

Northeast Asia and the International Criminal Court: Causes and Consequences of Normative Disposition

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Abstract

This paper aims to understand the policies of three major Asian states toward the norms contained in the Rome Statute of the International Criminal Court. It does so in two ways. First, it traces the interaction of South Korea, Japan, and China with the Court since negotiations on its formation in the late 1990s. To do so it employs a unique measurement index that aims to accurately conceptualize a state's "disposition" toward a particular international norm or set of norms. Second, it narrows its focus more to understand how the three major Northeast Asian states have responded to recent efforts to bring North Korea into the Court's orbit. Based on these analyses theoretical implications about the mutually constitutive character of international norms are elaborated with reference to the Northeast Asian region.

Introduction

Now in its second decade, the International Criminal Court (ICC) has become an important institution of international law. The Court represents the revolutionary and sometimes controversial norm of individual accountability for perpetrators of genocide, war crimes, and crimes against humanity. Given that the ICC relies on states for its jurisdiction, operation, budget, governance, and ultimately its efficacy, it is important for scholars and policy makers to accurately conceptualize and understand the positions that states take toward the Court.

The Asian region is under-represented in the ICC's Assembly of States Parties (Chesterman 2014). More broadly East Asia is much less thickly institutionalized than other regions of the

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world and those institutions that do exist are not robustly legalized (Johnston 2012: 63-67). Scholarship on East Asian international institutions emphasizes that they tend to be characterized by relative informality, pragmatism, consensus-building, nonconfrontational styles of bargaining, and an aversion to excessively dense institutionalization (Acharya 1997; *ibid.*). On the one hand, then, the fact that the ICC is relatively undersubscribed in Asia is not surprising. The ICC is highly legalized in that its norms are clearly elaborated, the obligation to comply is binding, and implementation is delegated to a judicial institution (Abbott et al. 2000). One would therefore expect Asian states to be hesitant to accede to the Court.

On the other hand, Asia's aggregate undersubscription to the ICC masks significant variation at the sub-regional level as Northeast Asia's engagement with the ICC has varied over time and across states. Two Northeast Asian states in particular have played leadership roles with regard to the highly legalized and institutionalized ICC: South Korea and Japan. South Korea has been a major supporter of the Court since 2002, having ratified and incorporated the Rome Statute, promoted the Court to other states in Asia, and contributed financially to the ICC. The current president of the Court, Judge Song Sang-hyun, is a South Korean national. Legal and political obstacles prevented Japan from initially acceding to the Rome Statute, but after a lengthy legislative process at the domestic level, it became a party to the Rome Statute and a major advocate and supporter of the Court. China is not a member of the ICC and is unlikely to become one given its understanding of national sovereignty and serious reservations that it has regarding the Court's jurisdiction. Nevertheless, Beijing actively participated in drafting the Rome Statute and has attended meetings of states parties in an observational capacity. Furthermore, China has occasionally supported a role for the ICC such as when it voted in favor of United Nations Security Council Resolution 1970 which referred the situation in Libya to the Court in 2011. Thus Northeast Asia only partially conforms to the expectation that Asian states would be hesitant to join a highly institutionalized and legalized judicial institution with ramifications for security policy.

The empirical aim of this article is to understand how Northeast Asia's three major states have engaged with the norm of individual accountability for war crimes, genocide, and crimes against humanity as embodied in the Rome Statute of the International Criminal Court. Theoretically, the aim of the article is to shed light on the mutually constitutive relationship between international norms and state agency (Kim and Sharman 2014). Like all states, China, South Korea, and Japan are embedded in an international normative structure that shapes their behavior and preferences in some domains of their foreign relations, but they are also active agents that seek to promote, shape, or undermine norms at the international level. This article will use an index called the *Normative Disposition Indicators*, or NDI, to accurately measure and assess the policies and dispositions of all three major Northeast Asian states toward the ICC over the past 15 years. This exercise provides a way to systematically assess the between-case and within-case variation over time described briefly above.

For obvious geopolitical reasons, recent moves to bring the Democratic People's Republic (DPRK or North Korea) before the ICC have particular salience in Northeast Asia and therefore provide fruitful grounds for understanding how the norms of the Court have unfolded in the



region. Not surprisingly, South Korea, Japan, and China have taken different stances toward the normative challenge posed by North Korea and tracing those differences helps to show norm construction and contestation in action in Northeast Asia. Examining this case therefore illuminates both the Northeast Asian response to a particular set of international norms as well as the efforts of states in the region to shape norms.

This article will proceed in five sections. First, it will situate its analysis in recent literature on international norms with regard to the ICC and with reference to East Asia. Second, it will briefly describe the NDI. Third, it will trace the engagement of South Korea, Japan, and China within the NDI framework from 1999 to 2014 to understand the normative disposition toward the ICC of each state over time. Fourth, it will narrow its focus to the circumstances surrounding calls to refer North Korea to the ICC over two military incidents with South Korea in 2010 and its human rights record over a longer period of time. Attention will be given to the ways in which each major Northeast Asian state understood the challenge presented by the DPRK and sought to shape the regional normative environment in light of that challenge. Fifth, the article will conclude with broader remarks about the implications of this research.

The ICC, International Norms, and Northeast Asia

The ICC and the Rome Statute are emblematic and important to the normative development of human rights and individual accountability for atrocities (see Teitel 2011: 73-104). With 122 countries party to the Rome Statute as of this writing, the Court is a part of broader international trends in this regard.¹ The Court has jurisdiction for cases of war crimes, crimes against humanity, and genocide since July 1, 2002. The Court investigates “situations” to determine if there are grounds for prosecution of any actors involved. There are three major triggers that could enable the ICC to investigate a situation: if a state party requests that the Office of the Prosecutor (OTP) does so and that state gives permission, if the United Nations Security Council (UNSC) refers the situation to the Court, or if the prosecutor decides to investigate and receives approval from a pre-trial chamber. The ICC operates on the principle of “complementarity,” which means that the Court may have jurisdiction when national courts cannot or will not genuinely investigate and prosecute relevant crimes.

The question of why states join the Court remains a puzzling one and it is likely that different international relations theories explain different aspects of state interaction with the ICC (Schiff 2008; Fehl 2004). Realism can be useful in explaining why a state does *not* join the Court because from a realist perspective, states would not be eager to join an institution which constraints their traditional sovereign imperative. In particular a realist perspective would predict that powerful states with military interests beyond their borders would be hesitant to cede power to the Court and indeed the United States, Russia, China, and India are not party to the Rome Statute.

¹ The number is 123 if Palestine’s accession to the Court is counted.



Nevertheless 122 (or 123) other states have ratified the Rome Statute and are clearly not doing so because of coercive pressure from the great powers that have themselves not joined. A neo-liberal institutionalist perspective has difficulty explaining state accession to the Court because it is not clear what joint gains the ICC allows states to achieve in cooperation that they would not otherwise without a permanent institution (Schiff 2008). This perspective can therefore help explain how the institution structures incentives for states that have already joined but is less satisfactory in explaining why states do so in the first place.

This theoretical puzzle has led scholars to turn to other theories to explain treaty ratification. For example, democratic states with relatively little violence are seen to be the most likely to join the Court given that it is relatively easy for them to comply with the Rome Statute, while autocratic regimes with weaker legal systems would be more prone to being investigated by the Court and may therefore be less likely to join (Chapman & Chaudoin 2013). Others stress the signals that joining the Rome Statute sends. For example, states with unaccountable domestic institutions but that wish to end an ongoing civil war may use the Court to demonstrate their credible commitment to ending violence by tying their own hands (Simmons & Danner 2010). Meanwhile states which are democratic and at peace have a 'double protection' against their citizens ever coming before the Court, meaning that they face few costs to expressing a normative commitment by signing the Rome Statute (*ibid.*). Others have emphasized the role of 'dependence networks' in ICC accession: if a state's major security, trade, and international organization partners have ratified the Rome Statute it may conform with the expectations of its network (Goodliffe et al. 2012).

Yet even these explanations leave certain patterns unexplained. For example, the enduring divide between Europe and the United States regarding the Court remains puzzling given their close cooperation in both economic and security affairs and the fact that they share democratic norms and institutions (see Aronsson 2011). Furthermore a dependency network perspective has a difficult time explaining Northeast Asia since South Korea and Japan are both supporters of the Court despite their close security and economic ties with the United States. More generally 57 states parties, including relatively powerless US trade partners like Costa Rica and Botswana, refused to sign bilateral immunity agreements with the Bush administration despite enormous pressure to do so and material penalties for not doing so (Kelley 2007).

The role of normative influences in the international system may help explain some of the patterns left under theorized by other approaches. Norms, understood as standards of appropriate behaviour, help to shape the preferences of states even as the actions of states help shape the content of norms. It is the mutually constitutive character of international norms that has led to both their distinctive explanatory power as well as the difficulties of measuring and assessing their influence (see Kim and Sharman 2014; see also Finnemore & Sikkink 2001). In the human rights issue area, some have emphasized the role of transnational activist networks in pressuring states to adopt and live up to human rights commitments (Risse et al. 1999; Keck & Sikkink 1998). Others have emphasized more diffuse normative pressures, such as 'acculturation' processes in which states wish to be seen as conforming to the standards and behaviours of their peer states



(Goodman & Jinks 2013). While scholars debate the mechanisms of human rights diffusion and its impact on state behaviour, what is clear from the literature is that human rights norms have spread to a remarkable degree in the post-World War II era, not only in the form of international treaties but also through rights enshrined in domestic constitutions (Elkins et al. 2013).

Meanwhile the role of norms in Northeast Asia is complicated by the fact that the region displays such variation in governing structures and national identities. The major actors of Northeast Asia have struggled to construct shared perceptions of collective challenges and the trust necessary to manage as a region in a changing global environment (Rozman 2004). Despite an increasingly dense institutional environment in East Asia (see, e.g. Stubbs 2002), the region remains much less institutionalized than, for example, Europe or the Americas (Dai 2015). Northeast Asia in particular has no specific regional trade bloc, no international human rights organization, and high levels of suspicion that sometimes bleed into overt tension and hostility. Despite its growing economic interdependence Northeast Asia has therefore not promoted a coherent version of regionalism on par with Europe or Southeast Asia, instead preferring to proceed bilaterally or with weakly legalized institutional regimes.

Yet the reticence to join highly legalized international institutions is not uniform in the region. With regard to the ICC, as will be discussed in more detail below, the three major states of Northeast Asia — Japan, South Korea, and China — have adopted difference stances toward the ICC over time. Given the structural position of China in the United Nations as well as Japan's and in particular South Korea's leadership in issues pertaining to the ICC, however, these three nations have been and will remain crucial to constructing, shaping, and contesting the norms embodied in the Rome Statute. The future of the ICC will in no small measure be driven by actors in Northeast Asia even as they operate within existing international normative structures. Before turning to the empirical details, however, a brief word is in order about how to measure the disposition of each state toward the norms contained in the Rome Statute over time.

Normative Disposition Indicators

This paper both relies on and advances previous efforts to articulate a framework of norm measurement and to deploy it with regard to the United States and subsets of African and Asian states (Dukalskis & Johansen 2013; Dukalskis 2015). Building on scholarship examining the legalization of world politics more broadly (Abbott et al. 2000; Goldstein et al. 2000) and critics of this perspective (Finnemore & Toope 2001), the NDI considers three dimensions of a state's actions toward any particular norm: consent, compliance, and promotion. When combined these dimensions of the NDI framework allow an analyst to construct an assessment of a given state's disposition toward an international norm or set of norms. It can be used to track changes in normative disposition over time and/or compare states with one another in a structured fashion.

The extent to which a state *consents* to the norms in question is measured by the state's domestic and international legal commitments with gradations between one extreme of having



signed, ratified, and incorporated the treaty into domestic law and the other extreme of indicating that it never intends to sign the treaty. The *compliance* of a state is measured both by its own observance of the norms' content and the support it offers to the treaty body itself to increase adherence to the norm. A state's *promotion* of the norms is measured by the diplomatic and material resources that it dedicates to advocate or block the treaty's adoption by other states. The scores for each component are then added together to create a composite normative disposition score. *Table 1* contains a summary of the NDI. More details about the intellectual foundations of the NDI can be found in Dukalskis and Johansen (2013) while a discussion of measurement validity is undertaken in Dukalskis (2015).

The International Criminal Court and Northeast Asia

Asian states are underrepresented in the ICC Assembly of States Parties. In addition to the ICC, Asian states can be seen as less incorporated into international legal mechanisms than many other global regions (Chesterman 2014). This “ongoing wariness” in Asia about institutions like the ICC may have roots in the fact that post-World War II international justice — most prominently on display at the Tokyo Trials of 1946 — had a problematic relationship with both race and (de)colonization that made it easy to view international legal processes as extensions of political power (ibid.). Yet the response of Asian states to the ICC is far from uniform. While some states remain circumspect about the Court, others are enthusiastic supporters. Focusing on Northeast Asia, this section traces in more detail the engagement of South Korea, Japan, and China with the ICC within the framework of the NDI. It is an updated version of a previous effort to deploy the NDI with regard to a selection of Asian states and the United States (Dukalskis & Johansen 2013) and provides the context for understanding the next session which seeks to understand the ways in which the three major Northeast Asian states managed the possibility of North Korea being brought before the Court. *Figure 1* displays the NDI ratings of these three states between 1999 and 2014.

Republic of Korea (South Korea)

South Korea's disposition toward the ICC is uniquely positive. It signed the Rome Statute on 8 March 2000, which was relatively soon after it became available for signature, and ratified the treaty on 13 November 2002. The government then tasked a group of experts associated with the Ministry of Justice to draft proposed legislation that would incorporate the Rome Statute into Korean law (see Kim 2011). The legislation that eventually enacted on 21 December 2007 was remarkable in that it not only incorporated the main aspects of the Rome Statute into domestic law, but it also stipulated some areas in which international norms would seemingly supersede domestic law, such some extradition provisions, head of state immunity, and rules regarding formal accusations for the crimes in question (ibid.). As an indispensable ally to the United States,



South Korea was officially exempt as of 2003 from the threat of Washington withdrawing military aid for ratifying the Rome Statute without signing a bilateral immunity agreement with the U.S., although one can assume that Seoul still received pressure sign such an agreement as part of the George W. Bush administration's first term efforts to undermine the Court (see Johansen 2006).

Korean diplomats have called for outreach efforts to encourage other states, particularly those in Asia, to join the Court. Korea makes significant financial contributions to the operation of the ICC and has some nationals employed at the Court. Most prominently, the current president of the ICC, Judge Sang-hyun Song, is a South Korean national and a major advocate for the Court. He has made clear his disappointment at Asia's underrepresentation in the ICC Assembly of States Parties, writing that "I have made it one of my priorities to promote greater involvement of my region in the ICC" because "there is no reason for Asian states to shy away from the ICC" (Song 2013).

Although South Korea has not had any of its nationals investigated by the Court, meaning that its compliance has not received a "hard" test, Seoul has demonstrated its faith in the institution by referring two instances of alleged North Korean crimes committed on South Korean territory in 2010 to the OTP. More will be said below regarding Seoul's decision to do so and the processes that transpired, but it is worth noting that a state which refers a 'situation' to the Court is taking a risk if that state is involved in the circumstances surrounding the situation. The OTP does not restrict the target of its investigation to the actor accused of the crime only, but rather takes a broader approach and investigates the 'situation' as a whole. This means that in the instances of 2010, South Korea not only took a risk of the OTP failing to find evidence of North Korean war crimes, but also that South Korean wrongdoing could have been exposed. In these specific instances the Court was unlikely to turn its prosecutorial gaze to South Korea, but the fact that Seoul was willing to put extremely security-sensitive investigations in the hands of an international institution with wide latitude to pursue its work as it saw fit is indicative of the country's positive disposition toward the Court.

Japan

Japan took a less direct path to its currently positive disposition toward the Court (see Meierhenrich & Ko 2006). Japan participated in the negotiations leading to the Rome Statute during the second half of the 1990s and seemed to be a supporter of the Court but did not ratify the treaty until 2007. Although broad political will was apparently present for Tokyo to join the court, it faced a number of political and legal hurdles to fully accede to the Rome Statute that took a number of years to resolve (Masaki 2008; Takayama 2008). For example, the issue of Japan's financial contributions to the Court required extensive negotiations with other states parties given that by the formulas stipulated in the treaty Japan would have had to cover 28% of the ICC's budget, which Tokyo felt was excessive. Thus while Japan expressed diplomatic and rhetorical support for the ICC, it was not able to accede to the Rome Statute until changes in international agreements and domestic legislation allowed it to do so.



Specifically legal experts in the Ministry of Justice and Ministry of Foreign Affairs had to examine the extent to which the crimes elaborated in the Rome Statute were already illegal under Japanese law and whether new legislation needed to be passed (*ibid.*). After determining that indeed most of the core crimes could be prosecuted under Japanese law, the government then had to draft and propose legislation that would make some procedural crimes under the Rome Statute, such as suppressing evidence before the international court, would also be illegal under Japanese law. This required a law to be passed outlining procedures for cooperation with the ICC (see Arai et al. 2008). These processes took several years of careful scrutiny and planning.

According to the former director for international legal affairs in the Ministry of Foreign Affairs at the time, political support could be found not only among the legal communities of his ministry and the Ministry of Justice, but also in the parliament, the opposition party, the media, and the public (Masaki 2008). The Japanese Bar Association lobbied the government starting in 2002 to join the ICC (Arai et al. 2008). Parliamentary debate and discussion covered a range of issues, including the treatment of U.S. military personnel stationed in Japan, Japanese nationals who are part of peacekeeping operations, and the potential to file a complaint with the Court about North Korean abductions of Japanese nationals (Masaki 2008: 420). Ultimately the relevant legislative package passed in time for Japan to join the Court in 2007. One issue on which there was interest in the parliamentary debates was whether North Korea could be investigated for its kidnapping of Japanese citizens. Given that the kidnappings themselves took place before the Rome Statute came into force and that the DPRK is not a party to the Court, legal experts advised the parliament that it was not immediately applicable, although there was some suggestion that because the crimes are ongoing (i.e. the kidnapped are still kidnapped), then there may be some possibility to encourage the Court to investigate (Arai et al. 2008).

Opposition did come, however, from the United States, which is Japan's most important ally and security partner. The U.S. relayed its views on the Rome Statute several times to Japan between its entry into force in 2002 and Japan's accession to the Court in 2007 (Arai et al. 2008). The United States requested that Japan sign a bilateral immunity agreement that would preclude Tokyo from handing over any U.S. nationals to the Court but Japan did not agree to do so (Masaki 2008). After 2003, Japan was officially exempt from the threat of withdrawal of U.S. military aid for not signing an agreement as the 2003 American Service Members' Protection Act listed Japan along with several other states as exceptions, including South Korea (U.S. Department of State 2003). Ultimately it was unlikely that U.S. nationals stationed in Japan would be handed over to the ICC because of the terms of the Status of Forces Agreement governing the U.S. military presence in Japan, but the Bush administration was an ardent opponent of the Court nonetheless and pressured other states to sign such agreements. Japan therefore rebuffed significant pressure from its main ally in the process of joining the Court, which is indicative of its positive normative disposition toward the Court.

Since its ratification of the Rome Statute in 2007 Japan has become an important backer of the ICC. Behind only Germany, it is usually the ICC's second-largest annual financial contributor (see, e.g. Assembly of States Parties 2013). In 2007 Judge Fumiko Saiga was elected to serve as a judge at



the ICC, which she did in both the pre-trial chamber and the trial chamber until her death in April of 2009. In January 2012, Judge Kuniko Ozaki began an eight year term in the Court's Trial Division, and while Japanese nationals are underrepresented as employees of the Court, this is part of a more general problem of European over-representation in its staff (see ICC Registry 2012). After Japan's ratification of the statute Japanese diplomats enthusiastically expressed support for the Court and took steps to encourage other Asian states to join (see examples in Dukalskis & Johansen 2013). Indeed, upon approving the bills stipulating cooperation with the ICC, both houses of parliament passed a resolution encouraging other states to join the ICC (Arai et al. 2008).

China

China has adopted a frostier disposition toward the ICC than its two major East Asian neighbors. In its foreign relations more generally China has displayed sensitivity to perceived violations of sovereign imperatives, preferring instead to promote norms of non-interference, dialogue, and mutual respect. Starting in the 1990s, however, as part of a more general engagement with international institutions, China showed that it is willing to abide by international adjudication in certain domains, such as investment and trade (Zhu 2014). China nevertheless objects to the ICC because its jurisdiction is not based solely on voluntary state acceptance nor does it apply solely in times of war, which China fears may allow politically motivated investigations of China's internal policies, particularly with regard to situations such as Tibet (Lu & Wang 2005). China worries that a tenuous "war nexus" for ICC jurisdiction means that the Court could unduly function as a sort of human rights mechanism that would interfere in Beijing's internal affairs (Zhu 2014). It thus voted against the Rome Statute in 1998 and has not joined since.

China's diplomatic and rhetorical support for the Court has been limited, although has not been outwardly hostile to the ICC by, for example, encouraging other states to not join. Chinese diplomats have occasionally made supportive but guarded remarks about the Court (see examples in Dukalskis & Johansen 2013), but have also expressed concern at its perceived politicization. Although there is an argument to be made that concerns about politicization and an expansion of the ICC mandate to include human rights issues may be based on a misunderstanding of the relationship between the ICC and human rights law, Chinese diplomats argue their case nonetheless (see Zhu 2014). In the ongoing debates about defining the crime of aggression in light of the Rome Statute, China has played an active role in arguing for an exclusive United Nations Security Council (UNSC) prerogative in adjudicating particular cases, which would of course give Beijing disproportionate power given its status as a permanent member of the UNSC (Zhu 2015).

China's UNSC voting record on referrals to the Court has been mixed. It voted in favor of Resolution 1970 referring the situation in Libya to the ICC in 2011. The remarks of the Chinese representative at the Security Council were brief and did not express overt support for the ICC (UNSC 2011). Instead, the representative noted that the situation in Libya was extraordinary and



alluded to the widespread support for the resolution among Arab and African delegations (ibid.). This course of action was different from six years prior when China abstained (along with the U.S., Brazil, and Algeria) on Security Council Resolution 1593 referring the situation in Sudan to the Court. China noted its preference for trials to take place with the consent of Sudan and noted that a political solution to the conflict must be prioritized (UNSC 2005). More recently in May 2014, China (along with Russia) vetoed a Security Council referral of the Syrian situation to the ICC on the grounds that the referral was not consistent with state sovereignty and complementarity and that it would not be conducive to a political solution to the crisis (UNSC 2014). As will be explored in greater depth below, China has opposed efforts by the UNSC to investigate situations in North Korea.

In sum, while China is not a member of the Court and argues for provisions that would increase China's voice in the Court's operations, it is in some instances open to supporting (or at least not opposing) the ICC's work. It does not actively encourage other states to withhold support for the organization, although its diplomatic rhetoric and behavior has become slightly more negative in recent years. Beijing's aversion to international norms which impinge on the traditional sovereign imperatives of the state makes it an unlikely supporter of the Court and thus far it has displayed a more negative disposition toward the ICC, although not without variation in particular cases.

Normative Disposition in Action: the DPRK and the ICC

It has long been noted in constructivist international relations scholarship that instances in which norms potentially clash with state strategic interests are a useful methodological context in which to assess the causal power of norms (Finnemore & Sikkink 2001). If states act in ways seemingly at odds with their self-interest in order to comply with a norm then the observer has powerful evidence that norms had causal influence in this instance. Given that various aspects of North Korea's foreign and domestic policy have direct impacts on the security interests of China, Japan, and South Korea, it is thus useful to examine how those states have disposed themselves to efforts to bring actors associated with Pyongyang before the Court. In particular, since the ICC is a highly legalized institution and since Asian states are sometimes reticent to embrace such institutions, it is useful to engage in a more fine-grained analysis of how Northeast Asian states conceive of the role of the Court in the region's politics.

Several dimensions of North Korea's relations with its neighbours have security ramifications. Most obvious is the tenuous peace that has existed between North Korea and South Korea for the past 60 years, but Pyongyang's efforts to acquire nuclear weapons, refugee outflows from North Korea, regime instability and opacity, links with organized crime, bellicose rhetoric from North Korea directed at neighbours and the United States, and its robust conventional military capabilities are all understood in various ways by Northeast Asian states as of concern to regional peace and stability. Thus while North Korea is not a member of the ICC and clearly has no



intention of joining, it nonetheless provides a salient nexus between Northeast Asia and the ICC for the purposes of understanding the dispositions of major states in the region toward the norms contained in the Rome Statute.

Efforts to bring North Korean nationals before the ICC can be divided into two different phases. First, the OTP preliminarily investigated two instances in 2010 in which North Korea engaged in military altercations with South Korean nationals. On 26 March 2010, North Korean forces allegedly sank a South Korean naval vessel called the *Cheonan*, killing 46 people, while on 23 November 2010 North Korean forces fired artillery shells at South Korea's Yeonpyeong Island, killing two South Koreans. Second, more recent efforts to involve the Court in North Korea's actions have revolved around its human rights record. A February 2014 report by the United Nations Human Rights Council alleging that some of North Korea's domestic repression constituted crimes against humanity led to subsequent calls by the UN General Assembly to refer the situation to the UN Security Council, urging it in turn to refer the DPRK to the ICC. Tracing the actions of the major Northeast Asian states in these two processes helps clarify the ways in which they are disposed toward the norms contained in the Rome Statute in finer detail and reveals their preferences for the level of legalization they are willing to accept in specific regional developments.

The preliminary investigations into North Korea's 2010 attacks on South Korean nationals were initiated by the OTP and were designed to inquire into the possibility that the attacks constituted war crimes (Office of the Prosecutor 2010). North Korea is not a member of the Court and South Korea did not officially refer the situation to the ICC, but the Court nonetheless had a jurisdictional trigger because the alleged crimes took place on South Korean territory. Given that South Korea is a member of the Court the OTP could open a preliminary investigation. The OTP's official statement left vague the sources of the information that initially prompted it to pursue a preliminary investigation, noting only that it had "received communications alleging that North Korean forces committed war crimes in the territory of the Republic of Korea" (ibid.). Elsewhere, it was reported that the then prosecutor, Luis Moreno-Ocampo, received that information from Korean citizens (UN News Centre 2010), although it did not specify if they were private citizens or groups, government officials, or private citizens who were encouraged by the South Korean government to contact the OTP. Information can be easily sent to the OTP via post, email, or fax and so any of the above scenarios is possible.

The responses of the three major countries in Northeast Asia to the OTP's preliminary investigation are revealing of their respective approaches to the Court's role in regional politics. South Korea, while not officially referring the situation to the OTP in 2010, nevertheless provided information to the prosecutor after requests to do so in January and July of 2011 (Office of the Prosecutor 2014). The prosecutor's eventual 2014 report commended Seoul for its cooperation in the investigation. Japan coordinated its response to the North Korean actions of 2010 with South Korea and the United States. Foreign ministers for the three states met on 6 December 2010 in Washington, the same day that the OTP announced the launch of its preliminary investigation, and while they did not mention the ICC explicitly in their trilateral statement they "pledged to



maintain and enhance coordination and consultation on DPRK related issues” and “affirmed that the DPRK’s provocative and belligerent behavior threatens all three countries and will be met with solidarity from all three countries” (US Department of State 2010; see also Ministry of Foreign Affairs of Japan 2010). Thus while none of the three security allies in Northeast Asia publicly pushed the ICC investigation of North Korea during 2010 they nonetheless coordinated their actions, which means that South Korea’s support of the OTP’s work was in turn supported, or at least not obstructed, by Japan and the United States.

China took a different approach in its response to the 2010 military clashes. Instead of overtly criticizing the DPRK or coordinating with other Northeast Asian states, Beijing chose to defend North Korea at an eight-hour meeting of the UN Security Council on 19 December 2010 about the sinking of the *Cheonan*. It refused to allow the Security Council to attribute responsibility for the attacks to Pyongyang (International Crisis Group 2010: 35-36). The end result was a Security Council statement that regretted the sinking of the *Cheonan* but that took note “of the responses from other relevant parties, including from the Democratic People’s Republic of Korea, which has stated that it had nothing to do with the incident” and that relied on a vague formulation that the council condemned “the attack which led to the sinking of the *Cheonan* (UNSC 2010). Instead, China may have attempted to put quiet pressure on North Korea to maintain peace and security. Some evidence suggests that privately Chinese experts and diplomats believe that North Korea was likely responsible for the sinking of the *Cheonan* (International Crisis Group 2010: 35-36). Furthermore, the visit in December 2010 by high level Chinese diplomat Dai Bingguo to Pyongyang apparently resulted in a “candid” discussion, although the official media of both China and North Korea did not divulge more details (Washington Post 2010). China briefed South Korea on the visit and apparently relayed that the North refused to make concessions, although it is unclear how much effort the Chinese delegation put into pressuring the DPRK (Yonhap News Agency 2010). While Chinese officials called into question the integrity of various international efforts to investigate the sinking of the *Cheonan* (International Crisis Group 2010: 35-36), Beijing remained quiet about the OTP’s investigation into potential war crimes committed by North Korea during 2010.

The OTP preliminary investigation found that while the Court had territorial and temporal jurisdiction given that the events took place in South Korea after the entry into force of the Rome Statute, it could not move forward with an investigation because of the nature of the events (see Office of the Prosecutor 2014). The sinking of the *Cheonan* was an attack on a military vessel in the context of a ceasefire between two adversaries and could therefore only be a war crime if it was demonstrated the DPRK purposely signed the ceasefire specifically with malicious intent in order to engage in surprise attacks of this sort. The prosecutor found this to be an untenable claim. The shelling of Yeonpeyong Island was more complex but still the OTP found no reasonable basis to continue a war crimes investigation. Four people were killed in the incident, two of whom were civilians, but the OTP did not find evidence that the DPRK specifically targeted civilians and instead found that North Korea was aiming for South Korean military installations but used unreliable weapons that encountered significant targeting difficulties. The OTP’s decision in this



case therefore may have deprived critics of the Court of evidence to support claims that it is politically biased because it arrived at a conclusion relatively favorable to North Korea.

The DPRK, however, again came into contact with the Court's procedures only four years later. In February of 2014 the United Nations Human Rights Council released a 372-page report detailing human rights abuses in North Korea. The report drew on hundreds of interviews with North Korean defectors as well as satellite imagery and publically available information. The Commission of Inquiry on Human Rights in the DPRK was established in March of 2013 by the Council to investigate human rights abuses with a view to ensuring accountability for potential crimes against humanity. The report found that crimes against humanity had indeed taken place. The report recommended the following (UN Human Rights Council 2014: Para. 87):

The United Nations must ensure that those most responsible for the crimes against humanity committed in the Democratic People's Republic of Korea are held accountable. Options to achieve this end include a Security Council referral of the situation to the International Criminal Court or the establishment of an ad hoc tribunal by the United Nations. Urgent accountability measures should be combined with a reinforced human rights dialogue, the promotion of incremental change through more people-to-people contact and an inter-Korean agenda for reconciliation.

In December of 2014, the UN General Assembly passed a resolution that recapped the main findings of the report and submitted it to the United Nations Security Council. The resolution encouraged the Security Council to ensure accountability for the crimes against humanity documented in the report, including referring the situation in the DPRK to the ICC (UN General Assembly 2014). North Korea regards the UN's inquiry commission as well as resolutions that condemn North Korean human rights performance as "products of politically-motivated confrontation and conspiracy on the part of the United States and its followers aiming at overthrowing, under the pretext of human rights protection, the sovereign State and a social system of its people's own choice" (UN Human Rights Council 2014b, Para. 121). North Korea also released its own human rights report and began diplomatic efforts to mitigate the report's impact (see Hawk 2014).

Nonetheless, the report was discussed at the Security Council in December of 2014. Two of the three major Northeast Asian states were on the Security Council at this time: China in its capacity as a permanent member and South Korea as a non-permanent rotating member. No other East Asian states were on the Council at this time.

The meeting began with a consideration of whether the Council should include the DPRK human rights situation in its agenda. Eleven members voted to do so, with Russia and China voting against discussing the report and Chad and Nigeria abstaining. In the first statement of the meeting, the Chinese representative argued that "China is opposed to exploiting the existence of large-scale violations of human rights in the Democratic People's Republic of Korea in the agenda of the Security Council" and that the Security Council is not the proper venue for discussing



human rights issues (UN Security Council 2014: 2). The Chinese delegate reiterated Beijing's preference for "upholding the goal of denuclearization of the peninsula, maintaining peace and stability on the peninsula and insisting on dialogue and consultations as a way to resolve issues" (ibid.). This was a clear call for a less institutionalized and less legalized approach to the North Korean human rights problem.

Nevertheless the agenda was adopted and discussed by the delegates. The Chinese delegate gave a brief statement reiterating its position that the Security Council is not the appropriate venue for a discussion of North Korea's human rights performance. It therefore opposed any sort of outcome document on DPRK human rights and called for renewed efforts at dialogue and consultation without provocative rhetoric or an escalation of tensions (ibid.: 16). China's procedural argument revealed its oft-stated preference for norms of relatively informal and non-binding processes to resolve human rights issues.

The South Korean delegate, however, gave an ardent speech about the need for the Council to take a central role in achieving accountability for the DPRK human rights situation. The delegate first argued that North Korea's human rights situation is so widespread and severe that it represents a threat to international peace and security, thus justifying its inclusion in Security Council proceedings. South Korea then stressed that the Human Rights Council report found that many of the human rights violations occurring in North Korea amounted to crimes against humanity and that the report as well as the UNGA resolution encouraged the Security Council to consider referring the North Korean situation to the ICC. The South Korean delegate finished his speech with an impassioned plea to improve the human rights situation in North Korea, expressing his hope that "one day, in the future, when we look back on what we have done today, we will be able to say that we did the right thing for the people of North Korea, for the life of every man and woman, boy and girl, who has the same human rights as the rest of us" (ibid.: 21).

Japan, while not a member of the Security Council at the time of these debates, nonetheless played a role in pushing for an ICC referral for the North Korean situation. Japan facilitated investigations and interviews with North Koreans for the UN's commission of inquiry. After the release of the report, Japan committed itself to playing a leading role in attempting to implement its recommendations (Ministry of Foreign Affairs Japan 2014a). Japan also co-drafted and co-sponsored, along with the European Union, the UNGA resolution that referred the Human Rights Council report to the Security Council for consideration. In a press release on the eventual passage of the resolution, the Japanese Ministry of Foreign Affairs noted that:

The adoption of the resolution demonstrates the international community's strong concerns about human rights violations in the DPRK, including the abductions issue. Japan strongly hopes that the situation of the human rights in the DPRK would be improved, including the early resolution of the abductions issue, and continues to make efforts to improve the situation of the human rights in the DPRK, in cooperation with the international community (Ministry of Foreign Affairs of Japan 2014b).



The starkly opposing views of China, South Korea, and Japan on this issue are illustrative of the divide in Northeast Asia about the role of the ICC and human rights norms more generally. The Chinese position is closer to what scholars sometimes call the “Asian way” of informal dialogue, less institutionalized procedures, and thin legalization. The South Korean position, however, is considerably more favourably disposed the operation of a highly elaborated and institutionalized set of norms aiming for accountability for human rights violations. Indeed, the fact that the OTP report from 2010 did not have the outcome that Seoul surely would have favoured and yet South Korea continued to support the Court indicates that its disposition toward the ICC remains extremely favourable. The Japanese position is also supportive of formal legalized processes to help resolve the North Korean human rights situation.

Yet with all three cases there is a degree of self-interest involved. North Korea is an adversary of South Korea and so the latter has some incentive to see the DPRK government condemned by the international community. For Japan the ICC provides a vehicle to keep the kidnapping of Japanese citizens by the DPRK on the international agenda in ways that it might not otherwise be. Indicative of this is the foreign ministry statement quoted above that includes reference to the abduction issue. The co-sponsored UNGA resolution noted “the importance of the issue of international abductions and of the immediate return of all abductees” (UN General Assembly). The Chinese position can also be partly explained by self-interest given the myriad reasons for Beijing to support some version of the status quo in North Korea. North Korea’s location is geographically sensitive for Beijing and the latter fears a united pro-American Korea that would bring a U.S. military presence to China’s border. China also fears destabilizing the government of Pyongyang because of the prospect of regional instability resulting in refugees entering China in large numbers.

Yet self-interest alone cannot explain the normative divide in Northeast Asia regarding the International Criminal Court. After all, Japan and South Korea had powerful incentives to spurn the ICC given their close relationship with the United States and the fact that China had not committed itself to the Rome Statute. Japan furthermore has a direct financial disincentive to participate in the Court given that it funds a large percentage of the institution’s operations. Furthermore, China has long encouraged North Korea to pursue economic reforms that would bring the DPRK back into contact with the world while raising living standards for North Koreans. Given that Beijing has not been successful in doing so, perhaps it could use its position on the Security Council combined with the increasing pressure for an ICC investigation to use the latter as leverage to push North Korea to pursue economic reforms that would be beneficial not only to the DPRK, but also China. A case for self-interest can thus be read in multiple ways, meaning that normative pressures must have at least some explanatory power.

As mentioned above, scholarship on the influence of international norms emphasizes their mutually constitutive nature (for a seminal statement, see Wendt 1999). Norms shape the identities and behaviours of states but states also shape the content and salience of international norms. Examining the norms contained in the Rome Statute of the ICC in the Northeast Asian region illuminates at least three theoretical points about norm construction and contestation.



First, it calls for nuance with regard to the disposition that states take toward the ICC. On the one hand, the cases of Japan and South Korea reveal the inadequacy of thinking about norms within a dichotomous accept/reject binary. These two states are much more than mere members of the Court. They have both taken leadership roles at the Court by incorporating significant elements of the Rome Statute into domestic law, sending judges to work at the Court, and devoting resources to efforts to promoting the institution to other states. On the other hand, the case of China reveals the limitations of putting all states that have not signed the Rome Statute into the same conceptual basket. Although Beijing was clearly wary of ICC investigations regarding its North Korean neighbour in 2010 and undermined the call to bring North Korea to the Court in 2014, it could have acted much more aggressively than it ultimately did. China could have attacked the Court rhetorically, attempted to use aid and economic leverage to discourage other states from signing, or attempted to introduce resolutions at the United Nations critical of the ICC. It did none of these things, instead preferring to abide by a quieter, behind the scenes brand of diplomacy. Its arguments in the 2014 Security Council debate were not critical of the ICC as such, but rather relied on the procedural logic that the Security Council was the wrong venue to discuss these issues. This is not entirely inconsequential. The arguments made in the international political sphere matter, and by not seeking to undermine the ICC directly China seems to have presumed the legitimacy of the Court in its remarks at the Security Council (see Risse 2000; Risse et al. 1999). While this does not further entrench the norm of individual accountability for human rights violations, nor does it necessarily erode it.

Second, the Northeast Asian region highlights the role of domestic politics in states shaping and being shaped by international norms. Japan and South Korea are democracies with independent judiciaries and an epistemic community of international lawyers. Domestic civil society groups – such as the Japanese Bar Association – can pressure the government to commit the state to particular international norms. Transnational civil society activism has long been understood as a causal factor in normative change at the international level (Keck and Sikkink 1998). Japan and South Korea both had public and parliamentary debates about the merits and drawbacks of joining the Court. In both cases joining the ICC was seen as an expression of the state's commitment to accountability for war crimes, crimes against humanity, and genocide. The Chinese position regarding the ICC has also influenced by its domestic politics, and specifically its fear of politically motivating cases being lodged against China. One could see in China's comments in the Security Council about not politicizing human rights issues its preference for treating most such issues as domestic political problems rather than matters of international concern. This is consistent with China's broader preference for norms of non-interference and sovereignty, and domestic lobbying for joining the Court or for China supporting an ICC investigation of North Korea appears weak or non-existent.

Finally, the forgoing analysis demonstrates how state disposition toward a norm influences its policies in particular instances. While all three major Northeast Asian states faced the same North Korean issue in 2014, the ways in which each state framed the issue differed. With its remarks at the Security Council South Korea framed it as an issue of suffering and abuse in which the



international community needed to involve itself. With its co-sponsorship of the UNGA resolution Japan was close to this position and also attempted to keep its own concern with abducted nationals on the international agenda. Both states were consistent with their positive dispositions toward the ICC. China reaffirmed its own preferred norms of non-interference and sovereignty by disagreeing with the referring North Korea to the ICC and therefore reaffirmed its moderately negative disposition toward the norms contained in the Rome Statute. That South Korea and Japan on the one hand and China on the other can react to the same regional problem in such different ways illustrates the extent to which the norms of individual accountability for crimes against humanity are still very much contested in Northeast Asia.

Conclusion

This paper has traced the engagement of the three major states of Northeast Asia – South Korea, China, and Japan – with the International Criminal Court. It did so in two ways. First, it examined engagement over a 15-year span on the three different dimensions of compliance, promotion, and commitment. This provided a nuanced overview of patterns of normative disposition in Northeast Asia toward the norms contained in the Rome Statute. Second, the paper focused in on the various ways in which North Korea presents itself as an issue on which its regional neighbours must reveal and debate their normative preferences regarding the ICC.

At least three conclusions can be drawn. First, there exists a stark normative divide in Northeast Asia regarding the Court. Japan and South Korea are major backers of the ICC while China is wary of the institution and the norms it embodies. The situation of North Korea is one in which the norms of these regional powers collide and with China holding a seat at the UN Security Council it is likely that Beijing will be able to stave off attempts to bring the Court closer to the DPRK situation.

Second, the paper has called into question concepts like the “Asian way” insofar as Japan and South Korea are leading supporters and promoters of the ICC. The ICC is highly legalized, its norms are precise, and its obligations are clear, all of which are in contradiction with the more informal, less legalized, and flexible approach thought to characterize Asian international relations. Beneath broad claims about the character of the region’s interactions lies a diversity of viewpoints on the Court, from the highly supportive dispositions of Seoul and Tokyo to the more wary stance of Beijing, and even the outright hostile disposition of Pyongyang.

Third, intra-regional contestation in Northeast Asia constraints the region’s ability from acting in a cohesive way on issues of accountability for war crimes, crimes against humanity, and genocide. With a Security Council seat and two neighbours very supportive of the Court, if China engaged with the Court it would mean that Northeast Asia would rival Europe as a centre of international support for the norms embodied in the Rome Statute. Yet China’s commitment to sovereignty and non-interference means that this is unlikely to occur despite South Korea and Japan’s intensely supportive dispositions. In this sense, then, the region’s collective disposition toward the ICC does



hedge closer to the conventional view of the Asian way, although the Court's preliminary investigations into North Korea's 2010 attacks may have been a first step in demonstrating to the region that legalization in this issue area is not as dangerous as critics argue. ■

Figure 1. Normative Disposition Indicators of Rome Statute, Northeast Asia 1999-2014

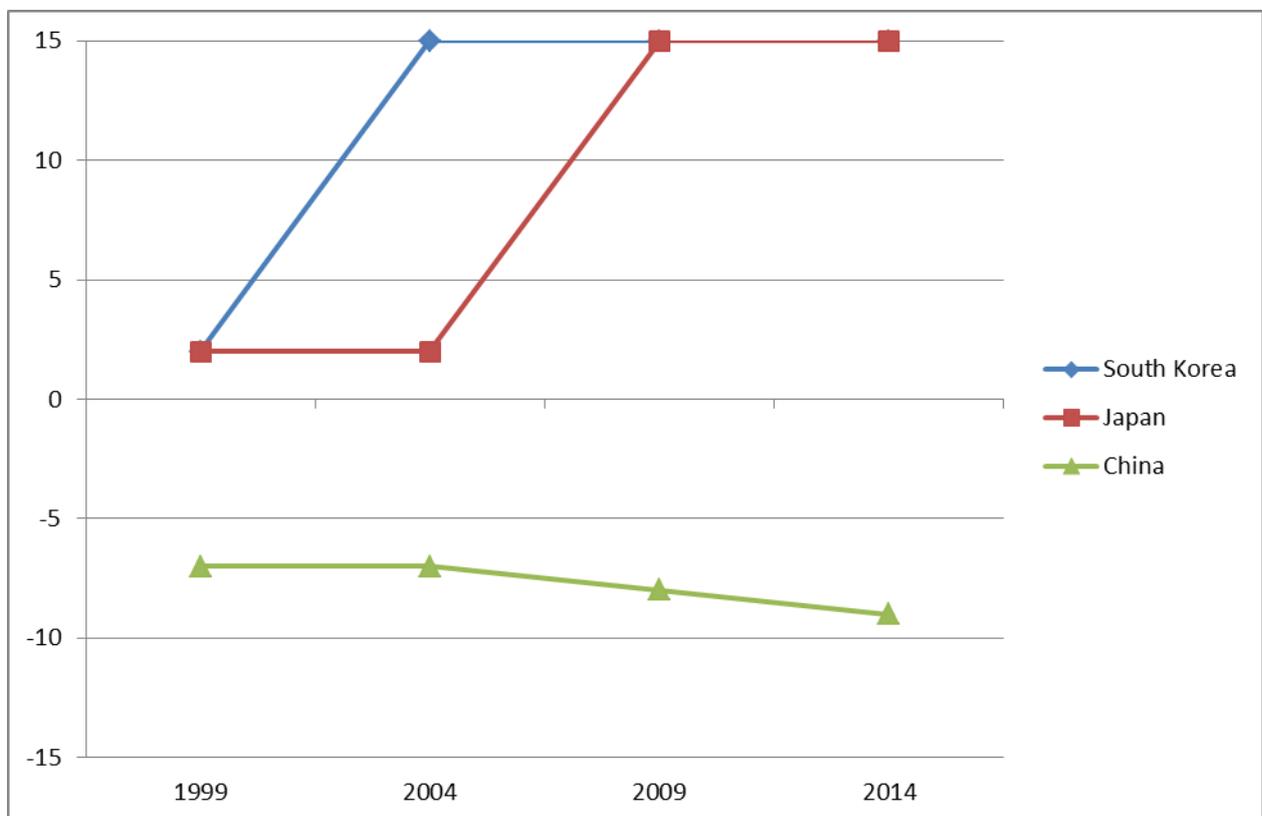




Table 1. Normative Disposition Indicators

	Consent	Comply	Promote
5	Signed, ratified, and implemented all treaty provisions	Complies with treaty provisions and decisions of the treaty body; offers diplomatic and material support for treaty implementation	Employs diplomatic and substantial material resources to promote treaty norms, ratification, and support
4	Signed, ratified, and implemented many treaty provisions	Complies with treaty provisions and decisions of the treaty body; offers diplomatic but little material support for treaty implementation	Employs diplomatic and modest material resources to promote treaty norms and perhaps ratification
3	Signed, ratified, and implemented only a few treaty provisions	Complies with treaty provisions and decisions of the treaty body	Employs diplomatic but no material resources to promote treaty norms and perhaps ratification
2	Signed and ratified, but implemented no treaty provisions	Complies with most but not all treaty provisions and decisions of the treaty body	Employs only rhetoric to promote treaty norms
1	Signed and ratified the treaty with minor reservations and no implementation	Complies with only some treaty provisions and decisions of the treaty body	Employs rhetoric only in self-serving situations to endorse selected treaty norms
0	Signed and ratified the treaty with major reservations and no implementation	Compliance with treaty and treaty body is inconsistent or a non-factor in state behavior	Does not promote or oppose treaty norms
-1	Signed and indicated it may ratify	Compliance with treaty and treaty body is a non-factor; minor violations of norms may occur	Employs rhetoric occasionally to oppose treaty norms
-2	Signed and indicated that it would not ratify without reservations or revisions	Compliance with treaty and treaty body is a non-factor and significant violations of treaty norms occur	Employs rhetoric actively to oppose treaty norms and ratification by others
-3	Signed and indicated it does not intend to ratify	Occasional noncompliance with major elements of the treaty and decisions of the treaty body	Employs rhetoric and diplomatic resources actively to oppose treaty norms and ratification by others
-4	Has not signed	Frequent noncompliance with major elements of the treaty and decisions of the treaty body; moderate resources employed to justify noncompliance	Employs rhetoric, diplomatic, and modest material resources to oppose treaty norms and ratification
-5	Indicated it never intends to sign	Overall noncompliance with treaty; substantial diplomatic and material resources employed to defend noncompliance of self and others and to indict treaty norms	Employs diplomatic and substantial material resources to oppose treaty norms and punish states that support the treaty



Table 2. Disaggregated NDI in Three Cases

	Consent	Comply	Promote
5	Japan 2009, 2014 Korea 2004, 2009, 2014	Korea 2004, 2009, 2014 Japan 2009, 2014	Korea 2004, 2009, 2014 Japan 2009, 2014
4			
3		Korea 1999 Japan 1999, 2004	Korea 1999 Japan 1999, 2004
2			
1			
0			
-1			China 1999, 2004
-2		China 1999, 2004, 2009, 2014	China 2009
-3			China 2014
-4	Korea 1999 Japan 1999, 2004 China 1999, 2004, 2009, 2014		
-5			



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