute

1. Discussions over the Rules of the Law of Treaties on the Creation of Obligations for Non-Party States

As has repeatedly been stated, the aim of this paper is to discuss the legal basis for the ICC's exercise of jurisdiction while viewing this topic as one of the issues demonstrating the current status of general international law concerning the creation of obligations for non-party states. Therefore, this subsection will analyse the discussions conducted in the preparatory work of the Statute over the relevant rules of the law of treaties.

Firstly, during the ILC's 43rd and 44th sessions held in 1991 and 1992 respectively, Christian Tomuschat acknowledged "the relative effect of international treaties"¹²⁶. Moreover, the ILC's report on the work of the latter session said that states had "rights, or potential rights of jurisdiction which cannot be affected without their consent"¹²⁷. From

120 U.N. Doc. A/CONF. 183/13 (Vol. II), p. 360, para. 5 (Kirsch, the Chairman).

121 *Ibid.*, p. 360 paras. 6-8 (India), p. 361, paras. 20-23 (United States of America). See also, U.N. Doc. A/CONF. 183/13 (Vol. III), pp. 247, 249-250.

122 U.N. Doc. A/CONF. 183/13 (Vol. II), p. 361, para. 15, p. 362, para. 31.

123 *Ibid.*, p. 362, para. 36.

124 U.N. Doc. A/CONF. 183/13 (Vol. III), pp. 93-147.

125 U.N. Doc. A/CONF. 183/13 (Vol. II), p. 121, para. 10.

126 Yearbook of the International Law Commission, 1991, Vol. I, p. 27, para. 8 (Tomuschat); *ibid.*, 1992, Vol. I, p. 30, para. 30 (Tomuschat, the Chairman, speaking as a member of the Commission).

127 The relevant paragraph of the report, which expresses (some of) the ILC's thoughts relating to the legal basis for the proposed ICC's exercise of jurisdiction, reads as follows:

It will also require further detailed consideration to establish precisely the range of situations, going beyond the cases dealt with in paragraphs 62 and 63 above, which should be within the court's jurisdiction *ratione personae*. The broadest approach would be to build on the existing principle of universal jurisdiction under the various treaties. Thus, a provision could be included to the effect that the court has jurisdiction *ratione personae* in any case where a State party to the statute has lawful custody of an alleged offender and has jurisdiction to try the offender under the relevant treaty or under general international law, but it consents to the international court exercising jurisdiction instead. This can be described as a system of "ceded jurisdiction". It relies on the argument that other States cannot complain if a State which is entitled under international law to exercise jurisdiction over a person for an offence cedes that jurisdiction to an international criminal court established by multilateral treaty—at least, if all other concerned States are parties to the treaty. On the other hand, under a treaty establishing universal jurisdiction over a crime of an international character, all States may be said to be "concerned" and

these statements and the report, it can be seen that the ILC's members generally thought that the proposed Statute or other treaties could not create obligations for non-party states without their consent¹²⁸.

Secondly, quite a few states also expressed, in their oral or written statements made in the preparatory work of the Statute, the view that the proposed Statute or other treaties could not create obligations for non-party states without their consent¹²⁹. For example, during the 48th regular session of the UN General Assembly held from 1993 to 1994, where the ILC's report on the work of its 45th session was considered, Thailand referred to "the basic tenet of treaty law that agreements or treaties did not bind third parties"¹³⁰. On the contrary, Kuwait, during the Assembly's 50th and 51st regular sessions held between 1995 and 1997, argued that "the statute of the court should be mandatory for all States"¹³¹ and "the court's jurisdiction should be compulsory and imposed on all States, not only on the States parties to the statute"¹³². This argument suggests that Kuwait thought that the proposed Statute could create obligations for non-party states without their consent, and also believed that it should actually provide for the obligation of all states to acquiesce in the proposed ICC's exercise of jurisdiction¹³³.

And additionally, during the discussions conducted in the UN from the end of the Rome Conference to the coming into force of the Statute¹³⁴, Indonesia stated clearly, in

have rights, or potential rights of jurisdiction which cannot be affected without their consent. Unless the treaty establishing the court had quasi-universal acceptance therefore, the "ceded jurisdiction" argument would not seem to work.

(*Ibid.*, 1992, Vol. II (Part Two), p. 67, para. 64)

It can also be noted that, during the ILC's 44th session, Alberto Szekely made a statement which was similar to the paragraph quoted here. *Ibid.*, 1992, Vol. I, p. 206, para. 19 (Szekely).

128 For the author's argument that the restriction of a right is caused by the creation of an obligation, see note 75 and accompanying text.

129 U.N. Doc. A/C. 6/45/SR. 27, p. 8, para. 30 (Ethiopia); U.N. Doc. A/C. 6/47/SR. 23, p. 12, para. 54 (Jamaica); Yearbook of the International Law Commission, 1993, Vol. II (Part One), p. 128, para. 20 (Australia); U.N. Doc. A/C. 6/48/SR. 28, p. 16, para. 81 (Thailand); U.N. Doc. A/C. 6/49/SR. 21, p. 4, para. 13 (Mali); U.N. Doc. A/C. 6/49/SR. 23, p. 15, para. 86 (Indonesia); U.N. Doc. A/AC. 244/1, pp. 17-18, para. 12 (Switzerland); U.N. Doc. A/CONF. 183/13 (Vol. II), p. 184, para. 55 (Syrian Arab Republic), p. 189, para. 48 (France), p. 195, para. 23 (United States of America), p. 196, para. 40 (Russian Federation), p. 297, para. 42 (United States of America), p. 300, para. 103 (Gabon), p. 361, para. 21 (United States of America), p. 362, para. 28 (China), p. 122, para. 15 (India), p. 123, para. 35 (Sri Lanka), pp. 123-124, para. 37 (China). See also, U.N. Doc. A/50/22, p. 16, para. 74.

130 U.N. Doc. A/C. 6/48/SR. 28, p. 16, para. 81 (Thailand).

131 U.N. Doc. A/C. 6/50/SR. 30, p. 14, para. 78 (Kuwait).

132 U.N. Doc. A/C. 6/51/SR. 26, p. 15, para. 89 (Kuwait).

133 It can be noted in this regard that, during the 5th plenary meeting of the Rome Conference, Azerbaijan contended that "[s]tates which were not parties to the Statute should also be subject to its jurisdiction". U.N. Doc. A/CONF. 183/13 (Vol. II), p. 93, para. 32 (Azerbaijan). However, it is not clear whether this contention means the same as Kuwait's argument quoted here, or whether Azerbaijan had in mind another way of creating obligations for non-party states such as their consent given on a case-by-case basis.

134 See note 99 and accompanying text.

1999, that "[i]nternational law was based on the will of sovereign States to develop binding legal rules to govern inter-State relations, but such norms *could only be binding when States gave their consent to be bound*" [emphasis added]¹³⁵.

To sum up, in the preparatory work of the Statute (and in its immediate aftermath), it was generally accepted that, under the current law of treaties, the proposed Statute (and the Statute) could not create obligations for non-party states without their consent. From this it can be inferred that such creation of obligations was not chosen as a method of legalising the proposed ICC's exercise of jurisdiction.

In the next subsection, to investigate what legal basis has actually been given for the ICC's exercise of jurisdiction, the discussions conducted in the preparatory work of the Statute over the state-consent requirements for the proposed ICC's exercise of jurisdiction, which included the statements relevant to its legal basis, will be analysed in great detail. For reasons of efficiency, however, this analysis will largely be carried out while tracing the relevant work backwards from the final days of the Rome Conference.

135 U.N. Doc. A/C. 6/54/SR. 14, p. 3, para. 11 (Indonesia). Moreover, Lebanon argued, in 1998, that "[t]he Statute should be binding on all States, moreover, regardless of whether or not they were party to it". U.N. Doc. A/C. 6/53/SR. 12, p. 8, para. 50 (Lebanon). This argument seems to suggest that Lebanon interpreted the Statute to actually provide for obligations of non-party states, but implicitly acknowledged that, under the current law of treaties, it could not create obligations for non-party states without their consent.