Prudence without Collateral Damage:
China and International Criminal Justice

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1. Apology for Omar al-Bashir with Collateral Damage

On 2 September 2015, just one day before the grand V-Day parade took place in Beijing, an editorial titled “China is not obliged to respond to accusations concerning Bashir’s alleged war-crimes” (“the Editorial’)¹ was published by the Chinese media outlet Global Times, a newspaper known for its “hardline and nationalistic take” on international affairs.² An English version of the piece was published under a less-polemic headline, “Invite of Bashir to WWII parade justified”.³ The Editorial was clearly a response to the United States (‘US’) State Department’s expressed opposition to Omar al-Bashir’s visit to China just after the Chinese Ministry of Foreign Affairs explained on 1 September 2015 that the hospitality China was offering to the wanted Sudanese President was both “reasonable and justified”,⁴ the same day as Chinese President XI Jinping officially greeted al-Bashir and referred to him as “an old friend of the Chinese people”.⁵

Never before had editorials intended for foreign readers delivered by the Global Times or other major official Chinese press agencies directly focused on operations of the International Criminal Court (‘ICC’).⁶ At a first glance, the background information and factual details presented by the Editorial appear correct, despite signs of selective use of facts, a phenomenon that is quite common in newspaper editorials around the world. For example, the Editorial refers to the Darfur conflicts – characterized by the United Nations as “the world’s worst humanitarian crisis”⁷ – in calm and neutral language, saying that “the causes of the Darfur conflicts are complicated”; nor were the wrong-doings for which al-Bashir is allegedly responsible ever mentioned.

For legal professionals, however, the argument part of the Editorial is perhaps more challenging. It leaves readers wondering whether some arguments or suggestions are politically charged in ways which could convey the wrong message about China’s stance towards the ICC and international criminal law altogether, perhaps even with the latter suffering an unnecessary “collateral damage”.

This brief is of course not intended to serve as an apology for a Western-centric or double-standard approach (both of which would seem to characterize international criminal justice), nor for what seems to be “natural responses” of Chinese actors. A sufficient number of Chinese representatives and scholars have endeavoured to illustrate China’s supportive stance towards international

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¹ Global Times, “China is not obliged to respond to accusations concerning Bashir’s alleged war-crimes” (环球时报: “巴希尔被指战争罪, 中国无义务理睬”), 2 September 2015 (http://www.legal-tools.org/doc/c1c4c3/).
³ Global Times, “Invite of Bashir to WWII parade justified”, 1 September 2015 (http://www.legal-tools.org/doc/ef43b6/). The translation of the Editorial from Chinese to English was on the whole accurate. Its English version serves as the primary text for this policy brief.
⁶ It should be noted that al-Bashir has visited China at least four times, thrice after 2009. Interestingly, the expression “old friend” was later removed from official news reports. See BBC Chinese, “China reacts to US discontent at Beijing’s invitation of Sudanese President to military parade” (BBC中文网, “美不满北京邀苏丹总统阅兵 中国做出回应”), 1 September 2015, available at http://www.bbc.com/zhongwen/simp/world/2015/09/150901_china_sudan_us, last accessed on 14 June 2016.
⁷ There had been previous coverage of negative news concerning the ICC published in English.
criminal law, including the ICC.9

Rather, it is the concern of this brief, that painstaking legal-professional efforts by State and non-State actors alike may be undermined by less-informed and sometimes spontaneous political narratives. While numerous Western scholars have refused to become apologists for the rule of power over international criminal law and justice, seeking new possibilities by re-examining the relationship between Realpolitik and international criminal justice, the same efforts should be expected of Chinese legal-professionals as more focus shifts to what China may contribute to the development of international criminal law under its current restraints.

This brief suggests that a careful assessment of the possible negative effects of the politicized sentences of the Editorial could contribute towards a higher level of prudence in the way actors such as the Global Times discuss international criminal law and justice, the ICC included. This again could help avoid misperceptions or negative views in the international community about China’s international legal policies. To this end, the policy brief tries to analyse the structure of the Editorial, what it said and what it did not say, and on which basic principles and considerations it was based (compared with other news reports and reviews in China during al-Bashir’s visit). I will then discuss whether this approach to, and view of, international relations and the international legal order remain adequate for China to cope effectively with future challenges along the path she has chosen.

2. China’s Adherence to Non-Intervention and its Consequences

International criminal justice’s inherent connection to external intervention inevitably triggers memories of China’s historical experience with consular jurisdiction and other forms of humiliating foreign interference that encroached upon China’s autonomy and eventually contributed to century-long domestic instability. Morten Bergsmo and LING Yan have analysed this connection.10 For the Chinese leadership, the defence of a “thick notion” of sovereignty as well as adherence to the principle of non-intervention have been perceived as being essential to its legitimacy.11 Intriguingly, by the time China finally regained her sovereignty — a collective empowerment for which the nation had strived for generations — the era started when sovereignty became subjected to severe criticism by international lawyers, diplomats and politicians in the wake of the Second World War. Sovereignty was seen as a legitimizer of the extreme abuse of State power experienced during the War. It was depicted as the aggressive power that threatens the universal well-being of individuals.12 After China initiated her exploration of the “brave new world” from which she had been alienated for decades, the principle of non-intervention served as China’s “normative entrenchment”, a safe haven into which she could retreat whenever she felt uncomfortable with foreign influences. The deeply-rooted and internalized notion of non-intervention therefore defines both the possibilities for and limits of China to engage with norms and institutions of the international society.13

The Editorial seems to have inherited such a classic mind-set. Where it emphasizes that the “causes of the Darfur conflicts are complicated” ultimately implies that foreign non-stakeholders would not be in the best position to make the calls. Foreign imposition — in particular decisions generated by the professional class of lawyers who operate by “foreign” standards and their own technical vocabulary14 – would only create more controversy, instead of settling existing problems (fourth paragraph: “The decisions made by the ICC were very controversial in Africa”). In reality, the Global Times favoured domestic negotiations over ICC jurisdiction, unless the latter approach could be embraced by the government. The preferred way would tend to honour the status quo and let the outcome and reality justify everything for itself. Thus the Editorial argued that “the West” ought to take into account that “Bashir, although indicted by the ICC, continues to hold his office for the years to come (and have become the symbol for Africa’s autonomy)”.15 This approach would perhaps be considered outdated (or even reactionary) by international lawyers, as it strips sovereignty of its normative implications, withdrawing the boundary between power and authority,16 risking to ignore the unequal distribution of the proclaimed “self-empowerment”.17

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13 Gill and Reilly, 2000, supra note 11, p. 41.

14 Koskenniemi, 2011, supra note 12, p. 68.

15 Global Times, 2015, supra note 3, para. 10, italics added. The English translation used the expression “has still ruled for years” which I believe is not a precise rendering of the original Chinese version. Moreover, the translation left out “become the symbol”.


17 José E. Alvarez, “State Sovereignty is Not Withering Away: A Few
What particularly concerns international lawyers is the apparent collision between the master-narrative of the non-intervention approach and the underlying rationale of international criminal justice. Transcending domestic legality and invoking individual responsibility directly based on international law is justified by the assumption that the alleged crimes, by their exceptional gravity, undermine the international community’s interests in peace and security or further “shock the conscience of humanity”.

Such consideration for collective conscience and interests embedded in the ICC Statute and UN Charter was somehow left out – if not implicitly mocked as hypocrisy – by the Editorial. Following its logic, the Editorial seems to propagate a view whereby China should extend her scepticism from the particular mechanism of the ICC to include even the basic principles of international criminal law and the Tokyo and Nuremberg legacy.

3. Respecting Our Intellectual Dignity

One may argue that the Editorial was nothing but a routine political piece that served a particular objective in particular circumstances. After all, criticism by the US government or other Western media may well remind the Chinese of the shaming campaign conducted just before the 2008 Beijing Olympic Games, at a time when Chinese actors felt particularly vulnerable. Since the parade was designed to be an opportunity for China to show her strength and confidence, the Global Times might as well try to hold its ground over matters of public opinion and even to ‘play offensively’. It is evident that the Sudan will continue to play as China’s important economic partner in Africa during the execution of China’s future overseas enterprise strategy, currently known as the “One Belt One Road Initiative”. Therefore, backing up al-Bashir politically after giving him immunity assurances for his trip seems to be a rather logical option, especially when the meeting between the heads of states were intended for the signing of a “Joint Statement of Strategic Partnership”.

Nevertheless, this policy brief respectfully takes the view that the article in the Global Times came across as arrogant, perhaps even ignorant, rather than conveying confidence in a way that would be understood and welcomed by English-language readers. The article would only confirm those who have expressed previous concerns about China’s foreign policy growing more assertive and threatening, instead of effectively addressing the US criticism which should not be so difficult given that the US is not an ICC State Party and arguably displays blatant double-standards in this area of international relations.

Despite the Editorial itself calling for China to be making its own “independent judgments”, a closer examination over its structure and content reveals that the author(s) may have simply borrowed the arguments of the Sudan, adding a few new details and sub-arguments. Subsequent to the referral of the situation in Darfur to the ICC by the United Nations Security Council (‘UNSC’), the Sudanese government took the chance of organizing its own coalition and sought to defy the actions of the ICC by discrediting its authority and neutrality, accusing the ICC of being “anti-African” and depicting it as being the instrument of Western neo-colonialism. With support of the late Gaddafi, who held the rotating chairmanship of the African Union (‘AU’) at the time, the Sudan managed to rally a number of African states that questioned the ICC’s involvement in the Darfur conflict (since the ICC’s impact on the restoration of peace in the region was questionable). This eventually led to the AU resolution that called for AU Member States not to co-operate pursuant to Article 98 of the Rome Statute.

Yet, it is one thing for the Sudan’s non-intervention campaign to seemingly have triumphed in Africa, it is quite another whether a great power such as China should adopt such an easily accessible argument without proper scrutiny or reflection. It seems the Editorial made the mistake of automatically acknowledging the vague

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19 Nonetheless, a much more explicit sarcasm was displayed towards the US (“while supporting ICC principles, has not signed the ICC Rome Statute”): Global Times, 2015, supra note 3, para. 6.
arguments presented by the “African brethren” as the basis for its own arguments. It failed to notice the gulf between actual practices and judgment based on imagination. In fact, China’s abstention over UNSC resolution 1593, in which the Council referred the situation in Darfur to the ICC, may serve as an indication of China’s flexibility on issues of State sovereignty, especially when confronted with a fermenting humanitarian crisis.\textsuperscript{28} Moreover, the AU resolution that called for non-cooperation with the ICC, was not as solid as it claimed to be. It had been exposed by Botswana officials that the resolution was pushed through without a vote,\textsuperscript{29} and States including Botswana, Chad, Ghana and Uganda distanced themselves from it.\textsuperscript{30} Nor should the popular opposition against al-Bashir occur in contexts of power politics,\textsuperscript{29} It would be perhaps also acknowledge the reality that the majority of African states have accepted the ICC as a global court with historically strong African support, with over 30 African states having ratified the Rome Statute.\textsuperscript{32} It would be beneath the intellectual dignity of China’s stature were she, on the basis of advice offered by the Global Times in the Editorial, to advocate on behalf of African peoples for their liberation from the “tyranny” of the ICC.

4. An International Law Narrative that Reflects Longer-Term Interests

Contemporary international criminal justice does indeed occur in contexts of power politics,\textsuperscript{33} and the strongest “gets away from murder”,\textsuperscript{34} to use language of authorities in this area. Yet, cynical or realist postulations ending with “it is all politics” do not bring us a single centimetre closer to better politics.\textsuperscript{35} Becoming a responsible great power (if not exactly the “responsible shareholder” expected by the US), requires of China that she embraces existing international institutions and laws, rather than inadvertently or otherwise undermining them.

China’s attitude towards peacekeeping readily captures her subtle transition towards a more pragmatic approach. The time has come for Chinese actors to pay more attention to our narrative about international criminal law and justice as well. The fact is that the Chinese government has long pledged commitment to international criminal justice and, more generally, to the international rule of law.\textsuperscript{36} This should be quite obvious insofar as China was extensively victimized by core international crimes during the Second World War, and was a major beneficiary of international criminal justice at Tokyo. We are a chief stakeholder in the Tokyo and Nuremberg legacy. And we will not be able to uphold the Tokyo Trial as “humanity’s justice” – rather than “victor’s justice” – if we apologize for al-Bashir and his claim that he has been targeted by the ICC because he is disliked by some Western states, as the Global Times Editorial seemed to suggest.

As a rising power with deep historical ties with the developing world, including regions where State violence might be overwhelmingly destructive, also for investment and trade, China has a strong, long-term interest in a strengthened, not weakened, international legal order. Chinese actors should reflect on this and choose their language carefully when they comment on international law and institutions.

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\textsuperscript{31} Peskin, 2009, supra note 26, p. 308.
\textsuperscript{34} Michael Mandel, How America Gets Away With Murder, Illegal Wars, Collateral Damage and Crimes Against Humanity, Pluto Press, 2004.
\textsuperscript{36} See, supra note 9.