Discrepancy and Synergy between China and the International Criminal Court

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Abstract:

International legal scholarship pays much attention to normative interpretations of China’s stance toward international criminal justice, which contributes little to the potential synergy between the two. This article develops the current analytical framework in two ways: first by outlining the rationale behind China’s conventional critique of the ICC, namely concerning supranational jurisdiction, judicial complementarity and situations in Africa, that results in the discrepancy; secondly, it examines the shift in China’s diplomatic strategy and domestic judicial reforms, and the expanding presence in Africa that bring about an alternative approach. This article then concludes with four factors that are likely to lead to an optimal relationship between China and the ICC.

Key Words: China, International Criminal Court, Supranational jurisdiction, State sovereignty, Sino-African relations

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1. INTRODUCTION

China’s position vis-à-vis the International Criminal Court (ICC) has emerged as a decisive topic of concern for the international system with China becoming an influential power particularly since its remarkable economic growth beginning in the 1990s. The Chinese government does not shy away from making its voice and preferences heard by its counterparts. China expressed its acknowledgment of the ICC’s role in international criminal justice, and its delegation addressed the session of the Assembly of States Parties to the Rome Statute in November 2015, saying that ‘the ICC has drawn more and more attention in the field of international affairs, … the work of ICC turns to proceed in a more efficient, cautious and pragmatic manner.’

On the other hand, China has not yet signed the Rome Statute, and has shown its reservations – and sometimes objections – toward the ICC’s operation. When the Third Committee of the United Nations’ General Assembly at its sixty-ninth session on 18 November 2014 approved a draft resolution on human rights situations in the Democratic People’s Republic of Korea, Syria and Iran, China was placed in the international spotlight after it ‘responded negatively to stop any ICC referral.’ China’s delegation voted against the draft resolution, saying that China would continue to oppose ‘the use of pressure on countries under the guise of protecting human rights’ and that the draft was ‘not practical, jeopardizing trust and provoking confrontation among Member States [of the United Nations].’

International legal scholars outside China are unfamiliar with the rationale behind China’s reaction to the ICC owing to the cultural barrier and more importantly, a tendency to underestimate an ongoing shift within China. China’s diplomatic positions have switched from stringently sticking to the primacy of state sovereignty to strategically enhancing China’s international impact. China’s stance toward the ICC can be easily grasped from records of international diplomatic bodies including the Preparatory Commission for the International Criminal Court or the General Assembly of United Nations or the Assembly of States Parties to the Rome Statute, occasionally accompanied by tactful but vague press releases from the


4 UN Meetings Coverage of General Assembly, supra note 2, 2014.
Foreign Ministry of China. The rationale behind these statements is, however, neither apparent nor arbitrary.

On the domestic level, even the Chinese policy makers have not arrived at some consensus about China’s relationship with the ICC as the latter is deemed complex. The Chinese officials would rather stay cautious and prudent, following a so-called ‘24-charater strategy’ composed by China’s former paramount leader Deng Xiaoping in 1990, that ‘observe calmly, secure our position, cope with affairs prudently, concentrate on enhancing our capacities, keep a low profile, and never claim leadership.’ Now that the ICC as a *sui generis* permanent institution is quite new to the whole international system, its interaction with the international power structure as well as its impact on international justice need to be carefully explained so that Chinese government – as a ‘calm observer’ – is willing to actively get involved with the ICC.

Aiming to reveal implicit factors that lead to China’s stance on the ICC, this article adds a contextual dimension to the current normative framework and demonstrates how historical exposure to the outer world affects the present-day minds of Chinese policymakers as well as the common public. The article is divided into three parts: first, an outline of issues that are often questioned by China; second, an analysis delving into the contextual aspect of China’s policy-making in the twentieth century; and lastly, an analysis of the potential factors attributing to synergy between China and the ICC.

2. ICC ISSUES IN QUESTION

With the ICC established as a permanent body in 2002, international criminal justice saw a momentous development for fighting against impunity; in the meanwhile, it invited some concerns in terms of the interpretation and application of the core basis on which the ICC operates. This part is not intended to provide a holistic introduction to China’s critique of the ICC, but instead seeks to highlight the issues that are frequently questioned by China.

2.1 Judicial Supremacy Over Sovereignty?

Speaking of the ICC’s role in contemporary criminal justice, one cannot obtain a sensible impression without looking into the key features of this first-ever treaty-based permanent international criminal court. Among other legacies from the previous international criminal tribunals, the ICC inherits the norm that impunity is under no condition acceptable and persons committing the most serious crimes must not go unpunished. The ICC’s value-oriented objective and its judicial nature as a supranational organ engender a concern for the enforcement of international justice and respect for state sovereignty.

The critique relates to a broad tension between supranational jurisdiction and state sovereignty that deserves much attention, as many entities transcending state authorities are quite influential in present-day global dynamics. Divided views among states and jurists lie in a divergent understanding of the sources upon which the supranational jurisdiction is built and the extent to which it can apply, and also in a contrasting context in which developed and developing states experience the compromise differently. Literature about international criminal law clearly shows that customary international law, international treaties, and domestic legislation serve as the most important sources for the Rome Statute on the basis of which the ICC was founded.6 While it is less explicit whether the international criminal norms developed in the past two decades are universally agreed on, and the extent to which the contextual differences of states affect their perception and application of those international norms. An interpretation of the judicial supremacy over state sovereignty that makes perfect sense to some societies is one that others may be hypercritical of.

Looking back to history, after the principle was adopted in the 1648 Westphalia Peace Treaty that acknowledged each state’s exclusive territory authority, the application of this norm outside Europe was processed differently. The 1858 Treaty of Tientsin, for example, compelled the Chinese government to give up their sovereign rights and accept extraterritorial zones in which criminal suspects of British, French and Russian nationalities could only be trailed in consular courts free from Chinese jurisdiction. As a study on the history of international relations reveals, the Third-World countries were ones who ‘did not have states that were strong enough to withstand European or Western aggression; the African, Asian and Oceanic people, as they see it, were subject to domination, exploration, and humiliation. It is by getting control of states that they have been able to take charge of their own destiny.’7 Therefore, developed and developing states may not regard the significance of state sovereignty in the same way.

The international community had to re-visit the ends of state sovereignty after the Second World War, and later assented to the concept that states should ‘set up [a supra-national regime] to overcome perceived problems arising from inadequately regulated or insufficiently coordinated national action.’8 And as supra-national tribunals at both regional and international levels emerged, the principles of criminal responsibility and other aspects of the ‘general part’ of criminal law have been posited in a heated debate: as to the most serious crimes against the fundamental values of humanity, should judicial supremacy over state sovereignty be accepted

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in order to provide the last resort for criminal justice? The ICC’s expectation is gradually incorporated into a normative framework maintaining that states should cooperate on cross-territory trials, and that they should facilitate the ICC’s exercise of its jurisdiction. However, the ICC’s initiation of an investigation is not necessarily dependent on the state’s consent can be problematic in light of how contrary the applications of customary international law were in history. Hence the ICC’s operational mechanism, which allows itself to exercise mandate in a sovereign state, is arguably a potential intervention in sovereignty and political independence of states.

The ICC may exercise its jurisdiction on its own motion and determine the admissibility of a case when ‘the principles of due process recognized by international law’\(^9\) are not met. Admissibility consists of three components: complementarity, gravity of the crime and a state’s unwillingness or inability to carry out investigation or prosecution, but the Rome Statute does not state whether these components should be considered in any particular order. During the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, the Chinese delegation revealed its concern that ‘the Prosecutor’s right to conduct investigations without sufficient checks and balances against frivolous prosecution, was tantamount to the right to judge and rule on State conduct’.\(^10\) In the 2015 session of the Assembly of States Parties to the Rome Statute in 2015, the Chinese representative reiterated the necessity to prove that the ICC’s efforts were made ‘in compliance with the principle of complementarity’, and that the ICC must “perform its duties with greatest prudence.”\(^11\)

### 2.2 Judicial Complementarity or Competition?

The Rome Statute respects states’ right to first prosecute crimes, and the ICC sticks to the principle to be ‘complementary to national criminal jurisdictions.’\(^12\) The interpretation and application of the complementarity principle can be controversial as well. As M. Cherif Bassiouni reflects, the concept of complementarity is not explicit, as its ‘premise of the existence of concurrent jurisdictional relationship between co-equal authoritative legal processes’ needs much articulation.\(^13\)

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\(^12\) *Rome Statute*, supra note 9, Preamble and Article 1, “The Court”.

China’s official claims have been constantly reserved toward the role of ICC Prosecutor. Under the ICC’s authority, the Prosecutor has several powers, including proposing amendments to the Elements of Crimes and Rules of Procedure and Evidence;\textsuperscript{14} analysing the seriousness of the information sent by States, organs of the United Nations, intergovernmental or non-governmental organizations, and other reliable sources; initiating investigations \emph{proprio motu} on the basis of jurisdiction; and submitting new facts or evidence when an investigation request is refused by the Pre-Trial Chamber.\textsuperscript{15}

Beside this, the complementarity principle also means that the ICC should ‘provide assistance to a State Party conducting an investigation into or trial in respect of conduct which constitutes a crime within the jurisdiction of the Court or which constitutes a serious crime under the national law of the requesting State.’\textsuperscript{16} The Office of the Prosecutor pursued a strategy of developing partnership and dialogue with States, by ‘encouraging national action and promoting anti-impunity measures,’ and ‘providing direct assistance and advice …including exchanging information and evidence to facilitate a national investigation or prosecution, providing technical advice, and offering training to countries [to a certain extent].’\textsuperscript{17}

In spite of the mutually beneficial outlook underlying the strategic plan on judicial cooperation between the ICC and states, the ICC’s operation often seems to proceed in a one-directional way, such as requesting cooperation from concerned States and other organizations rather than amplifying the existing judicial resources at the national level. In a report from the Office of the Prosecutor with regard to the case of Libya, ‘cooperation’ is explained as ‘all States and concerned regional and other international organizations cooperat[ing] fully with the Court and the Prosecutor’, and the Prosecutor ‘encourag[ing] partners to cooperate [as] fully as possible without unnecessary preconditions or restrictions to ensure the effectiveness of the investigation.’\textsuperscript{18}

Providing the fact that not every judicial system is up to the same standard, China emphatically raised the question of how to improve the national judicial system by cooperating with the ICC. In 1995, China requested that the then to-be-founded ICC should carefully settle “whether or how to render judicial assistance to the court or countries making such requests on a case by

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\footnotetext[14]{Rome Statute , \emph{supra} note 9, Article 9 “Elements of Crimes”, Article 51 “Rules of Procedure and Evidence.”}
\footnotetext[15]{Rome Statute , \emph{supra} note 9, Article 15 “Prosecutor”.}
\footnotetext[16]{Rome Statute , \emph{supra} note 9, Article 93 “Other forms of cooperation”.}
\end{footnotesize}
The Chinese delegation stated in 2013 that it expected the ICC to provide assistance to “further construct the state’s judicial capacity in order to better try individual cases.” More recently, China re-affirmed its preferred approach at 2013 Assembly of States Parties to the Rome Statute by stating “the Court should … encourage and support relevant states to exercise their jurisdictions over crimes, especially by strengthening judicial capacity building based on states’ judicial sovereignty.”

Furthermore, pre-conditions of exercising the ICC’s complementary jurisdiction depends on the ICC professionals’ discretion as to whether the [State’s] proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.’ This seemingly grants ICC the power to judge a sovereign state’s judicial quality, which is hardly acceptable to the Chinese government.

2.3 ICC Preoccupation in Africa

Since ICC’s inception in July 2002, its targeting African state heads has provoked a strident criticism for acting with bias. The ICC disputed the criticism of selective prosecution and being subject to political influence, arguing that among the eight cases brought before the Court, only two were begun propria motu, i.e. Kenya and Côte d'Ivoire, while the remaining six were either referred by the states themselves (Uganda, Democratic Republic of the Congo, Central African Republic and Mali) or by the UN Security Council (Darfur/Sudan and Libya). Another meritorious ICC argument is that ‘Africa has experienced a large number of atrocities, and statistically speaking, the rate of atrocity crimes committed on the continent would make it a natural focus for the Court.”

21 Statement by MA Xinmin, at the twelfth session of the Assembly of States Parties to Rome Statute of the International Criminal Court.
22 Rome Statute, supra note 9, Article 17(2c).
However China frequently questions the ICC’s prudence in its selection of cases primarily based on two considerations: first that the ICC seems to reinforce the concern that the current international system discriminates against less powerful states, and second that the supranational legal proceedings may constitute serious impediments to conflict resolution and peacebuilding process in Africa. At the preparatory conference, the Chinese delegations demonstrated their worries as to whether the ICC could operate in an independent and fair way, and recently in the 2013 Assembly of States Parties to Rome Statue, China reiterated the necessity to strengthen ICC’s fairness so that ‘no distinction should be made to different parties in every step of the proceedings of the Court, from situation referral, investigation to trial of a case or compensation stage. Any double standard, selective enforcement of law or selective justice is a violation and betrayal of justice itself.’

The former ICC Prosecutor Luis Moreno-Ocampo pursued a vigorous program of investigation in Africa, but failed to examine both sides sufficiently, which leads to an image of the ICC’s partiality. Given that the situation in Kenya is ‘relatively small-scale violent when compared to other situations such as Sudan and the Democratic Republic of Congo,’ the Prosecutor did not focus enough on the gravity of asserted crimes and it led to a problematic image of being biased in selecting cases. Later it was noted that some African states ‘take the view that they have been singularly targeted in the indictment and arrest of their officials and that the exercise of universal jurisdiction by European states is politically selective against them.’

In addition, the ICC’s presence in Africa conflict areas raises a fundamental debate on peace versus justice. The ICC’s presence in Uganda appeared unwelcomed by both Uganda president and local civil society leaders given the fact that the ICC neither delivered justice to the victims of the conflict, nor facilitated the peace talks between government and rebellion leaders. Although Article 16 on ‘Deferral of Investigation and Prosecution’ acknowledges the UN

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25 Ministry of Foreign Affairs of the People’s Republic of China (n 21), statement by MA Xinmin.
29 For instance, President Museveni stated that “[t]he state could withdraw its case [in the ICC] if leaders of the Lord’s Resistance Army(LRA) could 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 close to the government, released 15 November 2004., accessed 20 March 2014 via: www.iccnow.org/documents/AI-Ugandanpressrel_16Nov04.pdf
Security Council’s authority to suspend investigations or prosecutions for renewable one-year periods if they are deemed to pose a threat to peace and security, both the ICC and the UN Security Council have not shown the interest in employing these escape clauses.\textsuperscript{31} To date, the ICC has never suspended an investigation and prosecution at the request of the concerned state or international organizations. This invites some skepticism that the ICC can complicate domestic issues in a certain state, which contradicts the objective of development and peace pursued by African societies.

3. REVEALING DISCREPANCY BETWEEN CHINA AND THE ICC

Despite much normative pressure concerning China’s reaction to the ICC in particular and international criminal justice in general, there is no sign that the Chinese government will sign the Rome Statute in the foreseeable future. This part offers an explanatory perspective that analyzes three considerations that play a significant role in formulating the Chinese diplomatic principles and China’s stance toward the ICC.

3.1 State Integrity: Political Bedrock of Chinese Foreign Policy

State integrity in this part refers to a recognition that the state – and along with the system of the state – are entitled to exert primary jurisdiction and it is to be respected by other states under international law. It is perhaps helpful to briefly summarize how China as a state actor experienced being part of the international system, before a discussion on various interpretations on supra-national judicial organ begins.

Notwithstanding a critical attitude of the history of Western imperial hegemony, China saw an increased interest in joining the Western-led international system in the early twentieth century when then Chinese elites were enormously anxious about China’s weakness and underdevelopment. In the last decade of the nineteenth century, mainstream intellectuals were convinced that only by developing national institutions following the exemplary experience of Japan, West Europe and North America, could China ameliorate its declining fate and revive itself as a competent player in the modern international arena.\textsuperscript{32}

One of the attempts was to get acquainted with how the international legal framework worked. After the seclusive Imperial Dynasty ended in 1912, Chinese Republican governments begun to speed up the pace to accede to multilateral treaties. The first international treaty signed by Chinese Republican government was the International Opium Convention on 23 January 1912 in The Hague, in response to the increasing domestic consensus against the opium trade that


severely damaged both Chinese economy and demographic quality in the second half of the 19th century. China as a victor in the First World War had a strong intention to sign the 1919 Treaty of Versailles, hoping that they would regain the sovereign control over the German concessions on China’s Shandong peninsula. However, with 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, that ‘Germany renounces, in favour of Japan, all her rights, title and privileges particularly those concerning the territory of Jiaozhou, railways, mines and submarine cables [in Shandong].’

When the strategy of ‘seeking for self-evident justice from international society’ proved unsuccessful, the intellectuals lost their confidence in their Western ‘teachers’ and instead advocated for patriotic spirits which bloomed nationwide after the famous ‘May Fourth Movement’ in 1919. Not surprisingly, ‘standing up as an independent country’ was thrilling to the whole population when the Communist Party of China’s (CPC) declared the foundation of People’s Republic of China in 1949. Nationalism has been incorporated within public conceptions in China. To some extent, the CPC’s legitimacy is built upon their competency to free Chinese society from external intervention. ‘The Road of Rejuvenation’, a permanent exhibition at the National Museum of China in Beijing, reminds visitors of the 1840s’ Opium War and the follow-on fate of China becoming a semi-independent nation. Nationalist thinking extended in the 1990s when China’s economy prospered in the global market, expecting the world to show their respects to China – a great nation with a ‘large size and population, long history and legacy.’ In addition, ideological confrontations after the Second World War discouraged China from a broad interaction with most UN-related bodies and treaties until the 1970s.

Even though China adjusted its stance toward the international system after the normalization of Sino-American diplomacy pushed by Henry Kissinger’s secret mission to Beijing in 1971, it did not mean the Chinese policymakers conceded all the old norms encapsulated in the state integrity. The Chinese government was not prepared to replace these norms with universalistic values originating from abroad, especially after the 1980s’ popular cognitive wave of the post-Orientalism that criticizes the Eurocentric concepts Intellectual work and education in China have somehow contributed to a trend of ‘national rejuvenation’. To some extent, Chinese youth generations are influenced by the patriotic and nationalist education. Western imperialist

history is actively present in China’s contemporary discourse, and independent jurisdiction free from supra-national criticism and correction is a notable component to that perception.

According to China’s philosophy on foreign relations, states’ mutual respect for integrity holds a moral aspect - however small or underdeveloped a state is, its consent should be respected. Chinese diplomats have been proud about the morality reflected by their reaction that ‘we are opposed to the big bullying the small, but we also believe that the small must not make troubles out of nothing. We should respect each other.’

In short, an absolute state integrity free from external interventions is deemed to be a political bedrock for Chinese policymakers and a legitimate claim for the general public. The idea that intentional justice can surpass state integrity under some circumstances has not become well-known in Chinese discourse.

3.2 Judicial Reforms: An Ongoing Agenda in China

Chinese leaders allegedly strive to modify the equilibrium between executive and legislative powers, and declare to build an independent judiciary – though under the CPC’s supervision – in order to prevent arbitrariness of officials and protect rights of individuals. The Supreme People’s Court initiated a series of judicial reforms in the 1980s, ‘crossing a river by touching rocks under the water.’ In 1988 a national court conference decided that law – rather than politics - should regulate both the trial and prosecution.

Yet, China is still an ‘infant’ in terms of its judicial developmental stage. Judicial professionals independent from the state executive branch were unheard of until the late 1980s when the Ministry of Justice started to make a law aiming to regulate the legal profession. On 1 July 1995 the first Judges’ Law of China came into effect, followed by the first Lawyers’ Law of China effected on 15 March 1996. Reforms of formal legal institutions triggered a shift in the public perception of role of law - the term ‘legal practitioners’ begun replacing the former one ‘state legal workers’ and professional ethics of legal practitioners - such as independence – started flourishing in the 1990s.

In the context of judicial experiments and reform measures taken by the Chinese government, will the involvement with transnational and supranational judicial organs complement China’s domestic endeavours for justice? As far as China’s own experience is concerned, the answer seems to be no. Former top state Chinese leaders were facing investigation by the Spanish National Court in 2006. The already existing suspicion about jurisdiction transcending sovereignty was deepened afterwards, because the accusation did not take other remedies with ‘Chinese characteristics’ into consideration.


The judicial system in Tibet is far from developed – as discussed above, the national judicial system was rather underdeveloped before the 1980s when the judicial reforms aiming to establish a professional and independent judiciary in China were launched. During the transitional period, many grievances were addressed through non-judicial channels, such as executive-led petitioning mechanisms and grassroots customary mediation. The Spanish National Court came to the conclusion that no remedy existed before the Chinese courts with respect to the alleged crimes fails to clarify whether individual cases of brutality can be trialed in other legal regimes including the petition system, or *Letters and Visits*, that deals with a broad range of administrative and criminal complaints. Moreover, it did not take into regard that the Chinese government has made efforts to build an accessible court system in Tibet - for example, a legal assistance network is being built in Tibet in order to allocate Tibetan-speaking lawyers free-of-charge. As of June 2013, the network covered 73 counties and assisted 6,687 civil and criminal cases.\(^{38}\) Putting the Spanish judicial approach aside, there is another fear that the prosecution initiated by transnational or supranational judicial bodies will not only convey an impression that the Chinese judicial system is incompetent and unfair, but also likely intensify the separatist movements in Tibet Autonomous Region and Xinjiang Uyghur Autonomous Region.\(^{39}\)

China opposes resolutions of any kind that would give an international organization the right to ‘judge and rule on State conduct,’ and insists that ‘each state shoulders the primary responsibility to protect its own population. However, internal unrest in a country is often caused by complex factors. Prudence is called for in judging a government’s ability and will to protect its citizens. No reckless intervention should be allowed.’\(^{40}\) Then-vice-president Xi Jinping made a comment while touring South America in 2009, that ‘there are a few foreigners, with full bellies, who have nothing better to do than try to point fingers at our country. … China does not export revolution, hunger, poverty, nor does China cause you any headaches. What else do you want?’\(^{41}\) Xi’s statement is regarded as a deliberate strategy taken by the CPC, which highlights the state’s supreme role in improving national institutions and settling domestic affairs.\(^{42}\)


3.3 African Partnerships: Non-conditionality in Effect

China’s important role in Africa is being strengthened in the past two decades. The Chinese government expanded its traditional relationships with African states to secure energy supplies from such oil fields as Sudan, Algeria, Nigeria, Chad and Congo. After the China-Africa Cooperation 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 $222 billion - 21 times the sum in the year 2000 –making China the biggest trading partner to Africa for the sixth consecutive year. In comparison, European trade with Africa totaled $137 billion in 2013.43 China’s presence in Africa is sometimes criticised for doing ‘business-only’, as it agreed to accept the political status quo in African states in exchange for stable supplies.44

This is just one way to describe the Sino-African relations. 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. As a matter of fact, China’s non-conditionality principle applies in both political and economic fields. When Talisman Energy, the second largest Canadian oil company at the time, announced in 2003 to sell its share of the Greater Nile Petroleum Operating Company that manages petro exploration and production in Sudan, the Chinese government did not interfere with the business negotiation to favour the state-run Chinese National Petroleum Corporation, and in the end, an Indian Company, ONGC Videsh, bought Talisman’s 25% share.

At the official-policy level, China prefers international moderation including UN negotiation and multilateral dialogue over litigious and military actions, which adheres to the 1954 Five Principles of Peaceful Coexistence.45 China is in many respects skeptical of involving the ICC in African affairs. China conveyed in 2009 that “we should not fail to see that if the peace process is blocked, justice would be castles in the air. Therefore, the ICC, while doing its judicial work independently and endeavouring to end impunity, has to consider the larger picture of world peace and security.”46 In an interview with Rwandan newspaper The New Times

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45 The Five Principles of Peaceful Coexistence is seen as an overarching guideline for China’s diplomatic policy-making, that refers to: mutual respect for each other’s territorial integrity and sovereignty, mutual non-aggression, mutual non-interference in each other’s internal affairs, equality and cooperation for mutual benefits, and peaceful co-existence.

in March 2013, Lu Shaye, Director-General of Department of African Affairs of China’s Ministry of Foreign Affairs, responded to China’s non-conditionality principle that ‘no state in Africa wants conditions levied on its domestic affairs, … it is an invalid censure that China neglects the benefits of African people because the assistance and construction projects China has provided for African states are proven to improve the economic and social development in Africa, which is what the people in Africa really need.’ 47 China officially does not consider the African states as using power against the interests of the people, and prudently avoids putting itself in a contentious position between the African state leaders and the ICC.

In a formal conversation with a Japanese delegation in March 1985, Deng Xiaoping shared his judgment that peace and development were cruxes of challenges faced by human societies, and development was the key aspect. Deng Xiaoping further concluded that ‘China is no less concerned about the conflicting and unstable situations of today’s world. In fact China would plea for at least two decades of a peaceful environment so that any domestic development plan can be executed.’ 48 In other words, development is understood as a powerful tool to settle many problems faced by African societies.

The international community has higher expectations of China, and China passionately portrays itself as a peace-loving and mild power in order to enjoy a favourable geopolitical environment. Supporting the ICC does not seem to add much value to China’s advocacy of being a mild big power, nor does it suit China’s long-claimed diplomatic principles.

As of today, intellectual inquiries have not disclosed much about how the Chinese public view the functioning and legitimacy of the ICC. The challenge from examining public conception is formidable in any society, which is often too abstract to detect. Alternatively, communication studies have convincingly suggested that people visualize remote institutions through print-language.49 It is empirically evident that news media attempt to present multiple ideas and create a public platform with conscious neutrality.50 Hence news discourse is one of the best possible approximations to public conception in the society.


Chinese news media used to be merely arms of the government until a large-scale media commercialization starting in the early 1990s. Chinese media have been shifting to commercial institutions that need to carefully balance popular appeal and official interests so as to maintain their competitiveness in the market. An examination on news discourse produced by Chinese media allows us to capture public opinions in China.

The corpora computed below are retrieved from the WiseNews, the world’s largest database on Chinese news. The WiseNews monitors and captures update-to-the-minute news from a wide range of newspapers, magazines, journals and news agencies reporting on China. The datasets are selected from 1,303 Chinese-language news outlets produced by Chinese media.\textsuperscript{51} 52.8\% are from newspapers, 44.5\% from website news, 1.5\% from news agencies and 1.2\% from news magazines.

The search aim is to cover as many relevant texts as possible so that the result can be reflective enough of general perception in China. Disjunction (“or”) is therefore chosen as the search logic that means if one or more search terms are captured from the headline, lead or body of a certain text, the text will be included in the result. The search range starts on 1\textsuperscript{st} January 1998 from when the WiseNews provides full texts of the news, to 1\textsuperscript{st} May 2016. Three groups of search terms are used, namely,

Group one: international criminal court, Hague international criminal court, Rome statute, international criminal court statute, International criminal court Rome statute;\textsuperscript{52}

Group two: international criminal court and China, Hague international criminal court and China, Rome statute and China, international criminal court statute and China, International criminal court Rome statute and China;\textsuperscript{53}

And Group three: international criminal court and Africa, Hague international criminal court and Africa, Rome statute and Africa, international criminal court statute and Africa, International criminal court Rome statute and Africa.\textsuperscript{54}

The final result consists of 1,327 news texts which amount to 93,000 words. In accordance with the scientific norms developed by corpus analysts, the linguistic computation is conducted by the analytical software called AntConc that discovers statistically reliable qualities of the large-


\textsuperscript{52} The search is done in simplified Chinese: 国际刑事法院/海牙国际刑事法院/罗马规约/rome statute/国际刑事法院规约/国际刑事法院罗马规约.

\textsuperscript{53} The search is done in simplified Chinese: 国际刑事法院+中国/海牙刑事法院+中国/罗马规约+中国/国际刑事法院规约+中国/国际刑事法院罗马规约+中国.

\textsuperscript{54} The search is done in simplified Chinese: 国际刑事法院罗马规约国际刑事法院+非洲/海牙刑事法院+非洲/罗马规约+非洲/rome statute+非洲/国际刑事法院规约+非洲/国际刑事法院罗马规约+非洲.
scale textual objects. The ‘collocation model is chosen to process the statistically likely collocations surrounding a particular concept.

Excluding meaningless words from collocation analysis results, the first target ‘court’ is frequently associated with ‘accountability (or fuzezhil负责制)’, and ‘ideal (or lixiang/理想)’. This result implies that Chinese news discourse stresses on the accountability question and an idealist nature when reporting on the ICC. At the academic level, a number of Chinese scholars of international law have noticed that it remains one of China’s top concerns that the ICC is short of a sufficient institutional check to hold the Prosecutor accountable for his/her exercise of investigative and prosecutorial power.\(^5\) It is deemed unrealistic to regard the ICC as a sole emanation of the Rome Statute and overlook the impact of big powers on international criminal justice as “the successful stories of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda have shown the importance of political support in seeking for criminal justice.”\(^6\)

Meaningful keywords collocated to the target word ‘sovereignty’ include ‘ideology (or sixiang/思想)’, ‘independence (or duli zizhu/独立自主)’, ‘impeaching (or you sun/有损)’, ‘defending (or hanwei/捍卫)’ and ‘power politics (or qiangquan zhengzhi/强权政治)’. This type of linguistic combinations suggests that Chinese news discourse tends to link the sovereignty issue to contentious annotations. In light of China’s exposure to the outer world full of unequal international treaties in the nineteenth century, Chinese are traditionally in some way critical of Western powers. A book comparing Chinese and Ethiopian societies has been widely read by Chinese scholars of African studies since the 1930s, which concludes that ‘both suffered from capitalist invasions and the decline of handicraft industries, and both were victims of imperialism.’\(^7\) The sovereignty issue is contextually understood and interpreted among the Chinese public, which has been long related with the colonial history in China as well as in Africa.

As to the target word ‘jurisdiction’, meaningful results are shown as following: ‘wise (or mingzhi/明智)’, ‘withdraw (or chehui/撤回)’, ‘exhaustion (or qiongjin/穷尽)’, ‘compromise (or zhinan ertui/知难而退)’, ‘inconsistency (or youwei/有违)’ and ‘defend (or hanwei/捍卫)’. The first-ranked key word of ‘wise’ is surprising as it is the first time that news discourse on the

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ICC appears to be positive. However, upon a cross-examination of the original corpora, the description ‘wise’ is used to refer to the fact that in 2004 the US withdrew its demand from the UN Security Council aiming to exempt American citizens from jurisdiction of the ICC.58

In short, Chinese news discourse on the ICC indicates some kind of scepticism especially when relating to the checked functioning of the ICC, and the sovereignty and jurisdiction issues.

4. SEEKING SYNERGY BETWEEN CHINA AND THE ICC

Having analyzed China’s three primary concerns over the ICC, and the contextual rationale behind them, this part reflects upon a few trends that are likely to result in a shift in China’s attitude to the ICC. From a rationalist point of view, a state’s behaviours on the international scene are the result of calculations of potential costs and interests, and it is thus nearly pointless to ask whether China’s statements relating the ICC are genuine. It perhaps makes more sense to uncover the interaction between the ICC and China that is likely to safeguard international justice, and at the same time also match China’s ambition to rise as a responsible power internationally and develop a fair judicial system nationally.

First of all, China has been renowned for its pragmatism on the international stage, and this characteristic is reflected in many official positions with regard to international criminal justice. As a matter of fact, China was active during the Rome Statute negotiations in the mid-1990s. After the UN General Assembly, in its Resolution 44/39, requested the International Law Commission to address the question of establishing an international criminal court in 1989, the Chinese delegation made 33 comments 59 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.60

China felt urgently to be broadly immersed in the international regime that could regulate and protect cross-border actions with modernization and globalization listed on the national agenda. Consequently, Chinese engagement with international treaty bodies became deeper and broader in the 1980s, as shown in the Figure 1 below.


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

Moreover, the Chinese government tends to test the so-called ‘proactive diplomacy’ and to raise its voice together with other Third-World counties in the 21st century. With regard to the construction of international justice norms, it is observed that the guiding concept for China’s diplomatic policies is already experiencing a significant switch. Chinese President Xi Jinping advocated on many high-profile occasions for a new interpretation of Chinese diplomatic philosophy, that “justice and interests are intertwined, and we cannot achieve any of them unless a fair balance is made.” In June 2015, China’s Minister of Foreign Affairs Wang 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.’ Some Chinese scholars are already concerned that as a non-State Party to the ICC, China cannot enjoy some rights exclusively entitled to the state parties, including being substantively involved in the process of discussing and defining the crime of aggression, and nominating candidates for ICC judges and prosecutors who must be nationals of the state party, further leaving the authority of constructing international criminal jurisprudence to China’s counterparts.


Secondly, with China’s domestic reforms originating from the late 1970s, China valued concrete development plans over ideological contradiction in its policy-making process. Contemporary Chinese policy-makers are seen as ‘highly institutionalized based on standard rules and professionalized personnel’. Consequently, the objectives of Sino-African relations also changed – as Chinese scholars agreed, ‘the focus is adjusted from that “economy serves diplomacy” to the other way around after 1978.’ Interestingly enough, China’s assentation on absolute state integrity free from supranational inference is already less static in the recent years. When violence in Sudan was escalating and spilling across the border into neighbouring Chad in 2006, international pressure was mounting on China to play a constructive role in the humanitarian crisis in Darfur. There were signs that China had pressured corresponding government at different levels. For instance, in February 2007 former President Hu Jintao visited Khartoum and reportedly pressured Sudanese President Omar Hassan al-Bashir to cooperate with the United Nations and permit the deployment of a UN peacekeeping force in Darfur.

Besides this, China voted in favour of the UN Security Council resolution to refer the Libyan case to the ICC, because ‘China was very much concerned about the situation in Libya. The greatest urgency was to cease the violence, to end the bloodshed and civilian casualties, and to resolve the crisis through peaceful means, such as dialogue.’ This vote and statement surprised many observers as in the past China had rarely moved away from its longstanding foreign policy based on non-intervention. In its official explanation on China’s vote of abstention on the UN Resolution 1973 which authorized the creation of a no-fly zone over Libya and the bombing of ground targets, China asserted that it ‘always opposes the use of force in international relations … In the meantime, China attaches great importance to the decision made by the 22-member Arab League on the establishment of a no-fly zone over Libya’.

65 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。 (David Shambaugh, translated by HUANG Yusheng (2010) : Transition in 60-Year Foreign Policies of China, Contemporary China History Studies, Jan., Vol. 17, No. 1, page 117).


Libya. We also attach great importance to the positions of African countries and the African Union.\textsuperscript{70} China’s international image struck a high after this 2011 vote of abstention.

Furthermore, now that material importation from Africa - including crude oil, iron, metals and commodities - is progressively important for Chinese economy, a better socio-political environment in Africa is in China’s own interest. Challenges faced by African countries - armed conflicts, corruption, and the 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 became targets of attack in Sudan, Nigeria and Ethiopia in the past decade.\textsuperscript{71} It is hence reasonable to expect some shift in China’s balance between acknowledging the ICC’s jurisdiction and sticking to the supremacy of state sovereignty.

Thirdly, the power structure of the international community is under a significant transition. There is ample evidence for China to relieve its deeply-rooted suspicion about the international system subject to Western powers’ preferred agenda. The U.S., for instance, declared to the UN Security Council that they would not take part in any peacekeeping action organized by UN unless the ICC granted U.S. citizens immunity from prosecution on 19 June 2002. In an effort to shield U.S. citizens, the U.S. government sought for bilateral non-surrender agreements, or ‘Article 98’ agreements, which meant to preclude current and former U.S. government officials, military, and other personnel (regardless of whether or not they are nationals of the state concerned) as well as U.S. nationals from ICC’s prosecution.\textsuperscript{72} The attempt was unsuccessful. Fifty-three ICC States Parties resisted signing the Article 98 agreements, despite the U.S.’s threat of imposing large economic penalties. In addition, several intergovernmental bodies publicly opposed the Article 98 agreements and encouraged states to uphold the integrity of the Rome Statute.\textsuperscript{73}

A 2014 decision from the Office of the Prosecutor indicates that the ICC was trying hard to be independent from the political pressures of big powers. It re-opened the preliminary examination on alleged crimes attributed to the armed forces of the United Kingdom deployed in Iraq between 2003 and 2008.\textsuperscript{74} Though in the foreseeable future, the ICC is unlikely to


\textsuperscript{73} Supra note 72, Status of US Bilateral Immunity Agreements, Coalition for the International Criminal Court.

conduct an actual trial of British commanders, the criticism on ICC for being a neo-imperialist Western tool - as some African leaders metaphorically stated – is not as appealing as before. Closer involvement with the ICC may provide a good chance for China to adjust the existing legal norms as well as international power structure that used to be exclusively dominated by the Western powers.

Lastly, judicial reforms in China have already brought about some compatibility with the ICC. Despite the frequently-raised concern that the transnational jurisdiction could contradict the 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.’ The Standing Committee of the National People’s Congress of China adopted a decision in 1987 on ‘Exercising Criminal Jurisdiction over Crimes Prescribed in the International Treaties’, 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 up a gap between China’s national legislation and its international obligations, and further indicates domestic steps that have been taken and that are complementary to the international criminal norms.

Since the 1980s, China has acceded to or signed various international treaties that involve transnational jurisdiction, such as the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, the Convention for the Suppression of Unlawful Seizure of Aircraft, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, the Convention on the Physical Protection of Nuclear Material, and the International Convention against the Taking of Hostages. In short, Chinese policy-makers see the necessity of expanding China’s participation in the international legal system in the globalizing era. In October 2014, the Fourth Plenum of Central Committee of the CPC officially announced the national strategy of enhancing ‘socialist rule of law’, and underlining the status of the Chinese Constitution. It is seen as a positive progress of judicial advancement in China, and opens the possibility for China to accept and apply the international

legal norms that detach state heads from states, and punish criminals—regardless of their official ranking—who shocked the conscience of humanity.

Summarized briefly, the construction and acceptance of international norms may be slow, but it is an irreversible process. A relevant example is that in the 1970s ‘the answer given to discussion of human rights was as often no as yes. Today it has become completely normal for states to pursue human rights objectives in their bilateral and multilateral foreign policies.’ Chinese foreign policy has been more pragmatic than ever, and the CPC leaders ‘have learned quickly how the international systems work.’

5. CONCLUSION

‘The only constancy is change,’ says an ancient Greek philosopher Heraclitus of Ephesus. Change, be it evolutionary or revolutionary, is a sure status of human society. The interplay between China and the ICC is no exception to this constancy.

China’s position vis-à-vis the ICC has materialized as a crucial topic of contention in the agenda for safeguarding international criminal justice. Albeit the fact that China has not acceded to the Rome Statute and expressed its critique of the ICC on various occasions, the conventional normative analyses don’t seem to do enough justice to China’s intention and interests in furthering its involvement with international institutions. This article has tried to draw readers’ attention to not only the rationale behind China’s stance toward the ICC from a contextual perspective, but also a number of significant changes taking place within China.

The ICC is embedded in a cross-cultural consensus reached by the international community that the ends of state sovereignty have to be scrutinized. The conceptual change and also institutional experiments conducted at regional levels generated a normative framework that states should yield part of their sovereignty and cooperate on cross-territory trials when justice is challenged. This norm based on which the Rome Statute was drafted does not, however, take into consideration that trigger mechanisms of the ICC’s investigation are deemed problematic by not only Chinese government but also the general public when the state consent is bypassed.

As analyzed in the third section on the discrepancy, China undertook to join the Western-led international regime and get acquainted with the international legal system 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 activeness in Africa, the cases before the ICC reinforce China’s historical concern that today’s international system may still be hypercritical in a sense that not every state is treated fairly and equally.

80 Jack DONELLY, supra note 8, page 197.
State integrity is not only a political issue, but also a cultural one in China. The pro-nationalism ‘May Fourth Movement’ in 1919 has a far-reaching impact on Chinese common psyche. ‘Standing up as an independent country’, as proclaimed by Mao Zedong on 1st October 1949, has become an almost unchallengeable ideology in Chinese discourse. China’s belief in state integrity is attached to morality. The Chinese government has been attempting to be perceived as a responsible and fair big power by the world, and adhered to its claim that the will of any state regardless of its geo-political and economic influence shall be respected. The Chinese government prefers bilateral negotiations, multilateral dialogues and international moderations over any kind of third-party litigious and military measures to resolve international matters. Hence the ICC’s litigious operation with little observed efforts to facilitate peace negotiations within the national boundary is interpreted as irresponsible by China.

Since the late 1980s, the Chinese government has been devoted to judicial reforms. As of today, the ICC has not clarified the particular order of complementarity, gravity of the crime and a state’s unwillingness or inability for the decision of case admissibility. Several powers of the ICC’s Prosecutor, such as initiating investigations proprio motu on the basis of ICC’s jurisdiction, are likely to result in the scenario where the capacity and willingness of a State is judged by a supranational actor. This type of external judgment would be intolerable to China. Moreover, the complementarity principle also means that the ICC should provide assistance to a State Party, but the actual operation of the ICC seems to be just one-directional with no efforts to amplify the existing judicial remedies at the national level. A beneficial outlook for being a state party to the ICC is unclear to China.

Speaking of the ‘beneficial outlook,’ the Chinese government - and the Chinese population also – is renowned for being pragmatic as analyzed in the fourth section on the synergy. Now that China is more and more exposed to the international system, the Chinese government is testing a ‘proactive diplomacy’ and protecting China’s interests according to its preferred norms in the 21st century. Providing that the socio-political environment in Africa is hampered by corruption, conflicts and weakness of formal institutions, China’s strategic interests are being challenged to a large extent. Institutional studies have shown that the Chinese policy-makers are becoming more institutionalized and relying more on standard rules and procedural regulations. It is foreseeable that China will increasingly resort to legal measures available in the international arena. Actually China has ratified a series of international treaties since the 1980s, some of which involve jurisdictional concession.

At the domestic level, the CPC Central Committee has proclaimed to accelerate judicial reforms. It is likely that international legal norms will be more compatible with Chinese national system in the future, which ameliorates the relation between China and the ICC. At the international level, the ICC decided in 2014 to re-open its preliminary examination on alleged crimes committed by the armed forces of the United Kingdom in Iraq between 2003 and 2008.
This is a positive sign that the previously unquestionably status of Western big powers is being challenged. Contingent on the broad shift in the international power structure, China as a ‘calm observer’ can wisely switch its skeptical stance toward the ICC.

After all, compared with Mao’s era when ideological values mattered a lot in policy-making, and Deng’s reforming period in which development was deemed the predominant national objective, current Xi Jinping administration has displayed a different mindset in positioning China’s role in the international system. If China aims to ‘be better heard and understood by the world,’ and to ‘value justice as much as interests’, a deeper cooperation with ICC does seem a rational choice to China.

81 In a CPC national meeting on “Publicity and Ideological work” in August 2013, stressed President Xi Jinping, that it is imperative to “tell China’s stories well and spread China’s voice widely,” released 21 August 2013, accessed 16 August 2015 via: http://cpc.people.com.cn/n/2013/0821/c64094-22636876.html