The Beijing Workshop on the United Nations Security Council and the International Criminal Court

Summary of Discussions

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I. Introduction

In November 2012, UC Irvine School of Law hosted an international workshop in Laguna Beach, California, to discuss the relationship between the United Nations Security Council (also UNSC or Council) and the International Criminal Court (ICC or Court). Nearly thirty participants from around the world discussed two major influences shaping that relationship: how the law, norms, rules, and policies of the institutions themselves structure their relationship; and how key actors within the UNSC and the broader UN system influence policies with respect to the ICC. The Laguna Workshop resulted in the publication of *The Council and the Court: Improving Security Council Support of the International Criminal Court* (May 2013). *The Council and the Court* proposed structural and substantive policies to advance the relationship, perhaps most importantly the establishment of a forum for UNSC delegations to discuss ongoing ICC issues in a professional yet informal setting, such as the Council's Informal Working Group on International Tribunals. The report also highlighted ways in which the P-5, the permanent members of the Security Council, could contribute to a stronger relationship with the ICC.

A global community of academics, advocates, and diplomats has grown around the ICC, generating discussion, advocacy and analysis. This is particularly true among three of the members of the P-5: the United Kingdom, France, and the United States, only the first two of which are parties to the Rome Statute. Yet while the governments of Russia and China have remained non-party observers (like the United States) of the activities of the ICC, until recently neither they nor Russian and Chinese academics and analysts have been actively engaged in international discussions about the Court and its relationship with the Council. *The Council and the Court* urged those organizing discussions about the UNSC-ICC relationship—and, more generally, about broader support for the work of the ICC—to find ways to involve Russian and Chinese voices.

The Beijing Workshop summarized in this report resulted directly from the conversations held in Laguna in late 2012. On March 10, 2014, the China University of Political Science and Law, with the support of UCI Law's International Justice Clinic, hosted a workshop in Beijing, the first event of its kind hosted in China. The workshop aimed to identify and discuss developments concerning the relationship between the leading security institution of the international community and the leading mechanism of international justice. Academics, analysts, and current and former government and international tribunal officials participated in an exchange of views that touched on critical issues that influence the relationship between the Security Council and the Court. Approximately thirty Chinese experts were joined by specialists from around the world (names listed in the acknowledgments). The discussions included the following:

- The participants acknowledged the Security Council's increased reference to the ICC when discussing international peace and security. UNSC Resolutions regularly support a role for the ICC. In 2012, the UNSC devoted a full day's open meeting to discussing—and often praising—the ICC. Nonetheless, participants voiced concerns and criticisms about the current practices of both the Council and the Court and their relationship with one another.

- Looking at the subject from legal perspectives as well as political ones, participants explored the value and risks of a strong UNSC-ICC relationship. For instance, participants generally reflected the assumption that the UNSC is a political body while the ICC is a judicial one. Their legal separation aims to ensure the integrity of the ICC. But that same separation has a downside. The ICC does not have enforcement mechanisms independent of either the cooperation of states parties mandated by the Rome Statute, which is not always followed, or the cooperation of non-states parties when encouraged by the UNSC. The UNSC also has some influence over the situations in which the ICC exercises jurisdiction: the UNSC can refer situations to the ICC or defer proceedings under the Rome Statute. It was suggested a number of times that the adoption of amendments to the Rome Statute pertaining to the crime of aggression, at the 2010 Kampala Review Conference, may complicate the relationship.

- The participants touched upon the influence exerted by principles of national sovereignty and non-interference, traditional pillars of Chinese foreign policy. Participants addressed questions about the ways in which the ICC becomes involved in a state's domestic affairs. Should the ICC have the power to seek the arrest of heads of states? How, and by whom, is a state determined to be "unable or unwilling" to genuinely investigate these crimes? The governments of China and the United States share concerns about the ICC having jurisdictional reach over nationals of states not party to the Rome Statute, but for different reasons. Many participants believed that the United States is concerned about exposure because of its military presence abroad while China is concerned about international tribunals interfering with domestic affairs.

- Participants turned regularly to issues of non-cooperation, with significant attention given to the fraught relationship between the ICC and the African Union (AU). The AU's disapproval of cooperation with certain ICC requests is an example of this. It was suggested that the AU sees the ICC as a political tool of the UNSC. The UNSC's selective uses of referral and deferral powers, it was argued, exacerbate this view. The AU-ICC-UNSC triangle was also seen as an example of the broader clash between political and judicial bodies.

The discussions held at the Beijing Workshop are summarized in the panel reports that follow. Each panel summary is structured around (typically) three main presentations under subheadings, followed by group discussion. The Beijing Workshop was conducted under the Chatham House Rule. We note that a member of the Chinese Ministry of Foreign Affairs delivered the final address of the day.

II. Summary of Workshop Panels

Panel 1: The ICC Today

The workshop started with a panel discussing the current status of the ICC, its accomplishments thus far, and the key challenges the ICC faces in order to maintain legitimacy and efficiency. The participants turned repeatedly to a recurring theme: the importance of increased state cooperation and how non-cooperation may impact the ability of the Court to achieve its goals.

Cooperation and Efficiency

The ICC has exceeded initial expectations. In the last ten years, the ICC has become a fully-fledged judicial institution with over 700 staff members and six field offices in different countries; investigations have been opened in eight situations, bringing twenty-one cases before the ICC; eight individuals are in custody in The Hague. The ICC has proven itself to be relevant to conflict resolution and international law development.

However, the Court also faces serious challenges. Most of the challenges may be categorized as issues affecting either legitimacy or efficiency. The lack of universal jurisdiction, cooperation from states, and political support from the international community all implicate both kinds of challenges.

The lack of universal participation impacts the jurisdictional reach of the ICC as well as the selection of cases for prosecution. 122 states have joined the Rome Statute. Many important countries, including three permanent members of the UNSC, have not joined, which may undermine both the legitimacy and efficiency of the ICC. The majority of the cases brought before the ICC are in Africa; to some extent, the exclusive focus on Africa can be attributed to the limitations of jurisdiction derived from the Rome Statute itself. Since the ICC requires a certain nexus with states parties and is not based on universal jurisdiction, the ICC will not be able to intervene in all situations that would equally require its attention.

The Rome Statute obligates only states parties to cooperate with the court, but even those who are obliged to cooperate might not always do so. One way to expand cooperation might be for the ICC to enter into ad hoc agreements with other states and organizations. In fact, the ICC has actually made progress in this regard; the ICC has concluded a relationship agreement with the UN and is currently awaiting the conclusion of an equivalent agreement with the African Union.

The UNSC has the potential to enhance the efficiency of the system by requiring the cooperation of states when it refers matters to the Court. Unfortunately, this has not been the case in the two referrals the UNSC issued for Libya (2011) and Darfur (2005). With respect to these matters, the UNSC only reaffirmed the treaty obligations that states parties cooperate and imposed additional obligations only on the parties to the conflict. Neither situation country has cooperated, and other states' commitment to supporting the ICC has been weak. Such insufficient cooperation and political support affects the ICC's efficiency, as it delays the prosecution and investigation of cases, affecting the ICC's ability to collect evidence, adopt protective measures, and relocate witnesses.

The ICC is also looking at how problems of cooperation and efficiency may be linked to its own internal management and practices. A new Registrar is looking at ways to improve management. Judges are assessing their own handling of cases. Some of the problems may be related to the legal framework itself.

The prosecution is revisiting its investigation methodology and examining the best practices of ad hoc tribunals. There have already been proposed amendments, although these are not amendments to the Rome Statute itself. The amendments concern only procedural issues, such as prior recorded testimony and translation issues.

The ICC in Context

In evaluating the success of the ICC, it is helpful to look at the trajectory of courts that were established during various phases in the development of international criminal justice: (1) post-World War II tribunals in Nuremberg and Tokyo, (2) ad hoc tribunals, and (3) the ICC. In each phase, the courts have taken on bigger challenges with fewer tools and with more stringent procedures for the rights of the accused.

The Nuremberg and Tokyo international military tribunals were the first of their kind in prosecuting individuals for violating war crimes and crimes against humanity. These tribunals had enormous access to resources, but the procedures that were used in those courts, in retrospect, have been challenged as not sufficient by modern standards; however, the procedures for a fair trial were deemed as sufficient at the time.

Ad hoc tribunals took on a bigger challenge fifty years later—prosecuting cases through ongoing conflict. This second phase of the development of international criminal justice saw the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993 and the International Criminal Tribunal for Rwanda (ICTR) in 1994. These ad hoc tribunals were located away from the scenes of crime and without certain access to witnesses or other evidence. However, the procedures were significantly enhanced with respect to the rights of the accused.

The ICC marks the third phase in the development of international criminal justice. The ICC has arguably exceeded expectations. Several cases have been brought to completion. The ICC is a part of the discussion even if it is not part of the solution. This increased awareness of the ICC and its accomplishments demonstrates its relevance and legitimacy.

However, the ICC faces challenges, such as the quality of the cases that it prosecutes. The ICC has to look inward and make sure the cases it takes are of high quality. Ensuring high quality cases also requires improved state cooperation. Better quality cases means more investigation. ICC judges have signaled that they want cases more prepared from the beginning instead of having the prosecutors continue investigation throughout a case. As such, the prosecution must make sure they gather more direct, concrete evidence before submitting a case to the ICC.

A Chinese Academic's Reflection on Legal Issues

Some critics believe the ICC receives political pressure from the UNSC. Many of these critics wish to eliminate such political pressure so that the ICC can properly advance international justice. The criticisms come from a political perspective, not a legal one; while political discussions may have been proper during the negotiations leading up to the enactment of the Rome Statute, now, when there is a legal framework in place, current laws must be used to interpret the UNSC-ICC relationship instead.

Under Article 16 of the Rome Statute, the UNSC may adopt a resolution under Chapter VII of the UN Charter and request that the ICC defer or delay a prosecution for renewable periods of twelve months.

In 2002, the UNSC passed Resolution 1422, which requested the ICC to defer the investigation and prosecution of United Nations peacekeeping personnel from non-states parties to the Rome Statute. The United States insisted on this resolution and threatened to block all UN peacekeeping missions unless its troops were shielded from ICC prosecution. (It later dropped this initiative.) In 2005, the UNSC passed Resolution 1593, which referred the Darfur situation in Sudan to the ICC and required all parties to the conflict to cooperate. China abstained from voting on the resolution, insisting that the accused should be tried in domestic courts instead. Both Resolutions 1422 and 1593 were criticized by the Chinese.

The criticisms of Resolution 1422 were not completely reasonable. Resolution 1422, many argue, is inconsistent with UN Charter Chapter VII's goal of maintaining peace and security. Additionally, the criticisms towards Resolution 1422 seemed to stem from a distrust of the United States and the United States' motive of initiating the resolution. However, a criticism based on politics should not be brought into a discussion about the law. Legally, Resolution 1422 could be described as being consistent with Chapter VII and the Rome Statute.

On the other hand, from a legal perspective, the criticisms of Resolution 1593 were well founded. Paragraph 6 of Resolution 1593 is inconsistent with Article 16 of the Rome Statute. While Article 16 of the Rome Statute provides a grace period of twelve months for the deferral and delay of investigation of cases, Resolution 1593 in effect makes this period unlimited. As such, unlike Resolution 1422, there is a conflict between Resolution 1593 and the Rome Statute.

Separately, with respect to the UNSC-ICC relationship in prosecuting crimes of aggression, three scenarios may be possible. The first is where the UNSC believes a crime of aggression has been committed, but the ICC disagrees. This scenario is acceptable, since the UNSC concerns governments, and the ICC concerns individuals. The second scenario is where the UNSC does not believe there is a crime, but the ICC believes there is. This scenario is not acceptable. The third scenario is where the UNSC does not make a finding, but the amendments of the Rome Statute allow the ICC to defer findings. This scenario is also acceptable.

Further Steps of Improvement Within the ICC

There are at least four reasons why challenges have been raised in the early investigations of the prosecution at the ICC. First, one of the major criticisms of the ad hoc tribunal cases is that they were too broad. The ICC tried to learn that lesson, but it perhaps learned the lesson too well and brought cases that were overly focused and narrow. Second, in the early years, the prosecution believed that it had to move quickly to bring cases in order to be relevant and have an impact on ongoing conflicts, and that it would be allowed to continue to investigate as the case developed. While this worked with the ad hoc tribunals, at the ICC, judges have signaled that they want the cases more prepared at the beginning. Third, judges have signaled they wish to have more direct and less indirect evidence. Fourth, the evidence in these cases turns out to be fragile. The prosecution has brought cases, and after the arrest warrant or confirmation hearing, has seen evidence dissolve or disintegrate because of witness intimidation, witness bribery, and lack of state cooperation. The lesson that the prosecution has learned from that is that it needs to bring cases that have deeper evidence so that if evidence is lost along the way, it will still have sufficient evidence to pursue its prosecution.

The ICC has started a very formal process of lessons learned. A working group on lessons learned at the Court has been created. While it is open to all judges, it does not mean that only judges are involved since any proposed amendment needs to go through the Advisory Committee on Legal Texts, which is a formal

committee of the Court where all organs of the Court are represented. The Court has also established a roadmap that involves a dialogue with other states parties through a working group of government actors. The idea is that before the Court proposes any amendments, it needs to engage in a dialogue to make sure that everyone understands where the Court is going. However, at the end of the day, any proposed amendment will have to be adopted by the Assembly of States Parties (ASP). This is very different from the ad hoc tribunals where rules of procedure and evidence were adopted by the judges themselves. At times, this may result in an initiative that many international actors disagree with, such as the recent additions to Rules 134 of the ICC Rules of Procedure and Evidence, which allows an accused to be physically absent at trial. This is because such initiatives are adopted by the ASP, not from the Court's own working group.

The ICC is also working on having a better dialogue with the UNSC, especially when matters are referred to the Court or when the Court is dealing with individuals subject to sanctions and need cooperation from the UNSC, such as lifting travel bans on the accused. The ICC has suggested possible ways the Court can have better feedback and dialogue with the UNSC, such as creating a working group within the UNSC or some other mechanism in the UNSC Sanctions Committee.

Panel 2: The Security Council and International Justice

The second panel focused on the relationship between the UNSC and the ICC and the advancement of international justice more generally. Panelists assessed the benefits and criticisms of the UNSC-ICC relationship. Panelists shared their thoughts on the future relevance of the ICC and risk of the ICC becoming a marginalized court. Some suggested eliminating the referral process, arguing that the inconsistency and substance of the referrals may hurt the ICC.

Building Cooperation

The statutes of the ICTY and ICTR both contain primacy clauses that require states to defer domestic proceedings to the ICTY or ICTR. Both statutes allow the tribunals to pursue cases where the "national court proceedings were not impartial or independent, were designed to shield the individual from international criminal responsibility, or the case was not diligently prosecuted." The UNSC adopted the language of these statutes. As such, it is surprising to see critics now relying on a sovereignty argument to push back on the ICC, when the UNSC actually diluted state sovereignty through the ICTY and ICTR over two decades ago. In many ways, the ICC could be seen as a sovereignty-friendly institution.

The UNSC has acted "schizophrenically," cooperating very little with the ICC in the situations it has referred (Darfur and Libya) while offering support in situations it did not refer. Consider Resolution 1572, where the UNSC agreed to lift the travel ban on the former head of state of Cote d'Ivoire so that he could be surrendered to the ICC. This was not a situation referred by the UNSC, but by Cote d'Ivoire. The instances of noncooperation with the ICC on the two referred situations actually undermine the UNSC itself, especially considering the fact that the referrals were issued under Chapter VII of the United Nations Charter.

There is also a political divide within the UNSC as a result of its interactions with the ICC. In particular there is the situation in Kenya and the UNSC's decision to refuse an Article 16 deferral of the situation under the Rome Statute. This decision was based on political grounds, which generated a very unfortunate divide within the UNSC—pro-Africa and anti-Africa. While this was damaging for the ICC, it was more so for the UNSC, and as the UNSC and ICC continue to cross paths, the UNSC should prepare better for that overlap.

One possible solution is to revise the mandate of the Security Council's informal tribunals working group on the ICTY and ICTR. This would not be difficult, as the mandate was just recently amended so that the working group could also deal with the Special Court on Sierra Leone ("SCSL"). As the ICTY, ICTR, and SCSL are wrapping up and moving into their residual mechanisms, the informal working group can turn into the focus point for coordination and communication between the UNSC and ICC. The informal working group would give a certain degree of security because it is a subsidiary body of the UNSC. As such, its decisions will not be adopted without the consensus of the fifteen members of the UNSC.

The Interests of the Council and the Court

What does the UNSC want out of its relationship with the ICC? What does the rest of the world want? The UNSC appears to see the ICC as a tool for managing conflict to maintain international peace and security, while the rest of the world appears to want some degree of consistency from the ICC, which would include more follow-up during investigation and less direct tension on the issues of funding and limited jurisdiction of the ICC.

The UNSC is, has been, and always will be a political body, while the ICC is a judicial body. Accordingly, there has been a very marked tendency to be cautious about initiating investigations where major powers have a strong interest. For example, the ICC has refrained from opening full investigations in conflicts in Georgia, Palestine, and Afghanistan. It seems that the Court does not want to be involved in a situation where there are very distinct interests of key powers. While the ICC is certainly not fully controlled by political interests and political pressure, raising the prosecution of Omar al-Bashir as evidence, the ICC is extremely cautious in the investigations it chooses to open. From a political science perspective, it is no surprise that major powers figure out ways to control, guide, and circumscribe the work of an international organization. As such, to undo the perception that the ICC has reacted to political signals and realities, the ICC should investigate a situation that is going to put a major power in a situation of discomfort.

There is nothing inevitable about the ICC's future relevance. The danger of backsliding is significantly more real than the ICC's most ardent backers would acknowledge. While the fact that 122 states have now joined the ICC fits into a narrative that there's an inevitability of the ICC's relevance, that fact is not contextualized within the general population. Only about 30% of the general population lives in a member state; however, most of the world's population and most of the world's armed forces are not in an ICC member state. Additionally, looking at historical precedent and the International Court of Justice in particular, a court that is designed to be central could become marginal.

One participant argued there are different views of the relationship between peace and justice. In one view there can be no peace without justice and the individuals responsible for crimes must be brought to justice. The competing view is that overcoming national discord, ethnic clashes, reconciliation, and opening up society for a beneficial future is more important than bringing individuals to justice, even if responsibilities for crimes are watered down or disappear. Competing views of the Omar al-Bashir arrest warrant present an example as some considered him to be a factor of stability in a country that could collapse if he is removed from power.

China and the Crime of Aggression

Uncertainty surrounding crimes of aggression as defined within the Rome Statute is one of the reasons that China voted against it. China favored ICC jurisdiction over aggression subject to two conditions: China wanted a clear and precise definition of crimes of aggression, as well as appropriate inclusion of the UNSC. Despite failing to reach a consensus on these two issues at Rome, China closely followed the subsequent

negotiations over the definition of crimes of aggression by participating in various meetings and the 2010 Kampala Review Conference. At the Kampala Review Conference, the parties adopted the aggression amendments. While China did not object to the provisions involving individual acts of aggression, it disputed the provisions involving state acts of aggression, arguing that the provisions are not sufficiently clear or precise.

China has maintained a consistent position with regard to the conditions of the exercise of ICC jurisdiction over the crime of aggression. China insists that under the UN Charter, the UNSC has exclusive responsibility in maintaining international peace and security, which would require it to first determine whether acts of aggression have occurred before the ICC can hear a case. Any ICC investigation of crimes of aggression should otherwise be prohibited. China has a particular interest in making sure that the ICC jurisdiction of crimes of aggression does not encroach upon the UNSC's special role in maintaining international peace and security. For example, there may be cases where the UNSC does not find aggression, yet the ICC later takes a contrary position and subsequently finds individual responsibility for the aggression. This would infringe on the UNSC's mandate to serve as the primary guardian of international peace and security. Nonetheless, China's demand for an exclusive UNSC role in determining whether an act of aggression has been committed was rejected at the Kampala Review Conference.

China benefits from a cooperative UNSC-ICC relationship. China thinks the ICC is a positive element of the international architecture. While there may still be some difficulties in re-evaluating China's concerns towards the ICC, these difficulties are not insurmountable due to the development of the opt-out provisions decided during the Kampala Review Conference, which gives states the option to opt out of ICC jurisdiction over crimes of aggression.

Summary Thoughts on the ICC-UNSC Relationship

While advocates should not be blindly devoted to the ICC, they are in a good position to point out its weaknesses in order to improve the operations of the Court. With respect to the universal jurisdiction issue raised in the first panel, the ICC will not exercise jurisdiction over nationals of non-states parties; the system permits the UNSC to refer a situation to the ICC, where the ICC can essentially ignore the provisions limiting jurisdiction and apply the Rome Statute. While it was earlier noted that there is nothing that the ICC can do about this issue, the ICC can and should do something about the situation because as the Rome Statute currently stands, the ICC has no obligation to legally respect it. Moreover, with respect to the issue of funding for the ICC, this is the responsibility of the General Assembly, not the Security Council, under the UN Charter.

The AU first requested a deferral of the Darfur proceedings in 2008. From 2008 till today, there has only been one consideration of that request. While there have been some informal discussions from the United Kingdom, France, and South Africa, those discussions were quickly stopped by the United States. On the other hand, Kenya first requested a deferral in January 2011. Between January and June of 2011, there was one interactive dialogue (semi-formal meeting with the UNSC), one informal consultation (very formal meeting of the UNSC), two letters in response (one submitted to the AU and one submitted to the permanent representative of Kenya), as well as elements of the press issued. There was a real response from the UNSC toward the deferral request. With respect to Kenya, it is easier to respond to Kenya on legal grounds; the UNSC cloaks itself in the appearance of willingness to cooperate with the AU simply because there are legal constraints. However, it is legally more difficult to make the argument that the situation in Darfur, specifically with respect to President Bashir, does not more closely relate to what is provided for under Article 16 of the Rome Statute.

Panel 3: The United States, Regional Organizations, and ICC Member States

The third panel discussed the evolution of U.S. foreign policy regarding the ICC, the current AU-ICC tension, and possible motivating factors affecting states' cooperation with the Court. The panelists and participants engaged in a lively discussion comparing Chinese and American approaches toward the ICC.

The United States and the ICC

The United States signed the Rome Statute in 2000. The primary stated reason for not ratifying the Statute, at that time and since, is concern over the ICC's ability to exercise jurisdiction over nationals of states not party to the Rome Statute without UNSC referral. The administration of President George W. Bush was hostile towards the ICC during its first term. This hostility began to subside. But its acquiescence in the Security Council's referral of the situation in Darfur to the ICC in 2005 marked a significant shift in the Bush Administration's stance toward the Court, with the United States agreeing to abstain rather than exercise its veto.

During the first year of the Obama presidency, President Barak Obama's administration reassessed U.S. policy towards the ICC. The United States began to participate in the ASP meetings in November 2009 and has attended every one since then. In 2010, the United States was the only state not party to the Rome Statute to make a formal pledge of support to the ICC at the Kampala Review Conference. In 2011, the United States voted with a unanimous Security Council to refer the situation in Libya to the ICC. In 2013, the United States facilitated Bosco Ntaganda's surrender and transfer to the ICC, seven years after the Court charged Ntaganda with war crimes and crimes against humanity in the Democratic Republic of the Congo. U.S. support is based on a case-by-case determination, but the Obama administration has supported all of the cases opened by the ICC so far. However, despite the increased cooperation of the United States with the ICC, it should be noted that the current American support for the ICC is still selective.

A participant pointed out that over fifty UN member states requested referral of the situation in Syria to the ICC while the United States did not. Why does the US claim to support the ICC but not a referral of the situation in Syria? [Note: The United States later altered its position and voted in favor of a referral of Syria to the ICC, though vetoed by Russia and China.] It was speculated that some diplomats feel that the Libya referral was rushed to the ICC and that the experience there—simultaneously working with the ICC while seeking to end the conflict in Libya—was more difficult than expected, which might partly explain the different approaches.

A participant also noted that there was a large American presence in the ASP meetings due to the 2010 Kampala review process. The United States might have been attempting to influence the Kampala review process and minimize the possible effect of the resulting decisions on the crime of aggression adopted there. In response, it was noted that U.S. policy reflect the result of an overlapping consensus among various agencies that are involved in shaping policy; high among the interests that were reflected in the US decision to participate in ASP meetings was a commitment to ensure justice for those who endured terrible atrocities. There was an increased American presence at the Kampala meetings because of all the agencies with interests affected by new policy relating to the crime of aggression.

Cooperation, Support, and Financial Considerations

The success of the ICC depends not only on the rules and procedures of the ICC, but also on cooperation and support by states parties. The separation of the ICC from the Council intensifies the need for support and cooperation by states parties. The cooperation and support of states parties is a crucial factor for credibility of the ICC as an independent and impartial institution. The arrest and surrender of suspects is especially important. The states parties must cooperate with and support ICC requests for the ICC to be credible.

The success of the ICC also requires sufficient funding for the Court's operations, investigations, and prosecutions. As recently as 2011, the ICC's budget was the same as the ICTY. However, while the ICC's caseload has expanded, the available funding has not expanded at a proportionate rate. The ICC's financial concerns are further compounded by UNSC referrals that increase ICC expenses without any additional funding from the UNSC.

The ICC's ultimate goal should be for states themselves to investigate, prosecute, and punish crimes internally instead of utilizing the ICC. Some states parties have not whole-heartedly attempted to accomplish this ultimate goal. Four out of the eight referral cases were self-referred by states parties. While it is possible that this willingness to self-refer may be an indication of an inability to investigate and prosecute, it is also convenient both politically and economically to refer these cases to the ICC. In this view, states parties can outsource to the ICC the cost (political and otherwise) of prosecution. It is alarming that some states are defaulting on the obligation to use the ICC only as a court of last resort.

AU-ICC-UNSC Tension

Historically, the AU and individual African states have been advocates of the ICC. However, over the last five years there has been tension building between the AU and the ICC. The AU has made three broad criticisms of the ICC. The first is that the ICC has an anti-African bias, and it has become a court singularly devoted to the prosecution of African situations; the number of situations on the ICC docket that are African is a symptom of this bias. The second is that the ICC is a Western tool for targeting Africans, and the UNSC's use of its referral power and selected use of its deferral power suggest this dynamic. The third is that the ICC is asserting the mandate that the AU has for peace and security on the continent; the AU has made this argument with respect to the situations in Libya, Sudan, and even Kenya, which was not a referral.

The actual flashpoints with the AU-ICC relationship have been when the ICC attempted to prosecute sitting African heads of state, and the UNSC selectively used its referral and deferral powers related to these situations. Other commentators have indicated ICC's issuance of an arrest warrant for President Omar al Bashir as the turning point of the AU-ICC relationship. The situation in Darfur was referred to the ICC in 2005, and the negative reaction did not arise until this arrest warrant for Bashir was issued. The AU issued a request for deferral arguing that allowing the ICC to prosecute this case would cause instability in the region. The AU did not see much response from the UNSC, and this lack of response was seen as a slight. In response, the AU issued a request for its member states to not cooperate with the ICC in the arrest of President Bashir.

The most recent developments in the AU-ICC tension relate to the situation in Kenya and the prosecution of President Kenyatta and Vice President Ruto. Despite requests, there has not been any deferral. The AU held a summit in 2013. It was widely believed that this would be an attempt to instigate a massive withdrawal from the Rome Statute. At the summit, however, instead of mass withdrawal, the AU decided that an international court should not prosecute any sitting African head of state.

The AU's concerns with Article 16 and the UNSC's influence on current ICC proceedings support the idea that law and politics within the Rome Statute regime are out of sync with one another. The AU argues that by indicting the leaders of Kenya, the UNSC is undermining the democratic will of Kenyans.

Regional organizations can help recalibrate the relationship between law and politics within the Rome Statute regime. More engagement between regional organizations and the UNSC would be beneficial, such as engagement with regional organizations prior to making referral and deferral decisions. This could help to alleviate the perception that the ICC is a tool for Western powers. Similar to this approach, after the AU summit, the AU issued a decision to set up consultations with the UNSC and the P5 members.

A participant suggested that the AU is not leading any attempt to try moving the ICC beyond Africa. Why has the AU not promoted a referral of the situation in Syria or North Korea to the ICC in order to shift the focus of the ICC away from Africa? In 1995, the AU asked the UNSC to impose sanctions on Omar al Bashir for terrorist attacks against President Mubarak. How could the AU change so drastically from asking for sanctions to championing the same person as to obtain a UNSC deferral? In response, it was suggested that the AU is indeed contradictory. However, useful things can be gleaned from the AU's internal contradictions. Those interested in a powerful ICC and a powerful Rome Statute should look at the contradictions to see which criticisms are valid and see what can be learned.

A participant also claimed that the tension with the AU involves a dynamic of powerful states going after weaker states. Supporting referrals of the situations in Syria or North Korea will not resolve that tension.

American and Chinese Concerns About the ICC

A Chinese student, a participant said, once described the differences in Chinese and American foreign policy goals relating to the ICC: China is concerned mainly about complaints with regard to *domestic* matters; the United States is concerned about *international* exposure abroad, particularly military. Participants discussed their views on this student's observation. (The following reflects Chinese participant responses.)

It was argued that China does not want disputes to go to international tribunals. The Chinese have had a judge on one international tribunal or another for thirty years, yet China has not been a party in any international tribunal. The Chinese do not want to have disputes settled by international legal organizations and would prefer to handle them domestically or diplomatically. The head of the Chinese delegation to Rome stated that the Rome Statute could be accepted in terms of equality, but it cannot be accepted politically. The political reasons are complicated.

It was argued that as superpowers, the United States and China share the mentality that neither wants to be subjected to any judicial power beyond their own control. It was also noted that both nations inevitably follow their own national interests.

From a legal perspective, China and the United States share the same concerns over the role of the UNSC regarding the crime of aggression. Their political positions towards the ICC could shift in the same direction depending on many factors affecting political considerations.

It was also claimed that how American and Chinese situations change would dictate which country will become a state party to the Rome Statute first. Both the United States and China are not satisfied with ICC jurisdiction over nationals of non-states parties. The United States and China both believe this is a violation of the Vienna Convention on the Law of Treaties and that international treaties should not bind non-contracting parties. However, American and Chinese considerations about this are as the student observed: the United States is worried about soldiers abroad; China is worried about interference in domestic affairs. The Chinese reasons are worsened by the presentation of a universal jurisdiction case against the Chinese (related to domestic issues) before the Spanish courts and the ICC's indictment of heads of state .

It was further agreed that the American concerns relate to international military presence while the Chinese concerns revolve around domestic issues. However, the issue for China is not whether the ICC can have jurisdiction over Chinese nationals *per se*. Instead, the concern is how much foreign affairs can influence how China handles its domestic issues. China is consistently against international intervention of its domestic affairs.

One response was that China's foreign policy is fragmented. There is no uniform strategy for the Chinese foreign ministry regarding their reactions to ICC cases and international human rights cases that attract international attention. As an example, it is well known throughout China that China values diplomacy. However, there is no strategy to balance the pursuit of international peace with the pursuit of international criminal justice. In 2008, China exercised its veto power against a referral of the situation in Zimbabwe. A published paper argued that economic factors could be used to explain this; however, this explanation is not convincing. China suffered $18.8 billion USD in economic losses as a result of this veto. This economic loss illustrates a lack of coordination between China's ministry of foreign affairs and commercial departments. The Chinese foreign ministry's policy is more of a wait-and-see policy, handling foreign affairs on a case-by-case basis (as opposed to a well-thought-out coordinated effort). Another participant also agreed that the Chinese government has not followed a consistent approach regarding foreign policy in relation to the ICC.

On the other hand, it was also argued that China *is consistent* in its foreign policy relating to the ICC. In 2004, there was a delegation in which Judge Philippe Kirsch and others from the Court took part. The Chinese foreign affairs legal advisor stated then that China would always be a good friend of the ICC and would never to anything against their approach or position unless China's bottom line is touched. There are many occasions in which China does not exercise its veto power, even for the situation in Darfur despite that resolution's effect on Chinese economic interests in the region: China voted to pass resolutions for the situations in Cote d'Ivoire and Libya; China participated in the crime of aggression negotiations from the beginning through adoption in Kampala; and China has been attending all ASP meetings as an observer since the beginning. By contrast, consider the inconsistencies regarding how the United States treats the ICC: President Clinton signed the Rome Statute, yet Bush went back to his hostility; sometimes, the United States very actively supports the ICC's activities while being completely absent at other times. These inconsistencies cause China to be very suspicious of the United States' intentions regarding the ICC.

It was argued that the United States has great influence as a driving force of international law. As an example, debates over abolishing the death penalty are not actively pursued because America has not abolished it.

Additional Remarks

It is well known there is ethnic tension within the Xinjiang province. It was asked whether Chinese hesitance with the ICC and tensions in Xinjiang are related. Specifically, if tensions in Xinjiang rise further, will China's involvement with the ICC decline? It was suggested China does not want international influence over China's internal affairs, especially over the situation in Xinjiang, but the ICC is a court of last resort, and China has domestic courts capable of handling the matter—the possibility of the ICC having jurisdiction should not be an issue of concern.

It was noted that the ICC Prosecutor at times has spent over three years considering complaints that could have been dealt with in weeks. The very existence of a preliminary examination casts a shadow of incrimination, sometimes on governments, and if in the end the complaint is dismissed, that shadow may have already existed for several years. Others have argued that there is too much political risk for a state like China to become a party to the Rome Statute. The Prosecutor herself has issued a statement indicating that her office is analyzing the way it handles preliminary investigations to alleviate such unnecessary concerns.

It was pointed out that the complementarity system was designed to alleviate these concerns. This system always applies even in referral cases; the situation in Libya is an example of the ICC analyzing the issues of complementarity with respect to admissibility. It was added that the United States is familiar with the system of complementarity. Across administrations, there is an awareness that the ICC will have a lasting and enduring impact by not only handling cases that states could not otherwise handle, but also by acting as a catalyst to move the legal systems of these countries forward. Are the United State's anxieties laid aside by the system of complementarity? It was suggested that the United States holds a wait-and-see attitude regarding complementarity. The United States is not ready to become a party to the Rome Statute, and this will not likely change soon. It was separately argued that there are many things that must happen before China can decide whether the concept of complementarity is an alleviating factor.

Panel 4: Russian and Chinese Thinking about International Justice

The final panel discussed Russian involvement with international criminal tribunals and some possible current concerns about the ICC from a Russian perspective. Panelists also addressed the separation of political and judicial organs and analyzed the roles of the UNSC and the ICC from a scholarly Chinese perspective. Questions about current affairs with North Korea were also addressed.

A Russian Perspective

When the Rome Statute was negotiated, Boris Yeltsin was president of Russia. President Yeltsin was sincerely committed to promoting his vision of democracy in Russia. He surrounded himself with young advisers who were Western-minded. These people were in favor of rapprochement with Western Europe and the rest of the world. After President Yeltsin left office, Russia started to distance itself from international criminal tribunals. For instance, Russia initially supported the ICTY and later all but refused to cooperate with it. Even today, the ICTY is viewed critically with some claims of failure to prove utility or impartiality.

Russia joined the United States in referring Libya to the ICC and mirrored China and the United States by not exercising its veto power when the situation in Darfur was referred. Russia's concerns about the ICC are a combination of the American and Chinese concerns: Russia has concerns relating to internal developments as well as external military presence.

Consider Russia's domestic concerns. The war in Chechnya is over. Russian military and political leaders might not be without reproach. Anti-terrorist operations still continue. Almost daily, there are news stories describing terrorists trapped in a house and eventually 'neutralized' because of their refusal to surrender. One can imagine an argument that it is much easier to eliminate these terrorists than to bring them to justice. Terrorist acts still continue in Russia, and Russia wants to continue combating these terrorists without fear of prosecution through false or fictitious allegations. One of Russia's concerns when the Rome Statute was negotiated was that the Prosecutor could start an investigation on its initiatve based on information received from NGOs. The concern was that there were no limits to the information an NGO could bring to the Prosecutor.

Russia's external concerns are different. Officially, Russia has no territorial disputes; even Crimea is not an official territorial dispute between Russia and Ukraine. However, there are different views about the situation between Georgia and Russia. Some of the international community views Russia as an aggressor against Georgia. However, Russia's view is very different; in Russia's view, Russian troops were peacekeepers in South Ossetia, many have been attacked and killed by Georgians, and Georgian President Saakashvili gambled that Russian command would not be able to quickly make decisions while both the prime minister and president of Russia were disposed at the Olympic Games in Beijing. President Saakashvili tried to push the general population out of South Ossetia into North Ossetia to allow the Georgians to take the territory. Russia may be reluctant to ratify the Rome State because of differing views like the Russia-Georgia example.

Russia is not hostile towards the ICC, but addressing ratification of the Rome Statute is not a high priority for Russia currently. Public statements from Russia regarding the ICC are supportive. But Russia's reserved position towards the ICC will likely continue for years.

Russian legislation contains provisions pertaining to genocide in criminal court, and Russia has implemented the Geneva Conventions and protocols related to war crimes and crimes against humanity into legislation as well. Russian legislation is ready and capable of ratifying the Rome Statute; the reason for not ratifying the Rome Statute is not lack of legislation.

A Chinese Perspective

Three forums more than others have developed modern international criminal law: the ICTR, the ICTY, and the ICC. The cooperation of states is such an important element of international criminal justice that no international organ can function without it. This is evident because even the international criminal organ authorized to prosecute, indict, and issue arrest warrants of whomever it deems to have committed crimes is powerless without the support and cooperation of states. It is often said that there is no peace without justice. But not all states are equal; the P5 are different than other states on the UNSC. For example, the P5 have the primary responsibility for international peace and security.

China is an example of how things change over time for different situations, even though China likes to be a friend to the ICC. In 2005, China abstained from voting on Resolution 1593 referring the situation in Darfur to the ICC. Article 13 of the Rome Statute provides that the Prosecutor, states parties, and the UNSC can all be the trigger mechanism for ICC jurisdiction of a situation. There is an important difference on this point: the UNSC can only refer the situation while the ICC decides who should be prosecuted. China was watching to see what it could learn from the results of Resolution 1593.

In 2011, the Security Council adopted Resolution 1970. With the Arab Spring, many things were happening very quickly; it was natural for Libya to be submitted to the UNSC for discussion about a possible referral to the ICC. At that moment for that specific problem, China could go along with the other fourteen UNSC members and refer the situation to the ICC. This was the first and only time the entire UNSC unanimously voted for referral of a situation to the ICC.

Resolution 1973 resulted in a no-fly zone relating to the situation in Libya. It was determined that all member states should take all necessary measures to protect civilians. China did not prepare well for consequences of this resolution when it agreed to it. China was set back when other nations had military aircraft over Libya just two days after the resolution was passed. It is well known that the Gaddafi regime would not have been overthrown quickly without this intervention. Through Resolution 1970, the Rome Statute and the ICC were now being seen as a tool to help change a regime instead of to hold individuals accountable for their individual crimes. It was argued that one important principle of international law is the mature mutual respect for sovereignty, i.e. non-interference. This principle is very important to China.

The ICC has only focused on Africa so far. People not knowledgeable in international law are surprised that any international organ has the power to indict sitting heads of state, and that such power is justifiable. Many people think the sitting heads of states do not act for themselves; they do things for their country. In some cultures, indicting a head of states invokes a form of national shame.

As international criminal law develops, it will affect both the field of criminal law and the present international order. The crime of aggression is an example. Before 2010, there was no attempt to define the crime of aggression, and the UNSC was seen as the only organ authorized to determine if it had been committed. Now, the ICC might have that power. Additionally, the applicability of the system of complementarity is still not clear. Who determines the standard for "unable or unwilling" to prosecute a matter? The Rome Statute clearly establishes that this is for the ICC to decide. However, consider the Chinese criminal code, which does not address crimes against humanity, genocide, or war crimes: there is not enough case law, and it is not clear if this constitutes "unable" or "unwilling".

Specific Thoughts and Policies

A participant asked whether the Chinese have a position on North Korea. It was suggested by a Chinese participant that all of the allegations against North Korea are just hearsay so far. Yet there is a very negative attitude towards North Korea in China. It was separately noted that it is well known in China that there is something fundamentally wrong happening within North Korea. China is not comfortable making a move, but China does have some responsibility there. There is no way North Korea can get away from international prosecution by the ICC or some other ad hoc tribunal. It was agreed that nobody likes the situation in North Korea, but this is a political issue, not a legal one.

As a practical matter, China shares 600 kilometers of a border with North Korea, and any regime change there has the potential to burden China with possible refugee floods.

It was also asked if traditional principles of sovereignty and non-interference animate Chinese foreign policy today. A Chinese participant explained that starting in 1949, China formed a new central government and began focusing on sovereignty. In 1954, China and India agreed on five peaceful principles of coexistence; the main principle is the mature respect of sovereignty and non-interference. These principles are so important to China that they are included in China's constitution; these principles are regarded as guidance for many activities including international relations. The Chinese often look to the past for

guidance. Scholars are starting to rethink how different China's current position is compared to 1954, but presently, this principle of non-interference is still very important to the Chinese.

It was suggested that Chinese intellectuals are not as interested in the ICC as they used to be; young scholars are closer to the government position. The change in scholarly interest may be because of failure by international organizations to effectively outreach, or scholars may be losing interest in the ICC itself. By contrast, interest in the ICC from Russian legal professionals is rising. It was also countered that there is interest in the ICC among young Chinese scholars. The interest might have changed; at the beginning, the interest was in defining and critiquing the Chinese government's position while now, the interest is more in analyzing substantive issues of operating with the ICC. Another participant agreed and claimed that Chinese students are among the top supporters of the ICC seeking internships.

Several Americans and Russians work at the ICC full time, yet there is only one Chinese national. Additional Chinese working on the ICC, it was argued, would enhance China's relationship with the ICC.

It was asked by a participant whether fear of regime change might be a factor limiting Chinese friendship towards the ICC and how pervasive that fear is. Arguably, the concern about regime change is not common, a Chinese participant suggested, but concern about interference with domestic affairs is quite pervasive. It was argued that the principle of non-intervention is a leading reason that China has not ratified the Rome Statute. Complementarity is not the main concern, either, and the existence of comprehensive national legislation does not mean complementarity will work for a particular country. The main concern regarding complementarity is that it is undefined who can judge the inability and unwillingness of a state to investigate and prosecute alleged crimes against humanity, war crimes, and genocide.

III. Closing Session: Roles, Powers, and Responsibilities of the ICC and UNSC

The final session involved concluding remarks by a Chinese Government official.

China's government has consistently been supportive of the ICC because of the ICC's great contribution to maintaining international peace, security, and justice, to punishing international crimes, and to promoting the development of international law. The relationship of the UNSC to the ICC has been a long lasting debate since the conception of the ICC, and the central issue is what role the UNSC plays in the ICC system. There are two fundamental questions behind these differing views: what is the legal basis of the UNSC's role in the ICC system; and how to handle the UNSC-ICC relationship. These questions concern the standing of the Rome Statute laws, their interpretation, and their application.

This presentation is divided into four parts: the legal status of the UNSC and ICC system; the functions and powers of the UNSC in the current ICC system; the UNSC's authority relating to determination of whether an act of aggression occurred; and the relationship between the ICC and the UNSC.

First, according to the UN Charter and the Rome Statute, both the UNSC and ICC are significant mechanisms for the maintenance of international peace and security, and both mechanisms maintain the order of international peace and security. The UNSC is conferred some of the important functions and powers for the maintenance of international peace and security, including primary responsibility for the maintenance of international peace and security, the power to determine the existence of any threat to or breach of peace and security, and the power to determine whether an act of aggression has been committed. The UN Charter provides that the obligation of members of the UN shall prevail over the obligation of any other international agreement. These provisions grant primacy to the UN Charter and include the functions and powers of the UNSC.

The Rome Statute established the legal status of the UNSC in the ICC system by explicitly providing for specific functions and powers of the UNSC. These include the power to refer situations to the Prosecutor via Chapter VII of the UN Charter and the power to defer an ongoing investigation. This shows the UNSC is playing an important part in the current ICC system. The power the UNSC has within the ICC system is derived from the UN Charter. This is a solid legal basis and positive role the UNSC has in the ICC (system), and therefore states and the international community should respect this role.

Secondly, the concerns about the UNSC's referral and deferral powers are unnecessary. The referral concern is based on Article 13(b) of the Rome Statute. Article 13(b) has two limitations for when the ICC can exercise its jurisdiction: the situation referred to the Prosecutor included one or more of the eligible crimes, and the situation must have been referred in accordance with Chapter VII of the UN Charter. Even if a situation referred to the ICC satisfies the above criteria, the ICC may exercise jurisdiction—but it is not obliged to do so. The UNSC's influence on the ICC is limited: the UNSC's power to refer is unilateral, and the ICC is not required to oblige the request; after receiving the referral, the Prosecutor may assess whether there is a basis to proceed with an investigation. The decision to initiate an investigation rests upon the Prosecutor, and is only subject to the authorization of the pretrial chamber. A referral does not necessarily lead to investigation and prosecution; the concerns about the UNSC controlling whom the ICC prosecutes are unnecessary. The UNSC can only refer a situation and not criminal suspects; the UNSC provides a source from which the ICC can find cases. Concern that the UNSC selectively refers situations for political

reasons is not a good argument because states parties to the Rome Statute can also refer situations to the ICC; the UNSC's referral power does not interfere with the Prosecutor's right to investigate and prosecute at her behest. This referral power only enables the ICC to expand its jurisdiction over non-states parties.

There are two limits to the application of UNSC deferral requests: the request for deferral should comply with Chapter VII of the UN Charter, and the power of a UNSC deferral is limited by the twelve month maximum deferral. Although the situation can be deferred multiple times, there is an annual reassessment. Chapter VII necessitates that the UNSC has the power to defer cases that may adversely affect international peace and security processes. This power is derived from the primacy of the UN Charter and does not constitute interference with the judicial independence of the ICC. Rome Statute Articles 13 and 16 recognize the functions and powers of the UNSC within the ICC system, and strict limitations ensure the ICC's independence remains intact.

Thirdly, the UNSC has the authority to determine a state committed an act of aggression. In 2010, amendments to the Rome Statute were adopted to define the crime of aggression and the jurisdictional conditions for it. The core issue debated relating to the ICC's jurisdiction for the crime of aggression was whether the UNSC is the sole organ with power to commence an investigation and prosecution of the crime of aggression. Article 15(b) provides that where the prosecutor concludes that there is a reasonable basis to proceed with the investigation in respect to the crime of aggression, he or she shall first ascertain whether the UNSC has made a determination of whether the act of aggression was committed by the state concerned, and the prosecutor should notify the Secretary General of the UN of the situation before the ICC, including any relevant information and documents. Where no such determination is made within six months after date of notification, the prosecutor may proceed with the investigation in respect to the crime of aggression provided that commencement has been authorized. These procedures enact a determination by the UNSC to investigate a crime of aggression within a six-month window. This implies the UNSC has exclusive power to determine that an act of aggression occurred. Article 39 of the UN Charter states that the UNSC shall determine the existence of any threat to peace, breach of peace, or act of aggression; Article 24 grants the UNSC primary responsibility for the maintenance of international peace and security; and Article 5 of the Rome Statute states that provisions defining the crime of aggression and conditions for ICC jurisdiction over a crime of aggression shall be consistent with the relevant provisions of the UN Charter. These relevant provisions include UN Charter Articles 39 and 24. With all of this in mind the UNSC has the exclusive power to determine whether a crime of aggression has been committed. Only after the UNSC determines that an act of aggression has been committed and refers the situation to the ICC can the ICC initiate a legal procedure relating to the crime of aggression. No other international organization or state has this power, and relevant provisions of the amendments to the Rome Statute pertaining to the crime of aggression imply the authority of the UNSC to determine that an act of aggression occurred. Arguments against the UNSC's exclusive power to determine acts of aggression have no convincing legal basis in international law.

The fourth point is about the UNSC-ICC relationship. The UNSC and the ICC are independent from each other, but related to each other. They each have their own scope of functions and power. The ICC is a judicial institution with the mission of punishing grave international crimes that threaten international peace and security; the task of punishing criminals and ending impunity in order to achieve justice; and the exclusive power of investigation, prosecution, and trial. The UNSC is a political organ within the UN system accorded the primary responsibility for the maintenance of international peace and security; the UNSC's power to fulfill this purpose include the powers of referral and deferral of situations to the ICC and the determination of acts of aggression. The two institutions are both mechanisms to ensure international peace and security, and they should pay due respect to the functions and powers of each other as defined by the UN Charter and the Rome Statute.

These two institutions share common goals and interests and bear the common responsibility of preventing and punishing grave international crimes that threaten international peace and security. The UNSC's primary responsibility includes dealing with grave crimes that may constitute a threat to international peace and security. In most situations, preventative diplomacy, favored by the UNSC with respect to international peace and security, and the judicial and law enforcement acts of the ICC are not exclusive, but are mutually promoting. The UNSC and the ICC should seek cooperation to facilitate a win-win situation on the basis of these shared goals and common interests. Additionally, the UNSC and ICC are complementary to each other for the maintenance of peace and justice; peace and justice are the two primary values of the ICC, and they are the primary goal of the UN. Pursuing maximum peace and justice should be the primary goals of the ICC.

In conclusion, with all the overlaps between the ICC and the UNSC in terms of their functions and powers, it serves the best interests of both organs to cooperate in accordance with the UN Charter and the Rome Statute based on mutual respect and to remain committed to building a cooperative and constructive partnership. The maintenance of international peace and security is a goal common to all states and the international community. It is very important to punish international crimes that threaten international peace and security through criminal justice. Mutual respect and active cooperation between the ICC and UNSC is necessary to effectively confront common threats to international peace and security.

IV. Conclusions and Recommendations

The Beijing Workshop was the first substantive meeting held in China for a wide range of actors to discuss issues relating to international criminal justice in the UNSC. Participants came away from the workshop better informed of UNSC-ICC issues and, perhaps most importantly, the attitudes held by key actors. Participants held open exchanges on the role that countries like China, the United States, Russia, and those of the African Union can or should play in advancing international justice. They addressed thematic topics ranging from the legitimacy and relevance of the ICC; national sovereignty concerns; principles of complementarity; the mechanics of the ICC; and issues undermining the UNSC-ICC relationship.

The Council and the Court urged supporters of the ICC to integrate all P-5 members into discussions about the future relationship of the ICC and the Security Council—especially China and Russia. It highlighted five specific approaches to further involve Chinese and Russian thinkers and policymakers in discussions about the ICC: (1) conduct diplomacy in New York to encourage support for UNSC improvements related to the ICC; (2) involve China and Russia in unofficial meetings related to international justice; (3) build a knowledge base over the long term; (4) build the profile of the domestic public international law community; and (5) identify areas of collaboration in international justice.

Many of the findings published in *The Council and the Court* remain relevant today. Indeed, the Beijing Workshop reconfirmed the vital importance of ensuring that all Security Council voices are heard and given a place at the table even beyond the Council corridors. As advocates will continue to press for stronger relations between the Security Council and the ICC and deeper cooperation by all states with the Court, the Beijing Workshop helps frame how to ensure the future engagement of China in building that relationship. In particular, this concluding section highlights a set of lessons learned from the workshop and recommends further steps to ensure fully representative discussions moving forward.

Lessons Learned

The rich discussions that took place in Beijing underscored the depth of international criminal justice expertise and highlighted the fact that substantive discussions about law and politics may be debated in Beijing. Chinese experts—in academia, think tanks, and government—bring real value and insight to international roundtable discussions about the ICC. Much of the energy in the workshop derived from the combination of younger participants of the workshop – the young scholars and graduate students – and the inspiration of more experienced scholars, practitioners, and jurists who are helping to shape international criminal law. All were eager to offer detailed and substantive insights, but they were also open to sharing their own personal ideas as to what China's position *should be*, as well as posing difficult yet thoughtful questions for the other panelists in order to better understand the tensions resulting from the UNSC-ICC relationship.

Additionally, from a broader perspective, the workshop highlighted the various ways of viewing the "success" of the ICC. Is success punishing those individually culpable? Is it ending hardships and advancing economic and social stability goals in conflict countries? Or, is it to persuade every state to handle matters domestically, therefore eliminating the need for the ICC altogether? It is important to consider these questions to ensure that the ICC retains legitimacy and relevance as an international judicial body advancing international criminal justice.

Recommendations

It is essential that all P-5 members of the Security Council engage with issues relating to the ICC and international justice. Moving forward in the coming years, the lessons gained from the workshop can be applied to discussions in China and elsewhere.

1. Organize a series of similar workshops in China. All participants appreciated the opportunity to exchange ideas across borders and disciplines and were excited about the idea of holding similar workshops in the future. Academic workshops can be useful in extending scholarship on matters of structure, politics, and jurisprudence, and they should be pursued. However, workshops should not be limited to the academic level; policymakers and representatives of various foreign policy departments and political think tanks should be involved as well. Increasing the audience for these discussions will build a larger knowledge base at both the domestic and international level.

2. Involve more Chinese experts in unofficial international meetings related to international justice. Not only should additional similar workshops be held in China; to the extent that there are similar workshops held in other countries, measures should be taken to ensure that Chinese experts are invited to share their perspectives so that they are part of this international discussion on advancing international justice. Additionally, these experts could be invited to author or co-author articles and reports with other international experts to enhance dialogue.

3. Involve more international experts from other countries that are not states parties to the Rome Statute. As the UNSC-ICC relationship in advancing international justice is a global issue affecting all countries, it requires the attention of multiple actors. So far, much of the discussions revolving around UNSC-ICC issues have been concentrated in the West. In order to get a more complete picture as to how the UNSC-ICC relationship could be improved moving forward, it would be helpful to engage international experts from other countries, both those that have and have not ratified the Rome Statute. Doing so would also create a platform for major powers like China and Russia to offer insights and perspectives on the advancement of international justice and what that advancement can and should look like within the context of international law.

4. Involve more Chinese scholars and policymakers in universities. The impassioned interest in international justice issues seen in Beijing should be channeled and expanded through a variety of initiatives: encourage participation in moot court competitions focusing on international law, such as the Jessup International Law Moot Court Competition; offer scholarships and internships for students to work at international tribunals such as the ICC, the ICTY and the ICTR; and create exchange programs between Chinese and non-Chinese universities where students can broaden their knowledge on international issues from their peers.

5. Involve key UN actors to increase transparency within UNSC thought processes. One of the major criticisms of the UNSC-ICC relationship that was brought up throughout the workshop was the appearance of the ICC being used as a political tool by the UNSC in its selective referrals and deferrals of situations to the ICC. Increasing transparency within UNSC thought processes would help alleviate such concerns and support the legitimacy of both the UNSC and ICC as the international arena can better understand the rationale behind situations referred by the UNSC. This can be accomplished in part through increased communication with regional organizations that will be affected by a referral or deferral decision, reports explaining reasons for the decision, and expanding the UNSC's Informal Working Group on International Tribunals to include the ICC.

V. Acknowledgments and Participants

Many people and institutions made possible the Beijing Workshop and the publication of this report. We would first and foremost like to thank the participants in the workshop. Nearly three dozen Chinese academics, analysts, and policymakers joined the workshop, including the eminent Chinese jurist Judge Liu Daqun of the International Criminal Tribunal for the former Yugoslavia. The leadership of the China University of Political Science and Law deserves special mention, especially Vice President Professor Zhang, who supported the workshop intellectually and financially. We also wish to thank Professor Zhu Wenqi of Renmin University School of Law for his leadership and engagement.

More than anyone else, however, Professor Leng Xinyu, who organized and led the full-day workshop himself, deserves special credit for his dedication throughout the past year. The workshop would not have taken place without his energy, skill, and intellect.

Chinese participants in the workshop included H.E. Judge Liu Daqun, ICTY/ICTR Residual Mechanism, Appeals Chamber; Professor Leng Xinyu, China University of Political Science and Law (CUPL); Mr. Ma Xinmin, Counselor of Department of Treaties/Law, MFA; Ms. Ren Xiaoxia, Department of Treaties/Law, MFA; Professor Zhang Baosheng, Vice President, CUPL; H.E. Xue Gangling, *ad hoc* judge of Supreme Court of China, Dean of Law School of CUPL; Professor Lu Zhi'an, School of Law, Fudan University; Mr. Michael Liu, lawyer for civil party, ECCC; Professor Ling Yan, Research Centre for IHL/ICL, CUPL; Professor Zhu Wenqi, School of Law, Renmin University of China; Dr. Zhang Miao, School of Law, Nanjing University; Professor Jiang Guoqing, Faculty of International Law, China Foreign Affairs University; Professor Xie Dan, School of Law, CUPL; Professor Xiao Fengcheng, School of Law, CUPL; Dr. Zhang Binxin, School of Law, Xiamen University; Professor Zhang Guihong, School of Law, Beijing Normal Study University; Professor Liao Shiping, School of Law, Beijing Normal Study University; Professor Xie Jingjing, University of International Relations; Dr. Liu Peng, editor of China Social Science, Director of Department of Theory Studies; Dr. Wang Lijun, Information Center for Social Science, Renmin University of China; Professor Zhu Lijiang, Research Center for IHL/ICL, CUPL; Ms. Zhu Dan, Ph.D candidate, Edinburg University, Assistant of Judge Liu Daqun; Dr. Guo Yang, Legal Advisor/Assistant of Head of Delegation, ICRC Eastern Asian Delegation; Dr. Li Qiang, School of Law, CUPL; Professor Jiang Tao, School of Law, CUPL; Professor Liang Yabin, Central Party School of China Communist Party; Professor Zhang Zhong, Judicial Civilization Innovative Center, CUPL; Professor Yi Ping, School of Law, Peking University; Professor Wang Xiumei, Beijing Normal Study University; and Professor Gao Xiudong, China Foreign Affairs University

The non-Chinese participants included Professor Tendayi Achiume, UCLA School of Law; Ambassador Bruno Stagno Ugarte, Security Council Report; Ambassador Alexander Khodakov, International Criminal Court; Professor Alex Whiting, Harvard Law School; Professor Diane Orentlicher, American University Washington College of Law; Professor David Bosco, American University School of International Service; Professor Dire Tladi, University of Pretoria; Mr. Joshua Eisenman, UCLA; Judge Silvia Fernandez, International Criminal Court; Professor Morten Bergsmo, Peking University; Professor David Kaye, UC Irvine School of Law; Ms. Lucy Lin, UC Irvine School of Law; and Mr. Andrew Rothenberger, UC Irvine School of Law.

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