

On Discrepancy and Synergy Between China and the International Criminal Court

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1. Chinese Reservations

China's position *vis-à-vis* the International Criminal Court ('ICC') has become a topic as China is gradually emerging as an influential power. China has shown her reservations – and sometimes objections – to the ICC's operation. At the same time, China acknowledges the ICC's role in international criminal justice. Its delegation addressed the 2015 Session of the ICC Assembly of States Parties suggesting that the Court “has drawn more and more attention in the field of international affairs” and that its work seems to “proceed in a more efficient, cautious and pragmatic manner”.¹ Observers from outside China may easily misunderstand the rationale behind China's position towards the ICC, owing to the cultural barrier and, more importantly, an underestimation of changes within China.² It is important to observe the interplay between contested international criminal law norms and China's shifting reactions.

Other policy briefs in this series have mapped the concerns of China with regard to the ICC.³ Let me nevertheless mention two concerns. First, the ICC's targeting of African leaders has provoked strident critique of selective enforcement since 2004. The controversial first ICC Prosecutor, Luis Moreno-Ocampo, pursued what appeared to be a vigorous programme of investigation in Africa, but he failed to sufficiently examine all concerned parties in some investigations, leading to an im-

age of bias.⁴ Moreover, the Prosecutor offered limited clarification on the gravity of certain situations. Given that the situation in Kenya entails relatively small-scale violence compared to other situations such as the Sudan and the Democratic Republic of Congo,⁵ the Prosecutor did not focus enough on the gravity of the asserted crimes, thereby reinforcing the critique of bias.

Secondly, China frequently argues that supra-national legal proceedings may constitute impediments to conflict resolution and peace-building processes in Africa.⁶ Although Article 16 of the ICC Statute⁷ acknowledges the UN Security Council's mandate to suspend investigations or prosecutions for renewable one-year periods if they are deemed to pose a threat to peace and security, neither the ICC nor the Council has shown interest in employing this escape clause.⁸ The ICC refused to suspend its investigation in Uganda, although both the Ugandan president⁹ and concerned parties¹⁰ expressed

¹ Statement by the China Observer Delegation at the 14th Session of the Assembly of State Parties to the Rome Statute of the International Criminal Court, The Hague, 18-26 November 2015 (<http://www.legal-tools.org/doc/bef344/>).

² Jack Donnelly, *Universal Human Rights in Theory and Practice*, Cornell University Press, 2013, pp. 99-100.

³ See, for example, XUE Ru, “China's Policy Towards the ICC Seen Through the Lens of the UN Security Council”, FICHL Policy Brief Series No. 27 (2014), Torkel Opsahl Academic EPublisher, Brussels, 2014 (<http://www.legal-tools.org/doc/dee821/>), with the cited sources.

⁴ Claude E. Welch Jr. and Ashley F. Watkins, “Extending Enforcement: The Coalition for the International Criminal Court”, in *Human Rights Quarterly*, 2011, vol. 33, p. 1006.

⁵ Chandra Lekha Sriram and Stephen Brown, “Kenya in the Shadow of the ICC: Complementarity, Gravity and Impact”, in *International Criminal Law Review*, 2012, vol. 12, p. 222.

⁶ Statement by MA Xinmin at the 12th Session of the Assembly of States Parties to Rome Statute of the International Criminal Court (<http://www.legal-tools.org/doc/5fdbad/>).

⁷ ICC Statute, Article 16 “Deferral of Investigation and Prosecution”.

⁸ Victor Peskin, “Caution and Confrontation in the International Criminal Court's Pursuit of Accountability in Uganda and Sudan”, in *Human Rights Quarterly*, August, 2009, vol. 31, no. 3, pp. 680-81.

⁹ For instance, President Museveni stated that the “state could withdraw its case” in the ICC if leaders of the Lord's Resistance Army (LRA) would cease fighting and “engage in internal reconciliation mechanisms put in place by the Acholi community such as mataput or blood settlement”, as reported by the New Vision newspaper, which is believed to be close to the government (<http://www.legal-tools.org/doc/d7d04d/>).

¹⁰ Statement by the President of the Security Council, 16 November

their intention to participate in a peace negotiation if the suspects would not be investigated and tried by the ICC. This created some scepticism in China that the ICC can complicate domestic issues, contradicting the objective of development and peace in African societies.

2. State Integrity, Chinese Characteristics and Non-Conditionality

State integrity¹¹ is viewed as the political bedrock in modern China. China – a victor in World War I – had the intention to sign the 1919 Treaty of Versailles, hoping that she would regain sovereign control over the German concessions on the Shandong peninsula. However, with the British and French representatives supporting the Japanese delegation at the Paris Peace Conference, the Allied victors agreed to Japan's takeover of Shandong in Article 156 of the Treaty of Versailles.¹² This disappointing encounter with international justice distanced Chinese policy-makers from their Western 'teachers'. Accordingly, patriotic claims emerged in the 1920s and 1930s. Western imperialist history is actively present in China's contemporary discourse, and the Chinese general public is still influenced by nationalist education. The idea that voluntary justice can surpass state integrity under certain circumstances has not been well received in the Chinese public discourse.

The last four decades, Chinese leaders have advocated the concept of 'Chinese characteristics' which implies that international norms and values are not necessarily functional in China.¹³ The government led by the Communist Party of China allegedly strives to modify the equilibrium between executive and legislative powers in order to prevent the arbitrariness of officials and safeguard the rights of individuals. The Supreme People's Court initiated a series of reforms in the 1980s for judicial professionalism and independence. On 1 July 1995, China's Judges' Law came into effect, followed by the enactment of the first Lawyers' Law of China on 15 March 1996.¹⁴ China opposes solutions that would give an international or foreign entity the right to judge

and rule on her state conduct, and insists that "each state shoulders the primary responsibility to protect its own population [...] internal unrest in a country is often caused by complex factors [...] No reckless intervention should be allowed".¹⁵

Furthermore, the ICC's extensive operations in Africa collide with China's overarching principle of non-conditionality in foreign affairs. China likes to phrase itself as an 'old friend' to Africa, who has complied with the non-conditionality principle concerning official assistance for African states since 1956. At the official policy level, China prefers international moderation, including UN negotiation and multilateral dialogue, to litigious and military actions, adhering to the 1954 Five Principles of Peaceful Coexistence.¹⁶ China is sceptical of the involvement of the ICC in African affairs.

3. Synergies Between China and the ICC

Let us reflect briefly on a few trends that are likely to result in a shift in China's attitude towards the ICC. The key argument presented here is that a positive interaction with the ICC will match China's ambition to rise as a responsible power internationally and build a fair judicial system nationally.

First of all, China is known for her pragmatism on the international stage. In fact, China played an active role during the Rome Statute negotiations in accordance with the so-called 'proactive diplomacy' to raise its voice together with other developing countries in the twentieth century. After UN General Assembly resolution 44/39 requested the International Law Commission to address the question of establishing an international criminal court in 1989,¹⁷ the Chinese delegation made 33 comments¹⁸ in the form of recommendations, statements, proposals and joint proposals concerning the establishment and operation of the proposed court. China had hoped to enhance its influence on international affairs.¹⁹ China's diplomatic policies are already experiencing a significant adjustment since the early 1990s. In June 2015, China's Minister of Foreign Affairs WANG

2006, S/PRST/2006/45 (<http://www.legal-tools.org/doc/f65499/>).

¹¹ 'State integrity' refers to a recognition that the state – and system of the state – is entitled to exert exclusive jurisdiction and such authority is to be respected by other states under international law.

¹² Section VIII Shantung, The Versailles Treaty, 20 January 1920 (<http://www.legal-tools.org/doc/a64206/>).

¹³ SHAN Wenhua, "Comments on Codification and Application of International Customs in China," in *China Legal Science*, 1997, vol. 3, pp. 50-51 (单文华: 《中国有关国际惯例的立法评析——兼论国际惯例的适用》, 载于《中国法学》, 1997年第3期).

¹⁴ XIA Jinwe, "Achievements, Problems and Solutions of Judicial Reforms in Contemporary China", in *China Legal Science*, 2010, vol. 1, pp. 17-18 (夏锦文: 《当代中国的司法改革: 成就、问题与出路——以人民法院为中心的分析》, 载于《中国法学》, 2010年第1期, 页17-18).

¹⁵ Position Paper of the People's Republic of China on the United Nations Reforms (<http://www.legal-tools.org/doc/291b6a/>).

¹⁶ The Five Principles of Peaceful Coexistence – seen as an overarching guideline for China's diplomatic policy-making – entail: mutual respect for each other's territorial integrity and sovereignty, mutual non-aggression, mutual non-interference in each other's internal affairs, equality and co-operation for mutual benefits, and peaceful co-existence.

¹⁷ UN General Assembly resolution 44/39 (<http://www.legal-tools.org/doc/32547a/>).

¹⁸ This calculation is based on key-word searches in two databases, the ICC Legal Tools Database and the Coalition for the ICC.

¹⁹ CHEN Dongxiao, "China's 'home diplomacy': Opportunities, Challenges and Tasks", in *China International Studies*, 2014, issue 5, pp. 7-8 (陈东晓: 《中国的“主场外交”: 机遇、挑战 and 任务》, 载于《国际问题研究》, 第5期, 页7-8).

Yi interpreted “a New Journey of China’s Diplomacy” as being “the time when people believed ‘power is truth’ has gone, China is willing to carry forward the justice and pursue shared benefits in today’s world”.²⁰ With the ICC materializing in the international justice system, some Chinese scholars are concerned that, as a non-State Party to the ICC, China cannot enjoy some rights exclusively entitled to States Parties, including being substantively involved in the process of discussing and defining the crime of aggression, and nominating candidates for ICC judges who must be nationals of a State Party.²¹ The status quo leaves the authority to construct international criminal jurisprudence only to China’s counterparts.

Secondly, with China’s domestic reforms originating in the late 1970s, China has valued concrete benefits over ideological contradiction in the policy-making process. Interestingly, China voted in favour of the UN Security Council resolution referring the Libyan case to the ICC, because “the greatest urgency was to cease the violence, to end the bloodshed and civilian casualties”.²² This vote and statement surprised many observers, as in the past China had rarely moved away from its dogmatic foreign policy of non-intervention. Furthermore, now that raw material import from Africa, including crude oil, iron, metals and commodities, is progressively more important for the Chinese economy, a better socio-political environment in Africa is in China’s own interest. The challenges faced by African countries – armed conflicts, corruption, and deteriorating environment, just to name a few – affect Chinese strategic interests to a large extent. In 2011 alone, 35,000 Chinese workers had to evacuate from Libya when the conflict worsened, and many oil exploration facilities came under attack in the Sudan, Nigeria and Ethiopia during the past decade.²³ It is therefore reasonable to expect some shift in China’s balancing between acknowledging the ICC’s jurisdiction and sticking to the supremacy of state sovereignty.

Thirdly, the power structures of the international community are being transformed. A 2014 decision by the ICC Office of the Prosecutor indicates that the Court

was trying hard to be independent from political pressure from big powers. It reopened preliminary examination of alleged crimes attributed to the armed forces of the United Kingdom in Iraq between 2003 and 2008.²⁴ Closer involvement with the ICC may provide a good chance for China to adjust the existing legal norms as well as international power structures that used to be dominated by the West.

Lastly, judicial reforms in China have brought about potential compatibility with the ICC. Despite the frequently raised concern that transnational jurisdiction could contradict state sovereignty, the Chinese government acknowledges the necessity of cross-border jurisdiction in moderating transnational crimes, when a crime is not covered by “the territorial, personal or protective jurisdictions of a state”.²⁵ The Standing Committee of the National People’s Congress of China stated, in a decision in 1987 on “Exercising Criminal Jurisdiction over Crimes Prescribed in the International Treaties”,²⁶ that “China shall [...] exercise criminal jurisdiction over crimes prescribed in the international treaties to which China is a Party or has acceded”. This decision filled a gap between China’s national legislation and its international obligations.²⁷

In an increasingly globalized era, Chinese policy-makers see the necessity of reforming China’s legal system up to the universally endorsed standards. In October 2014, the Fourth Plenum of Central Committee of the CPC officially announced the national strategy of enhancing the “socialist rule of law” and underlining the status of the Chinese Constitution.²⁸ The legislative measures undertaken by the government in the past three decades have constrained government power in many areas, and enhanced public consciousness about human rights and criminal justice.²⁹ These developments at the domestic level will surely provide an opportunity for

²⁰ WANG Yi, “Correct Viewpoint of Righteousness and Benefit Is the Common Value Pursued by Both China and Africa”, available at www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1228846.shtml, last accessed on 9 November 2016.

²¹ LU Jianping and WANG Zhixiang, “China’s Attitude Towards the ICC”, in *Journal of International Criminal Justice*, 2015, vol. 3, pp. 619-20.

²² UN Press, “In Swift, Decisive Action, Security Council Imposes Tough Measures on Libyan Regime, Adopting Resolution 1970 in Wake of Crackdown on Protesters”, 26 February 2011 (<http://www.legal-tools.org/doc/3dff1e/>).

²³ Chris Alden, ZHANG Chun *et al.*, “China’s Growing Role in African Post-Conflict Reconstruction”, in *Global Review*, 2011, no. 6, p. 103 (克里斯·阿尔登, 张春等: 《非洲冲突后重建: 中国日益增长的作用》, 载于《国际展望》, 2011年第6期, 页103).

²⁴ ICC, “Prosecutor of the International Criminal Court, Fatou Bensouda, re-opens the preliminary examination of the situation in Iraq”, 13 May 2014 (<http://www.legal-tools.org/doc/d9d9c5/>).

²⁵ Statement by Chinese Delegate at the 68th Session of the UN General Assembly on Agenda Item 86 Scope and Application of the Principle of Universal Jurisdiction (<http://www.legal-tools.org/doc/ca2f34/>).

²⁶ See <http://www.legal-tools.org/doc/1cefea/>.

²⁷ GAO Minxuan and WANG Xiumei, “On Features of Universal Jurisdiction and Its Localization”, in *Law and Social Development*, 2001, no. 6, pp. 22-23 (高铭暄、王秀梅: 《普遍管辖权的特征及本土化思考》, 载于《法制与社会发展》, 2001年第6期, 页22-23).

²⁸ Xinhua, Communique of the Fourth Plenum of Central Committee of the CPC, 23 October 2014 (新华社, 中国共产党第十八届中央委员会第四次全体会议公报) (<http://www.legal-tools.org/doc/843790/>).

²⁹ MING Wan, “Human Rights Law-Making in China: Domestic Politic, International Law and International Politics”, in *Human Rights Quarterly*, 2007, vol. 29, p. 753.

further adaption to and implementation of international criminal law norms.

4. Concluding Remarks

“The only constancy is change”, said the Greek philosopher Heraclitus of Ephesus. Universal acceptance of international criminal law norms may be slow, but it is an irreversible process. The ICC needs to arrive at cross-cultural consensus by appealing to various states, and by performing at an appropriate level of professionalism. As described above, China undertook to join the Western-led international regime in the early twentieth century, hoping to import modern institutions from the West. However, deeply disappointed by the outcome of 1919 Peace Treaty of Versailles, political leaders and intellectual elites realized the prevalence of hypocrisy at the international stage. In light of the ICC’s predominant activity in Africa, the ICC’s selection of cases reinforces China’s historical concern that the contemporary international system may still apply double standards.

As of today, the ICC has not sufficiently clarified the threshold of gravity of the crime and a state’s unwillingness or inability for the decision on admissibility. As it stands, a supra-national actor will judge the capacity and willingness of a state. Applied to China, this type of external judgment would prove the Chinese government intolerable. Moreover, the actual operation of the ICC seems to compete with – rather than complement – the existing judicial remedies at the national level.

On the other hand, now that China is increasingly exposed to the global system, the sovereignty-sensitive policies are not sufficient to protect China’s interests in the twenty-first century. After the China-Africa Co-operation Forum was established in 2000, China vigorously promoted its trade and investment with 44 African countries. As of 2014, the Sino-African trade amounted to USD 222 billion – 21 times the sum in the year 2000 – making China the biggest trading partner with Africa for the sixth consecutive year.³⁰ Given that the socio-political environment in Africa is hampered by corruption, conflicts and weak formal institutions, China’s strategic interests are challenged. Institutional studies

³⁰ ZHOU Suya, “15 Years of Forum on China-Africa Cooperation”, in *People’s Daily*, 4 December 2015 (周素雅, 《中非合作论坛15年: 2020年中非贸易额将达4000亿美元》, 载于《人民日报》, 2015年12月04日).

have shown that Chinese policy-makers are becoming more institutionalized, relying more on standard rules and procedural regulations.³¹ It is foreseeable that China will increasingly resort to legal measures available in the international arena.

At the policy level, the CPC Central Committee has proclaimed to safeguard people’s right to sue government organs and their functionaries during the national congress in October 2015. Local government leaders are held accountable for violations of the Chinese Constitution and specific laws on administrative performance.³² It is likely that international legal norms will be more compatible with the Chinese national system, which may ameliorate the relationship between China and the ICC. After all, compared with MAO’s era when ideological values mattered more in policy-making, and DENG’s period of reform during which development was deemed the predominant objective, the current XI Jinping administration has displayed a different mind-set in positioning China’s role in the international system. If China aims to “be better heard and understood by the world and value justice as much as benefits”,³³ a deeper co-operation with the ICC would be a rational choice for China.

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³¹ David Shambaugh, translated by HUANG Yusheng, “Transition in 60-Year Foreign Policies of China”, in *Contemporary China History Studies*, 2010, vol. 17, no. 1, p. 117 (沈大伟著、黄语生译: 《中国外交60年变迁》, 载于《当代中国史研究》, 2010年1月第17卷第1期, 第117页).

³² Official archive of the Fifth Plenary Session of 18th CPC Central Committee (<http://www.legal-tools.org/doc/2b1fc9/>).

³³ In a CPC national meeting on “Publicity and Ideological Work” in August 2013, President XI Jinping stressed that it is imperative to “tell China’s stories well and spread China’s voice widely”, available at <http://cpc.people.com.cn/n/2013/0821/c64094-22636876.html>, last accessed on 16 August 2015.