A Reflection on China's Approach to the Crime of Aggression

[1]Hossein Jafari Taheri
[2] Shahrooz Darbandi

Abstract

By signing and ratifying several international legal instruments, China has shown its support for the international legal system at a time when the world has not yet achieved a single legal and global order. However, in response to the International Criminal Court's Statute and its 2010 amendments, including, the definition of the Crime of Aggression, it took the opposite direction. China has argued that the Court's activities should not conflict with the provisions of the Charter of the United Nations, in particular, that it should be in coordination with the Charter of the United Nations on the definition of the crime of aggression. In this article, we intend to address China's concerns about the expansion of the Court's jurisdiction and its approach towards the definition of the crime of aggression. China claims that allegations regarding the crime of aggression are generally politically controversial. The UN Charter stipulates that the Security Council is the political body that must deal with the issue and that only by doing so will the UN be able to take its commitments in maintaining international peace and security. Therefore, the Court's intervention in such matters with political sensitivity, and prior to the Security Council's appropriate actions, is not a proper process. Moreover, the jurisdiction of the Court's Prosecutor to intervene before the Security Council's decision undermines the credibility of both institutions. This article uses a descriptive-analytical method to examine China's approach towards the definition of the crime of aggression.

Keywords:

Ad hoc Commission, China's Approach to the Crime of Aggression, Rome Statute, International Criminal Court, Security Council.

[1] Assistant Professor at Islamic Azad University, West Tehran Branch, Tehran, Iran; (hjtaheri@yahoo.com).
[2] Master student of Islamic Azad University of West Tehran; Tehran, Iran; (shzdbi@yahoo.com).

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Introduction

World War I broke out between 1914 and 1918, and which led to the killing and displacing of millions.[3] After the First World War, practical measures were taken to prosecute those accused of war crimes under the provisions of Articles 227 and 228 of the Treaty of Versailles. In the same vein, efforts have been made by the Commission on Determination and Execution of Punishments since 1919. This is because some governments have insisted that those accused of waging wars of aggression, violating treaties and moral sanctity be brought to justice. However, due to political considerations and the lack of cooperation of some governments, and legal grounds such as the principle of Nullum crimen sine lege and Nulla poena sine lege led to the release of those accused of acts of aggression, the most important of which was the German Emperor William Caesar II who fled to the Netherlands and took refuge there.[4] World War I was an event that accelerated efforts to prevent war. Millions of Combatant and civilians were killed in the fighting. Millions were knocked down by outbreaks of infectious diseases and famine.[5]

The highest degree of use of force is in war. War is the traditional name for when the armed forces of two or more governments engage in reciprocal acts of violence. In war, the nature of the armed conflict is continuous and reciprocal. But in less grave forms of the use of force, the use of force is sporadic, irregular, and in many cases unilateral, and only occasionally finds the character of an armed conflict.[6] Although the war has been used by governments for centuries as a means to an end, because of the sufferings caused by it, humans have always tried to prevent war. Consequently, the governments that used these tools have always been trying to find a justification for their actions. Hence, the concept of just or legitimate war was opposed to unjust or illegitimate war.[7]

To prevent the recurrence of these wars and the establishment of a new international system, the creation of a society that could work together to help settle their disputes peacefully was on the agenda of the Paris Conference. To this end, the Paris Conference drafted a Covenant on which the League of Nations was established. According to the Covenant, recourse to war was illegal in four cases: first, when resort to peaceful means of dispute resolution such as arbitration, judicial review, or the Council of the League of Nations had not been made[8]. Second, when less than three months have passed since the date of the arbitral award or judicial authority or the decision of the Council[9]. Third, when war has been waged against the government who has agreed with the arbitral tribunal's award or the Council's report[1] , and finally[1] , when war has been waged by non-member states against the member state.[1] The Charter of the League of Nations did not establish a clear link between war and aggression, and its greatest focus was on the war, the provision of mechanisms for the peaceful settlement of disputes, and the imposition

[3]It began after the Austro-Hungarian Empire declared war on Serbia.

[4]Musazadeh, Reza, Foroughi Nia, Hossein, "Definition of the Crime of Aggression in the light of the resolution of the Kampala Review Conference (June 2011)", Strategy Quarterly, Issue 21, summer 2102.

[5]Nasrin Mosaffa, Mostaghimi, Bahram, Dr Abdul Rahman Alam, Massoud Tarom Sari, under the supervision of Professor Dr jamshid Mumtaz, "The Concept of Aggression in International Law", Legal Journal, No. 8.

[6] R.C., Hingorani,Modern International Law, 2nd ed. New Delhi: Oxford University Press, 1982, p. 330.

[7]Terry Nardin, "The Moral Bases of the Law of War", Journal of International Affairs, Vol. 37, No.2, winter, 1984, p. 295.

[8] Article 12(1).

[9] Article 12(1).

[1] Article 13(4)

[1] Article 17(1) and (3)

[1] M.S. Mc Dougal and F.P.Feliciano, *Law and Minimum World Public Older; The Legal Regulation of International Coercion*, New Haven: Yale University Press, 1961, p.139.

of penalties against the government for violating the Covenant.[1] The next step in overcoming the flaws of the Covenant was the conclusion of the General Agreement on the Reduction of War as a tool of national policy on August 27, 1928, known as the Kellogg–Briand Treaty, or the Treaty of Paris and under this treaty, the member states formally declared that they condemned the use of war to resolve international disputes and pledged to resolve their disputes only through peaceful means. After World War II, the victorious governments sought to end impunity in international criminal law by drafting the London Charter and establishing the Nuremberg Military Tribunal and subsequently the Tokyo Charter.

Following the widespread crimes committed in Yugoslavia and Rwanda and the establishment of two special tribunals, namely the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993 and the International Criminal Tribunal for Rwanda (ICTR) in 1994 to deal with the crimes of the perpetrators and the governments' concerns about the spread of such crimes, States and the affiliated institutions to the United Nations, especially the General Assembly and the Commission on International Law, codified the Statute of the International Criminal Court in the form of resolutions and proposals during the Rome Conference in 1998.[1]

When the International Criminal Court was established under the Rome Statute in 1998, different positions on the crime of aggression were taken by representatives of different governments in different factions or individually. These positions were such that some permanent members of the Security Council, such as the United States and China, opposed the Statute of the Court. On the other hand, the British and French governments helped establish the Court and established themselves among the first member states of the Court.[1]

At the Rome Conference, due to the disagreement of the states on the definition of the crime of aggression, the jurisdiction of the Court toward that crime was subject to a decision to be taken at the Statute Review Conference.[1] The International Criminal Court started to work as the first permanent International Criminal Court on 1 July 2002. Unlike the ad hoc international criminal tribunals, including the Nuremberg and Tokyo tribunals, which have priority over national courts in dealing with crimes under their jurisdiction, the complementary jurisdiction of the International Criminal Court over the domestic courts of statutory states was accepted as a fundamental principle in the jurisdiction of the Court. Thus, ICC was granted jurisdiction over four serious crimes including genocide, war crime, crime against humanity and the crime of aggression which are applied as universal jurisdiction.[1]

The Rome Statute, as the legal basis for the establishment of the International Criminal Court, is a treaty that has attracted much attention from governments and, at first, seemed complicated due to the many different views of governments.[1] The main problem that overshadowed the issue of aggression was the issue of the conditions for the court to exercise jurisdiction over the crime of aggression, since the exercise of this jurisdiction was subject to the occurrence and prior commission of the crime of aggression by the government and the

[1] Mosaffa et al., *op. cit.*

[1] Ibid..

[1] Schabas, 2007, p.112

[1] This is because, in the Charter of the United Nations, the initial determination of territorial aggression was entrusted to the United Nations Security Council (Charter of the United Nations, Art. 39). Agreeing on the definition of this crime, which naturally moderated the initial non-exclusive competence of the Security Council to some extent. (Shayganfard, 2008: pp. 273-4)

[1] Najandimanesh, Heybatollah, Bazzar, Vahid, "The Complementarity Jurisdiction of the International Criminal Court and the Crime of Aggression, Doctrines of Criminal Law", *Razavi University of Humanities*, Vol. 14, 2017.

[1] Tahmasebi, Javad, *Jurisdiction of the International Criminal Court*, Mizan Publications, 2018.

recognition of the commission of that crime has been deposited to Security Council.[1]

The crime of aggression is fundamentally different from other crimes under the jurisdiction of the Court. Although the Court deals with acts committed by individuals, the definition of aggression is based on "the use of force by one state against the sovereignty, territorial integrity and political independence of another state"[2] ,[2] which in fact, individuals who have effective control over the military or political action of that state are prosecuted in the Court. On July 17, 1998, the Statute of the International Criminal Court was approved by 120 votes to 7, with 21 abstentions, and China was one of seven countries to vote against the Rome Statute. It appears that China adopted that policy towards the Court for a variety of reasons which are worth considering.

Based on the views of the scholars, the definition of the crime of aggression and the conditions for exercising the jurisdiction of the Court are among the complexities of the Rome Statute, and the prosecution of this crime creates challenges for the International Criminal Court.[2] This article aims to take a realistic approach to understanding China's position and to make predictions about the developments that, based on the information currently published in China[2] , the official statements[2] and the news agencies[2] and the executive of the Court may occur. This article first defines the crime of aggression and then discusses China's different policies towards different legal and political events. China's concern about expanding the Court's jurisdiction is then addressed, and China's role in defining the crime of aggression is discussed. Finally, China's challenges in Taiwan, Tibet, and East Turkestan, and especially in Xinjiang, will be studied.

1- Defining the Crime of Aggression

The crime of aggression as an international crime has legal, material and mental elements. The legal element of the crime of aggression states in accordance with paragraph 1 of Article 8 of the Statute: the crime of aggression means any plan, preparation, initiation or execution of an act of aggression. Paragraph 1 of the Elements of Crimes also provides in Annex 2 of the repeated amendments to Article 8: The perpetrator has planned, prepared, initiated and carried out an act of aggression. Aggressive acts are also acts that are repeatedly enumerated illustratively in the second part of paragraph 2 of Article 8.[2] All of the instances mentioned in

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[1] Shayganfard, Majid, "International Criminal Court and Jurisdiction of the Crime of Aggression", *Journal of the Faculty of Law and Political Science*, Vol. 38, No. 4, 2007.

[2] "Act of Aggression" means the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state….

[2] Rome Statute of the International Criminal Court 1998: Art. 8bis (2).

[2] Sheffer, David, "The Complex Crime of Aggression under the Rome Statute", *Leiden Journal of International Law*, Vol. 23, 2010, p. 897.

[2] In China, scholars and practitioners have drawn on a variety of explanations for China's opposition to ICC membership, see LIU Jianping and WANG Zhixiang, "ICC and Non-State Parties: China's Attitude Towards the ICC", in Journal of International Criminal Justice, 2005, vol. 3, pp. 608–620; and JIA Bingbing, "China and the International Criminal Court: The Current Situation", in Singapore Year Book of International Law, 2006, p. 87.

[2] WANG Guangya, "The Statute of the International Criminal Court",*Legal Daily*, 29 July, 1998.

[2] WANG Yan, "The Prospect of China and the International Criminal Court from the Perspective of Jurisdiction", *Legal System and Society*, 2008, p.48.

[2] AghaeiJanatMakan, Hossein,"Definition, Elements and Conditions of Exercising Jurisdiction of the International Criminal Court in the Crime of Aggression with a Look at the Kampala Agreement", *International Law Journal*, Journal of the Center for International Legal Affairs, Issue 28, Vol. 44, 2011.

paragraphs 1 and 2 of Article 8 are repeated in the form of a positive material act, but some believe that the commission of the crime of aggression is also possible through omission.

The US Military Tribunal also noted in the German High Command Trial[2] that in certain circumstances, omission or inaction may result in criminal liability of individuals, as does active participation. The mental element of the crime of aggression comprises intent and knowledge, and this is what Article 30 of the Statute of the International Criminal Court endorses. Some prominent international jurists also believe that the crime of aggression requires a specific intent in addition to the general intent, that is, to seize land or economic benefits or to interfere in the internal affairs of the aggrieved state.[2] However, this opinion does not seem to be correct since regardless of the cases where the aggression is legitimate, such as self-defense or use of force based on the permission of the Security Council, in other cases, as soon as the aggression occurs, the crime is committed and does not require special intent.

2. A Realist View regarding China's Different Policies towards Different Political and Legal Events

China has signed or ratified several humanitarian and human rights instruments[2] , which reflect China's overall support for the international legal system, at a time when the world has not yet achieved a single legal and global order. However, China has taken the opposite approach to the Court's Statute and its amendments in 2010 and is wary of signing multilateral treaties that require significant legal, political and cultural considerations. The essential condition for the Security Council to refer a situation to the Court is when the Council finds the present situation is a threat to the peace, breach of the peace or act of aggression (art. 39 Un Charter).[3] A review of the records in situation Darfur[3] also shows that in March 2005, formally referred the situation in Darfur to the ICC Prosecutor with reference to Article 13(b) of the Statute, China abstained in the vote on the referral resolution.[3]

The most important feature of the Security Council referral that distinguishes it from the referral by member states is that it is universal, meaning that the referral of the Security Council does not require the consent of any state, whether the state where the crime is commissioned in its territory or the national state of the perpetrator.[3] The situation in Darfur, Sudan, is the first to be referred to the Court by the Security Council. On July 3, 2009, China encouraged the UN Security Council to suspend the arrest warrant issued by the Court to detain Sudanese President

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[2] The case concerns the trial of high-ranking German commanders. See: AghaeiJanatMakan, Hossein, *the Trial of Power*, Tehran, Ganj-e-Danesh Publications, 2007, p.35.

[2] Cassese, Antonio, *International Criminal Law*, translated by Hossein Piran et al., Tehran, Jangal-e Javdane Publications, 2008, p. 140.

[2] For Instance, the 1949 Geneva Conventions, the 1966 International Covenant on Economic, Social and Cultural Rights, and the 1989 Convention on the Rights of the Child.

[3] Akande, Dapo, "The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities", *Journal of International Criminal Justice* 2009 7(2), pp. 333-352.

[3] The public and the official announcement of the prosecutor of the International Criminal Court for the arrest of Sudanese President Omar al-Bashir while Omar al-Bashir is still in power put the international community in a completely new situation.

[3] UNSC, 5158th Meeting, "Security council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court", UN Press Release SC/8351, available at http://www.un.org/News/docs/2005/sc8351.doc.htm, last accessed on 16 July 2013.

[3] AghaeiJanatMakan, Hussein, "Assessment of the Possibility of Suspension of the Situation in Darfur, Sudan by the Security Council", *International Law Journal*, Journal of the Center for International Legal Affairs, Vol. 26, No. 41, 2009.

Omar al-Bashir because "It was an inappropriate decision made at the wrong time";[3]

Universal Jurisdiction is based on customary international law and has gained widespread acceptance as a valuable tool to enable national courts to punish serious crimes committed by foreigners across borders, and of course, this jurisdiction cannot be exercised against governments or citizens of those governments. Although Article 9 of the Chinese Criminal Law[3] recognizes the universal jurisdiction, China has explicitly stated that it is unable to enforce the part of the provisions of the Statute of the Court which may authorize the Court to exercise its jurisdiction to extend to crimes without the consent of that State according to the wording stated in the law of treaties.[3] Some articles have been dedicated to the scope of the Court's jurisdiction over non-state parties. For example, Article 12 (3) allows a non-state party to confer jurisdiction on a case-by-case basis without expressing its consent to the Statute.[3]

3. China's Concern over the Extension of the Court's Jurisdiction

China also has concerns about Article 13 and procedures for extending the Court's jurisdiction over non-state parties, which give the Court the power to act on Security Council referral. This may be in conflict with the customary legal principle of the privacy of contract.

The main issues that China raised in the public debate of the 16th session of the Assembly of the International Criminal Court, citing the Rome Statute, include the following issues:

The Chinese envoy first called on the International Criminal Court to play a constructive role, emphasizing that the People's Republic of China has always pursued law-abiding efforts concerning crimes threatening international peace and security. In connection with the interpretation and application of the important rules of the International Criminal Court and impartiality in the preliminary investigation, investigation, trial and trial by China. In the end, some suggestions were made in the mentioned meeting, which was created by China to solve the problems, and we will try to examine them in the following:

First, the Court should take a balanced approach in advancing its values and policies. It is necessary for the Court to strike a balance between its two core values, namely, peace and justice. Justice should not be pursued at the expense of the peace and reconciliation process in conflict areas. At the same time, as a product of the coordination of various legal systems, the Rome Statute is an embodiment of legal pluralism. By taking into full account the approaches of various legal systems in interpreting and applying the Rome Statute, it would be conducive for the Court to ensuring the fair trial, and obtaining broader support and recognition.

Second, the Court should adhere to uniform and consistent application of the Rome Statute. The confidence of States Parties in the Court depends on the predictability and certainty in the application of the Rome Statute. It is our common expectation that the Court interprets and applies the Rome Statute in an objective and unified manner. This is the essence of the rule of law and any practice of "double standard" and "selective justice" is a contravention to it. All States Parties shall be equal before the Rome Statute. The Court is required to apply the Rome Statute equally to all States and all case parties in dealing with both situations and cases, including preliminary examination, investigation, prosecution, trial and reparation. It is also

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[3] People's Daily, "China Says ICC's Measures Should Work for Sudan's Stability" (on file with the authors).

[3] Criminal Law of the People's Republic of China, available at http://www.legal-tools.org/en/go-to-database/record/2173f3/.

[3] Supra note 4, p. 4.

[3] See Carsten Stahn et al., "The International Criminal Court's Ad Hoc Jurisdiction Revisited", *American Journal of International Law*, 2005, vol. 99, p. 422.

essential for the Court to interpret and apply the Rome Statute and other relevant rules of international law integrally in all its Chambers and all cases based on consistent jurisprudence of international criminal justice.

Third, the Court should act in accordance with law in defining the relationship between the Rome Statute and rules of general international law. The Rome Statute shows respect to the application of rules of general international law. First of all, it regards general international law as an important source of the applicable law of the Court. For instance, Article 10 of the Statute provides, "[n]othing in this part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute"; Article 21 stipulates, "[t]he Court shall apply, where appropriate, applicable treaties and the principles and rules of international law". Secondly, on the relationship between the obligations under the Rome Statute and those under general international law, the Statute emphasizes that general international law shall not be violated. For instance, Article 98 provides that the Court may not proceed with a request of cooperation of a State which would require the requested State to act in contrary to its obligations *vis-a-vis* a third state under international law or a particular treaty. It is important for the Court to strictly follow the rules set out in the Rome Statute in handling the relationship between the Rome Statute and general international law.

Regrettably, this is not the case in the past judicial practice of the Court. For instance, the Court seems to have put one-sided emphasis on the "irrelevance of official capacity" in Article 27, but ignored or erroneously interpreted and applied the rules of customary international law on the immunity of heads of State which is actually confirmed in Article 98 of the Statute. This has triggered extensive controversy. We noticed that the Court pointed out in a decision issued in July this year that no rules of customary international law could be identified to exclude the immunity of heads of State. It remains to be seen whether this is a correction of the Court's previous decisions which held that the Rome Statute precludes the rules of general international law on the immunity of heads of State. In this respect, China believes that the Assembly can consider designating it as an agenda item for discussion with a view to achieving consensus.

Fourth, the Assembly of States Parties should address the issue of the Amendment on the Crime of Aggression cautiously. For the moment, although the objective conditions for States Parties to decide on the exercise of jurisdiction over the crime of aggression have been met, the controversies triggered by the Amendment have not been settled. On the one hand, it involves the relationship between the Court and the Security Council. The exclusive power of the Security Council to determine the existence of the act of aggression is a cornerstone of the collective security system, and shall not be diminished except with an amendment to the UN Charter. The Amendment on the Crime of Aggression, which allows the Prosecutor to investigate crimes of aggression without a determination by the Security Council on the existence of the act of aggression, will practically undermine the integrity and authority of the UN Charter as the basis of the international legal order. The Court and the Security Council share responsibilities and complement each other in preventing and punishing grave crimes which threaten international peace and security. We look forward to forging a partnership featuring win-win cooperation between the Court and the Security Council based on mutual respect, which is in the interest of both sides.

On the other hand, with respect to the jurisdiction of the Court, quite a few States, including China, are of the view that, for a State that has not accepted the Amendment or is not a Party to the Rome Statute, the Court should not exercise jurisdiction over acts of aggression committed by that state's nationals or on its territory. That is requisite for international law as

"state-based consent law", and is in line with rules of international treaty law and the intention of negotiating states of the Statute and the Amendment. China has noticed that, in accordance with the resolution adopted in the last session of the Assembly of States Parties, the facilitation aiming at clarifying certain controversial issues, such as the scope of jurisdiction on the crime of aggression, was held in New York. Regrettably, in contrast to the openness and transparency of the negotiation of the Kampala Amendment, non-States Parties were excluded from the facilitation. China believes that the "activation" of the jurisdiction over the crime of aggression should be based on broad consensus. Haste does not bring success. The premature activation of the Court's exercise of jurisdiction over the crime of aggression will not be beneficial for the universality of the Statute or the authority of the Court.

Fifth, the Assembly of States Parties should ensure the right of Observer States to participate in meetings according to established rules. China has noticed that the Bureau adopted a decision in October this year, confirming the rights of Observer States to participate in the Assembly of States Parties, plenary debates, formal meetings and informal consultations held by working groups and other subsidiary bodies with the general membership. In fact, these rights have not only been written into the Rome Statute and the Rules of Procedure of the Assembly of States Parties, but also been confirmed in the decision adopted in the first session of the Assembly of States Parties. However, it has not been effectively implemented in practice. The recent decision of the Bureau should have put right the relevant practice, but it seems that it over-emphasizes the exception that the subsidiary bodies are entitled to exclude Observer States while playing down the principle that Observer States are entitled to participate in the debates, meetings and consultations.

China merely recognizes piracy as the only crime that has been unanimously recognized by states as an international crime subject to universal jurisdiction. The Criminal Law of china does not include most of the international core crimes enshrined in the Court's Statute, including the crime of aggression, genocide, and crimes against humanity. It has been argued that to punish these crimes in China would constitute a violation of the principles of *nullum crimen sine lege*, *nulla poena sine lege* ("no punishment without law") and prohibition of analogy.[3]

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3-1. Kampala Conference and China's Approach toward the Definition of Crime of Aggression

During the Kampala Conference, China, as a permanent member of the Security Council, is committed to maintaining the competence and efficiency of the Security Council. The Chinese government made a statement about its relationship with the Court long before the adoption of the 2010 amendments, stating that "the activities of the Court should not conflict with the provisions of the UN Charter, in particular [they] should be comply with the UN Charter" regarding the crime of aggression." Allegations of aggression are generally politically controversial, and the UN Charter states that the Security Council is the political body that must deal with the issue.[3]

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By applying this method, the United Nations can fulfil its responsibility to maintain international peace and security. The Court's intervention in such matters with political

[3] MA Chengyuan, "The Connotation of Universal Jurisdiction and its Application in the Criminal Law of China", in Morten Bergsmo and LING Yan (eds.), State Sovereignty and International Criminal Law, *TorkelOpsahl Academic EPublisher*, Beijing, 2012, pp. 180-189 (available at http:// www.legal-tools.org/doc/a634d0/).

[3] Ministry of Foreign Affairs of the People's Republic of China, "China and the International Criminal Court", available at http://www.fmprc.gov.cn/eng/wjb/zzjg/tyfls/tyfl/2626/2627/t15473.htm , last accessed on 16 July 2013.

sensitivity, and before the Security Council's stance on the matter, is not considered to be an appropriate process. Giving competence to the Prosecutor of the Court to interfere in the matter without regard to the decision of the Security Council jeopardizes the credibility of both institutions[4] . During the negotiations on the Court's Statute, China announced its disagreement with the power given to the prosecutor to initiate an investigation or prosecution. China claimed that this power could be exercised "without the oversight and controlling balances of unfounded criminal prosecutions"; resulting in "the right to judge and rule over the conduct of state"; A year after the Court's Statute came into force, the Chinese government stated that "the Court must exercise its duties objectively and impartially and make every effort to stay away from political biases and prevent the court to become a place for political abuse of law"[4] ; During the negotiations, the negotiators pointed to the possible abuse of power by the prosecutor's office and noted the risk that the court might be seen as a political tool.[4]

Some cultural theorists have argued that cultural differences between China and the so-called Western world will lead to a lack of understanding between them.[4] Although constitutionalism and traditional Western human rights have had a profound impact on China, this does not mean that today, especially in China, "A completely Western approach to constitutionalism and human rights has been adopted".[4] China has always been skeptical of global human rights advocacy of Western values that can be a powerful "new interventionist" tool introduced to Chinese civilization like a Trojan horse, forcing China to embrace Western values, and even be regarded as an "Economic competition tool" between the West and the East.

The Chinese government is particularly sensitive to discrimination rooted in political differences. It says the differences have become part of the interpretation of China's human rights situations. Chinese officials, theorists, and others are skeptical that the tribunal could be used as a tool to criticize the Chinese government for conducting its internal affairs according to human rights standards, regardless of whether China is obliged to those standards. Regarding the relationship of the International Criminal Court with the national tribunals, China is reluctant to establish an international organization that is superior to or replaces the National tribunals.

Although China has not vetoed the supremacy of Tribunals established by the UN Security Council over national courts, it opposes the transfer of national courts' jurisdiction to the International Criminal Court. The present article states that for the Chinese government, political considerations related to the adoption of the Statute of the Court are among the most important

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[4] The idea does not seem right because:
The Prosecutor does not act without regard to the decision of the Security Council.
According to Article 15 bis (6), Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has decided of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.
And paragraph 7:
Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.

[4] *Supra note* 17.

[4] CHAN James, "Judicial Oversight over Article 12(3) of the ICC Statute", *Torkel Opsahl Academic Epublisher*, FICHL Policy Brief Series No. 11 (2013), Oslo, 2013 (available at http://www.fichl.org/policy-brief-series/).

[4] See for example, ZHANG Xu, *International Criminal Court: A Perspective from China*, 2011, *Law Press China*; and ZHANG Lei, China *and the ICC: Status and Prospect*, Chinese People's Police University Press, 2009.

[4] Jean-Pierre Cabestan, "Constitutionalism and Western Legal Traditions in Human Rights in Asian Legal Systems: with a Special Focus on Chinese Legal Systems", in J.C. Olivia and P. Cardinal (eds.), *One Country, Two Systems, Three Legal Orders – Perspective of Evolution*, Springer Verlag, Berlin/Heidelberg,2009,p. 721.

issues related to the Statute. Legal considerations can be resolved by improving China's domestic criminal justice system, accelerating the development of legal rules, and training international legal experts in criminal law. It is claimed that the cultural considerations set out above can also easily be used to obscure the underlying facts.

3-2. Taiwan, Tibet, and Eastern Turkestan: China's Challenges

One of the core political objectives of the Chinese Government is the reunification of the country. Up until now, the Chinese Government has not excluded the use of force to resolve the Taiwan issue. Were China to become an ICC State Party, the Chinese military would face the potential risk of being criticized for committing war crimes in internal armed conflicts, which, according to the Statute, falls within the jurisdiction of the ICC. There is also the potential risk that anti-China actors would use the 'Tibet issue' to interfere in China's affairs by using the ICC. Ever since 1959, Tibetans in exile and their foreign supporters have consistently accused the Chinese Government of human rights violations in Tibet.

US Congress continues to allocate annual funds to the Tibetan exile community.[4] On 18 June 1987, the US House of Representatives adopted language concerning "China's violation of human rights in Tibet"[4] which cited without credible evidence the figure of one million Tibetan deaths from the 1950s until the 1970s and related this to the crime of genocide. Last but not least, the 'Eastern Turkestan Islamic Movement' – which has been added to the UN's list of terrorists and terrorist supporters[4] – together with other 'Eastern Turkestan' forces, has long been implementing terrorist attacks against the Chinese Government and people.[4]

Practice regrettably shows that the OTP has allowed the Court to be used as a forum for the consideration of political questions of statehood through its discretionary preliminary examination powers.[4] This is a most serious matter from the perspective of China which impacts the legitimacy of the Court. The protracted and monarchical manner in which the former ICC Prosecutor indulged in his preliminary examination of the Palestinian Article 12(3) declaration for more than three years sets a landmark precedent for how the Office might disregard legitimate state interests during the examination of such declarations as well as complaints. There is little, if anything, affected governments can do during such preliminary examination, except to wait for what may be a very long time, even when the complaint is politically motivated. The present authors fail to comprehend how the ICC Prosecutor could spend more than three years examining the Palestinian declaration.

Against this background, it is argued that if China were to become an ICC State Party, it is unrealistic to expect that anti-China actors or states fearing the rise of China would not file politically motivated complaints against Chinese individuals. By doing so, they would vest in a single ICC Prosecutor an enormous political power over China through the Prosecutor's control

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[4] H.R.2506, Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2002, available at http://www. gpo.gov/fdsys/pkg/PLAW-107publ115/pdf/PLAW-107publ115. Pdf, last accessed on 16 July 2013.

[4] H.R.2467, Human Rights Violations in Tibet by the People's Republic of China, Congressional Record, 19 May 1987, 100th Cong., 1st Sess., 133 Cong. Rec. H 3710; see GUO Yonghu, The U.S. Congress and "Tibetan Problem" in Sino-U.S. Relations, World Affairs Press, 2011, p. 75.

[4] The List Pursuant to Security Council Resolution 1390 (2002) and Paragraphs 4(B) of Resolution 1267 (1999) and 8(C) of Resolution 1333 (2000), available at http://www.dt.tesoro.it/export/sites/sitodt/modules/documenti_it/prevenzione_reati_finanziari/normativa_nazioni_unite/Resolution-1267-99-list.pdf, last accessed on 16 July 2013.

[4] See supra note 15.

[4] See supra note 20.

of all aspects of the preliminary examination process, including the timing of the process and media statements about it. Long delays in prosecutorial decision-making at the ICC would mean a prolonged period of uncertainty for China. Given the increased perception in the US of a challenge to its leadership role by a surging China, this kind of thinking is naive that such preliminary examination would not be used against China were she to become an ICC State Party in these circumstances. The ICC Prosecutor's handling of the Palestinian Article 12(3) declaration regrettably provides emphatic support for this very fear. It comes on top of the separate concerns some in China may have entertained that Article 12(3) declarations could be used by non-state entities such as Taiwan to assert political independence.[5] Although China has traditionally considered the treatment of its citizens to be the internal affairs of governments, China's emphasis on sovereignty and opposition to foreign interference cannot be considered a complete rejection of its validity of international human rights law.

3-3. Xinjiang, China's Gateway to Central Asia (Silk Road)

East Turkestan, which is rich in natural resources, has the potential to become a major industrial hub in Asia at a time when we are witnessing the revival of the Silk Road slogan. On the other hand, China's strategy shows that using Xinjiang's geostrategic position as a launching pad to establish important connections with Central Asia, and especially with South Asia.[5]

China has ethnic issues in three regions of Inner Mongolia, Tibet and Xinjiang. The problems of Tibet and Xinjiang are rooted in past decades and have become more complex.[5] The people of Tibet and Xinjiang also had independence tendencies before communist China came to power. In fact, in Tibet and Xinjiang, there exists silent turbulence seen as a fire under the ashes.[5] During the 1990s, separatist groups in Xinjiang repeatedly attacked the Chinese government. On the other hand, the existence of religious and cultural differences in disadvantaged areas such as Xinjiang and Tibet, as well as gross differences in their level of development compared with other parts of China, increase the risk of racial, religious, cultural and economic development gaps. The massive social unrest that took place in these areas was severely suppressed by the Chinese central government and much blood was shed.[5] The Chinese government's relocation of the Han people to the Xinjiang region in recent decades to change the region's population has also led to ethnic tensions.[5]

China's policy in the face of this challenge in Xinjiang was identified in five main strategies: "re-focusing economic decision-making, Han migration to the region, exploiting Xinjiang's potential resources, further economic and political ties with Central Asia, and increasing ethnic and religious minority management control".[5] In fact, the Chinese central

[5] Yael Ronen, "ICC Jurisdiction over Acts Committed in the Gaza Strip, Article 12(3) of the ICC Statute and Non-state entities", in Journal of International Criminal Justice, 2010, Vol. 8 no. 1, pp.3-27.

[5] Clarke, Michael, "China's Integration of Xinjiang with Central Asia: Securing a Silk Road to Great Power Status", *China and Eurasia Forum Quarterly*, Volume 6, No. 2, pp. 89-111.

[5] Jansiz Ahmad, Farzi Majid, "The Role of Xinjiang Muslims in the Convergence and Divergence of the Islamic Republic of Iran and China", *the First International Conference on Geopolitical Crises in the Islamic World*, November 15 and 16, 2016.

[5] Kissinger, Henry, *China*, translated by Hossein Rasi, Tehran, Contemporary Culture Publishing, 2013.

[5] VerdinejadFereydoun, AlamayifarAbolghazl, GhazizadehShahram, *the Dragon of Patience: China Yesterday, Today and Tomorrow*, Second Edition, Tehran, Information Publications, 2011.

[5] Namayeshi, Alireza, "A Study of Iran-China Relations and Recent Developments in Xinjiang Province", *Events and Analysis Monthly*, Vol. 235, 2009

[5] Clarke, Michael, "China's War on Terror in Xinjiang: Human Security and the Causes of Violent Uighur Separatism", *Terrorism and Political Violence*, Vol. 20, Issue 2 2008, pp. 271-301.

government has sought to undermine the identity and culture of Muslims through these programs and has never sought to recognize their independent identity, which has led to a stronger reaction from Muslims to extremism. The two fronts of Uyghur culture, religion and language, are carefully governed by the Chinese government, and the Chinese Communist Party has always been concerned with managing their Islamic beliefs and has pursued two soft and hard policies towards them.[5] In the aftermath of the 9/11 attacks, China sought to portray all pro-Uyghur independence organizations as radical Islamists seeking to establish a Taliban Islamic state in Xinjiang. Under the discourse of post-9/11 combatting terrorism, China has identified some of these organizations as terrorists and used them as a pretext to increase pressure on Muslims, which has provoked reactions from some Muslim countries and human rights organizations.

4. Conclusion

China is "concerned with the development of international criminal justice and supports the establishment of an independent, impartial, effective and universally recognized institution of international criminal justice as a complement to domestic legal systems to punish the most serious international crimes, advance world peace and promote judicial justice". China's future accession to the ICC depends on whether the ICC can "win trust and respect of the international community through the objective and impartial performance of its duty". These are not statements lacking context. The unprecedented number of ICC cases where the charges have not been confirmed has been withdrawn, or where the confirmation hearing has been suspended for lack of evidence, combined with the 50% acquittal rate for completed ICC trials[5] , clearly show a crisis of confidence in the ICC Office of the Prosecutor – in particular in the quality of its work on facts and evidence – also among ICC judges.

This is further aggravated by how the Office has chosen to use its powers of the preliminary examination. It is unrealistic that China becomes an ICC State Party in these circumstances. The Chinese Government – which is responsible for feeding and providing water and heating to more than 1.3 billion persons, and maintaining public services and order within its jurisdiction – will not submit itself to an individual ICC Prosecutor whose Office has displayed a will and capacity to cast shadows of incrimination over governments during protracted preliminary examinations.

In a nutshell, it's improbable for China to become an ICC State Party as long as she would risk politically motivated and unfounded interference with her self-administration at this critical stage of her development, and the ICC Office of the Prosecutor has not demonstrated its professionalism and responsible exercise of authority in preliminary examinations and investigations. Only when the Court shows a consistent record of responsible administration of international criminal justice over several successive years, should China revisit the question of accession to the ICC Statute. Until that time, the burden of proof rests on the Court and its Prosecutor.

China's definition of human rights violations appears to be much lower than the list in the Rome Statute. This conceptual difference between China and the Rome Statute includes cases of human rights that Chinese authorities consider to be normal and outside the scope of international

[5] Clarke, Michael, "China, Xinjiang and the Internationalization of the Uyghur Issue, *Global Change, Peace and Security*, Vol. 22, Issue 2.

[5] International Criminal Court, "The Court Today", available at http://www.icccpi.int/iccdocs/PIDS/publications/TheCourtTodayEng.pdf, last accessed on 16 July 2013.

proceedings, such as arbitrary detention. In the Rome talks, China tried to reduce differences of opinion by linking crimes against humanity to armed conflict, but the result was not favorable because it wanted to be a permanent member of the governing bodies of the world (holding international criminals accountable), yet refuses to expose itself to extensive and in-depth research and to bring its domestic laws into line with international human rights standards.