

CHINA AND THE INTERNATIONAL CRIMINAL COURT: THE CURRENT SITUATION

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As “routine” judicial proceedings at the International Criminal Court (ICC) begin to take place, questions that have been lingering since the end of the Rome Conference require re-examination. One such issue is the failure to secure the participation of certain states in the Rome Statute. This bears implications for the future of the ICC.

This paper seeks to examine the current position of China towards the ICC. China had been actively involved in the negotiations that led to the adoption of the Rome Statute. However, the Chinese delegation cast a negative vote at the end of the Rome Conference. There have been developments ever since. On more than one occasion, the Chinese government has stated its support for the ICC, and indicated that accession is by no means a pipe dream. All this gives rise to the question of whether China is contemplating a change in its policy towards the ICC.

I. INTRODUCTION

As “routine” judicial proceedings at the International Criminal Court (ICC or Court hereinafter) begin to take place,¹ questions that have been lingering on the part of China since the end of the Rome Conference eight years ago require re-examination. The work of the Court at present has generated a certain momentum which, hopefully, will spur developments towards the achievement of universal participation in the Rome Statute of the International Criminal Court (Rome Statute or Statute hereinafter). This has been a much-cherished goal of State parties. Among the motley of issues left unresolved from 1998, the absence of certain States from the Rome Statute is all the more conspicuous as the prospect of the Court moving swiftly and successfully into its operative years becomes a reality.

The purpose of this paper is to examine the current position of China towards the Court. This position not only includes that of the government, but of related professions which may be affected by the clout emanating from the fully operational Court. Having been actively involved in the negotiations that led to the adoption of the Rome Statute, the Chinese delegation cast a negative vote at the end of the Rome Conference. There have been developments ever since. China has participated in the Assembly of States Parties since 2002. On more than one occasion, the Chinese Government has stated its support for the Court, and indicated the possibility that accession is by no means a pipe dream. All this gives rise to the question of whether China is contemplating a change in its policy in light of the progress made by the Court in the past few years. The question is ultimately one of timing.

This perusal of the Chinese position in relation to the ICC is based on official statements of the Chinese Government and the assorted writings of Chinese authors from the mainland. The literature by and large manifests a descriptive trait.

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¹ For instance, *Situation in the DR of the Congo, Prosecutor v. Thomas Dyilo, Decision on the Postponement of the Confirmation Hearing and the Adjustment of the Timetable set in the Decision on the Final System of Disclosure*, ICC-01/04-01/06, 24 May 2006, Pre-Trial Chamber I, before the Single Judge Steiner, online: <http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-126_English.pdf>. Cf. Art. 61, the Rome Statute.

The paper consists of four parts. First, the role of China in the negotiations at Rome in 1998 would be recalled. Second, the subsequent development following the casting of the negative vote by the Chinese delegation in June 1998 would be considered. Third, a word is devoted to the diverse views held by Chinese lawyers in general. Fourth, the possibility of Chinese accession in the near future will be briefly considered.

II. THE INVOLVEMENT OF CHINA IN THE PROCESS THAT ENDED WITH THE VOTING OF 17 JULY 1998 ON THE ROME STATUTE

The involvement of China in the negotiations at Rome in June and July 1998 was conspicuous.² It had delegates serving during the conference as vice-president of the conference and as members on the Drafting and Credentials Committees. The deputy head of the Chinese delegation later went on to become a member of the judiciary of the International Criminal Tribunal for the former Yugoslavia (ICTY).³

The Chinese concerns had gradually transpired during the sessions of the Rome Conference with regard to certain rules proposed for the future Statute. These concerns have eventually proven important in swaying the Chinese Government to cast a negative vote in respect of the Rome Statute at the end of the conference. They may be addressed here to set the stage for the analysis of the subsequent Chinese position.

A. Jurisdiction

There seems to be general agreement that the issue of the jurisdiction of the Court was among the most difficult items for negotiation.⁴ For some countries, the essence of the dispute over jurisdiction lies mainly in the means to bring a case before the Court. As the Chinese Representative stated at the 3rd Plenary Meeting of the Conference, of 16 June 1998, China did not want to see the Court become “a tool for political struggle or a means of interfering in other countries’ internal affairs”, and the Court should not compromise “the principal role of the United Nations, and in particular of the Security Council, in safeguarding world peace and security”.⁵ China would like to see the Court enjoying “universal participation”, and would prefer consensus to voting in respect of the text of the draft Statute.⁶ It called for “maximum flexibility” in negotiating the provisions on jurisdiction and elements of crimes. For that, China deemed the principle of complementarity as “the most important guiding principle of the Statute”, which should be “fully reflected in all its substantive provisions and in the work of the Court, which should be able to exercise jurisdiction only with the consent of the countries concerned”.⁷ China was thus quite forthcoming with its doubts about the nature of the envisaged institution. It preferred a cautious approach to the issue of jurisdiction.

As for the proposal that by ratifying or acceding to the Rome Statute, States parties recognise the automatic jurisdiction of the Court over certain core crimes, the Chinese view

² See *Official Records, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, Rome, 15 June-17 July 1998 (“Official Records” hereinafter), vol.ii, *Summary Records of the plenary meetings of the conference and of the Committee of the Whole*, A/CONF.183/13 (Vol. II). The following citations to the official records of the Rome Conference are all to Volume II, unless otherwise indicated.

³ H.E. Judge Liu Daqun.

⁴ A/CONF.183/C.1/SR.42, para. 28 (17 July 1998) (China); E. Wilmshurst, “Jurisdiction of the Court”, in R. Lee, ed., *The International Criminal Court: The Making of the Rome Statute* (Hague, the Netherlands: Kluwer Law International, 1999) at 127.

⁵ A/CONF.183/SR.3, para. 35.

⁶ *Ibid.*, para. 36.

⁷ *Ibid.*, para. 37.

was cool on it, as it preferred an opt-in system in relation to the issue of jurisdiction,⁸ thus giving universal participation a greater chance to achieve.⁹ For non-parties, jurisdiction could only be exercised by the Court after the States concerned made declarations accepting the latter's jurisdiction.¹⁰ China has been consistent in its opposition to the conferment of automatic jurisdiction on the Court.¹¹ Its view that consent by interested States parties was essential for the exercise of the Court's jurisdiction has remained unchanged.¹² This consent was particularly required where war crimes or crimes against humanity were involved.¹³ However, flexibility was shown at the time to endorse possible automatic jurisdiction over the crime of genocide.¹⁴

The Rome Statute, in its final version, provides for automatic jurisdiction for all crimes that it sets out to punish. As for crimes involving the territory, ships, aircraft, or nationals of non-parties to the Rome Statute, Article 12 requires a prior declaration by such States to accept the exercise of jurisdiction by the Court with respect to the crimes in question, before the Court exercises jurisdiction. The opt-in system only remains for non-party States. The insertion of Article 124 makes little difference to the overall framework, as it applies only to a State party.¹⁵

B. *Crimes under the Jurisdiction of the Court*

The Chinese position on the crime of aggression was favourable, subject, however, to two conditions: first, there should be a precise definition of the crime; and secondly, there should be a link with the Security Council of the United Nations.¹⁶ For such crimes over which there was as yet no consensus, they should be deferred to a future review conference. This is duly recognised in the Rome Statute.¹⁷

China, however, expressed concerns at the Rome Conference over the definitions of war crimes and crimes against humanity.¹⁸ With regard to the categories of crime that fall under the jurisdiction of the Court, the Chinese delegation pointed out that there was no international convention on crimes against humanity, and that such crimes should be qualified by the condition of armed conflict, as evidenced by the Nuremberg Charter and the Statutes for the ICTY and the International Criminal Tribunal for Rwanda (ICTR).¹⁹

The Chinese view on the scope of the category of war crimes seems to have been doubtful. For instance, the Chinese delegation rejected the idea that an attack on UN personnel in peace-keeping operations could, as in the Rome Statute,²⁰ give rise to a war crime, since in those situations the military personnel would be combatants and the others civilians, already

⁸ A device proposed by the International Law Commission in the *Draft Statute for an International Criminal Court*, in *Report of the International Law Commission on the Work of its Forty-Sixth Session* (2 May-22 July 1994) UNGAOR, 49th Session, Supplement No.10, A/49/10 (1994), Chapter II.B.I, Art. 22.

⁹ A/CONF.183/SR.8, para. 37 (19 June 1998). For an explanation of this system, see Wilmshurst, *supra* note 4 at 128.

¹⁰ *Ibid.*, para. 38.

¹¹ A/CONF.183/C.1/SR.29, para. 74 (9 July 1998).

¹² *Ibid.*, para. 76.

¹³ A/CONF.183/C.1/SR.33, para. 41 (13 July 1998).

¹⁴ *Ibid.*

¹⁵ This is a transitional provision, allowing a State party to the Statute to refuse by declaration to accept, for a period of seven years, the Court's jurisdiction over war crimes committed in its territory or by its nationals.

¹⁶ A/CONF.183/C.1/SR.7, para. 9 (19 June 1998).

¹⁷ Art.5(2). The provision defers the jurisdiction of the Court over such crimes until a provision is adopted defining the crime and setting out the conditions under which the Court exercises its jurisdiction over such crime. The provision also preconditions the future provision by reference to the relevant articles of the UN Charter.

¹⁸ A/CONF.183/SR.9, para. 38.

¹⁹ A/CONF.183/C.1/SR.3, paras. 73-74 (17 June 1998).

²⁰ *Cf.* Art.8(2)(b)(iii), the Rome Statute.

protected by other provisions of the Statute.²¹ China also suggested changes in wording in respect of a number of war crimes.²²

Parallel to the Chinese concerns over the definitions of the crimes, it is thought that other concerns had more to do with the applicability of the crimes than the elements of the crimes. Thus, the Chinese delegate commented on the proposal concerning statutes of limitations by saying that such statutes might not be applicable to genocide and crimes against humanity, but might just be with regard to war crimes.²³ The statement was made without elaboration. Further, China also liked the idea of linking crimes against humanity with armed conflict.²⁴

During the Rome Conference, China supported the idea proposed by the US to include in the Statute some elements of crimes to provide guidance for the work of the future Court.²⁵ The idea was eventually embodied in Article 21(1)(a) of the Rome Statute.

C. Criminal Responsibility of Legal Persons

At the first meeting of the Committee of the Whole, of 16 June 1998, the Chinese delegate stated that caution was required in approaching the issue of the criminal responsibility of legal persons, even though this was commonplace in many national legal systems.²⁶ His comments were made in light of the French efforts to include prosecution of criminal organisations following the Nuremberg model.²⁷ He made the point that the inclusion of the provisions in the Nuremberg Charter to criminalise certain organisations was not intended to enable the tribunal to prosecute such organisations as per legal persons.²⁸ Thus, the Nuremberg trials concentrated on the individuals who were members of such organisations. This was a clear case of individual responsibility. Further, he noted in passing that the Nuremberg trials were conducted by the victors, a situation no longer prevalent at the time when the Rome Conference was opened.²⁹

D. Criminal Responsibility of Superiors

With regard to the draft Article 25, the Chinese delegate noted that command responsibility derived from the post-World War II trials at which it was “relatively simple” to assess the responsibility of military commanders who had effective control.³⁰ However, his delegation did not agree with the extension of the responsibility to civilian superiors as proposed by the US.³¹ He referred to the Statutes of the ICTY and the ICTR, and considered that such responsibility was limited to armed conflict and military commanders.³²

At the time of the Rome Conference, the later oft-quoted *Celebici* trial judgement on the issue of the responsibility of civilian superiors was still in the making. When that judgement came out in November 1998, the issue was unambiguously dealt with by the trial chamber. The jurisprudence of the ICTY has been consistent since.³³

²¹ A/CONF.183/C.1/SR.25, para. 35 (8 July 1998).

²² A/CONF.183/C.1/L.5, 18 June 1998, in Official Records, vol.iii.

²³ A/CONF.183/C.1/SR.2, para. 71 (16 June 1998).

²⁴ A/CONF.183/C.1/SR.26, para. 84 (8 July 1998) (as noted by the Indian representative).

²⁵ A/CONF.183/C.1/SR.4, para. 65 (17 June 1998).

²⁶ A/CONF.183/C.1/SR.1, para. 36.

²⁷ *Ibid.*, para. 33.

²⁸ *Ibid.*, para. 36.

²⁹ *Ibid.*

³⁰ *Ibid.*, para. 77.

³¹ *Ibid.*

³² *Ibid.*

³³ Cf. *Prosecutor v. Delalic et al.*, IT-96-21-A, before the ICTY Appeals Chamber, Appeal Judgement (20 February 2001) at para. 240.

E. *The Powers of the Prosecutor*

An issue of importance at Rome was of the powers of the Prosecutor exercisable in accordance with the Rome Statute. China expressly disagreed with the power given the Prosecutor to initiate investigation or to prosecute *proprio motu*, which it considered to be exercisable “without checks and balances against frivolous prosecution”, thus amounting to “the right to judge and rule on State conduct”.³⁴ This was reiterated later on.³⁵ At the same time, the Chinese delegation stressed the role of the UN Security Council to refer cases to the Court.³⁶

At the Ninth Plenary Meeting of 18 July 1998, the Chinese delegate, while supporting an independent Court, felt that the investigations by the Court should not affect the sovereignty of national courts, and that the Statute did not resolve the Chinese concerns in this regard.³⁷

F. *Criteria for Admissibility*

China’s view on the criteria for admissibility was clear that most judicial systems in the world were capable of functioning properly, and that the cases of Rwanda and the former Yugoslavia in which *ad hoc* international tribunals were established to try individuals in those territories were exceptions to the rule.³⁸ In respect of the criteria for unwillingness, China stressed the point that unjustified delay or partiality in trials of the core crimes covered by the Rome Statute should be qualified by the condition that only when such occur in non-conformity with national rules of procedure, in addition to the condition contained in the Statute, may the Court determine that “a State” (as used in Article 17(1) (a) of the Rome Statute) is unwilling to carry out investigation or prosecution.³⁹ The condition recognised by the Statute is that delay or partiality occurs inconsistent with “the intention to bring the person concerned to justice”. The Chinese proposal seems to be designed to make the determination process more objective and the criteria more concrete.

G. *Selection of Judges*

In respect of the election of judges, China agreed with Japan and France in including alternative requirements for a judge put up for election, that is, with experience in either criminal trial experience or competence in international law.⁴⁰ Further, it stressed that the impartiality of the Court depended on the judges representing the principal legal systems of the world and there being an equitable geographical distribution of the seats on the bench.⁴¹

H. *Voting on the Text of the Rome Statute*

China also felt that the text of the Rome Statute should be adopted by consensus, rather than by voting, on the ground that past experience had shown that none of the treaties whose adoption was subject to voting could ensure that it would enjoy universal participation.⁴²

³⁴ A/CONF.183/SR.9, para. 39.

³⁵ A/CONF.183/SR.10, para. 9 (22 June 1998).

³⁶ *Ibid.*, para. 85. This can also be seen through a Chinese proposal tabled at the conference regarding the now Art. 90 of the Rome Statute: A/CONF.183/C.1/WGIC/L.2 (25 June 1998) in Official Records, vol.iii.

³⁷ A/CONF.183/SR.9, para. 36.

³⁸ A/CONF.183/SR.12, para. 9 (23 June 1998).

³⁹ A/CONF.183/C.1/L/15 (23 June 1998) in Official Records, vol.iii.

⁴⁰ A/CONF.183/SR.14, para. 72 (24 June 1998).

⁴¹ *Ibid.*

⁴² A/CONF.183/SR.9, para. 40.

Further, China held that the signatories to the Final Act of the Rome Conference should become observers in the Assembly of States Parties.⁴³

On 17 July 1998, China voted against the text of the Statute, together with several others.⁴⁴ By Resolution F annexed to the Final Act of the Conference, signatories to the Final Act, including China, are entitled to participate in the Preparatory Commission for the International Criminal Court.⁴⁵

III. CHINA'S CONTINUING INTEREST IN THE ICC

The interest of China in the Court has not diminished after the Rome Conference, but continues.

The Head of the Chinese delegation at the Rome Conference has shed light on this interest in his interview by a national newspaper, the *Legal Daily*.⁴⁶ When he was asked about the view of the Chinese Government towards the Court, he answered that China consistently supports the establishment of such a court, which would in its operation be independent, impartial, effective and universal, on condition that the Court would supplement the function of existing national legal systems. He said that, with this in mind, China would treat all major issues covered by the Rome Statute in a cautious manner to prevent the Court from becoming a political tool for intervention in the internal affairs of States. When asked the reason why China voted against the Rome Statute, he replied that China disagreed with the provisions allowing the Court to exercise universal jurisdiction, that China had serious reservations over the extension of the Court's jurisdiction to war crimes arising from non-international armed conflicts, in relation to which China preferred an opt-in mechanism to engage the competence of the Court, that China would like to see the UN Security Council to first act upon possible cases of aggression, without, in addition, the limitation that the Security Council's power in this regard be segmented by 12-month periods, that China had serious reservations over the power of the Prosecutor to initiate investigation *proprio motu*, which could entail interference with the internal affairs of States, and that China also regarded crimes against humanity as linked with armed conflict. Despite the above difficulties, he expressed the view that China would continue to observe and participate in the work of the preparatory commission established after the Rome Conference, and to be involved in the drafting of certain important documents of the Court.

Some time afterwards, in October 2003, a statement appeared on the website of the Chinese Foreign Ministry, which revealed the continued interest of the country in the matter.⁴⁷ The statement did not hesitate in setting out reasonable concerns of China regarding certain articles of the Rome Statute. It may be useful to briefly summarise the statement as follows.

First, the adoption of the Rome Statute meant that, as a permanent judicial organisation, the Court would soon enter into operation. As an active participant in the process of negotiations of the statute, China would welcome this significant development of international law.

Secondly, the Chinese Government consistently supports the establishment of "an independent, impartial, effective and universal international criminal court". The effective operation of the court would not only reinforce the confidence of the mankind in the international community, but also be conducive to international peace and security.

Thirdly, the Chinese Government is of the view that the operation of the Court should strictly follow relevant principles on which the Court was established, such as the principle of complementarity. The most important role of the Court is that it pushes all countries to

⁴³ A/CONF.183/SR.18, para. 62 (29 June 1998).

⁴⁴ A/CONF.183/SR.9, para. 10 and para. 40.

⁴⁵ Official Records, vol. i.

⁴⁶ "Wang Guangya on *The Statute of the International Criminal Court*", *Legal Daily* (29 July 1998) at 4.

⁴⁷ Ministry of Foreign Affairs of the People's Republic of China, "China and the International Criminal Court", 28 October 2003, online: <<http://www.fmprc.gov.cn/eng/wjzb/zzjg/tyfls/tyfl/2626/2627/t15473.htm>>.

improve their domestic judicial systems, and that the Rome Statute obliges all State parties to exercise jurisdiction over perpetrators of grave crimes according to their domestic judicial systems.

Fourthly, the crimes under the jurisdiction of the Court should be limited to the gravest crimes as provided in the Rome Statute.

Fifthly, the activities of the Court should not run counter to the provisions of the UN Charter, especially in respect of the crime of aggression.

Sixthly, the Court should execute its duties objectively and impartially, and make best efforts to avoid political bias so as not to become a tool susceptible of misuse for political reasons.

The statement further stated to the effect that, as to the question of acceding to the Rome Statute, the Chinese Government adopts an open attitude and the actual performance of the Court is undoubtedly an important factor for its consideration. China has not excluded the possibility of considering accession to the Rome Statute at an appropriate time. It also promised that, in future, the Chinese Government as an observer State would continue to adopt a serious and responsible attitude to follow carefully the progress and operation of the Court.

The statement is clear as to the Chinese view on the future shape of the Court, as well as the possibility of China acceding to the Rome Statute. The significance of having a permanent criminal court is not lost to China, but has been duly recognised, as in the statement quoted above and elsewhere, as a landmark event.⁴⁸ It is therefore no surprise that China has participated as an observer State in the Assembly of States Parties sessions since 2002.⁴⁹

In subsequent developments relating to the Court, China has also played a positive role. On 29 May 2004, the *Washington Post* reported that China was considering to veto a UN Security Council resolution designed to shield US troops serving in UN peace-keeping operations from prosecution by the ICC.⁵⁰ China was concerned, according to the report, with the possible fall-out from such a resolution which would exempt US troops from being held accountable for prisoner abuses in Afghanistan and Iraq as then reported in the media—acts which were deemed by China to be violations of international humanitarian law. The resolution in draft form was soon withdrawn and deferred to a later date.⁵¹

IV. THE DIFFERENT REACTIONS OF CHINESE LAWYERS

The Court and its field of work, such as international humanitarian law and criminal law, have grasped the attention of Chinese academic lawyers. Academic discussions are somewhat hovering on a spectrum of widely diverse issues.

⁴⁸ Indeed, the Head of the Chinese Delegation was reported by the *People's Daily* as acknowledging the attempt at Rome to establish the ICC as a reflection of the development of the international community and international law: "On the Establishment of the International Criminal Court: The Chinese Government Emphasised the Importance of State Sovereignty", *People's Daily* (18 June 1998) at 6. Further, see Liu Zhenmin, "The Development of International Law Viewed from the Angle of International Legislation" (2000/2001) *Chinese Yearbook of International Law* at 209. He wrote in his capacity as Associate Professor of the College of Diplomacy, Beijing, not as the Director-General of the Treaty and Law Department of the Chinese Foreign Ministry. The Chinese support for the Court as an institution has also been noted by other writers, see, e.g., D. McGoldrick, "Political and Legal Responses to the ICC" in D. McGoldrick, P. Rowe & E. Donnelly, eds., *The Permanent International Criminal Court* (Oxford: Hart Publishing, 2004) at 438.

⁴⁹ Wang Chen, "The Third Session of the Assembly of States Parties to the Rome Statute" 2004 *Chinese Yearbook of International Law* 347.

⁵⁰ Colum Lynch, "China May Veto resolution on Criminal Court: Beijing Says a UN Motion Could Shield US troops from Abuse Allegations" *Washington Post* (29 May 2004) A22.

⁵¹ *Ibid.* At that time, the US had entered into bilateral treaties with some 89 countries which would not send US troops or other personnel for trial before the ICC. As of 14 April 2006, that number had grown to 97, including 43 States parties to the Rome Statute. Online: <http://www.iccnw.org/documents/CICCFCS_BIAstatusCurrent.pdf>.

The cautious view, held by a lawyer with experience in international proceedings, is that, given the importance of the existence of the Court and of its work which will have impact in the current international order, it is imperative that Chinese lawyers study this institution, even though China is a non-party to the Rome Statute, and that it is hard to predict the effect of the Court before any case is disposed of by the Court.⁵²

Some views are more critical. One author states that the view held by Chinese government officials or diplomats towards the Rome Statute or the Court does not reflect that of the academic world.⁵³ He considers that the official view, being static culturally, might produce more negative than positive influence, in that the growing support for the Court would isolate those States opposing the Court. He also holds that the Chinese official position would deprive the Chinese legal profession of opportunities to learn from the operation of the Court, and that this loss of opportunity could eventually prove to be costly. He feels that China could lose its voice, even its place, in this fast developing field.

There are also technical discussions with respect both to the issues raised by the Chinese Government as reasons for its negativity towards the Rome Statute⁵⁴ and to the substantive law to be applied by the Court.⁵⁵ The contrast between Chinese criminal law and the Rome Statute is plain in many aspects.

V. THE REAL DIFFICULTIES

The Chinese concerns addressed in this paper are a reality which may, hopefully, change in the development of the Court's work. However, certain issues may not be open to easy solutions in any case.

A. Jurisdiction

China is unable to accept the rule of the Rome Statute that allows the Court to exercise jurisdiction over the crimes contained in Article 5 of the statute without the consent of a State.⁵⁶ However, Article 12 of the statute sets forth the pre-conditions for the exercise of the jurisdiction by the Court, which, if unfulfilled, would deprive the Court of jurisdiction. Thus, a non-party State will only be affected by the jurisdiction of the Court if it agrees to its exercise by declaration lodged with the Registrar of the Court.⁵⁷ Otherwise, it is free from the reach of the Court's jurisdiction by virtue of this article. In the meantime, it is also protected by the customary principle of treaty law: *pacta tertiis nec nocent nec prosunt*, as

⁵² Zhu Wenqi, Professor of Law, Renmin University, Beijing, "The Prospect of a Chinese Accession to the International Criminal Court", in Gao Mingxuan, Zhao Bingzhi & Wang Xiumei, eds., *The International Criminal Court: the Choices Faced by China* (Beijing: Chinese Public Security University Press, 2005) at 154, 177 (The editors of this book were professors of criminal law at Renmin University, Beijing).

⁵³ Lu Jianping, Professor of Criminal Law, Renmin University, Beijing, "A Cultural Assessment of China Joining the ICC" in Zhao Bingzhi & Chen Hongyi, eds., *Issues of International Criminal Law and International Crimes* (Beijing: Chinese Public Security University Press, 2003) at 325,328 (Professor Chen was the dean of the Law School, Hong Kong University).

⁵⁴ Lijun Yang, "Some Critical Remarks on the Rome Statute of the International Criminal Court" (2003) 2 *Chinese Journal of International Law* 599 (the author is an associate professor with the Law Institute, the Chinese Academy of Social Sciences).

⁵⁵ For instance, Zhang Shaoqian & Sun Zhanguo, "A Comparative Study of the Rome Statute and Chinese Criminal Law" in *The International Criminal Court: the Choices Faced by China*, *supra* note 52 at 114 (Mr. Zhang is a professor of law and Mr. Sun a postgraduate student at the Law School, Shanghai Jiaotong University, Shanghai).

⁵⁶ *Supra* note 46.

⁵⁷ Cf. M. Arsanjani, "Reflections on the Jurisdiction and Trigger-Mechanism of the International Criminal Court" in H. von Hebel, J. Lammers & J. Schukking, eds., *Reflections on the International Criminal Court* (Essays in Honour of Adriaan Bos) (the Netherlands: T.M.C. Asser Press, 1999) at 57, 61.

reflected in Article 34 of the 1969 *Vienna Convention on the Law of Treaties*.⁵⁸ On the other hand, the view was expressed that the jurisdiction of the Court should be strengthened even further at the first review conference in respect of the crimes of aggression and genocide.⁵⁹

It is recognised that there are situations in which the Court's jurisdiction could be employed with respect to a case in which a non-party State is involved. Article 13 of the Rome Statute allows the Court to act upon referral by the UN Security Council and upon investigation being initiated by the Prosecutor of the Court. For China, given its permanent seat in the Security Council that carries the right to veto, the real difficulty could be the power conferred by the Rome Statute upon the Prosecutor of the Court. But a close examination should dissipate China's concerns in this regard.

B. *The Prosecutor's Power*

Under Article 13, the exercise of the investigative power by the ICC Prosecutor can lead to the exercise of jurisdiction by the Court in a case involving a third State. The wording of Article 12 (2), however, adds further conditions. This is where the difficulty of China arises. The wording of the provision, "if one or more of the following States", is confusing.⁶⁰ It should have read "if the following States, respectively or both", stressing therefore that a State as described in the provision, which is concerned with the exercise of the jurisdiction of the Court, must give its consent before the Court can assume jurisdiction. This may be true without saying,⁶¹ given the relevant rules of the existing treaty law. It is felt, however, to be clearer if the wording could be revised—even if this could err on the side of elaborateness.

It may be that China has other concerns over Article 15 of the Rome Statute, but that its concern with Article 15(1) and (2) and Article 13(c) apparently outweighs the others.⁶² The exercise of the prosecutorial power in concrete cases may address such concerns, but this is a matter that can only be differently perceived through practice. As Article 12(2) provides the restriction, in the form of State consent, upon the exercise of the Court's jurisdiction, a non-party can at least avoid contact with the Office of the Prosecutor. On the other hand, it may be wondered whether the provisions of Article 15 could be improved to provide further balance to the prosecutorial power currently granted by the article. The existing roles of the Prosecutor are set forth, and there is no particular reason why these could not be augmented or subtracted or limited in some manner.⁶³

C. *Internal Armed Conflict*

As for China's view that war crimes in internal armed conflict should be dealt with by national courts, and should in definition reflect customary law,⁶⁴ there is no immediate alternative. Even the requirement that the Court exercises its jurisdiction over "the most

⁵⁸ A. McNair, *The Law of Treaties* (Oxford: Oxford University Press, 1961) at 309.

⁵⁹ Zhang Xu, "The International Criminal Court: A Chinese Lawyer's View" in Zhao Bingzhi & Wang Xiumei, eds., *Study on Major Issues Relating to the International Criminal Court* (Beijing: People's Court Press, 2003) at 80, 90 (the author is a professor of law with the Law School, JiLin University, JiLin Province).

⁶⁰ *Supra* note 54 at 603. Also see *supra* note 54 at 59.

⁶¹ E. Wilmshurst, *supra* note 4 at 137, footnote 37. Also see, H.P. Kaul, "Preconditions to the Exercise of Jurisdiction" in A. Cassese, P. Gaeta, & J. Jones, eds., *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002), vol. i at 606.

⁶² *Supra* note 46.

⁶³ In fact, the prosecutorial powers in all aspects may create disputes in its exercise. For instance, when the Prosecutor initiates investigation in the territory of a State party under Article 99: See Xu Hong, "The Regime of International Judicial Cooperation under the Framework of the International Criminal Court" (1999) *Chinese Yearbook of International Law* at 137, 156-158.

⁶⁴ *Supra* note 46.

serious crimes of concern to the international community as a whole” (Article 5(1) of the Rome Statute) may not reconcile the above view with the existing rules under the Rome Statute,⁶⁵ or with other States’ perception of this issue for that matter. The view could be bluntly put in terms of possible interference with the internal affairs of China.⁶⁶

D. *The Role of the UN Security Council*

The role of the UN Security Council in the life of the ICC may be another difficulty to China which offers no immediate solution. Indeed, China wants to see the Council decide the existence of a case of aggression, which would take the matter out of the hands of the ICC.⁶⁷ While it may be possible that the Security Council and the ICC are both seized of an allegation of aggression, it is plain that the jurisdiction of the Court in such cases is limited by the action of the Security Council.⁶⁸ In addition, the Council may stay the Court’s proceedings for renewable periods of time as defined by the Rome Statute.⁶⁹ However, this issue has been reserved under the Rome Statute, and the review conference in 2009 may find new ideas.⁷⁰

E. *Crimes against Humanity*

Compared with the preceding difficulties, the scope of crimes against humanity seems to be a lesser one. While China prefers to link such crimes with armed conflict by reference to customary law, and hopes for the list of such crimes in the Statute to exclude offences which are violations of human rights law,⁷¹ its argument is of substantive law, the perception and especially the preference as to the scope of application of which, with more time to reflect upon, could change and conform to a general consensus on the issue.⁷² Even with regard to the offences in violation of human rights, views among Chinese lawyers are divided between those which are close to the official position and those which are close to the terms of the Rome Statute.⁷³

⁶⁵ Cf. Gao Yanping, *The International Criminal Court* (Beijing: Knowledge of the World Press, 1999) at 286-287 (this book is probably an enlarged version of the author’s doctoral thesis submitted to the Law School, Beijing University, in 1997).

⁶⁶ Tan Shigui, “A Preliminary Study of the Relations between China and the ICC” in *Study on Major Issues Relating to the International Criminal Court*, *supra* note 59 at 60, 66 (the author is Chancellor of HaiNan University, HaiNan Province).

⁶⁷ *Supra* note 46.

⁶⁸ Liu Daqun, “Crimes within the Jurisdiction of the Court: Article 5” in Roy Lee, Liu Daqun & Ling Yan, eds., *The Rome Statute of the International Criminal Court: A Commentary* (Beijing: Beijing University Press, 2006) 52 (the author is currently an appellate judge with the ICTY).

⁶⁹ Art. 16.

⁷⁰ Arts. 121 and 123. Also see G. Gaja, “The Long Journey towards Repressing Aggression” in *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002), *supra* note 61, vol. i. at 432-434.

⁷¹ *Supra* note 46. For instance, *supra* note 46 at 610-611.

⁷² Cf. *supra* note 65 at 294; Wang Xiumei, *A Study of International Criminal Law* (Beijing: Renmin University Press, 2002) at 231 (the author is Associate Professor of Criminal Law, Beijing Normal University, Beijing); Jia Yu, *International Criminal Law* (Beijing: Press of the Chinese University of Politics and Law, 2004) at 185 (the author is a professor of law and Vice Dean of the Northwestern College of Politics and Law, Shan Xi Province). Also see A. Cassese, “Crimes against Humanity” in *The Rome Statute of the International Criminal Court: A Commentary*, *supra* note 61, vol. i at 356.

⁷³ For the former view, *supra* note 46 at 610-611; Tan Shigui, *supra* note 66 at 67-68. For the latter view, see Wang Xiumei, *supra* note 72 at 258-261; Zhou Zhonghai, Ma Chengyuan & Li Juqian, eds., *International Law* (Textbook) (Beijing: Press of the Chinese University of Politics and Law, 2004) at 668.

VI. AN UNCERTAIN FUTURE

China's position is similar to that of an observer who is looking at the growth of an institution in whose founding he has played a role. It will soon learn of the benefits or disadvantages of the institution to its interests.

While reality presses for prompt action, this does not, however, necessarily mean a change in the Chinese position. On the occasion on which the UN Security Council voted by eleven affirmative votes to four abstentions to refer the situation of Darfur, Sudan, to the ICC by Resolution 1593 of 31 March 2005, China's permanent representative to the UN reminded the Council that China had reservations on a number of issues covered by the Rome Statute, and that China was reluctant to see the Court's jurisdiction engaged without the consent of the State parties, or to see the UN Security Council referring such a situation to the Court in spite of the possibility that the Sudanese courts, which were mobilised, were capable of trying cases of violation of international humanitarian law.⁷⁴

Among Chinese academics and practitioners alike, the prospect of China's accession to the Rome Statute is seemingly bright.⁷⁵ To prepare for that eventuality,⁷⁶ considering the model of teaching and writing adopted in China for the subject of international criminal law,⁷⁷ it may be wondered whether, at this moment, the focus in Chinese literature has been expansive, rendering concentrated research efforts, which should have been limited as a matter of course to the gravest crimes recognized in international practice, unsustainable. Further, a comparison of the provisions of the Rome Statute and relevant rules of Chinese criminal law is no longer sufficient to raise awareness, and to sharpen the sense of the legal profession regarding the Court's work and its impact. In-depth works,⁷⁸ and a close study of the judicial works of the ICC, are desired. A group of diverse views, however, provides a good beginning to the future flourishing of the subject in Chinese legal education.

In conclusion, it seems that, as regards the most important issues to China,⁷⁹ jurisdiction and the applicability of the Statute's crimes to internal armed conflicts, there is no likelihood of a solution that is anytime soon.⁸⁰ The challenge provided by the advent of the ICC is immense for the national legal order of China, and ripples of the work of the body will transcend this and other legal systems, surging against the barriers, if any, of sovereignty of countries of today's world.⁸¹

⁷⁴ Wang Guangya, "It is for the Sudan to prosecute those guilty for violating human rights in Darfur", *People's Net* (31 March 2005), online: <<http://world.people.com.cn/GB/1029/3288284.html>>. This website is maintained by the *People's Daily*.

⁷⁵ At one recent conference relating to the ICC and international criminal law held in Shanghai, China in June 2005, participants were from academic institutions, courts, and procuratorates in Shanghai. In the replies to a questionnaire circulated by the organisers, over 70% of them expressed optimism towards the prospect of China's accession, even though some 29% of them expected the competence of the Court to be severely limited: see *supra* note 52 at 227.

⁷⁶ Chen Zhonglin, "The Correct Attitude China should Hold towards the ICC" in *supra* note 59 at 77, 79 (the author is the dean of the Law School, Southwestern University of Politics and Law, Chongqing City).

⁷⁷ For instance, Shao Shaping, *International Criminal Law* (Wuhan: Wuhan University Press, 2005) at 38. The author, a professor of law at the Law School, Wuhan University, China, mentions in her book that the subject of international criminal law has been taught in Chinese law schools since the late 1980s.

⁷⁸ For instance, along the line of Cassese's *International Criminal Law* (Oxford: Oxford University Press, 2003).

⁷⁹ A/CONF.183/C.1/SR.42, para. 28 (17 July 1998), by the Chinese delegate.

⁸⁰ It is good that the Rome Statute allows more than one review conference to be held under Article 123(2).

⁸¹ Acutely sensed by Chinese lawyers: Xu Hong, "The Regime of International Judicial Cooperation under the Framework of the International Criminal Court" (1999) *Chinese Yearbook of International Law* 164.

