

Issues of Admissibility under the ICC Statute
— The Tenth Anniversary of the ICC

国际刑事法院受理制度研究

——纪念国际刑事法院成立十周年

马伟阳◎著



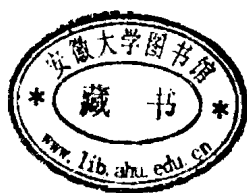
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引 言

《国际刑事法院罗马规约》(Rome Statute of the International Criminal Court, 以下称《罗马规约》)的生效和国际刑事法院(International Criminal Court, ICC)的发展都超出了国际社会的预期,是国际法数百年发展的结果。^[1]《罗马规约》于1998年7月17日由联合国罗马外交大会通过,于2002年7月1日生效。截止到2012年9月30日,有121个国家批准或加入,其中,非洲有33个国家,亚洲与太平洋地区有18个国家,东欧有18个国家,拉丁美洲与加勒比海地区有27个国家,西欧与其他地区有25个国家。^[2]在不到3年的时间内规约得以生效,在不足13年的时间内有121个国家批准或加入规约,这在多边条约史上发展是非常迅速的;几乎是接受已经存在近66年的国际法院(International Court of Justice, ICJ)强制性管辖权的国家(67个)^[3]的2倍。这些都表明了新世界秩序的发展方向,也表明了国际正义与结束有罪不罚需要国家合作与同意得到了国际社

[1] Todd Prichard, "The Rome Statute of the International Criminal Court: Should the United States sign on the dotted line?", (2003) 13 *Transnational Law and Contemporary Problems* 727, at 733.

[2] ICC, "The States Parties to the Rome Statute", <http://www.icc-cpi.int/Menus/ASP/states+parties/> (2012/9/30).

[3] ICJ, "Declarations Recognizing the Jurisdiction of the Court as Compulsory", <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3> (2012/9/30); Philippe Kirsch, "The International Criminal Court: from Rome to Kampala", (2010) *John Marshall Law Review* 515, at 525.

会的承认。^[4] 自 2003 年 3 月 1 日到 2012 年 9 月 30 日, 国际刑事法院正在处理 7 个情势,^[5] 涉及 16 个案件和 29 名被告人;^[6] 国际刑事法院检察官还正在初步审查 8 个情势 (阿富汗、格鲁吉亚、几内亚、哥伦比亚、洪都拉斯、韩国、尼日利亚和马里), 撤销了 3 个情势 (伊拉克、委内瑞拉和巴勒斯坦)^[7]。这反映了国际社会的需求, 也产生了很多问题。而受理问题 (issues of admissibility) 是国际刑事法院三大程序性问题之一, 是国家的首要关切;^[8] 是整个国际刑事法院制度的决定性根据^[9]。

受理问题是《罗马规约》起草和谈判期间争论最多的问题

[4] Remigius Chibueze, “United States Objection to the International Criminal Court: A Paradox of ‘Operation Enduring Freedom’”, (2003) 9 *Annual Survey of International and Comparative Law* 19, at 20; Philippe Kirsch, “The International Criminal Court: from Rome to Kampala”, (2010) *John Marshall Law Review* 515, at 525.

[5] 其中, 缔约国提交了 3 个情势 (乌干达情势、刚果民主共和国情势和中非共和国情势), 安理会提交了 2 个情势 (苏丹达尔富尔情势和利比亚情势), 检察官主动调查了 2 个情势 (肯尼亚情势和科特迪瓦共和国情势), 科特迪瓦情势还属于非缔约国承认国际刑事法院管辖的情形。

[6] ICC, “Situations and Cases”, <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/> (2012/9/30); ICC, Report of the International Criminal Court to the United Nations for 2010/11, 19 August 2011, A/66/309, p. 2.

[7] ICC, “Communications, Referrals and Preliminary Examinations”, <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Comm+and+Ref/> (2012/9/30).

[8] 另两大程序问题为管辖权问题和“正义利益”标准问题, 管辖权问题是国际刑事法院的首要关切, “正义利益”标准问题则是国际刑事法院检察官的首要关切。

[9] Hans - Peter Kaul, “The International Criminal Court—Its Relationship to Domestic Jurisdictions”, in Carsten Stahn and Goan Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (2009), pp. 31 ~ 38, at 33.

之一,是各国和各种力量妥协的产物,是《罗马规约》的基石。^[10]受理问题主要规定在《罗马规约》第17条至第20条,既包括标准等实体问题,也包括启动等程序问题。其中,规定受理标准的第17条是实施《罗马规约》核心原则即补充性的最核心规则。^[11]

在国际刑事法院运行的早期,受理问题较少成为司法审查的对象。自2008年以来,受理问题开始成为司法审查的对象,也日益受到国际社会和国际刑法界的关注。虽然国际刑事法院早期试图避免裁决受理问题,但是其的确这样做了,即使其还没有承认。^[12]涉及受理问题的案件主要是科尼等案(*Kony et al.*)^[13]、加丹加与恩乔洛案(*Katanga & Ngudjolo*)^[14]、别穆

[10] *Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* (hereafter “*Kony et al.*”) (ICC-02/04-01/05), ICC-02/04-01/05-377, para. 34. See also John T. Holmes, “The Principle of Complementarity”, in R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (1999) 41, at 73; Sharon A. Williams and William A. Schabas, “Article 17 – Issues of admissibility”, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2nd ed.) (2008) 605, at 607 [3] ~ 613 [20].

[11] Sharon A. Williams and William A. Schabas, “Article 17 – Issues of Admissibility”, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2nd ed.) (2008) 605, at 606 [1].

[12] Gilbert Bitti & Mohamed M. El Zeidy, “The Katanga Trial Chamber Decision: Selected Issues”, *Leiden Journal of International Law*, 2010, 23 (2), pp. 319 ~ 329, at 321.

[13] *Prosecutor v. Kony et al.*, Decision on the admissibility of the case under article 19 (1) of the Statute, Pre-Trial Chamber II, 10 March 2009, ICC-02/04-01/05-377 (hereafter “ICC-02/04-01/05-377”); Judgment on the appeal of the Defence against the “Decision on the Admissibility of the Case under Article 19 (1) of the Statute” of 10 March 2009, Appeals Chamber, 16 September 2009, ICC-02/04-01/05-408 (hereafter “ICC-02/04-01/05-408”).

[14] *Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui* (hereafter “*Katanga & Ngudjolo*”) (ICC-01/04-01/07), Reasons for the Oral Decision on the Motion Chal-

巴案 (*Bemba*)^[15]和鲁托、科斯奇与桑格案 (*Ruto, Kosgey and Sang*)^[16], 大多是在逮捕令程序中涉及受理问题^[17], 在确认

lenging the Admissibility of the Case (Article 19 of the Statute), Trial Chamber II, 16 June 2009, ICC - 01/04 - 01/07 - 1213tENG (hereafter "ICC - 01/04 - 01/07 - 1213tENG"); Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, Appeals Chamber, 25 September 2009, ICC - 01/04 - 01/07 - 1497 (hereafter "ICC - 01/04 - 01/07 - 1497").

[15] *Prosecutor v. Jean - Pierre Bemba Gombo* (hereafter "*Bemba* ") (ICC - 01/05 - 01/08), Decision on the Admissibility and Abuse of Process Challenges, Trial Chamber III, 24 June 2010, ICC - 01/05 - 01/08 - 802 (hereafter "ICC - 01/05 - 01/08 - 802"); Corrigendum to Judgment on the appeal of Mr Jean - Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled "Decision on the Admissibility and Abuse of Process Challenges", Appeals Chamber, 19 October 2010, ICC - 01/05 - 01/08 - 962 - Corr (hereafter "ICC - 01/05 - 01/08 - 962 - Corr").

[16] *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* (hereafter "*Ruto, Kosgey and Sang* ") (ICC - 01/09 - 01/11), Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19 (2) (b) of the Statute, Pre - Trial Chamber II, 30 May 2011, ICC - 01/09 - 01/11 - 101 (hereafter "ICC - 01/09 - 01/11 - 101"); Judgment on the appeal of the Republic of Kenya against the decision of Pre - Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19 (2) (b) of the Statute", Appeals Chamber, 30 August 2011, ICC - 01/09 - 01/11 - 307 (hereafter "ICC - 01/09 - 01/11 - 307").

[17] *Prosecutor v. Kony et al.*, Decision on the Prosecutor's Application for Warrants of Arrest under Article 58, Pre - Trial Chamber II, 8 July 2005, ICC - 02/04 - 01/05 - 1 (hereafter "ICC - 02/04 - 01/05 - 1"); *Prosecutor v. Thomas Lubanga Dyilo* (hereafter "*Lubanga* ") (ICC - 01/04 - 01/06), Decision concerning Pre - Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo, Pre - Trial Chamber I, 24 February 2006, ICC - 01/04 - 01/06 - 8 - Corr (hereafter "ICC - 01/04 - 01/06 - 8 - Corr"); *Prosecutor v. Ntaganda*, Decision on the Prosecutor's Application for Warrants of Arrest, Article 58, Pre - Trial Chamber I, 10 February 2006, ICC - 01/04 - 520 - Anx2 (hereafter "ICC - 01/04 - 520 - Anx2"); *Prosecutor v. Ahmad Muhammad Harun* ("*Ahmad Harun* ") and *Ali Muhammad AliAbd - Al - Rahman* ("*Ali Kushayb*") (ICC - 02/05 - 01/07), Decision on the Prosecution Application under Article 58 (7) of the Statute, Pre - Trial Chamber I, 27 April

指控程序中涉及受理问题也有6个^[18]。^[19]

2007, ICC - 02/05 - 01/07 - 1 - Corr (hereafter “ICC - 02/05 - 01/07 - 1 - Corr”); *Prosecutor v. Germain Katanga* (hereafter “*Katanga* ”), Decision on the Evidence and Information Provided by the Prosecution for the Issuance of a Warrant of Arrest for Germain Katanga, Pre - Trial Chamber I, 6 July 2007, ICC - 01/04 - 01/07 - 4 (hereafter “ICC - 01/04 - 01/07 - 4”); *Prosecutor v. Mathieu Ngudjolo Chui* (hereafter “*Ngudjolo* ”), Decision on the Evidence and Information Provided by the Prosecution for the Issuance of a Warrant of Arrest for Mathieu Ngudjolo Chui, Pre - Trial Chamber I, 6 July 2007, ICC - 01/04 - 01/07 - 262 (ICC - 01/04 - 02/07 - 3) (hereafter “ICC - 01/04 - 01/07 - 262”); *Prosecutor v. Bemba*, Decision on the Prosecutor’s Application for a Warrant of Arrest against Jean - Pierre Bemba Gombo, Pre - Trial Chamber III, 10 June 2008, ICC - 01/05 - 01/08 - 14 - tENG (hereafter “ICC - 01/05 - 01/08 - 14 - tENG”); *Prosecutor v. Al Bashir*, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Pre - Trial Chamber I, 4 March 2009, ICC - 02/05 - 01/09 - 3 (hereafter “ICC - 02/05 - 01/09 - 3”); *Prosecutor v. Abu Garda*, Decision on the Prosecutor’s Application under Article 58, Pre - Trial Chamber I, 7 May 2009, ICC - 02/05 - 02/09 - 15 - AnxA (hereafter “ICC - 02/05 - 02/09 - 15 - AnxA”); *Prosecutor v. Callixte Mbarushimana* (hereafter “*Mbarushimana* ”) (ICC - 01/04 - 01/10), Decision on the Prosecutor’s Application for a Warrant of Arrest against Callixte Mbarushimana, 28 September 2010, ICC - 01/04 - 01/10 - 1 (hereafter “ICC - 01/04 - 01/10 - 1”); *Prosecutor v. Ruto, Kosgey and Sang*, Decision on the Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Pre - Trial Chamber II, 8 March 2011, ICC - 01/09 - 01/11 - 01 (hereafter “ICC - 01/09 - 01/11 - 01”); *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (hereafter “*Muthaura, Kenyatta and Ali* ”) (ICC - 01/09 - 02/11), Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Pre - Trial Chamber II, 8 March 2011, ICC - 01/09 - 02/11 - 01 (hereafter “ICC - 01/09 - 02/11 - 01”); *Prosecutor v. Abdel Raheem Muhammad Hussein* (hereafter “*Hussein* ”) (ICC - 02/05 - 01/12), Decision on the Prosecutor’s application under article 58 relating to Abdel Raheem Muhammad Hussein, Pre - Trial Chamber I, 1 March 2012, ICC - 02/05 - 01/12 - 1 - Red (hereafter “ICC - 02/05 - 01/12 - 1 - Red”); *Prosecutor v. Sylvestre Mudacumura* (hereafter “*Mudacumura* ”) (ICC - 01/04 - 01/12), Decision on the Prosecutor’s Application under Article 58, Pre - Trial Chamber II, 13 July 2012, ICC - 01/04 - 01/12 - 1 - Red (hereafter “ICC - 01/04 - 01/12 - 1 - Red”). See *Situation in the Democratic Republic of the Congo* (ICC - 01/

04), Decision on the Prosecutor's Application for Warrants of Arrest, Article 58, Pre-Trial Chamber I, 10 February 2006, ICC-01/04-02/06-20-Anx2 (hereafter "ICC-01/04-02/06-20-Anx2"); Judgement of the Prosecutor's Appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58", Appeals Chamber, 13 July 2006, ICC-01/04-169 (hereafter "ICC-01/04-169").

[18] *Prosecutor v. Lubanga*, Decision on the Confirmation of Charges, Pre-Trial Chamber I, 29 January 2007, ICC-01/04-01/06-803-tEN (hereafter "ICC-01/04-01/06-803-tEN"); *Prosecutor v. Bemba*, Decision Pursuant to Article 61 (7) (a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, Pre-Trial Chamber II, 15 June 2009, ICC-01/05-01/08-424 (hereafter "ICC-01/05-01/08-424"); *Prosecutor v. Bahr I driss Abu Garda* (hereafter "*Abu Garda*") (ICC-02/05-02/09), Decision on the Confirmation of Charges, Pre-Trial Chamber I, 8 February 2010, ICC-05-02/09-243-Red (hereafter "ICC-05-02/09-243-Red"); *Prosecutor v. Banda and Jerbo*, Decision on the Confirmation of Charge, Pre-Trial Chamber I, 7 March 2011, ICC-02/05-03/09-121-Corr-Red (hereafter "ICC-02/05-03/09-121-Corr-Red"); *Prosecutor v. Ruto, Kosgey and Sang*, Decision on the Confirmation of Charges Pursuant to Article 61 (7) (a) and (b) of the Rome Statute, Pre-Trial Chamber II, 23 January 2012, ICC-01/09-01/11-373 (hereafter "ICC-01/09-01/11-373"); *Prosecutor v. Muthaura, Kenyatta and Ali*, Decision on the Confirmation of Charges Pursuant to Article 61 (7) (a) and (b) of the Rome Statute, Pre-Trial Chamber II, 23 January 2012, ICC-01/09-02/11-382-Red (hereafter "ICC-01/09-02/11-382-Red").

[19] Gilbert Bitti & Mohamed M. El Zeidy, *Supra note* [12], at 320.

第一章

国际刑事法院受理问题总论

第一节 国际刑事法院受理问题概述

一、受理问题的产生与含义

所谓受理问题 (issues of admissibility) 就是司法机构是否受理情势或案件的问题。受理问题不仅是国内法的重大问题,也是国际法的重大问题。在国际法领域,受理问题可能最早出现于常设国际法院的司法实践即波兰上西里西亚地区德国人权益案(管辖权)(Case concerning Certain German Interests in Polish Upper Silesia)^[1]中,后出现于1978年《国际法院规则》第79条第1款^[2]之中。^[3]在国际刑法领域,在《纽伦堡宪章》、《东

[1] PCIJ Series, A, No. 6, August 25th, 1925, Judgment, pp. 13, 18.

[2] 其英文为:“1. Any objection by the respondent to the jurisdiction of the Court or to the *admissibility of the application*, or other objection the decision upon which is requested before any further proceedings on the merits, shall be made in writing within the time - limit fixed for the delivery of the Counter - Memorial. Any such objection made by a party other than the respondent shall be filed within the time - limit fixed for the delivery of that party's first pleading.” <http://www.icj-cij.org/documents/index.php?p1=4&p2=3&p3=0> (2012/3/7).

[3] [日] 杉原高领著, 王志安、易平译:《国际司法裁判制度》, 中国政法大学出版社2007年版, 第205~210页。

京宪章》中没有规定管辖权异议,更没有规定受理异议;^[4]《前南刑庭程序与证据规则》第72条第1款^[5]和《卢旺达刑庭程序与证据规则》第72条第1款^[6]都规定了管辖权异议[虽然《前南斯拉夫国际刑事法庭规约》(以下称《前南刑庭规约》)和《卢旺达国际刑事法庭规约》(以下称《卢旺达刑庭规约》)中没有规定],但仍没有受理异议程序;受理异议问题最早则出现于1943年《成立国际刑事法院条约草案》(1943 Draft Convention for the Creation of an International Criminal Court)^[7],正式出现于1998年《罗马规约》。与其他领域的受理问题不同,国际刑事法院的受理问题不仅涉及案件的受理问题,也涉及情势的受理问题;国际刑事法院的受理问题与《罗马规约》中的补充性原则、国际刑事法院的管辖权问题经常交织在一起,关系非常密切。受理制度是分配国际刑事法院与有管辖权国家之间的起诉责任的最直接机制。^[8]不过,对受理问题的审查不是《罗马规约》科以预审分庭或审判分庭的义务性或强制性要求,

[4] Christopher K. Hall, “Article 19 – Challenges to the Jurisdiction of the Court or the Admissibility of a Case”, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2nd ed.) (2008) 638, at 640 [2].

[5] 其英文为:“(A) Preliminary motions, being motions which (i) **challenge jurisdiction**; ... shall be in writing and be brought not later than thirty days after disclosure by the Prosecutor to the defence of all material and statements referred to in Rule 66 (A) (i) and shall be disposed of not later than sixty days after they were filed and before the commencement of the opening statements provided for in Rule 84.”

[6] *Ibid.*

[7] 其第3条为:“As a rule, no case shall be brought before the Court when a domestic court of any one of the United Nations has jurisdiction to try the accused and it is in a position and willing to exercise such jurisdiction.” [See Michael A. Newton, “Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court”, (2001) 167 *Military Law Review* 20, at 53.]

[8] Michael A. Newton, *Supra note* [7], at 47.