SOME THOUGHTS ON THE OBSTACLES TO CHINA'S ACCESSION TO THE ROME STATUTE – NATIONAL SOVEREIGNTY AND HUMAN RIGHTS

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Some Thoughts on Obstacles to China's Accession to the Rome Statute -National Sovereignty and Human Rights

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According to the latest statistics, 139 states have signed the *Rome Statute*, and among them 104 states have ratified it since the *Rome Statute*'s opening for signature in 1998.[2] These statistics indicate that more than half of the world's sovereign states have pledged to prosecute and punish the most severe international crimes that endanger world peace and security, and have accepted the terms of jurisdiction of the Statute. China is the only permanent member of the UN Security Council that neither signed nor ratified the Statute.[3] What are China's worries? Why are those worries? Are those worries necessary? And could those worries be overcome? An in-depth research on those questions is not only very useful within China, but important to the universal implementation of the Statute as well.

I. Jurisdiction of the Substantive Criminal Law

In his general statement on the International Criminal Court's (ICC) substantive jurisdiction, Mr. WANG, Guangya, representative of the Chinese delegation to the Rome conference of the Statute in June 1998, conferred enthusiastic support for ICC's jurisdiction over crimes of armed conflicts. He stated that single state's judicial system and the existing international criminal justice co-operation are insufficient to punish the international crimes of armed conflicts.[4] The provisions of the Statute stipulating regional armed conflicts are mainly war crimes and the crimes of aggression in Article 5 Paragraph 1 (c) and (d). As the definition of the crime of aggression is not currently finalised among the provisions, according to Article 5 of the Statute, the Court has to wait for the finalisation of the definition of aggression crimes in order to exercise its jurisdiction.

Article 5 Paragraph 1 (a) and (b) of the Statute also mentioned the crime of genocide and the crimes against humanity. These two crimes may relate to the crimes occurred within a country, and some countries may worry that the exercise of jurisdiction over those crimes by the Court may infringe their sovereignty, and turn the Court into a "supranational judicial body".[5] Compared with the trial jurisdiction at the end of WWII, there has been indeed some delicate evolutions in the Court's jurisdiction over those crimes. We have to admit that since the end of WWII, there has not been any world-scale wars for over 60 years. Therefore, the international community's focus has somehow changed: under the international law, the individual criminal liability of genocide and crimes against humanity is not only about its endangering the stability of the world order, but its "shocking the conscience of humanity" as well. The jurisdiction over those crimes not only reflects the principles of international law as world peace and security, but upholds the common values of protecting basic human rights and promoting human development.[6] Those crimes could be regarded

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[2] See the International Criminal Court website, last visited on January 17, 2007.
[3] The United States signed the Statute on December 31, 2000, but has not ratified the Statute until the present days.
[4] See http//www.un.org/icc/speeches/.
[5] LIU, Jian, On International Criminal Court Jurisdiction and State Sovereignty. ZHAO, Bingzhi, *Study on Major Issues Relating to the International Criminal Court.* China Court Press, 2003, p. 139.
[6] Bruce Broomhall, *International Justice and Criminal Court: Between Sovereignty and the Rule of Law*, F. 49, Oxford University Press.

as "core crimes"[7] within the substantive jurisdiction of the customary international law, which have gone through numerous negotiations among states, even though we believe that the definition and scope of those crimes may evolve with the development of the world. As one of the permanent members of the UN Security Council, China should participate in the development of the definition of those crimes, but not act as an onlooker.

II. The Statute's Jurisdiction over Non-signatory States

Three circumstances under which the Court could exercise jurisdiction are stipulated in Article 13 of the Statute. Among them Paragraphs (a) and (c) are the circumstances targeting state parties, while Paragraph (b) stipulates that a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations. The literal meaning of the paragraph is that the Statute could impose jurisdiction over citizens of non-signatory states. This is what China and the United States worry about, or in other words, oppose. In his previously-mentioned statement, WANG, Guangya stated that only with the related states' consent, could the Court exercise jurisdiction.[8] The United States worries that American citizens particularly its armed personnel and government officials are subject to the Court's trials without its consent.[9] Some scholars backed the worries with international law provisions, invoking Article 34 of the *Vienna Convention on the Law of Treaties*: a treaty does not create either obligations or rights for a third State without its consent, and (Article 35) 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. The scholars posited that a sovereign state with criminal jurisdiction should not accept the jurisdiction stipulated in Article 13 (b) of the Statute.[10] This author thinks that the scholars' conclusion is over-simplistic. From a realistic perspective, according to the three means of jurisdiction well-accepted by the international community, which are the jurisdiction based on territory, individual, and acceptance, under most circumstances, the Court could indisputably exercise jurisdiction. Only under one circumstance, namely both the state on the territory of which the conduct in question occurred and the state of which the person accused of the crime is a national are non-signatory states of the Statute, and both the states have not accepted the jurisdiction of the Court according to Article 12 Paragraph 2 of the Statute, and all the domestic jurisdiction means have been exhausted with supplementary principle, with which the "unwillingness" and "inability" are verified, can the UN Security Council refer the situation with the occurrence of one or multiple crimes to the Prosecutor of the Court, according to Chapter VII of the UN Charter and Article 13 (b) of the Statute.

China expects the Court to become an independent and impartial institution, free of political and other factors' interference.[11] We could predict that under the supervision of the international community, the Court should be capable in protecting pertinent rights. From a practical perspective, as one of the permanent members of the Security Council, if China uses its veto power, the Security

[7] Claire de Than and Edwin Shorts, *International Criminal Law and Human Rights*, p. 320, Sweet & Maxwell, 2003.
[8] See http//www.un.org/icc/speeches/
[9] Francis Boudreault, The United States versus the International Criminal Court, *The Human Rights Databank*, Spring 2002, Vol. 9, No. 1.
[10] LIU, Jian, On International Criminal Court Jurisdiction and State Sovereignty. ZHAO, Bingzhi, *Study on Major Issues Relating to the International Criminal Court*. China Court Press, 2003, p. 130.
[11] See http//www.un.org/icc/speeches/.

Council Resolution will not materialise. Therefore, China's worries concerning the exercise of jurisdiction in Article 13 is actually meaningless and unnecessary. Based on its traditional national sovereignty operations, China could regard the provisions of Article 13 as necessary supplements to its domestic judicial system.

III. Complementarity Principle of the Court Jurisdiction

Most of the worries and disputes of China and the United States in the consultation process of the draft statute were probably around the provisions and operations of the complementarity principle. The understanding and operations of national sovereignty and the confidence in the widely accepted principle of basic human rights protection are involved here.

1 Sovereign States' Responsibility in Prosecuting Crimes under Customary International Law

As previously discussed, both China and the United States worry about the effects of the Statute over non-signatory states. The United States regards complementarity principle as a breach of its national sovereignty, as it could force a country to investigate and prosecute its citizens in order to free the case from the Court's jurisdiction.[12] Here the question is that for a sovereign state, whether it is forced, or obliged to investigate and prosecute the criminals under the customary international law. In fact, the sovereign states' priority investigation and prosecution rights encouraged by the Statute are not the Court's invention. The *Geneva Conventions* and its *Additional Protocols* stipulated that the states should first investigate and prosecute acts severely breaching the convention, no matter if the states are state parties of the convention or not.

2 Court's Admissibility

It is a shared concept that the Statute's complementarity principle is an "add-up" to a country's judicial system. From the specific provisions we could find that the original purpose of the Statute is not to override a country's judicial system, and generally speaking the priority is given to the domestic jurisdiction. The major concern is probably how to assess the "unwillingness" and "inability" of a country according to Article 17 of the Statute. Currently the Court has just started trying its first case, which was submitted by the government of the Democratic Republic of the Congo (DRC) itself. This shows that DRC government regards its domestic judicial system as unable to handle the case. From the initiation procedure of the case, we could find that the Court's jurisdiction and admission mechanism emphasised the support for a country's sovereignty. The DRC government surrendered the past civil warlords as defendants to the Court's investigations and trials, which may facilitate the current government's exercise of sovereignty domestically.

Of course China and the United States have different situations from the DRC, therefore may have theoretical disputes on the Court's admissibility criteria, which is very understandable. In fact, because the Court has just started its operations, and lacks cases and experiences, the criteria are still in the process of theoretical discussions. The difficulty could be imagined when the Prosecutor tries to verify these criteria in practice. The onus is on the Prosecutor to prove that a country's existing prosecution procedure falls into the category of "unwillingness" and "inability". It would

[12] Francis Boudreault, The United States versus the International Criminal Court, *The Human Rights Databank*, Spring 2002, Vol. 9, No. 1.

be quite possible that in future cases, the efforts rendered in verifying admissibility would be more than the ones exerted in proving the guilt of the accused.[13] Although specific definitions regarding "unwillingness" and "inability" have been stipulated in Article 17 of the Statute, difficulties may still occur in assessing and differentiating various circumstances from a theoretical perspective. The possible difficulties are introduced in the following paragraphs.

2.1 There are more subjective judgement factors involved in determining "unwillingness" than "inability". The term "genuinely" in Article 17 is ambiguous in differentiating itself from other similar terms like "effectively" or "arduously" in other international treaties.

2.2 The term "shielding" in Article 17 Paragraph 2 (a) indicates a subjective intention, and should be combined with other terms like the "unjustified delay in the proceedings" and the attributive phrase "inconsistent with an intent to bring the person concerned to justice". Those terms would prove to be insufficient in determining whether a state is genuinely carrying out the proceedings of a case or not.

2.3 The independence and impartiality of the proceedings stipulated in Article 17 Paragraph 2 (c) is really a concern to China. Even though judicial independence from the executive and other social groups is established in Chinese laws, China has different understanding about judicial independence from the Western society. China emphasises the independence of the courts and judicial institutions from other institutions, but exclude the internal independence of the courts, and the judges' independence. The internal independence is the goal of the reform in China, but there are still many obstacles in actual operations.

2.4 In actual operations, it is very difficult to determine the situations of "inability" and the previously-mentioned "unwillingness" in Article 17 Paragraph 3.

IV. Conclusion

We may have to admit that modern international law indeed challenges and influences the traditional national sovereignty concepts (absolute and exclusive exercise of sovereignty). For example the Statute provisions on crimes against humanity and genocide may affect the domestic handling of these cases. This is probably because of the changes in the interpretation of national sovereignty after WWII. The interpretation has extended from the integrity of territory to world stability, from absolute and permanent sovereignty to elastic concept integrating world order, basic rights, and state functions. Therefore we should not regard the Court as a threat to national sovereignty. The Court's jurisdiction over its first case revealed its goal of upholding national sovereignty and world order.

The other focus is how to explain the limitations of national sovereignty. The development of history indicates that power politics in the cold war is fading away, and the legal order and collective security have become crucial issues in the international community, with the growing recognition of international human rights laws, and particularly with the globalisation process under way. We have to realise that the crimes stipulated in the Statute are severe threats towards

[13] Mohamed M. EI. Zeidy, The Principle of Complementarity: A New Machinery to Implement International Law, *Michigan Journal of International Law*, Summer 2002, p. 898.

international peace and security, and are intolerable. The Statute is created on the basis of respect of national sovereignty, and is the extension of the national sovereignty in a certain sense. If there are any restrictions on sovereignty, these restrictions are based on sovereign states' mutual consent. Taking member states of the UN Security Council as an example, there are many states anxious to become permanent members of the Security Council, but they have to realise that privileges come with obligations.

This author believes that our country's current research on the *Rome Statute* and ICC needs to be furthered. In our future research and discussions, the misunderstanding on the Statute and the Court's effects over the national sovereignty may be eliminated. If China accedes to the Statute, it would actually strengthen its active role in international affairs, and it will boost the Court's development as well. In fact, the related principles of basic human rights protection of the Statute are basically stipulated in the *International Covenant on Civil and Political Rights* as well, with which China has signed, and is actively preparing to ratify. By joining those international treaties, we could speed up the reforms on domestic laws, and China will obtain more respect from the international community, because China has one quarter of the world's population, and China's development and progress will bring significant positive impact to the world.