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The ICC's Jurisdiction over War Crimes in Internal Armed Conflicts: An Insurmountable Obstacle for China's Accession?

Jing Guan*

I. INTRODUCTION

More than a decade has passed since the 1998 adoption of the Rome Statute establishing the International Criminal Court ("ICC").¹ Today, the ICC has developed into a fully functioning institution. By June 1, 2010, the ICC will enjoy as many as 111 states parties, with Bangladesh ratifying the Rome Statute most recently on March 23, 2010.² Four situations are currently under court proceedings: three self-referrals by states parties (Uganda, Democratic Republic of the Congo, and Central African Republic) and one by the United Nations ("UN") Security Council on a non-party state (Darfur, Sudan).³ Most recently on March 31, 2010, a majority of the ICC Pre-Trial Chamber II granted the Prosecutor's request to commence an investigation on crimes against

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1. See Rome Statute of the International Criminal Court, July 17, 1998, 37 I.L.M. 1002 [hereinafter Rome Statute].

2. See Press Release, International Criminal Court, Bangladesh ratifies the Rome Statute of the International Criminal Court (Mar. 24, 2010), available at <http://www.icc-cpi.int/menu/icc/press%20and%20media/press%20releases/bangladesh%20ratifies%20the%20rome%20statute%20of%20the%20international%20criminal%20court> (last visited April 23, 2010).

3. See Situations and Cases, <http://www.icc-cpi.int/Menu/ICC/Situations+and+Cases/> (last visited Apr. 13, 2010).

humanity allegedly committed in Kenya's 2007 post-election violence.⁴ This decision marks the first use of the Prosecutorial *proprio motu* power in a case before the ICC.⁵

Against such broad membership and robust development of the ICC, however, China, and some other major states such as the United States, Russia, and India are still outside of the ICC family.⁶ As one of the five permanent members of the UN Security Council (P-5) and a rising power playing increasingly greater role in international affairs, it is impossible and perhaps unwise for China to remain permanently detached from the development of the ICC. The first Review Conference for the Rome Statute is scheduled for May 31 and June 11, 2010, in Kampala, Uganda.⁷ Now is an opportune time for China to reassess its reservations towards the Rome Statute and consider what stance it wishes to take and what proposals it may wish to put forward as an observer at the first Review Conference. If achieving universality remains one of the main goals of the Rome Statute, it is also important for current states parties to the ICC to reexamine how major non-party states, such as China, could be attracted to join the ICC at the first Review Conference.

Due to its historically conditioned concern for maintenance of sovereignty and territorial integrity, the Chinese government stated five main reasons for voting against the Rome Statute after the 1998 Rome Conference.⁸ First, China is unable to accept the broad jurisdiction of the ICC as prescribed by the Rome Statute. It is not based on states' voluntary acceptance,⁹ but rather, imposes obligations on non-party states without their consent.¹⁰ Such jurisdiction violates the principle of state sovereignty and the Vienna Convention on the Law of Treaties.¹¹ Second, China holds serious reservations about the ICC's jurisdiction

4. See Press Release, International Criminal Court, ICC judges grant the Prosecutor's request to launch an investigation on crimes against humanity with regard to the situation in Kenya (Mar. 31, 2010), available at <http://www.icc-cpi.int/NR/exeres/D81AA5AF-CD76-4B3C-A4FC-AA7819569B44.htm>.

5. See *id.*

6. At the Rome Conference, both China and the United States voted against the Rome Statute despite their active involvement in the negotiations that led to its adoption. While India abstained and Russia actually signed the Rome Statute, the prospect of these four states joining the ICC any time soon remains doubtful.

7. See Review Conference of the Rome Statute, <http://www.icc-cpi.int/menus/asp/reviewconference/review%20conference?lan=en-GB> (last visited Apr. 13, 2010).

8. See *Guangya Wang on the Statute of the International Criminal Court*, LEGAL DAILY, July 29, 1998 (in Chinese), at 4 [hereinafter *Guangya Wang*].

9. According to Article 12(1) of the Rome Statute, acceptance of the ICC's jurisdiction is compulsory upon states' ratification.

10. See *Guangya Wang*, *supra* note 8.

11. See Vienna Convention on the Law of Treaties, May 23, 1968, 1115 U.N.T.S. 331.

over war crimes committed in internal armed conflicts.¹² In China's view, these crimes should be and are better handled by capable national courts, and the present definition of war crimes under the Rome Statute goes beyond that of customary international law.¹³ Third, China also has serious reservations over the *proprio motu* power of the Prosecutor to investigate, which, in China's view, amounts to the right to judge and rule on state conduct.¹⁴ Fourth, China contends that crimes against humanity should be related to wartime, and many conducts listed under the Rome Statute belong to human rights law rather than international criminal law.¹⁵ Finally, China views the ICC's jurisdiction over the crime of aggression weakens the power of the UN Security Council, who should first act upon possible cases of aggression.¹⁶ Despite its negative vote, China's current official stance remains that it has continuously shown support in principle for the ICC, that it currently adopts an open attitude as to accession, and actively observes the actual performance of the ICC with a serious and responsible attitude.¹⁷ China has also participated in the Assembly of States Parties ("ASP") as an observer since 2002.¹⁸

What should be revealed are China's real concerns behind its official reasons for not joining the ICC. Whereas the United States is mostly concerned about the ICC's possible reach to its enormous number of troops deployed in various war-torn areas around the world,¹⁹ and Russia and India are mostly concerned about the ICC's possible intervention into the Chechnya and Kashmir conflicts,²⁰ the Taiwan issue is the most fatal potential conflict between China and the ICC.²¹ The ICC's jurisdiction over war crimes in internal armed conflicts could

12. See *Guangya Wang*, *supra* note 8.

13. See *id.*

14. See *id.*

15. See *id.*

16. See *id.*

17. See China and the International Criminal Court, Oct. 28, 2003, www.fmprc.gov.cn/eng/wjzb/zjzg/tyfls/tyfl/2626/2627/t15473.htm (last visited Apr. 13, 2010). China reiterated similar views both in 2005 and 2008. See Position Paper of the People's Republic of China on the United Nations Reforms, June 7, 2005, available at <http://www.fmprc.gov.cn/eng/zxxx/t199318.htm>.

18. See ICC Archive, http://www.amicc.org/icc_archive.html (last visited Apr. 13, 2010).

19. See Michael P. Scharf, *Results of the Rome Conference for an International Criminal Court*, Aug. 1998, available at <http://www.asil.org/insigh23.cfm>.

20. See Flemming Splidsboel Hansen, *In the Transatlantic Gap*, *RUSS. IN GLOBAL AFF.*, No. 4, (Oct.-Dec. 2004), available at <http://eng.globalaffairs.ru/numbers/9/710.html>; see also *India non-aligned, but held back by insurgencies*, *INT'L JUST. TRIB.*, Apr. 16, 2007, <http://www.rnw.nl/international-justice/article/india-non-aligned-held-back-insurgencies> (last visited May 4, 2010).

21. See *infra* Part VII.

result in interference with China's internal affairs. To a lesser extent, Tibet, Xinjiang, Falun Gong and deficiencies in its national judicial system are other concerns for China vis-à-vis the ICC.²²

Hence, this article focuses on the examination of the ICC's jurisdiction over war crimes in internal armed conflicts and discusses whether such jurisdiction amounts to an insurmountable obstacle for China's accession to the ICC in light of its real concerns.²³ In order to make the picture complete, this article also briefly analyses China's other four major official reasons for not joining the ICC,²⁴ and summarizes positive reasons for China to join the ICC.²⁵ In concluding that although understandable concerns do exist, no real legal obstacles stand in the way for China's accession to the ICC,²⁶ this article finally attempts to explain what is really at stake for China's reluctance to join the ICC at this stage.²⁷

II. THE BATTLE OVER WAR CRIMES AT THE ROME CONFERENCE

At the 1998 Rome Conference, under the strong insistence of the United States and the powerful "Like-Minded Group,"²⁸ provisions on war crimes in internal armed conflicts were included in the Rome Statute.²⁹ Such inclusion was one of the most controversial issues during the negotiations.³⁰ The United States emphasized that extending the ICC's jurisdiction from international armed conflicts to internal armed conflicts was extremely important, because nowadays internal armed conflicts are the most frequent and most cruel.³¹ Other states concurred that such inclusion went to the very relevance of the ICC,³² to the "raison

22. See *infra* Part VIII.

23. See *infra* Parts II-VII.

24. See *infra* Part VIII.

25. See *infra* Part IX.

26. See *id.*

27. See *infra* Part X.

28. Composed of over 60 middle powers and developing countries, promoted the establishment of the ICC and generally favored a strong and independent court. See INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE (Vol. I) 3 (Shiguang Li, Daqun Liu & Yan Ling eds., Beijing Univ. Press, 2006) (in Chinese) [hereinafter Shiguang Li]; see also Philippe Kirsch & John T. Holmes, *The Rome Conference on an ICC: the Negotiating Process*, 93 AM. J. INT'L L. 2, 4 (1999).

29. See Rome Statute, *supra* note 1.

30. See Thomas Graditzky, *War Crime Issues before the Rome Diplomatic Conference on the Establishment of an International Criminal Court*, 5 U.C. DAVIS J. INT'L L. & POL'Y 199, 208 (1999).

31. See UN Doc. A/CONF.183/SR.5 (US), ¶ 61; UN Doc. A/CONF.183/C.1/SR.6, ¶ 100 (US).

32. UN Doc. A/CONF.183/C.1/SR.4, ¶ 72 (Denmark); UN Doc. A/CONF.183/C.1/SR.4, ¶ 74 (Sweden); UN Doc. A/CONF.183/C.1/SR.26, ¶ 123 (Greece).

d'être,"³³ to "credibility,"³⁴ and to the "integrity and rationale"³⁵ of the ICC.

A not negligible minority of states, mostly members of the Arab League and the Non-Aligned Movement, including Algeria, Azerbaijan, Burundi, China, India, Indonesia, Iran, Iraq, Libyan Arab Jamahiriya, Mexico, Nepal, Oman, Pakistan, Russia, Saudi Arabia, Sudan, Syrian Arab Republic, Thailand, Turkey, and Vietnam, objected to such inclusion.³⁶ These states believed that the provisions did not reflect customary international law,³⁷ would lead to interferences in the domestic affairs of states, and would result in difficulties in drawing a line between a genuine internal armed conflict and internal disturbances.³⁸ Some of these states only supported a provision based on Article 3 common to the 1949 four Geneva Conventions for the Protection of War Victims (common Article 3), but not one based on the 1977 Additional Protocol II to the four Geneva Conventions (Additional Protocol II).³⁹

During the 1998 Rome Conference, China expressed serious reservations over such inclusion.⁴⁰ China argued that the current definition of war crimes under the Rome Statute goes beyond that of customary international law.⁴¹ This argument is two-fold. First, internal armed conflicts are not within the scope of war crimes under existing customary international law, which only covers international armed conflicts.⁴² States with robust legal systems are capable of prosecuting war related offenses committed in internal armed conflicts. Domestic courts have apparent advantages over the ICC in prosecuting these types of crimes.⁴³ Second, the current definition of war crimes under the Rome Statute goes even beyond that of Additional Protocol II.⁴⁴ Therefore, China maintained that states should be allowed to opt in or

33. UN Doc. A/CONF.183/C.1/SR.26, ¶ 54 (Republic of Korea).

34. UN Doc. A/CONF.183/C.1/SR.26, ¶ 72 (Togo).

35. UN Doc. A/CONF.183/C.1/SR.26, ¶ 97 (United States).

36. See Anthony Cullen, *The Definition of Non-International Armed Conflict in the Rome Statute of the International Criminal Court: An Analysis of the Threshold of Application Contained in Article 8(2)(f)*, 12 J. CONFLICT & SEC. L. 419, n. 28 (2007); LINDSAY MOIR, *THE LAW OF INTERNAL ARMED CONFLICT* 165 (2002).

37. See UN Doc. A/CONF.183/C.1/SR.26, ¶ 102 (Iran); UN Doc. A/CONF.183/C.1/SR.25, ¶ 36 (China).

38. See UN Doc. A/CONF.183/C.1/SR.27, ¶ 5 (Algeria).

39. See UN Doc. A/CONF.183/C.1/SR.4, ¶ 76 (Sudan); UN Doc. A/CONF.183/C.1/SR.25, ¶ 59 (Azerbaijan); UN Doc. A/CONF.183/C.1/SR.25, ¶ 65 (Mexico).

40. See *Guangya Wang*, *supra* note 8.

41. See *id.*

42. See *id.*

43. See *id.*

44. See *id.*

out of the ICC's jurisdiction over these types of crimes.⁴⁵ Presently, although the Rome Statute makes temporal arrangement for the acceptance of the ICC's jurisdiction over war crimes (i.e., the seven-year opt-out mechanism), it rejects the "opt in or out" method in principle.⁴⁶ This will result in many states backing away from the ICC.⁴⁷

In response to China's arguments, I shall begin my discussion with the blurring of the conventional dichotomy between international and internal armed conflicts⁴⁸ and the possible implications of extending war crimes to internal armed conflicts.⁴⁹ My main contention is that even though the customary international law status of such extension is still not free from debate, it appears farfetched and no longer plausible for China to oppose such a compelling trend. In fact, China's position seems less rigid than denying the criminality of war related offenses in internal armed conflicts. Rather, China appears more concerned about the compulsory complementary jurisdiction of the ICC over war crimes.⁵⁰ While granting the ICC with compulsory complementary jurisdiction is with sound reasons, time is still needed for China to accept such "intrusive" jurisdiction. I then examine the specific war crimes provisions under the Rome Statute that exceed customary international law⁵¹ and analyze them in light of China's real concerns behind its official reasons for war crimes, i.e., the Taiwan issue, and to a lesser degree, possible recurrences of separatist/terrorist violence in the Tibet and Xinjiang provinces.⁵² My conclusion is that these provisions do not pose real difficulty for China.

III. THE BLURRING OF THE CONVENTIONAL DICHOTOMY BETWEEN INTERNATIONAL AND INTERNAL ARMED CONFLICTS

Traditional international law held that war crimes may only be committed during wars proper, i.e., international armed conflicts involving two or more sovereign states, and as an exception, civil wars that are treated as international armed conflicts due to recognition of belligerency.⁵³ Violations of international law committed in internal

45. See *Guangya Wang*, *supra* note 8.

46. See *id.*

47. See *id.*

48. See *infra* Part III.

49. See *infra* Part IV.

50. See *infra* Part V.

51. See *infra* Part VI.

52. See *infra* Part VII.

53. See *Prosecutor v. Tadic*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995), ¶ 96 [hereinafter *Tadic* Defence Motion].

armed conflicts were not criminalized.⁵⁴ In 1993, when commenting on the proposed draft statute for the International Criminal Tribunal for the former Yugoslavia (“ICTY”), the International Committee of the Red Cross (“ICRC”) underlined the fact that “according to international humanitarian law as it [stood then], the notion of war crimes [was] limited to situations of international armed conflict.”⁵⁵ The Commission of Experts appointed to investigate violations of humanitarian law in the former Yugoslavia reached similar conclusions in its final report:

The treaty-based law applicable to internal armed conflicts is relatively recent and is contained in [common Article 3], Additional Protocol II, and article 19 of the 1954 Hague Convention on Cultural Property. It is unlikely that there is any body of customary international law applicable to internal armed conflict which does not find its root in these treaty provisions. It is probable that [common Article 3] would be viewed as a statement of customary international law, but unlikely that the other instruments would be so viewed. In particular, there does not appear to be a customary international law applicable to internal armed conflicts which includes the concept of war crimes.⁵⁶

Two years later, in commenting on the subject matter jurisdiction of the International Criminal Tribunal for Rwanda (“ICTR”), the 1995 UN Secretary-General report viewed that the UN Security Council took a more expansive approach to the choice of the applicable law than the one underlying the ICTY Statute, and included within the subject matter jurisdiction of the ICTR international instruments “regardless of whether they were considered part of customary international law or whether they have customarily entailed the individual criminal responsibility of the perpetrator of the crime.”⁵⁷ The report stated that the ICTR Statute “for the first time criminalize[d] [common Article 3]”⁵⁸ while “the question of whether [common Article 3] entails the individual responsibility of the perpetrator of the crime is still debatable,”⁵⁹ and viewed that “violations

54. Theodor Meron, *Reflections on the Prosecution of War Crimes by International Tribunals*, 100 AM. J. INT’L L. 551, 572 (2006) [hereinafter, Meron, *War Crimes*].

55. Some Preliminary Remarks by the International Committee of the Red Cross on the Setting up of an International Tribunal (Feb. 22, 1993) (reprinted in VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER’S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 391, 392 (1995)).

56. Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), UN Doc. S/1994/674, Annex, ¶ 52.

57. Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994), UN Doc. S/1995/134, ¶ 12 (Feb. 13, 1995), available at <http://www.ictrcaselaw.org/docs/N9504302.pdf>.

58. *Id.*

59. *Id.* at n.8.

of Additional Protocol II, which, as a whole, has not yet been universally recognized as part of customary international law.”⁶⁰

Eight months later, the seminal judgment of the ICTY Appeals Chamber in its *Tadic* case brought about even more significant innovations.⁶¹ The Appeals Chamber directly challenged the conventional dichotomy between international and internal armed conflicts and paved the road to the extension of the concept of war crimes to internal armed conflicts under the Rome Statute.⁶² It concluded that war crimes could be committed not only in international armed conflicts but also in internal armed conflicts.⁶³ It claimed that “customary international law imposes criminal liability for serious violations of common Article 3,”⁶⁴ and that the core of Additional Protocol II can now be regarded as having reached the status of customary international law.⁶⁵ Therefore, the Appeals Chamber concluded that under Article 3 of the ICTY Statute (titled “violations of the laws or customs of war”), it had jurisdiction over the acts alleged in the indictment, “regardless of whether they occurred within an internal or an international armed conflict.”⁶⁶

In its detailed reasoning, the Appeals Chamber first opined that the dichotomy between international and internal armed conflicts was “clearly sovereignty-oriented and reflected the traditional configuration of the international community, based on the coexistence of sovereign States more inclined to look after their own interests than community concerns or humanitarian demands.”⁶⁷ The reason that “interstate wars were regulated by a whole body of international legal rules” but that “very few international rules govern[ed] civil commotion” was because “[s]tates preferred to regard internal strife as rebellion, mutiny and treason coming within the purview of national criminal law and, by the same token, to exclude any possible intrusion by other States into their own domestic jurisdiction.”⁶⁸ The Appeals Chamber then eloquently stated the following:

Since the 1930s, . . . [this] distinction has gradually become more and more blurred. . . . There exist various reasons for this development. First, civil wars have become more frequent. . . . Secondly, internal

60. *Id.* at ¶ 12.

61. See *Tadic* Defence Motion, *supra* note 53.

62. *Id.* at ¶¶ 97-137.

63. *Id.* at ¶ 137.

64. *Id.* at ¶ 134.

65. *Id.* ¶ 117.

66. See *Tadic* Defence Motion, *supra* note 53, at ¶ 137.

67. *Id.* at ¶ 96.

68. *Id.*

armed conflicts have become more and more cruel and protracted. . . . Thirdly, the large-scale nature of civil strife, coupled with the increasing interdependence of States in the world community, has made it more and more difficult for third States to remain aloof. . . . Fourthly, the impetuous development and propagation in the international community of human rights doctrines . . . has brought about significant changes in international law. . . . If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.⁶⁹

Indeed, logically speaking and from the *lex ferenda*⁷⁰ perspective, the same war related offenses committed in any armed conflict should not be treated differently. Armed conflicts, whether international or internal, are all bloody wars involving unfortunate human sufferings. It seems axiomatic that heinous war related offenses committed in any armed conflict, whether international or internal, must not escape punishment. Under such conclusion, it would be very difficult to reasonably explain why the same offenses amount to “the most serious crimes of concern to the international community as a whole” when committed in the context of international armed conflicts, but not when committed in the context of internal armed conflicts.⁷¹ As compellingly posed by the rhetorical question of the Appeals Chamber:

Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted “only” within the territory of a sovereign State?⁷²

Hence, “[t]here is no moral justification, and no truly persuasive legal reason, for treating perpetrators of atrocities in internal conflicts more leniently than those engaged in international wars.”⁷³

Nevertheless, from the *lex lata* perspective, the innovative conclusion of the *Tadic* decision was too advanced back in 1995.⁷⁴ As

69. *Id.* at ¶ 97.

70. *Lex ferenda* also known as *de lege ferenda*, is “[a] proposed principle that might be applied to a given situation instead or in the absence of a legal principle that is in force.” BLACK’S LAW DICTIONARY 459 (8th ed. 2004).

71. See *Tadic* Defence Motion, *supra* note 53, at ¶ 97.

72. *Id.*

73. Meron, *War Crimes*, *supra* note 54, at 573.

Judge Haopei Li (China) pointed out in his separate opinion to the *Tadic* decision, the decision failed to prove the two required elements of customary international law.⁷⁵ Indeed, the Appeals Chamber only enumerated a surprisingly small amount of state practice before concluding that “customary international law imposes criminal liability for serious violations of common Article 3.”⁷⁶ Judge Li also referred to the internal armed conflict of Rwanda, asking why, if violations of the laws or customs of war enumerated in Article 3 of the ICTY Statute could be committed in either type of conflict as the result of the development of customary international law, they were not included in the ICTR Statute (Article 4 of the ICTR Statute only referred to violations of common Article 3 and Additional Protocol II).⁷⁷ Theodor Meron similarly concluded that “[t]his omission reflects the accepted wisdom, which unfortunately denies war crimes a place in internal conflicts.”⁷⁸ Hence the ICTY Appeals Chamber has been accused of exercising unwarranted legislative power when the relevant customary international law was still ambiguous.⁷⁹

Similarly, it is still not free from debate whether customary international law, at the adoption of the 1998 Rome Statute or as it stands now, extended the concept of war crimes to internal armed conflicts. Arguably, the fact that a not negligible minority of states opposed such an extension at the Rome Conference and have not yet changed their position, serves the best evidence.⁸⁰ Wenqi Zhu, former ICTY Prosecutor in the Appellate Section from China, opined that from a pure academic perspective, there was no clear delimitation concerning this issue when the Rome Statute was adopted in 1998.⁸¹ Zhu reasoned that the consensus before the adoption of the Rome Statute was that even if common Article 3 and Additional Protocol II prohibited some conduct

74. *Lex lata*, also known as *de lege lata* is “the principle that a court should decide based on actual law and not on how it thinks that law ought to be.” BLACK’S, *supra* note 70, at 459.

75. See Prosecutor v. *Tadic*, Case No. IT-94-1, Separate Opinion of Judge Li on the Defence of Interlocutory Appeal on Jurisdiction, ¶ 11 (Oct. 2, 1995) [hereinafter *Tadic* Judge Li].

76. *Tadic* Defence Motion, *supra* note 53, ¶ 134.

77. *Tadic* Judge Li, *supra* note 75, ¶ 11.

78. Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT’L L. 554, 574 (1995).

79. See *Tadic* Judge Li, *supra* note 75, ¶ 13; WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 115 (3d ed. 2007); George H. Aldrich, *The Laws of War on Land*, 94 AM. J. INT’L L. 42, 61 (2000).

80. See *supra* Part II.

81. Wenqi Zhu, *Whether China Should Join the International Criminal Court (Upper)*, HUBEI SOCIAL SCIENCES (in Chinese), No. 10, 141, 145 (2007) [hereinafter *Zhu, Whether China Should Join (Upper)*].

during internal armed conflicts, such conduct did not necessarily lead to war crimes entailing individual criminal responsibility.⁸² Hence, Zhu concluded that the Rome Statute negated the traditional practice of leaving internal armed conflicts at the hand of domestic courts.⁸³ While Antonio Cassese opined in 2003 that “particularly after the [*Tadic* case], it is now widely accepted that serious infringements of customary or applicable treaty law on internal armed conflicts must also be regarded as amounting to war crimes proper,”⁸⁴ cautious Chinese scholars, in the same year, asserted that the international society has not yet come to an agreement as to whether the laws or customs of war apply to non-international as well as international armed conflicts.⁸⁵ Again, while Eve La Haye attempted to show that by January 1, 2007, the extension of the concept of war crimes to internal armed conflicts had already acquired a place under customary international law by enumerating a variety of evidences of practice and *opinion juris* of states and international organizations,⁸⁶ the most conservative Chinese scholars held in the same year that under customary international law as it stands now, the concept of war crimes still only applies to international armed conflicts.⁸⁷ These scholars argued that although *ad hoc* international tribunals have made certain breakthroughs in individual cases by applying the concept of war crimes to internal armed conflicts, such as the *Tadic* case, these cases lacked the necessary universality to break through customary international law.⁸⁸ Therefore, these scholars contended that conducts specified in common Article 3 and Additional Protocol II should remain under the jurisdiction of domestic courts.⁸⁹

Admittedly, therefore, there is still room for China and other dissenting states to contest the customary status of the extension of the concept of war crimes to internal armed conflicts. Dissenting states

82. *Id.*

83. Wenqi Zhu, *The Prospect of China's Joining in the International Criminal Court*, in *THE INTERNATIONAL CRIMINAL COURT: CHOICE OF CHINA* (in Chinese) 154, 159 (Mingxuan Gao et al. eds., 2005) [hereinafter Zhu, *Prospect of China's Joining*].

84. ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 47 (Oxford Press 2003).

85. See, e.g., Shigui Tan, *A Preliminary Study of the Relations between China and the ICC*, in *STUDY ON MAJOR ISSUES RELATING TO THE INTERNATIONAL CRIMINAL COURT* (in Chinese) 65 (Bingzhi Zhao ed., 2003).

86. January 1, 2007 is the end date of her data. See EVA LA HAYE, *WAR CRIMES IN INTERNAL ARMED CONFLICTS* 148-71 (Cambridge University Books 2008).

87. Mingxuan Gao & Junping Wang, *Issues of Concern to China regarding the International Criminal Court*, *PEOPLE'S PROCURATORIAL SEMIMONTHLY* (in Chinese), No. 7, 5, 9 (2007).

88. *Id.*

89. *Id.*

could argue that many specially affected states (though debatable),⁹⁰ such as China, India, and Russia, oppose such extension and thus remain non-party states to the ICC. And even if such extension has secured a customary status, dissenting states could still oppose it by resorting to the principle of the “persistent objector,”⁹¹ despite the fact that this principle itself has met various attacks.⁹² This is the very reason why China regrettably chose to cast a negative vote at the Rome Conference.⁹³

However, given the compelling rationale behind the extension of the concept of war crimes to internal armed conflicts and the broad recognition that this trend has already gained, the minority opposing states would at least be situated in an uneasy position pressurized to accept the new trend from their majority peer states that champion it. Hence, it appears farfetched and no longer plausible for China to rigidly insist on “respect for state sovereignty” and “non-interference with internal affairs” to exclude minimum humanitarian requirements and supervision by the international community over the most heinous crimes committed in internal armed conflicts. Indeed, the fact that by now—more than ten years after the adoption of the Rome Statute—more than half of the world’s states have ratified, and many of them have initiated domestic legislations to implement the Rome Statute evidences that the definitions of the international crimes under the Rome Statute have gained or are gaining broad recognition.⁹⁴ This in itself is a clarification and development of the relevant customary international law.⁹⁵

90. The concept of “specially affected states” was developed by the ICJ in *North Sea Continental Shelf Cases*. *N. Sea Cont’l Shelf* (F.R.G.-Neth.; F.R.G.-Den.), 1969 I.C.J. 42, 43 (Feb. 20). Jean-Marie Henckaerts argued that “[u]nlike the law of the sea, where a state either has or does not have a coast, with respect to humanitarian law any state can potentially become involved in armed conflict and become ‘specially affected.’” Jean-Marie Henckaerts, *Customary International Humanitarian Law: A Response to US Comments*, 89 INT’L REV. RED CROSS 473, 481(2007). While it is true that any state can potentially become involved in (internal) armed conflict, the degree of imminent potential differs among states. Arguably states confronting entrenched thorny domestic problems that are susceptible to mass violence are more affected than those confronting less thorny or mere potential ones.

91. The principle of the “persistent objector” was developed by the ICJ in the *Fisheries Case* (U.K. v Nor.), 1951 I.C.J. 131 (Dec. 18).

92. For an in-depth discussion of the existence and continued relevance of the principle of the “persistent objector” despite attacks on it, see Maurice H. Mendelson, *The Formation of Customary International Law*, in 272 RECUEIL DES COURS 227-244, 334 (1998).

93. See *supra* Part II.

94. Zhu, *Whether China Should Join (Upper)*, *supra* note 81, at 145.

95. *Id.*

IV. POSSIBLE IMPLICATIONS OF EXTENDING WAR CRIMES TO INTERNAL ARMED CONFLICTS

The above discussion reveals the obsession with proving or denying the customary status of extending the concept of war crimes to internal armed conflicts by the current literature. What is really at stake in this debate are the possible implications of upgrading war related offenses committed during internal armed conflicts to the category of war crimes under customary international law. Indeed, the full panoply of such implications can be quite daunting for any state.

To be specific, pushing the *lex ferenda* argument to its limit may, depending on a state's acceptance, implicate war crimes status on: (1) individual criminal responsibility under international law as opposed to national, which would increase the gravity and seriousness of the crime; (2) violations of *jus cogens*,⁹⁶ and (3) entitlement to claims of universal jurisdiction by third states, which may even trigger the mandatory duty of *aut judicare, aut dedere* that is already applicable to "grave breaches" of the four Geneva Conventions and Additional Protocol I.⁹⁷ The implications of *jus cogens* and/or universal jurisdiction would further include prohibition against immunities for governmental officials (at least substantive immunity if not procedural immunity as well), statutes of limitations, and national amnesty laws.⁹⁸ This list, if fully triggered, would indeed be very intrusive to the conventional understanding of sovereignty and non-interference with internal affairs. Arguably very few states would presently be willing and prepared to accept the whole package.

The reality, however, remains that most of the abovementioned implications are still under great debate, the least perhaps being the criminality of war related offenses during internal armed conflicts. Even the 2001 Princeton Project on Universal Jurisdiction, aimed to promote the very concept of universal jurisdiction and claimed to present

96. There is considerable support for the proposition that all states are entitled to exercise universal jurisdiction over violations of *jus cogens* norms, but this conclusion and nearly all of the other alleged implications of *jus cogens* have remained controversial. For detailed discussion, see CHRISTIAN J. TAMS, ENFORCING OBLIGATIONS ERGA OMNES IN INTERNATIONAL LAW 142-44 (Cambridge 2005). *Jus cogens* is defined as "[a] rule or principle in international law that is so fundamental that it binds all states and does not allow any exceptions." OXFORD DICTIONARY OF LAW 309 (Jonathan Law & Elizabeth A. Martin ed., Oxford University Press 2009) (1983).

97. Under extradition law, *aut judicare, aut dedere* is the "doctrine that offenders must be either punished by the state of refuge or surrendered to the state that can and will punish them." OXFORD DICTIONARY OF LAW, *supra* note 96, at 51.

98. See Tams, *supra* note 96, at 142-44.

elements of both *lex lata* and *lex ferenda*,⁹⁹ did not explicitly include internal armed conflicts under its scope of war crimes that would trigger universal jurisdiction. As aforementioned, Eve La Haye concluded after a comprehensive survey that, as of 2007, customary international law recognized war related offenses committed during internal armed conflicts as war crimes.¹⁰⁰ Based on a similar survey, however, she also concluded that war crimes committed in internal armed conflict do not yet entail the customary right of universal jurisdiction of all states, and that the mandatory regime of *aut judicare, aut dedere* does not apply to such internal crimes.¹⁰¹

Hence, it is still very much debatable whether giving war crimes status to war related offenses committed in internal armed conflicts amounts to automatically subjecting them to universal jurisdiction. In this sense, a state's ratification of the Rome Statute would not automatically or necessarily be tantamount to agreeing to any alleged universal jurisdiction over such crimes. At the same time, realistically speaking, states rarely invoke pure universal jurisdiction over nationals of other states (i.e. the crime, victim and defendant in question having no relation at all with the prosecuting state).¹⁰² This is due to concerns of reciprocity and mutual self-interest, lack of national interests, difficulties in apprehending the defendant and gathering evidence, and other practical or political concerns.¹⁰³ Belgium's amendment of its 1993 legislation on universal jurisdiction and, thus, retreat from the notion of pure universal jurisdiction (though at the dismay of human rights activists) serves as the prime example.¹⁰⁴ Nevertheless, the possibility of future normative development towards this direction cannot be precluded. Hence, should China (or any other non-party states) have any concerns over these issues when it decides to join the ICC, it may wish to clarify its position towards these issues in order to avoid any undesired inferences by the ICC or any other states.

99. See PRINCETON PROJECT ON UNIVERSAL JURISDICTION, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 37 (2001).

100. See HAYE, *supra* note 86, at 385.

101. See *id.*

102. See Stephen A Oxman, *The Quest for Clarity in UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW* 65 (Stephen Macedo ed., University of Pennsylvania Press 2006) ("That there have been fewer pure cases than one might expect is perhaps not surprising because nations and their courts seem predisposed, for understandable reasons, to avoid the less familiar, scary water of universal jurisdiction. . . .")

103. See Gabriel Bottini, *Universal Jurisdiction after the Creation of the International Criminal Court*, 36 N.Y.U. J. INT'L L. & POL. 503, 550-557 (2004).

104. See Sharon Sadeh, *Belgium amends war crime legislation*, CANADIAN JEWISH NEWS, Apr. 10, 2003, at 33 (Lexis 2010).

V. THE COMPULSORY COMPLEMENTARY JURISDICTION OF THE ICC OVER WAR CRIMES

Reading China's opposition to the extension of the concept of war crimes to internal armed conflicts closely, it seems that China's bottom line is not as rigid as denying the criminality of war related offenses in internal armed conflicts. Rather, the core of China's claim is the insistence that the jurisdiction over such crimes should remain in the hand of domestic courts.¹⁰⁵ Indeed, when the UN Security Council established the ICTR, even though China abstained, China did not explicitly oppose the criminalization of common Article 3 and Additional Protocol II as stipulated in Article 4 of the ICTR Statute.¹⁰⁶ China did, however, stress that "[t]he establishment of an international tribunal for the prosecution of those who are responsible for crimes that gravely violate international humanitarian law is a special measure taken by the international community to handle certain special problems," and that "[i]t is only a supplement to domestic criminal jurisdiction and the current exercise of universal jurisdiction over certain international crimes."¹⁰⁷ Thus, China appears more concerned about the compulsory, albeit complementary, jurisdiction of the ICC upon ratification over war crimes in internal armed conflicts without its further consent, and perhaps possible assertions of universal jurisdiction by third states over such crimes, than the criminality of war related offenses in internal armed conflicts itself. While granting the ICC with compulsory complementary jurisdiction over war crimes in internal armed conflicts is with sound reasons, immediate alternatives for China's opposition do not seem to exist as of yet.¹⁰⁸ Time is still needed for China to accept such "intrusive" jurisdiction.

Admittedly, as China claimed, states with robust legal systems are capable of prosecuting war crimes in internal armed conflicts.¹⁰⁹ Domestic courts have apparent advantages over the ICC in prosecuting these crimes since:

- (a) all those involved would be working within the context of an established legal system, including existing bilateral and multilateral arrangements;
- (b) the applicable law would be more certain and more developed;
- (c) the prosecution would be less complicated, because it

105. See generally *Guangya Wang*, *supra* note 8.

106. China's main reason for abstention was that the Rwanda government still found the draft resolution and statute difficult to accept. For details, see U.N. SCOR, 49th Sess., 3453d mtg. at 11, U.N. Doc. S/PV.3453 (Nov. 8, 1994).

107. *Id.*

108. See Bing Bing Jia, *China and the ICC: The Current Situation*, 10 SYBIL 1, 9-10 (2006), available at http://law.nus.edu.sg/sybil/downloads/current/Jia_SYBIL_2006.pdf.

109. See *Guangya Wang*, *supra* note 8.

would be based on familiar precedents and rules; (d) both prosecution and defense were likely to be less expensive; (e) evidence and witnesses would normally be more readily available; (f) language problems would be minimized; (g) local courts would apply established means for obtaining evidence and testimony, including application of rules relating to perjury; and (h) penalties would be clearly defined and readily enforceable . . . also . . . States had a vital interest in remaining responsible and accountable for prosecuting violations of their laws—which also served the interest of the international community, inasmuch as national systems would be expected to maintain and enforce adherence to international standards of behavior within their own jurisdiction.¹¹⁰

Furthermore, as Theodor Meron observed:

Proceedings conducted close to home may be better followed than those in a distant forum and would serve to educate people more fully about atrocities that took place in their country. Moreover, condemnation of atrocities by the country's own legal system might more powerfully inspire the local populace to condemn the atrocities themselves.¹¹¹

Realistically speaking, however, depriving the ICC's compulsory complementary jurisdiction upon ratification over war crimes in internal armed conflicts would go against much of the very reasoning of creating it in the first place. Nowadays, most armed conflicts are internal. National courts, however, will only rarely try their own nationals where war crimes are concerned, and even more rarely where crimes against humanity or genocide are concerned.¹¹² More importantly, "[h]istorically agents of the state themselves often were complicit in or even directing the crimes later referred to international tribunals. . . . Conditioning the ICC's jurisdiction on the acceptance of the leadership of such states would have frustrated the court's ability to end impunity."¹¹³ The inclusion of war crimes in internal armed conflicts in the ICC's compulsory jurisdiction would contribute to the strengthening of the ICC and the punishment of international crimes.

110. Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, UN Doc. A/50/22(SUPP) (1995) ¶ 31.

111. Meron, *War Crimes*, *supra* note 54, at 564.

112. Philippe Sands, *After Pinochet: the Role of National Courts*, in FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE 72 (Philippe Sands ed. 2003); *see also* Meron, *War Crimes*, *supra* note 54, at 554, citing Adam Roberts, *Land Warfare: From Hague to Nuremberg*, in THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD 116, 126 (Michael Howard et al. eds., 1994).

113. Philippe Kirsch, *Introductory Remarks*, in THE INTERNATIONAL CRIMINAL COURT AND NATIONAL JURISDICTIONS 2 (Mauro Politi & Federica Gioia eds., 2007).

For concerns about possible politicized prosecutions, the complementarity principle under the Rome Statute would give the desired priority to national prosecutions. That said, however, it is unlikely that states with less developed criminal judicial systems would feel easy and be willing to have the ICC monitoring over their domestic affairs. Even with regard to states parties, their nervousness about the scope of war crimes prosecutions is evidenced in the extremely precise and complex provisions of Article 8, which were cloaked in rhetoric about the need for precision in legal texts and the sanctity of the principle of legality.¹¹⁴

During the Rome Conference, the Chinese government and many other non-party states saw the ICC's complementary nature as a proactive one. The Chinese government viewed the ICC as having been granted the power to make the final judgment as to whether a state (including a non-party state) is willing or able to prosecute its own nationals, thereby turning the ICC into a supranational judicial body overriding states.¹¹⁵ Whereas in fact, consistent with China's own emphasis,¹¹⁶ the purpose of the complementarity principle is to promote all countries to improve their domestic judicial systems and guarantee that they exercise jurisdiction over perpetrators of grave crimes accordingly.¹¹⁷ Indeed, the Preamble (paragraph 6) of the Rome Statute recalls "the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."¹¹⁸ The ICC is, to a large extent, an international jurisdictional safety net, thus more of a utilitarian institution than a utopian one.¹¹⁹ The complementary principle is exactly designed to reassure the primacy of state criminal jurisdiction.

Nevertheless, the deficiencies of its present judicial system and the strong ideology of absolute state sovereignty have resulted in China's diffidence and fear that it would be easily deemed falling short of the "willingness" and "ability" standards of the Rome Statute. This fear would be best overcome through both China's endeavor to further improve its national judicial system, especially substantive and

114. See SCHABAS, *supra* note 79, at 117.

115. See Jie Xu, *The Rome Statute and the Rule of Pacta Tertiis Nec Nocent Nec Prosunt*, LAW REVIEW (in Chinese), No. 2, 94, 96-7 (1999) (summarizing the explanatory statement by the Chinese delegation at the vote on the Rome Statute, and the statement by the Chinese delegation on "The Establishment of ICC" at the 53rd UN General Assembly).

116. Ministry of Foreign Affairs of the People's Republic of China, China and the International Criminal Court, Oct. 28, 2003, available at www.fmprc.gov.cn/eng/wjbj/zjg/tyfls/tyfl/2626/2627/t15473.htm.

117. See *id.*

118. See Rome Statute, *supra* note 1.

119. M. Cherif Bassiouni, Editorial Comment, *Where is the ICC Heading? The ICC—Quo Vadis?*, 4 J. INT'L CRIM. JUST. 421, 422 (2006).

procedural criminal law,¹²⁰ and ICC's endeavor to prove its objectiveness and impartiality in reviewing states' judicial systems in the coming years. In fact, Wenqi Zhu expressed that China should have confidence in its judicial system, for there have been great improvements of the country in all aspects, especially in economic and legal constructions ever since the reform and opening-up policy in the late 1980s.¹²¹ Therefore, China should shift its thinking to view the ICC's complementary nature as a passive one. Just like what states parties are doing, the most important thing for China is to proactively improve its national judicial system to make full use of the complementarity principle because non-party states may still come under the purview of the ICC.¹²² This would also further promote the overall integration of China within the international legal system, as already shown by China's integration into the WTO system.

VI. WAR CRIMES PROVISIONS UNDER THE ROME STATUTE EXCEEDING CUSTOMARY INTERNATIONAL LAW

Apart from the fact that the extension of the concept of war crimes to internal armed conflicts under the Rome Statute is itself arguably already an expansion of the existing customary international law (consistent with China's first objection vis-à-vis war crimes under the Rome Statute), some of the specific provisions applicable to war crimes in internal armed conflicts under the Rome Statute went even beyond Additional Protocol II (consistent with China's second objection vis-à-vis war crimes under the Rome Statute), while the customary status of Additional Protocol II as a whole is still not free from contest.¹²³ Because China is a party to the four Geneva Conventions and both Additional Protocol I and II, if the war crimes provisions under the Rome Statute strictly followed these conventions and the two protocols, presumably China would have much less opposition. The specific excess of customary international law by war crimes provisions under the Rome Statute comprises of two aspects. First, the threshold under the Rome Statute for situations amounting to internal armed conflicts was even lower than that of Additional Protocol II.¹²⁴ Second, some new crimes or new contents were added to the list of war crimes (even for international

120. Presently, the Chinese Criminal Code has no provision on any of the international crimes under the Rome Statute.

121. Wenqi Zhu, *Whether China Should Join the International Criminal Court (Lower)*, HUBEI SOCIAL SCIENCES (in Chinese), No. 10, 133, 137 (2007) [hereinafter Zhu, *Whether China Should Join (Lower)*].

122. See *infra* Part VIII.A.

123. See *supra* Part III.

124. See *infra* Part VI.A.

armed conflicts) under the Rome Statute.¹²⁵ However, these expansions do not pose real difficulty for China if it wishes to ratify the Rome Statute.

A. *The Lowered Threshold for Situations Amounting to Internal Armed Conflicts*

To date, none of the conventional international humanitarian law applicable to armed conflicts has attempted to directly define the term “armed conflict.” Instead, they chose to negatively define it by enumerating situations failing to reach such status. The Rome Statute in its Article 8(2)(c)&(e) precludes “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature” from its scope of internal armed conflicts.¹²⁶ This approach is a word for word direct transplant of Article 1(2) of Additional Protocol II.¹²⁷ Indeed, the Rome Statute failed to contribute to easing the identification of an armed conflict not of an international character.¹²⁸

Nevertheless, the Rome Statute through its Article 8(2)(f) dramatically lowered the threshold for internal armed conflicts from that of Additional Protocol II.¹²⁹ To be specific, according to Article 8(2)(f) of the Rome Statute, Article 8(2)(e), the paragraph that enumerates “other serious violations of the laws and customs applicable in armed conflicts not of an international character,” applies to “armed conflicts that take place in the territory of a State when there is *protracted* armed conflict between governmental *authorities* and organized armed groups *or between such groups*”¹³⁰. Whereas the threshold under Additional Protocol II according to its Article 1(1) is:

This Protocol . . . shall apply to all armed conflicts [which are not of an international character] and which take place in the territory of a High Contracting Party between its *armed forces* and *dissident* armed forces or other organized armed groups which, *under responsible command, exercise such control over a part of its territory as to*

125. See *infra* Part VI.B.

126. Rome Statute, *supra* note 1, art. 8(2)(c)&(e).

127. Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, art. 1(2), available at <http://www.icrc.ch/ihl.nsf/7c4d08d9b287a42141256739003e636b/d67c3971bcff1c10c125641e0052b545> [hereinafter Additional Protocol II].

128. Sandesh Sivakumaran, *Chapter 20: Identifying an Armed Conflict Not of an International Character*, in THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 363, 380 (Carsten Stahn & Goran Sluiter eds., 2009).

129. Rome Statute, *supra* note 1, art. 8(2)(f).

130. *Id.* art. 8(2)(e) (emphasis added).

*enable them to carry out sustained and concerted military operations and to implement this Protocol.*¹³¹

Given the differences in the choice and specificity of wording emphasized in the preceding quote, Article 8(2)(f) clearly represents a dramatic lowering of the threshold from that of Additional Protocol II, and broadens the jurisdiction of the ICC significantly.¹³²

Moreover, the Rome Statute confused matters somewhat with its use of different words in the different provisions of Article 8(2).¹³³ Given that Article 8(2)(f) refers to Article 8(2)(e), but not Article 8(2)(c) that enumerates serious violations of common Article 3, the Rome Statute on its face arguably distinguishes the thresholds for “serious violations of common Article 3” and “other serious violations of the laws and customs applicable in armed conflicts not of an international character.”¹³⁴ Indeed, such distinction was preferred by Egypt, Sudan, and Bahrain at the Rome Conference.¹³⁵ These states proposed a higher threshold for the latter along the line of that laid down in Additional Protocol II.¹³⁶ While some states responded that following Additional Protocol II would set too high a threshold excluding conflicts between armed groups and conflicts in which the armed group did not exercise territorial control,¹³⁷ others, including China, had welcomed this proposal.¹³⁸ Still, others were opposed to the inclusion of any provision

131. Additional Protocol II, *supra* note 127, art. 1(1) (emphasis added).

132. *See also* MOIR, *supra* note 36, at 167.

133. Sivakumaran, *supra* note 128.

134. *See* Rome Statute, *supra* note 1, art. 8(2)(f).

135. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, June 15–July 17, 1998, ¶ 115, UN Doc. A/CONF.183/C.1/SR.26 (Nov. 20, 1998) (Egypt); United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, June 15–July 17, 1998, ¶ 64, UN Doc. A/CONF.183/C.1/SR.28 (Nov. 20, 1998) (Sudan); United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, June 15–July 17, 1998, ¶ 21, UN Doc. A/CONF.183/C.1/SR.27 (Nov. 20, 1998) (Bahrain).

136. *See id.*

137. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, June 15–July 17, 1998, ¶ 14, UN Doc. A/CONF.183/C.1/SR.33 (Nov. 20, 1998) (Austria on behalf of the member States of the European Union); United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, June 15–July 17, 1998, ¶ 60, UN Doc. A/CONF.183/C.1/SR.34, (Nov. 20, 1998) (South Africa on behalf of the member States of the Southern African Development Community); United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, June 15–July 17, 1998, ¶ 107, UN Doc. A/CONF.183/C.1/SR.34 (Nov. 20, 1998) (Australia).

138. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, June 15–July 17, 1998, ¶ 40, UN Doc. A/CONF.183/C.1/SR.33 (Nov. 20, 1998) (China); United Nations Diplomatic

on war crimes in non-international armed conflicts.¹³⁹ Thus the final version of Article 8(2)(f) could be seen as a compromise between states that preferred no distinction at all and states that preferred the higher Additional Protocol II threshold for serious violations other than that of common Article 3.¹⁴⁰ Nevertheless, one trial chamber of the ICTY¹⁴¹ and some commentators have concluded that Article 8(2)(f) has not created a new threshold.¹⁴² They argued that

[f]rom a *lex ferenda* perspective, to create a new threshold between armed conflicts and protracted armed conflicts is inadvisable for it is to discriminate within armed conflicts not of an international character in addition to the more traditional discrimination that exists between non-international armed conflicts and their international counterparts. And this is at a time in which it is starting to be recognized that, that which is prohibited in international armed conflicts should also be prohibited in non-international armed conflicts. It is also to introduce a criterion which may be particularly hard to evidence the line between protracted and not protracted being difficult to draw.¹⁴³

Resolution of this issue still awaits the ICC's future interpretation when it actually encounters this problem in a given case. What is telling here is that states try every effort to exclude the application of international humanitarian law by insisting on setting and upholding different thresholds for different levels of internal violence, ranging from mere "internal disturbances and tensions," to internal armed conflicts first passing the lowest common Article 3 threshold, then passing the intermediate Rome Statute threshold, and finally passing the highest Additional Protocol II threshold. In reality, however, it is often very difficult to clearly distinguish between these different levels of violence. Not to mention that violence is a chameleon that often fluidly glides

Conference of Plenipotentiaries on the Establishment of an International Criminal Court, June 15–July 17, 1998, ¶ 73, UN Doc. A/CONF.183/C.1/SR.35 (Nov. 20, 1998) (Portugal).

139. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, June 15–July 17, 1998, ¶ 6, UN Doc. A/CONF.183/C.1/SR.36 (Nov. 20, 1998) (Libyan Arab Jamahiriya).

140. See Rome Statute, *supra* note 1, art. 8(2)(f).

141. Prosecutor v Limaj, Bala and Musliu, Case No. IT-03-66-T, Judgment, ¶ 87 (Nov. 30, 2005).

142. See THEODOR MERON, *WAR CRIMES LAW COMES OF AGE* 309 (1998); see also Claus Kress, *War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice*, 30 ISRAEL YEARBOOK ON HUMAN RIGHTS 118-9 (2000); see also Peter Rowe, *War Crimes*, in *THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES* 203, 210 (D. McGoldrick et al. eds., 2004).

143. Sivakumaran, *supra* note 128, at 375.

either upwards into a higher level of intensity or downwards into a lower form of force, leaving us with extreme difficulties in determining exactly when such transformation took place. As a result, states are left with great leeway in interpreting international humanitarian law applicable to internal armed conflicts.¹⁴⁴ As Theodor Meron noted, one of the inherent weaknesses of international humanitarian law is “[t]he possibility to argue, as governments frequently do, that a particular humanitarian law instrument is inapplicable to a given conflict situation. As Professor Richard Baxter puts it, ‘the first line of defense against international humanitarian law is to deny that it applies at all.’”¹⁴⁵

With regard to China’s real concerns vis-à-vis war crimes in internal armed conflicts under the Rome Statute (i.e., the Taiwan issue, and to a lesser degree, possible recurrences of separatist/terrorist violence in Tibet and Xinjiang provinces), this article proposes that the fact that the threshold for internal armed conflicts under the Rome Statute is lower than that of Additional Protocol II would not make much difference vis-à-vis China’s situation. To be specific, even if the Rome Statute strictly followed the Additional Protocol II threshold, the hypothetical use of force between mainland China and Taiwan would most likely either remain within situations of “internal disturbances and tensions,” or qualify as an internal armed conflict even under this higher threshold. This is because, first of all, the Chinese government would prefer to resolve the Taiwan issue by peaceful means to the farthest extent possible.¹⁴⁶ To the extent that peaceful means is no longer an option in the Chinese government’s view, so that it has to resort to the use of force, then presumably China would want to achieve its reunion goal within the shortest span of violence. If the Chinese government is successful, the short lived violence could be interpreted as falling short of an “armed conflict.” But in the scenario that the Chinese government failed to succeed within a short span of violence, then arguably the protracted violence between mainland China and Taiwan would satisfy as an internal armed conflict even under the Additional Protocol II threshold, or even be treated as an international armed conflict.¹⁴⁷ Potential recurrences of separatist/terrorist violence in Tibet and Xinjiang provinces, on the other hand, would most likely fall short of “armed

144. See also, MOHAMED ABDELSALAM BABIKER, APPLICATION OF INTERNATIONAL HUMANITARIAN AND HUMAN RIGHTS LAW TO THE ARMED CONFLICTS OF THE SUDAN: COMPLEMENTARY OR MUTUALLY EXCLUSIVE REGIMES? 67-9 (2007).

145. Theodor Meron, *Convergence of International Humanitarian Law and Human Rights Law*, in HUMAN RIGHTS AND HUMANITARIAN LAW 97, 102 (Daniel Warner ed., 1997).

146. See *infra* Part VII.A.

147. See *infra* Part VII.C.

conflicts” and safely come under “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.” In other words, such low intensity violence would fall outside of the ICC’s reach for war crimes purposes. Nevertheless, low intensity violence events trigger China’s concerns for the ICC’s jurisdiction over crimes against humanity in peacetime.¹⁴⁸

B. *New Crimes and New Contents*

In addition to provisions reflecting the terms of the Hague Regulations and Additional Protocol I, new crimes and new contents added to the list of war crimes under the Rome Statute in the context of international armed conflicts include attacks against humanitarian or peacekeeping missions,¹⁴⁹ sexual offenses,¹⁵⁰ the conscription or enlistment of child soldiers,¹⁵¹ attacks causing severe environmental damages,¹⁵² population transfers by the occupying power,¹⁵³ and the use of human shields.¹⁵⁴ Among them, the first three are also included in the context of internal armed conflicts.¹⁵⁵

None of these new crimes or new contents, either in the context of international or internal armed conflicts, seems to pose any real difficulty for China. The only minor problem for China may lie in the phrase “conscripting or enlisting children . . . into the national armed forces *or* using them to participate actively in hostilities.”¹⁵⁶ Some Chinese scholars considered that the second “or” in this phrase should be substituted by “and,” otherwise this provision would be too strict.¹⁵⁷ This is because many state armies have their own colleges for physical or artistic trainings.¹⁵⁸ Some of these trainings need to begin at an early age. If conscripting or enlisting children into the national armies for the purposes of receiving these trainings would in itself amount to a war crime, rather than using them to participate in hostilities as well, such

148. See *infra* Part VIII.C.

149. Rome Statute, *supra* note 1, art. 8(2)(b)(iii).

150. *Id.* art. 8(2)(b)(xxii).

151. *Id.* art. 8(2)(b)(xxvi).

152. *Id.* art. 8(2)(b)(iv).

153. *Id.* art. 8(2)(b)(viii).

154. Rome Statute, *supra* note 1, art. 8(2)(b)(xxiii).

155. For more detailed discussions on these new crimes and new content, see SCHABAS, *supra* note 79, at 124-130.

156. Rome Statute, *supra* note 1, art. 8(2)(b)(xxvi) (emphasis added).

157. See Lijun Yang, *An Initial Analysis of the Rome Statute Establishing the International Criminal Court*, GLOBAL L. R. (in Chinese), 218, 225 (Summer 2003); see also, Lijun Yang, *Some Critical Remarks on the Rome Statute of the International Criminal Court*, 2 CHINESE J. INT'L L. 599, 612.

158. See *supra* note 157.

provision would seem too draconian.¹⁵⁹ In practice, China has conscripted or enlisted many children under the age of fifteen into its armies to participate in artistic and physical activities, and has achieved very good results and effects.¹⁶⁰ These scholars hence viewed that it is obvious that such practice should not be negated and suggested that China must draft its own war crimes provisions in order to avoid such adverse result.¹⁶¹ This article submits that even if China does not itself draft any related provisions, this issue can still be resolved through reasonable interpretation of the provision in question, including its purposes, under the Rome Statute in accordance with treaty interpretation provisions under the Vienna Convention on the Law of Treaties Articles 31 and 32.¹⁶²

VII. THE TAIWAN ISSUE—THE CORE OF CHINA’S REAL CONCERNS

The Taiwan issue is at the core of China’s real concerns behind its official reasons against the extension of the concept of war crimes to internal armed conflicts both under the Rome Statute and under existing customary international law. Such extension could result in the ICC’s interference with China’s internal affairs, making the Taiwan issue potentially the most fatal conflict between China and the ICC. To a lesser degree for concerns of war crimes, possible recurrences of separatist/terrorist violence in the Tibet and Xinjiang provinces are also within China’s real concerns. As discussed *supra*, such violence would most likely come under situations of “internal disturbances and tensions” which are explicitly excluded from the ICC’s reach for war crimes purposes.¹⁶³ However, they trigger China’s concerns for the ICC’s jurisdiction over crimes against humanity in peacetime.¹⁶⁴ As the issue of war crimes is the focus of this article, detailed discussion is limited to China’s real concerns over the Taiwan issue. My general conclusion is that the Chinese government is being overly cautious on the Taiwan issue vis-à-vis possible reaches by the ICC for war crimes purposes.

First, the outbreak of a cross-strait armed conflict between mainland China and Taiwan is highly unlikely.¹⁶⁵ Second, even if a cross-strait armed conflict unfortunately becomes a reality, there are many

159. *Id.*

160. Youxue Lu, *The Study on Domestic Legislation of War Crimes*, MODERN L. SCI. (in Chinese), 2007, Vol. 29, No. 2, 186, 191 (2007).

161. *Id.*

162. *See* Vienna Convention on the Law of Treaties, 1115 U.N.T.S. 331 at arts. 31-32.

163. *See supra* Part VI.A.

164. *See infra* Part VIII.C.

165. *See infra* Part VII.A.

safeguards in the Rome Statute against possible politicized prosecutions.¹⁶⁶ Third, China's oppositions against the extension of the concept of war crimes to internal armed conflicts under the Rome Statute would become much less meaningful if the nature of a cross-strait armed conflict becomes, or would nevertheless be treated as an international one when it actually occurs.¹⁶⁷ Fourth, disregarding the nature of a hypothetical cross-strait armed conflict, whether international or internal, current international political reality indicates that it would most likely be politically infeasible for the ICC to go after relatively powerful states parties and, arguably, non-party states unless referred by the UN Security Council in highly controversial situations involving politically sensitive issues at least for the foreseeable future.¹⁶⁸

A. The Outbreak of a Hypothetical Cross-Strait Armed Conflict Highly Unlikely

My first presumption is that the outbreak of a cross-strait armed conflict between mainland China and Taiwan is highly unlikely, though it cannot be categorically precluded. China is committed to realizing national reunification by peaceful means to the farthest extent possible,¹⁶⁹ though it does not renounce the possibility of using force as a last resort.¹⁷⁰ Resorting to a full scale "armed conflict" to solve the Taiwan issue would incur enormous and arguably too high a cost for China as a whole. It would possibly destroy much of mainland China's development since the 1978 reform and opening-up policy, and also Taiwan's development since 1949 when the defeated Kuomintang Party fled there. Thus, going to war would not be in the best interest of the entire Chinese population on both sides of the Taiwan Strait.

Admittedly, the road for China to solve the Taiwan issue in a peaceful manner has been, and continues to be, a bumpy one. Sixty years has passed since the creation of this issue as a legacy of the 1945-1949 Chinese civil war (second phase).¹⁷¹ During this period, cross-strait relations periodically alternated between tensions and relaxations, but had been especially exacerbated during the eight-year rule of the Democratic Progressive Party (2000-2008) in Taiwan that fanatically

166. See *infra* Part VII.B.

167. See *infra* Part VII.C.

168. See *infra* Part VII.D.

169. Anti-Secession Law, art. 5 (Nat'l People's Cong., Mar. 14, 2005, effective Mar. 14, 2005), available at <http://www.china.org.cn/english/20051h/122724.htm>.

170. *Id.* art. 8.

171. For more information on the Chinese civil war, see <http://www.globalsecurity.org/military/ops/chinese-civil-war.htm> (last visited Apr. 24, 2010).

propagandized for the independence of Taiwan.¹⁷² Gratifyingly, the Kuomintang Party reassumed power in Taiwan in March 2008 and claimed to return to the “1992 Consensus” (one China principle allowing different oral interpretations).¹⁷³ In addition, both the “referendum” for Taiwan’s “accession” to the UN and the “referendum” for Taiwan’s “return” to the UN had been unsuccessful.¹⁷⁴ In December 2008, current Taiwanese President Ma Ying-jeou promoted the final realization of the cross-strait “Three Direct Links” (mail, air and shipping services and trade).¹⁷⁵ At the turn of the New Year of 2009, mainland Chinese President Hu Jintao appealed for the formal end of cross-strait hostility and proposed six recommendations to Taiwan, including the establishment of a military mutual trust mechanism.¹⁷⁶ The Taiwanese official spokesman responded positively the next day, although at the same time appealed for mainland Chinese government’s concern and respect for Taiwanese population’s different views.¹⁷⁷ These two most recent events signaled a significant improvement of cross-strait relations and hopefully would lead to continuous prospect for a better future. Both mainland China and Taiwan should seize and maximize the current optimal opportunity to speed up the peaceful reunion agenda.

Nevertheless, so long as Taiwan is not reunited with mainland China, the possibility of using force as a last resort for reunion purposes cannot be categorically excluded. Thus the possibility of civilian casualties (on both sides) cannot be precluded. If such regrettable things came to pass, however, this article submits that there are many safeguards in the Rome Statute, both overall and war crimes specific, against possible politicized prosecutions that are of concerns to the Chinese government.

172. For more information on the Democratic Progressive Party, see <http://www.globalsecurity.org/military/world/taiwan/dpp.htm> (last visited Apr. 24, 2010).

173. For more information on the “1992 Consensus,” see http://www.china-daily.com.cn/english/doc/2004-10/13/content_382076.htm (last visited Apr. 24, 2010).

174. In fact, the low number of voters (both less than 36%) participating in both referenda meant that neither was able to even reach the minimum threshold of participation by 50% of all eligible voters to become effective. See Chen Shui-bian, *Government’s “referendum for Taiwan’s accession to the UN” Denied by the Taiwanese Population*, TAIWAN PEOPLE’S DAILY, Mar. 22, 2008, available at <http://tw.people.com.cn/GB/14812/14875/7032361.htm> (in Chinese).

175. Mark McDonald, *Taiwan and China Restore Air Links*, N.Y. TIMES, Dec. 15, 2008, available at http://www.nytimes.com/2008/12/16/world/asia/16taiwan.html?_r=1&scp=1&sq=China%20%20Taiwan&st=cse.

176. *Hu Jintao Appeals for the End of Cross-Straits Hostility*, XINHUA DAILY TELEGRAPH, Jan. 1, 2009, available at http://news.xinhuanet.com/mrdx/2009-01/01/content_10587961.htm.

177. *Taiwan Positively Responds to Mainland China’s Appeal to End Cross-Straits Hostility*, WALL ST. J. DIGITAL NETWORK, Jan. 1, 2009, available at <http://chinese.wsj.com/gb/20090102/BCH009779.asp?source=channel>.

B. *Safeguards under the Rome Statute*

Even if a hypothetical cross-strait armed conflict unfortunately breaks out, this article submits that there are many safeguards under the Rome Statute against possible politicized prosecutions that are of concerns to the China government. To begin with, the complementarity principle¹⁷⁸ and the high gravity threshold of crimes are two overall safeguards under the Rome Statute. Both the Preamble in paragraph 10¹⁷⁹ and Article 1¹⁸⁰ of the Rome Statute emphasize the ICC's complementary nature to national criminal jurisdictions; and both the Preamble in paragraph 9¹⁸¹ and Article 5(1)¹⁸² stress that the ICC's jurisdiction is limited to "the most serious crimes of concern to the international community as a whole."¹⁸³ Article 17(1)(d) explicitly states that the ICC shall determine a case inadmissible if it is not of sufficient gravity to justify further action by the ICC.¹⁸⁴ Thus, only very few serious war crimes incidences, if any at all, would come under the purview of the ICC should China be unwilling or unable to prosecute its own nationals.

Apart from overall safeguards, there are also many war crimes specific safeguards within the Rome Statute. First, Article 8(1) of the Rome Statute stresses that the ICC shall have jurisdiction in respect of war crimes "*in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.*"¹⁸⁵ As correctly cited by the ICTY Appeals Chamber in the *Tadic* case,¹⁸⁶ Chinese military instructions ever since Mao Tse-Tung's time have included the "Three Main Rules of Discipline and the Eight Points for Attention," among which humanitarian rules of not to "ill-treat captives," "pillage civilians' properties," "damage crops," or "take liberties with women" all reflect China's eminent tradition of caring for civilians.¹⁸⁷ Thus, if these official military instructions were fully followed in actual military actions, it would be difficult to legally characterize mainland China's military actions for reunion purposes as war crimes committed against

178. See *supra* Part V.

179. Rome Statute, *supra* note 1, pmb. ¶ 10.

180. *Id.* art. 1.

181. *Id.* pmb. ¶ 9.

182. *Id.* art. 5(1).

183. *Id.*

184. Rome Statute, *supra* note 1, art. 17(1)(d).

185. *Id.* art. 8(1) (emphasis added).

186. *Tadic* Defence Motion, *supra* note 53, at ¶ 102.

187. Chinese People's Liberation Army Discipline Regulation, art. 2 (promulgated by the Central Military Commission, Jan. 27, 1984), reprinted in David C. Rodearmel, *Military Law in Communist China: Development, Structure and Function*, 119 *MIL. L. REV.* 1, 16-18 (1988).

Taiwanese civilians “as part of a plan or policy,” even if civilian casualties were inevitably involved. Admittedly, whether such military instructions would be fully complied with remains the question. The key point is that as long as China demonstrates its willingness and ability to prosecute its own nationals when such military instructions are violated, the reach of the ICC would be barred. Article 8(1), nevertheless, adds the phrase “in particular” before the phrase “as part of a plan or policy.”¹⁸⁸ This means that the latter qualification is not exclusive for the ICC’s jurisdiction. But arguably other safeguards within the Rome Statute would be able to limit any unreasonable expansion.

Second, Article 8(2)(d) and (f) explicitly exclude “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature” from the ICC’s jurisdiction.¹⁸⁹ As mentioned *supra*, this exclusion should assure the Chinese government that separatist/terrorist violence in Tibet and Xinjiang provinces, and also similar cross-strait violence would fall short of “armed conflicts” under the Rome Statute, though they may trigger concerns of the ICC’s jurisdiction over crimes against humanity during peacetime for the Chinese government.¹⁹⁰ Furthermore, overriding Article 8(2)(c) and (e),¹⁹¹ which define and enumerate war crimes in internal armed conflicts, Article 8(3)¹⁹² states that “[n]othing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.”¹⁹³ In addition, the Preamble in paragraph 7 reaffirms “the Purposes and Principles of the Charter of the [UN], and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the [UN],”¹⁹⁴ and in paragraph 8 emphasizes “nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State.”¹⁹⁵

Third, Article 124 of the Rome Statute allows states parties to opt out of the ICC’s jurisdiction over war crimes for seven years when they ratify the Rome Statute.¹⁹⁶ France and Colombia, for instance, made

188. Rome Statute, *supra* note 1, art. 8(1).

189. *Id.* art. 8(2)(d), (f).

190. *See infra* Part VIII.C.

191. Rome Statute, *supra* note 1, art. 8(2)(c), (e).

192. *Id.* art. 8(3).

193. *Id.*

194. *Id.* at pmb. ¶ 7.

195. *Id.* at pmb. ¶ 8.

196. Rome Statute, *supra* note 1, art. 124.

such declarations when they ratified the Rome Statute.¹⁹⁷ This interim opt-out mechanism was originally proposed by the United States as it believed that such transition period is important for its government to evaluate the performance of the ICC and to attract a broad range of governments to join the Rome Statute in its early years.¹⁹⁸ Thus, China could also resort to this device as a buffer against its concerns. China could also decide to withdraw from the Rome Statute after the expiration of the seven-year period (if renewal is not possible), though this withdrawal option would arguably damage China's international reputation to such an extent that it may be wise not to resort to such an option unless absolutely necessary for national interests concerns.

Paradoxically, this seven-year mechanism is only available to states parties but not non-party states, putting the latter in an unequal position towards the former.¹⁹⁹ This is an internal flaw of the Rome Statute whereby amendments should be considered as to put all states on the same footing. One might envision the possibility of a UN Security Council's decision to override a state party's opt-out capability. But, the prerequisite is that the UN Security Council is willing to override such an opt-out capability. Also, a P-5's opt-out would remain untouched because of the veto power.²⁰⁰ It should be noted that Article 124 provides that itself shall be reviewed at the first Review Conference for the Rome Statute.²⁰¹ Therefore, we would have to wait and see how the ASP approaches this issue at the forthcoming 2010 Review Conference, whether abandoning it all together, amending it to put all states on the same footing, and/or allow for extension or renewal.

It should also be cautioned that there are many ambiguities in the Rome Statute, whether intentional or unintentional as the result of the rushed negotiations during the Rome Conference. On the one hand, these ambiguities inevitably create room for different interpretations, and open the possibility for politicized misinterpretations. For instance, how does one demarcate the line between "international armed conflicts" and "internal armed conflicts," and between "armed conflicts" and "internal

197. Examples of such declarations can be viewed at Statute of the ICC—Colombia Reservation Text, <http://www.icrc.org/ihl.nsf/a/6d97c3e21ccf24e2412566bb002f5c1a?opendocument> (last visited Apr. 26, 2010); Statute of the ICC—France Reservation Text, <http://www.icrc.org/IHL.NSF/NORM/909EEAAE157FBD43412566E100542BDE?OpenDocument> (last visited Apr. 26, 2010).

198. Is A UN International Criminal Court in the US National Interest?: Hearing before the Subcommittee on International Operations of the Committee on Foreign Relations, 105th Cong. 13-14 (1998) (statement of Hon. David J. Scheffer), available at <http://www.iccnw.org/documents/1stSesPrepComSenatecfr.pdf>.

199. See Rome Statute, *supra* note 1, art. 124.

200. See U.N. Charter, art. 27(3).

201. See Rome Statute, *supra* note 1, art. 124.

disturbances and tensions” for marginal cases?²⁰² What are the boundaries of “internal affairs” and “legitimate means?”²⁰³ Indeed, unlike conventional law violations, the customary law violations set out in Article 8 of the Rome Statute “are open to interpretation, particularly with respect to prohibited weapons and weapons of mass destruction. Between the objective uncertainty of customary law and the desires of certain [states] for built-in ambiguities, Article 8 is an unwieldy and, in part, an unclear provision.”²⁰⁴ There is also the problem of the “potentially intrusive powers of international institutions,”²⁰⁵ i.e., the ICC would arguably be inclined to interpret ambiguous provisions in favor of establishing its jurisdiction. Therefore, in cases of doubt, ambiguous provisions should be interpreted in favor of state sovereignty because of the ICC’s encroachment of states’ judicial sovereignty in the first place and its complementary nature to national criminal jurisdictions.²⁰⁶

On the other hand, while China may worry about politicized misinterpretations, uncertainties and unpredictability created due to existing ambiguities within the Rome Statute, the argument can cut the other way. Namely, it is precisely because of these ambiguities that it is in China’s interest to join the ICC in order to fully participate in the further shaping of the definitions of the international crimes, and international criminal and humanitarian law in general under the Rome Statute.²⁰⁷ The ultimate question is whether China (and other major non-party states) wishes to remain passively outside of the ICC process or if China wishes to take a proactive stance instead.

C. A Real Cross-Strait Armed Conflict is Highly Likely to Become or be Treated as An International Armed Conflict

My second presumption is that, if a cross-strait armed conflict breaks out, it is highly likely that third states would intervene and thus turn the internal armed conflict into an international one.²⁰⁸ If so,

202. *Id.* art. 8(2)(b).

203. *Id.* pmb. ¶ 8, art. 8(3).

204. M. Cherif Bassiouni, *Negotiating the Treaty of Rome on the Establishment of an International Criminal Court*, 32 CORNELL INT’L L.J. 443, 462 (1999).

205. John T. Holmes, *Complementarity: National Courts versus the ICC*, in THE ROME STATUTE OF THE ICC: A COMMENTARY 667, 668 (Cassese et al. eds., vol. I, 2002).

206. *See also*, Phani Dascalopoulou-Livada, *The Principle of Complementarity and Security Council Referrals*, in THE INTERNATIONAL CRIMINAL COURT AND NATIONAL JURISDICTIONS 57, 59 (Mauro Politi & Federica Gioia eds., Ashgate Publishers, 2007).

207. *See infra* Part IX for further discussions on positive reasons for China to join the ICC.

208. The scenario of third states intervening in support of the Chinese government solely to fight against Taiwan is first of all highly unlikely, and even if this is the case,

China's objection to the extension of the concept of war crimes to internal armed conflicts under the ICC's jurisdiction as one of its major reasons for not ratifying the Rome Statute becomes much less meaningful, as the ICC would have jurisdiction over international armed conflicts just as much, or as little as, internal armed conflicts. Mainland China's bottom line is that the Taiwanese leaders do not declare independence. Since Taiwan's own military power would presumably pale in comparison with that of mainland China, my sub-presumption is that the Taiwanese leaders would not dare to declare independence unless Taiwan has strong support from a powerful third state(s). However, the possibility of irrationality of the Taiwanese leaders and political miscalculations concerning third state(s)' firm support for Taiwan's independence could not be categorically precluded. Therefore, in the highly unlikely scenario that a cross-strait armed conflict breaks out, it is highly likely that it would involve third state(s)' intervention in support of the Taiwan side, thus turning the original internal armed conflict into an international one.

In addition, China needs to be prepared to confront possible arguments that even if third state(s) do not intervene, the cross-strait armed conflict between mainland China and Taiwan would still be treated as an international armed conflict due to possible recognition of belligerency or recognition of state to Taiwan by third states, or even due to Taiwan's alleged *de facto* state status.²⁰⁹

D. "Safeguards" Due to the Political Limit of the ICC

Disregarding the nature of a hypothetical cross-strait armed conflict (whether international or internal), if China becomes a state party to the Rome Statute, current international political reality indicates that it would most likely be politically infeasible for the ICC to go after relatively powerful states parties in highly controversial situations involving politically sensitive issues at least for the foreseeable future.

such intervention on the government side would not turn the internal armed conflict into an international one because there are no two states involved in conflict with each other. See BABIKER, *supra* note 144, at 54-8 for discussions on the issue of internationalized internal armed conflicts.

209. JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 88 (Oxford University Press 2006)(1979) ("As a matter of general principle, any territorial entity formally separate and possessing a certain degree of actual power is capable of being, and *ceteris paribus*, should be regarded as, a State for general international law purposes. The denomination *sui generis* often applied to entities which, for some reason, it is desired not to characterise as States is of little help."). For more discussions on the issue of the legal status of Taiwan, see Phil C.W. Chan, *The Legal Status of Taiwan and the Legality of the Use of Force in a Cross-Taiwan Strait Conflict*, 8 CHINESE J. INT'L L. 455. (2009).

Indeed, as Roberto Toscano noted, “we have to question very frankly the political ability to prosecute on the part of the ICC because there are certain targets that are politically more or less off-limits.”²¹⁰ This is not just the ICC’s own problem.²¹¹ The ICTY confronted similar problems vis-à-vis NATO’s bombing of Belgrade.²¹² Admittedly, this is a big political problem. But one should not be too shocked, since justice always had to deal with real existing powers, both at the international and national levels.

Normatively speaking, double standards should be eliminated, but this may well be a cruel reality that one has to accept, again, at least for the foreseeable future. Indeed, it is almost inescapable that the ICC will prosecute only or mostly cases related to developing states or “failed states.”²¹³ The fact that all current situations initiated under the ICC proceedings solely concern African states and the ICC Prosecutor’s decision not to go after the British soldiers in the Iraq war are the prime examples, although both are not free of criticism.²¹⁴ That said, this article does not contend that nationals of China, or nationals of any other relatively more powerful states, are free to commit international crimes under the ICC without fear of being prosecuted by the ICC. However, in highly controversial situations entangled with politically sensitive issues, relatively powerful states are likely to, though regrettably, have better chances over weaker states in escaping the scrutiny of the ICC over their actions.

With regards to states’ referrals, it is equally unlikely, if not more, that states would go after each other due to reciprocity and mutual self-interest concerns. In the highly unlikely scenario that the ICC Prosecutor decide to investigate a hypothetical cross-strait armed conflict situation, or that such situation is being referred to the ICC by other states, apart from making full use of the complementarity principle,²¹⁵ China could still try to mobilize the UN Security Council to defer any further proceedings.²¹⁶ Nevertheless, such deferral would arguably be difficult to obtain due to the reverse consensus requirement of all P-5 votes (proposed by Singapore and approved at the Rome Conference).²¹⁷ With regards to UN Security Council referrals, as China enjoys veto power,

210. Theodor Meron (Chair), *Round Table: The ICC relationship with national jurisdictions: what future? in THE INTERNATIONAL CRIMINAL COURT AND NATIONAL JURISDICTIONS* 133, 153 (Mauro Politi & Federica Gioia eds., Ashgate Publishers, 2007).

211. *See id.*

212. *See id.*

213. *See id.* at 136.

214. *See id.* at 134, 151.

215. *See supra* Part V.

216. *See Rome Statute, supra* note 1, art. 16.

217. *See id.* art. 10.

whether it remains a non-party or decides to become a state party to the Rome Statute, there is no need to worry about this possibility under the current UN Security Council voting structure.²¹⁸

To conclude, the Chinese government is being overly cautious on the Taiwan issue vis-à-vis possible reaches by the ICC for war crimes purposes. Apart from concerns over war crimes in internal armed conflicts, the Chinese government also expressed four other major reasons for not joining the ICC.²¹⁹ A discussion about China's concerns with regards to the ICC would not be complete without analyzing these four other reasons. Nevertheless, as China's concern over war crimes in internal armed conflict is the focus of this article, only a brief analysis of these other issues will be provided in the following so that the reader may have a more complete picture of the relationship between China and the ICC.

VIII. CHINA'S OTHER FOUR MAJOR OFFICIAL REASONS FOR NOT JOINING THE ICC

A. *The Broad Jurisdiction of the ICC*

At the Rome Conference, China and other non-party states, including the United States, Russia and India, fiercely attacked the broad jurisdiction of the ICC. They viewed it as imposing obligations on non-party states without their consent, as well as violating the principle of state sovereignty and the Vienna Convention on the Law of Treaties.²²⁰ China reiterated its view in the explanation of its abstention on the UN Security Council's referral of the Darfur situation to the ICC: China cannot accept any exercise of the ICC's jurisdiction against the will of non-party states and therefore find it difficult to endorse any UN Security Council authorization of such an exercise of jurisdiction by the ICC.²²¹

Indeed, the ICC does affect non-party states in that it has been granted jurisdiction over nationals of non-party states without their consent in three circumstances.²²² First, the ICC has jurisdiction over referrals by the territorial state that either is already a party to the Rome

218. See U.N. Charter, art. 27(3).

219. See *Guangya Wang*, *supra* note 8.

220. U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court ¶ 37, Jan. 25, 1999, UN Doc. A/CONF.183/SR.9, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V99/804/59/PDF/V9980459.pdf?OpenElement>.

221. See U.N. SCOR, 60th Sess., 5158th mtg, at 5, UN Doc. S/PV.5158, (Mar. 31, 2005) available at <http://www.amicc.org/docs/SC%20Meeting%20Record%201593.pdf>.

222. See Rome Statute, *supra* note 1, arts. 12 & 13.

Statute or otherwise agrees to the ICC's jurisdiction.²²³ Second, the ICC has jurisdiction over *proprio motu* investigations by the ICC Prosecutor whereby the territorial state either is already a party to the Rome Statute or otherwise agrees to the ICC's jurisdiction.²²⁴ Third, the ICC has jurisdiction over referrals by the UN Security Council.²²⁵ Such extension of jurisdiction over nationals of non-party states also becomes problematic should the ICC apply to these nationals provisions that exceed customary international law at the time their respective crimes are committed.²²⁶ Such application would violate the principle of legality (*nullum crimen sine lege*) that binds all criminal courts, whether international, mixed or domestic.²²⁷

Realistically speaking, with regards to China itself, the ICC's reach to Chinese nationals when it remains a non-party state is highly unlikely. First, a UN Security Council referral of China to the ICC is impossible due to China's veto power.²²⁸ Second, the ICC's jurisdiction over a Chinese national committing an ICC crime on a non-Chinese territory is highly unlikely, because China has few overseas military commitments. It is also difficult to imagine that Chinese overseas peacekeeping military forces would have the incentive to commit any crime that is as heinous as an ICC crime, or that China would be unwilling or unable to prosecute its own overseas peacekeeping soldiers should they commit an ICC crime. Indeed it has been reported that "Chinese personnel have a reputation for tight discipline and have not been tarnished by the sex and corruption scandals that have afflicted peacekeepers from some other nations."²²⁹ Thus, some Chinese scholars concluded that unlike the United States (which deploys overseas troops all over the world), China is not concerned that its overseas troops may one day come under the ICC's jurisdiction.²³⁰ One could argue, however, that even if China is not concerned right now, the ICC's jurisdiction over its overseas troops may still be a potential concern for China if and when it decides to

223. *See id.*

224. *See id.*

225. *See id.*

226. *See* Meron, *War Crimes*, *supra* note 54, at 577.

227. *See id.* "A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court." Rome Statute, *supra* note 1, art. 22.

228. *See* U.N. Charter, art. 27(3).

229. Andrew Higgins, *China showcasing its softer side: Growing role in U.N. peacekeeping signals desire to project image of benign power*, THE WASH. POST, Dec. 2, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/12/01/AR2009120104060.html>.

230. *See* Jianping Lu & Zhixiang Wang, *China's Attitude Towards the ICC*, 3 J. OF INT'L CRIM. JUST., 608, 611 (2005) available at <http://jicj.oxfordjournals.org/cgi/content/abstract/3/3/608>.

engage in greater overseas military activities in the future. Nonetheless, at least for the foreseeable future, it should be fairly safe to conclude that China is much more concerned about its own domestic issues (Taiwan, Tibet, Xinjiang, Falun Gong etc.) and overall national stability and development than its potential overseas military engagements.

What is really at stake for China, as already revealed in previous discussions concerning the ICC's jurisdiction over war crimes in internal armed conflicts, is the "compulsory upon ratification" nature of the ICC's jurisdiction.²³¹ Indeed, China is unwilling to accept the compulsory complementary jurisdiction of the ICC, especially over war crimes and crimes against humanity.²³² In China's view, the ICC's jurisdiction should be based on states' voluntary acceptance.²³³ This opt-in system is the key manner in which states accept external jurisdictions.²³⁴ States should be permitted to choose from whether or not to accept the ICC's jurisdiction, particularly when considerable controversies still exist over the scope and definition of crimes under the Rome Statute.²³⁵ In addition, the provisions on war crimes and crimes against humanity under the Rome Statute incorporated many new crimes and new contents. These new crimes and new contents entail an acceptance course for any state.²³⁶ The taming of the ICC's compulsory jurisdiction by the complementarity principle does not seem to satisfy China's concerns.²³⁷ In fact, this issue is not really a legal obstacle, but rather, a political obstacle concerning whether China is willing to concede a compulsory complementary jurisdiction over the international crimes in question to the ICC, which will later be discussed in relation to the Chinese government's current political reluctance to join the ICC.²³⁸

B. *The Proprio Motu Power of the Prosecutor*

China has serious reservations over the Prosecutor's power to initiate investigation *proprio motu*, which it considers to be exercisable "without checks and balances against frivolous prosecution," thus amounting to "the right to judge and rule on State conduct."²³⁹ Apart

231. See Rome Statute, *supra* note 1, art. 12(1).

232. See Shiguang Li, *supra* note 28, at 3.

233. See *Guangya Wang*, *supra* note 8.

234. See Jie Xu, *supra* note 115, at 97.

235. See *id.*

236. See *id.*

237. See *supra* Part V.

238. See *infra* Part X.

239. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court ¶ 39, Jan. 25, 1999, UN Doc. A/CONF.183/SR.9, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V99/804/59/PDF/V9980459.pdf?OpenElement>.

from China, more than 30 states, including the United States, Russia, and India, also expressly opposed the *proprio motu* power of the Prosecutor with similar reasons at the Rome Conference.²⁴⁰ The majority of states, however, viewed that safeguard provisions under the Rome Statute, including Article 15 on the pre-authorization by the Pre-Trial Chamber for the Prosecutor to initiate an investigation,²⁴¹ Article 18 on the Prosecutor's deferral to a state's investigation,²⁴² and other provisions concerning the control and filtering of the powers of the Prosecutor and the judges, constitute sufficient limits on the ability of the Prosecutor to initiate cases.²⁴³ In other words, the mechanism concerning the independent role of the Prosecutor was not created in a vacuum. One should not evaluate it by severing it from the other parts of the Rome Statute.²⁴⁴

In fact, the controversy over the *proprio motu* power of the Prosecutor is a sub-issue under the issue of the ICC's trigger mechanism. The latter was one of the most complicated and sensitive issues at the Rome Conference, because it not only concerns the initiation of the ICC's proceeding, but also concerns the rights and obligations of states parties or non-party states.²⁴⁵ Looking at Article 13 of the Rome Statute literally, the states parties, the UN Security Council and the Prosecutor all have the power to trigger the proceeding of the ICC.²⁴⁶ However, the power of the Prosecutor seems more important for the operation of the ICC than the other two. First, the Prosecutor could proactively trigger the jurisdiction of the ICC when states parties or the UN Security Council are hesitant to refer cases due to political or other reasons, which are common in international relations.²⁴⁷ States are loath to attack one another except on political or ideological grounds, and the UN Security Council will only rarely muster the political will and the requisite majority to refer situations to the ICC.²⁴⁸ Second, the Prosecutor has the decisive say on which cases or crimes the ICC shall hear, since states

240. *See id.*; *see also* United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Nov. 20, 1998, UN Doc. A/CONF.183/C.1/SR.10, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V98/574/63/PDF/V9857463.pdf?OpenElement>.

241. *See* Rome Statute, *supra* note 1, art. 15.

242. *See id.* art. 18.

243. *See generally id.*

244. *See* Silvia A. Fernández de Gurmendi, *The Role of the International Prosecutor*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE-ISSUES, NEGOTIATIONS, RESULTS* 175, 187 (Roy Lee ed., 1999).

245. *See* Zhu, *Whether China Should Join (Lower)*, *supra* note 121, at 133.

246. *See* Rome Statute, *supra* note 1, art. 13.

247. *See* Zhu, *Whether China Should Join (Lower)*, *supra* note 121, at 133.

248. Antonio Cassese, *Is the ICC Still Having Teething Problems?*, 4 *J. INT'L CRIM. JUST.* 434, 435 (2006).

parties and the UN Security Council can only refer "situations" but not specific "cases" to the ICC.²⁴⁹ Thus the *proprio motu* power ensures the potential effectiveness of the ICC to prosecute the most serious international crimes, and also substantially enhances states' incentive to ensure accountability through their national legal systems.²⁵⁰

Perhaps a close examination of the Prosecutor's present work would also help to alleviate China's concerns. As early as September 2003, a document was produced that outlined a general strategy for the Office of the Prosecutor and the priorities for its work.²⁵¹ This strategy document reaffirmed that the Office of the Prosecutor, in line with the Rome Statute, would not only strictly observe the principle of complementarity, but also promote it as far as possible by supporting national criminal justice systems.²⁵² The Office of the Prosecutor will focus its investigations and prosecutorial activities on those who bear the greatest responsibility for core crimes, and has indicated a clear preference for initiating investigations of alleged core crimes, wherever possible, on the basis of a referral by a state party or the UN Security Council.²⁵³ Such strategy has been reaffirmed by the Office of the Prosecutor in 2006 for the coming years.²⁵⁴ According to the Office of the Prosecutor's current record, since July 2002 it has received more than 8,461 communications from more than 132 countries.²⁵⁵ To date, three self-referrals from states parties (Uganda, Democratic Republic of the Congo, and Central African Republic) and one referral from the UN Security Council (Darfur, Sudan) have initiated investigations, and a number of states, including Afghanistan, Chad, Colombia, Georgia, Kenya, Palestine, are currently

249. See Rome Statute, *supra* note 1, art. 13.

250. See BRUCE BROOMHALL, *INTERNATIONAL JUSTICE & THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND THE RULE OF LAW* 79-80 (Oxford University Press 2003); see Lu & Wang, *supra* note 160, at 618.

251. See International Criminal Court, Office of the Prosecutor, Paper on Some Policy Issues Before the Office of the Prosecutor, Sept. 2003, available at http://www2.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf.

252. See *id.*

253. See Hans-Peter Kaul, *Construction Site for More Justice: the International Criminal Court after Two Years*, 99 AM. J. INT'L L. 370, 374 (2005).

254. See International Criminal Court, Office of the Prosecutor, Report on Prosecutorial Strategy, Sept. 14, 2006, available at http://www.icc-cpi.int/NR/rdonlyres/699AA4B3-E8C2-4E41-9EFA-EBA503BDBF7F/143694/OTP_ProsecutorialStrategy20060914_English.pdf.

255. See International Criminal Court, Office of the Prosecutor, Communications, Referrals and Preliminary Analysis, <http://www2.icc-cpi.int/Menu/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Comm+and+Ref/Communications+and+Referrals.htm> (last visited Apr. 4, 2010).

under analysis.²⁵⁶ The stark contrast between the number of communications received and those that launched investigations reflects the caution of the Prosecutor, which should give states reassurance and confidence in the Prosecutor's role and work.

However, the Prosecutor's indictment of Sudanese President Omar Al Bashir on July 14, 2008, authorized by the Pre-Trial Chamber on March 4, 2009, has been considered by many states, including Arab and African states, Russia and China to be imprudent and unwise as it would hinder efforts to bring peace to the Darfur region.²⁵⁷ Most recently on March 31, 2010, Pre-Trial Chamber II, by majority, granted the Prosecutor's request to commence an investigation, using his *proprio motu* power for the first time, on crimes against humanity allegedly committed in Kenya's 2007 post-election violence.²⁵⁸ Nevertheless, it should be noted that to date, there exists only very few practical works of the Prosecutor open for assessment. Thus, to change the views of hostile non-party states and to augment their confidence in the Prosecutor, the key point is to show consistent prudence, fairness, and continual improvement in the Prosecutor's work.

C. *Crimes against Humanity during Peacetime*

China also has reservations on the ICC's jurisdiction over crimes against humanity during peacetime.²⁵⁹ China views this as contrary to customary international law, where such crimes should be related only to wartime, as evidenced by the Nuremberg Charter²⁶⁰ and the ICTY Statute.²⁶¹ Furthermore, China contends that many types of conduct listed under the Rome Statute fall under human rights law rather than international criminal law, thus deviating from the real aim of establishing the ICC.²⁶² At the Rome Conference, a considerable

256. International Criminal Court, Office of the Prosecutor, <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor> (last visited Apr. 4, 2010).

257. See Al Jazeera.net, *Court Issues Bashir Arrest Warrant*, <http://english.aljazeera.net/news/africa/2009/03/20093412473776936.html> (last visited Mar. 31, 2010) ("China, the African Union and the Arab League have suggested an indictment could worsen the Darfur conflict and destabilise the entire region"); Al Jazeera.net, *Arab Leads Snub al-Bashir Warrant*, <http://english.aljazeera.net/news/middleeast/2009/03/2009330175846714662.html> (last visited Mar. 31, 2010).

258. See *supra* note 4.

259. See *Guangya Wang*, *supra* note 8.

260. See Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1546, 82 U.N.T.S. 284, available at <http://avalon.law.yale.edu/imt/imtconst.asp>.

261. See Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (May 25, 1993).

262. See *Guangya Wang*, *supra* note 8.

number of states, mainly those from the Arab League, Africa and Asia, concurred with China's view.²⁶³ These states viewed that "crimes against humanity were invariably committed in situations involving some type of armed conflict, as indicated by the ad hoc tribunals . . . and that customary law had not changed owing to the adoption of human rights instruments . . . or the [ICTR] Statute."²⁶⁴ Many of these states, including Syrian Arab Republic, the United Arab Emirates, Sudan, Bahrain, Iraq, Saudi Arabia, Tunis, Algeria, Morocco, and Pakistan, even contended that the ICC should not be granted with jurisdiction over crimes against humanity in internal armed conflicts.²⁶⁵

The majority of states, however, supported the severance of the nexus with armed conflict from the definition of crimes against humanity.²⁶⁶ These states referred to such severance in international legal documents such as the 1945 Control Council Law No. 10,²⁶⁷ the 1948 Genocide Convention,²⁶⁸ the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity,²⁶⁹ the 1973 Convention on Apartheid,²⁷⁰ the ICTR Statute,²⁷¹ and the 1996 International Law Commission's Draft Code of Offenses against the Peace and Security of Mankind,²⁷² and

263. See United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Comm. of the Whole, 3d mtg.*, ¶ 74, UN Doc. A/CONF.183/C.1/SR.3 (June 17, 1998), available at <http://www.un.org/Docs/journal/asp/ws.asp?m=A/CONF.183/C.1/SR.3> [hereinafter Rome Conference]; Rome Conference, ¶¶ 12, 90, *Comm. of the Whole, 4th mtg.*, UN Doc. A/CONF.183/C.1/SR.28 (July 8, 1998), available at <http://www.un.org/Docs/journal/asp/ws.asp?m=A/CONF.183/C.1/SR.28>.

264. See Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I (Proceedings of the Preparatory Committee During March-April and August 1996), G.A., 51st Sess., Supp. No. 22, A/51/22 (1996), ¶ 88 [hereinafter Report of the Prep. Com.].

265. See generally Rome Conference, *supra* note 263.

266. See THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS 92-93 (Roy S. Lee ed., 1999).

267. See Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, Nuremberg Trials Final Report app. D (Dec. 20, 1945), available at <http://avalon.law.yale.edu/imt/imt10.asp>.

268. See G.A. Res. 260 (III), U.N. Doc. A/810 (Dec. 9, 1948).

269. See G.A. Res. 2391 (XXIII), U.N. Doc. A/7218 (Nov. 26, 1968).

270. See International Convention on the Suppression and Punishment of the Crime of Apartheid, opened for signature Nov. 30, 1973, 1015 U.N.T.S. 243 (entered into force July 18, 1976).

271. See Statute of the International Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (Nov. 8, 1994).

272. See Draft Code of Crimes Against the Peace and Security of Mankind, *Report of the International Law Commission on Its Forty-eighth Session*, U.N. GAOR, 51st Sess., Supp. No. 10, at 9, U.N. Doc. A/51/10 (Jan. 1, 1996).

jurisprudences such as the ICTY's *Tadic* case,²⁷³ and argued that the reference to "armed conflict" in the Nuremberg Charter and the ICTY Statute was simply a limit on the jurisdiction of the courts, but was not inherent in the definition of crimes against humanity.²⁷⁴

Within the academia, western commentators have generally viewed that the definition of crimes against humanity lost the required nexus with armed conflicts over time based on similar evidences mentioned above.²⁷⁵ While most Chinese scholars seemingly acquiesce to this view by enumerating the relevant provisions of the abovementioned international legal instruments and the Rome Statute when discussing issues on crimes against humanity, cautious Chinese scholars believe that, relevant customary international law was still ambiguous at the time when the Rome Statute was adopted.²⁷⁶ Only very few Chinese scholars explicitly opposed the inclusion of crimes against humanity during peacetime in the ICC's jurisdiction, viewing that such inclusion plants hidden danger of interference with states' domestic affairs.²⁷⁷

In fact, whether crimes against humanity should include those taking place during peacetime as well as wartime can be analyzed by using the same logic for whether war crimes should include those taking place in internal armed conflicts as well as international armed conflicts. Same acts of atrocities should be punished no matter when and where they take place. Contrary arguments would be logically and morally difficult to sustain. Nevertheless, Article 7 of the Rome Statute in its present form does expand existing international law in at least two respects.²⁷⁸ First, it broadens the classes of conduct amounting to crimes against humanity.²⁷⁹ Thus "forced pregnancy," "enforced disappearance of persons," and "the crime of apartheid" are included.²⁸⁰ Second, it greatly expands the category of discriminatory grounds in dealing with the crime of persecution.²⁸¹ While under customary international law these grounds may be political, racial, ethnic, or religious, Article 7(1)(h) adds "cultural," "gender," as well as "other grounds that are universally recognized as impermissible under international law."²⁸²

273. See *Tadic* Defence Motion, *supra* note 53; see also Report of the Prep. Com., *supra* note 264, ¶ 89.

274. See Meron, *War Crimes*, *supra* note 54, at 568.

275. See e.g., M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 140 (2003); CASSESE, *supra* note 54, at 73; Meron, *War Crimes*, *supra* note 54, at 568; SCHABAS, *supra* note 79, at 100.

276. See e.g., Zhu, *Whether China Should Join (Upper)*, *supra* note 81.

277. See Mingxuan Gao & Junping Wang, *supra* note 87.

278. See Rome Statute, *supra* note 1, art. 7.

279. See *id.*

280. See *id.*

281. See *id.*

282. See *id.* art. 7(1)(h).

The Tibet, Xinjiang, and Falun Gong issues are among China's real concerns here. Especially in light of recent outbreaks of riots in Xinjiang on July 5, 2009,²⁸³ and Tibet on March 14, 2008,²⁸⁴ as well as Falun Gong's anti-Communist activities before and during the 2008 Beijing Olympic Games,²⁸⁵ it is natural for the Chinese government to express concern that its responses to these incidents, which it views as strictly falling under its internal affairs and legal under Chinese law, might be mischaracterized as crimes against humanity during peacetime and thus invoke the intervention of the ICC. With the development of China's human rights status, however, together with the rapid improvement of the national living standards, China's perceptions and standards could change and conform to a general consensus on this issue.²⁸⁶ It should also be reiterated that the scope of crimes against humanity is strictly confined to widespread or systematic attacks against a civilian population, rather than common violations of human rights.²⁸⁷ The ICC only deals with the most serious crimes of concern to the international community, and will not turn into a general court for human rights.²⁸⁸ Therefore, the expansions of crimes against humanity under the Rome Statute, viewed in light of these safeguards, should not pose any real difficulty for China.

D. *The Crime of Aggression*

The Chinese government is of the view that the crime of aggression is a state act.²⁸⁹ It does not yet have a legal definition. To avoid political abuse of litigation, it is necessary to have the UN Security Council first determine the existence of aggression before pursuing individual criminal responsibility, as is stipulated in Article 39 of the UN Charter.²⁹⁰ Thus China viewed that the ICC's jurisdiction over the crime of aggression weakens the power of the UN Security Council, which

283. See Zhou Yan & Li Laifang, *Death toll in Xinjiang riot rises to 140*, XINHUA, July 6, 2009, available at http://news.xinhuanet.com/english/2009-07/06/content_11661325.htm.

284. *Tibetan riots spread outside region*, N.Y. TIMES, Mar. 16 2008, available at <http://www.nytimes.com/2008/03/16/world/asia/16iht-tibet.4.11148124.html>.

285. Nishika Patel, *Falun Gong cries foul over stricter entry regulations*, THE STANDARD, Mar. 28, 2008, available at http://www.thestandard.com.hk/news_detail.asp?pp_cat=11&art_id=63634&sid=18243751&con_type=1.

286. See also Jia, *supra* note 108, at 10.

287. See Rome Statute, *supra* note 1, art. 7(1).

288. See *id.* arts. 1-6 (establishing the court and its jurisdiction).

289. See Permanent Mission of the People's Republic of China to the United Nations Office at Geneva and Other International Organizations in Switzerland, China and the International Criminal Court, <http://www.china-un.ch/eng/gjhyfy/hflygz/t85684.htm> (last visited Apr. 4, 2010).

290. See U.N. Charter, art. 39.

should first act upon possible cases of aggression, without the limitation of twelve-month periods.²⁹¹ At the Rome Conference, other members of the P-5 and many other states expressed similar views.²⁹² This important issue has been reserved under the Rome Statute, and will be discussed at the 2010 Review Conference.²⁹³

Considering that China is one of the P-5, and a relatively recent victim of aggression prior to 1945, the issue of defining the crime of aggression should be one of the appealing reasons for it to accede to the Rome Statute, rather than an obstacle, for only states parties have the right to participate in the determination process of the definition of the crime of aggression. Presently, China is only invited as an observer to the Special Working Group on the Crime of Aggression.²⁹⁴ In addition, according to Article 121(5) of the Rome Statute, any amendment to the definitions of the crimes under the jurisdiction of the ICC shall enter into force only for those states parties that have accepted the amendment.²⁹⁵ This means that the evolution of the crime of aggression will be slow and opens the possibility that the ICC will seldom have jurisdiction over the crime of aggression.²⁹⁶ Some scholars even noted that as a practical matter, such an amendment might even never happen,²⁹⁷ and that discussions about the crime of aggression carry the potential for rousing greater opposition from the major powers that are currently outside the ICC.²⁹⁸ Therefore, China's view on this crime does not at all hinder its consideration of the accession to the ICC.

IX. POSITIVE REASONS FOR CHINA TO JOIN THE ICC

All the previous discussions have centered round the issue of whether China's official reasons for not joining the ICC pose any real

291. See *Guangya Wang*, *supra* note 8.

292. See Rome Conference, *Summary Record of the 2d Plenary mtg.*, U.N. Doc. A/CONF.183/SR.2 (June 15, 1998), available at <http://www.un.org/Docs/journal/asp/ws.asp?m=A/CONF.183/SR.2>; Rome Conference, *Summary Record of the 3d Plenary mtg.*, U.N. Doc.; UN Doc. A/CONF.183/SR.3 (June 16, 1998), available at <http://www.un.org/Docs/journal/asp/ws.asp?m=A/CONF.183/SR.3>.

293. See Coalition for the International Criminal Court, Review Conference of the Rome Statute, <http://www.iccnw.org/?mod=review> (last visited Apr. 4, 2010).

294. See Garth Schofield, *The Empty U.S. Chair: United States Nonparticipation in the Negotiations on the Definition of Aggression (2007)*, available at www.amicc.org/. . /Crime%20of%20Aggression%20and%20the%20US.pdf.

295. See Rome Statute, *supra* note 1, art. 121(5).

296. See BROOMHALL, *supra* note 250, at 47.

297. See Jerry Fowler, *The Rome Treaty for an International Criminal Court: A Framework of International Justice for Future Generations*, in *THE INTERNATIONAL CRIMINAL COURT: GLOBAL POLITICS AND THE QUEST FOR JUSTICE* 131, 135 (William Driscoll et al eds., 2004).

298. See BENJAMIN N. SCHIFF, *BUILDING THE INTERNATIONAL CRIMINAL COURT* 254 (2008).

difficulty for its ratification of the Rome Statute. These discussions would not be complete without analyzing the positive reasons for China to join the ICC. This section summarizes five of these reasons below.

First, the fact that more and more states are joining the ICC is arguably already an inevitable trend. China's abstention from participation in the Rome Statute will prove detrimental to its international reputation. Especially after the ratification of the Rome Statute in late 2007 by another major Asian power—Japan, China's non-party status stands in stark contrast to Japan's exemplary role.²⁹⁹ The existence of the ICC as a permanent international judicial institution is already a fact. Currently more than half of all the states in the world are already states parties to the Rome Statute. The global support for the ICC is ever increasing.³⁰⁰ This trend will place the minority opposing states in a morally isolated plight that is more and more difficult to justify and sustain.

Jianping Lu noted that the current Chinese official stance vis-à-vis the ICC reflects a culturally static legal ideology.³⁰¹ Other Chinese scholars pointed out that in the regime of international crimes against humanity, restrictions imposed on state sovereignty are already a fact.³⁰² The world has changed and will continue to change rapidly. China can no longer wishfully rely on the notion of absolute sovereignty. Rather, it can only strive for proactivity in this course of gradual adaptation.³⁰³ Indian scholar Usha Ramanathan similarly cautioned India not to cynically oppose the ICC with ethnocentricity, but to adopt a universal idiom "where it is recognized and acted upon that peace anywhere requires justice everywhere."³⁰⁴ Therefore, as Sang-Hyun Song (Korea), the new president of the ICC as of March 11, 2009, put it, if China, a reputable and responsible big nation in the international society that plays an important role and exerts significant influences in international affairs, as well as a leader in the regime of international justice in Asia

299. See Coalition for the International Criminal Court, Ratification of the Rome Statute, <http://www.iccnw.org/?mod=romeratification> (last visited Apr. 4, 2010).

300. See *id.* ("The Rome Statute entered into force after achieving 60 ratifications in July 2002, decades earlier than predicted. Now, only a few years later, the number of ratifications has risen from 66 to 105.")

301. Jianping Lu, *A Cultural Assessment of China Joining the ICC*, in ISSUES OF INTERNATIONAL CRIMINAL LAW AND INTERNATIONAL CRIMES 325 (Bingzhi Zhao & Hongyi Chen eds., 2003) [hereinafter Jianping Lu, *Cultural Assessment*].

302. See Wanghuai Sun et al., *International Criminal Court: Insufficiency and Problems of the International Institutions for Criminal Justice*, in THE INTERNATIONAL CRIMINAL COURT: CHOICE OF CHINA 50, 61 (Mingxuan Gao et al. eds., 2005).

303. See *id.*

304. Usha Ramanathan, *India and the ICC*, 3 J. INT'L CRIM. JUST. 627, 634 (2005).

and even in the whole world, could ratify the Rome Statute, such ratification would send a strong message to the rest of the world.³⁰⁵

Second, as a non-party state to the Rome Statute, China cannot enjoy any right that states parties possess. For one thing, China cannot participate in the discussions of major issues concerning the ICC. Nor can it put forward any amendment proposals for the Rome Statute. Take the crime of aggression for instance. Non-party states can only participate as observers with no voting power.³⁰⁶ Thus non-party states are precluded from the lawmaking of the definition of the crime of aggression. Once a definition of the crime of aggression has been formulated under the Rome Statute, however, it would inevitably have profound impact on all states in the world including non-party states. More importantly, relevant laws concerning genocide, crimes against humanity and war crimes are still in the process of gradual formulation. All states are “keenly interested that the law in this field should develop in directions that are consistent with their views of international relations, with the extent and nature of their military engagements, as well as with their visions of what would provide the greatest justice and deterrence value.”³⁰⁷ Hence, the fact that China, as a non-party state, cannot participate in the discussions of relevant crimes, is obviously detrimental for the development of relevant international criminal law in the direction that are consistent with China’s views and national interests. In addition, the creation process of the ICC sufficiently demonstrates that international criminal law is a fast developing legal branch that is currently undergoing a high-speed growth period. If China takes an oppositional, resistant or non-participation stance towards this important lawmaking process, it could lose its voice in such an important field and lose a major stage where it could otherwise exert its own functions.³⁰⁸

For another thing, only nationals of states parties are eligible to be nominated as candidates for ICC judges and prosecutors. In fact, Asia is the least represented regional bloc in the current composition of the ICC’s personnel while some critics argued that Anglo-American influence remains strong in the ICC.³⁰⁹ Currently there are only two Asian judges, Sang-Hyun Song from Korea and Kuniko Ozaki from

305. Sang-Hyun Song, *The ICC: The Concerned Issues of China*, 2 INT’L CRIM. L. R. 21-22 (2007).

306. See Rome Statute, *supra* note 1, art. 112.

307. Madeline Morris, *The United States and the ICC: High Crimes and Misconceptions: the ICC and Non-party States*, 64 LAW & CONTEMP. PROB. 13, 33 (2001).

308. See Jianping Lu, *Cultural Assessment*, *supra* note 301.

309. See SCHIFF, *supra* note 298, at 180.

Japan, who was newly elected on November 18, 2009, in the current composition of ICC judges, which has been designed to be eighteen in total.³¹⁰ Not to mention that there is no Asian representative in the Office of the Prosecutor. Here, China, another influential Asian country possessing relevant professionals and expertise, is losing an opportunity to directly participate in the formulation and development of a new international organization which may be of use to it, if not for now, at least for the future. This would also deprive the Chinese legal profession of valuable learning opportunities that would ultimately amount to costly tuition fees for the Chinese government and people.³¹¹ More importantly, no matter what interpretation and decision it makes in its adjudications, ICC case precedents would inevitably exert profound influence on the development of the entire (public) international law, international criminal law and international relations.³¹² Hence, it would be very detrimental to China if there are no Chinese legal experts either within the composition of ICC judges or prosecutors.

In addition, China cannot enjoy current "privileges" given to states parties by the Rome Statute, such as the exclusion of the ICC's jurisdiction over war crimes by utilizing the seven-year opt-out mechanism,³¹³ and the exclusion of the ICC's jurisdiction over newly amended crimes unless the state party in question accepted such amendments.³¹⁴ These privileges ironically do not apply to non-party states, which may well come under the jurisdiction of the ICC in some circumstances as discussed *supra*.³¹⁵ Of course, they present inherent flaws within the Rome Statute, and arguably should be amended so that all states are put on the same footing.

Third, even if China decides not to ratify the Rome Statute, it may still be passively affected because of the obligations imposed upon non-party states by the current jurisdictional provisions under the Rome Statute.³¹⁶ What is vital at hand is that with regards to an universal international organization that concerns important areas in international politics and enjoys a large number of states parties, though non-party states have the freedom to join or not join, they would inevitably be charged with considerable pressure by remaining outside of such an

310. See Rome Statute, *supra* note 1, art. 36(1); The Judges of the Court: International Criminal Court, available at http://www.icc-cpi.int/NR/rdonlyres/B7346EA2-9E69-4DD7-928D-A391E2E5F8D7/281533/ICC_Judges_09_10_Eng.pdf (last visited Mar. 15, 2010).

311. See Jianping Lu, *Cultural Assessment*, *supra* note 301.

312. Zhu, *Whether China Should Join (Upper)*, *supra* note 81, at 177.

313. See Rome Statute, *supra* note 1, art. 124.

314. See *id.* art. 121(5).

315. See *supra* Part VIII.A.

316. See Rome Statute, *supra* note 1, arts. 12-13.

organization, and would also have less of a voice than states parties in relevant international political regimes.³¹⁷ In fact, the most negative possible result of a state's refusal to join international mechanisms such as the ICC is the possibility of becoming marginalized in international legal or political relations.³¹⁸ As Michael Scharf noted, "the United States preserves very little by remaining outside the ICC treaty regime."³¹⁹ The best way to protect the United States from a potentially politicized tribunal is not to assume the role of hostile outsider, but rather to sign the Rome Statute, to play an influential role in the selection of the ICC's judges and prosecutor, and then provide U.S. personnel to work in the Office of the Prosecutor.³²⁰ Therefore, China should also aim to be an active participant when it joins the ICC to safeguard international justice and its own legitimate national interests.

Fourth, the ICC would contribute to the multi-polarization of the world. Shigui Tan commented that as the world's only superpower, the United States strives to lead the world in an array of international and regional issues.³²¹ The United States promotes American values, ideologies, and political and economic models around the whole globe, and attempts to establish a unipolar world dominated by itself.³²² The trend of multi-polarization in the world reflects profound transformation of international relations. It carries significant meanings in containing hegemonism and power politics, promoting world peace and stability, and advancing the economic prosperity of developing countries.³²³ The Rome Statute and the world criminal court thereby established are precisely the product of the trend of multi-polarization of the international political configuration post cold war. They reflect the call for justice and the opposition against great-power politics by the vast majority of the middle and weaker states.³²⁴ The ICC's collision with hegemony makes its value stand out. In fact, some states have signed on to the Rome Statute precisely because the United States opposes the ICC.³²⁵ Hence, China and other states can utilize the ICC to contain American hegemonic policies, and increase their voice in sensitive

317. See Jing Xi, *An Analysis of the Reasons of the US's Oppositions to the International Criminal Court*, POLITICS & LAW (in Chinese), No. 6, 56, 57 (2001).

318. See Zhu, *Whether China Should Join (Lower)*, *supra* note 121, at 137.

319. Michael P. Scharf, *The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 LAW & CONTEMP. PROBS. 67 (2001), available at <http://global.law.duke.edu/shell/cite.pl?64+Law+&+Contemp.+Probs.+67+%28Winter+2001%29>.

320. See *id.* at 71.

321. See Tan, *supra* note 85, at 72.

322. See *id.* at 72-3.

323. See *id.* at 73.

324. See SCHIFF, *supra* note 298, at 192.

325. See *id.* at 180.

international political regimes such as armed conflicts and ethnic disputes.³²⁶

Fifth, joining the ICC would also be conducive to protecting Chinese overseas victims. As the implementation of China's reform and opening-up policy becomes more embedded, more Chinese nationals have been sent to work abroad. Some of them have even been sent to war-torn states such as Iraq and some African states.³²⁷ If China joins the ICC, apart from taking its own measures, China can also provide protections for and realize justice to its overseas victims of crimes under the Rome Statute through the ICC.³²⁸

In conclusion, Chinese legal scholars have generally voiced that instead of passively accepting the jurisdiction of the ICC and providing cooperation to it, China should take a proactive stance by ratifying the Rome Statute and actively participating in its possible amendments. Nevertheless, based on China's concerns over its thorny domestic issues and the current political reluctance of the Chinese government,³²⁹ its ratification of the Rome Statute cannot be achieved in a short period of time. This would still involve a process for China,³³⁰ whereby China should strengthen its own academic research and bring its judicial system in line with the international standards as soon as possible.

X. CURRENT POLITICAL RELUCTANCE OF THE CHINESE GOVERNMENT TO RATIFY THE ROME STATUTE

All the forgoing analysis has attempted to show that not only China's official reasons for not joining the ICC pose no real difficulty for China's accession to the Rome Statute, but that there are also many positive reasons for China to join the ICC. Assuming that these arguments hold (at least some) water, then how does one understand China's current reluctance to join the ICC? This article proposes that what is really at stake are not legal obstacles, but a lack of political will. It is the political reluctance of a rising power, who still confronts thorny domestic issues that are susceptible to mass violence, to be fettered by yet another multilateral restrictive mechanism. In other words, sovereignty related political concerns still heavily outweigh all legal arguments for China's accession to the ICC at this stage. As Benjamin Schiff noted in the context of the United States:

326. See Jie Xu, *supra* note 115, at 98.

327. See Zhu, *Whether China Should Join (Lower)*, *supra* note 121, at 139.

328. See *id.*

329. See *infra* Part X.

330. Shaoqian Zhang & Zhanguo Sun, *Comparative Study on the Rome Statute and Chinese Criminal Law*, in *THE INTERNATIONAL CRIMINAL COURT: CHOICE OF CHINA* (in Chinese) 114, 114 (Mingxuan Gao et al. eds., 2005).

*If U.S. policy makers seek immunity from international jurisdiction over the three crimes, their legal arguments . . . against joining the [ICC] are irrelevant. Supporting impunity for U.S. citizens can be justified only on the grounds that other strategic U.S. national interests override interests in an international rule of law. . . . This is a choice wherein sovereignty override legality, and historically most countries and certainly the United States have readily taken this position. If on the other hand, policy makers decide that adherence to the [ICC] would benefit the United States by winning friends, by strengthening deterrence against international crimes, and by making available a new institution for serving U.S. interests, then the legal arguments are also irrelevant where the United States should join.*³³¹

This argument can equally apply to other non-party states, including China, except that their respective “irrelevant” legal argument may differ in their own context.³³²

Insight from international relations theories may prove helpful in explaining states’ demurral from accession. First, from the realist perspective, states avoid relative disadvantage just as they pursue relative advantage.³³³ “States concerned that the ICC might constrain their independent behavior might oppose the [ICC] more than states lacking such concerns.”³³⁴ Therefore, the “U.S. opposition to the [ICC], and Chinese, Russian and Indian reluctance to join [reflect] powerful states’ inclination to preserve maximum flexibility in the use of military power and disinclination to subordinate themselves to cooperative structures that do not aid in promoting material objectives.”³³⁵ In contrast, “most of the states that join would expect not to be the scenes of international criminal law violations or the home states of international criminal law transgressors, and they would expect that should such crimes occur their domestic legal institutions would deal with them.”³³⁶ Second, “neoliberal institutionalists do not require relative gain as a state interest absolute gain can suffice.”³³⁷ “If a general problem among states is more amenable to solution by collective action, neoliberal institutionalists would predict cooperative behavior.”³³⁸ In the end, however, the interests of sovereignty for states like the United States, Russia, China and India outweighed the advantages of cooperation by joining the

331. SCHIFF, *supra* note 298, at 179 (emphasis added).

332. *See generally id.*

333. *See id.* at 89-90.

334. *Id.* at 90.

335. *Id.* at 192.

336. SCHIFF, *supra* note 298, at 254.

337. *Id.* at 90.

338. *Id.*

ICC.³³⁹ Third, for constructivists, “the impulse to join [the ICC for most states] must either be to support anti-impunity in other states or to demonstrate adherence to the norms for some other reason, such as the compulsions of identity or a quest for prestige.”³⁴⁰ Whereas for states opposing the ICC, their “dedication to absolute sovereignty is just as much based on ideas as is dedication to alternative norms, as would be decision makers’ belief in their own exceptional right to carry out the kinds of acts criminalized by the [ICC] Statute.”³⁴¹

Further, states generally prefer diplomatic solutions rather than adjudications. They see the former as “posing fewer risks and offering potentially more constructive resolutions than litigation would.”³⁴² Indeed, “states are particularly unwilling to enter into broad commitments to adjudicate future disputes, the content and contours of which cannot be foreseen.”³⁴³ Indeed, previous international criminal tribunals were all established after the fact to respond to defined situations where the failures of national systems were clear.³⁴⁴ In contrast, the ICC was created to address future situations which could not be defined in advance.³⁴⁵ Therefore, there is a natural tendency for states to fear possible politicized prosecutions and unforeseeable situations.

China arguably is even more inclined to prefer diplomatic solutions over unpredictable international adjudications. First, traditional Confucian thinking emphasizes harmony within the family and society, and thus praises non-litigiousness.³⁴⁶ Such culturally embedded thinking is still very influential in modern China. Second, China tends to distrust international judicial mechanisms because arguably they are mostly occupied by western judges advancing western values and ideologies. After all, international law itself is a product of Western civilization. The fact that China has yet never resorted to the ICJ is the best example. Third, for any rising state that possesses relatively weaker international power of influence, it is arguably better for such state to avoid any kind of political, legal or otherwise international restrictive mechanisms. In fact the lesser and weaker these mechanisms are, the better for these states.³⁴⁷ Therefore, as a “system reformer” of the present international

339. *See id.* at 91.

340. *Id.* at 254.

341. SCHIFF, *supra* note 298, at 254.

342. Morris, *supra* note 307, at 15.

343. *Id.* at 15.

344. *See id.* at 37.

345. Kirsch, *supra* note 113, at 5.

346. THE ANALECTS 4 (Raymond Dawson trans., Oxford University Press, 1993).

347. *See* Hongsheng Sheng, *The Role of the International Criminal Court in Realizing International Justice and Maintaining World Peace*, FORUM OF WORLD ECON. & POL. (in Chinese), No. 3, 60, 63 (2003).

legal system which China still distrusts, its attitude towards international law would inevitably be one based on instrumental rationality, i.e., taking a cost-benefit analysis approach, fully utilizing international legal rules that are of use to it, evading those that are disadvantageous to it to the extent possible.³⁴⁸

Moreover, the refusal of the United States to join the ICC, especially its emphatic hostility towards to the ICC under the former Bush administration, has attracted much criticism and been the focal point of world attention.³⁴⁹ This arguably worked as a shield and lifted peer pressures for the other relatively less powerful states, including China, who are reluctant to join the ICC. One could even argue that as long as the United States is not on board, other non-party states, including China, can safely follow suit.

In addition, states parties to the ICC do not seem to be in a position to pressurize non-party states to join the ICC at this stage. *Vis-à-vis* the United States, it could be explained that perhaps some states parties are actually happy that the United States is “outside” of the game and thus the ICC could be *their* court free from the influence of the United States. While they encourage additional states to sign the Rome Statute, states parties “do not accord accession a high priority in their bilateral relations with non-signatories.”³⁵⁰ This means that China or any other non-party states are presently not subjected to any real peer pressure to join the ICC.

Lastly, one could question some of the aforementioned positive reasons put forward to persuade China to join the ICC, in particular, the marginalization argument.³⁵¹ “Universality remains an important goal [for the ICC] because its legitimacy is strengthened by broad acceptance.”³⁵² The ICC also critically needs sustained cooperation and support from as many states as possible in order to operate with efficacy and vitality because enforcement power resides in states.³⁵³ In this sense, politically, economically, and/or militarily influential states such as the United States, Russia and China arguably can hardly be marginalized *vis-à-vis* the operation and development of the ICC. The

348. Chongli Xu, “*Outsider State of the System*” *Mindset and the Paucity of the Chinese International Law Theory*, TRIB. OF POL. SCI. & L., Vol. 24, No. 5, 33, 34 (2006).

349. See John B. Bellinger III, *A Global Court Quandary for the President*, GLOBAL POL’Y F., Aug. 10, 2009, available at <http://www.globalpolicy.org/international-justice/the-international-criminal-court/us-opposition-to-the-icc/48027.html>.

350. SCHIFF, *supra* note 298, at 254.

351. See *supra* Part IX.

352. Kirsch, *supra* note 113, at 5.

353. See Report of the ICC to the UN for 2007/08, UN Doc. A/63/323 (Aug. 22, 2008).

UN Security Council's referral of the Darfur situation serves as the prime example.³⁵⁴ Without the abstentions from the United States and China, this referral could never have gone through. Indeed, many people see, or would like to see these abstentions as significant signals of shift in attitude towards the ICC by the United States and China. For the same reason, one could also question the argument that non-party states would not be able to participate in the discussions and decision making processes within the ICC. Even if relatively powerful non-party states can only participate in these processes as observers with no voting power, their views and amendment proposals can hardly be ignored if the ICC wants to encourage them to join. Still along the same line, one could refute the view that the ICC would have any real impact on relatively powerful non-party states because of the political infeasibility for the ICC to go after these states in highly controversial situations involving politically sensitive issues especially at its early existential stage and at least for the foreseeable future.

In conclusion, there exist no real legal obstacles for China to join the ICC. What is lacking is the political will of a rising power. China still confronts thorny domestic issues that are susceptible to mass violence. Thus, China is reluctant to voluntarily enter into yet another multilateral restrictive regime where sovereignty related political concerns still outweigh all legal arguments.

XI. CONCLUSION

This article has attempted to show that the ICC's jurisdiction over war crimes in internal armed conflicts does not pose real difficulty for China if it wishes to join the ICC. First, the extension of the concept of war crimes to internal armed conflicts reflects the normative trend towards the gradual blurring of the conventional dichotomy between international and internal armed conflicts for humanitarian purposes. Admittedly, there is still room for China and other dissenting states to contest the customary status of such trend. These states could argue that many specially affected states (though debatable) such as Russia, China and India oppose such extension and thus remain non-party states to the ICC. And even if such extension has secured a customary status, dissenting states could arguably still oppose it by resorting to the principle of the "persistent objector" (though again controversial).³⁵⁵ But because of the compelling rationale of this new trend, and that granting the ICC with compulsory complementary jurisdiction over such crimes is

354. See *supra* Part VIII.B.

355. The principle of the "persistent objector" was developed by the ICJ in the Fisheries Case (U.K. v Nor.), 1951 I.C.J. 131 (Dec. 18).

also with sound reasons, it would appear farfetched and no longer plausible for China to rigidly insist on “respect for state sovereignty” and “non-interference with internal affairs” to exclude minimum humanitarian requirements and supervision by the international community over the most heinous crimes committed in internal armed conflicts.

Second, although some of the war crimes provisions under the Rome Statute do go beyond that of customary international law, they do not pose real difficulty for China’s accession to the ICC vis-à-vis China’s real concerns over its domestic issues, i.e., the Taiwan issue, and to a lesser degree, possible recurrences of separatist/terrorist violence in the Tibet and Xinjiang provinces. Although the Taiwan issue is potentially the most fatal conflict between China and the ICC, the Chinese government is being overly cautious on the Taiwan issue vis-à-vis possible reaches by the ICC for war crimes purposes. First, the outbreak of a cross-strait armed conflict between mainland China and Taiwan is highly unlikely. Even if a cross-strait armed conflict unfortunately becomes a reality, there are many safeguards in the Rome Statute against possible politicized prosecutions. Second, China’s oppositions against the extension of war crimes to internal armed conflicts under the Rome Statute would become much less meaningful if the nature of a cross-strait armed conflict becomes, or is nevertheless treated as an international one when it actually occurs. Such internationalization of a real cross-strait armed conflict is highly likely. In addition, disregarding the nature of a hypothetical cross-strait armed conflict, current international political reality indicates that it would most likely be politically infeasible for the ICC to go after relatively powerful states in highly controversial situations involving politically sensitive issues at least for the foreseeable future.

To make the picture complete, this article also briefly analyzed China’s other four major official reasons for not joining the ICC, and concluded that they too do not pose real difficulty for China if it wishes to join the ICC. In addition, this article summarized many positive reasons for China to join the ICC. The ultimate conclusion of this article lies in that though understandable concerns do exist, no real legal obstacles stand in the way for China’s accession to the ICC. What really explains China’s current reluctance to join the ICC is the political reluctance of a rising power, who still confronts thorny domestic issues that are susceptible to mass violence, to be fettered by yet another multilateral restrictive mechanism. In other words, sovereignty related political concerns still heavily outweigh all legal arguments for China’s accession to the ICC at this stage.