PRELIMINAYR STUDY ON THE ADVISORY JURISDICTION OF INTERNATIONAL CRIMINAL COURT

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Abstract

The Rome Statute and the Regulations of the International Criminal Court stipulate the very detailed contentious jurisdiction, but the Advisory Jurisdiction are not mentioned. Advisory jurisdiction, as the complement of the contentious jurisdiction, not only provides the other aspect support of legal basis for the settlement of international disputes, but also provides a new way of legal remedies for the statutory advisory qualified international organizations and other subjects of international law. Therefore, I try to suggest that the International Criminal Court can establish an Advisory Committee that includes two parts, one part is the Advisory Committee on Legal Texts, the other part is the Advisory Committee on the special cases, which can not only enhance the confidence of the International Criminal Court in pursuit of the judicial justice, but also can protect the interests of the victims in the greater degree.

The Key Words: International Criminal Court; Advisory Jurisdiction; The Advisory Committee on Legal Texts; The Advisory Committee

1. Along with the International Criminal Court Rome Statute (hereinafter referred to the Rome Statute) entered into force, the International Criminal Court was formally established on 1 July 2002. It is the eleventh anniversary of the International Criminal Court this year. As the first permanent international criminal court, it’s establishment marks the significant development in the field of International Criminal Law, and had the important impact on the international community. The establishment of the International Criminal Court has the great historical significance that is the milestone towards ending impunity in the international community. It is now a fully functional institution supported by 121 States Parties, with 22 warrants of arrest issued, 16 cases have already been sued in the International Criminal Court, and seven of them are ongoing investigations. 1

2. The article 1 of Rome Statute regulates that the International Criminal Court shall

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1 See: http://www.10a.icc-cpi.info/index.php/en/
have the power to exercise its jurisdiction over persons for the most serious crimes of international concern----the crime of genocide; crimes against humanity; war crime; the crime of aggression. There is no provision that regulates the advisory jurisdiction of the International Criminal Court in the whole Rome Statute. As we know, The contentious jurisdiction and advisory jurisdiction are the two parts of the jurisdiction of international court or international tribunal, each plays an irreplaceable important role. Advisory jurisdiction, as the complement of the contentious jurisdiction, not only provides the other aspect support of legal basis for the settlement of international disputes, but also provides the new ways and means of legal remedies for the statutory advisory qualified international organizations and other subjects of international law, and its advisory opinions, in particular, the advisory opinions of the Permanent Court of International Justice and the International Court of Justice play an important role in promoting the development of the international legal norms.

3. In this paper, try to study the advisory jurisdiction, the legal text advisory jurisdiction of International Criminal Court and the reasons why the International Criminal Court has not established the advisory jurisdiction, and then try to suggest that International Criminal Court should establish an Advisory Committee that not only can issue the advisory opinions on the legal texts, but also can issue the advisory opinions on the special cases and the other legal issues relating to the special cases, which can not only enhance the confidence of the International Criminal Court in pursuit of the judicial justice, but also can protect the interests of the victims in the greater degree.

### I. The Advisory Jurisdiction and the Advisory Opinion

#### I.A. The meaning of the advisory jurisdiction

4. Although the Advisory Jurisdiction is a familiar term, it is not easy to accurately define the meaning of the advisory jurisdiction. In some books and teaching materials, some just clarify the origins and characteristics of the advisory jurisdiction through citing the article 96 of the Charter of the United Nations and the provisions of the article 65 of the Statute of the International Court of Justice and comparing the different between the advisory jurisdiction with the contentious jurisdiction. Some only mentioned the sources of law of the advisory system and the effectiveness of the Advisory Opinions. Some only explained that the International Court of Justice has the competence that can issue the Advisory Opinions. Perhaps, understanding such term is too easy to specifically define it. Or, it is not easy to give a definition to a term.

5. A scholar thinks that the key issue to understand the definition of the advisory jurisdiction does not lie in defining the words of advisory jurisdiction, but should lie in understanding the parties, related matters and the effectiveness of advisory opinions

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4 Matsui Yoshiro etc.(Japan), The International Law, Xin Chongyang Translation, China University of Political Science and Law Press(2004), P238.
that issued by the International Court of Justice through exercising the advisory jurisdiction. Therefore, he believes that the Advisory Jurisdiction refers to that the international courts have the rights and privileges, through the way of issuing the unbinding advisory opinions, to adjudicate the request that proposed by the international organizations with consultative status.

I. B. Characters and Types of the Advisory Jurisdiction

6. Generally speaking, the advisory opinion refers to the judicial opinion of a permanent court on certain legal problems, regardless of whether such problem relating to an existing dispute that an international entity submitted to the international court. This opinion is not binding on entities or any other institution and any state that they need not to take any particular action, in generally, at best, the requesting entities will be required to adjust their own behavior on the basis that when they consider that the view of the advisory opinion over the legal situation is right. ⁶ Let us take the example with the advisory opinion of the Permanent Court and the International Court of Justice.

7. There are two types of the advisory opinions in the judicial practice of the Permanent Court in about two decades. One type of advisory opinion issued on "a dispute", the other type of advisory opinion issued on "a problem". This kind of the classification of advisory opinion was confirmed in the article 83 of the 1936 Statute of the Permanent Court. The provision is that If the question upon which an advisory opinion is requested relates to an existing dispute between two or more Member of the League of Nations or States, Article 31 of the Statute of the Court shall apply, as also the provisions of the present Rules concerning the application of that Article.

8. In the period of the United Nations, either the Charter of the United Nations or the Statute of the International Court of Justice uses the phrase of the "Legal question" instead of the "disputes and problems" that stipulated in the period of the Permanent Court. The International Court of Justice, however, in the Statute of the International Court of Justice 1946, actually distinguished two types of Advisory Opinions, when the court issues the different advisory opinions, the procedure adopted by the court is different. The article 83 of the Rules of the International Court of Justice stipulates that when an advisory opinion is requested upon a legal question actually pending between two or more States, Article 31 of the Statute shall apply, as also the provisions of these Rules concerning the application of that Article. In other words, If an advisory opinion is not requested upon a legal question actually pending between two or more State, Article 31 of the Statute shall not apply, as also the provisions of these Rules concerning the application of that Article. In addition, in the judicial

⁶ (Germany) Marx Planck Institute of Comparative Public Law and International Law: Encyclopedia of Public International Law • Settlement of dispute, Chen Zhizhong, Li Feinan translation, Zhong Shan University Press (1989), P92.

⁵ The rules of the court still retain such provisions after some revisions. Such as, the article 89 of the 1972 rules, and the article 102 of the Statute of the International Court of Justice since 1978 until now.

⁸ The Article 31 of the Statute of the International Court of Justice: (1) Judges of the nationality of each of the parties shall retain their right to sit in the case before the Court. (2) If the Court includes upon the Bench a judge of the nationality of one of the parties, any other party may choose a person to sit as judge. Such person shall be chosen preferably from among those persons who have been nominated as candidates as provided in Articles 4 and 5. (3) If the Court includes upon the Bench no judge of the nationality of the parties, each of these parties may proceed to choose a judge as provided in paragraph 2 of this Article.
practice of the International Court of Justice, legal questions actually covered the fact of the "disputes" and "questions". Liu Fangxiong\(^9\) thinks that although the Charter of the United States and the Statute of the International Court of Justice did not distinguish the types of the advisory opinion, based on the needs of practice, the court actually divided the advisory opinions into two types, namely, one type of advisory opinion is actually related to a pending legal question between two or more States, the other type of advisory opinion is not so. The relevant provisions, since 1978 until now, of the article 102 of the Statute of the International Court of Justice, is the proof of the different views about distinguishing such two types of advisory opinions\(^10\).

9. In summary, the advisory opinion, in principle, has no binding. The distinction between the different advisory opinions lies in the applicable procedures when the court issue the advisory opinion are different.

II. The Advisory Committee on Legal Texts of International Criminal Court

10. The Rome Statute detailedly stipulated the contentious jurisdiction of the International Criminal Court, but it did not mention the advisory jurisdiction of the International Criminal Court, namely, the International Criminal Court does not have the advisory jurisdiction like some other international tribunals, for example, the relevant statute of the Permanent Court of International Justice, the International Court of Justice, the International Tribunal for the Law of the Sea, the European Court of Justice, the European Court of Human Rights, the Inter-American Court of Human Rights, part of the Administrative Tribunal of the international organizations all stipulated that the courts or tribunals have the advisory jurisdiction.

11. Although the Rome Statute did not stipulate the advisory jurisdiction of the International Criminal Court, the Regulations of the Court (Official documents of the International Criminal Court, ICC-BD/01-01-04) passed by the International Criminal Court in the Fifth Plenary Session on 17-18 May, 2004 in Hague stipulated the Advisory Committee on Legal Texts.

12. The Regulations of the Court passed pursuant to the Article 52\(^11\) of the Rome Statute. The Article 4 of the Regulations of the Court stipulated the Advisory Committee on Legal Texts.

II.A. The Staff in the Advisory Committee on Legal Texts

\(^9\) Liu Fangxiong, Study on the Advisory Jurisdiction of International Court of Justice, Zhe Jiang University Press(2008), P11.

\(^10\) The Article102(2) of the Rules of Court stipulate: The Court shall also be guided by the provisions of the Statute and of these Rules which apply in contentious cases to the extent to which it recognizes them to be applicable. For this purpose, it shall above all consider whether the request for the advisory opinion relates to a legal question actually pending between two or more States.

The Article 102(3) stipulate: When an advisory opinion is requested upon a legal question actually pending between two or more States, Article 31 of the Statute shall apply, as also the provisions of these Rules concerning the application of that Article.

\(^11\) The Article 52 of the Rome Statute provide: (1)The judges shall, in accordance with this Statute and the Rules of Procedure and Evidence, adopt, by an absolute majority, the Regulations of the Court necessary to its routine functioning.(2) The Prosecutor and the Registrar shall be consulted in the elaboration of the Regulations and any amendments thereto.(3) The Regulations and any amendments thereto shall take effect upon adoption unless otherwise decided by the judges. Immediately upon adoption, they shall be circulated to States Parties for comments. If within six months there are no objections from a majority of States Parties, they shall remain in force.
13. There shall be an Advisory Committee on Legal Texts comprised of:

(a) Three judges, one from each Division, elected from among the members of the Division, who shall be members of the Advisory Committee for a period of three years;
(b) One representative from the Office of the Prosecutor;
(c) One representative from the Registry; and
(d) One representative of counsel included in the list of counsel.

14. In addition, the Article 4(3) of the Regulations of the Court stipulates that the Chairperson of the Advisory Committee may, as appropriate, invite other interested groups or persons to present their views if considered relevant for the work of the Advisory Committee. The Chairperson may also seek the advice of experts.

15. The Article 4(6) of the Regulations of the Court stipulates that the Presidency may, as appropriate, designate one person, who may be assisted by others, to provide administrative and legal support to the Advisory Committee.

II. B. The Application of the Advisory Opinion

II. B.i The subjects of the application of the advisory opinion

16. Who have the right to apply the advisory opinion? According to the Article 4, paragraph 4 and paragraph 5, they are Judge, Prosecutor, Registrar, the Plenary Session and the Presidency.

II. B.ii The submitting of the proposals

17. The article 4 of the Regulations of the Court stipulates: The Prosecutor can submit a proposal for an amendment to the Rules or to the Elements of Crimes; The Plenary Session can submit a proposal for an amendments to the Rules, Elements of Crimes and these Regulations to the Advisory Committee on Legal Texts; The Presidency can submit a proposal of requesting the Advisory Committee to consider and report on any matter.

18. In urgent cases, where the Rules do not provide for a specific situation before the Court, the Presidency, on its own motion or at the request of a judge or the Prosecutor, may submit proposals for provisional rules under article 51, paragraph 3, directly to the judges for their consideration in a plenary session.

19. All standard forms and templates for use during the proceedings before the Court shall be approved by the Presidency. The Presidency may refer any matter relating to the standard forms and templates to the Advisory Committee on Legal Texts for its

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12 The Article 4 of the Regulations of the International Criminal Court.
13 “judge” refers to a judge of the Court.
14 “Prosecutor” refers to the Prosecutor of the Court.
15 “Registrar” refers to the Registrar of the Court.
16 “plenary session” refers to a plenary session of the judges as described in rule 4. The article 4(2) regulate: The Advisory Committee shall meet at least twice a year and at any time at the request of the Presidency.
17 “Presidency” refers to the organ of the Court as described in article 34 comprised of the President and the First and Second Vice-Presidents of the Court.
19 Although the Regulations of the Court did not define the meaning of any matter, the meaning of any matter is only about related to the legal texts.
20 The Article 5, paragraph 2 of the Regulations of the Court.
consideration.\textsuperscript{21}

20. All agreements with any State not party to the Statute or any intergovernmental organization, setting out a general framework for cooperation on matters within the competency of more than one organ of the Court, shall be negotiated under the authority of the President who shall seek recommendations from the Advisory Committee on Legal Texts.\textsuperscript{22}

\section*{II.C. The Procedure of Advisory Opinion}

\subsection*{II.C.i. Amendments to the Rules and Elements of Crimes}

21. Any proposal for amendments to the Rules pursuant to article 51 or to the Elements of Crimes pursuant to article 9 shall be submitted by a judge to the Advisory Committee on Legal Texts. The Prosecutor may submit proposals to the Advisory Committee on Legal Texts. All proposals, together with any explanatory material, shall be presented in writing in both working languages of the Court.\textsuperscript{23}

22. In urgent cases, where the Rules do not provide for a specific situation before the Court, the Presidency, on its own motion or at the request of a judge or the Prosecutor, may submit proposals for provisional rules under article 51, paragraph 3\textsuperscript{24}, directly to the judges for their consideration in a plenary session.\textsuperscript{25}

\subsection*{II.C.ii. Amendments to the Regulations of the Court}

23. Any proposal for amendments to these Regulations shall be accompanied by explanatory material, and those documents shall be presented in writing to the Advisory Committee on Legal Texts in both working languages of the Court.

24. In urgent cases, the Presidency, on its own motion or at the request of a judge, the Prosecutor or the Registrar, may submit proposals for amendments to these Regulations directly to the judges for their consideration in a plenary session.

25. Amendments to these Regulations shall not be applied retroactively to the detriment of the person to whom article 55, paragraph 2\textsuperscript{26}, or article 58\textsuperscript{27} applies, the accused,

\footnotesize{\textsuperscript{21} The Article 23, paragraph 2 of the Regulations of the Court.} \\
\footnotesize{\textsuperscript{22} The Article 107, paragraph 1 of the Regulations of the Court.} \\
\footnotesize{\textsuperscript{23} The Article 5 of the Regulations of the Court.} \\
\footnotesize{\textsuperscript{24} The Article 51, paragraph 3 of the Rome Statute stipulate: After the adoption of the Rules of Procedure and Evidence, in urgent cases where the Rules do not provide for a specific situation before the Court, the judges may, by a two-thirds majority, draw up provisional Rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties.} \\
\footnotesize{\textsuperscript{25} The Article 5, paragraph 2 of the Regulations of the Court.} \\
\footnotesize{\textsuperscript{26} The Article 55, paragraph 2 of Rome Statute stipulate: Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have the following rights of which he or she shall be informed prior to being questioned: (a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court; (b) To remain silent, without such silence being a consideration in the determination of guilt or innocence; (c) To have legal assistance of the person’s choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the}
convicted or acquitted person.  

II. D. The Procedure of Making the Advisory Opinion

26. The Advisory Committee shall consider and report on proposals for amendments to the Rules, Elements of Crimes and these Regulations. Subject to sub-regulation 5, it shall submit a written report in both working languages of the Court setting out its recommendations on such proposals to a plenary session. A copy thereof shall be provided to the Prosecutor and the Registrar. The Advisory Committee shall also consider and report on any matter referred to it by the Presidency.  

27. When a proposal for an amendment to the Rules or to the Elements of Crimes is presented by the Prosecutor, the Advisory Committee shall transmit its report to the Prosecutor.

II. E. The Publication of the Amendment

28. According to the article 7 of the Regulations of the Court, An Official Journal of the Court shall be created and shall contain the following texts and amendments thereto: The Statute; The Rules; The Elements of Crimes; These Regulations; The Regulations of the Office of the Prosecutor; The Regulations of the Registry; The Code of Professional Conduct for counsel; The Code of Judicial Ethics; The Staff Regulations; The Financial Regulations and Rules; The Agreement on the Privileges and Immunities of the International Criminal Court; The Relationship Agreement between the Court and the United Nations; The Headquarters Agreement with the host State; Any other material as decided by the Presidency in consultation with the Prosecutor and/or the Registrar.

29. The Official Journal shall indicate the date when the text or any amendment thereto came into force.

30. According to the article 8 of the Regulations of the Court, the following materials shall be published on the website of the Court: The Official Journal of the Court referred to in regulation 7; The calendar of the Court; Decisions and orders of the Court and other particulars of each case brought before the Court as described in rule 15; Any other material as decided by the Presidency, the Prosecutor or the Registrar.

31. The reason why the author detailed discussed the Advisory Committee on the Legal Texts, not only because the Advisory Committee on the Legal Texts as a part of the Advisory Jurisdiction of the International Criminal Court plays a very important role, but also because it's advisory procedure can be used as a reference for the Advisory Committee on the special case established in the future issuing the advisory opinion.

III. The analysis of reasons why the Rome Statute does not provide the advisory

interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and (d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.

27 The Article 58 of the Rome Statute is: issuance by the Pre-Trial Chamber of a warrant of arrest or a summons to appear.

28 The Article 6 of the Regulations of the Court.

29 The Article 4, Paragraph 4 of the Regulations of the Court.

30 The Article 4, Paragraph 5 of the Regulations of the Court.
Jurisdiction of the International Criminal Court
32. The Rome Statute and the Regulations of the Court only detailed stipulate the contentious jurisdiction and procedures of the International Criminal Court and the advisory jurisdiction and procedures of the advisory committee on legal texts, they, however, do not stipulate the advisory jurisdiction of the International Criminal court. I think there are some reasons below.

III.A. The first reason: the Principle of Individual Criminal Responsibility
33. The article 25 of the Rome Statute provides the Principle of Criminal Responsibility, namely that the Court shall have jurisdiction over natural persons pursuant to this Statute; A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute; In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible; (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted; (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission; (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) Be made in the knowledge of the intention of the group to commit the crime; (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide; (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose. There is a specific provision in this article: No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.
34. The Article 26 of the Rome Statute provides that the Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime. This provision makes the application of the Rome Statute have the essence of the criminal law’s accuracy, all of the Convention of International Criminal Law have never had such legal phenomenon so far.
35. The meaning of the Principle of Individual Criminal Responsibility is that individual, as the actual, direct or indirect perpetrators of the international crimes, no matter who they are when they commit the crimes, whether their behavior are on behalf of country or on behalf of individual, should undertake the criminal
responsibility that adapt to their criminal behavior. The judgment of the Nuremberg Tribunal held that the criminal behavior breached the international law was committed by human being, not by abstract entity, and should only punish the individual who committed such crimes, then the rules of international law can be implemented. It confirmed the Principle of Individual Criminal Responsibility for all human beings who have committed such behaviors, this principle is one of the cornerstones of the international criminal law. Such a new principle, established in international law after the World War II, marking an important stage of development of modern international law, is a fundamental principle must be applied when the International Criminal Court determine the international criminal responsibility.

36. Certain scholars have proposed the theory of criminal responsibility of states. State, as a subject of international law, should also be able to become the subject of the international crimes; However, state, as the subject of the state responsibility, could not be, and also can not become the subject of the international criminal responsibility. States can not undertake the international criminal responsibility because states cannot undertake the manifestation of the international criminal responsibility, namely, the penalty punishment. And the criminal organizations is the same with the States, neither the sense, nor the competence of criminal responsibility. The court can only declare these organizations have the nature of crime, but can not investigate and affix the criminal responsibility for these criminal organizations.

37. After the World War II, based on the Principle of Individual Criminal Responsibility, the International Military Tribunal in Europe and the Far East International Military Tribunal respectively tried the Axis Powers and dozens of the major war criminals of Japan, and imposed them the deserved penalty. Other allies also have more than 2000 trial activities in their own country, tens of thousands of war criminals have been punished by law. Based on the same principle, the article 7, paragraph 1 of the Statute of the International Tribunal for the Former Yugoslavia and the article 6, paragraph 1 of the Statute of the International Tribunal for Rwanda, all of them clearly defined that a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to the present Statute, shall be individually responsible for the crime.

38. I think that it is because the Principle of the Individual Criminal Responsibility that the International Criminal Court does not have the advisory jurisdiction to investigate and affix the individual criminal responsibility of criminals. It is the same with that when the domestic court investigate and affix the criminal responsibility of criminals, if the criminal behavior is serious danger to society, the Public Prosecution Organs will be initiative to propose the lawsuit, then the court will adjudicate it, even if the victims require to withdrawal the action for any reason, the court, as long as the criminal behavior is serious danger to society, will not allow the

32 Wang Huhua, the International Law Criticism of the State Criminal Responsibility, Academic Quarterly, 2002(3).
34 Huang Zhaojiong, the Introduction to the International Criminal Law, Sichuan University Press, 1992, P83-84.
victim to withdrawal the action and will continue to adjudicate, the Public Prosecution
Organs will also not be initiative to withdrawal the indictable case. The declaration
and the article 5, paragraph 1 of the Rome Statute provide that the jurisdiction of the
Court shall be limited to the most serious crimes of concern to the international
community as a whole. The Court has jurisdiction in accordance with this Statute with
respect to the following crimes: the crime of genocide; crimes against humanity; war
crimes and the crime of aggression. Of course, these four most serious crimes should
be adjudicated by the International Criminal Court in order to investigate and affix the
criminal responsibility of criminals, but not just to issue some unbinding advisory
opinions to these criminal behaviors and criminals.

III.B. The second reason: the basis of the generation of the jurisdiction----the
Principle of the Consent of the State
39. There is no such judicial organs that beyond the sovereignty states in the
international law. In the system of domestic law, the jurisdiction of domestic court is
stipulated by the statute law or common law, the agreement or consent of the disputed
parties will not be concerned by the domestic court in the aspect of jurisdiction. If
allowing the agreement or consent of parties as the jurisdiction basis of the referee
organs, such as the arbitration organs, that is because the law of the continental law
system clearly and specially stipulated it. In this situation, the jurisdiction of this
referee organ is clearly stipulated in the statute law.
40. Between the sovereign State, based on the the Principle of Sovereign Equality of
State and the Principle of no Jurisdiction between Equals, the international law
prohibits a state to infringe on other state’s sovereignty and also prohibits to force the
sovereign state accept the jurisdiction of any institution without their consent.
Whether it is a temporary or permanent referee organ, from the arbitration court to the
international general judicial bodies and to specialized court, the consent of state is
the basis of the generation of the jurisdiction (of course, the jurisdiction here include
not only the contentious jurisdiction, but also the advisory jurisdiction). No exception
to the International Criminal Court, it is firstly an international court or international
tribunal, therefore, the International Criminal Court also should base on the consent of
the state in order to gain the jurisdiction.

III.B.i Permanent International Court of Justice and the International Court of
Justice
41. The Permanent Court of International Justice issued the advisory opinion about
the Eastern Carelia case in 1923\(^{35}\) and pointed out that the accepted rule of
international law is that any state, without their consent, will not be forced to submit
the dispute to the arbitration or other method of peaceful settlement.
42. The Permanent Court of International Justice, in Upper Silesia Minority school
case\(^ {36}\), pointed out that the jurisdiction of the court depends on the will of the parties.
That clearly confirmed that the relationship between the consent of the parties and

\(^{36}\) The Minority school Case (1928). PCIJ series A, No.15, at P22.
the generation of the court’s jurisdiction.
43. The International Court of Justice, in the Corfu Channel case (temporary measures), pointed out that it is because the implied consent of the parties, then the court gained the jurisdiction. In this case, the defendant state party—the Albanian Government, in a letter written to the court, announced that I accept the jurisdiction of the court, but just this once. The court announced that the British Government submitted the case in the way of filing an application that gave a chance to the Government of Albania to accept the jurisdiction of the court, the Government of Albania have already accept the court’s jurisdiction in the letter on July 2, 1947. This statement of court included a very important view that in the international judicial procedure, the state party can agree to accept the jurisdiction of the court in the way of implied (Form Proroguatem)—this view have already been detailed discussed in a paper of Professor Yee, namely, the Form Proroguatem Returns to the International Court of Justice.

44. In the 1951 Anglo-Iranian Oil Company case, the International Court of Justice pointed out that the article 36 of the Statute of the International Court of Justice is a provision on the jurisdiction based on a principle, namely, the jurisdiction that the courts try and referee the substantive of a case rely on the will of the states parties. The court believed that because there is no existing the treaty that can provide the basis of the jurisdiction, the court ultimately determined that it has no jurisdiction over the case for nine votes to five.

45. In the East Timor case, East Timor, originally is a colony of Portuguese, has been annexed by Indonesia in the 1970s. The reason that Portugal sued Australia to the International Court of Justice is that the agreement signed between East Timor and Australia about the division of the continental shelf did not get the consent of the suzerain state Portugal, therefore the agreement was invalid. The preliminary objections of Australia held that the request proposed by Portugal is not established. The reason is that the preliminary question of this case is whether the subject of proceeding is legitimate, but the key point of whether the subject of proceeding is legitimate is that whether East Timor occupied by Indonesian is legitimate, if the occupation is legitimate, the states parties of this case are Indonesia and Australia; if the occupation is illegitimate, the states parties of this case are Portugal and Australia. Because this case related to the interests of the third country—-Indonesian, under the premise that Indonesia did not participate in the litigation, not to make the adjudication related to his interests, otherwise it will not result in implementation of the judgment of the case, therefore Australia requested the International Court of Judge to dismiss the case. The International Court of Judge held that the justification of Australia was right, then determined to dismiss the case. And pointed out that if the disputed states parties did not consent to accept the jurisdiction, the International Court of Justice will not adjudicate the dispute between the states parties. In the

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37 1948 ICJ Report, at P27.
38 Sienho Yee, the Form Proroguatem returns to the international court of Justice, the rule of law research, 2011(12).
39 The Anglo-Iranian oil case, the report of ICJ 1952, P103.
40 East Timor Case, 1995 ICJ Reports at P.101.
Nauru Case\(^{41}\) and the Interpretation of Peace Treaty of Bulgaria, Romania, Hungary Case\(^{42}\), all of the adjudications of International Court of Justice related to the Principle of Consent.

46. The International Court of Justice also reiterate the Principle of Consent as the basis of gaining the jurisdiction in the case that the third country apply to participate in the litigation. Because when the third country participates in the existing dispute, it must related to the question that whether the court has the jurisdiction over this new case, the court has the jurisdiction over the existing case based on the consent of the states parties of the plaintiff and the defendant, whether the third country can participate in the existing litigation and whether the court can exercise the jurisdiction are also based on the consent of the states parties of the plaintiff and the defendant.

47. In the Libya-Malta Continental Shelf Delimitation Case\(^{43}\), Italy apply to participate in the litigation as the third country, but Libya, Malta proposed the objecting views. The International Court of Justice held that according to the request of Italy, the court must investigate about the right of Italy in the disputed area and whether such right of Italy disputed with Malta and Libya, but this request is a new dispute that different with the jurisdiction of the court over the existing dispute (in this case, Libya and Malta agreed to submit the dispute to the court in the way of the special agreement), and Italy are not in compliance with the “participation” condition of Article 62 of the Statute of the International Court of Justice, therefore the court dismissed the request of participation of Italy.

III.B.ii. The International Tribunal for the Law of the Sea

48. It is the same that gaining the jurisdiction of the International Tribunal for the Law of the Sea also depends on the consent of the disputed parties, the Article 286 of the United Nations Convention on the Law of the Sea, the Article 21 and the Article 22 of the Statute of the International Tribunal for the Law of the Sea stipulate the concrete way of the jurisdiction that the states parties agree to accept. In the Saiga Case (quickly releasing)\(^{44}\), the first case handled by the International Tribunal for the Law of the Sea, the court held that Saint Vincent Grenadines and Guinea, these two states parties, all are the parties of the United Nations Convention on the Law of the Sea, of course the states parties have already agreed with the jurisdiction of the tribunal, the tribunal of course has the quickly releasing jurisdiction over the vessels and the crews that stipulated in the Article 292 of the United Nations Convention on the Law of the Sea. However in the Saiga Case (provisional measures and substantive issues), these two states parties concluded a special agreement to submit the case to the tribunal\(^{45}\).

III.B.iii. The Agency of the International Criminal Justice

49. The Nuremberg International Military Tribunal and the Far East International Criminal Tribunal.
Military Tribunal established after the World War II and adjudicated the Nazi war criminals and the Japanese war criminals according to the Convention on the Law of War and the Customary International Law that compiled in the twice Hague Peace Conference. This is the first time of practicing precedent in human history that implemented the rules of the International Criminal Law in the Law of War and the International Humanitarian Law to the individual criminals through the Military International Criminal Judicial Agency. The practice of the Nuremberg International Military Tribunal and the Far East International Military Tribunal made a significant contribution to the development of the International Humanitarian Law and the International Criminal Law, established the principle of Individual Responsibility and the relative criminal behaviors confirmed in the resolution of the General Assembly of the United Nations on December 11, 1946, then be confirmed and developed in the Genocide Convention and the Geneva Convention.

50. The disintegration of the Former Federal Republic of Yugoslavia led to a series of the outbreak of war. Countless atrocities, especially Crimes against Humanity, War Crimes and Genocide broke out in these wars. The outbreak of the armed conflicts in Croatia and Bosnia and then in Kosovo and Macedonia were too tragic that shocked the international community since 1991 to 1995. At that time the domestic judicial agency of every state party did not yet prepare for investigate and affix the war crimes, at the same time the international community clearly expressed that they hope to “influence” the development of the Balkans situation through the means of political and military (consultations, international forces, the NATO bombing) and the means of international judicial procedure. Therefore, in order to sue the persons who must be responsible for the committed behaviors that serious violated the international humanitarian law in the former Yugoslavia since 1991, the Security Council of United Nations adopted the No. 827 resolution in 1993 that would establish the International Tribunal about the Former Yugoslavia issues. The establishment of the International Tribunal of Former Yugoslavia created a precedent about the International Tribunal adjudicate the domestic war criminals. Then the first International Criminal Court (namely the International Criminal Tribunal of Former Yugoslavia) established after the World War II.

51. The International Criminal Tribunal of Former Yugoslavia and the International Criminal Tribunal of Rwanda all are selectively established. Nevertheless, besides these two tribunals, as well as the mixture tribunals established in Bosnia and Herzegovina, Sierra Leone, Cambodia and East Timor no problem have made a significant contribution to develop the International Criminal Law and confirm the principle of the universality.

52. “Establishing the International Criminal Court is the ideals and goals of the international community for a long time.”46 From the Treaty of Versailles to the International Criminal Tribunal of Rwanda, from generating, developing the idea of establishing the International Criminal Court to the Statute of the International Criminal Court (the Rome Statute) come into being at the Rome diplomatic convention.

46 Legal Daily, June 18, 1998, the fourth version, the speech of Wang Guangya at the Rome Diplomatic convention.
Conference, again to the Rome Statute entry into force on July 1, 2002, which marks the long-waited permanent International Criminal Court in the international community have already lawfully established. The establishment of the International Criminal Court, eliminating various malpractice that the International Special courts have in order to punish the most serious international criminal behaviors in the international community in half a century, has the positive legal significance to punish and deterrence the serious international criminals and safeguard the world peace and security.

53. Through the above described, from the initial International Military Court of Nuremberg and the Far East International Military Court to The International Criminal Court of Former Yugoslavia and the International Criminal Court of Rwanda, again to the establishment of the International Criminal Court, all regulations of the courts or tribunals did not stipulate the advisory opinion jurisdiction issue. At that time when set up the various international criminal courts or tribunals, every country were eager to settle the particular crime committed by the particular people in the particular time and particular place, therefore they do not need to concern whether the court will issue an unbinding advisory opinion on the case with lots of “particular” factors, but on the contrary, every country were eager to need the binding judgment on the cases with lots of “particular” factors! They need to investigate and affix the criminal responsibility of these particular criminals! Therefore, for the advisory jurisdiction of the International Criminal Court, because of lacking the basis of the consent of every country, it is not surprising that not only the Rome Statute, but also the Regulations of Court of the International Criminal Court have not stipulated the advisory jurisdiction.

III.C. The Third Reason: The Limits of the Jurisdiction
54. The article 5 of the Rome Statute provides the Crimes within the jurisdiction of the ICC. It provides that the jurisdiction of the court shall be limited to the most serious crimes of concern to the international community as a whole, the court has jurisdiction in accordance with this Statute with respect to the crime of genocide; crimes against humanity; war crimes and the crime of aggression. At the same time, the article 17 also detailedly provides the issues of admissibility, that is the court shall determine that a case is inadmissible, there are 4 kinds of cases under such situation. Such provisions, not only from front affirmation, but also from the back constraint, are all emphasizing a problem that is the jurisdiction of the court should be limited in a certain range, should not be unlimitedly expanded.

55. All of these provisions, however, are about the contentious jurisdiction of the Court, but until now, whether the criminal court with the internationality or the national criminal court, there is no criminal court that has already established the committee of the advisory jurisdiction. Therefore, it is reasonable that the Rome Statute doesn’t provide the advisory jurisdiction of the International Criminal Court.

IV. The Suggestions of establishing the Advisory Committee of the International Criminal Court
56. Although there is no provisions on the advisory jurisdiction in the jurisdiction of the International Criminal Court, I, basis of studying on the advisory jurisdiction, think that if the International Criminal Court can establish an advisory jurisdiction committee that can issue the advisory opinion on the special cases and the legal issues related to these special cases, if so that not only can increase the International Criminal Court’s confidence of pursuing the judicial justice, but also can protect the interests of victims in the bigger extent. The concrete suggestions are below.

57. The advisory committee established by the International Criminal Court should include two parts, one part is the Advisory Committee on Legal Text, the other part is the Advisory Committee on the special cases that can issue the advisory opinions about these special cases.

58. Let us discuss about what cases and what legal issues related to such cases will the Advisory Committee issue the advisory opinions about.

59. In the accordance with the article17 paragraph 1 of the Rome Statute, having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 347; (d) The case is not of sufficient gravity to justify further action by the Court. Then the article 17, paragraph 2 and paragraph 3 of the Rome Statute stipulate the issues whether a certain case has the situation of unwillingness or inability.

60. Here, I only want to discuss the article 17, paragraph 1, sub-paragraph (d) of the Rome Statute: if the case is not of sufficient gravity to justify further action by the Court, the court at this moment shall determine that this case is inadmissible. Since the Statute has such provision, when this situation appears, the court can easily determine that this case is inadmissible, but after the determination, will the situation of the state parties also be the same as "easily"? Since the case has been sued to the International Criminal Court, the victimized states and the victims must think that there exists the harm behaviors committed by the criminal suspects, otherwise they will not sue the case to the International Criminal Court, but when the court determine that this case is inadmissible because the case is not of sufficient gravity, I think the victimized states and the victims will not feel the so-called "fair" for this reason. I think that when this situation appears, if the International Criminal Court can establish an Advisory Committee, this Advisory Committee can issue the advisory opinions specially on such cases. That is to say, after the International Criminal Court made the

47 The art.20, paragraph 3 of the Rome Statute: No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 bis shall be tried by the Court with respect to the same conduct unless the proceedings in the other court: (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.
inadmissible determination because the case is not of sufficient gravity, the victimized states and the victims can propose an application, then the Advisory Committee can issue the advisory opinions specially on this case. Some people may ask how to do if at this time the criminal suspects disagree with the advisory jurisdiction of the Advisory Committee. In fact, this question is very simple, just like the International Criminal Court originally established by the international community, whether every case sued in the International Criminal Court get the criminal suspects consent? Of course the answer is no. As long as the case involved belong to the jurisdiction of the International Criminal Court, regardless of whether the criminal suspects consent (of course they don't want to undertake the criminal responsibility, otherwise they would not commit the harm behavior.), all of the International Criminal Court have the jurisdiction over the special cases. Similarly, if such Advisory Committee can be established, it must be discussed and agreed by every country before the establishment, this procedure is the same as the procedure of the International Criminal court. The Advisory Committee has the jurisdiction over the special cases, regardless of the consent of the criminal suspects, because any judicial organs, regardless of the international, or regional, or temporary, or permanent judicial organs all are in pursuit of the greatest degree of fairness and justice! Therefore, I suggest that the International Criminal Court can establish such an Advisory Committee that can exercise the jurisdiction over the case related to the article 17, paragraph 1, sub-paragraph (d) of the Rome Statute and issue the advisory opinions on such special cases applied by the state party and the legal issues related to these special case.

61. In summary, I suggest that the International Criminal Court can establish an Advisory Committee that includes two parts, one part is the Advisory Committee on Legal Texts, the other part is the Advisory Committee on the special cases, namely that when the International Criminal Court determines that this case is inadmissible because the case is not of sufficient gravity, this Advisory Committee can issue the Advisory Opinion on the legal issues related to such special case after the state party applied.