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THE INTERNATIONAL CRIMINAL COURT: TAIWAN'S LAST HOPE?

Christa Tzu-Hsiu Lin

Abstract: In 1989, the United Nations General Assembly began work on establishing the first-ever permanent International Criminal Court. Eight years later, the draft code for the International Criminal Court is nearing completion and establishment of the Court is proposed for 1998. The goal of the International Criminal Court is to enhance international cooperation in international criminal matters. This Comment discusses the International Criminal Court in light of China's missile tests off the coast of Taiwan. The lack of international response to the missile tests in the past demonstrates the need for an international body to intervene in this act of aggression. If the International Criminal Court is established as proposed, however, Taiwan should not depend on the Court's assistance. Rather, inherent flaws exist in the draft that will hinder any attempts to stop China's acts of aggression against Taiwan.

I. INTRODUCTION

Taiwan's continuing quest for independence and international recognition during the last ten years has created tension between Taiwan and mainland China.¹ One recent event highlights this tension: China's

¹ Beginning in the late 1920s, Chiang Kai-shek, leader of the Kuomintang (KMT), began a struggle against the Chinese Communist Party (CCP) for control of China that would last over two decades. MARC J. COHEN, *TAIWAN AT THE CROSSROADS: HUMAN RIGHTS, POLITICAL DEVELOPMENT AND SOCIAL CHANGE ON THE BEAUTIFUL ISLAND* 7 (1988). In 1949, the CCP emerged the victor and the People's Republic of China was formed. *Id.* Chiang retreated to Taiwan. *Id.*

Prior to 1942, the KMT did not express any interest in regaining control of Taiwan for China. *Id.* at 8. Ironically, Dr. Sun Yat-sen, a KMT leader, publicly proclaimed his support for Taiwan autonomy from the Japanese empire. *KMT Document 1: The KMT on Taiwan Independence, 1925, reprinted in LET TAIWAN BE TAIWAN* 45 (Marc J. Cohen and Emma Teng eds., 1990) [hereinafter *LET TAIWAN BE TAIWAN*]. The KMT statement, issued by Sun Yat-sen, stated that "we advocate the independence of the Taiwanese nationality. The Taiwan national independence movement should be united with those who are in the same situation as Taiwan." *Id.* In addition, the CCP passed at least twenty resolutions between 1928 and 1943 urging the Taiwanese to seek independence from Japan. COHEN at 8.

Until 1895, Taiwan was a Chinese territory. VICTOR H. LI, *DE-RECOGNIZING TAIWAN: THE LEGAL PROBLEMS* 8 (1977). The Treaty of Shimonoseki ended the war between China and Japan and ceded Taiwan to Japan in perpetuity and full sovereignty. *Id.* In late 1943, Roosevelt and Churchill promised to "return" Taiwan to China at the end of the war. COHEN at 8. Taiwan was eventually "returned" to China under the Shanghai Communiqué. *Id.*

Since it was originally a part of China, many Mainland Chinese view Taiwan as having been "receded" to China at the end of Second World War II. Walter J. Kendall, *A Peace Perspective on the Taiwan United Nations Membership Question*, 28 J. MARSHALL L. REV. 259, 261 (1994). The Native Taiwanese, however, view the KMT as outside governors while the KMT viewed the Taiwanese as traitors for their behavior under the Japanese. *Id.* at 261.

missile tests off the coast of Taiwan. China began these military exercises in an apparent effort to intimidate the Taiwanese people and its leaders during their elections and to discourage Taiwan from seeking a more international profile.² The first series of tests on July 21, 1995, involved six surface-to-surface ballistic missiles, firing them eighty miles north of Taiwan.³ On August 15th, China began another series of military exercises in the East China Sea, 90 miles north of Taiwan.⁴ War games continued in March of 1996, coinciding with Taiwan's first democratic presidential election.⁵

The tests created fear among the Taiwanese that China might invade or attack Taiwan.⁶ The future will undoubtedly witness more escalation between the two countries as Taiwan presses for constitutional reform.⁷ The reforms are designed to decrease the powers of the provincial government and the National Assembly.⁸

Although the United States expressed concern for Taiwan's welfare,⁹ the United States was unable to stop China's actions. Ever since the Shanghai Communique, Taiwan has been one of the most important and

The new KMT administration in Taiwan openly expressed their contempt of the Taiwanese. COHEN, at 10. The KMT embezzled public funds, seized Japanese businesses, and forced voters to swear allegiance to the Nationalist Party. *Id.* Candidates for government office were subject to KMT approval. *Id.* The Chinese imposed martial law in Taiwan 1949 and this continued up until 1987. *Id.* at 14.

² *China Conducts Military Tests North of Taiwan - Tests Seen as Intimidation Tactic*, FACTS ON FILE WORLD NEWS DIG., Sept. 14, 1995, available in 1995 WL 7733728 [hereinafter *China Conducts*]. Leading up to the 1995 elections, several international actions by the Taiwanese increased China's animosity towards Taiwan. *Id.*

³ *Id.*

⁴ *Id.*

⁵ C.K. Chang, *Taiwanese Gambling with Their Future in Presidential Election*, DEUTSCHE PRESSE-AGENTUR, Mar. 21, 1996, available in LEXIS, News Library, WORLD File.

⁶ An unidentified source was quoted as saying, "Whatever tricks the Taiwan authorities are playing, the moves to change the fact that Taiwan is a province of China will not be successful." China has vowed to invade Taiwan if it splits from China. *Taiwan Gears Up for First Democratic Presidential Election*, DEUTSCHE PRESSE-AGENTUR, Mar. 22, 1996, available in LEXIS, News Library, WORLD File.

⁷ *China-Backed Newspaper Warns of Taiwan Constitutional Reform*, DOW JONES NEWS SERV., Jan. 7, 1997, available in LEXIS, News Library, WIRES File.

⁸ *Id.*

⁹ Bill Gertz, *Chinese Military Building, Updating Missile Tests Raise Stress with Taiwan*, WASH. TIMES, Oct. 12, 1995, at A4. To the Taiwanese, the United States government's attitude toward Taiwan appears to comprise a mixture of great concern and studied indifference. THE FUTURE OF TAIWAN: A DIFFERENCE OF OPINION 2 (Victor H. Li ed., 1980). Although the United States has extensive economic contacts with Taiwan, it has often taken actions that indicate its ignorance of or callousness toward the effect of the actions on Taiwan. *Id.* The Shanghai Communique, which ceded Taiwan to China, for example, was issued twenty years after the February 28th uprising in which the Republic of China troops put down a riot in Taiwan, killing several thousand Taiwanese in the process. *Id.*

sensitive issues in China-U.S. relations.¹⁰ The United States recognized the issue's importance in 1972 as it does now. In 1972, the United States declared that "[a]ll Chinese on either side of the Taiwan Strait maintain there is but one China and that Taiwan is a part of China. The United States does not challenge that position. It reaffirms its interest in a peaceful settlement of the Taiwan question by the Chinese themselves."¹¹ As a result of this declaration, China's current hold on the United States has been described as holding the United States as "hostage" to China.¹²

The proposed United Nations International Criminal Court ("ICC") hopes to become an appropriate international body to oversee disputes between nations.¹³ The ICC's jurisdiction will extend to the crimes of genocide, aggression, serious violations of laws and customs in armed conflict, crimes against humanity, and crimes established pursuant to treaty.¹⁴ Although the idea of an ICC is a good one, as presently envisioned such a Court would be powerless to actually stop acts of aggression similar to the Taiwan missile tests.

Section II of this Comment will discuss the history of the proposed ICC and China's reaction to the proposal. Section III will analyze the current proposal, while Section IV will demonstrate the inability of the Court to protect Taiwan. In concluding, this Comment argues that even with the enactment of the ICC, Taiwan will remain unprotected from Chinese acts of aggression.

II. THE INTERNATIONAL CRIMINAL COURT

A. *Summary of Past Efforts to Develop an International Court*

Although the idea of an International Criminal Court has existed since 1474,¹⁵ only after the establishment of the International Military

¹⁰ The United States and China issued the Shanghai Communique in 1972. *The Shanghai Communique, 1972 excerpts reprinted in* LET TAIWAN BE TAIWAN, *supra* note 1, at 189-92. In reviewing long-standing disputes, China reaffirmed its position that the question of Taiwan is the "crucial question obstructing the normalization of relations between China and the United States." *Id.* at 192.

¹¹ *Id.*

¹² *Senate Foreign Relations Committee Hearing: ABM Treaty and US Ballistic Missile Defense*, FED. NEWS SERV., Sept. 26, 1996, available in LEXIS, News Library, FEDNEW File.

¹³ *Report of the International Law Commission on the Work of Its Forty-Sixth Session*, U.N. GAOR, 49th Sess., at 3, U.N. Doc. A/49/355 (1994) [hereinafter *ICC Draft*].

¹⁴ *Id.* art. 20 at 10.

¹⁵ The first *ad hoc* international criminal court was established in 1474 in Germany. M. Cherif Bassiouni, *The Time Has Come for an International Criminal Court*, 1 IND. INT'L & COMP. L. REV. 1, 1

Tribunal¹⁶ did the concept of such a court gain momentum.¹⁷ The experience with the Nuremberg tribunal revealed the effectiveness of international justice when political will and the necessary resources are available.¹⁸

The Cold War sidelined the General Assembly's work on international law and a criminal court.¹⁹ The idea of a criminal court became purely one of academic interest.²⁰ Now, for the first time in fifty years, the international community is interested in the creation of an International Criminal Court.²¹ Among the factors contributing to this renewed interest are 1) the end of the Cold War;²² 2) the establishment of ad hoc tribunals for prosecuting persons responsible for violating international humanitarian law committed in the former Yugoslavia;²³ and 3) the work of the International Law Commission which has finally produced a draft ICC statute.²⁴

In 1989, the International Law Commission ("ILC"), upon the General Assembly's request, prepared a report on establishing an

(1991). Twenty-seven judges of the Holy Roman Empire judged and condemned Peter von Hagenbach for allowing his troops to rape and kill innocent victims. *Id.*

¹⁶ The International Military Tribunal was located in Nuremberg; the Tribunal heard cases regarding war crimes committed during World War II. M. Cherif Bassiouni, *Establishing an International Criminal Court: Historical Survey*, 149 MIL. L. REV. 49, 53-55 (1995).

¹⁷ See Sandra L. Jamison, *A Permanent International Criminal Court: A Proposal that Overcomes Past Objections*, 23 DENV. J. INT'L L. & POL'Y 419, 421-28 (1995) (giving an extensive history of the International Criminal Court). Including the Nuremberg Tribunal, four ad hoc tribunals have been established in the last fifty years: the International Military Tribunal for the Far East sitting in Tokyo, the International Criminal Tribunal for the Former Yugoslavia at the Hague, and the International Tribunal for Rwanda at Arusha. Bassiouni, *supra* note 16, 51-52.

¹⁸ *Id.* at 55.

¹⁹ Amnesty International, *Establishing a Just, Fair and Effective International Criminal Court* <<http://www.io.org/amnesty>> [hereinafter *Fair and Effective Court*].

²⁰ Benjamin Civiletti, *Report on the Task Force on an International Criminal Court of the American Bar Association*, 1994 A.B.A. SEC. INT'L LAW AND PRAC. at 43.

²¹ Jelena Pejic, *The Role of International Law in the Twenty-First Century: The International Criminal Court: Issues of Law and Political Will*, 18 FORDHAM INT'L L.J. 1762 (1995).

²² *Id.* General Secretary Mikhail S. Gorbachev wrote a letter in September 1987 to the United Nations proposing a tribunal to investigate acts of international terrorism. John Quigley, *Perestroika and International Law*, 83 AM. J. INT'L L. 788, 794 (1988).

²³ Pejic, *supra* note 21, at 1762. The conflict in the former Yugoslavia provided an opportunity to advance the idea of an international criminal justice system. Bassiouni, *supra* note 16, at 56. By establishing an ad hoc tribunal, the United Nations Security Council added an important precedent to the history of international criminal law. *Id.* Unlike prior experiences, the Security Council created a continuum between the investigatory and prosecutorial aspects. *Id.*

The Security Council, upon establishing the Rwandan tribunal, reportedly reached "tribunal fatigue." *Id.* The weariness in setting up ad hoc tribunals coincided with renewed efforts for establishment of a permanent international criminal court, thus enhancing its prospects. *Id.* at 57.

²⁴ Pejic, *supra* note 21, at 1762.

international criminal court for prosecuting persons engaged in drug trafficking crimes.²⁵ Although the General Assembly received the report favorably, the General Assembly mandate was later enlarged to include not only drug trafficking but other criminal issues as well.²⁶ After producing a comprehensive report and receiving comments from the international community, the ILC drafted a revised version in 1994.²⁷

As currently envisioned, the ICC's purpose includes furthering international cooperation in international criminal matters by enhancing the "effective prosecution and suppression of crimes of international concern."²⁸ The ILC touts the ICC as a "powerful new tool to punish individuals."²⁹ The ICC is envisioned as a permanent institution to be established by treaty.³⁰

The ILC recommended that a conference and a convention be set for 1998³¹ to study the Revised Draft Statute and to establish the Court.³²

B. *China's Position on Idea of an International Criminal Court*

Historically, China considers the United Nations a tool of imperialism and its court, the International Court of Justice, as a subordinate organ.³³

²⁵ Bassiouni, *supra* note 16, at 61.

²⁶ *Id.* at 62.

²⁷ *See Report of the International Law Commission on the Work of its Forty-sixth Session*, U.N. GAOR, 49th Sess., Supp. 10 at 23, U.N. Doc. A/49/10 (1994) [hereinafter *ILC Report*]; *see also* United Nations Press Release, GA/L/2718, *Committee Discusses Feasibility of Setting Up International Criminal Court*, 5 Nov. 1991.

²⁸ *ILC Report*, *supra* note 27, at 43. The Commentary also suggests that the purpose is to provide a forum for trial and to provide appropriate punishment in the event of conviction. *Id.* at 44.

²⁹ *Fact Sheet: International Criminal Court, March 1996* <<http://www.igc.apc.org/icc/factsheet.html>> [hereinafter *ICC Fact Sheet*].

³⁰ Thalif Deen, *United Nations: North-South Split Over U.N. Criminal Court*, InterPress Serv., April 5, 1995, available in 1995 WL 2260180. The United States, however, would prefer the U.N. Security Council create ad hoc tribunals to deal with international crimes on a case-by-case basis. *Id.*

³¹ Mireille Hector, *One Step Further Towards an ICC*, ICC MONITOR, Oct. 1996 <gopher://gopher.igc.apc.org:70/00/orgs/icc/ngodocs/monitor/onestep.art>.

³² In a survey to determine the support for a 1998 conference, 94.5 percent of the government delegates either strongly supported or supported a 1998 conference. *Support for 1998 ICC Diplomatic Conference* <<http://www.igc.apc.org/icc/1998conf.html>>. Only 5.5 percent of the government delegates did not endorse a 1998 conference. *Id.* China was one of the countries opposed to a 1998 conference. *Id.* A draft of the statute was originally to be submitted to the General Assembly's 51st session. At that session, the Assembly will consider convening a plenipotentiary conference for 1997. *Resolutions and Decisions*, U.N. GAOR, 15th Sess., Supp. No. 49, at 307, U.N. Doc. A/50/49 (1995); *see also* Bassiouni, *supra* note 16, at 62-63.

³³ JEROME ALAN COHEN & HUNGDAH CHIU, *PEOPLE'S CHINA AND INTERNATIONAL LAW* 1444 (1974) [hereinafter J.A. COHEN]. China was excluded by the ICJ for over two decades. *Id.* at 1443.

Because of deep-seated ideological difference,³⁴ Communist countries generally feel that the United Nations is attempting "to use the International Court of Justice to infringe the United Nations Charter and to replace the Security Council."³⁵ China, along with other Communist countries, feels that as long as Capitalist states are in the majority and the judges at the International Court are from these countries, no assurance of impartiality exists.³⁶

The Chinese are not alone in their discomfort. In 1985, the United States announced that it would not automatically abide by the International Court of Justice's decisions.³⁷ The United States chose to withdraw from proceedings initiated by Nicaragua in the ICJ after the ICJ determined that it had jurisdiction to hear Nicaragua's claims.³⁸ The ability of Western countries, such as the United States, to ignore the ICJ's judicial decrees contributes to China's suspicions.³⁹

³⁴ R.P. ANAND, *INTERNATIONAL COURTS AND CONTEMPORARY CONFLICTS* 312 (1974); see also *China Defends Human Rights Record*, UNITED PRESS INT'L, Dec. 27, 1995. China's response to the Western countries' participation in the United Nations Human Rights Committee to sponsor an anti-China resolution has been to rebuke foreign countries for meddling in its internal affairs. *Id.* The Chinese government published "The Progress of Human Rights in China" which stated that China is "firmly opposed to the 'hegemonic acts' of 'some countries' using a double standard to judge the human rights of developing countries." For China, accusations of human rights abuses amount to interference in its internal affairs. *Id.*

³⁵ S.B. Krylov, *Pacific Settlement of International Disputes in INTERNATIONAL LAW* 396 (Academy for Sciences of the USSR Institute of State and Law 1961) quoted in ANAND, *supra* note 34, at 313. Other factors also contribute to China's lack of enthusiasm for the International Court of Justice. The ICJ suffers from insufficient understanding of the special problems of various regions and lacks sufficient knowledge of the regional systems of international law. *Id.* at 329. In addition, China's lack of representation on the bench of the ICJ contributes to China's alienation. *Id.* at 329. The above difficulties lead China to view the United Nations and all its counterparts as organizations that give preference to Western states. *Id.* at 313.

³⁶ ANAND, *supra* note 34, at 313.

³⁷ John M. Goshko, *U.S. Limits Recognition of World Court Rulings*, WASH. POST, Oct. 8, 1985, at A01. In refusing to follow the Court's decision, the State Department noted that fewer than one-third of the world's nations have accepted the court's jurisdiction. *Id.* The U.S. action in 1985 means that, among the permanent members of the United Nations Security Council, only Britain automatically abides by the court's rulings. *Id.*

³⁸ *United States: Statement on the U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the International Court of Justice*, 24 I.L.M. 246 (1985). The United States believed that the Nicaraguan build-up of Soviet arms was a conflict that could only be resolved through political and diplomatic means, not through a judicial tribunal. *Id.* at 246-47. The ICJ, according to the United States, was never intended to resolve issues of collective security and self-defense. *Id.* The United States argued that not only did the ICJ not have subject-matter jurisdiction, but the ICJ did not have jurisdiction over Nicaragua itself because Nicaragua never accepted the Court's compulsory jurisdiction. *Id.*

³⁹ LELAND GOODRICH, *CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS* 552 (1977) [hereinafter U.N. CHARTER]; Joel Cavicchia, *The Prospects for an International Criminal Court in the 1990s*, 10 DICK.J. INT'L L. 223, 244 (1992).

The Chinese government's opposition to the ICC is also due to its belief that the ICC is a U.N. tool used by foreign countries to interfere in China's internal affairs, such as jurisdiction over Taiwan.⁴⁰ China, in an address to the Ad Hoc Committee on the Establishment of an International Criminal Court, stated that allowing an international criminal court to determine whether it or national courts would exercise jurisdiction would be unfair.⁴¹ As a result, China tried to limit the scope of the ICC's jurisdiction.⁴² The official Chinese view is that the criminal court should "complement the operation of national criminal justice systems and . . . make up for imperfections in existing international systems of cooperation in matters of criminal justice, while not affect[ing] the rights enjoyed by States under those systems."⁴³ The government also believes that each country's domestic system of criminal jurisdiction should retain its positions of primary precedence.⁴⁴

Without explicit statements in the ICC draft that the ICC will not intrude upon a State's jurisdiction, countries such as China will refuse to become a party to the Court.⁴⁵ China is adamant about ending foreign interference in its internal affairs. The Court, however, is needed due to China's human rights violations.⁴⁶ The Court, more likely than not, will want to interfere in China's internal affairs.

⁴⁰ "Those who fabricate excuses to infringe upon another country's sovereignty and interfere in their internal affairs will in the end eat their own bitter fruit," [Chinese President] Jiang Zemin said. "The peaceful reunification of the two sides of the Taiwan Straits is the unshakable will and determination of the entire Chinese people, including the Taiwan compatriots, and an irresistible trend of history." *Jiang Tells U.N. China will Not Tolerate Interference*, ASIAN POL. NEWS, Oct. 24, 1995, available in 1995 WL 10592109 [hereinafter *Jiang Tells*].

⁴¹ *Ad Hoc Committee on Establishment of International Criminal Court: Weighs Question of Inherent Jurisdiction over Certain Matters*, FED. NEWS SERV., Aug. 18, 1995, available in LEXIS, News Library, FEDNEW File.

⁴² *Comments Received Pursuant to Paragraph 4 of General Assembly Resolution 49/53 on the Establishment of an International Criminal Court*, U.N. GAOR at 9, U.N. Doc. A/AC.244/1 (1995) [hereinafter *Comments Received*].

⁴³ *Id.*

⁴⁴ *Id.* at 8.

⁴⁵ *See Id.* at 8-9.

⁴⁶ *See Michael D. Greenberg, Creating an International Criminal Court*, 10 B.Y.U. INT'L L.J. 119, 142 (1992).

C. *Current Proposal*

1. *Jurisdiction*

The ICC covers crimes of genocide, aggression, serious violations of laws and customs of armed conflict, crimes against humanity and crimes established by treaties.⁴⁷ Jurisdiction over these crimes is not conferred automatically.⁴⁸ The court obtains jurisdiction over these crimes in several ways. A state may fully accept the jurisdiction of the court.⁴⁹ If a state fully accepts the jurisdiction of the Court, the state is bound to detain and arrest the person indicted.⁵⁰ The rights of the accused include all the rights guaranteed in the International Covenant on Civil and Political Rights.⁵¹ These include the presumption of innocence, the right to counsel, the right to confront one's accusers, and the right to a speedy trial.⁵²

Secondly, a state may opt-in to jurisdiction on a case-by-case basis.⁵³ Article 22 allows a state to specify the time period and subject matter for which it accepts jurisdiction.⁵⁴ A country must affirmatively choose to submit to the jurisdiction of the court.⁵⁵ If a state submits to jurisdiction selectively, the ICC's jurisdiction over that state is limited.⁵⁶

The problems with the opt-in procedure are demonstrated in China's case. In the past, China has committed violations of crimes against humanity, crimes of aggression and crimes of genocide. China, therefore, could opt out of those crimes, the very crimes that the ICC would want to hold China accountable for.⁵⁷ This approach is flawed because laws governing international crimes, by definition, must be applicable universally. Piecemeal acceptance of such a code would render the code inoperable. An ICC should be accepted in its entirety or not at all.

⁴⁷ *ICC Draft*, *supra* note 13, at 10-11.

⁴⁸ *ILC Report*, *supra* note 27, at 82. The International Law Commission believed that an opting in system best reflected the considerations of the preamble. *Id.* at 82-83.

⁴⁹ *ICC Draft*, *supra* note 13, at 11.

⁵⁰ *ICC Fact Sheet*, *supra* note 29.

⁵¹ *ILC Report*, *supra* note 27, at 115.

⁵² *Human Rights: A Compilation of International Instruments*, U.N. Doc. 1994 ST/HR/1/Rev.5 (Vol. 1/Part 1), 26. Among the other rights provided by Article 41 of the draft include the right to be informed of the charges and to examine witnesses. *ILC Draft*, *supra* note 13, at 22.

⁵³ *ICC Draft*, *supra* note 13, at 12.

⁵⁴ *ILC Report*, *supra* note 27, at 82.

⁵⁵ *ICC Draft*, *supra* note 13, at 11-12.

⁵⁶ *ICC Draft*, *supra* note 13, at 11.

⁵⁷ *Id.*

A state may also refuse jurisdiction entirely. In that case, the country's cooperation would be requested.⁵⁸ China's cooperation, however, is unlikely. If the ICC requests China's cooperation in a matter, China may view the ICC as encroaching upon its sovereignty and interfering in its internal affairs.⁵⁹

Significantly, the Security Council may initiate action even if a State does not accept the Court's jurisdiction.⁶⁰ Article 23 allows the Security Council the right to initiate matters to the Court by dispensing with the requirement that a State accept the Court's jurisdiction.⁶¹

2. *Referral Procedures for Crimes of Aggression*

The Security Council is the only body that may refer acts of aggression to the Court.⁶² Under article 23 of the draft statutes, the Security Council must "first determine that a State . . . committed the act of aggression which is the subject of the complaint" before the act can be submitted to the ICC.⁶³ No prosecution for crimes of aggression may commence until the Security Council approves the prosecution.⁶⁴ The Security Council, therefore, may effectively veto almost any state complaints in cases of alleged aggression.⁶⁵

The ICC draft is ambiguous about the Security Council's decision-making process. The proposed statutes do not explicitly state whether the Security Council must determine a referral through a decision of a majority or through a unanimous vote. Because the referral process will affect how

⁵⁸ *ILC Report, supra* note 27, at 82.

⁵⁹ *United Nations at a Glance*, REUTERS, Oct. 24, 1995.

⁶⁰ *ILC Report, supra* note 27, at 85. Article 23(1) states that "the Court has jurisdiction in accordance with this Statute with respect to crimes referred to in article 20 as a consequence of the referral of a matter to the Court by the Security Council." *Id.* at 84. Article 20 lists the crimes within the Court's jurisdiction. *ILC Draft, supra* note 13, at 10-11. If the Court exercises its power under Article 23, Article 25 does not require a complaint in order to initiate an investigation. *ICC Draft, supra* note 13, at 12-13.

⁶¹ *ICC Draft, supra* note 13, at 12.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *ILC Report, supra* note 27, at 87. The Security Council must always act in a manner that "maintain[s] or restore[s] international peace and security or in reopens to an act of aggression." *Id.* Article 23(3) provides that "No prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as . . . an act of aggression . . . unless the Security Council otherwise decides." *ILC Draft, supra* note 13, at 12. This provision has created controversy among members of the ILC. *ILC Report, supra* note 27, at 87. The provision is viewed as preventing the operation of the Statute due to political decisions in other forums. *Id.*

the ICC deals with matters of aggression, a decision must be made before the draft statutes are implemented.

Although the ICC draft is not clear, some suggestions of how the decision-making process might work can be found in the UN Charter. The Charter differentiates between voting procedures for substantive and procedural issues.⁶⁶ Assuming that an ICC referral is a substantive issue, this decision of the Security Council must have seven votes including the concurring votes of the permanent members.⁶⁷

Because China is a permanent member of the Security Council,⁶⁸ China has the absolute ability to veto substantive proposals.⁶⁹ If the Security Council must decide unanimously, then all the permanent members are assured that human rights violations occurring in their country will never be referred to the ICC without their approval. The Security Council is a political body, and as such, will not necessarily use its powers to refer all situations that pose a threat or breach of peace or an act of aggression, even if the crimes occur within a member's jurisdiction.

III. THE ICC WILL BE UNABLE TO ADEQUATELY PROTECT TAIWAN

The preceding discussion of the ICC's structural aspects already indicates a number of ways that the ICC may fail to protect Taiwan. First, China could veto referral of the act of aggression. Second, China could decide not to accept jurisdiction on issues regarding Taiwan. In addition to these procedural loopholes, three other problems with the use of the ICC to protect Taiwan exist. These include the definition of aggression, the Chinese legal system, and extradition.

⁶⁶ U.N. CHARTER, *supra* note 39, at 125. Article 27 of the Charter and Provisional Rules of Procedure of the Council states: 1) Each member of the Security Council shall have one vote; 2) Decisions of the Security Council on procedural matters shall be made by an affirmative vote of seven members; 3) Decisions of the Security Council on all other matters shall be made by an affirmative vote of seven members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting. *Id.*

⁶⁷ *Id.*

⁶⁸ U.N. CHARTER, *supra* note 39, at 117. The other permanent members of the Security Council include the United States, U.S.S.R., Britain and France. *Id.*

⁶⁹ *Id.* at 125.

A. *Definition of Crime of Aggression Does Not Include China's Acts Against Taiwan*

1. *Definition is Too Vague and Narrow*

Although aggression is considered one of the most serious crimes by the international community,⁷⁰ no generally accepted definition of aggression for the purpose of determining individual criminal responsibility exists among the delegates of the U.N.⁷¹ The U.N. Charter, the Nuremberg Tribunal Charter, the Tokyo Tribunal Charter, and General Assembly resolution 3314 of 14 December 1974 all provide differing definitions of aggression.⁷²

Some delegates to the U.N. suggested that planning, preparing and initiating a war of aggression should be included within the definition of aggression.⁷³ Article 5(2) of General Assembly resolution 3314 of 14 December 1974, on the other hand, defines aggression as "a crime against international peace."⁷⁴

Before the ICC proposals are implemented, the definition of a "crime of aggression" must be concrete.⁷⁵ Without a concrete definition, the Security Council will have unbridled power to define the crime of aggression. China's military exercises off the coast of Taiwan in 1996⁷⁶ demonstrates the need for a sufficiently broad definition of aggression. The definition of aggression as preliminarily defined as "a crime against

⁷⁰ *United Nations Report of the Preparatory Committee on the Establishment of an International Criminal Court: Proceedings of the Preparatory Committee during March-April and August 1996 vol.1*, U.N. GAOR, 51st Sess., Supp. No. 22, at 18, U.N. Doc. A/51/22 (1996) [hereinafter *Preparatory Committee Report*].

⁷¹ Many reasons exist for the difficulty in defining aggression. *Id.* at 18. One of the reasons is the lack of precedent for individual criminal responsibility for acts of aggression. *Id.* Another reason is the involvement of political and factual issues, such as territorial claims, that are inappropriate for the Court's jurisdiction. *Id.* The lack of inclusion of the crime of aggression may also be due to the belief that States will struggle for political influence among each other. *Id.*

⁷² *Id.* at 19.

⁷³ *United Nations Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, U.N. GAOR, 50th Sess., Supp.No. 21, at 13, U.N. Doc. A/50/22 (1995). [hereinafter *Ad Hoc Report*]. Other definitions include those taken from international declarations. The Friendly Relations Declaration defines "A war of aggression constitut[ing] a crime against the peace, for which there is responsibility under international law." *ILC Report, supra* note 27, at 73.

⁷⁴ *Id.*

⁷⁵ Benjamin B. Ferencz, *An International Criminal Code and Court: Where They Stand and Where They're Going*, 30 COLUM. J. TRANSNAT'L L. 375 (1992). For 50 years, nations have been unable to agree upon the definition of aggression. It was easier to commit aggression than to define it. *Id.*

⁷⁶ *China Conducts, supra* note 2.

international peace"⁷⁷ would not include China's actions against Taiwan as an act of aggression in China's mind. Article 3 includes "wanton destruction of cities, towns, or villages, or devastation not justified by military necessity; . . . attack, or bombardment, by whatever means of undefended towns, villages, dwelling, or buildings" as an act of aggression.⁷⁸ China's missiles never landed on a city, town or village. Rather, China deployed its missiles in water at least eighty miles from the coast of Taiwan.⁷⁹

2. *Definition Does Not Distinguish Between Internal and External Affairs*

The current definition of aggression is a crime against international peace and, therefore, refers only to external acts. The draft codes assume that crimes of aggression occur between countries. Another proposed definition of aggression is an act committed by an individual who, as leader or organizer, is involved in the use of armed force by a State against the territorial integrity or political independence of another State.⁸⁰ Again, this proposal does not take into account crimes which may occur within a country's own borders.

The internal/external application is critical because China considers the question of Taiwan's status as purely an internal affair of China in which no country has the right to meddle or interfere.⁸¹ According to China's vice premier and foreign minister Qian Qichen, the issue of Taiwan can only be resolved by the Chinese people themselves.⁸² China characterizes the issue of Taiwan as Taiwan being a part of China because there is only one China in the world.⁸³ As such, the government of the

⁷⁷ *ILC Report*, *supra* note 27, at 73.

⁷⁸ *Id.*

⁷⁹ *China Conducts*, *supra* note 2.

⁸⁰ *Preparatory Committee Report*, *supra* note 70, at 13. Again, this proposal does not take into account crimes which may occur within a country's own borders. *Id.*

⁸¹ China's Constitution describes Taiwan as the "part of the sacred territory of the People's Republic of China. It is the lofty duty of the entire Chinese people, including our compatriots in Taiwan, to accomplish the great task of reunifying the motherland." P.R.C. CONST. preamble.

⁸² *Taiwan Issue Can Only be Solved by Chinese People*, XINHUA NEWS AGENCY, July 25, 1996, available in LEXIS, News Library, WORLD File.

⁸³ TAIWAN AFFAIRS OFFICE AND INFORMATION OFFICE, STATE COUNCIL, PEOPLE'S REPUBLIC OF CHINA, TAIWAN WENTI YU ZHONGGO TONGYI [THE TAIWAN QUESTION AND THE REUNIFICATION OF CHINA], translation reprinted in JOHN F. COOPER, WORDS ACROSS THE TAIWAN STRAIT: A CRITIQUE OF BEIJING'S "WHITE PAPER" ON CHINA'S REUNIFICATION 74-78 (1995). One of President Jiang Zemin of the People's Republic of China's Eight Points included "Adherence to the principle of one China." *Id.* at ii.

People's Republic of China is the only legitimate government representing all China.⁸⁴

Although the Chinese Government is attempting to unify the nation through peaceful means,⁸⁵ it has made no pledge to give up the use of force.⁸⁶ Instead, China reserves the power to use force against foreign interference in China's unification.⁸⁷ Assumedly, China will probably use force not only against Taiwan but against any country that came to Taiwan's aid.

On the other hand, the Taiwanese government considers itself as separate from the People's Republic of China.⁸⁸ However, the official Taiwanese government view is that there is only one China, and the government opposes "one China, one Taiwan" or "two Chinas."⁸⁹ One of the Taiwanese government's goals is to "emphasize the survival and development of the Republic of China and make the Chinese Communists recognize its right to existence."⁹⁰ Although President Lee Teng-hui stated in the past that he is not seeking independence from China,⁹¹ his actions have angered China.⁹² President Lee's demands for more international

⁸⁴ *Id.*

⁸⁵ In President Jiang Zemin's Eight Points, the fourth point was that "We should strive the peaceful reunification of the motherland since Chinese should not fight Chinese." *Id.* at iii.

⁸⁶ President Zemin would use force against "the schemes of foreign forces to interfere with China's reunification and to bring about the 'independence of Taiwan.'" *Id.*; see also *China Warns Taiwan on Independence Move, Threatens Force*, WASH. POST, Jan. 31, 1996, available in LEXIS, News Library, WPOST File.

⁸⁷ *Id.* If China were to use force, however, a slight possibility exists that the United States may cease recognition of China. Under the Taiwan Relations Act, the "United States decision to establish diplomatic relations with the People's Republic of China rests upon the expectation that the future of Taiwan will be determined by peaceful means." The Taiwan Relations Act, 22 U.S.C. § 3301(b) (1997) [hereinafter TRA].

⁸⁸ "The ROC government believes that China, as it is traditionally defined, is currently divided into two political entities: a free and democratic Taiwan, and mainland China which practices a socialist system." RELATIONS ACROSS THE TAIWAN STRAITS, MAINLAND AFFAIRS COUNCIL: THE EXECUTIVE YUAN, REPUBLIC OF CHINA 1994, reprinted in COOPER, *supra* note 83, at 96.

⁸⁹ *Id.*

⁹⁰ *Taiwan Premier Stresses Need to Build Up Defense Power*, AGENE FRANCE PRESSE, Apr. 2, 1996, available in LEXIS, News Library, NON-US File.

⁹¹ *Taiwan Leaders Urge Calm*, UNITED PRESS INT'L, Mar. 11, 1996, available in LEXIS, News Library, NON-US File.

⁹² Andrew Quinn, *Taiwan's Lee Braves New China Blast Over U.S. Visit*, REUTERS, June 9, 1995, available in LEXIS, News Library, NON-US File. President Lee's trip to Cornell is viewed by Taiwan officials as opening the door for even more overseas visits by President Lee, such as at the U.S.-R.O.C. Economic Council. *Id.* As expected, President Lee's visit to his alma mater Cornell University angered the Chinese. *Taiwan Ready for China's Threats*, UNITED PRESS INT'L, Feb. 23, 1996, available in LEXIS, News Library, NON-US File.

recognition for Taiwan⁹³ symbolize the growing sense in Taiwan and in the Kuomintang that Taiwan should distance itself from China.⁹⁴

No consensus exists within Taiwan as to the proper relationship between China, the mainlanders on Taiwan, and the Taiwanese. During the 1996 elections, Peng Ming-min, presidential candidate of the Democratic Progressive Party, stated that Taiwan is not a part of China and advocated independence from China.⁹⁵ When China began the missiles test, 20,000 Taiwanese marched to denounce the tests, rallying in support of the Taiwanese people.⁹⁶ Despite these fledging efforts at independence, Taiwan is still considered a part of China by the rest of the world and, thus, these aggressive actions would be considered "internal."⁹⁷ The lesson to be learned from the missile tests is that, if China is conducting routine missile attacks within its own country, then most countries will be reluctant to interfere in its internal affairs.

3. *Response from United States*

With the Shanghai Communique of 1972, the United States recognized the People's Republic of China as the official China. The Taiwan Relations Act ("TRA") continued "unofficial" relations with Taiwan after the People's Republic of China was recognized.⁹⁸ Under the TRA, the United States is obliged to provide adequate means to defend

⁹³ Quinn, *supra* note 92. See generally Cheri Attix, *Between the Devil and the Deep Blue Sea: Are Taiwan's Trading Partners Implying Recognition of Taiwanese Statehood?*, 25 CAL. W. INT'L L.J. 357 (1995).

⁹⁴ JAUSHIEH JOSEPH WU, TAIWAN'S DEMOCRATIZATION: FORCES BEHIND THE NEW MOMENTUM 163 (1995).

⁹⁵ William Kazer, *Taiwan President Appeals for Confidence, Votes*, REUTERS, Mar. 10, 1996, available in LEXIS, News Library, NON-US File. The Democratic Progressive Party believes that the future of Taiwan should be determined by its people. *April 1988 DPP Resolution on Self-Determination in LET TAIWAN BE TAIWAN*, *supra* note 1, at 99. Taiwan is a sovereign, independent entity and will seek independence if the "KMT sells out the interests of the people of Taiwan, if China attempts to take over Taiwan, or if the KMT fails to implement genuine political reform." *Id.*

⁹⁶ *Chinese Nuclear Tests Spark Taiwan Protests*, ASSOCIATED PRESS, Aug. 21, 1995. In Taipei, demonstrators chanted, "We are Taiwanese, we are not Chinese." *Id.*

⁹⁷ LET TAIWAN BE TAIWAN, *supra* note 1, at 118-25. On October 25, 1971, the United Nations Resolution 2758 recognized the People's Republic of China as the legitimate representatives of China to the United Nations and expelled Chiang Kai-shek's representatives. *Id.*

⁹⁸ Executive Order No. 12143 provides for maintaining unofficial relations with the people on Taiwan. Exec. Order No. 12143, 44 Fed. Reg. 37,191 (1979). The Executive Order also recognizes the People's Republic of China as the sole legal government of China. *Id.* See also Lori Fidler Damrosch, *The Taiwan Relations Act After Ten Years*, OCCASIONAL PAPERS/REPRINTS SERIES IN CONTEMP. ASIAN STUD. 1990, at 4.

Taiwan against outside aggression.⁹⁹ The TRA is neutral as to Taiwan's ultimate status, neither endorsing nor precluding eventual reunification or separation of Taiwan with the PRC.¹⁰⁰

Despite the fledgling efforts at independence, for all intents and purposes, Taiwan is still a part of China and thus, aggressive actions would be considered internal. An implemented ICC, therefore, is unlikely to be of any help to Taiwan until the external/internal issue is resolved.

B. *No Legal Concept of State Crimes in China*

There is also confusion in the draft statutes as to whether a charge of aggression should only be made against States or against individuals.¹⁰¹ The draft codes for the Commission envision that the Security Council will refer only "matters," not just individuals.¹⁰² This means that the Security Council may refer an act of aggression, but not the aggressors. Some members of the ILC, for example, believed that not every act of aggression was a crime under international law that would give rise to individual responsibility.¹⁰³ The members based this belief on the terms of article 5(2) of General Assembly resolution 3314, which states that "aggression is a crime against international peace. Aggression gives rise to international responsibility."¹⁰⁴ The members viewed the resolution as casting doubt as to whether aggression was a crime committed inter-state or by individuals.¹⁰⁵

⁹⁹ 22 U.S.C. § 3302 (1997). The Taiwan Relations Act provides for the United States to respond to threats to Taiwan's security or social and economic system and any danger to the United States' interest arising from it. 22 U.S.C. § 3302(c). The TRA was enacted to help maintain peace and security in the Western Pacific as well as to promote the United State's foreign policy of commercial, cultural, and other relations between the United States and Taiwan. 22 U.S.C. § 3301(a). The TRA also authorizes the United State to provide Taiwan with "arms of a defensive character." 22 U.S.C. § 3301(b)(5).

¹⁰⁰ Damrosch, *supra* note 98, at 25.

¹⁰¹ *ILC Report*, *supra* note 27, at 85. The United States, for example, expressed concern that "individuals will be prosecuted for actions that are essentially the responsibility of States and about which international law has not adequately defined the elements of offensive conduct." *Comments Received Pursuant to Paragraph 4 of General Assembly Resolution 49/53 on the Establishment of an International Criminal Court*, U.N. GAOR, U.N. Doc. A/AC.244/1/Add.2,12 (1995).

¹⁰² *Id.* The Prosecutor determines which individuals are charged once a matter is referred by the Security Council. *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 73.

¹⁰⁵ *Id.* Article 23(1), which provides for action by the Security Council, is specific to referring matters. *ILC Draft*, *supra* note 13, at 12.

In China, the "state crime" does not exist as a contemporary legal concept.¹⁰⁶ In the view of the Chinese, the ICC is intended to apply to individuals only, not the state.¹⁰⁷ Current and past systems of international justice focus on individuals. The Nuremberg and Tokyo military tribunals were directed at individuals.¹⁰⁸ Similarly, the international tribunals for the former Yugoslavia and Rwanda were established to deal with individuals responsible for crimes of aggression, genocide, and war crimes, rather than "state crimes."¹⁰⁹

The draft code, however, does not account for these differences in interpretation. The only area where the draft codes recognize differences in interpretation is with Article 3, the applicable law section. The draft statutes call for the Court to apply the Statute of the Court, applicable treaties and principles of general international law, and *to the extent applicable, any rule of national law*.¹¹⁰ Since national law differs from country to country, similarity in treatment of the accused is not assured. In addition, the Court appears to have the discretion to determine when exactly a rule of national law applies to an accused.

China's representative He Qizhi believes that China would have difficulty transplanting "the concept of crime in criminal law to the realm of state responsibility."¹¹¹ For China, a "state alone is entitled to punish criminals and a state itself can never be subject to any punishment."¹¹² For the Chinese, the concept of the ICC is inherently flawed because no supra-national judicial organ should exist with power greater than that of the sovereign states.¹¹³ Even if such an organ were to exist, it would be impossible to apply penal law among equal sovereign entities.¹¹⁴

Creating a new organization will not affect China's perception of Western law. China continues to believe that international tribunals are products of capitalist manipulation.¹¹⁵ In addition, China believes that

¹⁰⁶ *China Expresses Views on State Responsibility*, XINHUA NEWS AGENCY, Oct. 17, 1995, available in LEXIS, News Library, NON-US File [hereinafter *China Expresses*].

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* For China, the state is the only party responsible for compensating the damages caused by the individuals. *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *ICC Draft*, *supra* note 13, at 17.

¹¹¹ *China Expresses*, *supra* note 106.

¹¹² *Id.*

¹¹³ Wang Yao-t'ien, *Kuo-chi mao-t'iao-yueh ho hsieh-ting* (International trade treaties and agreements; Peking, 1958) 14, in J.A. Cohen, *supra* note 33, at 1206.

¹¹⁴ *Id.*

¹¹⁵ J.A. Cohen, *supra* note 33, at 80.

United Nations resolutions are merely recommendations and not binding upon member countries.¹¹⁶

C. *Extradition Issues*

For the Court to work in China, China must willingly consent to participate. Even if prosecution by the ICC were of the individual and not the state, China could still resist the extradition powers of the ICC. The draft codes do not deal directly with extraditing accused persons. The only provision in the ICC which addresses this issue is article 52, entitled Provisional Measures.¹¹⁷ The Provisional Measures call for a State to arrest a suspect provisionally, seize documents or other evidence, or prevent injury to or the intimidation of a witness.¹¹⁸

The Chinese government will only reluctantly relinquish its control over its own citizens. In its comments to the draft statute, the Chinese government stated that the "state should still enjoy the option of choosing whether or not to . . . allow the competent authorities of that State to initiate prosecution . . . and [to] extradite the accused to the requesting country."¹¹⁹ In other words, the Chinese government suggested that the state with custody over an accused, the state where the crime occurred, and the states which have the right to request extradition of the suspect must give their consent for extradition to the ICC.¹²⁰

The difficulty of achieving personal jurisdiction over the individual is exacerbated by political realities within the state where the suspect committed the crime. Political pressure may force the government to try the individual in that state. In addition, if the state has previously not accepted the Court's jurisdiction, it is unlikely that it will surrender the suspect pursuant to article 53(2)(c), which provides for transferring the accused to the Court.¹²¹ Achieving personal jurisdiction of a suspect, therefore, is only possible if all the States who are party to the ICC cooperate.

¹¹⁶ *Id.* at 81.

¹¹⁷ *ICC Draft, supra* note 13, at 25-26.

¹¹⁸ *Id.*

¹¹⁹ *Comments Received, supra* note 42, at 11.

¹²⁰ *Civiletti, supra* note 20, at 14.

¹²¹ *ICC Draft, supra* note 13, at 26-27. Procedurally, the Registrar requests the cooperation of the State in arresting the accused. *Id.* Upon receipt of the request, the State is to take immediate steps to arrest and transfer the accused to the Court. *Id.* A State has the option of filing with the Court within forty-five days of receiving the request an application that the request be set aside. *Id.*

IV. CONCLUSION

Inherent flaws in the current draft make the Court an unworkable and unenforceable idea. The ICC, as currently envisioned, would be powerless to stop any of China's future acts of aggression. No mechanism exists within the draft to force a country to submit to the Court's jurisdiction. China's past reaction to the Court indicates that it will be reluctant to become a full participant in the Court. In the unlikely event that China submits to the Court's jurisdiction, China and the United States both view Taiwan as an internal problem and, consequently, the ICC may be reluctant to intervene. If the ICC does intervene, China also has the power to refuse to extradite its citizens to the court. Taiwan, therefore, should not depend on the ICC for intervention on its behalf.