

**THE COMPLEMENTARITY REGIME OF THE  
INTERNATIONAL CRIMINAL COURT: CONCERNS OF  
CHINA**

DAN ZHU\*

ABSTRACT

The principle of complementarity was supported by China throughout the whole negotiation process of establishing the International Criminal Court (ICC). However, China had reservations over the way in which the principle of complementarity was eventually implemented in the Rome Statute, which was part of the rationale leading to China's decision not to join the ICC at that time. On one level, China's concerns regarding complementarity relate to the uncertainties about whether issues of fair trial per se will be addressed by the ICC in the context of admissibility; at another level, they echo China's traditional position with respect to international judicial bodies. This article examines the substance of the articulated Chinese concerns regarding complementarity in light of the ICC's jurisprudence, China's domestic judicial system, and its progressively greater engagement with international adjudication to see if these concerns still constitute a significant impediment to China's accession to the ICC. It also questions how the notion of, and the discourse surrounding, Chinese characteristics or Asian values on human rights may or may not explain Chinese and Asian resistance to ICC participation in the context of complementarity.

---

\* Dan Zhu is an Assistant Professor in International Law at Fudan University Law School and a member of the Chinese Bar. She holds a Ph.D. from the University of Edinburgh. She has worked at the Registry Legal Advisory Service Section and the Appeals Chamber of the International Criminal Court. She can be contacted via email at [danzhu@fudan.edu.cn](mailto:danzhu@fudan.edu.cn). This work was funded by the National Social Science Foundation of China [grant number 18ZDA153, 18AFX025], and the Shanghai Pujiang Program [grant number 15PJ C016].

## TABLE OF CONTENTS

1.	Introduction.....	179
2.	The negotiation history of the ICC's complementarity regime and concerns of China .....	185
	2.1 <i>China's sovereignty concerns and complementarity</i> .....	185
	2.2 <i>The criteria of admissibility and concerns of China</i> .....	187
	2.3. <i>Automatic jurisdiction and concerns of China</i> .....	190
3.	The criteria of 'unwillingness' and China's fair trial concerns.....	192
	3.1. <i>The controversies surrounding the criteria of "unwillingness" and concerns of China</i> .....	192
	3.2. <i>The ICC's practice in relation to 'unwillingness'</i> .....	195
	3.3. <i>Fair trial rights and the Chinese domestic criminal justice system</i> .....	201
4.	Complementarity and automatic jurisdiction of the ICC: concerns of China.....	208
	4.1. <i>China's traditional concerns towards compulsory jurisdiction</i> .....	208
	4.2. <i>China's dichotomy towards human rights violations</i> ...	209
	4.3. <i>Chinese Characteristics, Asian Values, and Human Rights</i> .....	213
5.	Conclusion .....	218

## 1. INTRODUCTION

China has long been supporting the establishment of a permanent international criminal court. It has considered that the creation of such an institution is a positive addition to the international legal system. To this end, China was actively involved in the discussions leading to the creation of the International Criminal Court (ICC).<sup>1</sup> In the course of the negotiations, the Chinese delegation identified and raised a range of specific concerns, some of which were taken on board at that time, and some of which remained outstanding. In 1998, at the conclusion of the Rome Diplomatic Conference, while 120 countries voted in favor of the adoption of the Rome Statute of the ICC, China was among the seven states that voted against it.<sup>2</sup> The Chinese delegation articulated several reasons for not joining the ICC at that time, which were all framed in legal terms.<sup>3</sup> Since its negative vote in Rome, China's interest in the ICC has not diminished. In fact, China has consistently maintained a dialogue with the ICC and involved itself in the process leading to the Court's continuous evolution.<sup>4</sup> Despite

---

<sup>1</sup> Bing Bing Jia, *China and the International Criminal Court: Current Situation*, 10 SING. Y.B. INT'L L. 87, 87-88 (2006).

<sup>2</sup> Press Release, United Nations, UN Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Criminal Court, U.N. Press Release L/2889 (July 20, 1998), <https://www.un.org/press/en/1998/19980720.l2889.html> [<https://perma.cc/SCB2-TNXB>].

<sup>3</sup> See Guangya Wang, in United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 3d plenary mtg., at 75, U.N. Doc. A/CONF.183/SR.3 (June 16, 1998) (reaffirming the importance of the principle of complementarity in underpinning the actions and decisions of the Court); see also Wensheng Qu, in U.N. GAOR, 6th Comm., 53d Sess., 9th mtg. at 5, U.N. Doc. A/C.6/53/SR.9 (Nov. 4, 1998) (stating China's comments on several issues, such as jurisdictions, definitions of crimes, power of prosecutors, and principle of complementarity).

<sup>4</sup> See Guan Jian, in U.N. GAOR, 6th Comm., 57th Sess., 15th mtg. at 6, U.N. Doc. A/C.6/57/SR.15 (Nov. 28, 2003) (highlighting China's active involvement in establishing the International Criminal Court and its continued support of its aims, despite not being a signatory to the Rome Statute); see also Dahai Qi, in U.N. GAOR, 6th Comm., 59th Sess., 6th mtg. at 6, U.N. Doc. A/C.6/59/SR.6, (Nov. 1, 2004) (reaffirming China's commitment to the goals of the International Criminal Court as indicated by previous initiatives to support the work and development of the Court); Xinmin Ma, Deputy Dir.-Gen. of the Dep't of Treaty and Law of the Ministry of Foreign Affairs of China, Statement of the Chinese Observer Delegation at the General Debate in the 16th Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court (Dec. 7, 2017), at 2, [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP16/ASP-16-CHI.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP16/ASP-16-CHI.pdf) [<https://perma.cc/ZF99->

being a non-party to the Rome Statute, the Chinese government continued to send its delegates to meetings of the Assembly of States Parties, where it voiced its views on a number of issues.<sup>5</sup> As a permanent member of the UN Security Council, China also played a constructive role in passing the resolutions of the Council regarding the effective functioning of the ICC.<sup>6</sup> All these different

---

RWZ4] (transcript available in the International Criminal Court's ASP Document Index) (expressing China's longstanding support for collective legal efforts to combat international crime, including the International Criminal Court).

<sup>5</sup> See Xinmin Ma, *supra* note 4, at 3-9 (suggesting as that the ICC adheres to the Rome Statute and addresses crime of aggression cautiously); Guo Xiaomei, Counselor of the Department of Treaty and Law of the Ministry of Foreign Affairs of China (China Observer Delegation) at the 14th Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court (Nov. 18-26, 2015), [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP14/GenDeb/ASP14-GenDeb--OS-China-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP14/GenDeb/ASP14-GenDeb--OS-China-ENG.pdf) [<https://perma.cc/XL42-8AJ9>] (transcript available in the International Criminal Court's ASP Documents Index) (recommending that the International Criminal Court adheres to the principle of complementarity and those aims established in the UN Charter to effectively implement the objectives of the Rome Statute); Xinmin Ma, Deputy Director-General of the Department of Treaty and Law of the Ministry of Foreign Affairs of China (Observer Delegation) at the 13th Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, (Dec. 8-17, 2014), [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP13/GenDeba/ICC-ASP13-GenDeba-China-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP13/GenDeba/ICC-ASP13-GenDeba-China-ENG.pdf) [<https://perma.cc/9BMU-PYDG>] (transcript available in the International Criminal Court's ASP Document Index) (urging the International Criminal Court to achieve a consensus view on the interpretation and application of the Rome Statute to enhance the legitimacy of the Court); Statement of China at 11th Session of the Assembly of States Parties (Nov. 15, 2012), [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP11/GenDeba/ICC-ASP11-GenDeba-CHN-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP11/GenDeba/ICC-ASP11-GenDeba-CHN-ENG.pdf) [<https://perma.cc/RRP3-KVGD>] (transcript available in the International Criminal Court's ASP Document Index) (reiterating China's view that the International Criminal Court must adhere to the UN Charter and the principle of complementarity, respect non-member states, and pursue both crime prevention and peace creation); Xu Hong, Head of Chinese Delegation, at the General Debate of the Eighth Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court (Nov. 20, 2009), [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP8/Statements/ICC-ASP-ASP8-GenDeba-China-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP8/Statements/ICC-ASP-ASP8-GenDeba-China-ENG.pdf) [<https://perma.cc/Y3SB-A439>] (transcript available in the ASP's Document Index) (advising the International Criminal Court to observe the guiding principles of international law and encouraging other countries to engage in the improvement and development of the Court).

<sup>6</sup> China voted in favor of the Security Council resolution referring the situation of Libya to the International Criminal Court. U.N. SCOR, 66th Sess., 6491st mtg. at 2, U.N. Doc. S/PV.6491 (Feb. 26, 2011). See generally S.C. Res. 1970 (Feb. 26, 2011) (referring the situation in Libyan Arab Jamahiriya to the International Criminal Court). China abstained in the Security Council vote referring the situation in Darfur to the International Criminal Court. U.N. SCOR, 60th Sess., 5158th mtg. at 2, U.N. Doc. S/PV.5158 (Mar. 31, 2005). See generally S.C. Res. 1593 (Mar. 31, 2005) (referring the situation in Darfur to the International Criminal Court).

forms of engagement indicate that China has left open the possibility of full participation in the ICC.

As of September 1, 2019, the ICC has been in operation for more than 15 years and has 122 member states.<sup>7</sup> There appears to be an irreversible momentum towards the establishment and ongoing refinement of a system of international criminal justice designed to bring to account those responsible for international crimes. Historically, China was involved and played a significant role in the establishment of the Nuremberg and Tokyo International Military Tribunals and the United Nations International Criminal Tribunals for the former Yugoslavia and for Rwanda.<sup>8</sup> China's reluctance to join the ICC, however, has led to doubts regarding China's international reputation as a large and responsible nation upholding international justice and human rights. The ICC, on the other hand, requires sustained support and cooperation from states in order to be truly representative and effective. Representing one-fifth of the world's population and being part of the most underrepresented region at the ICC, China's participation would be a step towards the Court's universality. With no enforcement mechanism of its own, the ICC's effective functioning is largely dependent on the cooperation it receives from party states. Lack of cooperation by non-party states, especially major powers such as China, the U.S., and Russia, will severely constrain its effectiveness.

While China is on its way to becoming a global superpower, it still refers to itself as the world's largest developing country and places great emphasis on the principle of sovereignty. The various Chinese concerns towards the ICC are likely to demonstrate its dual roles: first, as the leader of developing countries trying to prevent unjustified encroachments into their domestic affairs and second, as a global power to guard against the weakening of its authority among the United Nations Security Council and its permanent members. Thus, a close examination of the Chinese perspective will feed into broader debates on the trends of state engagement and disengagement with the ICC among different world blocs. Those

---

<sup>7</sup> *The States Parties to the Rome Statute*, INTERNATIONAL CRIMINAL COURT, [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx) [https://perma.cc/RM4Y-ZXSU].

<sup>8</sup> See Zhaoxing Li, in U.N. SCOR, 49th Sess., 3453d mtg. at 11, U.N. Doc. S/PV.3453 (Nov. 8, 1994) (expressing China's support for the creation of the International Criminal Tribunal for Rwanda); Jian Chen, in U.N. SCOR, 48th Sess., 3175th mtg. at 7, U.N. Doc. S/PV.3175 (Feb. 22, 1993) (expressing China's support for the creation of the International Criminal Tribunal for the Former Yugoslavia).

concerns involve questions about national sovereignty, non-interference in particular, that are not singular to China, but are shared by most of the other Asian states which have not ratified the Statute.<sup>9</sup> The overall relationship between Asia and the ICC can be described as one of particular hesitation.<sup>10</sup> China, as the most populous and powerful country in the region, is an influential actor. As such, addressing conceivable legal obstacles for China's accession to the ICC could potentially inspire other Asian states to engage more directly with the Court.

China's relationship with the ICC is also part of its broader dialogue with international adjudication and international law. Given its rapidly rising power, China has revised its traditional pattern of distancing itself from international mechanisms of a judicial character,<sup>11</sup> and there have been substantial Chinese movements in relation to international adjudication in certain areas since the 1990s.<sup>12</sup> However, the level of confidence held by China in engaging with international adjudicative bodies has not yet transmitted to those governing human rights issues. A study on Chinese concerns about the ICC will help better explain why this hesitancy has persisted despite China's fast-growing competence in international adjudication and global legal affairs. These broader implications suggest the need for a profound and deep understanding of China's position on the ICC.

The Chinese position towards the ICC is based on a range of specific concerns, which can be grouped into two kinds. One is on

---

<sup>9</sup> See Xing Yun, *Asia's Reticence Towards Universal Jurisdiction*, 4(1) GRONINGEN J. INT'L L. 54, 58 (2016) (explaining Asian states' imperative to protect national sovereignty and their commitment to the principle of non-intervention, rooted in their historical experience of imperialism, which can limit their participation in and hinder the efforts of international organizations).

<sup>10</sup> See Simon Chesterman, *International Criminal Law with Asian Characteristics?* 14-16 (Nat'l Univ. of Sing. L. Working Paper No. 2014/002, 2014) (noting the low proportion of Asian states that accept the International Criminal Court's jurisdiction and similarly, the lack of Asian state engagement in the Court's discussions).

<sup>11</sup> See Phil C. W. Chan, *China's Approaches to International Law since the Opium War*, 27 LEIDEN J. INT'L L. 859, 886 (2014) (explaining that China's reticence to participate in international judicial organizations is underpinned by a belief that interstate conflicts should be resolved through negotiation rather than legal proceedings).

<sup>12</sup> See Dan Zhu, *China, the International Criminal Court, and International Adjudication*, 61 NETH. INT'L L. REV. 43, 55 (2014) (noting China's increased involvement in international adjudication in the economic and technical areas, although its involvement has been least pronounced in the domain of human rights).

the jurisdictional issue of the ICC, and the other concerns the definition of the core crimes under the Court's jurisdiction. While the Chinese concerns about the core crimes are ICC-specific, the jurisdictional concerns have historical resonance with China's traditional approach towards international judicial bodies, which includes a strong emphasis on a strict concept of sovereignty. The principle of complementary jurisdiction was supported by China throughout the whole negotiation process, but China had reservations over the way in which the principle of complementarity was eventually implemented in the Rome Statute. Given the centrality of state sovereignty to the Chinese thinking in international legal matters, the ICC's complementary jurisdiction and its practical application hold great importance to China's consideration of its relationship with the ICC.

While concern with complementary jurisdiction was articulated by the Chinese authorities as one of the legal barriers preventing its move towards full participation in the ICC in 1998, the Court has been in operation for over a decade, and there have been substantive developments both in law and in practice surrounding the ICC Statute. Undoubtedly, back in 1998, there was still a lack of clarity as to precisely how aspects of the complementarity principle would apply in practice; matters like this would only become clear after the Court had the opportunity to consider, in detail, the relevant terms of the Rome Statute governing complementary jurisdiction during the course of proceedings brought before it. The question remains as to whether the Chinese concerns have become less robust or have been cured in the light of relevant developments.

The Chinese perspective on the ICC's complementarity regime, however, has been subject to relatively little sustained academic attention to date. Although there is a growing body of literature discussing the overall China-ICC relationship from either a legal,<sup>13</sup>

---

<sup>13</sup> See Jianping Lu & Zhixiang Wang, *China's Attitude Towards the ICC*, 3 J. INT'L CRIM. JUST. 608, 619 (2005) (setting forth reasons in favor of Chinese participation in the ICC, including mutual interests, the ICC's capacity to adjudicate issues concerning non-state parties, and the rights associated with State Party status); see, e.g., Dan Zhu, *From Tokyo to Rome: A Chinese Perspective*, in HISTORICAL WAR CRIMES TRIALS IN ASIA 31 (Daqun Liu & Binxin Zhang eds., 2016) (tracing China's reluctance to engage in international criminal tribunals, in part, to the perceived deficiencies of the International Military Tribunal for the Far East after World War II, but also reiterating China's longstanding support of the establishment and development of the International Criminal Court).

policy,<sup>14</sup> or comparative perspective,<sup>15</sup> as well as the Chinese attitude towards the core crimes under the Rome Statute,<sup>16</sup> almost no systemic studies have been made on China's specific concerns regarding the ICC's jurisdictional regime. This article, therefore, aims to fill the academic vacuum by critically examining the Chinese position in the context of the design and emerging practice of the ICC's complementarity regime. Against the above background, the article is structured as follows. It first provides a description of China's engagement with negotiations on the complementary jurisdiction of the ICC and the arguments made by the Chinese authorities during this process. It then examines the Chinese concerns relating to complementarity, both in the abstract and in light of the subsequent developments, to see if they are legally sound and still as significant as they first appeared. As China's position on the ICC's complementarity system is partly informed by its domestic situation, this article continues to assess the extent to which China's national criminal judicial system meets international standards. In addition, as China and other Asian states traditionally hold an almost absolutist understanding of national sovereignty and

---

<sup>14</sup> See Congrui Qiao, *On Discrepancy and Synergy Between China and the International Criminal Court*, FICHL Policy Brief Series, no. 72, 2016, at 4 (recognizing the forces drawing China into participating more actively with the International Criminal Court in competition with concerns reinforcing China's reservations to do so); see, e.g., Ken Yang, *Prudence without Collateral Damage: China and International Criminal Justice*, FICHL Policy Brief Series, no. 61, 2016, at 2 (discussing negative views in the international community concerning China's reservations to engage in international criminal law initiatives, by way of perceptions concerning a Chinese newspaper's editorial in 2015).

<sup>15</sup> See Suzannah Linton, *India and China Before, At, and After Rome*, 16 J. INT'L CRIM. JUST. 265, 265 (2018) (comparing China and India's participation in the creation and development of the International Criminal Court); see, e.g., Alexander Dukalskis, *Northeast Asia and the International Criminal Court: Measuring Normative Disposition*, 17 J. E. ASIAN STUD. 29, 29 (2017) (comparing the interactions between the International Criminal Court and certain Northeast Asian countries, including China, South Korea, North Korea, and Japan).

<sup>16</sup> See Dan Zhu, *China, Crimes against Humanity and the International Criminal Court*, 16 J. INT'L CRIM. JUST. 1021, 1023 (2018) (examining Chinese concerns regarding the definition of crimes against humanity under the ICC's jurisdiction and its impact on China's future accession to the Court.); Dan Zhu, *China, the Crime of Aggression, and the International Criminal Court*, 5 ASIAN J. INT'L L. 94, 95 (2015) (analyzing China's concerns regarding the inclusion of the crime of aggression in the International Criminal Court's jurisdiction); Jing Guan, *The ICC's Jurisdiction over War Crimes in Internal Armed Conflicts: An Insurmountable Obstacle for China's Accession?*, 28 PENN ST. INT'L L. REV. 703, 754 (2010) (examining China's concerns over the International Criminal Court's jurisdiction over war crimes in international conflicts and the ways in which these concerns should not inhibit China from joining the Court).

non-interference in relation to matters involving human rights, this article consequently questions how that traditional approach adopted by these Asian states may or may not explain their resistance to ICC participation in the context of complementarity. Since the ICC is part of a broader landscape of international courts and tribunals, this article also considers the substance of the specific Chinese concerns regarding complementary jurisdiction in light of China's engagement with international judicial bodies, and some of the traditional concerns that have had an impact on that engagement. It concludes by assessing the extent to which the Chinese concerns about complementarity would affect China's accession to the ICC in years to come.

## 2. THE NEGOTIATION HISTORY OF THE ICC'S COMPLEMENTARITY REGIME AND CONCERNS OF CHINA

The principle of complementarity is widely regarded as one of the cornerstones of the architecture of the Rome Statute.<sup>17</sup> In the quest for agreement on the Statute, the relationship between the International Criminal Court and national criminal jurisdictions proved to be a pivotal issue at the heart of states' concerns about their sovereignty. China, whilst supporting the establishment of international criminal tribunals, was reluctant to create a body that could impinge on national sovereignty.<sup>18</sup>

### 2.1 China's sovereignty concerns and complementarity

This kind of concern can be traced back to the establishment of the ad hoc tribunals, which raised for the first time the question of the appropriate relationship between the jurisdiction of national courts and that of an international criminal tribunal.<sup>19</sup> While the

---

<sup>17</sup> See, e.g., Markus Benzing, *The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity*, 7 MAX PLANCK Y.B. U.N. L. 591, 593 (2003) (describing the centrality of complementarity in the ICC Statute).

<sup>18</sup> See John T. Holmes, *The Principle of Complementarity*, in THE MAKING OF THE ROME STATUTE, ISSUES, NEGOTIATIONS, RESULTS 41, 41 (Roy S. Lee et al. eds., 1999).

<sup>19</sup> See Bartram Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 YALE J. INT'L L. 383, 385 (1998).

Statutes of the International Criminal Tribunal for the former Yugoslavia ("ICTY") and International Criminal Tribunal for Rwanda ("ICTR") recognize that national courts have concurrent jurisdiction over crimes within the competence of these tribunals, they endow the international bodies with primacy over national courts.<sup>20</sup> China expressed its concern that the adoption of these Statutes giving the ad hoc tribunals preferential jurisdiction was not in compliance with the principle of state judicial sovereignty.<sup>21</sup>

While the intrusion upon sovereignty under the primacy model could be accommodated by China in very specific instances,<sup>22</sup> China has been reluctant to yield its jurisdiction to an international criminal court permanently. In 1994, China cautioned that "the proposed court [the ICC] should not replace or override systems of national criminal or universal jurisdiction: the relationship must be a complementary one."<sup>23</sup> In 1996, China reiterated that "[s]tates must bear the primary responsibility for the prevention and punishment of international crimes. In the majority of cases, the judicial system of a State played a leading role which could not be superseded. An international criminal court could function only as an adjunct to national courts."<sup>24</sup>

The Chinese concerns, to a certain extent, were accommodated by the concept of complementarity, which provided for the primacy of states' jurisdiction. As a key element of the Draft Statute for an International Criminal Court prepared by the International Law Commission, the principle of complementarity was regarded by China as "the most important guiding principle of the Statute."<sup>25</sup> It,

---

<sup>20</sup> See International Criminal Tribunal for Rwanda Res. 1901, art. 8 (Dec. 16, 2009); International Criminal Tribunal for the former Yugoslavia Res. 1877, art. 9(1) (July 7, 2009).

<sup>21</sup> See Zhaoxing Li, *in* U.N. SCOR, 49th Sess., 3453d mtg. at 11, U.N. Doc. S/PV.3453 (Nov. 8, 1994) (reiterating China's opposition to establishing an international tribunal by Security Council resolution); Zhaoxing Li, *in* U.N. SCOR, 48th Sess., 3217th mtg. at 33, U.N. Doc. S/PV.3217 (May 25, 1993) (stating China's concerns about the precedent raised).

<sup>22</sup> See Zhaoxing Li 49th Sess., *supra* note 21, at 11; Zhaoxing Li 48th Sess., *supra* note 21, at 33.

<sup>23</sup> Kening Zhang, *in* U.N. GAOR, 6th Comm., 49th Sess., 18th mtg. at 10, U.N. Doc. A/C.6/49/SR.18 (Oct. 26, 1994).

<sup>24</sup> Shiqiu Chen, *in* U.N. GAOR, 6th Comm., 51st Sess., 28th mtg. at 20, U.N. Doc. A/C.6/51/SR.28 (Oct. 31, 1996).

<sup>25</sup> Guangya Wang, *in* U.N. Diplomatic Conference Official Records of Plenipotentiaries on the Establishment of an International Criminal Court, at 75, U.N. Doc. A/CONF.183/13 (Vol. II) (June 16, 1998); *see also* Wensheng Qu, *supra* note 3, at 6 (declaring the importance of complementarity).

however, raised concerns about how to precisely define the complementarity regime.<sup>26</sup> In the view of China, the principle of complementarity was not fully implemented in the operative part of the draft statute, and some provisions appeared to be contrary to it,<sup>27</sup> including the term “unwillingness” defined by Article 17 of the Rome Statute,<sup>28</sup> and the automatic jurisdiction under Article 12.<sup>29</sup>

## 2.2 The criteria of admissibility and concerns of China

Complementarity was eventually regulated by the Rome Statute’s provisions on the admissibility of a case and it thus belongs to the broader issue of admissibility, rather than jurisdiction. Article 17(2) of the ICC Statute declares that “having regard to the principles of due process recognized by international law,” the Court is to consider whether the purpose of the national proceedings was to shelter an offender,<sup>30</sup> whether they have been unjustifiably delayed,<sup>31</sup> or whether they fail to be conducted in a manner which was independent or impartial, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.<sup>32</sup> In the view of China, this provision “hardly reflected the principle of complementarity; on the contrary, the Court seemed to have become an appeals court sitting above the national court.”<sup>33</sup>

In fact, during the negotiating process, China was not alone in fearing the Court would become an appeal court.

---

<sup>26</sup> See Shiqiu Chen, in U.N. GAOR, 6th Comm., 50th Sess., 25th mtg. at 13–14, U.N. Doc. A/C.6/50/SR.25 (Oct. 30, 1995) (arguing that the ICC should not become a “supranational court”).

<sup>27</sup> See *id.* (arguing that, regretfully, the principle of complementarity had not been fully implemented in the operative part).

<sup>28</sup> Wensheng Qu, *supra* note 3, at 6 (arguing that Article 17 might allow the ICC to negate a decision of a national court).

<sup>29</sup> See Jielong Duan, in U.N. GAOR, 6th Comm., 52nd Sess., 11th mtg. at 12, U.N. Doc. A/C.6/52/SR.11 (Nov. 4, 1997) (arguing against giving the ICC jurisdiction over all “core crimes”).

<sup>30</sup> See Rome Statute of the International Criminal Court art.17, ¶ 2(a), July 17, 1998, 2187 U.N.T.S. 38544 (entered into force July 1, 2002).

<sup>31</sup> See *id.* at art. 17, ¶ 2(b).

<sup>32</sup> See *id.* at art. 17, ¶ 2(c).

<sup>33</sup> Wensheng Qu, *supra* note 3, at 6.

While most delegations agreed that the ICC could take jurisdiction where no national proceedings were underway, there was disagreement about whether the ICC should have the power to step in where a national investigation or prosecution was underway, but was in reality a “sham” proceeding designed to thwart international justice.<sup>34</sup>

Many delegations were sensitive to the potential for the Court to function as a kind of appeals court, passing judgments on the decision and proceedings of national judicial systems.<sup>35</sup> They were therefore opposed to the ICC being empowered to judge national judicial systems.<sup>36</sup> China, in particular, expressed the view that “[t]he International Criminal Court had only a complementary role to play in the event that a State’s judicial system collapsed,”<sup>37</sup> but “[i]ts jurisdiction should not apply when a case was already being investigated, prosecuted, or tried by a given country.”<sup>38</sup>

At the beginning of the negotiations, China cautioned that “[t]he international criminal court should not supplant national courts, nor should it become a supranational court or act as an appeal court for national court judgements,” otherwise it “would violate the principle of complementarity.”<sup>39</sup> As negotiations continued, resistance to the inclusion of the concept of willingness started to decline. The majority view was that a failure to include unwillingness as a ground for the ICC to assume jurisdiction could amount to an invitation for states to block the Court’s jurisdiction by initiating investigation or prosecutions merely to protect the perpetrators.<sup>40</sup> In attempting to allay the concerns that the ICC would become an appellate body to review decisions of domestic courts, the delegations agreed that the criteria permitting ICC

---

<sup>34</sup> DAN ZHU, CHINA AND THE INTERNATIONAL CRIMINAL COURT, 82 (Zhimin Chen et al. eds, 2018); see also Philippe Kirsch & Darryl Robinson, *Reaching Agreement at the Rome Conference*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 69 (Antonio Cassese et al. eds., 2002).

<sup>35</sup> See Holmes, *supra* note 18, at 49.

<sup>36</sup> See Jeffrey L. Bleich, *Complementarity*, 25 DENV. J. INT'L L. & POL'Y 281, 284 (1997).

<sup>37</sup> Wensheng Qu, *supra* note 3, at 6.

<sup>38</sup> Guangya Wang, *supra* note 25, at 75.

<sup>39</sup> Shiqiu Chen, *supra* note 26, at 13–14.

<sup>40</sup> See Sharon A. Williams and William A. Schabas, *Article 17*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT – OBSERVERS’ NOTES, ARTICLE BY ARTICLE 605, 610 (Otto Triffterer ed., 2008); Holmes, *supra* note 18, at 48.

intervention should be as objective as possible.<sup>41</sup> Yet it is clear that the Court has to maintain necessary subjectivity in order to have a degree of “latitude” when deciding on states’ unwillingness.<sup>42</sup> The phrase “principles of due process recognized by international law” was added to the chapeau of Article 17(2) in response to concerns raised by some delegations, including China, that the three subparagraphs gave the Court unduly broad discretion to determine unwillingness and insufficient objective criteria on which the Court should base its ruling.<sup>43</sup> This language was originally intended to be added to the paragraph that dealt with the independence and impartiality of the national proceedings in order to ensure greater objectivity.<sup>44</sup> As the negotiations continued, several delegations favored the change, yet indicated their concern that this still left other criteria relating to unwillingness less objective. Accordingly, it was added to the chapeau that the phrase “principles of due process recognized by international law” would serve all the subparagraphs.<sup>45</sup>

This solution, however, did not satisfy China, who had proposed a different approach in order to make the criteria more objective. The suggestion made by the Chinese delegation was that in Paragraph 2(a) the words “in violation of the country’s law” be added after the words “the national decision was made.”<sup>46</sup> Further, in Paragraph 2(b), a reference to “national rules of procedure” should be included, and in Paragraph 2(c) a reference to “the general applicable standards of national rules of procedure.”<sup>47</sup> However, China’s preference for making reference to national law and procedure in determining the unwillingness of a state to carry out an investigation was eventually rejected by the Rome Conference. After the adoption of the Rome Statute, China reiterated its concerns that:

As stipulated in article 17, the Court could judge ongoing legal proceedings in any State, including a non-party, in

---

<sup>41</sup> See John T. Holmes, *Complementarity: National Courts versus the ICC*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 667, 673–74 (Antonio Cassese et al. ed., 2002).

<sup>42</sup> See Holmes, *supra* note 18, at 48.

<sup>43</sup> See *id.* at 53.

<sup>44</sup> See *id.*

<sup>45</sup> Williams & Schabas, *supra* note 40, at 612.

<sup>46</sup> Yanduan Li, in Rome Diplomatic Conference Official Records, U.N. Doc. A/CONF.183/C.1/SR.12, June 23, 1998, 218.

<sup>47</sup> *Id.* at 218.

order to determine whether [ . . . ] the trial was fair, and could exercise its jurisdiction on the basis of that decision. In other words, the Statute authorized the Court to judge the judicial system and legal proceedings of a State and negate the decision of the national court. What was worse, the criteria for determining whether a trial was fair or whether a State had the intention to shield a criminal were very subjective and ambiguous. For instance, under article 17, paragraph 2, the normal legal proceedings of a State might be determined to be unfair or intended to shield the criminal. It was highly possible that such a provision would be abused for political purposes. In Rome, his delegation had worked hard for the adoption of a more objective set of criteria, but without success.<sup>48</sup>

### 2.3. *Automatic jurisdiction and concerns of China*

China considered the automatic jurisdiction of the ICC to be inconsistent with the principle of complementarity. In fact, the acceptance of the jurisdiction of the Court was another controversial issue in all the negotiations surrounding the establishment of the ICC.<sup>49</sup> One question was how a state would accept the Court's jurisdiction—whether states would automatically accept the court's jurisdiction over crimes as soon as ratification took place, or whether they would have to give specific acceptance to the Court's jurisdiction over each particular crime.<sup>50</sup> China argued for an opt-in system whereby jurisdiction over certain crimes was not conferred automatically on the Court by the sole fact of becoming a party to the ICC Statute, but that in addition, a special declaration was needed to that effect.<sup>51</sup> However, the opt-in system favored by the

---

<sup>48</sup> Wensheng Qu, *supra* note 3, at 6.

<sup>49</sup> See Sharon A. Williams & William A. Schabas, *Article 12*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT—OBSERVERS' NOTES, ARTICLE BY ARTICLE 547, 548 (Otto Triffterer ed., 2008) (describing how a "fundamental issue in all stages of the debate was whether . . . the ICC would have vested in it inherent jurisdictions to prosecute the crimes listed in article 5 on account of ratification or acceptance of the Statute").

<sup>50</sup> See Philippe Kirsch & John T. Holmes, *The Rome Conference on an International Criminal Court: The Negotiating Process*, 93 AM. J. INT'L L. 2, 3 (1999).

<sup>51</sup> See Shiqui Chen, *supra* note 26, at 14 (stating that the court's jurisdiction would derive from the voluntary consent of parties and would not be mandatory); see also Shiqui Chen, *supra* note 24, at 20; Guangya Wang, in Opening Speech to the

Chinese authorities was not adopted by the Rome Statute; rather, Article 12 granted the ICC automatic jurisdiction over the crimes listed in Article 5 without the additional consent of states parties.<sup>52</sup> The Chinese delegation pointed out that “[t]he inherent jurisdiction of the court, when extended to cover all core crimes, would accord precedence to the court over national courts; that was clearly at variance with the principle of complementarity.”<sup>53</sup>

The logic of China’s proposition can be found in the argument by James Crawford, who noted that, under Article 12, “the requirement of separate consent to jurisdiction is removed for states parties to the Statute.”<sup>54</sup> As a corollary, he pointed out that “the principle of complementarity has no effect in determining the existence of [the ICC’s] jurisdiction.”<sup>55</sup> It would retain its force only in terms of the exercise of jurisdiction, which “is to be given effect by the Prosecutor in deciding whether to take forward an investigation, and by the Court in deciding whether to authorise a prosecution” at the level of admissibility.<sup>56</sup> Under the opt-in system provided by the International Law Commission (ILC) draft, the principle of complementarity had effects on both levels: the existence of the ICC’s jurisdiction, which was determined by the state consent regime, and the exercise of the ICC’s jurisdiction, which was effectuated by the admissibility system. The Rome Statute, however, defines the question of complementarity as pertaining to the admissibility of a case rather than to the jurisdiction of the Court.<sup>57</sup> In other words, state consent as a first layer of protection for state sovereignty at the level of the existence of jurisdiction has been removed by the Rome Statute; accordingly,

---

UN Diplomatic Conference on the Establishment of an International Criminal Court, June 16, 1998, at 8, <http://www.un.org/icc/speeches/616cpr.htm> [<https://perma.cc/6T2L-QGLP>]; Yanduan Li, in *Rome Diplomatic Conference Official Records*, U.N. Doc. A/CONF.183/C.1/SR.8, June 19, 1998, ¶¶ 37-38.

<sup>52</sup> The Rome Statute of the International Criminal Court art. 12, July 17, 1998, 2187 U.N.T.S. 90 (entered into force Jul. 1, 2002).

<sup>53</sup> Jielong Duan, *supra* note 29, at 12; *see also* Shiqui Chen, *supra* note 26, at 20.

<sup>54</sup> James Crawford, *The Drafting of the Rome Statute*, in *FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE* 109, 147 (Philippe Sands ed., 2003).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 148.

<sup>57</sup> *See* Benzling, *supra* note 17, at 594 (explaining that because complementarity affects only a case’s admissibility, it determines when the ICC may exercise its jurisdiction, not whether the ICC has jurisdiction).

the principle of complementarity is relevant only at the admissibility stage on the level of the exercise of jurisdiction.

### 3. THE CRITERIA OF 'UNWILLINGNESS' AND CHINA'S FAIR TRIAL CONCERNS

In scrutinizing the concerns of China, it is important to first examine whether the criteria of "unwillingness" would permit the ICC to intervene only when the national proceedings are conducted for the purpose of shielding perpetrators of crimes within the jurisdiction of the ICC, or if it would allow the Court to examine all issues in relation to "due process," including "fair trial," as perceived by China. In the latter situation, the ICC's role with respect to national criminal jurisdiction would be more analogous to that of an international appeals court, vested with review authority, passing judgment on the decisions and proceedings of national judicial systems. If this is the case, perhaps the concerns voiced by China are warranted.

#### *3.1. The controversies surrounding the criteria of "unwillingness" and concerns of China*

The reference to "principles of due process recognized by international law" in the chapeau of Article 17(2) has given rise to controversies over its interpretation. Scholars' views are divided on whether a violation of human rights at the domestic level renders a case admissible before the ICC. On the one hand, some have argued that:

[T]he phrase "having regard to the principles of due process recognized by international law" . . . requires that the assessment of the quality of justice, as reflected in the subparagraphs (a)-(c) [of Article 17(2)], takes into consideration "procedural" as well as "substantive" due process rights . . . enshrined in human rights instruments and developed in the jurisprudence of international judicial bodies.<sup>58</sup>

---

<sup>58</sup> MOHAMED M. EL ZEIDY, *THE PRINCIPLE OF COMPLEMENTARITY IN INTERNATIONAL CRIMINAL LAW: ORIGIN, DEVELOPMENT AND PRACTICE* 169 (2008).

Therefore, a state's failure to guarantee a defendant's due process rights, most notably fair trial rights as recognized in the International Covenant on Civil and Political Rights (ICCPR), makes a case admissible under Article 17 of the Rome Statute.<sup>59</sup> On the other hand, the view has been expressed "that the purpose of the complementarity principle (and the main purpose of the Rome Statute) is to prevent impunity and not to secure the suspect's fair trial."<sup>60</sup> The ICC will not be equally entitled to step in when violations of due process by the national court occur to the detriment, rather than to the benefit, of the person subjected to the proceedings.<sup>61</sup>

---

<sup>59</sup> See Mark S. Ellis, *The International Criminal Court and Its Implication for Domestic Law and National Capacity Building*, 15 FLA. J. INT'L L. 215, 241 (2002) (explaining that states that fail to protect the due process rights of defendants may be subject to the ICC exercising its jurisdiction); see also Federica Gioia, *State Sovereignty, Jurisdiction, and 'Modern' International Law: The Principle of Complementarity in the International Criminal Court*, 19 LEIDEN J. INT'L L. 1095, 1111 (2006) (discussing how "allowing the ICC to remedy the failures of national courts in complying with due process standards seems entirely consistent with this role" as an international body complementing national jurisdictions in meting out fair punishment for the most serious crimes); Jann K. Kleffner, *The Impact of Complementarity on National Implementation of Substantive International Criminal Law*, 1 J. INT'L CRIM. JUST. 86, 112-13 (2003) (reaffirming that, under complementarity, states lose the right to exercise jurisdiction in criminal cases if they fail to meet international standards of due process); cf. Albin Eser, *For Universal Jurisdiction: Against Fletcher's Antagonism*, 39 U. TULSA L. REV. 955, 963 (2004) (testimony of Monroe Leigh) (arguing that "the Treaty of Rome contains the most comprehensive list of due process protections which has so far been promulgated").

<sup>60</sup> JO STIGEN, *THE RELATIONSHIP BETWEEN THE INTERNATIONAL CRIMINAL COURT AND NATIONAL JURISDICTIONS: THE PRINCIPLE OF COMPLEMENTARITY* 221 (2008).

<sup>61</sup> See ROBERT CRYER ET AL., *AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE* 156-57 (2d ed. 2010) (explaining that ICC intervention requires a showing that the State is unwilling or unable to conduct "proceedings genuinely" with the "intent to bring the person concerned to justice"); see also Benzing, *supra* note 17, at 598 (noting that the ICC "was established to address situations" in which "a breach of human rights standards works in favour of the accused"); cf. Enrique Carnero Rojo, *The Role of Fair Trial Considerations in the Complementarity Regime of the International Criminal Court: From 'No Peace without Justice' to 'No Peace with Victor's Justice'?*, 18 LEIDEN J. INT'L L. 829, 869 (2005) (arguing that the human rights mentioned in Article 17(2) were not read as standards for the Court to protect the individual against possible abuses by the state, but as standards for the Court to prevent state authorities from shielding a person from accountability). *But see* Kevin Jon Heller, *The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process*, 17 CRIM. L. F. 255, 257 (2006) (arguing that Article 17 permits the Court to find a State "unwilling or unable" only if its legal proceedings are designed to make a defendant more difficult to convict. If its legal proceedings are designed to make the defendant easier to convict, the provision requires the Court to defer to the State no matter how unfair those proceedings may be).

The latter view seems to be more persuasive, for it finds support in the wording of the Statute and its “preparatory works.” “The general rule of interpretation laid down in [Article 31 paragraph 1 of the Vienna Convention on the Law of Treaties] does not allow establishing an abstract meaning of a phrase, divorced from the place which that phrase occupies in the text to be interpreted.”<sup>62</sup> Accordingly, the chapeau and the three subparagraphs under Article 17(2) of the ICC Statute should be interpreted conjunctively: the Court can only find a state to be unwilling if the national proceeding both violates international due process and satisfies one of the three conditions specified in Article 17(2), which more or less include the requirement of shielding the person concerned from justice. As such, it is not possible to “read in” a stand-alone due process requirement to Article 17(2), given that all three subparagraphs deal with circumstances benefitting the accused, not prejudicing her rights. During the Rome negotiations, Italy proposed a definition of unwillingness which mandated the ICC to assess whether the fundamental rights of the accused were respected or not; that proposal was consequently rejected.<sup>63</sup> This is clear evidence that the drafters of the Rome Statute did not intend to grant the ICC jurisdiction to look into stand-alone due process violations. The purpose of the Statute also leaves no doubt that the ICC was not created to monitor the fairness of the domestic proceedings. As such, unwillingness cannot be declared simply because domestic proceedings fail to ensure international fair trial standards.

Perhaps a close analogy can be made between Article 17 analysis in the ICC and the ICTY’s experience with Article 11 *bis* under the Rules of Procedure and Evidence, which permits the Tribunal to transfer some defendants who are parties for domestic trial to states, provided certain criteria are met.<sup>64</sup> Under Rule 11 *bis*, the ICTY

---

<sup>62</sup> Oliver Dörr, *Article 31. General Rule of Interpretation, in VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY* 543 (Oliver Dörr & Kirsten Schmalenbach eds., 2012).

<sup>63</sup> See *Draft Proposal by Italy on Article 35 (Issues of Admissibility)*, U.N. Doc. A/AC.249/1997/WG.3/IP.4 (Aug. 5, 1997) (stating how “[i]n deciding on issues of admissibility under this article, the Court shall consider whether . . . (ii) the said investigations or proceedings . . . were or are conducted with full respect for the fundamental rights of the accused”).

<sup>64</sup> See International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, Rules of Procedure and Evidence, Rule 11 *bis*, U.N. Doc. IT/32/Rev. 50 (July 8, 2015).

judges must be satisfied that the accused would receive a fair trial domestically and that the Tribunal's jurisprudence has set out specific factors for assessing fairness in domestic proceedings.<sup>65</sup> It should, however, be noted that the ICTY was established through a very different political process and has primacy over domestic courts,<sup>66</sup> which is radically different than the ICC's complementarity system. The creators of the ICC have already ruled out the possibility of granting the Court jurisdiction on the basis of due process violations in national proceedings. Even if one might be politically sympathetic to the need to respect due process rights,<sup>67</sup> the door is now closed for such considerations under the current legal framework of the Rome Statute. However, the practice of the ICC, so far, has suggested otherwise, and it is likely to intensify China's human rights concerns.

### 3.2. *The ICC's practice in relation to 'unwillingness'*

The challenges brought by Libya to the admissibility of the cases against Saif Gaddafi and Abdullah Al-Senussi offered the ICC a chance to clarify the extent to which domestic fair trial violations matter for the purpose of assessing unwillingness under Article 17 of the Rome Statute. The government of Libya filed submissions under Article 19(2)(b) of the Rome Statute to challenge the admissibility before the ICC of the cases concerning Gaddafi and Al-

---

<sup>65</sup> See Samuel C. Birnbaum, *Predictive Due Process and the International Criminal Court*, 48 VAND. J. TRANSNAT'L L. 307, 346-347 (2015) (highlighting how "[i]n most [Rule 11 *bis* decisions], the panel recalls [the due-process factors established in *Mejacic*], then cross-references them against the criminal code of the country to which the accused is to be transferred and determines if there are any significant gaps").

<sup>66</sup> See S.C. Res. 827, at 2 (May 25, 1993) (resolving that "an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991").

<sup>67</sup> See Angela Walker, *The ICC Versus Libya: How to End the Cycle of Impunity for Atrocity Crimes by Protecting Due Process*, 18 UCLA J. INT'L L. & FOREIGN AFF. 303, 333-38 (2014) (arguing that the ICC must assume a role in protecting the due process right of the accused to be "a 'meaningful' enforcement mechanism"); see also Jennifer Trahan, *Is Complementarity the Right Approach for the International Criminal Court's Crime of Aggression? Considering the Problem of "Overzealous" National Court Prosecutions*, 45 CORNELL INT'L L. J. 569, 596 (2013) (suggesting that ICC judges could more liberally interpret Article 17 as making a case admissible before the ICC when domestic courts fail to provide due process).

Senussi on May 1, 2012, and April 2, 2013, respectively.<sup>68</sup> Libya submitted that the cases were inadmissible on the grounds that its national judicial system was actively investigating both individuals and their alleged crimes.<sup>69</sup> On the other hand, Gaddafi and Al-Senussi's defense argued that the Court should declare a case admissible if the accused would not receive an acceptable fair trial in accordance with the basic international standards of due process.<sup>70</sup> In the Gaddafi case, both the Pre-Trial Chamber and the Appeals Chamber did not consider it necessary to address the issue of fair trial in the context of unwillingness, as Libya was unable to genuinely carry out investigations.<sup>71</sup>

In assessing the admissibility of Al-Senussi's case, the Pre-Trial Chamber had to deal with the arguments of the defense, which alleged that, due to the lack of legal representation as well as lack of independence and impartiality, the domestic proceedings against the defendant were being conducted in violation of his fundamental

---

<sup>68</sup> See *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Case No. ICC-01/11-01/11, Application on Behalf of the Government of Libya Pursuant to Article 19 of the ICC Statute (May 1, 2012), [https://www.icc-cpi.int/CourtRecords/CR2012\\_05322.PDF](https://www.icc-cpi.int/CourtRecords/CR2012_05322.PDF) [https://perma.cc/4BKG-Z4SV]; *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Case No. ICC-01/11-01/11, Application on Behalf of the Government of Libya Relating to Abdullah Al-Senussi Pursuant to Article 19 of the ICC Statute (Apr. 2, 2013), [https://www.icc-cpi.int/CourtRecords/CR2013\\_02635.PDF](https://www.icc-cpi.int/CourtRecords/CR2013_02635.PDF) [https://perma.cc/8VBJ-4JHQ].

<sup>69</sup> See *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Case No. ICC-01/11-01/11-130-Red Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute, ¶ 68 (May 1, 2012), [https://perma.cc/4BKG-Z4SV]; *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Case No. ICC-01/11-01/11-307-Red, Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute, ¶¶ 42-52 (Apr. 2, 2013), [https://perma.cc/8VBJ-4JHQ].

<sup>70</sup> See *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Case No. ICC-01/11-01/11-190-Corr-Red, Public Redacted Version of the Corrigendum to the "Defence Response to the 'Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute'," ¶ 37-46 (July 31, 2012), [https://www.icc-cpi.int/CourtRecords/CR2012\\_07805.PDF](https://www.icc-cpi.int/CourtRecords/CR2012_07805.PDF) [https://perma.cc/M2WN-MUVQ] (expounding upon the use of the ICC to implement fair trials).

<sup>71</sup> See *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Case No. ICC-01/11-01/11, Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi, ¶ 216 (May 31, 2013), [https://www.icc-cpi.int/CourtRecords/CR2013\\_04031.PDF](https://www.icc-cpi.int/CourtRecords/CR2013_04031.PDF) [https://perma.cc/5ZH5-6RZU]; *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Case No. ICC-01/11-01/11 OA 4, Judgment on the Appeal of Libya Against the Decision of Pre-Trial Chamber I of 31 May 2013 Entitled "Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi", ¶ 210 (May 21, 2014), [https://www.icc-cpi.int/CourtRecords/CR2014\\_04273.PDF](https://www.icc-cpi.int/CourtRecords/CR2014_04273.PDF) [https://perma.cc/YCT2-JHR8].

rights.<sup>72</sup> In ruling that the case against Al-Senussi was inadmissible before the Court, the Pre-Trial Chamber “emphasize[d] that alleged violations of the accused’s procedural rights are not *per se* grounds for a finding of unwillingness under Article 17 of the Statute.”<sup>73</sup> According to the Chamber, violations of procedural rights would be relevant only when they are inconsistent with the intent to bring the defendant to justice.<sup>74</sup> The Appeals Chamber subsequently affirmed the Pre-Trial Chamber’s judgment.<sup>75</sup> Addressing a variety of challenges brought by Al-Senussi, the Appeals Chamber concluded that Libya’s failure to appoint counsel for Al-Senussi did not make it unwilling to prosecute under the Rome Statute,<sup>76</sup> but its reasoning somehow sent a confusing message about whether domestic due process violations *per se* could serve as a ground for admissibility.

On one hand, the Appeals Chamber emphasized that “the Court was not established to be an international court of human rights, sitting in judgment over domestic legal systems to ensure that they are compliant with international standards of human rights.”<sup>77</sup> The Chamber suggested that the primary reason for the inclusion of Article 17(2) was not to guarantee fair trial rights of the accused.<sup>78</sup> However, it also noted that “human rights standards may assist the Court in its assessment of whether the proceedings are or were conducted ‘independently or impartially’ within the meaning of article 17(2)(c).”<sup>79</sup> The Chamber tried to strike a balance and distinguished human rights violations that did not affect the genuine nature of the justice process from those egregious violations that prevented genuine forms of justice for the accused to take

---

<sup>72</sup> See Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Case No. ICC-01/11-01/11, Decision on the Admissibility of the Case Against Abudullah Al-Senussi, ¶ 220 (Oct. 11, 2013), [https://www.icc-cpi.int/CourtRecords/CR2013\\_07445.PDF](https://www.icc-cpi.int/CourtRecords/CR2013_07445.PDF) [<https://perma.cc/CVD8-EHA8>].

<sup>73</sup> *Id.* ¶ 235.

<sup>74</sup> *Id.*

<sup>75</sup> See Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Case No. ICC-01/11-01/11 OA 6, Judgment on the Appeal of Mr. Abdullah Al-Senussi Against the Decision of Pre-Trial Chamber I of 11 October 2013 entitled “Decision on the Admissibility of the Case Against Abdullah Al-Senussi”, ¶ 170 (July 24, 2014), [https://www.icc-cpi.int/CourtRecords/CR2014\\_06755.PDF](https://www.icc-cpi.int/CourtRecords/CR2014_06755.PDF) [<https://perma.cc/AC6S-WSLC>].

<sup>76</sup> *Id.* ¶ 200.

<sup>77</sup> *Id.* ¶ 219.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* ¶ 220.

place.<sup>80</sup> The latter violations were considered by the Chamber as relevant in assessing unwillingness, but not the former.<sup>81</sup> The Chamber especially declined to countenance “proceedings that are, in reality, little more than a predetermined prelude to an execution, and which are therefore contrary to even the most basic understanding of justice.”<sup>82</sup> “The [Appeals] Chamber was clearly wary of transforming itself into a human rights tribunal, yet it was plainly so bothered by the show trial hypothetical that it left the door open for consideration of due process and human rights norms.”<sup>83</sup> The Chamber, however, did not provide any tangible criteria regarding when due process violations become so egregious as to command the Article 17 analysis. In the absence of defined terms, “the judges are left with wide discretionary powers, which carry the risk of inconsistent interpretations.”<sup>84</sup>

Although the drafters of the Rome Statute specifically rejected violations of due process as grounds for admissibility, the Appeals Chamber has nevertheless read a due process component into the language of Article 17 of the Statute. This practice has raised the issue of “overly creative judicial interpretation,”<sup>85</sup> or judicial activism, which represents a deviation in implementation of the announced public policy decisions of the legislators.<sup>86</sup> In fact, the tendency for international criminal courts or tribunals to engage in judicial activism was prevalent in the jurisprudence of the ICC’s immediate predecessors, especially the ICTY.<sup>87</sup> The definition of

---

<sup>80</sup> *Id.* ¶ 230.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> Samuel C. Birnbaum, *Predictive Due Process and the International Criminal Court*, 48 VAND. J. TRANSNAT’L L. 307, 332 (2015).

<sup>84</sup> Nidal N. Jurdi, *The Complementarity Regime of the International Criminal Court in Practice: Is it Truly Serving the Purpose? Some Lessons from Libya*, 30 LEIDEN J. INT’L L. 199, 213 (2017).

<sup>85</sup> See Chatham House, *The International Criminal Court and Libya: Complementarity in Conflict*, International Law Programme Meeting Summary, 8 (2014), [https://www.chathamhouse.org/sites/default/files/field/field\\_document/20140922Libya.pdf](https://www.chathamhouse.org/sites/default/files/field/field_document/20140922Libya.pdf) [<https://perma.cc/8PAC-23SX>].

<sup>86</sup> See Jared Wessel, *Judicial Policy-Making at the International Criminal Court: An Institutional Guide to Analyzing International Adjudication*, 44 COLUM. J. TRANSNAT’L L. 377, 386–87 (2006).

<sup>87</sup> Shane Darcy & Joseph Powderly, *The International Criminal Tribunals and the Judicial Development of International Criminal Law*, in JUDICIAL CREATIVITY AT THE INTERNATIONAL CRIMINAL TRIBUNALS 1, 3–10 (Shane Darcy & Joseph Powderly eds., 2010).

crimes against humanity is a prime example. In 1993 when the ICTY Statute was adopted, it may well have been that customary international law required a nexus between crimes against humanity and armed conflict,<sup>88</sup> or, at best, that the existence of such a requirement was subject to debate.<sup>89</sup> The majority judges of the ICTY Appeals Chamber in the *Tadić* Case nevertheless concluded that such a requirement was inconsistent with customary international law.<sup>90</sup> The subsequent negotiations to establish the ICC preponderantly took the jurisprudence of the ad hoc tribunals as reflecting customary international law and incorporated it in the Rome Statute, but the proposal to omit the armed conflict requirement was met with some resistance and a number of states, including China, were against the innovative interpretations made by *Tadić* Appeals Chamber.<sup>91</sup> Although most drafters of the Rome Statute “appreciated the results of judicial activism in the past, they were not anxious for it to be repeated.”<sup>92</sup> Keenly aware of the potential risk, the creators of the ICC equipped the Court with a well-prepared and detailed legal framework to limit possible space for judicial activism or, at a minimum, make it more difficult to justify.<sup>93</sup>

In contrast with its predecessors, the ICC Appeals Chamber’s overly creative judicial interpretation of “unwillingness” is striking, as it is not the result of interpretation or customary norms, but rather of detailed and clear wording of the Rome Statute; thus exhibiting its activist attitude. It should be noted that “judicial activism is not perceived to be the same as judicial lawmaking,” which “is an

---

<sup>88</sup> See U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, ¶ 47, U.N. Doc. S/25704 (May 3, 1993).

<sup>89</sup> See WILLIAM A. SCHABAS, *THE UN INTERNATIONAL CRIMINAL TRIBUNALS; THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE* 188 (2006).

<sup>90</sup> See *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 141 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995), <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm> [<https://perma.cc/H7P9-565Y>].

<sup>91</sup> See generally DARRYL ROBINSON & HERMAN VON HEBEL, *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, ISSUES, NEGOTIATIONS, RESULTS* 93 (Roy S. Lee et al. eds., 1999) (claiming that China and a number of Middle Eastern states continued to support the retention of a requirement of a nexus with an armed conflict at the Rome conference, which could be considered as an implicit indication that these countries did not agree with the *Tadic* Chamber on its interpretations).

<sup>92</sup> William A. Schabas, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, 6 J. INT’L CRIM. JUST. 731, 755 (2008).

<sup>93</sup> *Id.* at 755–56.

acknowledged phenomenon in international law” and an appropriate discharge of the judicial function.<sup>94</sup> Rather, courts practicing judicial activism deem themselves entitled to “ignore expressions of authoritative policy and assume a competence” to determine on their own what the law should be.<sup>95</sup> The Appeals Chamber’s decision was activist in that it was counter to both the text of the Statute and the intent of its drafters. Because the ICC was established and possesses jurisdiction solely through state consent as expressed in a multilateral treaty, the Court sacrifices what was once a sovereign prerogative by engaging in judicial activism. As observed by some commentators, when a judge invokes a particular interpretive canon to yield a desired outcome, rather than being guided by the law in light of sound and consistent methodological reasoning, it may call into question the legitimacy of the Court.<sup>96</sup> As such, the judges of the ICC should have behaved more cautiously and with due loyalty to the text of the Rome Statute and the intent of its drafters.

Since the ICC came into operation in 2002, China has kept its pledge to follow the Court’s developments closely.<sup>97</sup> China has moved on to deliver pointed remarks about the ICC’s implementation of the complementarity principle in practice, which largely echo earlier Chinese concerns made in *abstracto*. On several occasions, China stressed that “the Court should perform its functions in strict conformity with the principle of complementarity.”<sup>98</sup> After the Appeals Chamber’s ruling in Libya in 2014, China reemphasized the importance of the ICC

---

<sup>94</sup> Fuad Zarbiyev, *Judicial Activism in International Law—A Conceptual Framework for Analysis*, 3 J. INT’L DISP. SETTLEMENT 247, 253 (2012).

<sup>95</sup> MICHAEL REISMAN, LIBER AMICORUM JUDGE SHIGERU ODA 66 (Nisuke Ando et al. eds., 2002).

<sup>96</sup> Leena Grover, *A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court*, 21 EUR. J. INT’L L. 543, 583 (2010).

<sup>97</sup> See Xiaomei Guo, in U.N. GAOR, 65th Sess., 41st mtg. at 18, U.N. Doc. A/65/PV.41 (Oct. 29, 2010) (discussing how China has been closely following actions of the ICC); see also Yingfan Wang, in U.N. SCOR, 57th Sess., 4568th mtg. at 17, U.N. Doc. S/PV.4568 (Jul. 10, 2002) (stating that China plans on following the operation of the ICC closely).

<sup>98</sup> Statement of China at 11th Session of the Assembly of States Parties (Nov. 15, 2012), [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP11/GenDeba/ICC-ASP11-GenDeba-CHN-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP11/GenDeba/ICC-ASP11-GenDeba-CHN-ENG.pdf) [<https://perma.cc/RRP3-KVGD>] (transcript available in the International Criminal Court’s ASP Document Index); Huikang Huang, in U.N. GAOR, 68th Sess., 42nd mtg. at 23, U.N. Doc. A/68/PV.42 (Oct. 31, 2013); Guo Xiaomei, *supra* note 5, at 2.

“perform[ing] its duties with greatest prudence.”<sup>99</sup> In 2016, China cautioned that “the Court serves as a complement to national jurisdiction, and the Court should fully respect national judicial sovereignty rather than replace it, still less become a tool for certain countries or group of countries to pursue their own political interests.”<sup>100</sup> Through this connection, China further pointed out that “[t]he question of how to exercise the power of the Court in a prudent manner under the Rome Statute – thereby gaining trust and respect from States parties through the Court’s objective and impartial conduct with a view to realizing the original intent of the Court – deserves our serious consideration.”<sup>101</sup> This statement seems to indicate that the ICC’s past practice regarding complementarity has not yet provided a level of comfort to the Chinese authorities. As such, if ICC judges continue to interpret the Rome Statute in such a willful manner and take on more human rights mandate in their practice, it will not only exacerbate tensions between state parties and the ICC, but also alienate non-party states, including China, from joining the Court.

### *3.3. Fair trial rights and the Chinese domestic criminal justice system*

In light of its emerging practice, the ICC’s complementarity regime may represent more of a threat to state sovereignty than originally anticipated by the Chinese authorities. However, addressing these Chinese concerns also requires analyzing the extent to which international standards of fairness can be fully met by China’s domestic legal system. The Chinese authorities’ fear regarding the ICC’s jurisdictional reach into its sovereign matters would be greatly diminished if they had confidence in the conformity of China’s domestic criminal justice system with international standards for fair trials.

The right to a fair trial is gaining acceptance as an international human rights standard in all countries respecting the rule of law. It is an essential component of many international human rights instruments, including the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, to both

---

<sup>99</sup> Guo Xiaomei, *supra* note 5, at 2.

<sup>100</sup> See Yongsheng Li, in U.N. GAOR, 71st Sess., 38th mtg. at 11, U.N. Doc. A/71/PV.38 (Oct. 31, 2016).

<sup>101</sup> *Id.* at 11.

of which China is a signatory.<sup>102</sup> The right to a fair trial is stipulated not only in China's Constitution Law, but also in its Criminal Procedure Law (CPL), which was enacted in 1979 and has since been revised three times in 1996, 2012 and 2018.<sup>103</sup> The revised law promised increased protections for criminal suspects and defendants, as well as a fairer trial process.<sup>104</sup> On the face, these amendments have brought China closer to compliance with the right to a fair trial,<sup>105</sup> but they do not fully satisfy the requirements of international law. Many elements of the right to a fair trial are still absent from China's written laws, and certain provisions introduced by the revisions even contravene international standards.<sup>106</sup> Despite the fact that the proliferation of Chinese laws meant to protect its citizens' right to a fair trial, there still remains a large gap between those rights that are promised in principle and those that are realized in practice.<sup>107</sup>

It is clear that the Chinese legal system has been improving in terms of the legal guarantees of a fair trial, but it has not yet reached the stage of full compliance with international standards. The right

---

<sup>102</sup> G.A. Res. 217 (X) A, Universal Declaration of Human Rights (Dec. 10, 1948); International Covenant on Civil and Political Rights art. 14, Dec. 16, 1966, 999 U.N.T.S. 171.

<sup>103</sup> Xingshi Susong Fa (刑事诉讼法) [Criminal Procedure Law] (promulgated by the Standing Comm. Nat'l People's Cong., July 7, 1979, effective Jan. 1, 1980), art. 8; Xingshi Susong Fa (刑事诉讼法) [Criminal Procedure Law] (amended by the Nat'l People's Cong., March 17, 1996, effective Jan. 1, 1997), art. 11; Xingshi Susong Fa (刑事诉讼法) [Criminal Procedure Law] (amended by the Nat'l People's Cong., Mar. 14, 2012, effective Jan. 1, 2013), art. 11 & 14; Xingshi Susong Fa (刑事诉讼法) [Criminal Procedure Law] (amended by the Standing Comm. Nat'l People's Cong., Oct. 26, 2018, effective Oct. 26, 2018), art. 11 & 14.

<sup>104</sup> See JONATHAN HECHT, OPENING TO REFORM? AN ANALYSIS OF CHINA'S REVISED CRIMINAL PROCEDURE LAW 13 (1996) (discussing some of the protections that the revised law of China was intended to provide).

<sup>105</sup> See Jennifer Smith & Michael Gompers, *Realizing Justice: The Development of Fair Trial Rights in China*, 2 CHINESE L. & POL'Y REV. 108, 111-12 (2007) (outlining how some of the reforms to the Criminal Procedure Law appear to be directed at protecting the right to a fair trial); see also Mike P.H. Chu, *Criminal Procedure Reform in the People's Republic of China: The Dilemma of Crime Control and Regime Legitimacy*, 18 UCLA PAC. BASIN L. J. 157, 158 (2000) (presenting the idea that the reforms made in the Chinese law at that time were meant to protect the rights of the accused).

<sup>106</sup> See Dan Zhu, *China, Crimes against Humanity and the International Criminal Court*, 16 J. INT'L CRIM. JUST. 1021, 1039 (2018) (arguing that China is still out of compliance with certain international human rights standards in spite of the revisions).

<sup>107</sup> See Rongjie Lan, *A False Promise of Fair Trials: A Case Study of China's Malleable Criminal Procedure Law*, 27 UCLA PAC. BASIN L. J. 153, 160-61 (2010) (providing examples of ways in which the revisions of the CPL are not the same in principle as they are in practice).

to counsel and the right to a hearing before an independent, objective, and competent court are two examples of this non-compliance. Prior to the 1996 amendments, the right to counsel under Chinese CPL was only attached at the trial stage and did not exist at the investigative stage.<sup>108</sup> It was a tremendous improvement that suspects could get access to legal counsel from the early stages of the criminal process, but the revisions did not go far enough to bring China into compliance with international standards. The most significant deficiency of the revised law in 1996 was the discretion it granted the investigating body to use “state secrets” as a justification for denying suspects access to a lawyer during the investigation phase.<sup>109</sup> Given the expansive definition of “state secret” in China, it can easily turn into a loophole facing the risk of being abused by authorities.<sup>110</sup> In the CPL’s 2012 amendment, “state secret” was replaced by “national security,” “terrorism” and “especially serious bribery” as exceptions to the right of legal counsel during the investigation stage.<sup>111</sup> It seemed that China was trying to legalize more grounds to block suspects’ access to counsel, which has further vitiated the progress toward meeting the internationally recognized standards. Although the 2018 amendment removed “especially serious bribery” from the exceptions list,<sup>112</sup> the current CPL is still deficient according to international standards.

The right to a hearing before an independent, objective, and competent court is another important aspect of the right to a fair trial, and judicial independence is an indispensable means to realize such a right. Although Article 131 of China’s Constitution Law declares that the people’s courts are judicially independent from “administrative organ[s], public organization[s],” and “individual[s],” the question remains as to whether the Chinese Communist Party (CCP) can be defined as either an administrative organ or a public organization.<sup>113</sup> The leading role of the CCP,

---

<sup>108</sup> Xingshi Susong Fa (刑事诉讼法) [Criminal Procedure Law] (amended by the Nat’l People’s Cong., March 17, 1996, effective Jan. 1, 1997), art. 33.

<sup>109</sup> *Id.* at art. 96.

<sup>110</sup> See JONATHAN HECHT, OPENING TO REFORM? AN ANALYSIS OF CHINA’S REVISED CRIMINAL PROCEDURE LAW 41 (1996).

<sup>111</sup> Xingshi Susong Fa (刑事诉讼法) [Criminal Procedure Law] (amended by the Standing Comm. Nat’l People’s Cong., Mar. 14, 2012, effective Jan. 1, 2013), art. 37.

<sup>112</sup> Xingshi Susong Fa (刑事诉讼法) [Criminal Procedure Law] (amended by the Standing Comm. Nat’l People’s Cong., Oct. 26, 2018), art. 34.

<sup>113</sup> XIANFA art. 131 (2004) (China).

affirmed in the Preamble of the current Constitution, further creates uncertainties as far as its interference in the judiciary is concerned.<sup>114</sup> Judicial independence in China also depends on the judiciary's ability to function without interference from other external sources, such as people's congresses, local governments, the procuracy, the military, or members of society.<sup>115</sup> For example, a significant form of external intervention actually comes from the procuracy. According to the Chinese Constitution Law<sup>116</sup> and Criminal Procedure Law,<sup>117</sup> the procuracy has the power to supervise the work of judges and the courts and to call for reconsideration of cases. As the procuracy has dual roles as both prosecutor and supervisor of the legal process, it has a substantial conflict of interest in exercising its functions, especially in cases concerning international crimes. In addition, the Constitution speaks only of independence of the courts, without specifically referring to any independence of the individual judges. Although the Judges Law of China provides that judges have the right to be free from external interference,<sup>118</sup> a contentious issue has been the internal independence "of the judges hearing the case to issue a final decision without approval from the adjudicative committee or senior judges on the court."<sup>119</sup> In addition, internal judicial independence may also be undermined when the higher courts in China exert undue influence on lower courts outside the normal channels of appeal.<sup>120</sup> Several rounds of judicial reforms have been conducted in China with the intent to promote both internal and external independence of the judiciary.<sup>121</sup> For example, in 2013, the CCP Central Committee adopted the "Decision

---

<sup>114</sup> See Suli Zhu, *The Party and the Court*, in JUDICIAL INDEPENDENCE IN CHINA 52, 67 (Randall Peerenboom ed., 2010) (discussing the relationship between the CCP and Chinese courts).

<sup>115</sup> See Randall Peerenboom, *Judicial Independence in China: Common Myths and Unfounded Assumptions*, in JUDICIAL INDEPENDENCE IN CHINA 69, 71 (Randall Peerenboom ed., 2010).

<sup>116</sup> XIANFA arts. 129, 135 (2004) (China).

<sup>117</sup> Xingshi Susong Fa (刑事诉讼法) [Criminal Procedure Law] (amended by the Nat'l People's Cong., March 17, 1996, effective Jan. 1, 1997), arts. 8, 256.

<sup>118</sup> Faguan Fa (法官法) [Chinese Judges Law] (amended by the Nat'l People's Cong., June 3, 2001, effective Jan. 1, 2002), art. 8(2).

<sup>119</sup> See Peerenboom, *supra* note 115, at 77.

<sup>120</sup> *Id.* at 84. (arguing that "higher courts often engage in a longstanding practice of responding to inquiries from lower courts for advice regarding legal issues in particular cases currently before the lower court").

<sup>121</sup> See Lin Feng, *The Future of Judicial Independence in China*, in ASIA-PACIFIC JUDICIARIES: INDEPENDENCE, IMPARTIALITY AND INTEGRITY 81-82 (Hoong Phun Lee & Marilyn Pittard eds., 2018) (providing several judicial reforms by CCP in China).

on Major Issues Concerning Comprehensively Deepening the Reform,”<sup>122</sup> which is widely interpreted as an important progress towards judicial independence, assuring the autonomy of the courts on issues relating to their budgets, personnel, and assets. Despite these noteworthy reforms, a completely independent judiciary in China is not yet guaranteed at the current stage, and more profound reforms in the future are needed to realize it.

It should also be noted that not all the changes in the Chinese judicial system demonstrate a positive step toward providing the right to a fair trial. For instance, the introduction of “Residential Surveillance in a Designated Location” (RSDL) by the CPL’s 2012 amendment is arguably a regression in terms of China’s commitment to promoting fundamental aspects of a fair trial, including the right not to be subjected to arbitrary arrest or detention, as well as the right to be free from torture. According to the amendment, law enforcement agencies would have the power to detain persons suspected of crimes related to national security, terrorism, or especially serious bribery cases in a designated location by the agencies for up to six months.<sup>123</sup> In plain language, this means that usual time limits of criminal detention before a formal arrest can be ignored, and the suspect can be held incommunicado for half a year. In turn, it opens the door for maltreatment and torture, as a detained individual is totally isolated from the surrounding world. The Office of the High Commissioner for Human Rights has found that incommunicado detention may violate Article 7 of the ICCPR, which prohibits torture and inhuman, cruel and degrading treatment.<sup>124</sup> In its 2015 review of China, the Committee Against Torture urged China to repeal “the provisions of the Criminal Procedure Law that allow suspects to be held de facto incommunicado, at a designated location, while under residential surveillance.”<sup>125</sup> Although the 2018 amendment has

---

<sup>122</sup> *Decision on Major Issues Concerning Comprehensively Deepening the Reform* (adopted at the Third Plenary Session of the 18th Central Committee of the Communist Party of China, November 12, 2013).

<sup>123</sup> See Xingshi Susong Fa (刑事诉讼法) [Criminal Procedure Law] (amended by the Nat’l People’s Cong., March 17, 1996, effective Jan. 1, 1997), arts. 73, 77.

<sup>124</sup> See Commission on Human Rights Res. E/CN.4/RED/1997/38 (Nov. 4, 1997), para. 20 (declaring that “prolonged incommunicado detention may facilitate the perpetration of torture and can in itself constitute a form of cruel, inhuman or degrading treatment”).

<sup>125</sup> See Comm. Against Torture, Concluding Observations on the Fifth Periodic Report of China, U.N. Doc. CAT/C/CHN/CO/5, at 4 (Feb. 3, 2016).

excluded the application of RSDL to serious bribery cases,<sup>126</sup> the agents of state are still granted unfettered power to act in the preservation of national security and against terrorism. It should be noted that “endangering national security” or “terrorism” are vaguely defined offenses that can be manipulated to cover international crimes.

China’s legal system is still at an early stage of development, and accordingly is still struggling to realize the promise of the right to a fair trial. Wide discrepancy often exists in China between the law on paper and the law in practice. In 2004, the Chinese Constitution was amended to expressly provide that “the state respects and safeguards human rights,”<sup>127</sup> indicating perhaps a greater commitment to effective realization of the rights provided by the constitution. Nevertheless, claims based directly on the Constitution are generally not justiciable. It has long been contended that China lacks specific procedures and mechanisms for implementing the Constitution, which subsequently renders the Constitution toothless.<sup>128</sup> Similarly, Chinese nationals have no recourse to mechanisms for international enforcement of their fair trial rights, as China has intentionally opted out of all individual petition systems of international human rights treaties, and Asia is the only region not covered by regional human rights treaties. Although after the latest revision, the Chinese Criminal Procedure Law is much more in conformity with international standards, the question remains as to whether these changes have only taken place in theory. In fact, the right to a fair trial cannot be materialized without significant legal and judicial reform taking place in China.<sup>129</sup>

Judicial reform is by no means new in China,<sup>130</sup> but the Chinese authorities’ increasing commitment to the rule of law and human rights has made it possible for judicial reforms to move forward speedily in recently years. Since the 18th Communist Party of China National Congress in late 2012, a number of judicial reforms have been conducted with the aim of promoting fair trial rights. Several

---

<sup>126</sup> See Xingshi Susong Fa (《刑事诉讼法》) [Criminal Procedure Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Oct. 26, 2018, effective Oct. 26, 2018), arts. 75, 79.

<sup>127</sup> XIANFA art. 33, (2004) (China).

<sup>128</sup> See Qianfan Zhang, *A Constitution Without Constitutionalism? The Paths of Constitutional Development in China*, 8 INT’L J. CONST. L. 950, 952 (2010).

<sup>129</sup> See Lan, *supra* note 107, at 165.

<sup>130</sup> See Keyuan Zou, *Judicial Reform in China: Recent Developments and Future Prospects*, 36 INT’L L. 1039, 1039 (2002) (discussing legal reforms as early as 1978).

white papers detailing the progress of judicial reforms have been issued regularly by the Chinese government.<sup>131</sup> The most recent white paper “Progress in Human Rights over the 40 Years of Reform and Opening Up in China” noted that China has effectively enhanced judicial protection of human rights, and that progress has been boosted under the country’s deepened judicial reform.<sup>132</sup> Although the Chinese authorities have been trying to sustain the momentum for judicial reform, one cannot be overly optimistic about immediate prospects for China’s compliance with internationally recognized fair trial standards. While committed to following international rules and standards, China constantly insists on a relativistic approach to human rights protection based on each country’s unique conditions and is trying to build up a judicial system that reflects its own history, culture, values, and political peculiarities.<sup>133</sup> The context of the ICC’s complementarity regime underscores the importance of fully respecting “choice by relevant states or regions for specific means to realize justice,” and takes into account “their judicial traditions and practical needs.”<sup>134</sup> In fact, the Chinese authorities have been using “Chinese characteristics” for explaining the actual divergence between China’s CPL and international standards, which will be discussed later in this article.

---

<sup>131</sup> See Info. Off. of the St. Council, China, *Whitepaper on Judicial Reform in China* (Oct. 2012), [http://english.www.gov.cn/archive/white\\_paper/2014/08/23/content\\_281474983043170.htm](http://english.www.gov.cn/archive/white_paper/2014/08/23/content_281474983043170.htm) [https://perma.cc/U9LY-TF4N]; Sup. People’s Ct, China, *White Paper on Judicial Reform in China* (Feb. 29, 2016), [http://english.court.gov.cn/2016-03/03/content\\_23724636.htm](http://english.court.gov.cn/2016-03/03/content_23724636.htm) [https://perma.cc/9QF2-AYVW].

<sup>132</sup> See Info. Off. of the St. Council, China, *Progress in Human Rights over the 40 Years of Reform and Opening Up in China* (Dec. 2018), <http://www.scio.gov.cn/zfbps/ndhf/37884/Document/1643472/1643472.htm> [https://perma.cc/EJJ3-6SZ6].

<sup>133</sup> See Hainian Liu, *On the View on Human Rights with Chinese Characteristics*, CHINA HUM. RTS. (May 3, 2017), [http://www.chinahumanrights.org/html/2017/MAGAZINES\\_0503/7964.html](http://www.chinahumanrights.org/html/2017/MAGAZINES_0503/7964.html) [https://perma.cc/8U8V-A2P8].

<sup>134</sup> See Statement of China at 11th Session of the Assembly of States Parties (Nov. 15, 2012), [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP11/GenDeba/ICC-ASP11-GenDeba-CHN-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP11/GenDeba/ICC-ASP11-GenDeba-CHN-ENG.pdf) [https://perma.cc/RRP3-KVGD] (transcript available in the International Criminal Court’s ASP Document Index).

#### 4. COMPLEMENTARITY AND AUTOMATIC JURISDICTION OF THE ICC: CONCERNS OF CHINA

Apart from its fair trial concerns, China also considered the concept of automatic jurisdiction to be inconsistent with the principle of complementarity. As illustrated earlier, due to automatic jurisdiction of the ICC, the principle of complementarity has no effect in determining the existence of the jurisdiction, although it still plays a role at the level of the exercise of jurisdiction. In fact, China's concern towards the ICC's automatic jurisdiction has resonance with its traditional position with respect to international judicial bodies, although the ICC's automatic jurisdiction is articulated in the specific ICC context.

##### *4.1. China's traditional concerns towards compulsory jurisdiction*

Historically, China kept a distance from international adjudication and considered compulsory jurisdiction to be antithetical to state sovereignty. In the view of China:

States should settle their disputes through negotiation and consultation . . . States were free to choose other means to settle their disputes. However, if a sovereign State were asked to accept unconditionally the compulsory jurisdiction of an international judicial organ, that would amount to placing that organ above the sovereign State, which was contrary to the principle of State sovereignty.<sup>135</sup>

However, there has been greater Chinese engagement with a wider range of international adjudicative bodies since the 1990s, contemporary with or even after the ICC negotiation. It seems that China's primary concern regarding compulsory jurisdiction which had traditionally restricted its engagement with international adjudication has been obviated in the contexts of the World Trade Organization, the International Centre for Settlement of Investment Disputes, and the United Nations Convention on the Law of the Sea.<sup>136</sup> Should the ICC be considered along the same lines, its

---

<sup>135</sup> See Yali Lai, *in* The Third U.N. Conference on the Law of the Sea, 60th Plenary mtg., at 24, U.N. Doc. A/CONF. 62/SR. 60 (Vol. 5) (1976).

<sup>136</sup> See Zhu, *supra* note 12, at 54-55.

automatic jurisdiction would no longer be regarded as an impediment to China's accession to the Rome Statute.

While there has been substantial Chinese acceptance in relation to compulsory jurisdiction of international juridical bodies in economic and technical areas, there is still a reluctance to do so in certain fields, including military activities, sovereignty disputes, and more significantly, human rights. It is apparent that the different subject areas over which each body has jurisdiction have also influenced China's approach towards international adjudication. Relinquishing control in trade and investment cases coincides with economic interests, which are customarily prioritized and are less politically sensitive in China. In addition, resolving economic disputes through an international legal forum can also help China to diffuse public anxiety and political tensions that can arise within its domestic market, and thus to maintain political stability.<sup>137</sup> Even though there has been a greater Chinese acceptance of the compulsory jurisdiction of international judicial bodies, China still jealously guards its prerogatives to select the areas in which it will relinquish sovereignty. It is obvious that China has had and will continue to have sovereignty concerns with respect to the way in which certain international human rights instruments and their associated institutional architecture operate, but the ICC is not the appropriate box in which to place these kinds of concerns if its mandate could be properly perceived by the Chinese authorities. While international human rights bodies mainly deal with ordinary human rights violations, the ICC is only concerned with gross human rights violations that amount to international crimes. In fact, China's past practice has implicitly acknowledged the dichotomy between ordinary human rights violations and gross human rights violations.

#### *4.2. China's dichotomy towards human rights violations*

In the view of China, "human rights are essential matters within the domestic jurisdiction of a country. Respect for each country's sovereignty and non-interference in internal affairs are universally recognized principles of international law, which . . . of course [are]

---

<sup>137</sup> See Kennan J. Castel-Fodor, *Providing a Release Valve: The U.S.-China Experience with the WTO Dispute Settlement System*, 64 CASE W. RES. L. REV. 201, 222 (2013).

applicable to the field of human rights as well."<sup>138</sup> As such, China's position on human rights issues was, to a large extent, based on the understanding that human rights law enforcement can be administered only by sovereign states and not through an international mechanism. While the Chinese authorities have ratified most of the international human rights treaties, including major international conventions,<sup>139</sup> they consistently refuse to recognize the competence of the relevant human rights governing bodies to receive and consider individual complaints of human rights violations against China.<sup>140</sup> Notwithstanding this position, China left some room for international intervention with respect to gross human rights violations by acknowledging that "the International Community should interfere with and stop acts that endanger world peace and security, such as gross human rights violations caused by colonialism, racism, foreign aggression and occupation, as well as apartheid, racial discrimination, genocide, slave trade and serious violation of human rights by international terrorist organizations."<sup>141</sup> In its 2005 Position Paper on UN reform, China reiterated that "each state shoulders the primary responsibility to protect its own population," but it also explicitly acknowledged that "when a massive humanitarian crisis occurs, it is the legitimate concern of the international community to ease and defuse the crisis."<sup>142</sup> China's different approaches towards different kinds of human rights violations have also been confirmed by the Chinese State Council.<sup>143</sup> While China continues to champion a strong concept of state sovereignty and non-interference in interstate relations, it does not rule out, but indeed actively supports, certain international interventions to prevent and punish the most serious violations of human rights that amount to international

---

<sup>138</sup> See Info. Off. of the St. Council, China, *Chapter X: Active Participation in International Human Rights Activities* (1991), <http://www.china.org.cn/e-white/7/7-L.htm> [<https://perma.cc/HE98-K2NQ>].

<sup>139</sup> See HANQIN XUE, *CHINESE CONTEMPORARY PERSPECTIVE ON INTERNATIONAL LAW: HISTORY, CULTURE AND INTERNATIONAL LAW* 147 (2012).

<sup>140</sup> See Zhu, *supra* note 12, at 51.

<sup>141</sup> See Info. Off. of the St. Council, *supra* note 138.

<sup>142</sup> See Permanent Mission of the People's Republic of China to the UN, *Position Paper of the People's Republic of China on the United Nations Reforms*, CHINA U.N. (June 7, 2005), <http://www.china-un.org/eng/chinaandun/zzhgg/t199101.htm> [<https://perma.cc/6PWE-AUQ3>].

<sup>143</sup> See RANDALL PEERENBOOM, *CHINA MODERNIZES: THREAT TO THE WEST OR MODEL FOR THE REST?* 127-28 (2007) (discussing China's "renewed emphasis on democratic centralism" as "an attempt to manage diverse views").

crimes. There has been a growing willingness by China to endorse multilateral humanitarian interventions subject to certain conditions being met.<sup>144</sup> Most significantly, in 2011, China allowed the passage of the Security Council Resolution 1970, which formed the legal basis for military intervention in the Libyan Civil War to protect civilians from mass atrocities.<sup>145</sup> It has also been supportive of establishing a system of international criminal justice designed to adjudicate gross human rights violations that amount to international crimes. Though a non-party state to the Rome Statute, China did not seek to use its veto power to block the Security Council referrals of situations of mass atrocities in either Darfur or Libya to the ICC.<sup>146</sup>

It appears that ordinary human rights violations and gross human rights violations can be viewed as two ends of the spectrum of Chinese human rights policy. While China has cautiously embraced international interventions on gross human rights violations as manifested by R2P and the ICC, it is not willing to subject itself to international scrutiny for ordinary human rights violations represented by traditional human rights treaty bodies. In addition to the lack of legal competence to accept international supervision on ordinary human rights violations, China may also have some policy concerns that human rights could be used by Western states as an instrument to contain China. In the context of the Rome Statute, China is particularly concerned that the ICC would become an appeals court, examining a state's compliance with international human rights standards.

It is true that the admissibility scheme under the Rome Statute is analogous to the approach taken by international human rights bodies, which gives national systems priority in terms of resolving their own human rights problems – only when they fail to do so may

---

<sup>144</sup> Jonathan E. Davis, *From Ideology to Pragmatism: China's Position on Humanitarian Intervention in the Post-Cold War Era*, 44 VAND. J. TRANSNAT'L L. 217, 220 (2010).

<sup>145</sup> See Andrew Garwood-Gowers, *China and the "Responsibility to Protect": The Implications of the Libyan Intervention*, 2 ASIAN J. INT'L L. 375, 383-86 (2012) (expressing that "[g]iven the gravity and immediacy of the threat to civilians, blocking a resolution would have attracted significant criticism").

<sup>146</sup> China abstained in the Security Council vote referring the situation in Darfur to the ICC. S.C. Res. 1593 (Mar. 31, 2005). China voted in favor of the Security Council resolution referring the situation of Libya to the ICC. S.C. Res. 1970 (Feb. 26, 2011).

the international bodies proceed.<sup>147</sup> The similarity between the ICC and the human rights bodies is that both types of international bodies will not proceed with a case unless domestic adjudication or remedies are unavailable. However, the substantive criteria for determining whether the international body in question should step in are different. With regard to human rights treaty bodies, domestic jurisdictions enjoy primacy in dealing with their own alleged human rights violations, and only when “available” and “effective” domestic remedies have been exhausted can the international body proceed.<sup>148</sup> Under the Rome Statute, the ICC will only take over if the national judicial system is “unable” or “unwilling” to take legal action.<sup>149</sup> In essence, the different criteria are due to their different mandates. Actually, “[t]he ICC was not created as a human rights court *stricto sensu*”<sup>150</sup> or “an institution to monitor human rights.”<sup>151</sup> The admissibility regime addresses only the particular aspects of the proceedings which are referred to in Article 17, whereas international law provides alternative remedies to address breaches of human rights of the accused in the context of traditional international human rights bodies, such as the Human Rights Committee.<sup>152</sup> As such, if the ICC strictly refrains from performing the mandates of traditional human rights courts, the automatic jurisdiction under the Rome Statute should no longer be regarded as an impediment to China’s direct engagement with the Court, in light of China’s dichotomy towards human rights violations. This, to a significant extent, depends on the Court’s

---

<sup>147</sup> Henry J. Steiner, *Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?*, in *THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING* 15, 27 (Philip Alston & James Crawford eds., 2000).

<sup>148</sup> Wouter Vandenhole, *The Procedures Before the UN Human Rights Treaty Bodies: Divergence or Convergence?* 290 (2004); see also Dinah Shelton, *Remedies in International Human Rights Law* 113–16 (1999) (discussing wrongful death cases where a state’s failure to prosecute counted as an additional injury when those cases were litigated in international courts).

<sup>149</sup> Stigen, *supra* note 60, at 219 (stating that “[o]riginally, the ILC did not propose the term ‘genuinely’ but rather the terms ‘[not] available’ and ‘[in]effective,’ both well-known terms from a part of human rights law dealing with the adequacy of national proceedings. The subsequent substitution by the terms ‘unwillingness’ and ‘inability’ makes human rights jurisprudence less relevant”).

<sup>150</sup> Benzing, *supra* note 17, at 598.

<sup>151</sup> Rolf E. Fife, *The International Criminal Court: Whence it Came, Where it Goes*, 69 *NORDIC J. INT’L L.* 63, 66 (2000).

<sup>152</sup> See Cryer, *supra* note 61, at 157 (suggesting that it is more proper to address general human rights considerations about the conduct of national prosecutions by human rights treaties and bodies).

current and future practice in interpreting the criteria of unwillingness. If the ICC continues to examine a state's compliance with international human rights standards during its determination of admissibility, it would inevitably trigger China's sensitivities about human rights courts of the traditional kind and its anxieties about international scrutiny of ordinary human rights violations, especially those relating to fair trial rights. It should be noted that China has signed but not yet ratified the ICCPR,<sup>153</sup> which guarantees fair trial rights ranging from the right to trial before an independent and impartial court to the right to be presumed innocent.<sup>154</sup> Although in recent years the Chinese criminal justice system has introduced several key rights and procedural safeguards for criminal defendants, the right to a fair trial is still far from a reality in China due to the lack of necessary guarantees to ensure compliance in practice.

#### 4.3. Chinese Characteristics, Asian Values, and Human Rights

China's official human rights discourse has also attached great importance to "Chinese characteristics,"<sup>155</sup> which arguably explains the actual discrepancies between China's Criminal Procedure Law and international standards. According to the Chinese authorities, "no country in its effort to realize and protect human rights can take a route that is divorced from its history and its economic, political and cultural realities,"<sup>156</sup> and "human rights can only advance in the context of national conditions and people's needs."<sup>157</sup> The authorities pointed out that "during the past 40 years of reform and opening-up, China has consistently combined the universality and particularity of human rights . . . and pioneered a path of human rights developed with Chinese characteristics in line with its own

---

<sup>153</sup> UNITED NATION OFFICE OF THE HIGH COMMISSIONER, RATIFICATION OF 18 INTERNATIONAL HUMAN RIGHTS TREATIES, <https://indicators.ohchr.org/> (indicating that China signed ICCPR in 1998).

<sup>154</sup> G.A. Res. 2200A (XXI), ¶ 14, (Dec. 16, 1966).

<sup>155</sup> See Info. Off. of the St. Council of China (2018), *supra* note 132, Foreword (explaining how "[r]eform . . . has opened up a path of socialism with Chinese characteristics, and ushered in a new chapter in the development of human rights").

<sup>156</sup> Info. Off. of the St. Council of China (1991), *supra* note 138.

<sup>157</sup> See Info. Off. of the St. Council of China (2018), *supra* note 132, VIII. Path of Human Rights Protection Suited to National Conditions.

conditions.”<sup>158</sup> As such, in the view of the Chinese authorities, the debate about the compliance of the Chinese criminal justice system with international human rights law will be distorted if taken exclusively from perspectives outside of China’s unique history, culture, values, and political system. China’s insistence on Chinese characteristics also reflects its continued adherence to a strict concept of state sovereignty and the principle of non-intervention. The culture-specific understanding of human rights and the primacy of state sovereignty have also emerged as key elements of the “Asian values,” which are deeply embedded in Asian inter-state relations. The debate over Asian values originated during the 1993 Vienna World Conference on Human Rights, largely in response to a pre-conference regional document known as the Bangkok Declaration, which was signed by over forty Asian states, including China.<sup>159</sup> While reaffirming “the principles of respect for national sovereignty, territorial integrity and non-interference in the internal affairs of states,” the Bangkok Declaration argued for the importance of unique Asian historical, cultural, and religious factors in determining human rights standards.<sup>160</sup> Although the document never uses the term “Asian values,” “it was seen by many . . . as asserting an Asian viewpoint.”<sup>161</sup> At the subsequent World Conference, “Chinese and Singaporean delegates propagated a *culture-specific* notion of human rights” in contrast to a “*universalistic* interpretation of human rights.”<sup>162</sup> In this connection, the Member States of the Association of Southeast Asian Nations (ASEAN) adopted the ASEAN Declaration on Human Rights in 2012, using the Vienna Declaration as a benchmark.<sup>163</sup> According to the proponent of “Asian values,” human rights are a matter of national sovereignty, and each nation should be allowed to adopt standards for the right to a trial that are fair in the context of its specific culture.

---

<sup>158</sup> Xu Jinquan, *China’s perspective on human rights widely understood, recognized, supported: diplomat*, XINHUA NET (Nov. 7, 2018), [http://www.xinhuanet.com/english/2018-11/07/c\\_137590004.htm](http://www.xinhuanet.com/english/2018-11/07/c_137590004.htm) [<https://perma.cc/CN6Z-S98S>] (last visited Jan. 30 2019).

<sup>159</sup> Michael C. Davis., *Chinese Perspectives on the Bangkok Declaration and the Development of Human Rights in Asia*, 89 AM. SOC’Y INT’L L. PROC. 157, 158 (1995).

<sup>160</sup> *Bangkok Declaration*, 1 ASIA-PAC. J. ON HUM. RTS. & L. 144, 145–46 (2000).

<sup>161</sup> Karen Engle, *Culture and Human Rights: The Asian Values Debate in Context*, 32 N.Y.U. J. INT’L L. & POL. 291, 311 (2000).

<sup>162</sup> Christian Welzel, *The Asian Values Thesis Revisited: Evidence from the World Values Surveys*, 12 JAPANESE J. POL. SCI. 1, 2 (2011).

<sup>163</sup> See William J. Jones, *Universalizing Human Rights the ASEAN Way*, 3 INT’L J. SOC. SCI. 72, 77–78 (2014).

However, neither Chinese characteristics nor Asian values have been advanced in the context of gross violations of human rights. Cultural diversity cannot justify gross violations of human rights.<sup>164</sup> Further, “[c]ultural relativist arguments used by ASEAN states to contest the universality of human rights are arguably *prima facie* inapplicable to the international crimes contained in the ICC Statute.”<sup>165</sup> Although there is general reticence among Asian states towards universal jurisdiction,<sup>166</sup> “Asian values have never been invoked to defend egregious human rights violations in the same manner as they have been invoked to contest violations of human rights regarded as ‘Western’.”<sup>167</sup> From a Chinese perspective, the contestability of ordinary human rights violations on the basis of Chinese characteristics contrasts with the universality of gross human rights violations, but no clear dividing line between the two categories has been provided by the authorities. In fact, “gross,” “serious,” “grave,” “flagrant,” and other qualifiers (“egregious,” “massive”) are often used interchangeably and sometimes cumulatively by various international and regional human rights bodies, and no method has been agreed upon for deciding whether a given act should be characterized as a gross human rights violation.<sup>168</sup> Likely the best analogy to Chinese dichotomy on human rights is ASEAN states’ distinction between ‘core’ and non-core human rights, but the boundary there is also fuzzy.<sup>169</sup> Core human rights are often regarded as non-derogable rights, *jus cogens*,

---

<sup>164</sup> See Bilahari Kausikan, *An Asian Approach to Human Rights*, 89 AM. SOC’Y INT’L L. PROC. 146, 147 (1995) (arguing that while Western and Asian conceptions of human rights may differ in certain ways, there are nevertheless fundamental understanding of certain human rights abuses shared across cultures).

<sup>165</sup> Amrita Kapur, *Asian Values v. The Paper Tiger: Dismantling the Threat to Asian Values Posed by the International Criminal Court*, 11 J. INT’L CRIM. JUST. 1059, 1066 (2013).

<sup>166</sup> See Xing Yun, *Asia’s Reticence Towards Universal Jurisdiction*, 4(1) GRONINGEN J. INT’L L. 54, 58 (2016).

<sup>167</sup> Kapur, *supra* note 165, at 1068.

<sup>168</sup> See generally GENEVA ACADEMY, *What Amounts to ‘A Serious Violation of International Human Rights Law’*, ACADEMY BRIEFING NO. 6 (2014), [https://www.geneva-academy.ch/joomlatools-files/docman-files/Publications/Academy%20Briefings/Briefing%206%20What%20is%20a%20serious%20violation%20of%20human%20rights%20law\\_Academy%20Briefing%20No%206.pdf](https://www.geneva-academy.ch/joomlatools-files/docman-files/Publications/Academy%20Briefings/Briefing%206%20What%20is%20a%20serious%20violation%20of%20human%20rights%20law_Academy%20Briefing%20No%206.pdf) [<https://perma.cc/3A35-CSM7>] (discussing what constitutes serious and gross human rights violations).

<sup>169</sup> See Kapur, *supra* note 165, at 1067–68.

obligations *erga omnes*,<sup>170</sup> “[b]ut these equations [also] require further explanation” and examination.”<sup>171</sup> Though the notion of “gross violation” or “core human rights” has usually been approached from the perspective of human rights law, international criminalization of serious human rights violations are also relevant in defining the boundaries.

Core international crimes such as genocide and crimes against humanity constitute important manifestations of serious human rights violations. The selection of core crimes for which the ICC is competent to adjudicate is limited to “the most serious crimes of concern to the international community as a whole,”<sup>172</sup> and the drafters of the Rome Statute relied on customary international law in defining these crimes. While “a potent customary international law norm rejecting impunity for serious violations of ‘core’ human rights has emerged,”<sup>173</sup> the scope of customary international law has been contested. One hotly debated issue which proved to be concerning for China and other Asian states was whether a nexus to armed conflict needed to be included in the definition of crimes against humanity.<sup>174</sup> Without a linkage to armed conflict, China maintained, “many actions listed under that heading of the crimes against humanity belongs to the area of human rights rather than international criminal law.”<sup>175</sup> It further pointed out that:

what the international community needed at the current stage was not a human rights court but a criminal court that punished international crimes of exceptional gravity. The injection of human rights elements would lead to a

---

<sup>170</sup> See Diane A. Desierto, *Universalizing Core Human Rights in the “New” ASEAN: A Reassessment of Culture and Development Justifications Against the Global Rejection of Impunity*, 1 GÖTTINGEN J. INT’L L. 77, 95 (2009).

<sup>171</sup> Teraya Koji, *Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-derogable Rights*, 12 EUR. J. INT’L L. 917, 920 (2001).

<sup>172</sup> Rome Statute of the International Criminal Court, art. 5, July 17, 1998, 2187 U.N.T.S. 3.

<sup>173</sup> See Desierto, *supra* note 170, at 84.

<sup>174</sup> See Darryl Robinson & Herman von Hebel, *Crimes Within the Jurisdiction of the Court*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, ISSUES, NEGOTIATIONS, RESULTS 79, 91 (Roy S. Lee ed., 1999) (describing how “[a]s in the preparatory negotiations, the majority controversies in the negotiations in Rome concerned the threshold test: namely, whether such crimes could only occur in armed conflict”).

<sup>175</sup> Zhu, *supra* note 34, at 149 (quoting *Statement by Mr. Guangya Wang on the Statute of the International Criminal Court*, FAZHI RIBAO [LEGAL DAILY], July 29, 1998 (China)).

proliferation of human rights cases, weaken the mandate of the Court to punish the most serious crimes and thus defeat the purpose of establishing such a court.<sup>176</sup>

As discussed earlier, the customary law surrounding crimes against humanity was developed significantly through innovative interpretations by the ad hoc tribunals. Due to the nature of that process and the power conferred on the ad hoc tribunals to develop individual criminal responsibility, China did not have an opportunity to influence the outcomes or claim to be a persistent objector within that institutional context. The overwhelming evidence now points in the opposite direction of the Chinese view on these issues, and the customary law status of crimes against humanity as reflected in the Rome Statute are now firmly entrenched. It seems that the boundary between ordinary human rights violations and gross human rights violations is further blurred due to the expansion of international criminal law. As the Draft International Convention on the Prevention and Punishment of Crimes against Humanity retains the definition of crimes against humanity under the Rome Statute, China reiterated its reservations over the omission of a nexus to conflict.<sup>177</sup>

Although international law on core human rights violations relating to both state and individual accountabilities is not evolving in a way that is completely along the lines of the Chinese thinking, it is difficult for China and other Asian states to invoke Chinese characteristics or Asian values to defend crimes against humanity committed during peace time in the same manner as they have been invoked to contest violations of undisputed non-core human rights. Nonetheless, this may well be a specific concern among states in a region where non-interference has historically permitted internal state-committed atrocities to remain unpunished. Unlike other regions of the world, there is not yet a well-developed and effective regional system of human rights protection in Asia, which is a reflection of the general reluctance at the regional governmental level to adopt an internationalized approach to issues that are traditionally seen as internal matters, particularly questions relating to non-core human rights violations and accountability measures. This cautious Asian approach to human rights however does not necessarily affect their support for international criminal law. Rather, there is a growing acceptance among Asian states for

---

<sup>176</sup> See Dahai Qi, *supra* note 4, at 6.

<sup>177</sup> See Xu Hong, *supra* note 5.

individual criminal responsibility regarding core human rights violations. As observed by former Singaporean diplomat Bilahari Kausikan:

International law has evolved to the point that how a country treats its citizens is no longer a matter for its exclusive determination. But international human rights law still co-exists uneasily, and in as yet an unresolved matter, with the fundamental principle of national sovereignty. It would thus be prudent to restrict such discussions to gross and egregious violations of human rights, which clearly admit of no derogation on the grounds of national sovereignty. Attempting to expand the debate to areas where there are legitimate national differences of interpretation or implementation only exacerbates misunderstanding and prevents consensus.<sup>178</sup>

This holds particularly true for the ICC's implementation of its mandate, which is to end impunity for most serious international crimes rather than monitoring the fairness of domestic proceedings. However, in light of the emerging practice of the ICC on complementarity, the risk to sovereignty and Asian values posed by the ICC may be higher than originally anticipated.

## 5. CONCLUSION

The Chinese concerns regarding the complementarity regime of the ICC at one level relate to the uncertainties about the means by which particular provisions regarding admissibility would be applied; at another level they echo China's traditional concerns with respect to international judicial bodies. However, since Chinese formulation of its concerns some 20 years ago, there have been developments in practice both in the specific ICC context and in the wider context of China's engagement with international adjudicative bodies. As such, there is both an obvious need and opportunity for the Chinese authorities to reassess its objections towards the Rome Statute's complementarity regime, which were articulated as one of the legal barriers preventing China from moving towards more direct engagement with the ICC.

---

<sup>178</sup> Kausikan, *supra* note 164, at 149.

Although China by and large supported the principle of complementarity, it had reservations over the way in which complementarity was eventually implemented in the Rome Statute. As the Statute granted the ICC automatic jurisdiction, which was considered by China as undermining state sovereignty and the principle of complementarity, therefore, the extent to which the reduced role of state consent in determining the existence of the ICC's jurisdiction was effectively addressed by the way in which the principle of complementarity was factored into the Statute as part of the admissibility regime could be key to assessing the underlying Chinese concerns. Back in 1998, a lingering hesitation existed among Chinese policy-makers that the ICC might become an appeals court, judging a state's compliance with international human rights standards when considering the issue of admissibility. Although the Rome Statute was clear in its core content on admissibility, there was still a lack of clarity as to precisely how aspects of admissibility would apply in practice. It is understandable that China regarded the Court with a degree of suspicion while the uncertainties remained. As such, the practice of the relevant organs of the ICC in interpreting the criteria of unwillingness is enormously important in China's reconsideration of its fair trial concerns. By becoming a state party to the ICC Statute, China will be committed to bringing to account those responsible for international crimes, but it does not anticipate exposing itself to unreasonable or unwelcome levels of scrutiny, over such issues as the fairness of its domestic criminal justice system. Although China's national judicial system with Chinese characteristics is still deficient by universal human rights standards, the ICC lacks authority in mainstreaming national courts to dispense justice according to international norms.

China's objection to the ICC's automatic jurisdiction, to some extent, mirrors its traditional approach towards international adjudication. However, since the 1990s, the primary concern about compulsory jurisdiction which had traditionally surrounded the discussion of Chinese engagement with international adjudication has been broadly resolved in relation to a range of international adjudicative bodies properly so-called. Although the substantial Chinese movements in relation to international adjudication have been least pronounced in the domain of human rights, China has recognized that it is a common task of the international community as a whole to put a stop to atrocities and other forms of grave and massive violations of human rights, in contrast to categorizing

ordinary human rights violations as internal affairs and therefore subject to Chinese characteristics. If China can be fully assured that a state's compliance with international human rights instruments is not within the purview of the ICC, the ICC's automatic jurisdiction will no longer be considered as an obstacle in the way of China's full participation in the ICC. This, to a great extent, depends upon the ICC's practical application of the criteria of unwillingness. However, due to the judicial activism of the ICC judges, the trajectory of the post-Rome developments in practice are arguably not heading towards alleviating the underlying Chinese fair trial concerns. If the Court continues to take on the role of securing fairness at national proceedings, it would indeed add a dimension entirely different from the initial idea for the establishment of the ICC, and it would inevitably trigger China's concern about human rights issues not only in the specific ICC context but also in the wider context of international adjudication. This kind of practice will similarly hinder membership among other Asian states because of the perceived threat to Asian values, which consider due process rights a matter of state sovereignty and stress that they need to be balanced with territorial integrity and non-interference, as well as with specific cultural, social, economic, and political circumstances. As such, Chinese characteristics and Asian values can be used as a legitimate basis for China and other Asian states' resistance to the ICC treaty.

While the current gap between China and the ICC has been partly caused by the Court's seemingly expanded mandate over ordinary human rights violations in the context of complementarity, there have been other legal and policy factors influencing the Chinese government's attitude towards the Court, including the *proprio motu* power of the ICC Prosecutor, the Court's jurisdiction over the crime of aggression, and the definitions of the core crimes. Since these concerns were first raised in the 1990s, there have been significant developments with regard to the amendment of the Rome Statute, the practice of the Court and the Security Council, and even in the content of customary international law. The year 2018 marks the 20th Anniversary of the Rome Statute, and it presents China an opportunity to re-examine its concerns towards the Statute to see if they have become less robust or have been resolved in a manner which is in line with Chinese thinking over the past two decades. For example, the Amendments to the Rome Statute adopted at the Kampala Review Conference in 2010 directly touched China's pre-existing concerns about the crime of aggression. China's

concerns regarding the definitions of crimes against humanity and war crimes are also related to fields of customary international law that have been undergoing rapid developments in the past 20 years. Were China to take this opportunity to make a reassessment, the Chinese concerns towards the ICC's complementarity regime might still be considered an obstacle for China's accession to the Court. Whether these concerns will be diminished in years to come will largely depend on the ICC's future interpretation of the criteria of "willingness."