China and the International Criminal Court: Home and Abroad

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Introduction:

On July 17 1998, 120 states agreed at a diplomatic conference to establish the International Criminal Court. It took some years before the international agreement establishing the International Criminal Court (the *Rome Statute*) became law, on 1 July 2002, with ratification by 60 countries. The court was established as an autonomous body, not as part of the United Nations system.

A number of Asian countries are States Party to the *Rome Statute*, including (in order of accession) Tajikistan (May 5 2000), Cambodia and Mongolia (April 11 2002), Timor-Leste (September 6 2002), Republic of Korea (November 13 2002), Afghanistan (February 10 2003), Japan (July 17 2007), and Bangladesh (March 23 2010). The Philippines, Kirgizstan, Uzbekistan, and Thailand have signed, but not ratified, the *Rome Statute*. And some Asian countries, including the People's Republic of China, have neither signed nor ratified this treaty.

1. China and International Law

Prior to 1949, the Republic of China had been a significant actor in the field of international law. But the new government in Beijing was initially doubtful about international law, and soon became disenchanted of the system of international law. Indeed, during the Great Proletarian Cultural Revolution, Chinese officials denounced the operations of international organisations, such as the International Court of Justice. At that time, China sought to promote alternative institutions such as the Non-Aligned Movement, which grew out of the Bandung Conference of 1955. In more irenic phases, China adopted the "Five Principles of Peaceful Coexistence" and sought the adherence of other nations to these principles. But China's own adherence waned during the Great Proletarian Cultural Revolution, when China emphasised that it was impossible for the new China to pursue peaceful co-existence with imperialists and their lackeys. The discourse of China's leaders was drawn from the language of the class struggle, even while China began to practice 'ping-pong diplomacy'.

The establishment of the reform era in China's domestic affairs from 1979 was paralleled by a reform in China's diplomatic practice. Gradually China began to participate in fields of international law. Initially, the focus was on the elimination of the Republic of China (Taiwan) from the international arena, but over time China began to exercise a more mature participation, with a wide variety of interests in international affairs. This positive approach has continued into recent years. Since 1979, other countries which were previously criticised by China's leaders have generally been prepared to put behind them the fierce condemnations of the revolutionary period, and to look forward to a new era of Chinese participation in international life. At first, China was hampered by a shortage of trained personnel who could take their places easily in the international discussions in centres such as Geneva and New York, but soon impressive diplomats and lawyers came to represent China in international law.

From earlier condemnation, China came to participate in some of the major international legal organs. Chinese judges were named to the International Court of Justice (倪征燠 Ni Zhengyu 1985-1994; 史久镛 Shi Jiuyong 1994-2010; and 薛捍勤 Xue Hanqin since 2010) and to the Tribunal for the Former Yugoslavia and the Tribunal for Rwanda (李浩培 Li Haopei 1993-1997; 王铁崖 Wang Tieya 1997-2000; 刘大群 Liu Daqun since 2000). The earliest judges were drawn from those trained before 1949, but now a new generation of judges are taking their place in the international tribunals. The language of the class struggle has been abandoned in favour of cautious participation and renewed professionalism. Moreover, besides judges, a number of Chinese legal personnel have taken roles such as procurators or law officers in the international tribunals. Some of these

personnel now have academic posts in China's prestige universities, where they are influential promoters of international law.

2. The establishment of the International Criminal Court

Proposals for an international court with criminal jurisdiction had been put forward at a variety of international meetings, since the end of the First World War. The *ad hoc* Nuremburg and Tokyo tribunals provided models for international co-operation. The proposal was renewed in 1946 at the new United Nations, with a focus on genocide. The most important steps forward came with the formation of the International Tribunal for the former Yugoslavia, the International Tribunal for Rwanda, and a variety of special tribunals and mixed courts for other countries. States suggested that various crimes should be within the jurisdiction of the proposed court, including war crimes and genocide, terrorism, and international drug smuggling.

In the event, the states who accepted the *Rome Statute* agreed to four crimes. These are the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. But the states were unable to agree on a definition of aggression. Rather than have the discussions fail, the states agreed to leave the definition of aggression to a later date. This proved to be an acceptable compromise.

A special feature of the new court is the use of the doctrine of *complementarity*. This doctrine emphasises that the International Criminal Court is not a superior court, in a hierarchy above national (domestic) courts. Rather, it is meant to *complement* the work of national courts, dealing with cases only when national courts are unwilling or unable to do so.

Since it was chartered in 1945, the International Court of Justice has functioned as an integral part of the United Nations system. The International Court of Justice only has jurisdiction over states. The International Criminal Court, by contrast, is not part of the United Nations system, and has jurisdiction over individuals. The two courts are not related.

3. The Chinese responses to the International Criminal Court

China took an active part in the discussions leading to the *Rome Statute*, and China's positive record of contributing to the International Court of Justice and the two major international tribunals hinted that China would become a signatory to the *Rome Statute*. But in the event, China chose not to become a signatory. The language used was not the language of rejection, but of delay, thus giving China time to wait and see how the Court was to operate. The Ministry of Foreign Affairs suggested a number of key issues on which the Court would need to build up its authority and win the trust and confidence of states (that is, of China).

The first is the principle of complementarity. The Ministry of Foreign Affairs thought that the most important role of the new Court was to help state (domestic) courts to exercise their own jurisdiction. The second was to limit the jurisdiction of the Court to very few crimes, not going beyond the four listed in the agreed *Rome Statute*. The third was that the activities of the Court should be consistent with the Charter of the United Nations, especially in relation to genocide. The fourth concern was that the Court should execute its duties objectively and impartially, refraining from any political prejudice, and preventing the Court from becoming the venue of politically motivated abuse of litigation.

Nevertheless, the Chinese government did not want to be left out of future developments. Usually only states who have become parties to an international agreement have the right to take part in discussions (for example, at periodic review conferences) on the future of the agreement and its implementation. But China's Ministry of Foreign Affairs wanted a seat at the table in any discussions, on an equal basis to states which had become parties to the *Rome Statute*. This demand has both a positive side, indicating China's willingness to continue to be involved in the future of

the International Criminal Court; and a negative side, indicating a demand by China to seek benefits without undertaking the responsibilities of membership.

4. A key issue: the politicization of the International Criminal Court

Concern about politicization of the Court is important for the People's Republic of China. But what does this mean? Primarily China's concerns centred around control of the process of the new Court, and its jurisdiction within China. Thus China expressed caution about the role of the Prosecutor, and in particular her ability to proceed on her own motion. China expressed the view that the new Court should only have jurisdiction in cases of international armed conflict, and internal armed conflict should be solely within the jurisdiction of the state itself. Moreover, who is to decide when state courts are unable or unwilling to act? Can the Court do this independently? If the Court can do this independently, then a state cannot resist the jurisdiction of the Court. It is not so long ago, during the Great Proletarian Cultural Revolution, that China's courts and legal professions were shattered by the political convulsions in China, so this is not just an academic question.

5. At Home: Politicization of China's Domestic Courts

Given China's concerns at the international level, it is a sharp contrast that China's own courts at home are highly politicized. Most recently, the politicization of China's courts has been re-emphasised in the promotion of the "Three Supremes".

In December 2007, during the National Conference on Political-Legal Work (convened by the Party's Central Political-Legal Committee), President and Party Secretary-General 胡锦涛 Hu Jintao announced to the assembled judges, procurators and other officials: "In their work, the grand judges and grand procurators shall always regard as supreme the Party's cause, the people's interest, and the constitution and laws". This has become known as 三个至上 *San ge zhi shang*, the Three Supremes.
The interests of the Chinese Communist Party come ahead of the "people's interests", the constitution and the law. Supreme Court President Wang Shengjun 王胜俊 proclaimed this new contribution as theoretically very important in the construction of socialist democratic legality. President Wang is a political appointment to China's Supreme Court, without legal or judicial experience. It is his task to maintain the politicization of China's domestic courts.

6. Abroad: Two factors

What inspires China to ask for a different system abroad than it operates at home? If the President of China's own Supreme Court has no legal or judicial experience, why is China asking for independent and experienced professionals at the international level? The answer is to be found in two quite different points. The first relates to an ideological standpoint on the question of sovereignty, the second relates to China's experience in a multi-polar, multi-legal world.

Professor 卢建平 Lu Jianping suggests that there is an underlying cultural question here. He suggests that there are three cultural attitudes shaping China's stance. The first is cultural nationalism, whereby each state simply claims its own cultural superiority, while engaged in the race for advantage or power. Non-interference is a key element of this culture. The second is cultural cosmopolitanism, where countries openly look to and adopt good points of other cultures to lead to the good life. This underlies the "Chinese essence plus western technology" standpoint. The third is cultural internationalism, where each culture is perceived as part of a greater culture which is human. Without losing its uniqueness, each culture is open to the human commonality of all people. At present, Professor Lu suggests, all three cultural attitudes are operating in China. In the particular area of legal globalization, China does not follow a consistent attitude or standpoint. The result, Professor Lu suggests, is ambivalent attitudes to the World Trade Organisation, to international protection of human rights, and to the new International Criminal Court.

7. Abroad: Sovereignty and Ideology

In recent centuries, China has had to endure invasion and other indignities at the hands of a variety of colonial and trading powers. China's last imperial rulers were hardly sovereigns in their own land. Foreigners directly invaded Chinese lands, or reduced China's internal power by a variety of treaties, back by armed force. It is not surprising that China's leaders and people now have an acute sense of the dangers of loss of sovereignty. This sense is so strong, that it is the principal *motif* in China's conduct of international relations. Nations which have not suffered in the way that China has suffered may be more relaxed about sovereignty. But for China, the ideology of sovereignty is particularly strong.

International law does not have a legislature. There are a wide variety of legal opinions promoted by states and scholars, which may be persuasive in international courts. Among these, doctrines such as 'limited sovereignty', 'human rights before states' rights' and 'humanitarian intervention' have the potential to intrude into China's internal affairs. Also, any suggestions of compulsory jurisdiction, especially over states which are not states party to the *Rome Statute*, are particularly troubling to China. The sensitivity of China's present rulers to the prospect of further intervention in China's internal affairs cannot be taken lightly, and is understandable in the light of China's history.

8. Abroad: Pragmatism and a Multiplicity of Legal Systems

At home, China is developing its own system of law, with the characteristics of Chinese socialism. But aboad China must live in a world with a wide variety of legal systems. Few countries now implement soviet or socialist legal systems. China already has some experience of the common law and continental European systems through its earlier Republican laws, and through Hong Kong and Macau. China's response to this situation is essentially pragmatic rather than ideological. The new International Criminal Court faces similar issues. The court has to develop a legal system which reflects the wide variety of systems employed by states which are party to the *Rome Statute*. Even questions such as developing professional ethics for judges or for counsel have to deal with such issues. Just as China is willing to accept "one country, two systems" at home, so China is willing to co-operate pragmatically with other states in this multi-polar and multi-legal world.

9. The new issue: Definition of the Crime of Aggression in 2010

When the *Rome Statute* was first agreed, the negotiators could not agree on a definition of the crime of aggression. Rather than cause the whole process to fail, the negotiators agreed to leave this definition until a later date. That date has now arrived, at the Review Conference in Uganda in June 2010. At the Conference, the states party agreed by consensus on a complex definition of the crime of aggression. This definition will come into force when it is agreed by thirty states. This will not happen until at least 2017, when the states party will meet again to review the amendment.

In addition, the exercise of jurisdiction by the court is limited in various ways. One is that the Prosecutor must refer cases of alleged aggression to the Security Council of the United Nations. In the Security Council, China and other states which are permanent members have a powerful veto, not available to ordinary nations. Although not a state party, China did send a delegation to Uganda to join in the negotiations, and was able to place its own emphasis on the role of the Security Council, and the need for concord between definitions of aggression by the United Nations and by the Court.

Professor 岳礼玲 Yue Liling has argued that, as one of the permanent members of the UN Security Council, China should participate in the development of the definition of those crimes, and not act as an onlooker. However, for the time being China has benefitted from being able to participate as an invited observer.

10. The open door: The International Criminal Court and China's Future

Professors 高铭喧 Gao Mingxuan and 王俊平 Wang Junping have suggested that China should become a signatory to the Rome Statute. "It is better for China to sign the Rome Statute voluntarily at an appropriate time in a reasonable way to exercise our active right and to take part in the amendments of the Statute. Only by taking part in the policy making of the ICC as a State Party can China maximize its national interests through participating in "the chess game" on the international stage." Other academics have made comparable suggestions. Indeed the Chinese government continues to watch the development of the Court, and it remains a possibility that China could become a party to the *Rome Statute*, and make its own proper contribution to the growth of the Court and its jurisprudence.

In recent decades, China has shown a cautious willingness to be involved in the dynamic growth of international law, and in particular to be involved in international courts. The increased professionalism of China's legal personnel enables China to find qualified personnel at all levels to express that participation. But the development of the *Rome Statute* and the International Criminal Court brings to the fore both the ideological limitations which influence China's practice, as well as the variety of opinions shaping the future at home and abroad. The door is open for China to enter.

Nevertheless, a continuing tension for the Chinese government is that courts abroad have very different rules from courts at home. Some academics are encouraging China to take a pro-active role in participating in the making of the rules for the International Criminal Court. But for the time being a more cautious policy is in place.

Further reading:

高铭喧Gao Mingxuan and 王俊平Wang Junping, "Issues of Concern to China Regarding the International Criminal Court", paper for the Symposium on the International Criminal Court, Beijing, February 2007.

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朱文奇：《国际刑事法院与中国》2009, 北京，中国人民大学出版社。

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Roderick O'Brien is an Australian lawyer. He has a long-term interest in international humanitarian law. In recent years he has served in Beijing and Hong Kong in university mooting competitions helping to prepare Asian students for future participation in the International Criminal Court. For this contribution, in 2010 he has been specially commended by the Chinese Red Cross Society (Hong Kong Branch).