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No Place to Hide: Why China Will Ratify the Rome Statute

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1. Introduction

As the international community considers how to strengthen the International Criminal Court ('ICC') in order to disseminate the effects of international justice, China could be seen as pursuing silent opposition. Despite the noteworthy contributions to the Rome Statute ('ICCSt') negotiations, China has not yet signed the Statute nor has she expressed an intention to do so in the near future. Rather, China observes the activities of the Court, assessing how membership could serve her interests and what the risks would be.

But in concurrence with the ICCSt negotiations and subsequent establishment of the Court, China has engaged with the international community in another context, reshaping her role in UN peace-keeping operations ('UNPKO'). From a general sense of reluctance at the outset of the 1990s, China is today one of the main contributors to UNPKOs, both financially and with personnel. China's ability to redefine her priorities in the international arena and become a supporter of international peace and security reflects an overall effort to be a responsible actor and to meet the expectations of the international community towards global powers.

2. China and International Criminal Justice

Throughout the history of international criminal justice, China has actively enforced international criminal law norms. In 1946, together with his prosecution team, the Chinese Judge MEI Ju-Ao collected evidence on crimes committed during the Japanese invasion of China, which represented a significant contribution to the success of the International Military Tribunal for the Far East.[1] In 1956, China established her own Special Military Tribunals in Shenyang and Taiyuan to try Japanese Imperial Army officials accused of crimes committed during the second Sino-Japanese War.[2] Starting in the 1950s, China began a long process of ratification of international humanitarian law ('IHL') conventions and instruments, such as the four Geneva Conventions and the two Additional Protocols. To date, the country is a party to the major international instruments in the areas of IHL, repression of torture and genocide, and prohibition of use of large-scale destructive weapons.

Entangled in continuous internal struggles, China's approach to international criminal justice in the 1990s nevertheless included active support for the creation of the two *ad hoc* international criminal tribunals for the former Yugoslavia and Rwanda.[3] "China has consistently opposed crimes that violate international humanitarian law and advocated that criminals in this category should be brought to justice. Bearing in mind the particular circumstances in the former Yugoslavia and the urgency of restoring and maintaining international peace, the Chinese delegation voted in favour of the resolution we have just adopted", declared the Chinese representative before the Security Council ('UNSC').[4] In this instance, China recognized the urgency of establishing judicial mechanisms that can end impunity as well as safeguard peace. This same conviction guided the delegation of China to the Rome Conference where her contributions to the drafting of the ICCSt were significant. Nevertheless, China opposed the adoption of the Statute together

1 LIU Daqun, "Chinese Humanitarian Law and International Humanitarian Law", in Larissa van der Henk and Carsten Stahn (eds.), *The Diversification and Fragmentation of International Criminal Law,* Brill, Leiden, 2012, p. 354.

2 LING Yan, "The 1956 Japanese War Crimes Trials in China", in Morten Bergsmo, CHEAH Wui Ling and YI Ping (eds.), *Historical Origins of International Criminal Law: Volume 2,* Torkel Opsahl Academic EPublisher ('TOAEP'), Brussels, 2014, pp. 215–241 (http://www.legal-tools.org/doc/7c217c/).

3 XUE Ru, "China's Policy Towards the ICC Seen Through the Lens of the UN Security Council", FICHL Policy Brief Series No. 27 (2014), TOAEP, Brussels, 2014, no. 27, pp. 1–2 (http://www.legal-tools.org/doc/dee821/).

4 UNSC, Provisional Verbatim Record of the Three Thousand Two Hundred and Seventeenth Meeting, S/PV.3217, 25 May 1993, p. 33 (http://www.legal-tools.org/doc/f32dda/).

with six other States. The main concerns expressed were lack of respect for the principle of voluntary acceptance of the ICC's jurisdiction, jurisdiction over internal armed conflicts and crimes against humanity without the requirement of commission "at war", the inclusion of the crime of aggression, and *proprio motu* prosecutorial powers under Article 15.[5] The common aspect of these criticisms of the ICCSt is the risk of intervention in State affairs by the Court.[6]

3. Non-Intervention in State Affairs: The Middle Ground

In the past decades, the principle of non-intervention in domestic State affairs has been the cornerstone of Chinese foreign policy. Even if in its application the principle entails a certain degree of flexibility, during the Rome Conference, the Chinese delegation stressed the importance of strict implementation of non-interference in internal affairs.[7] In addition, whereas China supported the establishment of a judicially independent ICC, concerns were raised about its possible impairment of legitimate interests and sovereignty of national judicial systems.[8] According to the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, "no State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State".[9] The principle of non-intervention in domestic State affairs is an important expression of national sovereignty. It refers to the prohibition of the use of force and interference in "matters which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy".[10]

This author respectfully submits that the well-established non-interference principle is in effect manipulated by China to shield her interests. While focused on protecting her stakes in Africa, China has not raised concerns regarding human rights violations and core international crimes committed in States where she has important investments. For example, DENG Shao Zin, Chinese ambassador to the Sudan, deemed the gross human rights violations in the country as an internal affair.[11] In a different instance, when the Kosovo humanitarian intervention was put to vote before the UNSC, a multi-ethnic country like China feared entering a conflict with ethnic implications: "fundamentally speaking, ethnic problems within a State should be settled in a proper manner by its own Government and people, through the adoption of sound policies. They must not be used as an excuse for external intervention, much less used by foreign States as an excuse for the use of force".[12]

Non-intervention has been employed by China to protect her interests and to avoid precedents relevant to her domestic conditions. Even if an abundance of legal arguments have been formulated on the ICC's potential supranationality, this brief argues that, instead of genuinely fearing the Court's intervention, China has sought a window to gain time to learn about the Court's performance and adjust to the pace of international criminal justice. It is symptomatic that rising powers show an expansive sense of protection of their interests.[13] China's behaviour towards the ICC and its Statute is understandable, even if not appreciated by this author. During the negotiations, China was active in making suggestions, but she has not been ready to face the challenges of signing and ratifying the Rome Statute. For one, significant modifications would be required in national criminal law, an area that is still in development. Embarking on such a process may not be the best option for a rising major power that is still adjusting to international standards, on multiple fronts, simultaneously.

4. The Chinese International Security Dogma: Peace-Keeping

One of the areas where China has engaged is international security. In particular, China's attitude towards UNPKOs has undergone considerable change in recent years, to the point where China has made peace-keeping one of her international security dogmas. During DENG Xiaoping's era, the *bu daitou* doctrine prevailed, that is, avoiding hegemonic approaches to international

5 WANG Guangya, "Discussion on the Statute of the International Criminal Court", in *Legal Daily*, 29 July 1998.

6 For an intelligent Chinese perspective, see XIAO Jingren and ZHANG Xin, "A Realist Perspective on China and the International Criminal Court", FICHL Policy Brief Series No. 13 (2013), TOAEP, Brussels, 2013.

7 United Nations, Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 3rd Plenary Meeting, A/CONF.183/SR.3, 16 June 1998, para. 35 (http://www.legal-tools.org/doc/313a47/).

8 *Ibid.*, para. 36.

9 UNGA, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, A/RES/25/2625, 24 October 1970 (http://www.legal-tools.org/doc/e6c77e/).

10 International Court of Justice, Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits), Judgment of 27 June 1986, para. 205 (http://www.legal-tools.org/doc/046698/).

11 DENG Shao Zin, the Chinese ambassador to Sudan, as quoted in Ian Taylor, "China's Oil Diplomacy in Africa," in *International Affairs*, 2006, vol. 82, no. 2, p. 950.

12 UNSC, 4011th Meeting, S/PV.4011, 10 June 1999, pp. 8–9 (http://www.legal-tools.org/doc/081bd0/).

13 Robert Kagan, *Dangerous Nation: America's Place in the World from Its Earliest Days to the Dawn of the Twentieth Century*, Alfred A. Knopf, New York, 2006, p. 304.

affairs.[14] Shortly thereafter, under the JIANG administration, China started to manifest interest in international organizations that are not economically oriented, until multilateralism became a pillar of the country's strategic thinking.[15] The deployment of civilian observers in Namibia in 1989 followed by military observers for the UN Truce Supervision Organization marked the first steps of China in this area. Between 1990 and 2008, China has mainly contributed to the missions with civilian police and force enablers such as logistic, medical and transport units, and military observes. In December 2008, WEN Jiabao announced the intention to contribute 1,000 combat personnel to the United Nations Interim Force in Lebanon II (UNIFIL II). Coinciding with this increased level of participation, a training centre opened in 2000 for civilian police to become peace-keeping personnel.

Initially China resisted participation in missions to States that did not recognize China.[16] To the surprise of many, China adopted a more stimulus-based strategy when she participated in the post-earthquake mission to Haiti which recognizes Taiwan and not mainland China. Such a radical shift in the approach to UNPKOs requires strong motivating interests. The global strategy of China seems based on a multipolar worldview where power shifts from West (established powers) to East (emerging powers).[17] The leadership of the country has deepened its engagement with the UNPKOs to strengthen multilateral responses *vis-à-vis* unilateral solutions to security threats.

Under these circumstances, China has evolved from being a low-profile country to a deeply involved one. But, peacekeeping, emergency response, and disaster relief are also attractive platforms for power projection without making use of the military. What appears to be humanitarian assistance may well be a self-serving, more than an altruistic, contribution. As China's interests cross national borders, in search of self-establishment, her experience with peace-keeping operations reflects the pursuit of power while emerging as a global actor. UNPKOs provide China with a lawful basis to exert global influence without menacing other States or the international order. This same argument may also apply to international criminal justice, as I will elaborate in the next section.

14 Marc Lanteigne, *Chinese Foreign Policy: An Introduction*, Routledge, New York, 2013, p. 68.

15 UNSC, 1993, *supra* note 4, p. 70.

16 China had previously vetoed the United Nations Verification Mission in Guatemala (MINUGUA) in 1997 and the United Nations Preventive Deployment Force in Macedonia (UNPREDEP) in 1999 as both States recognized Taiwan.

17 LEI Xue, *China as a Permanent Member of the United Nations Security Council*, Friedrich Ebert Stiftung, 2014, p. 4.

5. An Argument for Chinese Ratification of the Rome Statute

The Rome Statue can be seen as a substantive compendium of developing international criminal law that reflects new trends and innovations in the prosecution of the most heinous crimes under international law.[18] The legitimacy of the ICC is largely rooted in its Statute, a long negotiated multilateral treaty upon which the institution has been crafted. The efforts put into the extended negotiations and the referrals from the UNSC, among other factors that include the aspirations of people around the world, have brought the ICC into the spotlight, perhaps more so than other international institutions.

The rise of China poses challenges to the international order and its traditional values. One pressing question is whether impunity can be ended if one of the world's major powers shows no participation. The same question may apply to international security and peace-keeping: could the world live in peace if a global power should not show willingness to co-operate?

The previous section concluded that the bottom line for Chinese engagement in UNPKOs is the possibility of projecting power and maximizing her interests without being a menace to other States. The same may apply to China's future engagement with the ICC as a potential State Party. For as much as law operates in tension with power, a bit like water to fire,[19] we should recognize that justice projects that disregard the struggle for power of States may fail.[20] Politics, and especially the element of power, play a key role in the struggle of governments for survival,[21] whereas international law, on the other hand, seeks to set a series of rules that regulate the behaviour of States.[22] Despite the aspirations of international law, the absence of a strong and legitimate centralized international authority undermines the achievement of common goals. This weakness of the international community can to a certain extent be tempered by institutional-

18 Sean D. Murphy, "Aggression, Legitimacy and the International Criminal Court", in *European Journal of International Law*, 2010, vol. 20, no. 4, p. 1156.

19 Frédéric Mégret, "Three Dangers for the International Criminal Court: A Critical Look at a Consensual Project", in *Finnish Yearbook of International Law*, 2001, vol. 12, p. 198.

20 Scott Burchill, Andrew Linklater, Richard Devetak, Jack Donnelly, Matthew Paterson, Christian Reus-Smit and Jacqui True (eds.), *Theories of International Relations*, Palgrave Macmillan, New York, 2005, p. 1.

21 Georg Schwarzenberger, *Power Politics: An Introduction to the Study of International Relations and Post-War Planning*, F.A. Praeger, London, 1941, p. 705.

22 Some scholars have argued the ICC itself is a politicized institution, see ZHU Dan, "Who Politicizes the International Criminal Court?", FICHL Policy Brief Series No. 28 (2014), TOAEP, Brussels, 2014.

ization in different branches of international law.[23] The ICC is a mechanism through which States have bound themselves to a mutually advantageous treaty: on the one hand the ICC will grow in influence and power to prosecute international crimes, while on the other States will show compliance and act collectively to end impunity[24] and by that reinforce their standing in the international community. The ICC is a "substitute for world government" in criminal justice matters,[25] and the product of efforts to suppress crime and protect humanity.[26]

State commitment to put power at the service of criminal justice is as required, one could argue, as it is for peace-keeping operations to tackle security threats. Based on the comparison between the Chinese approach to international criminal justice and to UNPKOs, this author submits that international criminal law and justice may come to enjoy the support of States such as China, when the former become instruments of power or what realists would call expressions of hegemony.[27] If we assume that a measure of power-driven anarchy is the current state of affairs in the global community, and that sovereignty is a leading value in the pantheon of international law, justice needs to become a tool for self-affirmation to gain the benefit of commitment from States. Chinese scholars have called for a broader participation of their country, precisely in this sense: China, which plays an important role on the international stage, should exert her power in punishing international crimes and protecting the interests of humanity.[28]

Before signing the Rome Statute, China would have to engage in two phases of revision. First and foremost, she should ratify a legal instrument that she signed more than a decade ago, namely the International Covenant on Civil and Political Rights. Secondly, she should amend her national criminal law to fully embrace international standards. After these two steps are taken, China would be ready to face her responsibilities as an international stakeholder and become a party to the most innovative treaty on international criminal law, the ICCSt.

6. Conclusion

Despite the reluctance of some governments, the ICCSt has been adopted by 124 States Parties among the world's sovereign nations. The mandate of the ICC assumes relevancy for contemporary peace and security and for the advancement of international criminal law as a tool that can promote harmonious relations among States – that promotes the triumph of Reason over Power.[29] Sovereign rights of States are not eradicated under the Rome Statute, rather they are transformed.

As a global power, China should embrace, and not shy away from, her global responsibilities and continue to project power by being a proactive norm-maker and not a norm-taker. Only by becoming a party to the Rome Statute will China have a full say on further developments and not be left aside. In the years to come, States resisting the ICCSt will face increasing pressure by the global consensus. China, among other States, will not be able to escape her essential responsibilities to the international community. In this sense, there will be no place to hide.

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23 Stanley Hoffman, "Hedley Bull and His Contribution to International Relations", in *International Affairs*, 1986, vol. 62, no. 2.

24 Neil Boister, "Transnational Criminal Law?", in *European Journal of International Law,* 2003, vol. 14, no. 5, p. 969.

25 Hedley Bull, *Anarchical Society: A Study in World Politics*, Columbia University Press, New York, 1995, p. 230.

26 M. Cherif Bassiouni, *Crimes against Humanity in International Criminal Law*, Kluwer Law International, The Hague, 1999, p. 219.

27 Some scholars suggest that instead it is necessary to find a balance between "unwillingness to prosecute and victor's justice", see Marquise Lee Houle, "China and the War Crimes Far Eastern and Pacific Sub-Commission", in Morten Bergsmo, CHEAH Wui Ling, SONG Tianying and YI Ping (eds.), *Historical Origins of International Criminal Law: Volume 4*, TOAEP, Brussels, 2015, pp. 215–241.

28 LU Jianping and WANG Zhixiang, "China's Attitude Towards the ICC", in *Journal of International Criminal Justice*, 2005, vol. 3, p. 619.

29 Benjamin B. Ferencz, "Ending Impunity for the Crime of Aggression", in *Case Western Reserve Journal of International Law*, 2009, vol. 41, no. 2, p. 290.

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