

What can China do to develop International Criminal Law and Justice further from the perspective of the International Criminal Court?¹

¿Qué puede hacer China para desarrollar en una mayor medida el Derecho Penal Internacional y la Justicia desde la perspectiva del Tribunal Penal Internacional?

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Abstract: The Rome Statute, as well as the International Criminal Court (ICC), regarded as a worldwide mechanism for the fight for impunity and a better protection of human rights, has 124 State parties up to date. China, however, is still not a party to the Rome Statute, mainly because of five reasons. This article looks for promoting the academic research on the Rome Statute and the ICC to clarify some confusion, and strengthening the Chinese domestic legislation to make use of the principle of complementary jurisdiction to exclude the jurisdiction of the ICC at largest. It is possible for China to be ready to access to the Rome Statute and take part in the ICC club in the future, which is also a contribution of China to the development of the international criminal law and justice.

Keywords: Rome Statute – International Criminal Court – Universal Jurisdiction – China – Domestic Legislation

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Resumen: *El Estatuto de Roma, así como el Tribunal Penal Internacional (TPI), considerado como un mecanismo mundial para la lucha contra la impunidad y una mejor protección de los derechos humanos, tiene actualmente 124 Estados partes. China, sin embargo, todavía no es parte del Estatuto de Roma, debido principalmente a cinco motivos. Este artículo busca promover la investigación académica sobre el Estatuto de Roma y el TPI, para aclarar cierta confusión, y para fortalecer la legislación nacional de China a fin de hacer uso del principio de jurisdicción complementaria a fin de restringir la jurisdicción del TPI. Es posible que China esté lista para unirse en un futuro próximo al Estatuto de Roma y participar en el TPI, lo cual sería también una contribución de China en el desarrollo del derecho penal internacional y la justicia.*

Palabras clave: *Estatuto de Roma –Tribunal Penal Internacional–jurisdicción universal – China –legislación doméstica*

1. Introduction

The Rome Statute of the International Criminal Court (often referred to as the International Criminal Court Statute or the Rome Statute, hereinafter “Rome Statute”)² is the treaty that established the International Criminal Court (hereinafter “ICC”), which was adopted at a diplomatic conference in Rome on July 17, 1998 and entered into force on July 1, 2002. As of June 20, 2016, 124 states are party to the statute³. The Rome Statute established and formulated four core international crimes: genocide, crimes against humanity, war crimes, and the crime of aggression. Those crimes “shall not be subject to any statute of limitations”⁴. Under the Rome Statute, the ICC can only investigate and prosecute the four core international crimes in situations where States are “unable” or “unwilling” to do so themselves. The ICC has jurisdiction over crimes only if they were committed in the territory of a State party or if they were committed by a national of a State party; an exception to this rule is that the ICC may also have jurisdiction over crimes if its jurisdiction is authorized by the United Nations Security Council (hereinafter “Security Council”).

² “Rome Statute of the International Criminal Court”, July 17, 1998 (in force on July 1, 2002).

³ United Nations, “Treaty Collection”, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en (accessed: Jun. 20, 2016).

⁴ Article 29 of Rome Statute, “Non-applicability of statute of limitations”.

Until now, China is still not a State party to the Rome Statute. In this article, the author would firstly explain why China rejects to access to Rome Statute, and then try to figure out what China can do to develop international criminal law and justice further in this regard.

2. Why does China Reject to Access to Rome Statute?

China, although having participated in the Assembly of States Parties to the Rome Statute as an observer, still rejects to access the Rome Statute up to date, mainly based on the five reasons as follows⁵.

2.1 Universal Jurisdiction

China cannot accept the principle and rules of universal jurisdiction by the ICC, for the universal jurisdiction authorized in the Rome Statute is not based on State's consent, but imposes obligation on the non-contracting party without State's consent. According to the understanding of the Chinese government, such universal jurisdiction has violated both the principle of State Sovereignty, and the Vienna Convention on the Law of Treaties⁶.

2.2 War Crimes in Non-International Armed Conflicts

China disagrees to include the war crimes in non-international armed conflicts into the universal jurisdiction. In the view of the Chinese government, it's a better policy to punish war crimes in non-international armed conflicts by domestic legal system, which has obvious advantages and justification; moreover, the definition of the war crimes in non-international armed conflicts has gone beyond the customary international law.

⁵ Wenqi Zhu, *Modern International Criminal Law* (Beijing: The Commercial Press, 2015) 90-97; Wenqi Zhu, *International Criminal Procedure Law* (Beijing: The Commercial Press, 2014) 34-35; Bingzhi Zhao, *Commentary on International Criminal Law*, vol. 2 (Beijing: Chinese People's Public Security University Press, 2007) 253-254; Wenqi Zhu, "Should China Access the International Criminal Court (First Part)", *Hubei Social Science* 10 (2007) 141-46; Wenqi Zhu, "Should China Access the International Criminal Court (Second Part)", *Hubei Social Science* 11 (2007) 133-39..

⁶ Article 34 of Vienna Convention on the Law of Treaties provides that, "A treaty does not create either obligations or rights for a third State without its consent."

2.3 Crime of Aggression

China has made a reservation⁷ on the regulations on the role of Security Council. Considering that the crime of aggression is an act of State, that whether an aggression really exists under international law should be firstly determined by the Security Council, which is also in consistent with article 39 of the Charter of the United Nations⁸. For the purpose of avoiding the abuse of the process politically as much as possible, it's necessary to determine the existence of an aggression by the Security Council as a prerequisite before investigating the individual criminal responsibility; however, the Rome Statute has not any regulation or clarification as such.

Furthermore, according to Article 16 of the Rome Statute, “No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions”, the 12-month limit is obviously not conducive for the Security Council to fulfill its functions granted by the Charter of the United Nations.

2.4 Powers of the Prosecutor

China raises serious doubts and makes reservations on the powers of the Prosecutor with respect to investigations⁹, which, in the view of the Chinese government, is too extensive, so it is very likely to be abused in some circumstances, even undermining the fundamental principle of non-intervention. Moreover, that the Prosecutor may initiate investigations *proprio motu* is also likely to lead to too many accusations made by individuals or NGOs, which would distract the Prosecutor from investigating the most serious international crimes, or even make the Prosecutor involved in the political vortex and hardly exercise his or her powers in a really independent and just manner.

⁷ It should be noted that the word “reservation” used here is not the equivalent to that in the Vienna Convention on the Law of Treaties.

⁸ Article 39 of the Charter of the United Nations provides that, “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”

⁹ Article 15 of Rome Statute, “Prosecutor”.

2.5 Definition of Crimes against Humanity

China does not agree with the definition of crimes against humanity, because, according to customary international law, crimes against humanity only exists in war time or in the extreme period relating to war; the existing treaties such as the Nuremberg Charter and the Statute of International Tribunal for the Former Yugoslavia have made it very clear. The Rome Statute, however, has deleted the “war time” standard in the regulation of crimes against humanity. Moreover, the enumeration of the specific crimes included in crimes against humanity has gone beyond the existing customary international law and treaty law too much, including some that actually belong to the international human rights law. In the opinion of the Chinese government, the ICC is not a world court for human rights but for the purpose of punishing the most serious international crimes, and the main purpose of the ICC should never be blurred.

2.6 Some Reflections on the Concern of China

On the one hand, from the standpoint of China, to some extent the concerns, doubts and reservations mentioned above are understandable. The Rome Statute is a very complicated legal instrument, which includes many regulations concerning the State sovereignty, actually restraining it, and it's inescapable for States to make some reservations¹⁰. On the other hand, as mentioned above, 124 States have become party to the Rome Statute, and in the context of the humanization of international law¹¹, the ICC is regarded as a worldwide mechanism for a better protection of human rights¹². Therefore, considering the balance between the fight for impunity by way of an independent, strong and efficient international judicial institution and the State sovereignty, China should also consider playing a more active role in this regard to develop the international criminal law and justice further.

¹⁰ Wenqi Zhu, “Should China Access the International Criminal Court (First Part)”, *Hubei Social Science* 10 (2007) 141-46.

¹¹ See Lingliang Zeng, “Trends towards Humanization in Contemporary International Law”, *Social Sciences in China* 1 (2007) 89-107.

¹² Of course there has been some criticism on the international criminal justice, see e.g. James Silk, “International Criminal Justice and the Protection of Human Rights: The Rule of Law or the Hubris of Law?”, *YJIL* 39 (2014) 94-111.

3. What Can China Do in Relation to the ICC?

3.1 Promoting the Academic Research on the Rome Statute and the ICC

With regard to the attitudes of China to the Rome Statute and the ICC, some are understandable, while some are probably misunderstood to some extent. Recalling the traditional opinion regarding the international judiciary, China has not gotten used to making full use of these international judicial mechanisms. One of the reasons is, from the view of the author, that China has not gotten familiar with some of these mechanisms in depth.¹³ Therefore, one suggestion is promoting the academic research in this regard to help understand more and better about these institutions, including the advantages and disadvantages of accessing to the Rome Statute, in a more detailed analysis instead of in general or abstract.

Concerning the present situation of the academic research on the ICC, after entering the Chinese full name of the ICC¹⁴ in the most famous “China Knowledge Resource Integrated Database”¹⁵, the author could find out only 424 articles in Chinese since the adoption of the Rome Statute, namely two in 1998, six in 1999, three in 2000, four in 2001, 21 in 2002, 20 in 2003, 27 in 2004, 28 in 2005, 26 in 2006, 39 in 2007, 48 in 2008, 26 in 2009, 30 in 2010, 38 in 2011, 30 in 2012, 28 in 2013, 29 in 2014, 19 in 2015¹⁶; it seems that the peak was around 2008 and there is some decline in 2015 in general. Among these articles, the most cited top five include: “The Historical Breakthrough in the Development of International Law: Commentary on the Rome Statute” written by Lingliang Zeng in 1999¹⁷, “The Supplementary Rules of the Jurisdiction of International Criminal Court: An Analysis from the Angle of the Situation in Sudan” written by Xiumei Wang in 2005¹⁸, “The Prospects of International Criminal Law: Concurrently on the ICC” written by Xu Zhang in 2000¹⁹, “The Rome Statute and the

¹³ A good example of China’s performance in the international judicial settlement is the WTO mechanism, which is the only one that China has accepted the compulsory jurisdiction, and until now, the performance of China in WTO dispute settlement is regarded as excellent.

¹⁴ The Chinese full name of the ICC is “国际刑事法院”.

¹⁵ More information is available at <http://cnki.net/> (accessed: Jun. 20, 2016).

¹⁶ More information is available at http://epub.cnki.net/kns/brief/result.aspx?dbprefix=scdb&action=scdbsearch&db_opt=SCDB (accessed: Jun. 20, 2016).

¹⁷ Lingliang Zeng, “The Historical Breakthrough in the Development of International Law: Commentary on the Rome Statute”, *Social Sciences in China* 2 (1999) 141-52.

¹⁸ Xiumei Wang, “The Supplementary Rules of the Jurisdiction of International Criminal Court: An Analysis from the Angle of the Situation in Sudan”, *Modern Law Science* 27 (2006) 180-86.

¹⁹ Xu Zhang, “The Prospects of International Criminal Law: Concurrently on the ICC”, *Law Review* 1 (2000) 65-72.

Principle of Relative Validity of Treaty” written by Jie Xu in 1999²⁰, “The Nature of the Jurisdiction of the ICC” written by Zexian Chen in 2003²¹. From this, we could draw as preliminary conclusion that the most cited top five articles were published ten years ago, and the main issue the scholars concentrated on was the jurisdiction of the ICC, which could also give us a hint why China is so hesitating with regard to the Rome Statute and the ICC.

Honestly speaking, the research on the subject of international criminal law in China is not as popular as the other branches of international law, especially the international economic law, let alone the civil and commercial law. This is a very special phenomenon, probably in relation to China’s economy oriented policy in the past 30 years²².

As we could see, even if a State does not access to the Rome Statute, according to the jurisprudence of the universal jurisdiction of Rome Statute, the latter could still have jurisdiction on the non-contracting party in some circumstances. Therefore, although still controversial, the Rome Statute would actually have effects on China in this reasoning. However, there still exists lots of confusion and worries regarding the rationality and legality of the universal jurisdiction for most of the Chinese, including the government; hence, the Chinese academics should pay more attention to this topic and make it more clear to the public that, on the one hand, no matter whether China accesses to the Rome Statute, the latter could still has jurisdiction on China in some circumstances, and on the other hand, considering the actual situation of China²³, the universal jurisdiction of the Rome Statute has a very small probability to be applied to China. The same can be said in relation to the other controversial issues raised by the Chinese government.

Of course, from the worldwide perspective, the Chinese academic research on the Rome Statute and the ICC is also a contribution to the international criminal law and justice.

3.2 Strengthening the Domestic Legislation

Although the ICC has the universal jurisdiction authorized by the Rome Statute, we have to bear in mind that the ICC “shall be complementary to national criminal jurisdictions”,²⁴ which

²⁰ Jie Xu, “The Rome Statute and the Principle of Relative Validity of Treaty”, *Law Review* 2 (1999) 94-98.

²¹ Zexian Chen, “The Nature of the Jurisdiction of the ICC”, *CASJ Journal of Law* 6 (2003) 121-128.

²² The factors related to this phenomenon are very complicated, and the author is not going to discuss this issue further in this article.

²³ Wenqi Zhu, “Should China Access the International Criminal Court (Second Part)”, *Hubei Social Science* 11 (2007) 133-39.

²⁴ Article 1 of the Rome Statute provides that, “An International Criminal Court (“the Court”) is hereby established. It shall

means, if a State does not give up the jurisdiction on the most serious international crimes committed by its nationals according to its domestic law, the universal jurisdiction of ICC would not start up automatically; in other words, the ICC could not exercise its jurisdiction unless the State is “unwilling or unable genuinely to carry out the investigation or prosecution”²⁵.

Therefore, for the purpose of achieving the balance between the fight for impunity by way of the ICC and the respect for the State sovereignty, if accessing to the Rome Statute, China could exercise its jurisdiction on the most serious international crimes defined in the Rome Statute on its own initiative, and then exclude the complementary jurisdiction of the ICC. The question is how could China exercise such jurisdiction more effectively?

One of the suggestions is to strengthen its domestic legislation gradually, especially in the field of criminal law and criminal procedure law. Until now, there are no crimes named either genocide, crimes against humanity, war crimes, or the crime of aggression, directly in Chinese Criminal Law. This probably constitutes an obstacle for investigating or prosecuting such crimes. There are some specific crimes which could be considered within the scope of the said most serious international crimes; for example, article 232 of the Criminal Law of China provides that, “Whoever intentionally commits homicide shall be sentenced to death, life imprisonment or fixed-term imprisonment of not less than 10 years; if the circumstances are relatively minor, he shall be sentenced to fixed-term imprisonment of not less than three years but not more than 10 years”; also, article 236 provides that, “Whoever rapes a woman by violence, coercion or any other means shall be sentenced to fixed-term imprisonment of not less than three years but not more than 10 years...”, etc. However, such specific crimes still cannot cover all the most serious international crimes.

In the case of the International Court of Justice, *Questions relating to the Obligation to Prosecute or Extradite*²⁶, one of the grounds of Senegal’s opposition was that there existed no crimes against humanity directly in its domestic legal system²⁷ and for the purpose of prosecuting the

be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.”

²⁵ Article 17 of the Rome Statute, “Issues of admissibility”.

²⁶ *Questions relating to the Obligation to Prosecute or Extradite* (Belgium v. Senegal), Judgment, I.C.J. Reports 2012, 422.

²⁷ On Feb.19, 2009, Belgium filed in the Registry of the Court an Application instituting proceedings against Senegal in respect of a dispute concerning “Senegal’s compliance with its obligation to prosecute Mr. Hissène Habré (former President of the Republic of Chad, for acts including crimes of torture and crimes against humanity which are alleged against him as perpetrator, co-perpetrator or accomplice) or to extradite him to Belgium for the purposes of criminal proceedings”. See the Summary of the Judgment of July 20, 2012, available at <http://www.icj-cij.org/docket/files/144/17086.pdf> (accessed: Jun. 20, 2016)

perpetrator domestically, Senegal amended its criminal law. Although it is not a case in the ICC, the issues, related to the relationship between the most serious international crimes and the jurisdiction, could offer the Chinese government some inspirations. Making the domestic criminal law and criminal procedural law connect to the “international standards”²⁸ with regard to the most serious international crimes, according to the principle of “*nullum crimen sine lege*”, China could exercise its jurisdiction in this regard and no longer encounter any jurisdictional conflicts.

4. Conclusion

Although accession to the Rome Statute is not the only way for China to develop the international criminal law and justice, we have to admit that, the Rome Statute and the ICC mechanism is the crystallization of the collective wisdom of human beings, which has established, for the first time in history, a worldwide permanent mechanism to end up with the tolerance for impunity. The Chinese people, of course including the Chinese government, have no doubt about its purpose and mission; and what they are still concerned about, are frequently some technical issues as mentioned above. By way of promoting the academic research on the Rome Statute and the ICC, including publicity and education, to clarify some confusion, and strengthening the Chinese domestic legislation gradually, especially in the field of the criminal law and criminal procedure law, to make use of the principle of complementary jurisdiction to exclude the jurisdiction of the ICC at largest, there is every possibility for China to be ready to access to the Rome Statute and take part in the ICC club in the future, which is also a contribution of China to the development of the international criminal law and justice. Let us look forward to the future and embrace the justice.

²⁸ The expression of “international standards” is likely to invoke some controversy in some circumstances, however, the author used this expression here to refer to the core crimes regulated in the Rome Statute.