

# China's Approach Regarding the International Criminal Court (ICC)

## China's Approach Regarding the International Criminal Court (ICC)

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### Abstract

China is one of the most important countries in the international criminal justice system. On the one hand, China is a permanent member of the UN Security Council, and its role in the Security Council's referrals to the International Criminal Court is crucial, on the other hand, the country has not acted to limit or weaken the Court. China has not yet become a party to the Rome statute. Therefore, the Court has no jurisdiction over the crimes of Chinese nationals except in the case of the Security Council referral. Due to the membership of China in the Security Council, this issue also seems unlikely. China has always supported national proceedings and the need for a peaceful settlement of disputes. This paper seeks to examine the current position and substantive concerns of China towards the ICC.

**Key Words:** China, International Criminal Court, Security Council, International Crimes

### Introduction

Historically the Chinese state adhered to diplomatic negotiations for the settlement of whatever disputes it was embroiled in and shunned participation in international adjudication.<sup>3</sup> China expressly opted out of the international court of justice (ICJ) compulsory jurisdiction and practically rejected its voluntary jurisdiction and conventional jurisdiction. Historically, China considered compulsory jurisdiction as being antithetical to its state sovereignty.<sup>4</sup> China's approach to international legal issues and related disputes extends exactly to the international criminal justice system. China believes that the prosecution and punishment of international crimes are the inescapable responsibilities of every country. When the criminal law of the People's Republic of China (PRC) was newly revised in 1997, certain international crimes were included, and the principle of universal criminal jurisdiction was laid down.<sup>5</sup> The entry of the Chinese government into the international criminal justice system is defined in terms of its role in the Security Council and the Council's resolutions on the establishment of "Yugoslavia and Rwanda International Criminal Tribunals."

An important question that arises is about the obstacles to the Chinese government's accession to the Court. The purpose of this paper is to examine the obstacles and the current position of China towards the Court Which includes legal and political concerns, as well as the role of this country in the security council in the relationship with the court, will be examined. This article is based on official statements of the Chinese government, in particular, the views expressed by the delegates of the Chinese government regarding the establishment of the *ad hoc* international criminal tribunals and international criminal court, as well as the views of the

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<sup>3</sup>. Zhao Haifeng, *Zhongguo ya Guoji sifa Jigou Guanxi de yanjin, Evolution of the Relationship between China and International Judicial Organization*, 6 Faxue Pinglun law Review 2008, p. 3, cited in Dan Zhu, *China, the International Criminal Court, and International Adjudication*, Netherland International Law Review, lxi: 43-67, 2014. p. 45

<sup>4</sup>. Dan Zhu, *China, the International Criminal Court, and International Adjudication*, Netherland International Law Review, lxi: 43-67, 2014. pp. 47, 52

<sup>5</sup>. Jianping Lu and wang zhixiang, *China's Attitude towards the ICC*, *Journal of International Criminal Justice*, 3 (2005), p. 609

Chinese representative to the Security Council on referrals to the international criminal court (ICC) and the deferrals of proceedings.

The paper consists of three parts. First, the involvement of China in the international criminal justice system would be recalled. Second, China's Reasons for opposing the Court would be considered. Third, China's role in the Security Council will be examined.

### **1. China`s Agreement to Establishment a Permanent International Criminal Body**

China has long been supporting the establishment of a permanent international criminal body. Such an approach stems from the Chinese state's general view of the need for international action through international organizations. In this regard, in particular, there are two distinct stages, one, in the case of the establishment of *ad hoc* international criminal tribunals and the other, in the case of the establishment of the International Criminal Court.

#### **1-1. *Ad Hoc* International Criminal Tribunals**

At the meeting of adopting Resolution 827 (1993) concerning the establishment of the International Criminal Tribunal in Yugoslavia different views have been raised among members of the Security Council. The Chinese representative, while voting in favor of Resolution 827 and separating this legal affirmation from the political position, stated in describing her political position:

This political position of ours, however, should not be construed as our endorsement of the legal approach involved. We have always held that to avoid setting any precedent for abusing Chapter VII of the Charter, a prudent attitude should be adopted concerning the establishment of an international tribunal through Security Council resolutions under Chapter VII. It is the consistent position of the Chinese delegation that an international tribunal should be established by concluding a treaty to provide a solid legal foundation for it and ensure its effective functioning. Furthermore, the Statute of the International Tribunal just adopted is a legal instrument with the attributes of an international treaty involving complicated legal and financial questions.<sup>6</sup> The Chinese delegation emphasizes that the International Tribunal established in a current manner can only be an *ad hoc* arrangement suited only to the special circumstances of the former Yugoslavia and shall not constitute any precedent. Despite the insistence of some delegations that the formation of the "Yugoslav International Criminal tribunal" should not be considered as a precedent, almost a year later such a mechanism was accepted under Resolution 995 to establish the " International Criminal Tribunal for Rwanda." The Chinese delegation stated:

At present people still have doubts and worries about how an international tribunal is established by a Security Council resolution under Chapter VII of the United Nations Charter, and careful studies are still being carried out. In principle, China is not in favor of invoking at will Chapter VII of the Charter to establish an international tribunal through the adoption of a Security Council resolution. That position, which we stated in the Council last year during the deliberations on the establishment of an International Tribunal for the Former Yugoslavia, remains unchanged.<sup>7</sup> China, due to the need to prosecute perpetrators of core international crimes

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<sup>6</sup>. Provisional Verbatim Record of the Three Thousand Two Hundred and Seventeenth Meeting, s/pv.3217, 25 May 1993, p.33

<sup>7</sup>. Provisional Verbatim Record of Security Council, Forty-Ninth year, 3453rd Meeting, undoc,s/pv.3453, 8 November 1994, p. 11

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and especially based on the urgent desire of the Government of Rwanda, the current unique circumstances in that country and the strong demand of the African countries and the international community, did not oppose the Security Council resolution. China's opposition to the establishment of international criminal tribunals through the Security Council is based on the fact that countries can investigate and prosecute core international crimes based on universal jurisdiction.

China's positive role in the case of the ad hoc International Criminal Tribunals is not to oppose its establishment, in other words, not to veto the resolutions that have established these tribunals, as well as the limited participation of Chinese judges in these tribunals. The deputy head of the Chinese delegation later went on to become a member of the judiciary of the International Criminal Tribunal for the former Yugoslavia (ICTY).<sup>8</sup>

### 1-2. International Criminal Court (ICC)

This phase oversees China's participation in the various stages of the Court's establishment. The first stage includes the actions of the International Law Commission. After the presentation of the International Law Commission draft to the UN General Assembly<sup>9</sup>, China actively involved itself in the discussion of the product of the ILC in the Sixth Committee.<sup>10</sup> At its Forty-ninth Session in 1994, the General Assembly established an ad hoc committee, open to all UN members, to review the major substantive and administrative issues arising out of the draft statute prepared by the commission and to consider arrangements for the convening of an international conference.<sup>11</sup> In 1996, the Ad Hoc Committee was followed by a Preparatory Committee, which was created to prepare a widely acceptable consolidated text of a convention for an international criminal court.<sup>12</sup> The Chinese representative on both committees was active and expressed her government's views and interpretations of important and controversial issues.<sup>13</sup> China was actively involved in the Rome Diplomatic Conference. China had delegates serving during the conference as vice-president of the conference and as members of the Drafting and Credentials Committees.<sup>14</sup> China's delegation believed that universal participation was essential for the authority and effectiveness of the Court. To ensure such participation, the Statute should be based on the principles of democracy and equality and should give expression to the positions and views of all countries.<sup>15</sup>

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<sup>8</sup>. Bing Bing Jia, *China and the International Criminal Court: Current Situation*, Singapore Yearbook of International Law and Contributors, 10(2006), p. 2

<sup>9</sup>. Report of the Working Group on the Question of an International Criminal Jurisdiction, in Report of the International Law Commission on the work of its forty-fifth session, UN GAOR, 48th Sess., Supp. No. 10, at 255-335, UN Doc. A/48/10, 1993

<sup>10</sup>. Statement by Mr. Guangjian Xu (China), 6th Comm., 19th Mtg., GAOR, 48th Sess., UN Doc. A/C.6/48/SR.19, 27 October 1993, para. 12

<sup>11</sup>. GA Res. 49/53(1994)

<sup>12</sup>. GA Res. 50/46(1995)

<sup>13</sup>. Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, adopted 6 September 1995, UN GAOR, 50th Sess., Supp. No.22, UN Doc. A/50/22(1995). See Report of the Preparatory Committee on the Establishment of an International Criminal Court, Adopted 13 September 1996, UN GAOR, 51st Sess., Supp. No. 22, UN Doc. A/51/22(1996)

<sup>14</sup>. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June–17 July 1998, Vol. II, UN Doc. A/CONF.183, p. 45

<sup>15</sup>. Summary Record of the 3rd Plenary Meeting, A/CONF.183/SR.3, 20 November 1998, para.36

One of the issues raised was political concerns. China delegation said that his Government believed that the Court, to be independent and fair, should not be subject to political or other influence, and should not become a tool for political struggle or a means of interfering in other countries' internal affairs. However, it should not compromise the principal role of the United Nations, and in particular of the Security Council, in safeguarding world peace and security.<sup>16</sup> After the conference, while 120 countries voted in favor of the adoption of the Rome Statute of the International Criminal Court, China voted against it.<sup>17</sup>

## 2. China's Reasons for Opposing the Court

China's opposition to the Court is based on legal and political reasons. Political reasons are generally related to the relationship between peace and justice, the role of the Security Council, the need to pay attention to the processes of peaceful settlement of disputes and internal proceedings. According to the Chinese delegate:

China believes that justice cannot be pursued at the expense of a peaceful process, nor should it impede the process of national reconciliation.... The ICC, as an integral part of the international system of the rule of law, must abide by the purposes and principles of the Charter and play a positive role in maintaining international peace and security ... Since the Charter entrusts the Security Council with the primary responsibility for the maintenance of international peace and security, we hope that the ICC will exercise caution in carrying out its functions and avoid impeding the work of the Security Council by seeking political settlements to international and regional conflicts.<sup>18</sup> Legal reasons are related to matters that have legal effects and in particular, include criminal jurisdiction and the division of crimes.

### 2-1. Legal Concerns

Wang Guangya, Representative of the People's Republic of China to the United Nations from 2003 to 2008, stated the views of the Chinese government, in other words, the reasons for its opposition, reasons that have legal aspects. He believed that: (a) The jurisdiction of the ICC is not based on the principle of voluntary acceptance; the Rome Statute imposes obligations on non-States Parties without their consent, which violates the principle of state sovereignty and the Vienna Convention on the Law of Treaties. Furthermore, the complementary jurisdiction principle gives the ICC the power to judge whether a state is able or willing to conduct proper trials of its nationals. As a result, the Court becomes a supra-national organ. (b) War crimes committed in internal armed conflicts fall under the jurisdiction of the ICC. Further, the definition of "war crimes" goes beyond that accepted under customary international law and Additional Protocol 2 to the Geneva Conventions. (c) Contrary to the existing norms of customary international law, the definition of "crimes against humanity" does not require that the state in which they are committed to being "at war". Furthermore, many actions listed under that heading belong to the area of human rights law rather than international criminal law; this deviates from the real aim of establishing the ICC. (d) The inclusion of the crime of aggression within the jurisdiction of the ICC weakens the power of the UN Security Council. (e) The *Proprio motu* power of the Prosecutor under Article 15 of the Rome Statute may make it

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<sup>16</sup>. Ibid, para. 35

<sup>17</sup>. UN Press Release, UN Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Criminal Court, L/ROM/22, 17 July 1998

<sup>18</sup>. Statement by Mr. Baodong Li (China), SCOR, 6849th Mtg. UN Doc. S/PV.6849, 17 October 2012

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difficult for the ICC to concentrate on dealing with the most serious crimes and may make the Court open to political influence so that it cannot act in a manner that is independent and fair.<sup>19</sup>

### 2-1-1. Jurisdiction

Concerning criminal jurisdiction, China, primarily believes in national jurisdictions, with priority given to universal jurisdiction. About the Rwanda International Criminal tribunal, the Chinese representative in the Security Council considered this tribunal to be only a supplement to the domestic courts,<sup>20</sup> or concerning the referral of Darfur, the Chinese representative said her country would prefer that perpetrators be tried in Sudanese courts and that China would not agree to refer the case to the International Criminal Court without the consent of the Sudanese government.<sup>21</sup> According to the Chinese government, the Rome Statute is an international instrument like any other international treaty, and in light of the principle of relativity adopted in the 1969 Vienna Convention on the Law of Treaties, any obligation is imposed only on states who are the parties to the treaty. Accordingly, the Court's jurisdiction over non-member states is both contrary to their sovereignty and inconsistent with the 1969 Vienna Convention.

China delegation believes that complementarity was the most important guiding principle of the Statute and should be fully reflected in all its substantive provisions and in the work of the Court, which should be able to exercise jurisdiction only with the consent of the countries concerned. Its jurisdiction should not apply when a case was already being investigated, prosecuted, or tried by a given country.<sup>22</sup> Two issues are significant in this regard; First, if states don't agree with the Court's jurisdiction, the Court's jurisdiction will be effectively hampered, and the principle of complementarity jurisdiction will be meaningless; and secondly, China has generally referred to national proceedings and has not mentioned the genuineness of these proceedings, which is effective in the issues of admissibility.

### 2-1-2. Classification of Crimes under the Jurisdiction of Court

China does not agree with the inclusion of domestic war crimes in the Rome Statute. Perhaps one of the reasons for this is the special situation of the Chinese government. Some commentators believe that up until now, the Chinese Government has not excluded the use of force to resolve the Taiwan issue. Were China to become an ICC State Party, the Chinese military would face the potential risk of being criticized for committing war crimes in internal armed conflicts, which, according to the Statute, falls within the jurisdiction of the ICC. There is a potential risk that anti-China actors would use the 'Tibet issue' to interfere in China's affairs by using the ICC. Ever since 1959, Tibetans in exile and their foreign supporters have consistently accused the Chinese Government of human rights violations in Tibet. Last but not least, the 'Eastern Turkestan Islamic Movement' – which has been added to the UN's list of terrorists and terrorist supporters together with other 'Eastern Turkestan' forces, has long been implementing terrorist attacks against the Chinese Government and people.<sup>23</sup> China's non-membership in the court will undermine the possibility of proceeding war crimes in domestic armed conflict in the

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<sup>19</sup>. Statement by Mr. Guangya Wang (China) on the Statute of the International Criminal Court, Legal Daily, 29 July 1998, p.4

<sup>20</sup>. S/PV.3453,8 November 1994, p.11

<sup>21</sup>. [www.un.org/press/en/2005/sc8351.doc.htm](http://www.un.org/press/en/2005/sc8351.doc.htm), Accessed April 26, 2020

<sup>22</sup>. A/CONF.183/SR.3,20 November 1998, para. 37

<sup>23</sup>. Jingren Xiao and Zhang Kin, *A Realist Perspective on China and the International Criminal Court*, Fichle Policy Brief Series, No 13, 2013, Torkel Opsahl Academic Epubisher, p. 3

court because in that case, the only possible way to deal with the court is to refer by the Security Council, which the Chinese government will veto it.

Regarding the crime of aggression, China agreed with its inclusion in the Rome Statute, but from the time of the Rome Conference to the Kampala, it was believed that a link should be established between the crime and the Security Council. China was in favor of the inclusion of crime of aggression under the Rome Statute, subject, however, to two conditions: firstly, there should be a precise definition of the crime, and secondly, there should be a link with the Security Council.<sup>24</sup> The representative of China, who was present at the preliminary commission of the Kampala Review Conference, said:

Since the precondition for an individual to bear the criminal responsibility is that the state commits an act of aggression, in the absence of a determination by the Security Council on the situation of aggression, the court lacks the basis to prosecute the individual for his criminal liability. Besides, allowing the court to exercise jurisdiction before the Security Council makes the determination was practically bestowing on the court the right of determination on the state act of aggression. This runs counter to the provision of the Charter.<sup>25</sup> China believes that the Security Council in dealing with the crime of aggression has a unique role, and does not agree with the intervention of the Court and the Prosecutor to assess this issue, although it does not say if the Security Council refuses to determine the crime, what authority and how has the jurisdiction to determine this issue.

Concerning the crimes against humanity that fall under the jurisdiction of the Court, the Chinese delegation pointed out that, there was no international convention on crimes against humanity, and that such crimes should be qualified by the condition of armed conflict, as evidenced by the Nuremberg Charter and the Statutes for the ICTY and the International Criminal Tribunal for Rwanda (ICTR).<sup>26</sup> Under Article 6(c) of the Charter of the International Military Tribunal at Nuremberg (IMT), “crimes against humanity” was specifically set out as a category of crimes coming within the jurisdiction of the IMT. However, under that article, a clear nexus is required with armed conflict – crimes against humanity needed to be committed “before or during the war ... in the execution of or in connection with any crime within the jurisdiction of the Tribunal”, i.e., war crimes or crimes against peace, which were in turn linked to an armed conflict.<sup>27</sup>

It has been posited that a possible rationale for this strong-armed conflict nexus was as follows: The Allies wished to avoid setting a precedent by which States could seek in the future to hold Allied leaders accountable for “crimes against humanity” performed in their territories in peacetime unless such crimes were associated with a scheme of aggression, It could also be argued that the underlying rationale was the Allied powers’ fear that some of their actions during World War II could have constituted “crimes against humanity” if there was no requirement that

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<sup>24</sup>. A/CONF.183/C.1/SR.7, 19 June 1998, para. 9

<sup>25</sup>. Statement by Chinese Delegate at the Sixth session of the Preparatory Commission (2000) available at <http://www.China-un.ch/eng/gjhyfy/hflygz/t85684.html>>, Accessed April 26, 2020

<sup>26</sup>. A/CONF.183/C.1/SR.3, 17 June 1998, paras. 73-74

<sup>27</sup>. Abtahi Hirad, Crimes Against Humanity and the Armed Conflict Nexus: from Nuremberg to the ICC, European Society of International Law, Conference Paper No. 1/2013, *Amsterdam Research Forum*, 23-25 May 2013, pp.3,4

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such crimes be linked to armed conflict.<sup>28</sup> The Chinese government's attitude towards crimes against humanity can be justified on the grounds stated above.

Although the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) recognized the link between crimes against humanity and domestic or international armed conflict<sup>29</sup>, the Statute of the International Criminal Court for Rwanda did not recognize such a link. Under Article 3, the requirement is that crimes such as murder, extermination, enslavement, rape, etc., be "committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds"<sup>30</sup> It is now widely recognized that 'crimes against humanity are no longer linked to the laws of war but rather to human rights law.'<sup>31</sup> Thus, Article 7 of the ICC Statute definitively divorced crimes against humanity from armed conflict, enshrining its autonomy as a concept rooted in human rights.<sup>32</sup> According to the Chinese delegation, the definition of the crimes against humanity under the Rome Statute does not require the state in which they are committed to being 'at war' is contrary to the existing norms of customary international law.<sup>33</sup> China also pointed out that 'many actions listed under that heading belong to the area of human rights law, rather than international criminal law.'<sup>34</sup> China believes that crimes against humanity should be investigated in light of the armed conflict.

Regarding the crime of genocide, the Chinese government did not object to the provision of this crime in the Rome statute. However, China raised doubt about the inherent jurisdiction over genocide provided by the Statute by stating: "it must be asked whether the court should have compulsory jurisdiction in such cases ... becoming a party to the Convention on the Prevention and Punishment of the Crime of Genocide did not automatically mean the acceptance of international criminal jurisdiction".<sup>35</sup>

### 2-2. Political Concerns

China's political concerns about its membership in the Court are, in general, due to its traditional view of national sovereignty and its reliance on universal jurisdiction to deal with important international crimes. The country's dominant view of "ad hoc international criminal tribunals" was that the Security Council, as a political organ, should not interfere in the establishment of criminal tribunals, but those national systems should investigate and prosecute perpetrators of international crimes. As the Chinese Representative stated at the 3rd Plenary Meeting of the Conference, of 16 June 1998, China did not want to see the Court become a tool for political struggle or a means of interfering in other countries internal affairs, and the court should not compromise the principal role of the United Nations, and in particular of the Security

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<sup>28</sup>. Ibid. p. 4

<sup>29</sup>. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, art. 5, SC Res. 827, U.N. SCOR 48th sess., 3217th mtg., U.N. Doc. S/RES/827 (25 May 1993)

<sup>30</sup>. Statute of the International Criminal Tribunal for Rwanda, art. 3, SC Res. 955, U.N. SCOR 49th sess., 3453rd mtg., U.N. Doc. S/Res/955 (11 Nov. 1994)

<sup>31</sup>. K. Ambos and S.Wirth, 'The Current Law of Crimes Against Humanity: An analysis of UNTAET Regulation 15/2000', 13 Criminal Law Forum (2002) 1-90, at 24.

<sup>32</sup>. Akhavan Payam, Reconciling Crimes Against Humanity with the Laws of War Human Rights, Armed Conflict, and the Limits of Progressive Jurisprudence, *Journal of International Criminal Justice* 6 (2008), p. 26

<sup>33</sup>. Statement by Mr. Guangya Wang (29 July 1998)

<sup>34</sup>. Ibid

<sup>35</sup>. Statement by Mr. Kening Zhang (China), 6th Comm., 18th Mtg., GAOR, 49th Sess., UN Doc. A/C.6/49/SR.18, 26 October 1994, para 46

Council, in safeguarding world peace and security.<sup>36</sup> The Chinese government believes that there is a limited role for the Security Council with the court, and it is deducing of the act of aggression. Without the consent of the non-part states, the referral by the Security Council is contrary to the principle of sovereignty and the principle of the relative effect of international treaties.<sup>37</sup>

### 3. Security Council

China is not a party to the Statute of the International Criminal Court. The only and most important role of China in the international criminal justice system is related to its membership in the Security Council as a permanent member. In this regard, in particular, the country's role in the case of *ad hoc* international criminal tribunals, as well as the referral by the Security Council of situations to the ICC, can be mentioned.

As stated, China took the view that the ICC should be 'independent and fair', and 'not be subject to political or other influence', At the same time, the Court 'should not compromise the principal role of the Security Council in safeguarding world peace and security'.<sup>38</sup> China's position on Security Council Referral and Deferral will be discussed below.

#### 3-1. Situation of Darfur

In 2005, by UNSC Resolution 1593 the situation in Darfur was referred to the ICC.<sup>39</sup> Eleven States voted in favor and there were four abstentions, including one by China. In the explanation of the vote, the Chinese delegate restated China's position on the ICC. China believed that there were more effective and feasible approaches than referring the Darfur situation to the ICC. Chinese delegate stated:

Undoubtedly, the perpetrators must be brought to justice. The question is: What is the most effective and feasible approach in this connection? In addressing the issue of impunity, we believe that, when trying to ensure justice, it is also necessary to make every effort to avoid any negative impact on the political negotiations on Darfur. When punishing the perpetrators, it is also necessary to promote national reconciliation. When trying to solve the question of Darfur, it is also necessary to sustain the hard-won results in the North-South peace process. Based on that position and out of respect for national judicial sovereignty, we would prefer to see perpetrators of gross violations of human rights stand trial in the Sudanese judicial system. We have noted that the Sudanese judiciary has recently taken legal action against individuals involved. To ensure the justice, transparency, and credibility of the trials, the international community could provide appropriate technical assistance and necessary monitoring. Of course, the African panel for criminal justice and reconciliation, proposed by Nigeria on behalf of the African Union, could also serve as a way out. We are not in favor of referring the question of Darfur to the International Criminal Court (ICC) without the consent of the Sudanese Government, because we are afraid that that would not only severely complicate efforts to secure an early settlement of

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<sup>36</sup>. A/CONF.183/SR.3, 20 November 1998, para. 35

<sup>37</sup>. Article 34 of the Vienna Convention (1996) recalls the customary rule of the relative effect of treaties by affirming that "A treaty does not create either obligations or rights for a third State without its consent"

<sup>38</sup>. Statement by Mr. Guangya Wang (16 June 1998), para. 35

<sup>39</sup>. UN Doc. S/RES/1593 (2005)

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the Darfur issue, but also have unforeseeable consequences for the north-south peace process in Sudan.<sup>40</sup>

The Chinese decision appears to be more political than legal, as it does not address the legal capacity of Sudan's internal system to prosecute perpetrators of international crimes. As Sudan's most important political patron, China has reaped concrete benefits from its relationship with Khartoum, not least of which has been substantial crude oil imports—Sudan is China's largest foreign supplier—and the extension of Chinese influence in a strategic part of Africa.<sup>41</sup>

### 3-2. Situation of Libya

On 26 February 2011, the UNSC adopted Resolution 1970 to refer the situation of Libya to the ICC.<sup>42</sup> The Chinese delegation- Mr. Li Baodong- voted in favor of the resolution. He said:

it is of the greatest urgency to secure the immediate cessation of violence, avoid further bloodshed and civilian casualties, restore stability and normal order as soon as possible, and resolve the current crisis through peaceful means, such as dialogue. The safety and interests of foreign nationals in Libya must be assured throughout this process.<sup>43</sup> The draft resolution received 15 votes in favor and the draft resolution has been adopted unanimously.

### 3-3. Situation of Kenya

On 15 November 2013, 14 African States submitted a proposed resolution to the UNSC requesting the ICC to defer the investigation and prosecution of Kenyan President Kenyatta and Deputy President Ruto for 12 months under Article 16 of the ICC Statute.<sup>44</sup> The proposal was not approved by the Security Council.

The Chinese delegation- Mr. Liu- voted in favor and expressed regret at the failure to adopt the resolution. He stated that the Kenyan leaders play an important role in maintaining peace and stability in Kenya and Africa in general and that the principles of complementarity and judicial sovereignty should, moreover, be respected by international judicial institutions.<sup>45</sup> The Chinese representative's statement stemmed from China's approach to the political settlement of disputes and judicial proceedings by national systems.

### 3-4. Situation of Syria

A notable example of the failure of the security council to refer a situation to the Court is the situation in Syria. Since the start of the civil war in Syria in 2011, the Independent International Commission of Inquiry has provided regular and annual reports on gross violations of human rights and international humanitarian law.<sup>46</sup> In its 2013 report, the commission

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<sup>40</sup>. UN Doc. S/PV. 5158. P. 5

<sup>41</sup>. Peskin Victor, *The International Criminal Court, the Security Council, and the Politics of Impunity in Darfur*, Genocide Studies and Prevention: An International Journal, Volume 4, 2009 p. 319

<sup>42</sup>. UN Doc. S/RES/1970 (2011)

<sup>43</sup>. UN Doc. S/PV.6491. p. 4

<sup>44</sup>. UN Doc. S/2013/660. P.3

<sup>45</sup>. UN Doc. S/PV.7060

<sup>46</sup>. Report of the independent international commission of inquiry on the Syrian Arab Republic,

recommends that the Security Council: Commit to ensuring the accountability of those responsible for violations, including possible referral to international justice.<sup>47</sup> In addition to the Commission's recommendation, on 22 May 2014, 64 States submitted a proposed resolution to the UNSC to refer the situation of Syria to the ICC.<sup>48</sup> China's representative opposes referring the situation in Syria to the Court and said:

First, China believes that any action to seek recourse to the International Criminal Court (ICC) to prosecute the perpetrators of serious violations should be conducted based on respect for State judicial sovereignty and the principle of complementarity. China is not a State party to the Rome Statute. China always has reservations concerning the referral by the Security Council of particular country situations to the ICC. This is our principled position. Secondly, efforts to seek a political settlement to the question of Syria are encountering difficulties. The international community must shore up its confidence, remain patient, and be steadfastly committed to the overall direction of the political settlement. What is most urgently needed now is to urge the Government of Syria and the opposition to immediately implement a ceasefire and put an end to the violence to start a third round of negotiations in Geneva to advance the political process and embark on a political transition. In the current circumstances, to forcibly refer the situation in Syria to the ICC is not conducive either to building trust among all parties in Syria or to an early resumption of the negotiations in Geneva. It will only jeopardize the efforts made by the international community to push for a political settlement. Thirdly, for some time now, the Security Council has maintained unity and coordination on the question of Syria, thanks to efforts by Council members, including China, to accommodate the major concerns of all parties. At a time when seriously diverging views exist among the parties concerning the draft resolution, we believe that the Council should continue holding consultations, rather than forcing a vote on the draft resolution, to avoid undermining Council unity or obstructing coordination and cooperation on questions such as Syria and other major serious issues. Regrettably, China's approach has not been taken on board; China, therefore, voted against the draft resolution.<sup>49</sup> The draft resolution was not adopted due to the opposition of two permanent members of the UNSC, namely China and Russia. Although China stressed the principle of the Court's complementarity jurisdiction, the need for national proceedings, and the political settlement of disputes, it seems China's opposition is more political, while we see a double standard, because China did not oppose the referral of the situation in Libya to the court.

### **Conclusion**

Although China has been actively involved in the preliminary discussions of the international criminal court, it is not yet a state party to the statute of the court. China's role in the international criminal justice system can be illustrated by its permanent membership in the UN

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A/HRC/S-17/2/Add.1, 23 November 2011.

<sup>47</sup> . Report of The Independent International Commission of Inquiry on The Syrian Arab Republic, A/HRC/23/58, 18 July 2013, Para. 171

<sup>48</sup> . UN Doc. S/2014/348

<sup>49</sup> . UN Doc. S/PV.7180

## **China's Approach Regarding the International Criminal Court (ICC)**

Security Council. On the one hand, China did not oppose the establishment of ad hoc international criminal tribunals, and on the other hand, it has played an important role in referring the situations to the Court, as well as the deferral of the Court's proceedings by the Security Council. Like Russia, and unlike the United States, China has not taken steps to weaken the Court and encouraged other states not to join the Court and to encourage non-cooperation with the Court. Although China emphasizes national proceedings in the light of the principle of universal jurisdiction and the need to respect the sovereignty of states, it has specific concerns about the Court which has prevented this country from joining the court.

Regarding China's role in the Security Council, the country has not followed a concert and unified approach regarding referring situations to the Court. In fact, in this regard, we are witnessing a double standard, which is undoubtedly due to political interests. It should be noted that other permanent members of the Security Council are no exception and have a similar procedure. The lack of serious action by the security council in referring situations to the court is a result of political interests among its five permanent members, particularly the United States, China, and Russia. China's failure to ratify the Rome statute will undermine the possibility for prosecuting war crimes in domestic armed conflicts before the court because in that case, the only possible way to deal with by the court is to refer a situation by the Security Council, which the Chinese government will veto it. China's main concern with the court is its fight against opposition groups, which could lead to criminal proceedings in the court.