

The Legal Basis for the Exercise of Jurisdiction  
by the International Criminal Court and  
the Preparatory Work of the Rome Statute (VI)

Yoshiaki KITANO

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【Research Note】

## **The Legal Basis for the Exercise of Jurisdiction by the International Criminal Court and the Preparatory Work of the Rome Statute (VI)**

Yoshiaki KITANO

### **Chapter 3 Examination of the Preparatory Work of the Statute (Continued)**

#### **Section 2 Analysis of the Relevant Discussions Conducted in the Preparatory Work of the Statute (Continued)**

#### **2. Discussions on the State-Consent Requirements and Legal Basis for the Proposed ICC's Exercise of Jurisdiction (Continued)**

##### *(B) Exercise of Jurisdiction in the Cases of the Security Council's Referral*

In contrast to the last-minute compromise on the preconditions to the ICC's exercise of jurisdiction in the cases of the state parties' referral or Prosecutor's initiative which was described in the previous sub-subsection, it seems to have been generally accepted from the beginning of the Rome Conference that such preconditions were not necessary for the cases of the Security Council's referral. Article 6, paragraph 1, of the Preparatory Committee's Draft Statute stipulated the following:

The Court [may exercise its] [shall have] jurisdiction [over a person] with respect to a crime referred to in article 5, paragraph [(a) to (e), or any combination thereof] [and in accordance with the provisions of this Statute] if:

[(a) The [matter] [situation] is referred to the Court by the Security Council, [in accordance with article 10<sup>187</sup>] [acting under Chapter VII of the Charter];]

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187 Article 10, paragraph 1, of the Preparatory Committee's Draft Statute stipulated the following:

[Notwithstanding article 6, [7] [and [9], the Court has jurisdiction in accordance with this Statute with respect to crimes [referred to] [specified] in article 5 [as a consequence of the referral of] [on the basis of a [formal] decision to refer] a [matter] [situation] in which one or more crimes appear to have been committed to [the Prosecutor of] the Court by the Security Council [acting under Chapter VII of the Charter of the United Nations] [in accordance with the terms of such referral].  
(U.N. Doc. A/CONF. 183/13 (Vol. III), p. 24)

- (b) [...];
- [(c) [...].]<sup>188</sup>

Although it still contained many brackets indicating undecided points, this stipulation seems to have inspired the Korean Proposal, which did not lay down any precondition to the proposed ICC's exercise of jurisdiction in the cases of the Security Council's referral<sup>189</sup>. Article 7 thereof stipulated the following:

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of the Statute if:

- (a) [...];
- (b) [...]; or
- (c) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations in accordance with article 10<sup>190</sup><sup>191</sup>.

The chapeau (introductory clause) and subparagraph (c) of this stipulation were largely identical to the chapeau and subparagraph (b) of Article 13 of the Statute finally adopted. However, when explaining the reasons for their proposal in writing or orally, the Republic of Korea did not mention anything about the legal basis for the proposed ICC's exercise of jurisdiction in the cases of the Security Council's referral<sup>192</sup>. Nor was it discussed by any other state which referred to the Korean Proposal during the Rome Conference.

On the contrary, the German Proposal, which was discussed along with the Korean Proposal in the CoW, was accompanied by a fairly clear explanation about the legal basis for the proposed ICC's exercise of jurisdiction in all cases. Regarding its state-consent requirements, the German Proposal simply stipulated the following:

1. A State which becomes a Party to the Statute thereby accepts the jurisdiction of the

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188 *Ibid.*, p. 22.

189 For the text of Article 8 of the Korean Proposal, which laid down only the preconditions to the proposed ICC's exercise of jurisdiction in the cases of the state parties' referral or Prosecutor's initiative, see 167 and accompanying text.

190 As the Korean Proposal did not contain Article 10, the article mentioned here is probably Article 10 of the Preparatory Committee's Draft Statute. For the text of paragraph 1 of this article, see note 187.

191 U.N. Doc. A/CONF. 183/13 (Vol. III), p. 228.

192 *Ibid.*, pp. 227-228; U.N. Doc. A/CONF. 183/13 (Vol. II), p. 184, paras. 52-54 (Republic of Korea).

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Court with respect to the crimes referred to in article 5, [paragraphs (a) to (d)].

- [2. A State that is not a Party to this Statute may, by declaration lodged with the Registrar, accept the obligation to cooperate with the Court with respect to the prosecution of any crime referred to in article 5. The accepting State shall then cooperate with the Court without any delay or exception in accordance with Part 9 of this Statute.]<sup>193</sup>

From this stipulation, it can be seen that, in contrast to the Korean Proposal, the German Proposal made no distinction between the cases of the Security Council's referral and those of the state parties' referral or Prosecutor's initiative, and did not require an acceptance by any particular state in any case. Germany explained the reasons for their proposal at the CoW's 7th meeting (on 19 June), stating the following with regard to the legal basis for the proposed ICC's exercise of jurisdiction:

Under current international law, all States might exercise universal criminal jurisdiction concerning acts of genocide, crimes against humanity and war crimes, regardless of the nationality of the offender, the nationality of the victims, and the place where the crime had been committed. That was not only confirmed by extensive State practice, but also by the Nuremberg Tribunal, and was enshrined inter alia in generally accepted international instruments, such as the Geneva Conventions of 1949 or the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It meant that each State could bring to justice individuals who had committed, for example, acts of genocide in third States, even if the offender and the victim were not nationals of the prosecuting State. The Court would be acting on behalf of the international community as a whole. Since the contracting parties to the Statute could individually exercise universal jurisdiction for the core crimes, *they could also, by ratifying the Statute, vest the Court with a similar power to exercise such universal criminal jurisdiction on their behalf*, though only of course with regard to the core crimes<sup>194</sup>.

This argument suggests that Germany thought that an acceptance by any state in accordance with paragraph 1 of their proposal could legalise the proposed ICC's exercise of jurisdiction in all cases. Quite a few states expressed support for the German Proposal

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

194 U.N. Doc. A/CONF. 183/13 (Vol. II), p. 184, para. 48 (Germany), with emphasis added.

during the debate at the CoW's 7th meeting (on 19 June) to the 11th meeting (on 22 June) where Part 2 of the Preparatory Committee's Draft Statute was used as the (main) basis for debate<sup>195</sup>. Although some of these states also expressed support for the Korean Proposal at the same time, the majority of them favoured the German Proposal<sup>196</sup>.

In the Bureau's Discussion Paper, however, any provision or option identical or similar to the German Proposal was not included. Regarding the state-consent requirements for the proposed ICC's exercise of jurisdiction in the cases of the Security Council's referral, the Bureau's Discussion Paper did not require any acceptance in accordance with the proposed Statute<sup>197</sup>, and Article 6 thereof stipulated the following:

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

- (a) [...];
- (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or

Option 1

- (c) [...].

Option 2

No subparagraph (c)<sup>198</sup>.

This stipulation was practically identical to Article 7 of the Korean Proposal quoted above, and its chapeau and subparagraph (b) were exactly the same as those of Article 13 of the Statute finally adopted. However, the Coordinator who introduced Article 6 of the Bureau's Discussion Paper at the CoW's 29th meeting (on 9 July) did not say anything about the legal basis for the proposed ICC's exercise of jurisdiction in the cases of the Security Council's referral<sup>199</sup>. Moreover, during the debate conducted afterwards, Germany and other states expressed their disappointment that the German Proposal was

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195 *Ibid.*, p. 186, para. 7 (Belgium), p. 187, para. 13 (Denmark), p. 187, para. 15 (Jordan), p. 187, para. 17 (Czech Republic), p. 188, para. 23 (Ukraine), p. 188, para. 36 (Norway), p. 190, para. 56 (Netherlands), p. 191, para. 65 (Switzerland), pp. 193-194, paras. 8-10 (New Zealand), p. 194, para. 20 (Italy), p. 196, para. 47 (Portugal), p. 200, para. 95 (Costa Rica).

196 See also note 164 and accompanying text. Only Switzerland favoured the Korean Proposal for the cases of the state parties' referral or Prosecutor's initiative, while Norway, the Netherlands, New Zealand and Italy favoured the German Proposal.

197 U.N. Doc. A/CONF. 183/13 (Vol. III), pp. 208-209.

198 *Ibid.*, p. 208.

199 U.N. Doc. A/CONF. 183/13 (Vol. II), p. 295, para. 2 (Kourula, Coordinator).

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not incorporated into the Bureau's Discussion Paper<sup>200</sup>, but no state indicates what theoretical framework this paper had with regard to the above-mentioned legal basis.

Likewise, the Bureau's Proposal did not require any acceptance in accordance with the proposed Statute in the cases of the Security Council's referral, and the chapeau and subparagraph (b) of Article 6 thereof were exactly the same as those of Article 13 of the Statute<sup>201</sup>. The Coordinator who introduced the former article at the CoW's 33rd meeting (on 13 July) did not say anything about the legal basis for the proposed ICC's exercise of jurisdiction in the cases of the Security Council's referral<sup>202</sup>, nor was it discussed by any state during the debate conducted afterwards<sup>203</sup>. Furthermore, it was not discussed during the CoW's 42nd meeting (on 17 July) or the 9th plenary meeting (on 17 and 18 July) where the Bureau's Draft Statute was presented and the Statute adopted, either.

From the aforementioned, it can be seen that, when drawing up Article 6, subparagraph (b), of the Bureau's Discussion Paper, which later became Article 13, subparagraph (b) of the Statute, the Bureau dismissed the German Proposal and adopted the Korean Proposal without substantial modification. And since the latter proposal seems to have been inspired by the Preparatory Committee's Draft Statute, it is necessary to examine the preparatory work prior to the Rome Conference in order to ascertain what theoretical framework the Statute has with regard to the legal basis for the ICC's exercise of jurisdiction in the cases of the Security Council's referral.

It can be noted in this regard that, during the preparation of the ILC's final Draft Statute, the ILC studied the possibility of the proposed ICC exercising its jurisdiction over the cases brought with the authorisation of the UN Security Council, and several states also made relevant oral and written comments. In 1993, a working group of the ILC<sup>204</sup> presented at its 45th session "the Draft statute for an international criminal tribunal" (hereinafter referred to as "the ILC's 1993 Draft Statute")<sup>205</sup>, Article 25 of which stipulated the following:

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200 *Ibid.*, p. 296, para. 23 (Trinidad and Tobago), p. 302, para. 131 (Guinea), p. 303, para. 153 (Mali), p. 304, paras. 183, 185 (Germany), p. 308, para. 59 (Ukraine), p. 311, para. 110 (Djibouti), p. 315, para. 16 (Congo), p. 317, para. 38 (Croatia).

201 U.N. Doc. A/CONF. 183/13 (Vol. III), p. 216.

202 U.N. Doc. A/CONF. 183/13 (Vol. II), p. 320, para. 10 (von Hebel, Coordinator).

203 In this round of debate only Congo expressed their disappointment that the German Proposal was not incorporated into the Bureau's Proposal. *Ibid.*, p. 345, para. 15 (Congo).

204 The unabridged official name of this working group was initially "the Working Group on the question of an international criminal jurisdiction" but was subsequently changed to "the Working Group on a draft statute for an international criminal court". See, e.g., Yearbook of the International Law Commission, 1993, Vol. II (Part Two), p. 100.

205 *Ibid.*, 1993, Vol. II (Part Two), pp. 101-132. Regarding the reason for the change in terminology from "tribunal" in the ILC's 1993 Draft Statute to "court" in the ILC's final Draft Statute, the relevant part of the commentary on the latter draft statute reads as follows:

Subject to article 27<sup>206</sup>, the Court also has jurisdiction under this Statute over cases referred to in articles 22<sup>207</sup> or 26, paragraph 2 (a)<sup>208</sup> which may be submitted to it on the authority of the Security Council<sup>209</sup>.

However, this stipulation and the commentary thereupon did not make it clear what the phrase "on the authority of the Security Council" meant, especially whether the Council should act under Chapter VII of the UN Charter<sup>210</sup>, nor whether any acceptance

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The question of the title to be given to the jurisdictional structure was the subject of some debate. In the draft articles proposed by the Working Group at the forty-fifth session in 1993, the entity as a whole was referred to as the "tribunal", with the term "court" reserved for the judicial organs. However some members thought that it was unusual to have a "court" within a "tribunal", and others preferred not to use the word "tribunal" at all in relation to a permanent body intended to exercise criminal jurisdiction. The Commission agreed that the term "court" should be used to refer to the entity as a whole, and that where specific functions are intended to be exercised by particular organs (such as the Presidency, the Procuracy, the Registry), this would be specifically stated.  
(*Ibid.*, 1994, Vol. II (Part Two), p. 27)

206 Article 27 of the ILC's 1993 Draft Statute stipulated the following:

A person may not be charged with a crime of or directly related to an act of aggression under article 25 or article 26, paragraph 2 (a) unless the Security Council has first determined that the State concerned has committed the act of aggression which is the subject of the charge.  
(*Ibid.*, 1993, Vol. II (Part Two), p. 111)

207 Article 22 of the ILC's 1993 Draft Statute stipulated the following:

The Court may have jurisdiction conferred on it in respect of the following crimes:  
(a) genocide and related crimes as defined by articles II and III of the Convention on the Prevention and Punishment of the Crime of Genocide, of 9 December 1948;  
[...]  
(h) the crimes defined by article 3 of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and by article 2 of the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, both of 10 March 1988.  
(*Ibid.*, 1993, Vol. II (Part Two), pp. 106-107)

208 Article 26 of the ILC's 1993 Draft Statute stipulated the following:

1. The Court also has jurisdiction under this Statute in respect of other international crimes not covered by article 22 where the State or States identified in paragraph 3 notify the Registrar in writing that they specially consent to the Court exercising, in relation to that crime, jurisdiction over specified persons or categories of persons.
  2. The other international crimes referred to in paragraph 1 are:
    - (a) crimes under general international law, that is to say, under a norm of international law accepted and recognized by the international community of States as a whole as being of such a fundamental character that its violation gives rise to the criminal responsibility of individuals;
    - (b) [...].
  3. The State or States referred to in paragraph 1 are:
    - (a) in relation to a crime referred to in paragraph 2 (a), the State on whose territory the suspect is present, and the State on whose territory the act or omission in question occurred;
    - (b) [...].
- (*Ibid.*, 1993, Vol. II (Part Two), pp. 109-110)

209 *Ibid.*, 1993, Vol. II (Part Two), p. 109.

210 The relevant part of the commentary on Article 25 of the ILC's 1993 Draft Statute read as follows:

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in accordance with the proposed Statute<sup>211</sup> should be required for the proposed ICC's exercise of jurisdiction in the cases brought with the authorisation of the Council. Several states also raised these issues orally 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, or in the written comments submitted in accordance with the Assembly Resolution 48/31<sup>212,213</sup>. For example, the Czech Republic claimed that "[d]espite the lack of an explicit provision to this end it would be appropriate for the Security Council to have the right to submit complaints to the tribunal only when alleged crimes were committed in situations envisaged in Chapter VII of the Charter. This should be clearly stipulated in the statute. It should also be beyond doubt that the general provision requiring the acceptance of jurisdiction of States does not apply and that the right of the Security Council to submit complaints does not depend on the State's consent of the jurisdiction of the tribunal"<sup>214</sup>. Moreover, with regard to the legal basis for the proposed ICC's exercise of jurisdiction, Japan contended that "[s]ince the statute is based on the ceded jurisdiction principle, it would be natural to consider that this article [=Article 25] prescribes a case in which the Security Council, based on the measures taken under Chapter VII of the Charter of the United Nations, decides that jurisdiction of a specified State should be ceded to the court"<sup>215</sup>.

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Article 25, as clearly arises from its text, does not constitute a separate strand of jurisdiction from the point of view of the kind of crimes which may give rise to the Court's jurisdiction. It, rather, broadens the category of subjects which may bring to the Court the crimes referred to in articles 22 and 26, paragraph 2 (a), by providing the Security Council of the United Nations also with this right. The Working Group felt that a provision such as this one was necessary in order to enable the Security Council to make use of the Court, as an alternative to establishing tribunals ad hoc.  
(*Ibid.*, 1993, Vol. II (Part Two), p. 109)

211 For the state-consent requirements prescribed in the ILC's 1993 Draft Statute, see Articles 24 and 26. The latter article was already quoted in note 208, while the former article stipulated the following:

1. The Court has jurisdiction under this Statute in respect of a crime referred to in article 22 provided that its jurisdiction has been accepted under article 23:
  - (a) by any State which has jurisdiction under the relevant treaty to try the suspect of that crime before its own courts;
  - (b) in relation to a suspected case of genocide, by any State party to the Convention on the Prevention and Punishment of the Crime of Genocide, of 9 December 1948.
2. If the suspect is present on the territory of the State of his nationality or of the State where the alleged offence was committed, the acceptance of the jurisdiction of the Court by that State is also required.

(*Ibid.*, 1993, Vol. II (Part Two), pp. 108-109)

212 For the invitations to submit written comments, see note 102 and accompanying text.

213 U.N. Doc. A/C. 6/48/SR. 20, p. 5, para. 25 (Czech Republic); Yearbook of the International Law Commission, 1994, Vol. II (Part One), pp. 27-28, para. 24 (Australia), p. 31, para. 15 (Austria), p. 40, paras. 13-14 (Czech Republic), pp. 51-52, para. 23 (Japan), p. 71, para. 16 (Sri Lanka), p. 77, para. 21 (United Kingdom of Great Britain and Northern Ireland), p. 95, para. 10 (Switzerland).

214 *Ibid.*, 1994, Vol. II (Part One), p. 40, paras. 13-14 (Czech Republic).

215 *Ibid.*, 1994, Vol. II (Part One), pp. 51-52, para. 23 (Japan).

Furthermore, when the ILC's 1993 Draft Statute was considered during the plenary meetings of the ILC's 46th session held in 1994, some of its members elaborated on the legal basis for the proposed ICC's exercise of jurisdiction in the cases brought with the authorisation of the UN Security Council, fully agreeing that a decision of the Council under Chapter VII of the UN Charter could serve as a substitute for the acceptance by states in accordance with the proposed Statute<sup>216</sup>. For example, James Crawford said that "under article 25, the Security Council could, in fact, delegate jurisdiction to the court, inasmuch as *a Security Council resolution could replace the consent of States set out in articles 23<sup>217</sup> and 26*" [emphasis added]<sup>218</sup>. This elaboration was clearly reflected in Article 23, paragraph 1, of the ILC's final Draft Statute, which stipulated the following:

Notwithstanding article 21<sup>219</sup>, the Court has jurisdiction in accordance with this Statute

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216 *Ibid.*, 1994, Vol. I, p. 5, para. 31 (Crawford), p. 5, para. 33 (Rosenstock), p. 9, para. 15 (Mikulka), p. 29, paras. 75-76 (Mikulka).

217 Article 23 of the ILC's 1993 Draft Statute stipulated the following:

ALTERNATIVE A

1. A State Party to this Statute may, by declaration lodged with the Registrar, accept at any time the jurisdiction of the Court over one or more of the crimes referred to in article 22.
2. [...].
3. [...].
4. A State not a Party to this Statute may, by declaration lodged with the Registrar, accept at any time the jurisdiction of the Court over a crime referred to in article 22 which is or may be the subject of a prosecution under this Statute.

ALTERNATIVE B

1. Unless it makes the declaration provided for in paragraph 2, a State becoming Party to this Statute is deemed to have accepted the jurisdiction of the Court over any crime referred to in article 22, if it is a Party to the treaty which defines that crime.
2. A State Party to the present Statute may, by declaration lodged with the Registrar, indicate that it does not accept the jurisdiction of the Court over one or more of the crimes referred to in paragraph 1.
3. [...].
4. [...].

ALTERNATIVE C

1. A State Party to this Statute may, by declaration lodged with the Registry, accept at any time the jurisdiction of the Court.
2. Unless otherwise specified, a declaration of acceptance under paragraph 1 shall be deemed to confer jurisdiction on the Court with regard to all of the crimes listed in article 22.
3. [...].

(*Ibid.*, 1993, Vol. II (Part Two), pp. 107-108)

218 *Ibid.*, 1994, Vol. I, p. 5, para. 31 (Crawford). This statement can be said to have referred (mainly) to the cases where the UN Security Council took a decision under Chapter VII of the UN Charter. For the scope of application of Article 25 thereof, see note 84.

219 Article 21 of the ILC's final Draft Statute stipulated the following:

1. The Court may exercise its jurisdiction over a person with respect to a crime referred to in article 20 if:
  - (a) In a case of genocide, a complaint is brought under article 25, paragraph 1;

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with respect to crimes referred to in article 20 as a consequence of the referral of a matter<sup>220</sup> to the Court by the Security Council acting under Chapter VII of the Charter of the United Nations<sup>221</sup>.

This stipulation was essentially identical to the Statute's provision for the cases of the Security Council's referral. Moreover, with regard to the legal basis for the proposed ICC's exercise of jurisdiction, the relevant part of the commentary on Article 23, paragraph 1, of the ILC's final Draft Statute reads as follows:

Some members were of the view that the power to refer cases to the court under article 23, paragraph 1, should also be conferred on the General Assembly, particularly in cases in which the Security Council might be hampered in its actions by the veto. On further consideration, however, it was felt that such a provision should not be included as *the General Assembly lacked authority under the Charter of the United*

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(b) In any other case, a complaint is brought under article 25, paragraph 2, and the jurisdiction of the Court with respect to the crime is accepted under article 22:

(i) By the State which has custody of the suspect with respect to the crime ("the custodial State");

(ii) By the State on the territory of which the act or omission in question occurred.

2. If, with respect to a crime to which paragraph 1 (b) applies, the custodial State has received, under an international agreement, a request from another State to surrender a suspect for the purposes of prosecution, then, unless the request is rejected, the acceptance by the requesting State of the Court's jurisdiction with respect to the crime is also required.

(*Ibid.*, 1994, Vol. II (Part Two), p. 41)

220 Regarding what the UN Security Council should refer to the proposed ICC, the relevant part of the commentary on Article 23, paragraph 1, of the ILC's final Draft Statute reads as follows:

The Commission understood that the Security Council would not normally refer to the court a "case" in the sense of an allegation against named individuals. Article 23, paragraph 1, envisages that the Council would refer to the court a "*matter*", *that is to say, a situation to which Chapter VII of the Charter applies*. It would then be the responsibility of the Prosecutor to determine which individuals should be charged with crimes referred to in article 20 in relation to that matter: see article 25, paragraph 4.

(*Ibid.*, 1994, Vol. II (Part Two), p. 44, with emphasis added)

It can be seen from this explanation that the word "matter" in Article 23, paragraph 1, of the ILC's final Draft Statute had practically the same meaning as the word "situation" in Article 13 of the Statute finally adopted, though a member of the Singapore delegation to the Rome Conference notes that "those who preferred 'matter' did so on the basis of the need for some degree of specificity in the referral before the Court could assert jurisdiction, while those who preferred 'situation' argued that the referral of a 'matter' by the Council was still too specific for the independent functioning of the Court". Lionel Yee, "The International Criminal Court and The Security Council: Articles 13(b) and 16," in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer Law International, 1999), p. 148.

221 Yearbook of the International Law Commission, 1994, Vol. II (Part Two), p. 43.

*Nations to affect directly the rights of States against their will*, especially in respect of issues of criminal jurisdiction<sup>222</sup>.

It can be seen from this explanation that the ILC concluded that, in contrast to the UN General Assembly, the UN Security Council possessed authority under the UN Charter to create obligations for states without their consent<sup>223</sup> in order to legalise the proposed ICC's exercise of jurisdiction. This conclusion obviously followed the above-mentioned agreement among some of the ILC's members that a decision of the Council under Chapter VII of the UN Charter could serve as a substitute for the acceptance by states in accordance with the proposed Statute which was also supposed to legalise it. Moreover, Japan's contention quoted above also meant, as indicated in the phrase "[s]ince the statute is based on the ceded jurisdiction principle", that a decision of the Council that state jurisdiction should be ceded to the proposed ICC could replace the acceptance by states in accordance therewith<sup>224</sup>. Therefore, it can be said that Article 23, paragraph 1, of the ILC's final Draft Statute was based on the idea of such substitution or replacement.

To be more precise, it should be added that it is not clear from the aforementioned what a state would consent to exactly when accepting the proposed ICC's exercise of jurisdiction in accordance with the ILC's final Draft Statute, that is to say, what was the exact meaning of such an acceptance which could be replaced by a decision of the UN Security Council. Japan clearly thought that an acceptance in accordance therewith would constitute consent to the creation of the accepting state's obligation to acquiesce in the proposed ICC's exercise of jurisdiction as the exercise of its state jurisdiction through this court, while those members of the ILC did not seem to address this issue<sup>225</sup>. However, that does not have to be answered definitively for the purposes of this paper because, if the Statute's provision for the cases of the Security Council's referral is based on the idea of replacement, this means that a decision of the Council can replace the acceptance by states in accordance with the Statute finally adopted, not the ILC's final Draft Statute.

In short, the Statute's provision for the cases of the Security Council's referral, which

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222 *Ibid.*, 1994, Vol. II (Part Two), p. 44, with emphasis added.

223 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.

224 For the whole text of Japan's written comment submitted in accordance with the UN General Assembly Resolution 48/31, see Yearbook of the International Law Commission, 1994, Vol. II (Part One), pp. 48-52.

225 It should be noted in this regard that Crawford mentioned the delegation of "jurisdiction", not "state jurisdiction" (see note 218 and accompanying text).

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does not lay down any precondition to the ICC's exercise of jurisdiction, can be said to originate from Article 23, paragraph 1, of the ILC's final Draft Statute. Moreover, it can also be said that it is based on the idea that a decision of the UN Security Council under Chapter VII of the UN Charter can serve as a substitute for, or replace the acceptance by states in accordance with Article 12 of the Statute, which, as revealed in the previous sub-subsection, constitutes consent to the creation of the accepting states' obligation to acquiesce in the ICC's exercise of proper jurisdiction which is not characterised as the exercise of a kind of state jurisdiction through the ICC. Accordingly, it can be argued that, unless there is evidence to the contrary, the resolutions adopted by the Council when it refers situations to the Prosecutor are interpreted to provide for the obligation of (at least) UN member states to acquiesce in the ICC's exercise of such proper jurisdiction<sup>226</sup>.

Additionally, relevant discussions can also be found in the preparatory work of the Statute with regard to the other three issues raised in subsection 2 of section 2 of the previous chapter. Firstly, the issue of whose rights could be violated by the ICC's exercise of jurisdiction was already addressed in the previous sub-subsection. Secondly, as to whether referrals by the Council conform with Chapter VII of the UN Charter, especially whether there can be any referrals which constitute measures in Chapter VII, the members of the ILC did not reach any conclusion<sup>227</sup>, and some states made a negative

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226 It can be noted in this regard that, for example, when the UN Security Council Resolution 1593 (2005) (see subsection 2 of section 2 of the previous chapter) was adopted, the US stated that "[w]e reiterate our fundamental objection to the Rome Statute's assertions that the ICC has jurisdiction over the nationals, including government officials, of States that have not become parties to the Rome Statute. Non-parties have no obligations in connection with that treaty *unless otherwise decided by the Security Council*, upon which Members of this Organization have conferred primary responsibility for the maintenance of international peace and security" [emphasis added]. U.N. Doc. S/PV. 5158, p. 3 (United States of America).

227 The relevant part of the commentary on Article 23, paragraph 1, of the ILC's final Draft Statute reads as follows:

Paragraph 1 of article 23 does not constitute a separate strand of jurisdiction from the point of view of the kind of crimes which the court may deal with (jurisdiction *ratione materiae*). Rather, it allows the Security Council to initiate recourse to the court by dispensing with the requirement of the acceptance by a State of the court's jurisdiction under article 21, and of the lodging of a complaint under article 25. This power may be exercised, for example, in circumstances where the Council might have authority to establish an ad hoc tribunal under Chapter VII of the Charter of the United Nations. The Commission felt that such a provision was necessary in order to enable the Council to make use of the court, as an alternative to establishing ad hoc tribunals and as a response to crimes which affront the conscience of mankind. On the other hand it did not intend in any way to add to or increase the powers of the Council as defined in the Charter, as distinct from making available to it the jurisdiction mechanism created by the statute.

[...]

In adopting article 23, paragraph 1, the Commission is not to be understood as taking any position as to the extent of the powers of the Security Council under Chapter VII of the Charter of the United Nations or otherwise, or as to the situations in which it is proper that these powers should be exercised.

statement<sup>228</sup>. However, the vast majority of states made an affirmative one<sup>229</sup> or accepted the possibility of the Council's referral without addressing this issue explicitly. Lastly, as to whether or not it is possible to create obligations for non-members of the UN which have not accepted the ICC's exercise of jurisdiction in accordance with Article 12 of the Statute, there did not seem to be any state which made an affirmative statement, while a negative one was made by Switzerland, which only joined the UN in 2002<sup>230</sup>.

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Different views were expressed on these issues during the debate in the Commission. (Yearbook of the International Law Commission, 1994, Vol. II (Part Two), p. 44)

- 228 For example, in 1994 Algeria stated that "[w]ith regard to the competence of the court, article 23 of the draft attributes to the Security Council the authority to bring a complaint directly to the court under Chapter VII of the Charter [...]. There is no denying that the functions assigned to the Security Council by the Charter would be appreciably expanded. The consequences of that expansion had not been given enough thought and more than that, it lacked a sound legal basis. Since the proposal did not have the unanimous support of the Commission, the article should be deleted". U.N. Doc. A/C. 6/49/SR. 20, p. 17, para. 78 (Algeria).
- 229 For example, in 1996 the Czech Republic stated that "[h]is delegation did not share the view of some delegations that the position of the Security Council, as envisaged in article 23, would undermine the court's judicial independence and integrity. Article 23 was fully consistent with the responsibilities of the Security Council under the Charter of the United Nations, and the draft statute conferred no additional authority on it. The possibility for the Security Council to trigger jurisdiction might become particularly pertinent if the court's jurisdiction was finally narrowed down to three or four core crimes". U.N. Doc. A/C. 6/51/SR. 29, p. 8, para. 42 (Czech Republic).
- 230 In its written comment on the ILC's final Draft Statute, Switzerland stated that "[t]he draft statute also envisages the possibility of a treaty instrument deploying its effects even against States that are not parties thereto, namely, when the Security Council, acting under Chapter VII of the Charter, refers a matter to the international criminal court (article 23, paragraph 1 of the draft statute). This possibility, which results from a reading of article 21 together with article 23, disregards the principle of the relativity of treaties and should be ruled out". U.N. Doc. A/AC. 244/1, pp. 17-18, para. 12 (Switzerland). It should be noted, however, that, after making this statement, Switzerland did not refer to the cases of the Security Council's referral again until the end of the Rome Conference.