

A Realist Perspective on China and the International Criminal Court

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FICHL Policy Brief Series No. 13 (2013)

1. Introduction

On 17 July 1998, the Statute of the International Criminal Court (“ICC”) was adopted by a vote of 120 to 7, with 21 states abstaining. China was one of the seven states that voted against the Rome Statute (the “Statute”). Factors affecting China’s policy towards the ICC seem to be dynamic, inviting explanatory reflection. By adopting a realistic approach, this brief seeks to understand China’s position and predict how it may evolve based on existing Chinese publications,¹ official statements,² news commentaries,³ and the performance of the ICC.

2. Diversity of Concerns

China has signed and ratified several legal instruments on international humanitarian and human rights law,⁴ reflecting her overall support for the international legal system at a time when we still do not have a unified global constitutional order. But China has adopted a reserved attitude towards the ICC Statute and its 2010 amendments, acting cautiously in the signing of multilateral treaties when significant legal, political and cultural concerns are at stake. In the Sudan-Darfur issue, records show that in March 2005, when the United Nations Se-

curity Council (“UNSC”) formally referred the situation in Darfur to the ICC Prosecutor with reference to Article 13(b) of the Statute, China abstained in the vote on the referral resolution.⁵ On 31 July 2009, China urged the UNSC to suspend the ICC’s arrest warrant against Sudanese President Omar al-Bashir, stating it was “an inappropriate decision made at an inappropriate time”⁶.

2.1. Legal Concerns

Universal jurisdiction based on customary international law is widely accepted as a valuable tool to enable domestic courts to punish serious crimes committed abroad by foreigners albeit not against the forum state or its citizens. While Article 9 of the Criminal Law of China⁷ provides a basis for universal jurisdiction, China has expressed that it is unable to accept provisions of the ICC Statute that may empower the Court to exercise jurisdiction over crimes without the consent of a state as required by the law of treaties.⁸ There are several articles that expand the scope of the ICC’s jurisdiction to non-states parties. For example, Article 12(3) allows non-states parties to grant jurisdiction to the Court on an *ad hoc* basis without acceding to the Statute.⁹ China also has concerns regarding Article 13 and the way it can extend the ICC’s jurisdiction to non-states parties by allowing the Court to act upon a referral by the UNSC which may

1 In China, scholars and practitioners have drawn on a variety of explanations for China’s opposition to ICC membership, see LIU Jianping and WANG Zhixiang, “ICC and Non-State Parties: China’s Attitude Towards the ICC”, in *Journal of International Criminal Justice*, 2005, vol. 3, pp. 608–620; and JIA Bingbing, “China and the International Criminal Court: The Current Situation”, in *Singapore Year Book of International Law*, 2006, p. 87.

2 WANG Guangya, “The Statute of the International Criminal Court”, *Legal Daily*, 29 July 1998.

3 WANG Yan, “The Prospect of China and the International Criminal Court: from the Perspective of Jurisdiction”, in *Legal System and Society*, 2008, p. 48.

4 For instance, the 1949 Geneva Conventions, the 1966 International Covenant on Economic, Social and Cultural Rights, and the 1989 Convention on the Rights of the Child.

5 UNSC, 5158th Meeting, “Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court”, UN Press Release SC/8351, available at <http://www.un.org/News/Press/docs/2005/sc8351.doc.htm>, last accessed on 16 July 2013.

6 People’s Daily, “China Says ICC’s Measures Should Work for Sudan’s Stability” (on file with the authors).

7 Criminal Law of the People’s Republic of China, available at <http://www.legal-tools.org/en/go-to-database/record/2173f3/>.

8 See *supra* note 2, p. 4.

9 See Carsten Stahn *et al.*, “The International Criminal Court’s Ad Hoc Jurisdiction Revisited”, in *American Journal of International Law*, 2005, vol. 99, p. 422.

conflict with the customary treaty law principle of *pacta tertiis nec nocent nec prosunt*.¹⁰

China prescribed that piracy is the only crime unanimously accepted among states as an international crime subject to universal jurisdiction.¹¹ The criminal law of China does not include most of the core international crimes provided for in the ICC Statute, including the crime of aggression, genocide and crimes against humanity. It has been suggested that to punish these crimes in China would constitute a violation of the principles of *nullum crimen sine lege, nulla poena sine lege*, and prohibition of analogy.¹²

2.2. Political Concerns

2.2.1. Aggression and the UN Security Council

The definition and conditions for exercise of jurisdiction over the crime of aggression were adopted by consensus at the 2010 Kampala Review Conference by the ICC States Parties.¹³ The most hotly debated issue was whether the ICC should be able to independently proceed with an investigation absent a determination of aggression by the UNSC. The new provisions of the ICC Statute allow the Prosecutor to proceed with the investigation if the UNSC does not take action beyond a six months' time limit. As one of the permanent members of the UNSC, China has been committed to maintaining the Council's authority and functions.¹⁴ Well before the adoption of the 2010 amendments, the Chinese Government published a statement regarding its relationship with the ICC, observing that "the activities of the Court should not run counter to the provisions of the Charter of the United Nations, especially [they] should be in keeping with the provisions of the Charter of the United Nations on the question of crimes of aggression".¹⁵

10 A treaty binds the parties and only the parties; it does not create obligations for a third state, see Article 34 of the 1969 Vienna Convention on the Law of Treaties.

11 A/C.6/65/SR.11, para. 25.

12 MA Chengyuan, "The Connotation of Universal Jurisdiction and its Application in the Criminal Law of China", in Morten Bergsmo and LING Yan (eds.), *State Sovereignty and International Criminal Law*, Torkel Opsahl Academic EPublisher, Beijing, 2012, pp. 180–189 (available at <http://www.legal-tools.org/doc/a634d0/>).

13 Article 8bis on the definition and Articles 15bis and ter on the conditions for the exercise of jurisdiction for the crime of aggression.

14 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", available at <http://gd.china-embassy.org/eng/zyxw/t858193.htm>, last accessed on 16 July 2013.

15 Ministry of Foreign Affairs of the People's Republic of China, "China and the International Criminal Court", available at <http://www.fmprc.gov.cn/eng/wjzb/zzjg/tyfls/tyfls/2626/2627/t15473.htm>, last accessed on 16 July 2013.

Allegations of aggression are normally politically contentious and the UN Charter provides that the UNSC is the right political organ to address this issue. This way the UN can fulfil its responsibility to maintain international peace and security. The ICC is not well-suited to intervene in such sensitive political issues before the Council decides to take action. Authorization by the ICC Prosecutor to proceed with a case regardless of the decision of the Council could put the credibility of both institutions at risk.

2.2.2. Potential Politicization and Abuse of Discretion

During the negotiations on the ICC Statute, China disagreed with the power given to the Prosecutor to initiate investigations or prosecute *proprio motu*. According to China, this power could be exercised "without checks and balances against frivolous prosecution", which amounts to "the right to judge and rule on State conduct".¹⁶ One year after the Statute went into effect, the Chinese Government made the observation that "the Court should execute its duties objectively and impartially, make best efforts to avoid political bias and prevent the Court from becoming a place for political misuse of litigation"¹⁷. During the operation of the OTP, actors have suggested abuse of discretionary power by the ICC Prosecutor and highlighted the danger that the ICC may be seen as politically instrumentalised.¹⁸

2.3. Perception of Cultural Differences

Some cultural relativists argue that cultural differences between China and the so-called Western world lead to misperceptions.¹⁹ Although Western constitutionalism and human rights traditions have exerted deep influence on China, this does not mean that "a fully Westernised approach to constitutionalism and human rights is today accepted in Asia", in particular in China.²⁰ China remains cautious of how the universal human rights advocated as core values by Western states could be used politically as

16 A/CONF.183/SR.9, para. 39, available at <http://www.legal-tools.org/en/doc/6e77d1/>.

17 See *supra* note 15.

18 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 (available at <http://www.ficlh.org/policy-brief-series/>).

19 See, for example, ZHANG Xu, *International Criminal Court: A Perspective from China*, 2011, Law Press China; and ZHANG Lei, *China and the ICC: Status and Prospect*, Chinese People's Police University Press, 2009.

20 Jean-Pierre Cabestan, "Constitutionalism and Western Legal Traditions in Human Rights in Asian Legal Systems: With a Special Focus on Chinese Legal Systems", in J.C. Olivia and P. Cardinal (eds.), *One Country, Two Systems, Three Legal Orders – Perspective of Evolution*, Springer Verlag, Berlin/Heidelberg, 2009, p. 721.

powerful “new interventionism” tools²¹, as a ‘Trojan horse’ surreptitiously introduced into China’s civilization forcing China to accept these Western values, or even as an “instrument of economic competition” between the West and the East.

The Chinese Government is particularly sensitive to prejudice rooted in political differences. It has declared that this has become a part of interpretations of China’s human rights situation.²² Lingering hesitation exists among Chinese Government officials, scholars and others that the ICC could be used as an instrument to undermine the Chinese Government in its administration of internal affairs on the basis of international human rights standards, whether or not China is bound by them.²³

The present writers argue that the political concerns associated with accession to the ICC Statute are most important for the Chinese Government. The legal concerns can be resolved by improving China’s domestic criminal legal system, speeding up progress on the rule of law, and training legal professionals in international criminal law. The cultural concerns referred to above can easily, we submit, be used to becloud underlying realities.

3. Real Risks

3.1. China’s 3T Challenges:

Taiwanese, Tibetan, Eastern Turkestan Issues

One of the core political objectives of the Chinese Government is the reunification of the country. 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, pursuant to the Statute, falls within the jurisdiction of the ICC. This is not to suggest that Chinese Armed Forces are inclined to use excessive armed force, but few contemporary armed conflicts are without violations of international criminal law.

There is also the 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.

21 See *The White Paper of Human Rights in China*, Information Office of the State Council, 1991; cited in Henry J. Steiner and Philip Alston, *International Human Rights in Context: Law, Politics and Morals*, Oxford, 1996, p. 233.

22 Xinhua, “Political Bias Concerning China Human Rights ‘Deeply Rooted’”, People’s Daily, available at <http://english.people-daily.com.cn/90780/7713987.html>, last accessed on 16 July 2013.

23 LIU Jianping and WANG Zhixiang, *op. cit.*, p. 616.

The United States (“US”) Congress continues to allocate annual funds to the Tibetan exile community.²⁴ On 18 June 1987, the US House of Representatives adopted language concerning “China’s violation of human rights in Tibet”²⁵ which cited without credible evidence the figure of one million Tibetan deaths from the 1950s until the 1970s and related this to the crime of genocide.

Last but not least, the ‘Eastern Turkestan Islamic Movement’ – which has been added to the UN’s list of terrorists and terrorist supporters²⁶ – together with other ‘Eastern Turkestan’ forces, has long been implementing terrorist attacks against the Chinese Government and people.²⁷

3.2. Discretion and Preliminary Examination

Practice regrettably shows that the ICC Office of the Prosecutor has allowed the Court to be used as a forum for the consideration of political questions of statehood through its discretionary preliminary examination powers.²⁸ This is a most serious matter from the perspective of China which impacts on the legitimacy of the Court. The protracted and monarchical manner in which the former ICC Prosecutor indulged in his preliminary examination of the Palestinian Article 12(3) declaration for more than three years sets a landmark precedent for how the Office might disregard legitimate state interests during the examination of such declarations as well as complaints. There is little, if anything, affected governments can do during such preliminary examination, except to wait for what may be a very long time, even when the complaint is politically motivated. The present authors fail to comprehend how the ICC Prosecutor could spend more than three years examining the Palestinian declaration.

Against this background, we submit that if China were to become an ICC State Party, it is unrealistic to expect that anti-China actors or states fearing the rise of China would not file politically motivated complaints

24 H.R.2506, Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2002, available at <http://www.gpo.gov/fdsys/pkg/PLAW-107publ115/pdf/PLAW-107publ115.pdf>, last accessed on 16 July 2013.

25 H.R.2467, Human Rights Violations in Tibet by the People’s Republic of China, Congressional Record, 19 May 1987, 100th Cong., 1st Sess., 133 Cong. Rec. H 3710; see GUO Yonghu, *The U.S. Congress and “Tibetan Problem” in Sino-U.S. Relations*, World Affairs Press, 2011, p. 75.

26 The List Pursuant to Security Council Resolution 1390 (2002) and Paragraphs 4(B) of Resolution 1267 (1999) and 8(C) of Resolution 1333 (2000), available at http://www.dt.tesoro.it/export/sites/sitodt/modules/documenti_it/prevenzione_reati_finanziari/normativa_nazioni_unita/Resolution-1267-99-list.pdf, last accessed on 16 July 2013.

27 See *supra* note 15.

28 See *supra* note 18.

against Chinese individuals. By doing so, they would vest in a single ICC Prosecutor an enormous political power over China through the Prosecutor's control of all aspects of the preliminary examination process, including the timing of the process and media statements about it. Long delays in prosecutorial decision-making at the ICC would mean a prolonged period of uncertainty for China. Given the increased perception in the US of a challenge to its leadership role by a surging China, it is naïve to think that such prosecutorial preliminary examination would not be used against China were she to become an ICC State Party in these circumstances. The ICC Prosecutor's handling of the Palestinian Article 12(3) declaration regrettably provides emphatic support for this very fear. It comes on top of the separate concerns some in China may have entertained that Article 12(3) declarations could be used by non-state entities such as Taiwan to assert political independence.²⁹

4. The Proof is in the Performance

China is "concerned with the development of international criminal justice and supports the establishment of an independent, impartial, effective and universally recognized institution of international criminal justice as a complement to domestic legal systems to punish the most serious international crimes, advance world peace and promote judicial justice".³⁰ China's future accession to the ICC depends on whether the ICC can "win trust and respect of the international community through objective and impartial performance of its duty".³¹

These are not statements lacking context. The unprecedented number of ICC cases where the charges have not been confirmed, have been withdrawn, or where the confirmation hearing has been suspended for lack of evidence, combined with the 50% acquittal rate for com-

pleted ICC trials,³² clearly show a crisis of confidence in the ICC Office of the Prosecutor – in particular in the quality of its work on facts and evidence – also among ICC judges. This is further aggravated by the manner in which the Office has chosen to use its powers of preliminary examination.

Is it realistic that China becomes an ICC State Party in these circumstances? Should the Chinese Government – which is responsible for feeding and providing water and heating to more than 1.3 billion persons, and maintaining public services and order within its jurisdiction – willingly submit itself to an individual ICC Prosecutor whose Office has displayed a will and capacity to cast shadows of incrimination over governments during protracted preliminary examinations? Rather than being a mere rhetorical question, this juxtaposition captures a balancing between fundamental functions of governance in China today and the risks which ICC membership would entail for the ability of her Government to move the whole country forward at an unprecedented pace in a united manner.

In short, China is unlikely to become an ICC State Party as long as she would risk politically motivated and unfounded interference with her self-administration at this critical stage of her development, and the ICC Office of the Prosecutor has not clearly demonstrated its professionalism and responsible exercise of authority in preliminary examinations and investigations. Only when the Court shows a consistent record of responsible administration of international criminal justice over a number of successive years, should China revisit the question of accession to the ICC Statute. Until that time, the burden of proof rests on the Court and its Prosecutor.

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29 See Yael Ronen, "ICC Jurisdiction over Acts Committed in the Gaza Strip, Article 12(3) of the ICC Statute and Non-state entities", in *Journal of International Criminal Justice*, 2010, vol. 8 no. 1, pp. 3–27.

30 Ministry of Foreign Affairs of the People's Republic of China, "Position Paper of the People's Republic of China at the 67th Session of the United Nations General Assembly", available at <http://www.fmprc.gov.cn/eng/zxxx/t970926.shtml>, last accessed on 16 July 2013.

31 *Ibid.*

32 See International Criminal Court, "The Court Today", available at <http://www.icc-cpi.int/iccdocs/PIDS/publications/TheCourtTodayEng.pdf>, last accessed on 16 July 2013.