ISSUES OF CONCERN TO CHINA REGARDING THE INTERNATIONAL CRIMINAL COURT

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Content

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1. Introduction

With the Rome Statute formally in force, the first ever permanent International Criminal Court (ICC) was established in the international community. The inception of the ICC put an end to the various maladies of ad hoc international tribunals which were established by international community to punish the worst international crimes during the past half-century. The ICC promotes the fundamental spirit of justice and peace enshrined in the Charter of the United Nations, as a "gift of hope to future generations, and a giant step forward in the march towards universal human rights and the rule of law[1]." It carries positive legislative implications in punishing and deterring serious international crimes as well as maintaining world peace and security.

[1] Kofi Annan, former United Nations Secretary-General, as quoted in "Unrestraint Talks on Criminal Law", GAO, Mingxuan, Law Press, 2004: P.636.

As a permanent member of the United Nations Security Council and the largest developing country, China has adopted a comparatively positive attitude toward the establishment of an ICC. China has always supported the establishment of an ICC that is independent, just, effective, and broadly represented in order to punish the worst international crimes. China has played a constructive role in the whole process of the establishment of ICC, including the Preparatory Committee for the Establishment of the ICC, the Roman Diplomatic Conference, and the subsequent Preparatory Committee for the ICC, making positive and significant contributions to its establishment and receiving widespread recognition in the international community. However, since some of the fundamental issues related to the Rome Statute that were of concern to China have not been satisfactorily resolved, China voted against the Statute and chose not to join the ICC in the end.

According to the explanatory statement by the Chinese delegation at the vote on the Rome Statute, and the statement on "The Establishment of ICC" at the 53rd United Nations Assembly, our nation's major areas of concern over the ICC are primarily on the characteristics of the Court's jurisdiction, the power of the ICC Prosecutor to pursue self-initiated investigations, and some issues arising from crimes that fall under the ICC jurisdiction. As a powerful nation that is rising peacefully, China cannot remain forever to be an outsider when majority of the nations have joined the ICC. Therefore, a close study of the concerns of China will bear important significance in gradually resolving the factors that impeded China from signing and ratifying the Rome Statute, in facilitating China's joining of the ICC at an appropriate time and in contributing to the improvement of Rome Statute.

2. Characteristics of International Criminal Court Jurisdiction

(1) Complementarity

The jurisdiction of the ICC inevitably involves a state's criminal jurisdiction and is, ultimately, a matter closely related to state sovereignty. That was why throughout the negotiations of the Statute, the jurisdiction of ICC remained the issue of focus for every nation involved in the process.

What exactly is the relationship between the ICC and the domestic court of a state? The Rome Statute sets out to define the relationship in both its Preamble and Article 1. The Preamble states, "The International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions." Article 1 provides, "It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, … and shall be complementary to national criminal jurisdictions." It is therefore obvious that "the ICC is not a substitute for the state's criminal jurisdiction and cannot replace the criminal justice system of a state. It nevertheless is "complementary to the state's criminal justice system.[1]"

In accordance with the provision of Article 17 of the Rome Statute, complementarity of the ICC jurisdiction is mainly expressed in two conditions, under which the state's criminal justice system is either "unwilling" or "unable" to exercise its jurisdiction. In other words, the first condition is where a state which has jurisdiction

[1] M. Cherif Bassiouni. "Introduction to International Criminal Law" translated by ZHAO, Bingzhi and WANG, Wenhua. Law Press, 2006: P.422.

over a case is unwilling or unable to practically undertake investigation or prosecution. The second condition is where a state which has jurisdiction over a case decides, after investigation, not to proceed with prosecution of the person in question because the state is unwilling or unable to practically proceed with prosecution. Only under these two circumstances does a case fall under the ICC jurisdiction.

How to determine whether a domestic court is "unwilling" to exercise its jurisdiction? The Rome Statute provides that proper procedural principles recognized by international law should be upheld, and considerations with discretion be given to whether one or more of the following conditions exist:

(1) A proceeding that has been completed or is underway has been or is being carried out, or a decision has been made, to shield the concerned person and exempt that person from criminal liabilities for crimes over which the ICC has jurisdiction in accordance with the Rome Statute, Article 5.[1] (2) An undue delay occurred in the proceedings, and based on actual conditions, such delay is not consistent with the purpose of bringing the concerned person to justice. (3) A proceeding that has been completed or is underway has not been or is not being carried out in an independent or fair manner, and based on the actual conditions such manner is not consistent with the purpose of bringing the concerned person to justice. With respect to the procedure, the ICC prosecutor must first contact the chief prosecuting officer or the attorney-general of the state in question to confirm whether the state's justice system was actually unwilling to exercise its power to prosecute or to put the person to trial, or whether the exercise of such power is not credible. After confirmation, the ICC prosecutor can request the Pre-trial Chamber to transfer the judicial jurisdiction of that state to the ICC. The state in question possesses the right to participate in the decision process of ICC; it can also raise an objection to the transfer of its judicial jurisdiction. If the majority of the judges of the court affirm the necessity to transfer that state's judicial jurisdiction over a certain case to the ICC, the state then has the right to appeal to the Court of Appeal.

How to determine whether a state is actually unable to carry out investigation and prosecution, and is therefore unable to exercise its jurisdiction? In this regard, the Rome Statute holds that the ICC should consider if the state's judicial system has collapsed in total or in practice or does not exist, and therefore have no way to arrest the defendant or to obtain the necessary evidence and testimony - or is unable to carry out the domestic proceedings in other aspects. If a state's judicial system has broken down and has no way to exercise its proper jurisdiction, it falls under the condition of a state being unable to carry out actual investigation or prosecution, such as the conditions emerged after the conflict in the Cambodian region, or after the conclusion of domestic or international conflicts in Rwanda, Somalia, or the former Yugoslavia.[2]

(2) Compulsion

In accordance with the Rome Statute provisions, the preconditions to the ICC exercising its jurisdiction are: (1) one or more states involved are State Parties; (2) the defendant is a national of a State Party; (3) the crime is

[1] Article 5 of the Rome Statute: 1). The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression. 2). The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

[2] See GAO, Mingxuan, ZHAO, Bingzhi, and WANG, Xiumei. "The International Criminal Court and its Related Issues". Also, ZHAO, Bingzhi (ed.). "A Special Discussion on International Criminal Court, The People's Court Press, 2003: P.523.

committed within borders of a State Party; (4) a state, although a non-State Party, decides to accept ICC jurisdiction over a specific crime committed within its borders or by one of its nationals. Besides, the Rome Statute provides that if the United Nations Security Council, acting in accordance with Article 7 of the Charter of the United Nations Charter, tenders a situation to the Prosecutor, the abovementioned conditions need not apply. It is therefore evident that the ICC jurisdiction is in some degree self-contradictory in that it emphasizes complementarity while embodies compulsion.

The compulsion of the ICC jurisdiction is manifested in three areas. First, in accordance with Paragraph 1, Article 12 of the Rome Statute, a State Party must accept the ICC jurisdiction on a crime that falls within the ICC jurisdiction. Second, in accordance with Paragraphs 2 and 3, Article 13 as well as Article 15 of the Rome Statute, if the United Nations Security Council acts under Chapter 7 of the United Nations Charter, or the prosecutor undertakes self-initiated investigation, the state, whether a State Party or non-State Party, can be made to accept the jurisdiction of the ICC. Third, in accordance with Article 120 of the Rome Statute, no state can make reservations to the Rome Statute.

(3) Universality

Even though the Preamble and relevant articles of the Rome Statute emphasize the complementarity of the ICC jurisdiction, the text of the Statute is more an embodiment of a universal jurisdiction. For example, Paragraph 2, Article 12 of the Rome Statute provides, even if a state is not a party to the Rome Statute, nor has it filed with the Registrar a declaration of acceptance of the Court's jurisdiction, the ICC jurisdiction may still extend to this state. This is because if either the state in which the crime is committed or the state of which the accused person is a national consents, the ICC may still bring the case to trial without consent of the non-State Party or a third state. The non-State Party or a third state thereupon is made to passively accept the ICC jurisdiction and to fulfill the same obligations as the State Parties do.

(4) Evaluation of the Provisions

First, with regard to complementarity of the ICC jurisdiction, we hold that the ICC be an institution in pursuit of international cooperation and collaboration, another optional tool for resolving issues between states in the area of international criminal law, rather than a substitute for existing domestic or international institutions. At temporal and spatial levels, the exercise of ICC jurisdiction should be placed after the exercise of state jurisdiction and only when necessary can the ICC exercise its complementary jurisdiction. Analysing from the characteristics of criminal jurisdiction and its relationship with state sovereignty, the ICC should make respecting a state's sovereign rights a clear priority in order to fulfill its mandate while seeking assistance and cooperation from the states. It is therefore evident that in the relationship between the jurisdiction of the ICC and the criminal jurisdiction of the domestic court, the criminal jurisdiction of a sovereign state should have precedence over the criminal jurisdiction of the ICC; and the criminal jurisdiction of the ICC is complementary to the state criminal jurisdiction. In this regard, the Rome Statute's emphasis on the complementarity of the ICC is scientific and reasonable.

That said, we have noted that the Rome Statute's provisions of the complementary principle are not totally reasonable. For example, Paragraph 2, Article 17 of the Statute provides that when the ICC believes the

proceedings having been or being undertaken or a decision made by a domestic court have violated the spirit and purpose of the statute, or there has been an undue delay in the proceedings or as a result of which the accused person did not get a proper punishment, the ICC may override the domestic court and exercise jurisdiction over the crime. It is therefore clear that the ICC by this provision seems to be vested with the power to judge the judicial activities and rulings made by the domestic court. If this power of the ICC is not duly exercised, its complementary principle is very likely damaged and its cooperation with the domestic court is inevitably affected.[1]

Second, with regard to compulsion of the ICC jurisdiction, we reckon that from the view of resolving conflicts over jurisdiction, the compulsory principle of the ICC jurisdiction definitely plays a vital role. It is because the jurisdiction, when exercised with due compulsion, can in the highest degree prevent jurisdiction conflicts between several states and between domestic courts and the ICC. For example, in the case of Lockerbie air crash, both the US and the UK demanded that the two Libyan officials who bombed the Pan-American Flight 103 be prosecuted. Based on its law which prohibits extradition of its nationals, the Libyan government insisted that prosecution and trial be conducted within the state. The US and the UK, however, held that the Libyan government was unable to carry out effective proceedings because they firmly believe such international terrorist violence committed by those individuals was supported by their national policy and is part of the national policy; therefore, Libya does not meet the requirement for effectively prosecuting the case. It was then meaningless to let Libyan carry out the function of prosecution. Accordingly, the US and the UK persisted their demand to the Libyan government for transferring these two persons through extradition or other avenues in order that they are prosecuted in the US or the UK. At the same time, France also demanded for extradition of these two Libyans because the plane they bombed was a French UTA aircraft. The scenario of the four states contending for jurisdiction illustrates that if at the time the ICC, which possesses the compulsive jurisdiction, had been established, the dispute over jurisdiction could have been resolved more expeditiously, thereby avoiding the diplomatic tensions and potential violence that may possibly be triggered.

Of course, on the other hand, the compulsory nature of the ICC jurisdiction is actually at odds with the principle of state sovereignty. The compulsory nature of jurisdiction not only seriously encroaches on state sovereignty, but also impedes a state's implementation of its international treaty obligations based on the general principle of jurisdiction. Consequently, not only is the effectiveness of penalizing international crimes being compromised, punishment of the criminals will also be delayed or may even cause the criminals to escape legal sanction. Our concern is that this outcome defeats the original purpose of the international community in establishing the ICC.

Finally, with respect to the universality of the ICC jurisdiction, a prerequisite for the ICC to exercise its jurisdiction is that a state must ratify or sign the Rome Statute, or declare its acceptance of the ICC's jurisdiction. As a result, the Rome Statute in principle requests that non-States Parties continue to carry out its duty to punish serious international crimes within their respective national jurisdictions. This in formality does not seem to impose any obligation on Non-State Parties. However, careful examination of the provisions of the Rome Statute shows that while the Statute asks the Non-State Parties to cooperate voluntarily with the ICC, it actually asks them to accept passively the jurisdiction of the ICC[2]. It even asks the Non-State Parties to fulfill the same obligations State Parties are committed to. Obviously, the provisions of the Rome Statute actually breach the

[1] See HU, Yunteng. "A General Discussion on the Relationship between ICC and Domestic Court", from "A Special Discussion on the Internal Criminal Court," ZHAO, Bingzhi (Ed.), The People's Court Press, 2003: P.58.

[2] See provisions in Article 12, paragraph 2; Article 13, paragraph 2; and Article 15 paragraph 1 of the Rome Statute.

rule of “Treaty Relative Effectiveness” which is universally recognised and followed by the international community[1]. In this regard, Wang Guangya, head of the Chinese delegation, pointed out, “The ICC jurisdiction is not based on a voluntary acceptance by a state of the Court’s jurisdiction, but by an imposition of regulations on non-party states’ obligations, without the states’ consent. This defies the principle of a state’s sovereignty and is inconsistent with the provisions of the Vienna Convention on the Law of Treaties.”[2]

3. Role of the Prosecutor

(1) The Rome Statute Provisions on the Prosecutor’s Role

With respect to the role of the ICC Prosecutor, the Rome Statute provides that the Prosecutor possesses the following powers:

1. The Prosecutor can propose an amendment to the applicable Elements of Crimes of the ICC;

2. Based on a situation referred to the Prosecutor by a State Party which shows one or more crimes committed within the jurisdiction of the ICC and for which, the Prosecutor is requested to investigate, the Prosecutor examines and investigates to determine whether one or more specific persons should be charged with the commission of such crimes.

3. The Prosecutor can initiate an investigation based on the information related to crimes within the jurisdiction of the ICC.

4. Based on new facts or evidence subsequently uncovered at a later date, the Prosecutor can make a new request for authorization to undertake an investigation, even though the Pre-trial Chamber has refused the Prosecutor’s request for authorization to undertake investigation.

5. The Prosecutor or Deputy Prosecutor may seek the Presidents Council’s permission to withdraw from a certain case.

6. If a State is investigating, or has investigated its nationals or others within its jurisdiction, then at the request of that State, the Prosecutor shall defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation.

7. Pending the decision of a State's investigation, the Prosecutor can make a review six months after the date of deferral, or at any time when there has been a significant change of circumstances arising from the State's unwillingness or inability to actually carry out the investigation.

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[1] According to the provision on the General Rule Regarding Third States, Article 34 of United Nations Convention on the Law of Treaties signed at Vienna on 23 May, 1969, states a treaty does not create either obligations or rights for a third State without its consent. This is the principle of Treaty Relative Effectiveness.

[2] See WANG, Guangya. “Discussion on the Statute of the International Criminal Court,” published in Legal Daily, July 29, 1998, P. 4

8. The State involved or the Prosecutor may appeal to the Appeals Chamber against a ruling of the Pre-Trial Chamber in accordance with Article 82, and the appeal may be heard on an expedited basis.

9. When the Prosecutor has deferred to the State's investigation, the Prosecutor may request that the State involved informing him/her periodically of the progress of its investigations and any subsequent prosecutions. The State Parties shall respond to such requests without undue delay.

10. Pending a ruling by the Pre-Trial Chamber, or at any time when the Prosecutor has deferred an investigation under the relevant provisions, where there is a unique opportunity to obtain important evidence, or there is a significant risk that such evidence may not be subsequently available, the Prosecutor may on an exceptional basis seek authorization from the Pre-Trial Chamber to undertake necessary investigative steps for the purpose of preserving such evidence.

11. The Prosecutor may seek a ruling from the ICC regarding a question of jurisdiction or admissibility. Before the ruling is made, the Prosecutor shall suspend the investigation.

12. The Prosecutor may seek authorization from the ICC to undertake necessary steps to investigate crimes within the jurisdiction of ICC, to take a statement or testimony from a witness, or to complete the collection and examination of evidence which had begun prior to the making of the challenge, and in cooperation with the relevant States to prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest.

13. The making of a challenge by the Prosecutor shall not affect the validity of any prior act that had been performed by the Prosecutor or any order or warrant issued by the ICC prior to the making of the challenge.

14. If the ICC has decided that a case is inadmissible under Article 17, the Prosecutor, when fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under Article 17, may submit a request for a review of the said decision.

15. If the Prosecutor defers an investigation, he or she may request that the State involved make available to him or her information on the proceedings, and that information shall, at the request of the State involved, be kept confidential.

16. The Prosecutor or the Deputy Prosecutor has the right to comment on a non-appearance submission made by the accused person.

(2) Evaluation of the Provisions on the Prosecutor's Role

The provisions concerning the above-mentioned powers possessed by the Prosecutor use a subtle and discreet language stipulating certain Prosecutorial powers "may" be exercised, rather than "will" be exercised, demonstrating the subtlety about those powers. Nevertheless, we should consider these contents: (1) The Prosecutor can initiate an investigation based on relevant information of the crime within the jurisdiction of the ICC; (2) Based on new facts or evidence uncovered at a later date, the Prosecutor can make a new request for authorization to investigate a situation that the Pre-trial Chamber has previously refused the Prosecutor's request

for authorization to investigate; (3) When the Prosecutor has deferred to the State's investigation, the Prosecutor may request that the State involved periodically inform him or her of the progress of its investigations and any subsequent prosecutions. The States Parties shall respond to such requests without undue delay. It therefore seems that the above-mentioned prosecutorial powers seemed to be excessive, and this is particularly so to Non-State Parties which originally should not undertake the Rome Statute obligations but have to accept passively the ICC's jurisdiction because of accusation of the Prosecutor.

Certainly, in order to curtail excessive use of prosecutorial powers which can undermine a state's judicial sovereignty, the Rome Statute and the Rules of Procedure and Evidence impose certain restrictions on prosecutorial powers. For example, before initiating an investigation, the Prosecutor has to make a request in writing for authorization from the Pre-trial Chamber. During the investigation, the suspect and the state involved have the right to challenge the actions taken by the Prosecutor. However, while the Rome Statute provides that the Pre-trial Chamber can impose a certain restraint on the prosecutorial powers by refusing authorization for investigation, yet such refusal cannot prevent the Prosecutor from making another request for investigation of the same situation. It is therefore obvious that the Pre-trial Chamber's rein for balance on the Prosecutor is insignificant.[1] Even though the party involved in the case can challenge the actions taken by the Prosecution, in the absence of a corresponding division or provision to monitor effectively the independence and fairness in the delivery of prosecutorial duties and to impose restrictions accordingly, in practice it is difficult to stop the abuse of the ICC prosecutorial powers.

4. Issues arising from Crimes that fall under the International Criminal Court Jurisdiction

(1) The Connection between Crimes against Humanity and Armed Conflicts

During the negotiations leading to the Rome Statute, one hotly debated issue that generated widespread interests was whether crimes against humanity should be connected with armed conflicts.

Some delegations believed crimes against humanity always involves certain forms of armed conflicts; as ad hoc courts had pointed out that existing laws require general connections with certain types of armed conflicts, such as the Nuremberg Charter, Statute of the International Tribunal for the Former Yugoslavia, and so on. Even though the Statute of the International Tribunal for Rwanda handled crimes through special proceedings, customary law has not been altered[2]. Other delegations held that such requirement did not exist in customary international law. For example, there is no mention of armed conflict as an essential element in the Control Commission Act No.10, Statute of the International Tribunal for Rwanda, and other relevant legal documents, expert commentaries, and jurisprudence from the International Tribunal for the Former Yugoslavia. If the condition of armed conflict were appended to crimes against humanity, then crimes against humanity would be highly superfluous as most, if not all, of the acts or related acts of that crime are covered under War Crimes[3].

The Rome Statute has not made armed conflict an essential element of crimes against humanity in the end. The

[1] See ZENG, Lingliang. "A Historic Breakthrough in the Development of International Law: Comments on the Statute of the International Criminal Court," published in "Social Sciences in China," 1999: 2nd Issue.
[2] See WANG, Xiumei. "A Study on the International Criminal Court", Remin University Publishing House, 2002, P. 231.
[3] See Roy S. Lee (Ed.). The International Criminal Court: "Elements of Crimes" and "Rules of Procedure and Evidence," New York: Transnational Publishers, 2001: 62.

Chinese government has reservations about this, recognising that by the customary international law, crimes against humanity should occur in war or war-related periods. From the existing statutory law, some international legal documents clearly provide that “this crime is applicable to war times.” The Rome Statute removed the important standard of “war time” and instead listed out many contents from human rights laws. This runs contrary to the intention of the international community in establishing the ICC, that is, to punish the worst international crimes[1].

From the legal point of view, we believe, conceivably launching widespread or systematic attacks against civilians during war times endangers society to a far greater extent than during non-war times. Besides, the psychological impact on the international community by the former is far greater than the latter, which cannot be compared on the same levels. Therefore, removing the essential element of “armed conflict,” which is required to establish the crimes against humanity, in effect lowers the threshold to convict a core crime under the jurisdiction of the ICC. This apparently defies the purpose of establishing the ICC and sows the ills of outrageous interference with a state’s sovereignty.

(2) War Crimes and Domestic Armed Conflicts

During the negotiations for the ICC Statute, all State Parties had a consensus that war crimes be listed as a core crime within the jurisdiction of the ICC. However, dissenting opinions arose as to whether domestic armed conflicts within a state should be considered a constituting element of war crimes. As this issue relates to a state’ sovereignty, it has caused widespread concerns.

The provisions of the Rome Statute eventually affirmed a definite stand. Article 8 of the Statute specifies five types of war crimes. The first two are war crimes committed in international armed conflicts, namely, acts that outrageously violated the four Geneva Conventions of August 12, 1949 as well as other grave breaches of applicable international laws and customs. The remaining three are war crimes which involve no armed conflicts of international nature, namely, acts specified in Article 3 commonly found in all four 1949 Geneva Conventions, and in the Second Additional Protocol.

It is our view that by customary international law, war crimes are only applicable to war or international armed conflicts. Although the ad hoc international courts have made certain breakthroughs in the trial of individual cases by making war crimes applicable to domestic armed conflicts[2], they lack the universal pertinence necessary to break through customary international law. Furthermore, a state with a sound legal system is capable of penalizing war crimes committed in domestic armed conflicts. Domestic courts have obvious advantages over the ICC in penalizing this type of crime[3]. In this regard, our stand is that the interpretation of war crimes should remain consistent with the prevailing understanding under customary international law, and

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[1] See WANG, Guangya. “Discussion on the Statute of the International Criminal Court,” published in Legal Daily, July 29, 1998, p. 4

[2] For the case of TADIC, the International Tribunal for the Former Yugoslavia holds that the provision in Article 3 of the Statute of the International Tribunal for the Former Yugoslavia concerning “Violations of the Laws or Customs of War ” is applicable to not only international armed conflicts but also domestic armed conflicts.

[3] See WANG, Guangya. “Discussion on the Statute of the International Criminal Court,” published in Legal Daily, July 29, 1998, P. 4

conducts specified in Article 3 common to all four 1949 Geneva Conventions and in the Second Additional Protocol should remain under the jurisdiction of the domestic courts.

(3) On Crimes of Aggression

During the entire time of preparation and the Diplomatic Conference for the establishment of the ICC, whether or not crimes of aggression should be classified as a core crime under the ICC jurisdiction has been highly controversial. Focus of discussion was the possibility of constructing a definition for crimes of aggression which would be universally acceptable. Since it is difficult to precisely define crimes of aggression, the Rome Statute finally provides "The Court shall exercise jurisdiction over the crime of aggression once provisions are adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such provisions shall be consistent with the relevant provisions of the Charter of the United Nations."
This provision suggests that the jurisdiction of the ICC over crimes of aggression had to wait for its definition at the Review Conference, to be convened for the statute's amendments seven years after the Rome Statute had entered into force.

It is our view that it seems any future efforts in defining crimes of aggression should take the following into consideration: first, whether it is possible to consider breaking through the provision on the international administration of criminal law which holds only individuals criminally responsible. Article 25 of the Rome Statute clearly provides that the ICC exercises its jurisdiction only over natural persons, which means the ICC only pursues the criminal liability of individuals, not states or organizations. However, an analysis based on practices shows actions of aggression can never be carried out by individuals but usually with the state or an organization behind the scene. In the event when the Security Council rules that a state or an organization has carried out aggressive actions, the ICC in accordance with the Rome Statute would investigate only for evidence of aggressive crimes committed by individuals and therefore exercise jurisdiction over only that person and would not pursue criminal liabilities of a state or an organization. It seems there is contradiction in logic. Second, we should take into account fully and seriously the power of prejudgment of the Security Council on crimes of aggression. In accordance with the relevant provisions of the Charter of the United Nations, the Security Council is vested with the power of ruling on state conducts of aggression. Therefore, in the circumstance in which the Security Council has yet to rule on a situation of aggression, the ICC has no basis to initiate its jurisdiction. Finally, the relationship between the functionary duties of the Security Council and the ICC's independence must be appropriately managed. The Security Council has the power to decide whether aggressive conducts occurred and refer the situation to the ICC Prosecutor. If the ICC takes up the case, and the outcome of the trial differs from the Security Council's prejudgment, the Security Council's credibility or the ICC's dignity may be negatively impacted. Therefore, the relationship between these two institutions must be aptly managed.

5. Conclusion

As summarized above, since no consensus has been reached on the important issues discussed in this paper, China, with the consideration to safeguard its own interests, has yet to ratify or sign in for the ICC Statute. In reality, whether and when a state assents to the statute is an issue involving considerations of the state's actual conditions and a discretionary give-and-take decision. A state does not merit criticism if it chose not to join in before a concerned issue of divergent principles has reached a consensus.

However, the fact that cannot be ignored is that China does not ratify or sign the Rome Statute does not imply it can stay away from the influence of the ICC, which is an international organization of relatively high universality. The provisions of the Statute on non-State Parties cooperation render China to passively undertake obligations with regard to acceptance of the ICC jurisdiction and cooperation with the ICC. Besides, as a non-state party, China has no right to attend the state party conference or propose amendments to the many less than perfect provisions inherent of the Statute. In particular, China hardly has any direct right of say over the series of regulations concerning the operations of the ICC, as well as other significant issues that have always been major concerns of China.

In light of this, the writer believes that instead of passively accepting the ICC jurisdiction and extending our cooperation, it is better for China to sign the Rome Statute voluntarily at an appropriate time in a reasonable way to exercise our active right and to take part in the amendments of the Statute. Only by taking part in the policy making of the ICC as a State Party can China maximize its national interests through participating in “the chess game” on the international stage. This is, of course, the urge from us only as academics and the final decision must come from the government.