THE INTERNATIONAL CRIMINAL COURT: TAIWAN'S LAST HOPE?

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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

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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. The first series of tests on July 21, 1995, involved six surface-to-surface ballistic missiles, firing them eighty miles north of Taiwan. On August 15th, China began another series of military exercises in the East China Sea, 90 miles north of Taiwan. War games continued in March of 1996, coinciding with Taiwan’s first democratic presidential election.

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

Although the United States expressed concern for Taiwan’s welfare, the United States was unable to stop China’s actions. Ever since the Shanghai Communique, Taiwan has been one of the most important and
sensitive issues in China-U.S. relations. 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.” 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.

The proposed United Nations International Criminal Court (“ICC”) hopes to become an appropriate international body to oversee disputes between nations. 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. 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, only after the establishment of the International Military
Tribunal did the concept of such a court gain momentum. The experience with the Nuremberg tribunal revealed the effectiveness of international justice when political will and the necessary resources are available. The Cold War sidelined the General Assembly's work on international law and a criminal court. The idea of a criminal court became purely one of academic interest. Now, for the first time in fifty years, the international community is interested in the creation of an International Criminal Court. Among the factors contributing to this renewed interest are 1) the end of the Cold War; 2) the establishment of ad hoc tribunals for prosecuting persons responsible for violating international humanitarian law committed in the former Yugoslavia; and 3) the work of the International Law Commission which has finally produced a draft ICC statute.

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

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(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.*


18 *Id.* at 55.


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.\textsuperscript{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.\textsuperscript{26} After producing a comprehensive report and receiving comments from the international community, the ILC drafted a revised version in 1994.\textsuperscript{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.”\textsuperscript{28} The ILC touts the ICC as a “powerful new tool to punish individuals.”\textsuperscript{29} The ICC is envisioned as a permanent institution to be established by treaty.\textsuperscript{30}

The ILC recommended that a conference and a convention be set for 1998\textsuperscript{31} to study the Revised Draft Statute and to establish the Court.\textsuperscript{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.\textsuperscript{33}

\textsuperscript{25} Bassiouni, supra note 16, at 61.

\textsuperscript{26} Id. at 62.


\textsuperscript{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.

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

\textsuperscript{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.


\textsuperscript{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, 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." 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.

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. 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. The ability of Western countries, such as the United States, to ignore the ICJ's judicial decrees contributes to China's suspicions.

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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.

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. 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. As a result, China tried to limit the scope of the ICC's jurisdiction. 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." The government also believes that each country's domestic system of criminal jurisdiction should retain its positions of primary precedence.

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. China is adamant about ending foreign interference in its internal affairs. The Court, however, is needed due to China's human rights violations. The Court, more likely than not, will want to interfere in China's internal affairs.
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. Jurisdiction over these crimes is not conferred automatically. The court obtains jurisdiction over these crimes in several ways. A state may fully accept the jurisdiction of the court. If a state fully accepts the jurisdiction of the Court, the state is bound to detain and arrest the person indicted. The rights of the accused include all the rights guaranteed in the International Covenant on Civil and Political Rights. These include the presumption of innocence, the right to counsel, the right to confront one's accusers, and the right to a speedy trial.

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

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. 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. I/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. 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.

Significantly, the Security Council may initiate action even if a State does not accept the Court’s jurisdiction. 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.

2. **Referral Procedures for Crimes of Aggression**

The Security Council is the only body that may refer acts of aggression to the Court. 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. No prosecution for crimes of aggression may commence until the Security Council approves the prosecution. The Security Council, therefore, may effectively veto almost any state complaints in cases of alleged aggression.

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
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. 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.

Because China is a permanent member of the Security Council, China has the absolute ability to veto substantive proposals. 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.

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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

I. Definition is Too Vague and Narrow

Although aggression is considered one of the most serious crimes by the international community,\(^7\) no generally accepted definition of aggression for the purpose of determining individual criminal responsibility exists among the delegates of the U.N.\(^7\) 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.\(^7\)

Some delegates to the U.N. suggested that planning, preparing and initiating a war of aggression should be included within the definition of aggression.\(^7\) Article 5(2) of General Assembly resolution 3314 of 14 December 1974, on the other hand, defines aggression as “a crime against international peace.”\(^7\)

Before the ICC proposals are implemented, the definition of a “crime of aggression” must be concrete.\(^7\) 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 1996\(^7\) demonstrates the need for a sufficiently broad definition of aggression. The definition of aggression as preliminarily defined as “a crime against

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\(^7\) 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.

\(^7\) Id. at 19.


\(^7\) Id.

\(^7\) 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.

\(^7\) China Conducts, supra note 2.
international peace” 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 or aggression. 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.

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. 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. According to China’s vice premier and foreign minister Qian Qichen, the issue of Taiwan can only be resolved by the Chinese people themselves. China characterizes the issue of Taiwan as Taiwan being a part of China because there is only one China in the world. 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.
People's Republic of China is the only legitimate government representing all China.\(^4\)

Although the Chinese Government is attempting to unify the nation through peaceful means,\(^5\) it has made no pledge to give up the use of force.\(^6\) Instead, China reserves the power to use force against foreign interference in China's unification.\(^7\) 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.\(^8\) However, the official Taiwanese government view is that there is only one China, and the government opposes "one China, one Taiwan" or "two Chinas."\(^9\) 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."\(^10\) Although President Lee Teng-hui stated in the past that he is not seeking independence from China,\(^11\) his actions have angered China.\(^12\) President Lee's demands for more international

\(^{4}\) Id.

\(^{5}\) 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.

\(^{6}\) 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.

\(^{7}\) 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].

\(^{8}\) "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.

\(^{9}\) Id.


\(^{12}\) 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 Taiwan symbolize the growing sense in Taiwan and in the Kuomintang that Taiwan should distance itself from China.

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. When China began the missiles test, 20,000 Taiwanese marched to denounce the tests, rallying in support of the Taiwanese people. Despite these fledgling 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." 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. Under the TRA, the United States is obliged to provide adequate means to defend

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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 Nation 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 Fisler Damrosch, The Taiwan Relations Act After Ten Years, OCCASIONAL PAPERS/REPRINTS SERIES IN CONTEM. ASIAN STUD. 1990, at 4.
Taiwan against outside aggression.\textsuperscript{99} The TRA is neutral as to Taiwan’s ultimate status, neither endorsing nor precluding eventual reunification or separation of Taiwan with the PRC.\textsuperscript{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.

\textbf{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.\textsuperscript{101} The draft codes for the Commission envision that the Security Council will refer only “matters,” not just individuals.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{104} The members viewed the resolution as casting doubt as to whether aggression was a crime committed inter-state or by individuals.\textsuperscript{105}

\textsuperscript{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).

\textsuperscript{100} Damrosch, supra note 98, at 25.

\textsuperscript{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).

\textsuperscript{102} Id. The Prosecutor determines which individuals are charged once a matter is referred by the Security Council. Id.

\textsuperscript{103} Id.

\textsuperscript{104} Id. at 73.

\textsuperscript{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. In the view of the Chinese, the ICC is intended to apply to individuals only, not the state. Current and past systems of international justice focus on individuals. The Nuremberg and Tokyo military tribunals were directed at individuals. 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.”

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. 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.” For China, a “state alone is entitled to punish criminals and a state itself can never be subject to any punishment.” For the Chinese, the concept of the ICC is inherently flawed because no supranational judicial organ should exist with power greater than that of the sovereign states. Even if such an organ were to exist, it would be impossible to apply penal law among equal sovereign entities.

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. In addition, China believes that


\[107\] 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 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.\textsuperscript{116}

\section*{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 \textit{Provisional Measures}.\textsuperscript{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.\textsuperscript{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."\textsuperscript{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.\textsuperscript{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.\textsuperscript{121} Achieving personal jurisdiction of a suspect, therefore, is only possible if all the States who are party to the ICC cooperate.

\textsuperscript{116} Id. at 81.
\textsuperscript{117} ICC Draft, supra note 13, at 25-26.
\textsuperscript{118} Id.
\textsuperscript{119} Comments Received, supra note 42, at 11.
\textsuperscript{120} Civiletti, supra note 20, at 14.
\textsuperscript{121} ICC Draft, supra note 13, at 26-27. Procedurally, the Registrar requests the cooperation of the State in arresting the accused. \textit{Id.} Upon receipt of the request, the State is to take immediate steps to arrest and transfer the accused to the Court. \textit{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. \textit{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.