

Prudence without Collateral Damage: China and International Criminal Justice

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1. Apology for Omar al-Bashir with Collateral Damage

On 2 September 2015, just one day before the grand V-Day parade took place in Beijing, an editorial titled “China is not obliged to respond to accusations concerning Bashir’s alleged war-crimes” (‘the Editorial’)¹ was published by the Chinese media outlet *Global Times*, a newspaper known for its “hardline and nationalistic take” on international affairs.² An English version of the piece was published under a less-polemical headline, “Invite of Bashir to WWII parade justified”.³ The Editorial was clearly a response to the United States (‘US’) State Department’s expressed opposition to Omar al-Bashir’s visit to China⁴ just after the Chinese Ministry of Foreign Affairs explained on 1 September 2015 that the hospitality China was offering to the wanted Sudanese President was both “reasonable and justified”,⁵ the same day as Chinese President XI Jinping officially greeted al-Bashir and referred to him as “an old friend of the Chinese people”.⁶

1 *Global Times*, “China is not obliged to respond to accusations concerning Bashir’s alleged war-crimes” (环球时报: “巴希尔被指战争罪, 中国无义务理睬”), 2 September 2015 (<http://www.legal-tools.org/doc/c1c4c3/>).

2 Allen Carlson and Jason Oaks, “Is China’s *Global Times* Misunderstood?”, 14 September 2012, available at <http://thediplomat.com/2012/09/is-chinas-global-times-misunderstood/?allpages=yes>, last accessed on 14 June 2016.

3 *Global Times*, “Invite of Bashir to WWII parade justified”, 1 September 2015 (<http://www.legal-tools.org/doc/ef43b6/>). The translation of the Editorial from Chinese to English was on the whole accurate. Its English version serves as the primary text for this policy brief.

4 Mark C. Toner, Deputy Spokesperson, Daily Press Briefing, Washington, DC, 31 August 2015; available at <http://www.state.gov/t/pa/prs/dpb/2015/08/246473.htm>, last accessed on 14 June 2016.

5 See Foreign Ministry Spokesperson HUA Chunying’s Regular Press Conference on 1 September 2015, available at http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1292984.shtml, last accessed on 14 June 2016.

6 It should be noted that al-Bashir has visited China at least four times, thrice after 2009. Interestingly, the expression “old friend” was later removed from official news reports. See *BBC Chinese*,

Never before had editorials intended for foreign readers delivered by the *Global Times* or other major official Chinese press agencies directly focused on operations of the International Criminal Court (‘ICC’).⁷ At a first glance, the background information and factual details presented by the Editorial appear correct, despite signs of selective use of facts, a phenomenon that is quite common in newspaper editorials around the world. For example, the Editorial refers to the Darfur conflicts – characterized by the United Nations as “the world’s worst humanitarian crisis”⁸ – in calm and neutral language, saying that “the causes of the Darfur conflicts are complicated”; nor were the wrongdoings for which al-Bashir is allegedly responsible ever mentioned.

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

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

“China reacts to US discontent at Beijing’s invitation of Sudanese President to military parade” (*BBC* 中文网, “美不满北京邀苏丹总统阅兵 中国做出回应”), 1 September 2015, available at http://www.bbc.com/zhongwen/simp/world/2015/09/150901_china_sudan_us, last accessed on 14 June 2016.

7 There had been previous coverage of negative news concerning the ICC published in English.

8 *UN News*, “World’s worst humanitarian crisis unfolding in Darfur, Sudan”, 19 March 2004, available at <http://www.un.org/apps/news/story.asp?NewsID=10142&Cr=&Cr1=#.VowG06Es-So>, last accessed on 15 June 2016.

criminal law, including the ICC.⁹

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

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

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

International criminal justice's inherent connection to external intervention inevitably triggers memories of China's historical experience with consular jurisdiction and other forms of humiliating foreign interference that encroached upon China's autonomy and eventually contributed to century-long domestic instability. Morten Bergsmo and LING Yan have analysed this connection.¹⁰ For the Chinese leadership, the defence of a 'thick notion' of sovereignty as well as adherence to the principle of non-intervention have been perceived as being essential

to its legitimacy.¹¹ Intriguingly, by the time China finally regained her sovereignty – a collective empowerment for which the nation had strived for generations – the era started when sovereignty became subjected to severe criticism by international lawyers, diplomats and politicians in the wake of the Second World War. Sovereignty was seen as a legitimizer of the extreme abuse of State power experienced during the War. It was depicted as the aggressive power that threatens the universal well-being of individuals.¹² After China initiated her exploration of the "brave new world" from which she had been alienated for decades, the principle of non-intervention served as China's "normative entrenchment", a safe haven into which she could retreat whenever she felt uncomfortable with foreign influences. The deeply-rooted and internalized notion of non-intervention therefore defines both the possibilities for and limits of China to engage with norms and institutions of the international society.¹³

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

9 Among them, see Statement by Mr. MA Xinmin, Counsellor of the Department of Treaty and Law of Ministry of Foreign Affairs of the People's Republic of China, At the Twelfth Session of the Assembly of States Parties To Rome Statute of the International Criminal Court (<http://www.legal-tools.org/doc/5fdbad/> and <http://www.legal-tools.org/doc/5a9252/>); see also JIA Bing Bing, "China and the International Criminal Court: The Current Situation", in *Singapore Yearbook of International Law*, 2006, vol. 10, pp. 1–11.

10 Morten Bergsmo and LING Yan, "On State Sovereignty and Individual Criminal Responsibility for Core International Crimes in International Law", in Morten Bergsmo and LING Yan (eds.), *State Sovereignty and International Criminal Law*, Torkel Opsahl Academic EPublisher, Beijing, 2012, p. 4 (<http://www.legal-tools.org/doc/82ec96/>).

11 Bates Gill and James Reilly, "Sovereignty, Intervention and Peacekeeping: The View from Beijing", in *Survival*, vol. 42, no. 3, Autumn 2000, The International Institute for Strategic Studies, p. 41.

12 Martti Koskenniemi, "What Use for Sovereignty Today?", in *Asian Journal of International Law*, 2011, vol. 1, p. 61.

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

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

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

16 Martti Koskenniemi, "The Police in the Temple. Order, Justice and the UN: A Dialectical View", in *European Journal of International Law*, 1995, vol. 6, p. 327.

17 José E. Alvarez, "State Sovereignty is Not Withering Away: A Few

What particularly concerns international lawyers is the apparent collision between the master-narrative of the non-intervention approach and the underlying rationale of international criminal justice. Transcending domestic legality and invoking individual responsibility directly based on international law is justified by the assumption that the alleged crimes, by their exceptional gravity, undermine the international community's interests in peace and security or further "shock the conscience of humanity".¹⁸

Such consideration for collective conscience and interests embedded in the ICC Statute and UN Charter was somehow left out – if not implicitly mocked as hypocrisy – by the Editorial.¹⁹ Following its logic, the Editorial seems to propagate a view whereby China should extend her scepticism from the particular mechanism of the ICC to include even the basic principles of international criminal law and the Tokyo and Nuremberg legacy.

3. Respecting Our Intellectual Dignity

One may argue that the Editorial was nothing but a routine political piece that served a particular objective in particular circumstances. After all, criticism by the US government or other Western media may well remind the Chinese of the shaming campaign conducted just before the 2008 Beijing Olympic Games,²⁰ at a time when Chinese actors felt particularly vulnerable. Since the parade was designed to be an opportunity for China to show her strength and confidence, the *Global Times* might as well try to hold its ground over matters of public opinion and even to 'play offensively'. It is evident that the Sudan will continue to play as China's important economic partner in Africa during the execution of China's future overseas enterprise strategy, currently known as the "One Belt One Road Initiative".²¹ Therefore, backing up al-Bashir politically after giving him immunity assurances for his trip seems to be a rather logical option, especially when the meeting between the heads of states were intended for the signing

of a "Joint Statement of Strategic Partnership".²²

Nevertheless, this policy brief respectfully takes the view that the article in the *Global Times* came across as arrogant, perhaps even ignorant, rather than conveying confidence in a way that would be understood and welcomed by English-language readers. The article would only confirm those who have expressed previous concerns about China's foreign policy growing more assertive and threatening, instead of effectively addressing the US criticism which should not be so difficult given that the US is not an ICC State Party and arguably displays blatant double-standards in this area of international relations.²³

Despite the Editorial itself calling for China to be making its own "independent judgments", a closer examination over its structure and content reveals that the author(s) may have simply borrowed the arguments of the Sudan, adding a few new details and sub-arguments. Subsequent to the referral of the situation in Darfur to the ICC by the United Nations Security Council ('UNSC'),²⁴ the Sudanese government took the chance of organizing its own coalition and sought to defy the actions of the ICC by discrediting its authority and neutrality,²⁵ accusing the ICC of being "anti-African" and depicting it as being the instrument of Western neo-colonialism. With support of the late Gaddafi, who held the rotating chairmanship of the African Union ('AU') at the time, the Sudan managed to rally a number of African states that questioned the ICC's involvement in the Darfur conflict (since the ICC's impact on the restoration of peace in the region was questionable).²⁶ This eventually led to the AU resolution that called for AU Member States not to co-operate pursuant to Article 98 of the Rome Statute.²⁷

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

Lessons for the Future", in Antonio Cassese (ed.), *Realizing Utopia: The Future of International Law*, Oxford, 2012, p. 37.

18 Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and Rule of Law*, Oxford, 2003, p. 10.

19 Nonetheless, a much more explicit sarcasm was displayed towards the US ("while supporting ICC principles, has not signed the ICC Rome Statute"): *Global Times*, 2015, *supra* note 3, para. 6.

20 Helene Cooper, "Darfur Collides with Olympics, and China Yields", 13 April 2007 (<http://www.nytimes.com/2007/04/13/washington/13diplo.html>, last accessed on 15 June 2016); Nicholas Kristof, "China's Genocide Olympics", 24 January 2008 (http://www.nytimes.com/2008/01/24/opinion/24kristof.html?_r=0, last accessed on 15 June 2016).

21 Tessa Li Powell, "China's Relationship with Sudan – and Human Rights Consequences", in Arianna Nowakowski (ed.), *Human Rights in China*, Josef Korbel School of International Studies, Denver, 2009, pp. 157–59, available at <http://www.du.edu/korbel/hrhw/researchdigest/china/SudanChina.pdf>, last accessed on 15 June 2016.

22 *Xinhua News*, "China, Sudan to establish strategic partnership: Xi", 1 September 2015 (http://news.xinhuanet.com/english/2015-09/01/c_134577535.htm, last accessed on 15 June 2016).

23 Ingrid d'Hooghe, *China's Public Diplomacy*, Brill Nijhoff, 2014, pp. 67–68.

24 Press Release, Security Council, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court, S/RES/1593(2005), 31 March 2005 (<http://www.legal-tools.org/doc/4b208f/>).

25 Victor Peskin, "The International Criminal Court, the Security Council, and the Politics of Impunity in Darfur", *Genocide Studies and Prevention: An International Journal*, vol. 4, no. 3, 2009, pp. 305–308.

26 Gwen P. Barnes, "The International Criminal Court's Ineffective Enforcement Mechanisms: The Indictment of President Omar Al Bashir", in *Fordham International Law Journal*, 2011, vol. 34, p. 1606.

27 Assembly of the Africa Union, Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), AU doc. Assembly/AU/13(XIII) 1 8, 8 July 2009 (<http://www.legal-tools.org/doc/e16c2f/>).

arguments presented by the “African brethren” as the basis for its own arguments. It failed to notice the gulf between actual practices and judgment based on imagination. In fact, China’s abstention over UNSC resolution 1593, in which the Council referred the situation in Darfur to the ICC, may serve as an indication of China’s flexibility on issues of State sovereignty, especially when confronted with a fermenting humanitarian crisis.²⁸ Moreover, the AU resolution that called for non-cooperation with the ICC, was not as solid as it claimed to be. It had been exposed by Botswana officials that the resolution was pushed through without a vote,²⁹ and States including Botswana, Chad, Ghana and Uganda distanced themselves from it.³⁰ Nor should the popular opposition against al-Bashir among African civil society be ignored.³¹ And if indeed the Editorial really intends to adhere to its belief that “it is Africans that will decide African matters”, it should perhaps also acknowledge the reality that the majority of African states have accepted the ICC as a global court with historically strong African support, with over 30 African states having ratified the Rome Statute.³² It would be beneath the intellectual dignity of China’s stature were she, on the basis of advice offered by the *Global Times* in the Editorial, to advocate on behalf of African peoples for their liberation from the “tyranny” of the ICC.

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

Contemporary international criminal justice does indeed occur in contexts of power politics,³³ and the strongest “gets

28 Jonathan E. Davis, “From Ideology to Pragmatism: China’s Position on Humanitarian Intervention in the Post-Cold War Era”, *Vanderbilt Journal of Transnational Law*, vol. 44, no. 2, March 2011, pp. 272–273.

29 See Katherine Iliopoulos, “The African Union and the ICC”, in Crimes of War Project, available at <http://www.crimesofwar.org/commentary/the-african-union-and-the-icc/>, last accessed on 15 June 2016.

30 *Sudan Tribune*, “AU agree to protect Sudanese president from arrest”, 3 July 2009 (<http://www.sudantribune.com/spip.php?article31702>, last accessed on 15 June 2016).

31 Peskin, 2009, *supra* note 26, p. 308.

32 Gerhard Werle (ed.), *Africa and the International Criminal Court*, T.M.C. Asser Press, 2014, p. 16. See also Coalition for the International Criminal Court, “Africa and the ICC” (http://www.iccnw.org/documents/Africa_and_the_ICC.pdf, last accessed on 15 June 2016).

33 Wolfgang Kaleck, *Double Standards: International Criminal Law and the West*, Torkel Opsahl Academic EPublisher, Brussels, 2015, p. 1 (<http://www.legal-tools.org/doc/971c3c/>).

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

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

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

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34 Michael Mandel, *How America Gets Away With Murder, Illegal Wars, Collateral Damage and Crimes Against Humanity*, Pluto Press, 2004.

35 Martti Koskeniemi, *The Politics of International Law*, 2011, Hart Publishing, Oxford, p. 64.

36 See, *supra* note 9.



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