

China's Policy Towards the ICC Seen Through the Lens of the UN Security Council

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China is not a State Party to the Statute of the International Criminal Court ('ICC'), but is one of the five permanent members of the United Nations Security Council ('UNSC'). This policy brief examines the positions, attitudes and views of China towards the ICC, drawing primarily on China's conduct in the UNSC. It will analyse China's substantive concerns towards the ICC, and some key factors contributing to the uncertain future of the relationship between China and the ICC.

1. Chinese Position on the Establishment of the ICTY, ICTR and ICC¹

1.1. ICTY

The ICTY was established pursuant to UNSC Resolution 827 on 25 May 1993, on the basis of a report prepared by the UN Secretary General with input from many States and non-governmental organizations ('NGOs').² China voted in favour of this resolution, but she made clear her reservation as regards the legal approach taken. Apart from emphasizing the special circumstances of the former Yugoslavia, the Chinese delegate expressed concern about the possible abuse by the UNSC of its powers under Chapter VII of the UN Charter in establishing an international tribunal. The representative also made it clear that China preferred that such a tribunal should be established by a new multilateral treaty. That approach would respect the principle of State judicial sovereignty to the extent possible, and many difficulties both in theory and practice could be avoided.³ Although China voted for the establishment of the ICTY with reservations, she has since supported its operation in practice. There has always been a Chinese judge at the ICTY.⁴

¹ 'ICTY' and 'ICTR' stands for the *ad hoc* international criminal tribunals for the former Yugoslavia and Rwanda.

² UN Doc. S/RES/827 (1993) (<http://www.legal-tools.org/doc/dc079b/>).

³ UN Doc. S/PV.3217.

⁴ Mr. LI Haopei was the first Chinese Judge at the ICTY (1993–1997); Mr. WANG Tiewa succeeded him (1997–2000); and Mr.

1.2. ICTR

UNSC Resolution 955 (1994) adopted under Chapter VII established the ICTR by 13 votes in favour, one against (Rwanda), and one abstaining (China).⁵ The Chinese delegation abstained because it was not in favour of "invoking at will Chapter VII of the Charter to establish an international tribunal through the adoption of a Security Council resolution"; it also believed that without Rwanda's support and co-operation it would be "difficult for the Tribunal to perform its duties in an effective manner".⁶ In principle, China did not oppose the setting up of the ICTR and in all subsequent UNSC votes, she voted in favour of it.

1.3. ICC

During the 1998 Rome Diplomatic Conference, China provided clear and specific suggestions and comments on various legal issues pertaining to the nature and functions of the ICC, such as the jurisdiction of the Court, definition of the crimes, criminal responsibility of legal persons, criminal responsibility of superiors, powers of the prosecutor, criteria for admissibility, selection of the judges, and the process of voting on the text of the draft ICC Statute.⁷ Some of its suggestions were subsequently incorporated into the Statute. Regrettably, at the end of the Conference, China voted against adopting the Statute because her fundamental concerns had not been satisfactorily addressed.

After the Conference, the head of the Chinese delegation explained the reasons for voting against the Statute in a newspaper interview.⁸ He pointed out that the text im-

LIU Daqun has been Judge since 2000.

⁵ UN Doc. S/RES/955 (1994) (<http://www.legal-tools.org/doc/97d395/>).

⁶ UN Doc. S/PV.3453.

⁷ For a comprehensive analysis of the position of China during the Rome Diplomatic Conference, see JIA Bingbing, 'China and the International Criminal Court: The Current Situation', in *Singapore Year Book of International Law*, 2006, Vol. 10, p. 87.

⁸ 'WANG Guangya on the Statute of the International Criminal

posed obligations on non-States Parties without their consent and, as a result, violated the principle of State sovereignty and the Vienna Convention on the Law of Treaties; war crimes and crimes against humanity defined by the text went beyond generally accepted customary international law; the *proprio motu* power of the ICC Prosecutor to initiate investigations could lead to political abuse of the Court; and China would rather see the UNSC acting in situations of aggression without any constraints.⁹ In sum, China took a negative view of some provisions of the ICC Statute.

2. Chinese Position on Security Council Referral and Deferral

By mid-July 2014, the Darfur, Libya, Syria and Kenya situations had been discussed by the UNSC with a view to ICC referral or deferral. Let us consider China's position on each of these situations.

2.1. Darfur

In 2005, by UNSC Resolution 1593 the situation in Darfur was referred to the ICC.¹⁰ Eleven States voted in favour and there were four abstentions, including one by China. In the explanation of 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. China expressed major reservations about the exercise of ICC jurisdiction against the will of non-States Parties.¹¹ Moreover, China had concerns about the arrest warrant against Sudanese President Omar al-Bashir and supported the proposal in the UNSC to defer the ICC proceedings against him, although it was not adopted.¹² President al-Bashir – a person suspected by the ICC for crimes against humanity, genocide and war crimes – visited China in his capacity as Head of State in June 2011 at the invitation of the Chinese President.¹³

2.2. Libya

On 26 February 2011, the UNSC adopted Resolution 1970,

Court', *Legal Daily*, 29 July 1998, p. 4 (<http://www.legal-tools.org/doc/bb0b03/>); 'The State Sovereignty should be stressed in the establishment of the International Criminal Court', *People's Daily*, 18 June 1998, p. 6 (<http://www.legal-tools.org/doc/39b90e/>).

⁹ For more details, see also JIA Bingbing, 2006, p. 91, see *supra* note 6; LU Jiangping and WANG Zhixiang, 'China's Attitude Towards the ICC', in *Journal of International Criminal Justice*, 2005, Vol. 3, p. 611.

¹⁰ UN Doc. S/RES/1593 (2005) (<http://www.legal-tools.org/doc/da64ab/>).

¹¹ UN Doc. S/PV. 5158.

¹² Foreign Ministry Spokesperson QIN Gang held a regular press conference and answered questions about the arrest warrant against President al-Bashir issued by the ICC, see 'China regretful, worried about Sudan president arrest warrant', 5 March 2009, *Xinhua Net* (<http://www.legal-tools.org/doc/1ba9e6/> and <http://www.legal-tools.org/doc/6e52e1/>).

¹³ See 'Sudanese president arrives in Beijing for China visit', *Xinhua Net*, 28 June 2011 (<http://www.legal-tools.org/doc/0aa6cc/>).

inter alia, to refer the situation of Libya to the ICC.¹⁴ It was the first time that a situation was unanimously referred to the ICC by all members of the Council. The Chinese delegation voted in favour of the resolution because of "the special situation in Libya at this time and the concerns and views of the Arab and African Countries".¹⁵

2.3. Syria

On 22 May 2014, 64 States submitted a proposed resolution to the UNSC to refer the situation of Syria to the ICC.¹⁶ The draft resolution was not adopted due to the opposition of two permanent members of the UNSC, namely China and Russia. The representative of China provided three reasons for the position taken. First, China believed that any action to seek recourse to the ICC to prosecute the perpetrators of serious violations of the international criminal law should be conducted on the basis of respect for State judicial sovereignty and the principle of complementarity. Second, in China's view, an ICC referral would not be conducive to the political settlement of the dispute, and would only serve to jeopardize the fragile peace efforts. Third, instead of rushing through a vote on the proposed resolution, China saw the need for a longer process of consultation among the UNSC members as the best way to overcome obstruction to consensus on the way forward. At the same time, China expressed deep concern at the worsening humanitarian situation in Syria and had provided humanitarian assistance through various channels on several occasions.¹⁷

2.4. 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 a period of 12 months in line with Article 16 of the ICC Statute.¹⁸ Mr. LIU Jieyi, the representative of China and President of the UNSC that month, presided over the meeting and put the draft resolution to a vote. It received seven votes in favour and eight abstentions, hence failing to obtain the requisite majority. The Chinese delegation voted in favour and Mr. LIU 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 in Africa in general, and that the principles of complementarity and judicial sovereignty should, moreover, be respected by international judicial institutions.¹⁹ The Chinese Prime Minister visited Kenya and held talks with President Kenyatta on 10

¹⁴ UN Doc. S/RES/1970 (2011) (<http://www.legal-tools.org/doc/00a45e/>).

¹⁵ UN Doc. S/PV.6491.

¹⁶ UN Doc. S/2014/348.

¹⁷ UN Doc. S/PV.7180.

¹⁸ UN Doc. S/2013/660.

¹⁹ UN Doc. S/PV.7060.

May 2014.²⁰

From the above-mentioned facts it can reasonably be concluded that China, as a permanent member of the UNSC, has chosen to give priority to the primary function of the UNSC, namely, its power to maintain international peace and security, over justice on those occasions where those two fundamental principles would appear to be in conflict. Thus, China prefers negotiation or other forms of political settlement to action by the ICC as evidenced in situations such as the al-Bashir case, Syria and Kenya.

3. China's View on Some Other ICC Issues Discussed in the Security Council

UNSC Resolutions 1422, 1487 and 1497 created in reality immunity for UN peacekeepers sent by non-States Parties *vis-à-vis* the jurisdiction of the ICC.²¹ The Chinese delegation voted in favour of these resolutions.²² Unlike the strong criticism of the exceptional immunity granted by these resolutions by several other States, China's silence on this point could be explained by her consistent objections to the ICC exercising any form of jurisdiction over non-States Parties.

The UNSC has regularly debated issues relevant to the ICC, such as children in armed conflicts, women, peace and security, protection of civilians in armed conflict, justice and the rule of law. While some States have made explicit reference to the ICC in discussions about these matters, the Chinese delegation has not mentioned the ICC once in its statements. It seems that China deliberately chooses to keep silent about the possible role of the ICC in these areas.

4. Substantive Concerns of China Towards the ICC

From the preceding descriptive survey of various sources, we have noted that China has consistently acted to uphold its belief in the supremacy of the principle of State sovereignty in international relations. Mutual respect for sovereignty and territorial integrity tops the 'Five Principles of Peaceful Coexistence' which have long amounted to the guiding policy of Chinese diplomacy.²³ From the state-

²⁰ See 'Chinese premier holds talks with Kenyan president in Nairobi', *Xinhua Net*, 10 May 2014 (<http://www.legal-tools.org/doc/0b3300/>).

²¹ UN Docs. S/RES/1422 (2002) (<http://www.legal-tools.org/doc/1701d5/>), S/RES/1487 (2003) (<http://www.legal-tools.org/doc/20e269/>), and S/RES/1497 (2003) (<http://www.legal-tools.org/doc/43299a/>).

²² UN Docs. S/PV.4772 and S/PV.4803.

²³ The Five Principles include mutual respect for sovereignty and territorial integrity, mutual non-aggression, non-interference in each other's internal affairs, equality and mutual benefit, and peaceful coexistence. On 28 June 2014, Chinese President XI Jinping delivered a keynote speech at the conference marking the 60th anniversary of the Five Principles of Peaceful Coexistence in the Great Hall of the People in Beijing, see 'Five Principles of Peaceful Coexistence not outdated: Chinese president', 28 June 2014, *Xinhua Net*, p. 1 (<http://www.legal-tools.org/doc/3f6310/> and <http://www.legal-tools.org/doc/2c9e32/>).

ments delivered in the UNSC concerning the ICC, State sovereignty was indeed the notion most frequently referred to by China. Stemming from the great importance it attaches to State sovereignty, China's views diverge from the ICC Statute in certain fundamental respects, such as its jurisdiction over non-States Parties, implementation of the principle of complementarity, and the power of the ICC Prosecutor.

China has consistently opposed the possible jurisdiction of the ICC over a non-State Party. Article 12(2) of the ICC Statute allows the ICC to exercise its jurisdiction over non-States Parties if the suspect was a national of such a State or, even if not, committed a crime on the territory of a State Party. China has taken the position that the exercise of jurisdiction by the ICC over non-States Parties would conflict with the treaty law principle of *pacta tertiis nec nocent nec prosunt*.²⁴

Furthermore, China has disagreed with how the ICC has implemented the principle of complementarity. During the Rome Diplomatic Conference, China suggested, in respect of the criteria for 'unwillingness' to prosecute, that unjustified delay or partiality in trials of core international crimes should be qualified by the additional condition that only when this occurs in nonconformity with national rules of procedure can the ICC find that there is a case of 'unwillingness'.²⁵ But the Rome Conference stipulated that delay or partiality occurs when the case handling is inconsistent with "the intention to bring the person concerned to justice".²⁶ This means that it is up to the ICC to decide whether national criminal rules of procedure conform with the intention to bring the suspect to justice. In this way, the ICC not only puts the suspect on trial, but also the judicial system of the State in question. This was unacceptable to China as the review by a supranational institution of the performance of a State and the efficacy of its domestic legal system was tantamount to "interfering in other countries' internal affairs".²⁷

Additionally, the Chinese delegation has expressed its disagreement with the power granted to the ICC Prosecutor to initiate investigation or prosecution *proprio motu* "without checks and balances against frivolous prosecution", thus amounting to "the right to judge and rule on State conduct".²⁸ This concern was not heeded by the ma-

²⁴ "Treaties neither harm nor benefit third parties. Neither can a treaty dispose of a right of a nonparty to the treaty or otherwise operate to the prejudice of a nonparty's existing legal rights", see Aaron X. Fellmeth and Maurice Horwitz, *Guide to Latin in International Law*, Oxford University Press, 2009, p. 212.

²⁵ UN Doc. A/CONF.183/C.1/L/15, 23 June 1998, in Official Records, vol. iii. Quoted from JIA Bingbing, 2006, p. 90, see *supra* note 6.

²⁶ ICC Statute Article 17 (2)(b)-(c).

²⁷ UN Doc. A/CONF.183/SR.3, para. 35.

²⁸ UN Doc. A/CONF.183/SR.10, para. 9, 22 June 1998. Quoted from JIA Bingbing, 2006, p. 90, see *supra* note 6.

jority of States, and the extent of prosecutorial discretion and its exercise continue to be closely scrutinised by China.²⁹

All the negative views and concerns of China towards the ICC can be attributed to its deeply rooted belief in the paramount interest of State sovereignty. China has supported the idea of an independent international court, but she has been unable to accept a court that, in her view, undermines the sovereignty of States and their juridical independence.

5. China's Commitment to Maintaining the Authority of the Security Council

As a permanent member of the UNSC, China has attached great importance to the role of the Council and is clearly committed to maintaining its authority, as a key objective of Chinese foreign policy. China has insisted that “the principal role of the United Nations, and in particular of the Security Council, in safeguarding world peace and security” should not be compromised.³⁰ China has stressed the role of the UNSC before the ICC, for example as regards the possibility to refer situations to the Court.³¹ The 2010 amendments to the ICC Statute on aggression will allow the Prosecutor to proceed with an investigation if the UNSC has not taken any action within six months. China has disagreed publicly on this point and has stated that the activities of the ICC should not run counter to the provisions of the UN Charter, in particular its provisions on aggression.³²

6. Uncertain Future

The actual performance of the ICC is an essential factor affecting the future relationship between the ICC and China. It is the view of this author that China will welcome and accept an effective, fair and independent Court. On the contrary, a Court of low efficiency, caught up in political wrangling and hostage to competing political agendas,

will ensure that China remains a keen yet distant observer. From its establishment until mid-2014, the ICC has only delivered judgment in two minor cases, with appeals pending at the time of writing. The possible politicization of the ICC in its handling of the Article 12(3) declaration by the Palestinian administration caused great concern and may well have undermined the legitimacy of the ICC.³³ The amendments to the ICC Rules of Procedure and Evidence adopted by the 12th Session of the Assembly of States Parties have allowed accused who enjoy a mandate to “fulfil extraordinary public duties at the highest national level” to be absent from their trial and only be represented by counsel.³⁴ These amendments have to a certain extent infringed on the principle of equality before the law. These developments reflect negatively on the actual performance of the ICC and the ICC system as a whole. The Government of China is only one of many witnesses to this state of affairs.

On the other hand, the ongoing implementation of China's open foreign policy and domestic reforms are conducive to the improvement of her relationship with the ICC. China has consistently condemned core international crimes and been in favour of bringing those responsible to justice. China and the ICC share this same ideal. One would expect that as it pursues its modernising policies with vigour, China should be less reluctant to accept some international legal norms. But all of this depends, in the final analysis, on the view that China is prepared to take on the professionalism and integrity of the ICC's own performance. This remains the chief variable determining the future relationship between China and the ICC, including China's willingness to support the Court within the context of the UN Security Council.

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²⁹ See the representative analysis of this problem in XIAO Jingren and ZHANG Xin, ‘A Realist Perspective on China and the International Criminal Court’, Torkel Opsahl Academic EPublisher, FICHL Policy Brief Series No. 13 (2013), Beijing, 2013 (<http://www.legal-tools.org/en/doc/9ff2b7/>).

³⁰ UN Doc. A/CONF.183/SR.3, *op. cit.*, para. 35.

³¹ UN Doc. A/CONF.183/SR.10, *op. cit.*, para. 85.

³² Ministry of Foreign Affairs of the People's Republic of China, ‘Position Paper of the People's Republic of China at the 66th Session of the United Nations General Assembly’, quoted from XIAO Jingren and ZHANG Xin, *op. cit.*

³³ For a more detailed analysis, see CHAN James, ‘Judicial Oversight over Article 12(3) of the ICC Statute’, Torkel Opsahl Academic EPublisher, FICHL Policy Brief Series No. 11 (2013), Oslo, 2013 (<http://www.legal-tools.org/doc/bc46c4/>).

³⁴ Resolution ICC-ASP/12/Res.7 (<http://www.legal-tools.org/doc/a02fd9/>).