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NORTHEAST ASIA AND THE INTERNATIONAL CRIMINAL COURT: MEASURING NORMATIVE DISPOSITION

ABSTRACT

This article aims to understand the policies of three major Northeast Asian states toward the Rome Statute and the International Criminal Court (ICC) that it established. Using a unique measurement tool, it traces the interactions of South Korea, Japan, and China with the Court since negotiations on its formation in the late 1990s. Included in this analysis is a focus on how Northeast Asian states have responded to recent efforts to bring North Korea into the Court's orbit for that country's military actions in 2010 and its human rights record over several decades. Data is based on publicly available documents as well as interviews with diplomats, legislators, legal experts, and activists in Japan, South Korea, and China conducted in 2015.

Keywords

International Criminal Court (ICC), norms, human rights, North Korea, Japan, South Korea, China, Northeast Asia

INTRODUCTION

The International Criminal Court (ICC or Court) 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. While much attention has been given to questions about why states commit to the Court (Chapman and Chaudoin 2013; Goodliffe et al. 2012; Simmons and Danner 2010; Schiff 2008; Kelley 2007; Fehl 2004), the positions of the United States and Europe (Bower 2015; Aronsson 2011; Johansen 2006), and how the ICC has operated in Africa (Cronin-Furman 2013; Mills 2012), less systematic attention has been paid to dynamics in Asia—and in particular Northeast Asia—regarding the Court.

Asia is under-represented in the ICC's Assembly of States Parties (Chesterman 2014). Of the 14 states in Bruce Gilley's recent classification of (East) Asian states, only four (South Korea, Japan, Cambodia, and Philippines) are members of the Court (Gilley 2014). This 29 percent rate of accession to the ICC is much lower than rates for

Africa (63%), Eastern Europe (78%), Latin America (82%), and the amalgam of Western Europe, North America, and Australia (86%) (see Chesterman 2014, 17). Yet Asia's aggregate undersubscription to the Court masks significant variation at the sub-regional level. As Asia's most economically and militarily significant sub-region (Calder and Ye 2010), Northeast Asia's engagement with the ICC is important to consider for both the future of the Court itself and its role in regional politics.

This research aims to provide an empirical picture of the ICC in Northeast Asia by examining engagement with the Court by China, South Korea, and Japan since the 1990s. It does so by further developing a novel index of engagement with the ICC, the Normative Disposition Indicators, which considers the propensity of states not only to consent to the court but also to comply with and promote its norms. To provide a comprehensive depiction of the Court's relationship with Northeast Asia, I also develop a case study drawn from publicly available documents as well as discussions with diplomats, legislators, legal experts, and activists in Japan, South Korea, and China addressing recent and ongoing efforts to bring the Democratic People's Republic of Korea (DPRK or North Korea) before the Court.

In many ways, the three major Northeast Asian states behave toward the ICC as their domestic regime types would predict. As consolidated democracies with active civil societies, it is perhaps not surprising that South Korea and Japan are both positively disposed toward the norms of accountability contained in the Rome Statute. Despite expectations at the level of regional international relations that Asian states would be hesitant to join a highly institutionalized and legalized judicial institution with ramifications for security policy (see Johnston 2012, 63–67; Calder and Ye 2010; Rozman 2004; Stubbs 2002; Acharya 1997), the domestic political systems of South Korea and Japan allow space for advocacy and lobbying that influence each state's positive engagement with the ICC. China, as a single-party autocracy with an almost absolutist understanding of national sovereignty, is predictably reticent to embrace the ICC. Domestic lobbying efforts for China to join the Court are negligible and it is difficult to find reason to believe that China under the Chinese Communist Party will accede to the Rome Statute as either is currently understood.

Yet a more nuanced examination of each state's engagement with the Court over the past 17 years based on the Normative Disposition Indicators reveals some questions for further analysis. First, from the standpoint of 2016 both South Korea and Japan are among the world's most enthusiastic supporters of the ICC. But South Korea joined the Court much earlier than Japan and was a key player in negotiations on the Rome Statute while Japan waited longer before joining the Court. When Japan did join, it fully committed itself across multiple domains to supporting the ICC. Yet while both Korea and Japan have been supportive of a role for the Court with regard to North Korea, they have lent support in different ways and to pursue slightly different instrumental goals. South Korea has pressed its case on human rights issues directly at the UN Security Council while Japan has worked more in the UN General Assembly. Substantively, Japan has used the platform of the ICC to keep the issue of North Korean abductions of its nationals on the global agenda while for South Korea the ICC fits into a larger strategy of discrediting the DPRK for its human rights record.

Second, while China is not a member of the Court, and appears opposed to joining for the time being, Beijing nevertheless 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. In recent years, however, data on China's normative disposition towards the Court shows a sharp turn away from engagement. This coincides both with the subsequent military intervention in Libya authorized by UN Security Council Resolution 1973 as well as the more assertive foreign policy tendencies of the Xi Jinping administration since 2012 (see Zhang 2015).

With regard to a role for the Court in Northeast Asia itself, China's behavior has also displayed some variation that corresponds with the larger trend. While it defended North Korea in the aftermath of two controversial 2010 military actions by the DPRK, it remained relatively quiet—at least publicly—when the Court conducted a preliminary investigation of those actions in subsequent years. Regarding the prospect of a UN Security Council referral of North Korea to the ICC for human rights violations from 2013 to the present, however, China is steadfast in its opposition to a role for the Court. Beijing's opposition to the Court involving itself in Northeast Asia has become more strident in recent years, likely due to a combination of the more assertive foreign policy outlook of the Xi Jinping administration and the increasing relative global power of China (see Zhang 2015).

In sum, both Northeast Asia's long-term state-level engagement with the Court and its more recent role regarding North Korea deserve clearer and more systematic attention. As presented above, Asian states are relatively underrepresented in the ICC Assembly of States Parties. In addition to the ICC, it is often argued that Asian states can be perceived as less incorporated into international legal mechanisms than many other global regions (Chesterman 2014). This "ongoing wariness" in Asia about hard law 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 (Chesterman 2014; see also Osten 2013). And yet in issue areas of trade, investment, and territorial disputes, Voeten (2010) argues that Asian states are not less integrated into global rules than other groups of states, nor are they less likely to resolve interstate disputes judicially. More generally, Haggard (2013, 195) argues that the characterization of Asia's international institutions as weak has become "less and less accurate over time."

The remainder of this article attempts to measure and trace in fine-grained detail one international institution in one sub-region of Asia, beginning with a discussion of how to measure state "disposition" toward the Court. While the main objectives of the piece are empirical and descriptive, preliminary theoretical and policy considerations will be provided in the article's concluding section. Specifically, and most obviously, there exists a stark normative divide in Northeast Asia regarding the Court that is largely shaped by domestic politics. Japan and South Korea are major backers of the ICC while China is wary of the institution and the norms it embodies. Domestic politics and the opportunity structures of activism predictably operated differently in the open democracies of South Korea and Japan than in the closed authoritarian system of China. Norms of individual accountability for crimes against humanity are therefore still very much contested in Northeast Asia which lends credence to the arguments that the behavior of Asian

states toward international norms and institutions is more complex and heterogeneous than sometimes assumed (see Haggard 2013). In applied terms, the situation of North Korea is one in which the normative dispositions of these regional powers collide and with China holding a seat at the United Nations Security Council (UNSC) it is likely that Beijing will be able to stave off attempts to involve the Court more in the DPRK situation.

MEASURING STATE DISPOSITION TOWARD THE ICC IN NORTHEAST ASIA

The ICC and the Rome Statute are emblematic and important to the normative development of human rights and individual accountability for atrocities (Teitel 2011, 73–104). With 123 states party to the Rome Statute as of this writing, the Court is a part of broader international trends in this regard. 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.

This article both relies on and advances previous efforts to articulate a framework that measures state engagement with the ICC in the United States and several Asian cases (Dukalskis 2015a, 2015b; Dukalskis and Johansen 2013). 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 and Toope 2001), the measurement framework—called the Normative Disposition Indicators (NDI or Index)—considers three dimensions of a state’s actions toward the ICC: consent, compliance, and promotion. These three dimensions are each scored on a spectrum ranging from –5 to 5 and are combined to arrive at an aggregate score of disposition toward the ICC ranging from –15 to 15. Detailed measurement criteria for each dimension of the NDI can be found in Appendix 1.¹

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. One would expect states that have consented to the treaty to be largely complying with and promoting its norms and those that have not consented to be obstructing or indifferent to them, but closer inspection reveals that there are considerable grey areas to be found. Therefore, the NDI considers compliance and promotion of treaty norms as analytically separate from consent. 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 facilitate or frustrate 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 and the Court’s activities.

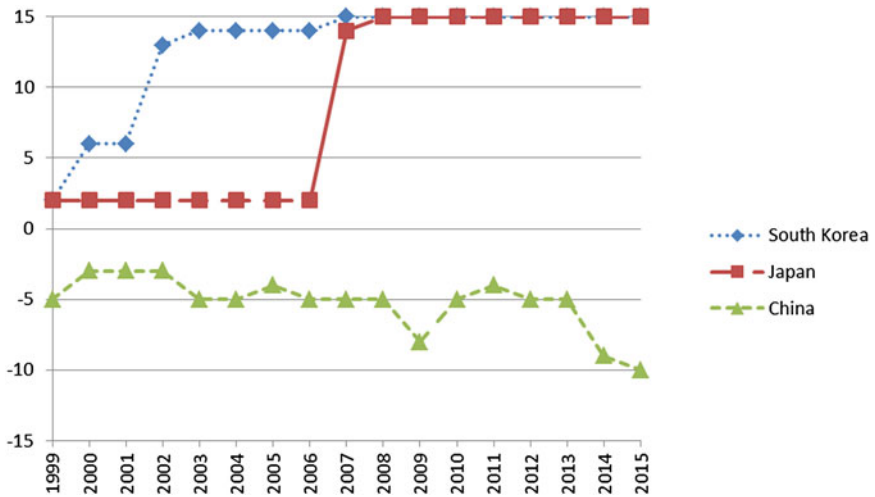
As can be seen in [Figure 1](#), the response of the three Northeast Asian states to the ICC is far from uniform; Appendix 2 provides annual disaggregated scores on the three metrics of consent, compliance, and promotion for each state. Applying this measurement framework to the case of Northeast Asia through careful qualitative analysis reveals that (1) South Korea and Japan took different pathways to arrive at their currently highly positive dispositions; that (2) South Korea and Japan now have very similar dispositions toward the Court but may support its role in the North Korean context for a mixture of normative and instrumental reasons, and that (3) China, although not consenting to the norms, has often been willing to not obstruct the ICC and has on occasion even been willing to offer partial support in terms of compliance and promotion.

REPUBLIC OF KOREA (SOUTH KOREA)

South Korea's disposition toward the ICC is uniquely positive. It signed the Rome Statute on March 8, 2000, which was relatively soon after it became available for signature, and ratified the treaty on November 13, 2002. Korean signature and ratification came during the administration of Kim Dae Jung, which was eager to signal to the international community South Korea's commitment to human rights. This helped facilitate Seoul's early and enthusiastic adoption of the Rome Statute.² At the Rome negotiations themselves Korean diplomats played a key role in proposing compromise formulations of the potential Court's jurisdiction and brokering between states keen for inherent universal jurisdiction and those preferring a narrow jurisdiction for the ICC. As [Figure 1](#) illustrates, South Korea's disposition was highly positive from 2002 to 2006, but domestic incorporation of the Rome Statute would soon move it to the highest rating. Following ratification the government 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 was eventually enacted on December 21, 2007 not only incorporated the main aspects of the Rome Statute into domestic law, but also stipulated some areas in which international norms would seemingly supersede domestic law, such as some extradition provisions, head of state immunity, and rules regarding formal accusations for the crimes in question ([Kim 2011](#)).

With tens of thousands of US soldiers stationed in South Korea, Seoul received diplomatic pressure to sign a bilateral immunity agreement with the US as part of the George W. Bush administration's first term efforts to undermine the Court (see [Johansen 2006](#)). Prior to ratification in November of 2002, Korea argued to the US that it would be premature to discuss a bilateral immunity agreement pertaining to a treaty that Korea had not yet ratified ([Human Rights Watch 2003](#)). The August 2002 American Servicemember's Protection Act (ASPA) stipulated that ICC states parties would be barred from receiving US military aid one year after the passage of the act. Korea, however, along with NATO states and key non-NATO allies, was exempt from this provision, which meant that pressure for South Korea to not ratify the treaty was not backed by the credible leverage that American opponents of the Court may have desired. Following passage of the ASPA, Korea was free to ratify the Rome Statute without facing negative material consequences in its relationship with its ally.

Korean diplomats have called for outreach efforts to encourage other states, particularly those in Asia, to join the Court, which helps account for Korea's high scores on

FIGURE 1 Normative Disposition Indicators of ICC, Northeast Asia 1999–2015

the “promotion” dimension of the Index even before full ratification and domestic incorporation of the Rome Statute (see examples in Dukalskis and Johansen 2013). Korea makes significant financial contributions to the operation of the ICC and has some nationals employed at the Court. Most prominently, the recently retired president of the ICC, Judge Sang-hyun Song, is a South Korean national and a major advocate for the Court. During his tenure he 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). For example, Song worked to build support for the Court in Indonesia, China, Philippines, and Bangladesh. In the latter two cases there was interest in joining the ICC and Song spent time discussing its benefits and mechanics with members of the bureaucracy, legislators, legal professionals, and members of the cabinet and executive branch.³ Ultimately, the Philippines and Bangladesh did ratify the Rome Statute in 2011 and 2010, respectively.

Although South Korea has not had any of its nationals investigated by the Court, meaning that its compliance has not received the most stringent test of its commitment, Seoul has demonstrated its confidence in the institution by participating in the OTP’s preliminary investigation of alleged North Korean crimes committed on South Korean territory in 2010. The referral apparently came from South Korean civil society and not the government, but the latter nevertheless facilitated the Court’s activities with regard to the investigation. Given that the OTP does not restrict the target of its investigations to the actor accused of the crime only, but rather takes a broader approach and investigates the “situation” as a whole, there was not only 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 countenance extremely security-sensitive investigations by an international institution with wide

latitude to pursue its work is indicative of the country's positive disposition toward the Court. Indeed, while Seoul did not officially refer the situation to the OTP in 2010, it 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 South Korea for its cooperation in the investigation.

JAPAN

Japan took a less direct path to its currently positive stance toward the Court (see Meierhenrich and Ko 2009). 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 support 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 several 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 percent of the ICC's budget, which Tokyo felt was excessive. In the legal sphere 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 (Masaki 2008; Takayama 2008). After determining that most of the core crimes could be prosecuted under Japanese law, the government then had to draft and propose legislation that would also make some procedural crimes under the Rome Statute, such as suppressing evidence before the international court, 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. Japan's latent positive attitude toward the Court took longer to manifest itself than in the case of South Korea due mainly to domestic political and rule of law concerns.

Another factor that appeared to have kept Japan from ratifying the Rome Statute as early as Korea was Tokyo's desire to wait for the United States to adopt a less hostile position toward the Court (Lukner 2012, 102). While Japan would face no material penalties for ratification it was nonetheless hesitant to cause friction in its relationship with Washington. Prior to 2002, Tokyo argued (like Korea) that it would be best to wait until after Japan had ratified the Rome Statute to discuss a bilateral immunity agreement (Human Rights Watch 2003). Like Korea, Japan was also officially exempt from the threat of withdrawal of US military aid due to the terms of the ASPA (US Department of State 2003). Nevertheless, the US requested that Japan sign such an agreement multiple times and relayed its views on the Rome Statute on several occasions to Japan between its entry into force in 2002 and Japan's accession to the Court in 2007 (Arai et al. 2008; Masaki 2008; Lukner 2012, 102). Japan apparently adopted a wait-and-see strategy on the international level while the domestic drive for ratification continued. In this context, Washington's muted response to Mexico ratifying the ICC in 2005 and its abstention from a UNSC resolution referring Sudan to the Court may have been taken as signals in Japan that it would not cause a diplomatic rift if it acceded to the Statute (Lukner 2012, 102).⁴ Though the US disposition improved in Bush's second term (Dukalskis and Johansen 2013), Japan nonetheless 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.

Once Japan did join the ICC, though, it committed itself fully and quickly. This can be seen in [Figure 1](#), which illustrates a mildly positive disposition toward the Court until 2006 due to Japan's promotion and compliance with the treaty followed by a major jump in 2007 toward extremely positive disposition due to nearly simultaneous signature, ratification, and incorporation. The NDI helps reveal that there was a latent positive disposition toward the ICC in Japan before 2007 even if Tokyo had not signed the Rome Statute. According to the former director for international legal affairs in the Ministry of Foreign Affairs at the time, political support in the lead-up to ratification could be found not only among the legal communities of his ministry and the Ministry of Justice, but also in the Diet, the opposition party, the media, and the public ([Masaki 2008](#)). The Japan Federation of Bar Associations passed a resolution in 2002 calling for Japan to join the ICC (Japan Federation of Bar Associations [2002](#); [Arai et al. 2008](#)). Prominent members of the legal profession worked to convince Diet members of the value of joining the ICC, arguing that: (1) Japan should take a leading role in international justice given its recent national history; (2) as a state party Japan could place judges and prosecutors at the Court; (3) Japan's international strategy should be based on legality and the rule of law given Article 9 of its domestic constitution; and (4) the ICC would be cheaper than ad hoc tribunals set up by the United Nations.⁵ Proponents of the Court initially faced concerns from Diet members about the legacies of the Tokyo Trials and whether the ICC would be a new form of victor's justice, but principled opposition to the Court faded with relative ease.⁶

Debate and discussion in the Diet covered a range of issues, including the treatment of US 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 broader debates was whether North Korea could be investigated for its kidnapping of Japanese citizens. Civil society groups worked to pressure policymakers to use the Court to exert leverage on North Korea to return abductees.⁷ 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 Diet that it was not immediately applicable, although there was some suggestion that because the crimes are ongoing (i.e. the kidnapped are still wrongly imprisoned), then there may be a possibility to encourage the Court to investigate based on unjustified imprisonment as a crime against humanity ([Arai et al. 2008](#)).

Since its ratification of the Rome Statute in 2007 Japan has become an important backer of the ICC. Along with Germany, it is usually the ICC's largest or second-largest annual financial contributor (see, e.g. [Assembly of States Parties 2015](#)). 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 [Assembly of States Parties 2015](#)). 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 and 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). To facilitate the ratification of other states in the region, the Ministry of Foreign Affairs took steps such as circulating English-language copies of Japan's implementing legislation so that other states in the region could use it as a model for their own laws as well as participating in conferences and symposia to share Japan's experiences and persuade other states to ratify (see Yoshikawa 2014).

CHINA

China has adopted a frostier disposition toward the ICC than its two major Northeast Asian neighbors. It has never been entirely opposed to the ICC, but Figure 1 shows how Beijing's disposition toward the Court has gone from mildly negative to more deeply negative in the past several years. 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 (see, e.g. Nathan and Scobell 2012; Shambaugh 2013). 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 (see Zhu 2014; Foot and Walter 2013). China nevertheless is reluctant to join 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 some of its controversial internal policies, particularly with regard to Tibet (Jianping and 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). Although it actively participated in negotiations, it ultimately voted against the Rome Statute in 1998 and has not joined since. It has occasionally publicly declined to comply with the Court, as when it hosted Sudan's leader Omar al-Bashir in Beijing in 2011 and 2015 despite his ICC arrest warrant.

China's diplomatic and rhetorical support for the Court has been limited, although it has not pressured other states to refrain from joining and it has indicated that it remains open to the possibility of joining if its concerns are addressed (Jia 2006). Chinese diplomats have occasionally made supportive but guarded remarks about the Court (see examples in Dukalskis and Johansen 2013), but have also expressed concern at its perceived politicization. Some legal scholars argue 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 (Zhu 2014), Chinese diplomats argue their case nonetheless. 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 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 position provides a unique lens through which to view its disposition toward the ICC, where its 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 (UNSC 2011). This course of action was different from six years prior when China abstained (along with the US, 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).

China's increasingly skeptical approach to the ICC in recent years as captured by the NDI can be viewed as part of a more general shift in China's foreign policy toward a more confrontational stance regarding the existing normative order (see, e.g., Nathan 2015; Shambaugh 2013; Schweller and Pu 2011). For example, Beijing under the Xi Jinping administration has displayed more assertive behavior in the South China Sea since 2012. In the non-military realm, the well-publicized Asia Infrastructure Investment Bank is a China-led effort to provide development assistance outside of Western-dominated institutions. Perhaps to lay the groundwork for more overtly assertive foreign relations, for roughly the past 15 years China has actively sought to influence voting in international venues such as the UN General Assembly (see, e.g., Flores-Macías and Kreps 2013; Strüver 2016).

China's more negative recent disposition toward the ICC coincides with this narrative, although the Index reveals that the drop-off in Beijing's support was most manifest in 2014 and 2015. This is likely related to China's prior support for UNSC Resolution 1970 referring Libya to the Court and abstention from UNSC Resolution 1973 authorizing a no-fly zone over Libya as well as other measures. The latter was seen as paving the way for NATO intervention in Libya, which damaged China's economic interests in that country. From Beijing's perspective, China's cooperation on those resolutions was not reciprocated by Western states, who continued to accuse China of being an "irresponsible power" (Sun 2012). The lesson drawn in Beijing from the Libya resolutions to be applied to the Syrian situation three years later seemed to be that China had little to gain and much to lose from siding with western powers in advocating for more military and/or ICC involvement in Syria (Sun 2012).

In sum, while China is not a member of the Court, it has in some instances been open to supporting (or at least not opposing) the ICC's work. This is surprising given what one would predict based on China's domestic political system and understanding of sovereignty. A 'hard test' in this regard would be ICC involvement in its region and focused on its lone treaty ally of North Korea, a subject to which the next section turns.

NORTH KOREA, NORTHEAST ASIA, AND THE ICC

Two distinct episodes comprise efforts to bring North Korean nationals before the ICC. First, the OTP preliminarily investigated two instances in 2010 in which North Korea

engaged in military altercations with South Korean nationals. On March 26, 2010, North Korean forces allegedly sank a South Korean naval vessel called the *Cheonan*, killing 46 people, while on November 23, 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 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.

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. 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" (Office of the Prosecutor 2010). 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 further specify their identity.

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 (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 1953 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 Yeonpyeong 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 conclusions relatively favorable to North Korea.

Even before the OTP report was released, however, a referral of North Korea to the ICC was being discussed for a different set of reasons. 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 publicly available information. The Commission of Inquiry on Human Rights in the DPRK (COI) 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. Activist groups in South Korea, such as NK Watch and the International Coalition to Stop Crimes Against Humanity in North Korea,

worked with Korean legislators and various United Nations organs, including the COI itself, to keep the North Korean repression internationally salient and facilitate the investigation.⁸ The COI report found that crimes against humanity had indeed taken place and recommended the following (UN Human Rights Council 2014a, 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 2014, the UN General Assembly passed a resolution that recapped the main findings of the report and submitted it to the 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). Kim Jong Un's 2016 New Year's address continued to cast human rights as a plot against the DPRK, arguing that the United States was "escalating the tension and egging its vassal forces on to stage a 'human rights' racket against the country" (Kim 2016). Nevertheless, the North Korean situation was discussed at Security Council meetings in both 2014 and 2015, which provides an opportunity to assess how Northeast Asian states responded to a proposed role for the ICC in solving one of the region's most troubling political issues. The remainder of this section will take up that analysis while embedding it within a broader context of engagement with the Court by South Korea, Japan, and China, respectively.

South Korea was a member of the UNSC in 2014 when the latter debated whether and how to react to the COI report on North Korea. The South Korean delegate gave an ardent speech about the need for the Security 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 General Assembly 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 (UNSC 2014, 21).

Regarding the North Korean military altercations of 2010, Japan did not actively push for an ICC investigation and was not vocal about the Court's actions in this instance, but rather allowed the Court to do its work and coordinated its political response with South Korea and the United States. Foreign ministers for the three states met on December 6, 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).

While not a member of the Security Council at the time of debates about DPRK human rights, Japan nonetheless played a role in pushing for an ICC referral for the North Korean situation. Japan co-drafted and co-sponsored, along with the European Union, the UN General Assembly 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).

Prior to the resolution, Japan was active in facilitating the work of the COI. For example, it helped plan investigations and organize interviews with North Koreans for the COI. After the release of the report, Japan committed itself to playing a leading role in attempting to implement its recommendations, which included referral to the ICC (Ministry of Foreign Affairs of Japan 2014a). In sum Japan was quietly supportive of the OTP preliminary investigation about the 2010 North Korean attacks and proactively supportive of pushing the North Korean human rights issue, and specifically the abduction of its nationals, to the ICC via UN channels.

Turning to China's disposition, the differences in its behavior regarding the 2010 North Korean military clashes and the 2014 human rights issue are instructive. Beijing chose to defend North Korea at an eight-hour meeting of the UN Security Council on December 19, 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 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*" (UN Security Council 2010).

Nevertheless, China may have attempted to put quiet pressure on North Korea to maintain peace and security. Some evidence suggests that Chinese experts and diplomats privately 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 neither the official media of China or North Korea divulged 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. Indeed, China’s relatively muted stance paid off as the Court ultimately decided that it did not have grounds to continue legal proceedings.

However, China has been publicly and unequivocally opposed to an ICC referral of North Korea on human rights grounds. The UNSC discussed the COI for the first time in December 2014, with China participating in its capacity as a permanent member. 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 (UNSC 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” (UNSC 2014, 2). 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 practices. 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 (UNSC 2014, 16). China’s procedural argument revealed its oft-stated preference for norms of relatively informal and non-binding processes to resolve human rights-related issues. In its 2015 debate concerning the DPRK human rights situation, China made the same procedural argument against considering the issue (UNSC 2015, 2) and made a brief statement during discussion reiterating its procedural concerns and highlighting China’s role as a constructive force for peace on the Korean peninsula (UNSC 2015, 7–8). Of course, as noted above, this disposition not only reflects China’s changing attitude toward the ICC specific to North Korea, but may be a manifestation of larger shifts in China’s disposition toward international norms.

CONCLUDING REMARKS

This research 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 17-year span using a unique

measurement framework. The NDI is unique insofar as it allows for more fine-grained assessment of how states interact with international institutions. It can help structure qualitative case studies so that state behavior can be more easily compared and contrasted over time. In this research it helped reveal the differing velocity of ICC engagement between South Korea and Japan as well as slight but important variations in China's disposition toward the Court. Second, the article narrowed its focus to analyze the ways in which North Korea presents itself as an issue on which its regional neighbors must reveal and debate their positions regarding the ICC's role in Northeast Asia. The positive dispositions of Japan and South Korea toward the ICC lend credence to the perspective that Asian states are by no means uniformly opposed to participation in highly legalized international institutions. There exists substantial heterogeneity in Northeast Asia with regard to the ICC, with Japan and South Korea's respective leadership roles in the Court providing evidence that strong international institutions can and do find supportive states in Asia.

Quite obviously, there exists a stark normative divide in Northeast Asia regarding individual accountability at the international level for war crimes, crimes against humanity, and genocide. Japan and South Korea are major backers of the ICC while China is wary of the institution and the norms it embodies. Domestic politics and the opportunity structures of activism played a key role in shaping the disposition toward the ICC of all three major states in Northeast Asia. Civil society activism is more possible in the open contexts of democratic systems while transnational activist networks across borders have long been understood as a causal factor in normative change at the international level (see Keck and Sikkink 1998; Risse, Ropp, and Sikkink 1999). Japan and South Korea are democracies with independent judiciaries, an epistemic community of international lawyers, and active civil societies. Domestic civil society groups—such as the Japanese Federation of Bar Associations or the International Coalition to Stop Crimes Against Humanity in North Korea (ICNK)—pressured their respective governments to commit the state to the norms contained in the Rome Statute. In South Korea, civil society organizations such as the ICNK and NK Watch worked with sympathetic legislators in the Korean National Assembly and provided information to United Nations bodies to keep the North Korean human rights issue on the international agenda. They also attempted to persuade domestic policymakers to support the activities of the COI and the ICC referral and coordinated with Japanese activists to persuade them to embed the abduction issue in a broader effort to seek accountability for North Korean crimes against humanity.⁹ The Index reveals differing rates of velocity in each of the democratic states' accession to the Court, with South Korea a relatively early adopter and Japan a more cautious joiner. Domestic pressure played a role as Korean civil society was active and mobilized from an early stage and could interface with a Korean president, Kim Dae Jung, who was himself a former human rights activist and was keen to present South Korea as a leading state in terms of human rights norms.

The Chinese position regarding the ICC also reflects its domestic priorities, and specifically its anxiety about cases being lodged against it for domestic repression. 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 inclination 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 given the closed nature of China's political system. The more open and democratic contexts of South Korea and Japan allowed for social groups to pressure the state and shape state interest while China's authoritarian political system precluded such mobilization. South Korean and Japanese groups trying to build transnational linkages and alliances with potentially like-minded groups in China found it difficult to do so due to the latter's political system.¹⁰

In addition to the primary importance of domestic regime type in driving disposition toward the ICC in Northeast Asia, it is also clear that states attempt to use the Court to advance particular strategic interests. 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 its citizens by the DPRK on the international agenda in ways that might otherwise prove difficult. Indicative of this is the foreign ministry statement quoted above that includes reference to the abduction issue. The co-sponsored UN General Assembly resolution noted "the importance of the issue of international abductions and of the immediate return of all abductees" (UN General Assembly 2014). The Chinese position can also be 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 US military presence to China's border (see, e.g., Nathan and Scobell 2012, 135–137). China also fears destabilizing the government of Pyongyang because of the prospect of regional instability resulting in refugees entering China in large numbers.

Finally, the search for accountability in North Korea through the ICC has thus far been frustrated. Most proximately, Chinese and Russian efforts to shield North Korean leaders from being referred to the Court mean that the impasse at the Security Council is likely to remain. However, even if China and Russia were to set aside their concerns and allow a referral to be made, the ICC would face practical hurdles in its investigations and execution of any resulting arrest warrants. Even with the impracticality of fulfilling its mandate, an ICC investigation could nonetheless act as point of leverage on the DPRK for transnational activist regimes and other governments. Ultimately, however, the political status quo precludes a role for the Court in North Korea, a point to which activist groups in South Korea seem resigned as they search for a new strategy.¹¹

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NOTES

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1. 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 (2015b).
2. Many thanks to Keun-Gwan Lee for alerting me to this crucial point.
3. Author interview with Judge Song Sang-hyun, Seoul, South Korea; May 4, 2015.
4. Author interviews with members of Japanese international legal community, Tokyo, Japan, May 1, 2015.
5. Author interviews with members of Japanese international legal community, Tokyo, Japan, May 1, 2015.
6. Author interviews with members of Japanese international legal community, Tokyo, Japan, May 1, 2015.
7. Author interviews with policymakers, Tokyo, Japan, from April 27 to May 1, 2015.
8. Author interviews with South Korean policymakers and activists, Seoul, South Korea, from May 2 to 10, 2015.
9. Author interviews with South Korean and Japanese policymakers and activists, Tokyo, Japan, from April 27 to May 1, 2015, and Seoul, South Korea, from May 2 to 10, 2015.
10. Author interviews with South Korean and Japanese policymakers and activists, Tokyo, Japan, from April 27 to May 1, 2015, and Seoul, South Korea, from May 2 to 10, 2015.
11. Author interviews with South Korean policymakers and activists, Seoul, South Korea, from May 2 to 10, 2015.

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APPENDIX 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

APPENDIX 2 Disaggregated NDI in Three Cases

South Korea, 1999–2015					Japan, 1999–2015					China, 1999–2015				
Consent	Compliance	Promotion	Total		Consent	Compliance	Promotion	Total		Consent	Compliance	Promotion	Total	
SK 99	-4	3	3	2	J 99	-4	3	3	2	C 99	-4	0	1	-5
SK 00	-1	3	4	6	J 00	-4	3	3	2	C 00	-4	0	1	-3
SK 01	-1	3	4	6	J 01	-4	3	3	2	C 01	-4	0	1	-3
SK 02	3	5	5	13	J 02	-4	3	3	2	C 02	-4	0	1	-3
SK 03	4	5	5	14	J 03	-4	3	3	2	C 03	-4	0	-1	-5
SK 04	4	5	5	14	J 04	-4	3	3	2	C 04	-4	-1	0	-5
SK 05	4	5	5	14	J 05	-4	3	3	2	C 05	-4	0	0	-4
SK 06	4	5	5	14	J 06	-4	3	3	2	C 06	-4	0	-1	-5
SK 07	5	5	5	15	J 07	5	4	5	14	C 07	-4	0	-1	-5
SK 08	5	5	5	15	J 08	5	5	5	15	C 08	-4	0	-1	-5
SK 09	5	5	5	15	J 09	5	5	5	15	C 09	-4	-1	-2	-8
SK 10	5	5	5	15	J 10	5	5	5	15	C 10	-4	0	-1	-5
SK 11	5	5	5	15	J 11	5	5	5	15	C 11	-4	-3	3	-4
SK 12	5	5	5	15	J 12	5	5	5	15	C 12	-4	0	-1	-5
SK 13	5	5	5	15	J 13	5	5	5	15	C 13	-4	0	-1	-5
SK 14	5	5	5	15	J 14	5	5	5	15	C 14	-4	-1	-3	-9
SK 15	5	5	5	15	J 15	5	5	5	15	C 15	-4	-3	-3	-10