

SYMPOSIUM ON THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER  
YUGOSLAVIA AND RWANDA: BROADENING THE DEBATE

THE LEGACY OF THE ICTY AND ICTR IN CHINA

*Bing Bing Jia\**

Legacy is a matter that may become topical when its creator finally stops producing.<sup>1</sup> Normally, the silent years would be many before the thought of legacy enters into open, formal discourse among lawyers and decision-makers. This comment treats the meaning of the word as relative to the circumstances in which it is invoked. The more closely it is used in relation to the present, the more distant it drifts from its literal meaning, to the extent that it denotes what the word “impact” signifies. This essay questions whether the word “legacy” is apt in describing the footprint of the work of the two *ad hoc* tribunals in China, where its influence has, as a matter of fact, been waning ever since the adoption of the Rome Statute of the International Criminal Court in 1998 (“Rome Statute”). The Chinese example suggests that the work of the tribunals is (at least so far) no more significant to international criminal law than the illustrious Nuremberg and Tokyo Trials of the 1940s. The most major impact (a more apposite term than legacy) of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Tribunal for Rwanda (ICTR) for China may be that China’s policy with regard to the tribunals, manifested mostly in the United Nations, has determined its approach to the International Criminal Court (“ICC”). For that, the work of the tribunals could be considered as having left China something in the nature of an indirect legacy.

The legacy of the Nuremberg and Tokyo trials itself has several histories. One of these histories is the acknowledgement of that legacy in the 1990s, in relation to the establishment by the UN Security Council (“UNSC”) of the two *ad hoc* tribunals. The license to reutilize that legacy was claimed before the curtain rose on the new tribunals; it was, for instance, in the UN Secretary-General’s Report of 3 May 1993 that the legacy of those past trials was resurrected.<sup>2</sup> In the course of establishing the ICTY, the UNSC refrained from legislating the law to be applied by the future tribunal, but tasked the latter to apply “existing international humanitarian law.”<sup>3</sup> On the list of sources of customary law enumerated by the Report, there was the Charter for the International Military Tribunal of 8 August 1945 (“Nuremberg Charter”), being the blueprint for trials of major war criminals held in Nuremberg and Tokyo. The Charter also came closest, among the sources listed in the Report, to a workable code for international criminal proceedings.

\* *Professor of International Law at the Tsinghua University Law School, Beijing, China.*

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<sup>1</sup> A similar thought was expressed in Sara Kendall & Sarah M. H. Nouwen, *Speaking of Legacy: Towards an Ethos of Modesty at the International Criminal Tribunal for Rwanda*, 110 AJIL 212, 213 (2016).

<sup>2</sup> Secretary-General, Report Pursuant to Paragraph 2 of Security Council Resolution 808, UN Doc. S/25704 (May 3, 1993).

<sup>3</sup> *Id.* at para. 29.

The decades following the end of the Nuremberg and Tokyo Trials in October 1946 and November 1948, respectively, did not witness a wholesale embrace by the international community of the legacy of the Nuremberg Charter and the jurisprudence stemming from it. Doubts came into the open almost immediately after the judgments were delivered in the trials, a feature reflected in ensuing sharp divisions over the nature and terms of the legacy.<sup>4</sup> Full and reasonably widespread acceptance of the legacy—especially those major principles—arrived much later when, in 1993, the need for criminal prosecutions became pressing for the UNSC seized of the depressing situation in the former Yugoslavia.

These histories are enough to suggest that it may be premature to consider the legacy of the ICTY and ICTR at present, for whether their work will stand the test of time is a historical question the present cannot answer. It is likely that that body of work will be viewed as a stage in the development of modern international criminal law, just as is the cumulative experience of post-WWII military trials. The new, post-ICTY/ICTR phase in this field has so far been and will remain dominated by the ICC for some time to come.

Thus it may be said that the term “legacy” is better understood at present as the impact, temporary or lasting, of the work of the *ad hoc* tribunals, including impact upon individual legal systems, such as the Chinese one. It is submitted that the impact on China’s legal system has been modest. China’s interest in the tribunals has been more pronounced at the international level, mainly because the ways in which the tribunals were created and have subsisted directly called for the support of the Chinese government within the UNSC. Without that support, the UNSC could not have agreed on matters critical to the existence of the tribunals, such as their creation, finance, amendment of the statutes, and winding-up by way of the “completion strategy.”

### *Creation of the Tribunals*

When Draft Resolution 808 was debated prior to voting in the UNSC, the Chinese representative addressed the Council, expressing willingness to vote for it, with the caveat that the adoption of the resolution should not prejudice China’s position on future resolutions on the subject.<sup>5</sup> The voting result was a unanimous one, endorsing the resolution to establish an international tribunal for the former Yugoslavia.

On 23 May 1993, the UNSC was engaged in debate on Draft Resolution 827, which would establish the ICTY and adopt its statute. The Chinese representative explained his affirmative vote after the resolution was adopted.<sup>6</sup> First, he disputed the approach for the establishment of the tribunal by way of a UNSC resolution, rather than a treaty, with the latter route being the one China had preferred all along.<sup>7</sup> He explained that, resembling a treaty, the statute should have been “negotiated and concluded by sovereign States and ratified by their national legislative organs.” Otherwise, its implementation would bring problems, unspecified, in both theory and practice. Secondly, the Chinese representative expressed the hope that this resolution would be a one-off exercise in setting up an *ad hoc* institution, and should not constitute a precedent. With that consideration in mind, Resolution 955, which approved the establishment of the second *ad hoc* tribunal in 1994, was

<sup>4</sup> For instance, on the principles of international law recognized by the Nuremberg Charter and the judgment of the International Military Tribunal at Nuremberg, as formulated by the International Law Commission, see YORAM DINSTEIN, THE DEFENCE OF ‘OBEDIENCE TO SUPERIOR ORDERS’ IN INTERNATIONAL LAW 238 (1965); Bing Bing Jia, *The Two Approaches to the Superior Orders Plea, in TRIALS FOR INTERNATIONAL CRIMES IN ASIA* 248, 260-263 (Kirsten Sellars ed., 2016).

<sup>5</sup> UNSC, 47th Sess., 3175th mtg., UN Doc. S/PV. 3175 (Feb. 22, 1993).

<sup>6</sup> UNSC, 47th Sess., 3217th mtg. at 33-34, UN doc. S/PV.3217, (May 23, 1993).

<sup>7</sup> This view was again instrumental in China’s abstention in the voting on Resolution 955 that established the ICTR and endorsed its statute: 49th Sess., 3542d mtg. at 11, UN Doc. S/PV.3452 (Nov. 8, 1994).

obviously not agreeable to China as a repetition of the resolution-based approach, and China not only abstained in the voting on the resolution, but has also never nominated a judge to the tribunal.

Without speculating on the reasons for China's fixation on the preceding questions, it seems that it was at least interested in the legitimacy of the founding, as well as the limiting of the impact, of the ICTY as a precedent for future cases. However, there was no mistaking the importance of the affirmative vote for Resolution 827. Points of legal technicalities aside, China was straightforward with its intention in the debates. The point about founding a tribunal on the basis of a treaty was satisfied when the ICC was established on the basis of the Rome Statute. As will be shown below, however, the form of the constituent document for an international tribunal was no longer China's main concern in 1998.

### *China's First Brief at an International Tribunal*

In the early days of the ICTY, one case probably sums up the principal difficulty faced by that tribunal and any institution that follows its pattern: the fundamental tension between the sovereignty of states and the need for an end to impunity. The pivotal balance between those two values attracted considerable interest among states, and China was no exception.

The case in point was *Prosecutor v. Blaškić*, in which *subpoenae duces tecum* were issued to the Croatian government and its defense minister.<sup>8</sup> The Croatian government sought leave to appeal them before the ICTY Appeals Chamber. Given the importance of the subject matter, the Appeals Chamber granted leave for *amicus curiae* briefs to be filed by governments, organizations, and individuals. Prior to the appellate hearings scheduled for 22 September 1997, several such briefs were filed with the Registry, including one from the Chinese government.<sup>9</sup> This was the first time since its creation in 1949 that the People's Republic took a direct role in an international judicial proceeding. This brief was impressive, in that, while it was concise about China's legal position on each of the questions posed by the Appeals Chamber, it illustrated the fundamentals of China's general view on the limits of international adjudication. In particular, it sought to reassert the authority of the mandate given by the UNSC to the tribunal, and to insist upon the primary position held by states in terms of their cooperation with the tribunal. This indicated China's strong adherence to the UN system and its fundamental principles.

If this act of participation in international judicial proceedings was a positive development, it was some years later bettered by the appearance of a Chinese delegation before the International Court of Justice in a case involving a breakaway region of the former Yugoslavia: Kosovo.<sup>10</sup> The fact that China thought it advisable to file submissions in both of these cases reveals an inclination, under suitable circumstances, towards a legal exposition of complex matters, such as is usually crafted by government lawyers in major capitals. There has been no particularly Chinese perspective in these submissions, but always an opinion that integrates law and fact. Detached as they are in style, the opinions are colored, as expected, by the particular interest of China in the key issues of the cases. Seen in this light, credit for China's gradual warming to international proceedings, proportional to the growth in sophistication of its legal opinions, must be given to its experience with the ICTY, in the building of which China has consciously involved itself throughout.

<sup>8</sup> *Prosecutor v. Blaškić*, Case No. IT-95-14-PT, Decision on the Objection of the Republic of Croatia to the Issuance of Subpoenae Duces Tecum (Int'l Crim. Trib. for the Former Yugoslavia July 18, 1997).

<sup>9</sup> *Prosecutor v. Blaškić*, Case No. IT-95-14-AR108bis, A 1470-A 1465 (Int'l Crim. Trib. for the Former Yugoslavia).

<sup>10</sup> Written Statement of the People's Republic of China to the International Court of Justice on the Issue of Kosovo (filed at the Court on 16 April 2009); Oral Submissions: ICJ, Public Sitting on the Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo, CR 2009/29 (Dec. 7, 2009).

*Impact of the Work of the ICTY and ICTR upon China's Attitude towards the ICC*

The preceding discussion may serve to show that the work of the two *ad hoc* tribunals is seen by China as part of a greater process which is the contemporary revival of international criminal law.<sup>11</sup> But on a deeper level, the work affects China's perspective on international jurisdiction more than anything else. This effect was instrumental in forging the Chinese approach to the negotiation of the Rome Statute in 1998, where the legacy of the *ad hoc* tribunals played a significant role.

With regard to the categories of crime that would fall under the ICC jurisdiction, the Chinese view was that there was no international convention on crimes against humanity, and that such crimes should be qualified by the condition of armed conflict, as evidenced by the customary law embodied in the Nuremberg Charter and the statutes for the ICTY and ICTR.<sup>12</sup> The Chinese delegate, in addition, noted that the doctrine of command responsibility was derived from post-World War II trials during which it was "relatively simple" to assess the responsibility of military commanders who had effective control.<sup>13</sup> However, the Chinese delegation did not agree with such extension of the responsibility to civilian superiors as proposed by the United States.<sup>14</sup> For support, it made reference to the statutes of the ICTY and the ICTR.<sup>15</sup>

The disquiet of China over substantive issues throughout the Rome Conference was matched in intensity by its concern with the impartiality of the future ICC, since it could not support the institution unless "care [would] be taken to ensure that investigations did not affect the legitimate interests and sovereignty of national judicial systems."<sup>16</sup> But, in its view, the draft statute granted the ICC "universal jurisdiction" over core crimes without subjecting it to state consent, and this arrangement became more worrisome when it vested the Prosecutor with the right to initiate investigations with an insufficient screening mechanism.<sup>17</sup> This type of jurisdiction differed markedly from what had been given to the *ad hoc* tribunals.

The worry of China about expansion of jurisdiction and broadening of the substance of international crimes soon worsened. While keeping watch on the progress made by the ICC since 2002, one such instance of expansion materialized at the Kampala Review Conference of 2010 in the form of amendments to the Rome Statute regarding the crime of aggression that would conceivably further distance China from the ICC.<sup>18</sup>

<sup>11</sup> *Supra* notes 5 and 6.

<sup>12</sup> United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Committee of the Whole 3d mtg. paras. 73-74, UN Doc. A/CONF.183/C.1/SR.3 (June 17, 1998). Also United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 9th plenary mtg. para. 38, UN Doc. A/CONF.183/SR.9, (July 17, 1998) (when the Chinese representative explained his negative vote on the draft Rome Statute). *But see*, Statute of the International Criminal Tribunal for Rwanda art. 3, SC Res. 955 (Nov. 8, 1994).

<sup>13</sup> United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Committee of the Whole 3d mtg. para. 77, UN Doc. A/CONF.183/C.1/SR.3 (June 17, 1998).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 9th plenary mtg. para. 36, UN Doc. A/CONF.183/SR.9, (July 17, 1998).

<sup>17</sup> *Id.* at para. 39.

<sup>18</sup> Review Conference of the Rome Statute of the International Criminal Court (Kampala, 31 May – 11 June 2010), Official Records, Annex IX, Statement by China, at 125 ("it is necessary for the Security Council to make a determination of its existence first before the International Criminal Court could exercise jurisdiction over the crime of aggression. The existence of an act of aggression should be determined by the Security Council").

*The Impact Waning since 1998*

In light of the Chinese reception of the work of the *ad hoc* tribunals for the past two decades, it seems that Chinese lawyers and scholars, like their counterparts in government, have also taken a general view that the work of the tribunals constitutes but one aspect of the global ascendance of international criminal justice. They see it as an external development that differs, in significant aspects, from Chinese criminal law. The statutes of the tribunals, as distinct from a few landmark decisions, have had little influence upon Chinese legal practice, with perhaps the exception of national military manuals. But even the drafting group of the military manuals has been seemingly more responsive to legal findings on customary law the tribunals have reached from interpretation of the statutes, than to the text of the statutes themselves. This almost replicates what followed the Tokyo Trial, in that the military trials held in China in 1956 were based on a national law that avowedly reflected customary international law more than it did the provisions of the Nuremberg Charter.<sup>19</sup> The value of the work of the ICTY and ICTR, just like that of those national trials, has not been constant in headlines, but preserved in publications ready for future references. This state of affairs is presumably due to 1) the large distance between the former Yugoslavia or Rwanda and China, 2) the work of the tribunals being viewed in China as partial evidence of customary law, and 3) the rapid taking of the centre stage in this field by the Rome Statute, in the negotiation of which China was actively involved.<sup>20</sup> With the passage of time, however, even the interest in international criminal law and in the Rome Statute has been fading in Chinese legal circles.

On occasion, the case-law of the tribunals has been invoked in the context of a legal argument. On 1 November 2006, the Chinese Government made a statement before the UNGA Sixth Committee on the International Law Commission's draft articles on the effects of armed conflicts on treaties.<sup>21</sup> Backing as customary law the definition of armed conflict adopted by the Institute of International Law in 1985, it suggested that the definition given by the ICTY in the *Tadić* case, which "included conflicts among different armed groups within a State," was relevant only to that case, lacking universal support.<sup>22</sup>

The interesting question that could arise in the future would be the status of judicial decisions of the ICC within China. Given the discrepancies in substantive law known to exist between the statutes and case law of the tribunals and the Rome Statute, however, reliance on the former may be more agreeable to China, as it hews more closely to customary law yet to be altered by the case law of the ICC or practice subsequent to the adoption of the Rome Statute. A focus on customary law may stave off the impact of the ICC decisions.

For sake of completeness, it is added that existing literature in China, including many textbooks on international criminal law, have been laconic with regard to both the question of the relations of China to the tribunals, and the impact of the work of the tribunals upon Chinese law. In addition, Chinese scholars have published relatively little on this subject in English or other languages. Whether this state of things will change may depend on two future scenarios: either that China accedes to the Rome Statute at some point of time, or that the country becomes subject to judicial decisions of the ICC. In both situations, however, the

<sup>19</sup> DOCUMENTS OF THE TRIALS OF JAPANESE WAR CRIMINALS 2 (Chinese) (Zhan-Ping Wang et al. eds., 2005) (reproducing the *Decision on the Treatment of War Criminals Involved in Japan's Invasion of China and Currently in Custody*, adopted by the Standing Committee of the People's Congress of China on 25 April 1956).

<sup>20</sup> United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome, 15 June -17 July 1998), II Official Records, summary records of the plenary meetings of the conference and of the Committee of the Whole, UN Doc. A/CONF.183/13.

<sup>21</sup> Sixth Committee, 61st Sess., 18th mtg. para. 44, UN Doc. A/C.6/61/SR.18, para. 44 (Nov. 1, 2006).

<sup>22</sup> *Id.* at para. 46. Also see International Law Commission, Report on the work of its fifty-eight session paras. 83-84 UN Doc. A/CN.4/577 (Jan. 17, 2007).

work of the ICTY and ICTR will serve as valuable guidance for determining the state of customary international law and may thus provide judicial precedents that diverge from the decisions of the ICC.