Chapter 12
Expectation of Prosecuting the Crimes of Genocide in China

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12.1 Introduction

Genocide is one of the most heinous crimes in human history and under international law. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide (hereafter the "Genocide Convention") for the first time gave a clear definition of the crime.[1] The Genocide Convention imposes obligations on every State party to enact domestic legislation to "give effect to the provisions" of the Convention.[2] The International Court of Justice (ICJ) has constantly observed in its case law that punishing genocide is an obligation *erga omnes*[3]; State practice has further confirmed the existence of universal jurisdiction over the crime.

Until only a few years ago China appeared to be far from prosecuting serious crimes under international law, but has since decided to discuss the possibility of preventing and punishing international crimes, including the crime of genocide. Though China is a party to the Genocide Convention, no domestic legislation on the crime of genocide exists. There is no provision incorporating genocide into Chinese criminal law. While there is

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[1] A survey of the critical articles in the Genocide Convention is undertaken in Francis M. Deng, Chapter 4, Section 4.2 (above).

[2] *Convention on the Prevention and Punishment of the Crime of Genocide*, art.6, Office of the High Commissioner for Human Rights, January 12, 1951.

[3] *Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide*, *Advisory Opinion*, International Criminal Court, 1951 I.C.J. 15 (May 28, 1951), 23; *Barcelona Traction*, *Light and Power Company*, *Limited (Belgian* v. *Spain);* Second Phase, International Court of Justice (ICJ) (February 5, 1970), paras. 33–34, http://www.unhcr.org/refworld/docid/4040aec74.htm (Accessed June 13, 2009); *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *(Bosnia-Herzegovina v. Yugoslavia) (Preliminary Objection*), International Court of Justice Report (July 11, 1996), para. 31, http://www.un.org/law/icjsum/9625.htm (Accessed June 13, 2009).

R. Provost, P. Akhavan (eds.), *Confronting Genocide*, Ius Gentium: Comparative Perspectives on Law and Justice 7, DOI 10.1007/978-90-481-9840-5_12,

no question that a State's domestic legislation is within its sovereign power, the current situation of the world today means that individual States are more closely related to each other than ever. As a result, the development of international criminal law has an effect on every State in the world, including China.

States are increasingly being faced by practical challenges as a result of the development of international criminal law: the introduction of universal jurisdiction over international crimes like genocide; the establishment of the International Criminal Court (ICC); as well as the ICC's special mechanisms and jurisdiction over State parties and non-State parties.[4] As increasingly more States sign on to the ICC and establish domestic legislation for prosecuting the most serious international crimes, the trend for preventing and punishing international crimes becomes ever more prevalent. China is faced with a practical need to catch up with this trend and contribute to the international effort of combating international crimes, including genocide. After examining the crime of genocide under current international law and introducing the legal framework in China, this article argues that it is both necessary and possible for China to legislate on the issue.

12.2 Genocide Under International Criminal Law

Examples of the brutal act of genocide are not rare in human history.[5] Yet only after World War II did it become a separate crime under international law. The Nuremberg International Military Tribunal was the first to charge and try the act of genocide as a crime against humanity. The Genocide Convention of 1948 distinguished genocide as a crime in its own right and provided the first clear definition of the crime.[6,7] Later, genocide was included in the Statutes of the two Security Council ad hoc tribunals, the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), as well as in the Rome Statute of the ICC.[8] *Akayesu* became the first case in which an

[4]The establishment and role of the ICC are discussed in Luis Moreno-Ocampo, Chapter 16 (below).

[5]See Joshua M. Kagan, "The Obligation to Use Force to Stop Acts of Genocide: An Overview of Legal Precedents, Customary Norms, and State Responsibility." *San Diego International Law Journal* 7, No. 461, 462.

[6]Antonio Cassese, *International Law*, 2nd ed. (New York: Oxford University Press, 2005), 443.

[7]A survey of the critical articles in the Genocide Convention is undertaken in Francis M. Deng, Chapter 4, Section 4.2 (above).

[8]*Statute of the International Tribunal for the former Yugoslavia*, art. 4., adopted by United Nations Security Council Res. 827, (May 25, 1993), http://www.un.org/icty/legaldoc-e/index.htm (Accessed June 14, 2009); *Statute of the International Criminal Tribunal for Rwanda*, art. 2, 2007, http://www.ictr.org/ENGLISH/basicdocs/statute.

international tribunal was called upon to interpret the meaning of genocide as defined in the Genocide Convention.[9,10]

Genocide has been viewed as one of the most heinous crimes in human history and described as the "crime of crimes" by the Rwanda Tribunal.[11] The ICJ has declared that genocide is a crime that "shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations."[12] The extremely severe nature of the crime warrants its status as a crime under customary international law. What is more, the punishment of genocide has even been recognized as an *erga omnes* obligation of every State, thus giving rise to universal jurisdiction over the crime.

12.2.1 Genocide as a Crime Under Customary Law

The customary nature of the prevention and punishment of the crime of genocide is uncontroversial.[13] In its 1951 Advisory Opinion concerning the Reservation of the Genocide Convention (hereafter the "1951 Opinion"), the ICJ observed that "the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation."[14] This was a clear confirmation of the customary nature of the underlying principles of the Genocide Convention which obliges States to give effect to the Convention through legislation in order to prevent and punish genocide and related acts, such as conspiracy to commit genocide.[15] State practice has been affirmed, not only by the 104 States that have incorporated the crime into domestic

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html?sess=24cff403f7d1ae05a8c4a3bef2c7b8d (Accessed June 13, 2009); *Rome Statute of the International Criminal Court*, arts. 5–6 (July 1, 2002), http://www.un.org/children/conflict/keydocuments/english/romestatuteofthe7.html (Accessed June 14, 2009).

[9]*The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T (September 2, 1998), http://69.94.11.53/ENGLISH/cases/Akayesu/judgement/akay001.htm (Accessed June 15, 2009).

[10]The contribution of the *Akayesu* case is higlighted in Francis M. Deng, Chapter 4, Section 4.2 (above) and Irwin Cotler, Chapter 9, Section 9.2 (above).

[11]*Prosecutor v. Niyitegaka*, *Case No. ICTR-96-14-A*, (Jul. 9, 2004), 53; see also *Prosecutor v. Stakic*, Case No. IT-97-24-T, Judgment (Jul. 31, 2003), 502.

[12]*Reservation to the Genocide Convention*, 1951, 23.

[13]See *Attorney General of Israel v. Eichmann* (1961), 36 I.L.R. 18, 39 (Dist. Ct.); *Attorney General of Israel v. Eichmann* (1962), 36 I.L.R. 277, 36 ILR 18 (Supreme Ct.), and William A. Schabas, "Genocide, Crimes Against Humanity, and Darfur: the Commission of Inquiry's Findings on Genocide," in *Cardozo Law Review* 27, No. 4 (February 2006): 1703.

[14]*Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide*, *Advisory Opinion*, International Criminal Court, 1951 I.C.J. 15 (May 28, 1951), 23.

[15]*Genocide Convention*, Article 1, 3, 5, 1951.

legislation,[16] but also by a resolution adopted by the General Assembly in 2005. The *Outcome Document* of the United Nations summit declares that "each individual state has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity."[17] It is without doubt therefore that the crime of genocide has a solid basis in customary international law.

12.2.2 Punishing Genocide as a Jus Cogens *Rule*

A *jus cogens* rule is binding upon all States: they can neither derogate from such a rule nor contract out of their obligations under it.[18] *Jus cogens* is situated at the top of the normative hierarchy of international legal principles. Article 53 of the 1969 Vienna Convention on the Law of Treaties, for the first time in history, equivalently confirmed the legal effect of a *jus cogens* rule.[19] In the 1951 Opinion, before the creation of the Vienna Convention, the ICJ explicitly recognized the condemnation of genocide as a *jus cogens* rule. The Court opined that both the "condemnation of genocide" and "the co-operation required" for its punishment are of "universal character."[20] About 20 years later, in the *Barcelona Traction* case, the ICJ made it clear that "the outlawing of acts . . . of genocide" was an obligation *erga omnes*.[21] The Court asserted this once again in its 1996 judgment of the Genocide Convention case by observing that "the rights and obligations enshrined in the Convention are rights and obligations *erga omnes*."[22] While there is no consensus as to which rules are subject to *jus cogens*, outlawing and punishing genocide has been held as one of "the least controversial examples of a" *jus cogens* rule.[23]

12.2.3 Universal Jurisdiction

The *jus cogens* nature of outlawing genocide makes it the responsibility of every State to prevent and punish the crime of genocide, and gives basis

[16] Prevent Genocide International, "Implementing the Genocide Convention in Domestic Law," http://preventgenocide.org/law/domestic/ (Accessed July 14, 2009).

[17] United Nations General Assembly, *2005 World Summit Outcome*, UN Doc. A/60/L.1 (September 15, 2005), 31, para. 138.

[18] Ian Brownlie, *Principles of Public International Law*, 6th ed. (New York: Oxford University Press, 2003), 489.

[19] Dinah Shelton, "Normative Hierarchy in International Law," in *American Journal of International Law* 100 (2006): 291, 300.

[20] *Reservation to the Genocide Convention*, 1951, 23.

[21] *Barcelona Traction*, *1970*, paras. 33–34.

[22] *Case Concerning Application of the Genocide Convention*, 1996, 616, para. 31.

[23] Brownlie, *Principles*, 2003, 488–490.

to the argument that States have universal jurisdiction over the crime. The Genocide Convention itself does not contain an *aut dedere aut judicare* provision like many other conventions on international crimes. Article 6 of the Convention provides two fora in which to try persons charged with the crimes contained therein. Firstly, it details that a "competent tribunal of the State in the territory of which the act was committed" can take jurisdiction or, secondly, that an "international penal tribunal" may have jurisdiction where the Contracting Parties have accepted its jurisdiction. Therefore, to examine the issue of universal jurisdiction over genocide, two questions should be answered: first, is Article 6 an exhaustive enumeration of jurisdiction? Second, can a State prosecute genocide based on universal jurisdiction under customary law?

Article 31 of the Vienna Convention on the Law of Treaties details the general rules for the interpretation of a treaty that has been recognized as part of customary international law.[24] It establishes that, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." As seen above, Article 6 of the Genocide Convention only provides two means by which to prosecute perpetrators of genocide. However, it cannot be inferred that this is the only meaning to be taken exclusively from the ordinary meaning of the text. Considering that the purpose and object of the Convention is to "liberate mankind from such an odious scourge" as genocide,[25] it is therefore obvious that the General Assembly and the drafters of the Convention intended for genocide to be punished as effectively as possible. Bearing this in mind, it is hard to conceive that the Convention meant to limit the jurisdiction to only the two fora indicated.

Furthermore, Article 31 of the Vienna Convention has set out other elements that should be "taken into account" when interpreting a treaty, including "any application of the treaty." The International Court of Justice, in its 1951 Advisory Opinion, as well as in its judgment on the Genocide Convention case, has consistently asserted the view that genocide is a crime under customary international law, and that every State is obliged to outlaw and punish genocide, even without a conventional basis.[26] State practice also supports this. For example, Spain's National Court, when examining the extradition application for Pinochet, observed that Article 6

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[24] *Territorial Dispute (Libyan Arab Jamahiririya/Chad)*, *International Court of Justice Reports 1994*, 6, para. 41; *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgement, International Court of Justice Reports 1996, 803, para. 23; *Kasikili/Sedudu Island (Botswana/Namibia)*, *International Court of Justice Reports 1999*, 1045, para. 18.

[25] *Genocide Convention*, preamble, 1951.

[26] *Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide*, *Advisory Opinion*, International Criminal Court, 1951 I.C.J. 15 (May 28, 1951), 23.

of the Convention does not place a limitation upon the jurisdiction of State parties; instead, it only sets out an obligation for the State in whose territory the crime took place to take action to punish the crime.[27] The legal effect of Article 6 is that it gives priority to the two fora enumerated therein in terms of exercising jurisdiction. However, where these two fora do not or cannot take action, other States are not precluded from asserting universal jurisdiction.[28]

Since the Genocide Convention itself does not place a limitation on the jurisdiction, it is also possible that universal jurisdiction over the crime of genocide may be exercised based on customary law as a State is free to exercise its sovereign rights unless there is a prohibitive rule forbidding it.[29] In 2001, Belgium took the lead in becoming the first country to domestically prosecute genocide as four Rwandans were prosecuted for their crimes committed during the 1994 Rwandan genocide.[30] In the aforementioned *Pinochet* case, the Spanish National Court ruled that Spain could exercise universal jurisdiction over Pinochet for possible acts of genocide.[31] Furthermore, during the Rome Conference, the delegation of Germany expressed the view that States had a legitimate basis under international law to assert universal jurisdiction over the crimes listed in Article 5 of the Rome Statute, which included genocide.[32] It was declared that the crime of genocide was so serious that it is deemed to be committed not only against victims but against the whole of mankind. Therefore, the gravity of the crime warranted that no perpetrators of genocide should be allowed to escape from punishment. As a result, there should be no jurisdictional vacuum for the perpetrators of such a crime to escape to and hide.

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[27] *In Re Pinochet*, *Spanish National Court*, Criminal Division (Plenary Session) Case 19/97, November 4, 1998; Case 1/98, November 5, 1998; Genocide Convention, 1951, art. 6.

[28] Maria Del Carmen Marquez Carrassco and Jaquin Alcaide Fernandez, *In re Pinochet*: *Spanish National Court*, *Criminal Division (Plenary Session)*. Case 19/97, November 4, 1998; Case 1/98, November 5, 1998, (1999) 93 A.J.I.L. 690, at 693.

[29] *SS Lotus Case (France v. Turkey)* (1927), P.C.I.J. Series A, No. 10.

[30] Linda Keller, *Belgian Jury to Decide Case Concerning Rwandan Genocide*, in American Society of International Law (May 2001), http://www.asil.org/insights/insigh72.htm, (Accessed June 16, 2008); Wenqi Zhu, *The Trigger Mechanism of the International Criminal Court and the Reaction of USA*, Henan Social Science 11, No. 5 (September 2003): 66.

[31] Maria Del Carmen Marquez Carrassco and Jaquin Alcaide Fernandez, *supra* note 19, at 693.

[32] Sharon A. Willianms, in Otto Triffterer, eds., *Commentary on the Rome Statute of the International Criminal Court*, article 12, (Germany, Nomos Verlagsgesellschaft, Baden-Baden, 1999): 332–334.

12.3 Legal Framework in China

Chinese criminal law offers a glimmer of hope in the prosecution of genocide. Article 9 of the Chinese Criminal Code reads: "For crimes stipulated in the international conventions which the People's Republic of China concluded or acceded to, if the People's Republic of China exercised criminal jurisdiction within the scope of its obligations under the conventions, the present law applies." According to this provision, it seems possible that China can exercise criminal jurisdiction over international crimes in situations where it has become a party to the relevant international convention. China signed the Genocide Convention in 1949 and ratified it in 1983.[33] Therefore, where an action of genocide has been committed on Chinese territory, China bears the obligation to exercise jurisdiction over persons charged with those crimes.[34]

China has also shown an active attitude towards the application of the Convention and the efforts to punish genocide. Four days before China resumed its exercise of sovereignty over Hong Kong and 3 days before resuming sovereignty over Macau, the Chinese government sent notification of the depositary of the Genocide Convention and notified the UN that the Convention would be applicable in these two areas.[35]

However, according to the principle of *nullum crimen sine lege*, there can be no crime committed, and no punishment imposed, without a violation of the penal law as it exists at the time. Fortunately, Article 3 of Chinese Criminal Code reflects this principle, which reads as follows: "For acts that are explicitly defined as criminal acts in law, the offenders shall be convicted and punished in accordance with law; otherwise, they shall not be convicted or punished." However, there is no "law" in China criminalizing the act of genocide.[36] The fact that "genocide" is not an independent crime under Chinese criminal law, and therefore has not been specifically defined, seems to result in, according to Article 3, the conclusion that the acts of genocide cannot be convicted or punished under the charge of "genocide." Instead, they may constitute other lesser crimes, such as murder or rape, but these acts cannot be prosecuted and punished as genocide.

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[33] *Status of the Convention on the Prevention and Punishment of the Crime of Genocide* (October 9, 2001), http://www.unhchr.ch/html/menu3/b/treaty1gen.htm (Accessed June 14, 2009).

[34] *Genocide Convention*, 1951, art. 6.

[35] *Status of the Genocide Convention*, 2001.

[36] The Criminal Code of China was enacted in 1979 and amended in 1999. It has 6 amendments. There is no provision in the Criminal Code and its amendments dealing with the crime of genocide.

12.4 The Necessity and Possibility of Chinese Legislation on Genocide

From the above analysis it can be seen that there still exist some doubts and difficulties for prosecuting genocide in China. Without specific provisions in the criminal law, or any specific legislation on the prosecution and punishment of genocide, it is not clear whether Article 9 of the Criminal Code can serve as a basis for prosecution. Even if proceedings are brought under Article 9, the court will encounter practical problems, such as defining the elements of the crime and determining the appropriate sentence. China needs to legislate on the crime of genocide. This is a necessary step in fulfilling China's obligation to punish the crime of genocide under both the Genocide Convention and customary international law, and also in addressing the practical needs posed by developments of international criminal law, as discussed further below.

12.4.1 Obligation Under the Genocide Convention

Every State party to a treaty bears the obligation to perform the treaty in good faith.[37] Article 5 of the Genocide Convention requires every contracting party "to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III."[38] The Convention imposes obligations on every State party to establish jurisdiction over the crime of genocide in the case where the act was committed on the territory of the State.[39] As a party to the Genocide Convention, China is legally obliged to enact legislation on the crime of genocide, to lay down specific procedures for the prosecution and investigation of the crime, and to "provide effective penalties" for the perpetrators.

12.4.2 The Influence of the International Criminal Court

The establishment of the International Criminal Court is of great significance for the development of international criminal law, and has a substantial impact on every State, whether or not they are parties to the

[37]Vienna Convention on the Law of Treaties, art. 26, United Nations, *Treaty Series*, vol. 1155 (May 23, 1969), 331.

[38]*Genocide Convention*, 1951, art. 5.

[39]Ibid, art. 6.

Rome Statute.[40] The ICC contains particularly unique mechanisms for triggering proceedings and for both exercising jurisdiction over non-State parties as well as ensuring that State sovereignty is preserved. Though not yet a party to the Rome Statute, China is faced with the practical need to perfect its domestic criminal legislation under the influence of the ICC's special mechanisms.

The jurisdiction of the ICC is limited to the most serious international crimes of concern to the international community as a whole: the crime of genocide, crimes against humanity, war crimes and the crime of aggression.[41] Under Article 12, the Court's jurisdiction may be exercised in three ways: if the national of a State party to the Statute has committed a crime; if the crime has occurred on the territory of a State party; or if a non-State party has accepted the Court's jurisdiction. The Court has jurisdiction, however, over all cases referred to it by the Security Council.[42] There are also three trigger mechanisms for the Court's jurisdiction, namely (i) a State party refers a case to the Prosecutor; (ii) the UN Security Council refers a case to the Prosecutor under Chapter VII of the UN *Charter*; or (iii) the Prosecutor himself or herself initiates an investigation on the basis of relevant material.[43]

This therefore means two things. Firstly, the Security Council can play an important role in triggering proceedings before the ICC. Secondly, citizens of a non-State party or who have committed crimes in the territory of a non-State party may be tried by the ICC without the State's consent. Both of these implications will be considered in turn. While it is without doubt that they pose challenges to State sovereignty, a fundamental provision is contained within the Rome Statute which guarantees the priority of domestic jurisdiction and balances State sovereignty against the needs to effectively punish international crimes: the principle of complementarity.

12.4.3 Influential Role of the Security Council

When the UN Security Council refers a case to the Court for investigation and prosecution, it specifically involves UN member states. In other words, it entails the obligation to cooperate by both State parties and States not party to the ICC. The authority of the UN Security Council is derived from the UN *Charter*. By virtue of Article 25 of the UN *Charter*, all decisions made by the UN Security Council are binding upon all UN member

[40]The impact of the ICC on international criminal law is discussed in Luis Moreno-Ocampo, Chapter 16 (below).

[41]*Rome Statute*, 2002, art. 5.

[42]*Rome Statute*, 2002 art. 12.

[43]*Rome Statute*, articles 13–15.

states. Consequently, when the UN Security Council refers a case to the ICC which it deems to be related to the maintenance of peace and security, it can oblige all UN member states to co-operate in the Court's process of investigating that case. There is already one case that demonstrates the influential role of the UN Security Council on the ICC and of its requests for co-operation with the Court.

In view of the war crimes and crimes against humanity that had occurred in the Darfur region of Sudan, the International Commission of Inquiry submitted a report to the UN Secretary-General on 25th January 2005. In the report, the Commission recommended that the Security Council refer the situation in Darfur to the ICC, because "the Sudanese judicial system is incapable and the Sudanese government is unwilling to try the crimes that occurred in the Darfur region and to require the perpetrators to assume the accountability for their crimes."[44]

After receiving the report, the UN Security Council, acting under Chapter VII of the UN *Charter*, adopted Resolution 1593 on 31 March 2005, in which it decided to "refer the situation in Darfur since 1 July 2002 to the ICC Prosecutor."[45,46] The Security Council further decided and declared that:

> the Government of Sudan and all other parties to the conflict in Darfur shall co-operate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to co-operate fully.[47]

The adoption of Resolution 1593 concerning the situation in Darfur was the first case in which the Security Council triggered the ICC's investigation mechanism in accordance with Article 13(b) of the Statute. It is also the first case in which a non-State party to the Rome Statute has been subjected to the ICC's jurisdiction. Though it has expressed opposition to the Security Council resolution,[48] Sudan, as a UN member State, has no choice but to abide by the provisions of the UN *Charter* and obey the Security Council resolution by co-operating with the Court. The statement in Resolution 1593 that "the Government of Sudan and all other parties to the conflict in Darfur shall co-operate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution"

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[44] International Commission of Inquiry on Darfur, "Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General," in pursuance with the United Nations Security Council Res. 1564, (September 18, 2004), January 25, 2005, http://www.un.org/News/dh/sudan/com_inq_darfur.pdf (Accessed June 15, 2008).

[45] United Nations Security Council, Res. 1593, (March 31, 2005), para. 2.

[46] The ICC's treatment of the Darfur situation is examined in Catherine Lu, Chapter 18, Sections 18.1 and 18.2 (below) and Luis Moreno-Ocampo, Chapter 16 (below).

[47] Ibid, para. 2.

[48] Beijing Evening News, 1 April 2005, p. 8.

clearly shows that all non-State parties, including Sudan, must co-operate with and assist the ICC accordingly.

While it is certainly true that a Security Council resolution could not require States like China or the US to cooperate without their own consent, given the fact that they have veto powers as permanent members of the Council, these States can still be persuaded to cooperate though somewhat implicitly. Resolution 1593 was adopted by a vote of 11 in favor, none against, and four abstentions.[49] Surprisingly, China and the US decided to abstain, rather than block the adoption of the resolution. This is despite the fact that neither of them has agreed to the ICC's jurisdiction and that both have somewhat differing opinions from the majority consensus on whether crimes have been committed in Darfur.[50] Such an example serves to demonstrate that China is, to a certain extent, still involved in the triggering of proceedings before the Court, despite its non-party status.

12.4.4 Challenge to the Principle of Pacta Tertiis Nec Nocent Nec Prosunt

The aforementioned trigger mechanism and conditions for exercising jurisdiction, however, pose a challenge to a traditional principle of treaty law. Article 35 of the 1969 Vienna Convention clearly provides that "an obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing." Also, Article 34 clearly details that a treaty does not create either obligations or rights for a third state without its consent. This is one of the general principles of treaty law.

However, the current jurisdictional powers of the ICC potentially contravene this principle. It is possible that a non-State party that has not accepted the ICC's jurisdiction may be involved in proceedings before the ICC. This is because it is sufficient to trigger the jurisdiction of the ICC if either the territorial State or the national State of the accused is a State party to the Rome Statute or has accepted the ICC's jurisdiction by special declaration. As a result, if the territorial State has accepted the jurisdiction of the ICC, then a citizen of a non-State party may be prosecuted for crimes he committed in that State. Or, if the national State of the accused has accepted the ICC's jurisdiction, he may then be tried for crimes that have taken place in the territory of a non-party State. Thus, the Rome

[49] United Nations Security Council, Res. 1593, 2005, para. 2.

[50] The impact of economic interests on China's position *vis-à-vis* Darfur is addressed in Yehuda Bauer, Chapter 7, Sections 7.1 and 7.3 (above) and Richard J. Goldstone, Chapter 11, Section 11.4 (above).

Statute has practically influenced the rights and obligations of non-State parties without their consent. Furthermore, for cases referred to the ICC by the Security Council, there are no conditions attached to the exercise of jurisdiction. Again however, this may not have much impact on States like China or the US who could veto any proposition that concerned them.

This potential legal contravention raised much concern both in the process of negotiating the Rome Statute and after its adoption. The US delegation to the Rome Conference, for example, argued that Article 12 of the Rome Statute is a deviation from Article 34 of the 1969 Vienna Convention and contrary to recognized principles of international law. The US was among the group of States that took the view that except for the situations referred to the Court by the Security Council, the Court cannot assert jurisdiction over non-State parties without their consent.[51]

Setting aside the question of whether Article 12 violates a general principle of treaty law, it is enough to point out that the Rome Statute has come into force and the ICC has been functioning somewhat successfully. Therefore, no matter what opinion a State holds, it is of no doubt that every State in the world is influenced by the Rome Statute and is faced with the possibility of becoming involved in the proceedings before the ICC even if it is not a State party. China can choose not to accede to the Rome Statute but it cannot avoid the possibility that its citizens or those responsible for crimes committed within its own territory could be tried at the ICC at some point.

12.4.5 The Principle of Complementarity

The ICC determines that a case is inadmissible where the case is being investigated or prosecuted by a State which has jurisdiction over it, or where the person concerned has already been tried for conduct which is the subject of the complaint.[52] If either of these conditions are met, then a trial by the ICC is not permitted under Article 17 of the Statute. The ICC can only assert jurisdiction over a crime when it has been established that the State who has jurisdiction is unwilling or unable to investigate and prosecute the alleged crime.[53] This is known as the principle of complementarity. This principle was the result of a difficult compromise reached after intense multinational negotiations. It relieved the majority of States

[51] Sharon A. Williams, *Commentary on the Rome Statute of the International Criminal Court*, article 12, in ed. Otto Triffterer (Germany: Nomos Verlagsgesellschaft, Baden-Baden, 1999), 336–338.

[52] *Rome Statute*, 2002, articles 1 and 17.

[53] Ibid, art. 17(1)(a).

from the concern that the Court might infringe State sovereignty and thus serves as a cornerstone of the Rome Statute.[54]

In accordance with the principle of complementary any State concerned may challenge the jurisdiction of the ICC. In the aforementioned Sudan situation, Sudan could oppose the investigation and prosecution of the ICC so long as it can prove that it is actually willing and able to exercise jurisdiction in accordance with Article 17. This is unlikely however as the UN Security Council adopted Resolution 1593 on the premise of having determined that the Sudanese legal system was unable to genuinely investigate or prosecute and the Sudanese government was unwilling to try the crimes committed. Therefore, for States who prefer to try the accused in their own courts, it is important to prove their willingness and ability to do so, and to conduct the investigation and prosecution in accordance with their own domestic criminal law.

Paragraph 2 of Article 17 of the Rome Statute, which deals with the issues of admissibility, lists three situations under which unwillingness can be determined, and paragraph 3 deals with inability. The requirement, in brief, is that the State with jurisdiction must investigate or prosecute the accused "genuinely," or in other words, in good faith. It is not explicitly detailed that the accused should be investigated and/or prosecuted for the core crimes listed in Article 5 of the Statute. It seems enough for the case to be rendered inadmissible before the ICC if domestic criminal proceedings have started in good faith and the perpetrator is tried under any kind of criminal charge in accordance with domestic criminal law. In the case of China, the fact that there is no criminal legislation dealing with genocide may not per se affect the proof of willingness and ability.

However, possible loopholes still exist because of the special nature of the crime of genocide, considering its extreme gravity and the "special intent" requirement. Due to the fact that genocide is such a grave crime, some acts like incitement may amount to a charge of genocide while not constituting other crimes generally.[55,56] The special intent required for genocide – destroying a group in whole or in part – transforms acts that may otherwise constitute murder, intentional injury, rape, etc. into the crime of genocide.[57] Without specific provisions dealing with genocide in domestic criminal law, it may be difficult to effectively investigate and prosecute the

[54] Williams, *Commentary*, 1999, 385–392.

[55] *Rome Statute*, 2002, art. 25(e); *Genocide Convention*, 1951, art. 3; *Statute of the ICTY*, 1997, art. 4(3); *Statute of the ICTR*, 2007, art. 2(3).

[56] A discussion of what constitutes incitement is provided in Irwin Cotler, Chapter 9, Section 9.2 (above).

[57] The difficulty in meeting Genocide Convention criteria particularly in relation to intent is addressed in Gérard Prunier, Chapter 3, Section 3.1 (above) and Francis M. Deng, Chapter 4, Section 4.2 (above).

offender and prove to the ICC that these acts are underway. Even if investigations and prosecutions can indeed be conducted, the crimes that can be charged and the possible sentence of the accused may not correspond to the gravity of the crime of genocide. To better guarantee that genocidal offenders will not escape national jurisdiction, legislation is vital. Furthermore, for a permanent member of the Security Council and for a State that wants to play an important and responsible role in the international community, it is necessary to show more determination and effectiveness in combating such grave international crimes like genocide.

12.4.6 Exercise of Universal Jurisdiction

As analyzed above, the outlawing and punishment of genocide is an obligation *erga omnes*. Existing State practice for exercising extraterritorial jurisdiction over the crime of genocide based on the principle of universality is abundant. Some Chinese scholars believe that the aforementioned Article 9 of the Chinese Criminal Code provides the basis for Chinese courts to assert universal jurisdiction.[58] Arguably national courts may assert universal jurisdiction without specific provisions of domestic law as long as there is a conventional or customary basis.[59] However, from a practical perspective, national courts often refrain from invoking universal jurisdiction without specific domestic legislation.[60] This is fairly understandable. While international conventions and customary law may provide a legal basis for asserting universal jurisdiction, they are usually not as detailed and specific as domestic legislation. Asserting universal jurisdiction based solely on international law would cause the national court many practical difficulties, such as determining the procedure for requesting judicial cooperation in extraterritorial investigations, determining the sentence, dealing with the obligation to punish international crimes and determining how to respect foreign State immunity. Furthermore, the exercise of universal jurisdiction often involves political implications which may add to a national court's reluctance to act without specific legislation requiring it to do so.

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[58]Gao Mingxuan and Wang Xiumei, "Reflections on the Characteristics and Localization of Universal Jurisdiction," in *Law and Social Development* (June, 2001), 23.

[59]Princeton University Program in Law and Public Affairs, *The Princeton Principles on Universal Jurisdiction*, 28 (2001). For background information of the Princeton Principles, see http://www.derechos.org/nizkor/icc/princeton.html (Accessed June 19, 2008).

[60]Tanaz Moghadam, "Revitalizing Universal Jurisdiction: Lessons from Hybrid Tribunals Applied to the Case of Hissene Habre," in *Columbia Human Rights Law Review* 39, No. 1 (2008): 471, 489.

The *Hissène Habré* case serves as an example to illustrate the importance of domestic legislation in the exercise of universal jurisdiction. In 2000, the former president of Chad, Hissène Habré was accused in Senegal of being an accomplice to torture, committing barbarous acts, and crimes against humanity. The torture charge was based on the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT), which Senegal ratified in 1986.[61] Article 7 of the Convention requires parties to either extradite or prosecute an alleged offender of the crime of torture.[62] The Senegalese Chambre d'Accusation however dismissed the complaint citing a lack of jurisdiction. The Senegalese court placed emphasis on Article 5 of the CAT, which provides that "each State Party shall take such measures as may be necessary to establish its jurisdiction" for offences listed in the CAT. The court relied upon Article 5 stating that the lack of domestic legislation establishing its jurisdiction over extraterritorial torture meant that Senegal was under no obligation to prosecute Hissène Habré if it did not extradite him.[63]

Many believe that this case was a result of political interference by Senegalese President Abdoulaye Wade.[64] Whether this is true or not, the case demonstrates the importance of domestic legislation in exercising universal jurisdiction. Despite an *aut dedere aut judicare* provision in the CAT, which clearly vests the obligation in every State party to prosecute the offenders and deny them the safety of a jurisdictional vacuum, the Senegalese court nevertheless found a way to dismiss the case. The Genocide Convention has no such provision explicitly requiring States to extradite and prosecute. The exercise of universal jurisdiction over genocide can only be based on customary law. It is therefore even more important and necessary to provide specific stipulations in domestic law if a State is ready to prosecute and punish the crime of genocide on the basis of universal jurisdiction. Belgium, Spain and Germany have already domestically incorporated genocide into their legislation.[65]

The Rome Statute only requires State parties to "ensure that there are procedures available under their national law for all of the forms of co-operation."[66] States that are not party to the ICC have no legal obligation

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[61] Inbal Sansani, "The Pinochet Precedent in Africa: Prosecution of Hissene Habre," in *Human Rights Brief* 8, No. 2 (2001): 32, 33.

[62] *Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, art. 7(1) UN Doc. CAT/C/4/Rev.3 (July 18, 2005).

[63] Inbal Sansani, *The Pinochet Precedent*, 2001, 35.

[64] Dustin N. Sharp, "Prosecutions, Development, and Justice: The Trial of Hissene Habre," *Harard. Human Rights Journal* 16 (2003): 147, 169.

[65] See generally M. Cherif Bassiouni, "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice," in *Virginia Journal of International Law* 42 (Fall 2001): 1, 81.

[66] *Rome Statute*, 2002, art. 88.

to enact relevant domestic legislation. However, given the fact that non-parties, such as China, can also be involved in proceedings before the ICC, it may be wiser for States to have their own legislation to assert universal jurisdiction, especially when they want to prove that they have the ability and willingness to try the persons charged. Moreover, there is an evident need for the possible exercise of universal jurisdiction bearing in mind that the purpose of the Genocide Convention is "to liberate mankind from such an odious scourge."

China is under the obligation to enact domestic legislation to give effect to the provisions in the Genocide Convention. Despite China's seeming unwillingness to legislate on these issues so far, China has in fact a sufficient legal and psychological foundation to enact legislation that prevents and punishes serious criminal acts perpetrated against specific national, ethnic, religious and racial groups. The Constitution of China enshrines the underlying general principles to equality, unity and mutual assistance among the 56 nationalities in the country.[67] In the Constitution and other legislation and regulations, there are many provisions protecting the rights of minorities in China. For example, while a Chinese couple can generally have only one child,[68] minorities are granted privileges to have more than one child.[69] For certain areas in Tibet and certain nationalities in Inner Mongolia, no restriction on the number of children is imposed.[70] The age limitation of marriage for minorities is also lower than for those of Han nationality.[71] What is more, where Chinese criminal law criminalizes the

[67] *Constitution of the People's Republic of China*, Preamble, para.11, art. 4 (December 4, 1982). There are 56 nationalities in China, the majority nationality is called the Han nationality, and other 55 are all clarified as minorities. According to Fifth National Population Census Data, Han are of more than 90% of the country's population. Data available at http://www.chinapop.gov.cn/zwgk/gbgg/t20040326_2819.htm (Accessed June 2008). About how it was confirmed that there were 55 minority nationalities in the country, see Zhao Wei, *About the Identification Process of the 55 Minority Nationalities*, Ethnic Unity (March 1999), 52.

[68] *Law of Population and Family Planning of the People's Republic of China*, art. 18, adopted at the 25th Meeting of the Standing Committee of the Ninth National People's Congress (December 29, 2001).

[69] Ordinance of Population and Family Planning of Xinjing Uygur Autonomous Region, art. 15; Ordinance of Family Planning of Ningxia Hui Autonomous Region; Ordinance of Family Planning of Inner Mongolia Autonomous Region, arts. 9–15; Interim Measures for Family Planning Management in Tibet Autonomous Region, arts. 7–10.

[70] Interim Measures for Family Planning Management in Tibet Autonomous Region, arts. 9–10. Ordinance of Family Planning of Inner Mongolia Autonomous Region, art. 11.

[71] *Marriage Law of the People's Republic of China*, art. 6, amended according to the Decision on Amending the Marriage Law of the People's Republic of China made at the 21st meeting of the Standing Committee of the Ninth National People's Congress (April 28, 2001); Supplementary Provisions concerning the Implementation of the Marriage Law of the People's Republic of China in Xinjing Uygur Autonomous Region, art. 2; Adaptive Provisions concerning the Implementation of the Marriage Law of the People's

act of incitement for certain grave crimes, it includes the crime of incitement to ethnic hatred and discrimination.[72] As a principle enshrined in the Constitution, the idea of unity among nationalities and the protection of specific groups and minorities is a well-rooted concept both in the legal system and in the minds of ordinary Chinese people.

Furthermore, the Chinese legal profession has been calling for legislation on genocide and other international crimes in recent years. Researchers and scholars are conducting research on relevant legislation in other states and have provided specific suggestions for future Chinese legislation.[73] Although this does not mean real legislation is under way, it can provide some guidance for future legislation. Furthermore, it shows that the issue is now being discussed and considered in China. It is therefore reasonable to believe that Chinese legislation on the prosecution and punishment of genocide as well as other international crimes will not be a remote dream.

12.5 Conclusion

Genocide is a crime of extreme gravity, and thus the prevention and punishment of the crime of genocide is an obligation *erga omnes* under international law. In other words, every State in the world is required to prosecute and punish the crime of genocide. Although the Genocide Convention does not establish universal jurisdiction, its application to territorial jurisdiction and jurisdiction of competent international tribunals does not limit universal jurisdiction under customary law, according to the general rules of treaty interpretation. Rulings of the ICJ along with State practices have shown the universal character of States' rights and obligations to prosecute the crime of genocide.

China ratified the Genocide Convention more than 20 years ago, and it has always supported international efforts in combating international crimes, including genocide. However, Chinese criminal law has no specific provisions concerning the crime of genocide. It is unclear whether

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Republic of China in Tibet Autonomous Region, art. 1; Supplementary Provisions concerning the Implementation of the Marriage Law of the People's Republic of China in Inner Mongolia Autonomous Region, art. 3.

[72] Criminal Law of the People's Republic of China, art. 249, adopted by the Second Session of the Fifth National People's Congress (July 1, 1979), amended by the Fifth Session of the Eighth National People's Congress (March 14, 1997). There are 5 crimes of incitement in Chinese Criminal Law, the other 4 are found in crimes endangering national security, crimes of impairing the interest of national defense and crimes disturbing public order, see arts. 103, 105, 278 and 373.

[73] Shen Hong, *On the Crime of Genocide*, doctoral diss., Renmin University of China (June 2008), 166–174; Leng Xinyu, *On the Universal Jurisdiction*, doctoral diss. Renmin University of China (April 2007), 140–150, 196–198.

or not the investigation and prosecution of a genocidal offender can be conducted in China in accordance with the relevant international conventions to which China is a party. As a result, there are increasing calls for legislation on genocide in China.

China is under an obligation to enact the provisions of the Genocide Convention through domestic legislation. The establishment and functioning of the ICC has further presented practical needs for China to perfect its domestic legislation on international crimes, including genocide. Although not a party to the Rome Statute, China has already been involved in triggering proceedings before the ICC. When the Security Council acted to refer the situation in Sudan to the ICC, China, as a permanent member of the Council, played a role in the procedure. The fact that China did not block the resolution, regardless of its current negative stance towards the ICC, underscored a powerful trend: punishing serious international crimes has increasingly become an international concern and every State should feel obliged to contribute to the international effort in combating international crimes.

Furthermore, under the Rome Statute, it is possible that a non-State party may be directly involved in the proceedings before the ICC without its consent. Due to this, the Rome Statute at the same time emphasizes the principle of complementarity so that the need to deny a jurisdictional vacuum to the offenders is balanced with the need to respect the sovereignty of States. Generally speaking, States with jurisdiction would prefer to try the offenders in their own domestic courts rather than at the ICC. To satisfy the requirement of willingness and ability, and also to effectively deal with the crimes, it is vital for China to have specific domestic legislation.

Domestic legislation is also necessary for the exercise of universal jurisdiction. Understandably, national courts are reluctant to assert universal jurisdiction, and practical difficulties exist for national courts who wish to prosecute extraterritorial crimes. For the crime of genocide, it is perhaps even more difficult because, unlike torture and war crimes, there is no conventional basis for States to exercise universal jurisdiction over genocide. The claim of universal jurisdiction is based solely on customary international law. Specific domestic legislation not only provides national courts with a clear legal basis by which to define and prosecute the crime, but also provides practical guidance.

China is a State with 56 nationalities, and, for the most part, the people of these different nationalities are living peacefully together. The idea of harmonization and unity among nationalities is a cultural tradition as well as a fundamental constitutional principle in China. Though protected groups under the law of genocide are not conceptually the same as nationalities, the well-rooted idea of equality and unity among different ethnic groups may still serve as a good psychological foundation for legislation on genocide. In recent years, this problem has been increasingly discussed

by the legal profession, and practical suggestions concerning the possible amendments to current legislation have been proposed. It could be safely concluded therefore that it is both necessary and possible for China to legislate on the prosecution and punishment of the crime of genocide, and that the time has now come to do so.