worked there. We have many American lawyers working there at different points in time but China itself is not a member of the ICC. Why is that?

Remarks by Zhu Dan*

Okay. First, thanks, Tom, for the introduction. And thanks, everyone, for coming. I am really delighted to be among these distinguished panelists.

To your question why China is a nonmember state to the ICC, I will just first give you a brief introduction about the background of China's relationship with the International Criminal Court. Actually, China has been supportive of the establishment of international criminal tribunals. It played a constructive role in the establishment of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. And they also participated actively in the negotiation process of the Rome Statute.

But due to several concerns, which the Chinese government articulated in legal terms in 1998, it voted against the Rome Statute alongside the United States and Russia. But afterwards, China's approach towards the ICC differed from the United States. Where the United States has a shifting policy towards the ICC, China has a consistent approach towards the ICC. The United States initially had a hostile attitude, then moved to disengagement, and then moved to principled engagement. But after voting against the Rome Statute, China engaged itself in the negotiation process of the crime of aggression, whereas the United States was absent.

Even though China is not a member state, China actively participated or played a constructive role in the operation of the court through the Security Council. It abstained in the Security Council resolution which referred the Darfur situation to the ICC and also voted in favor of the Libya situation to the ICC.

When it comes to the concerns of the Chinese government towards the ICC, there are two kinds of concerns: legal and policy concerns. As for China's legal concerns, as a permanent member of the Security Council, China shared some concerns with the United States, such as ICC jurisdiction over non-party nationals—that is clearly understood here that the United States has been concerned about its peacekeepers all over the world. The other legal concern China shared with the United States is ICC jurisdiction over the crime of aggression. Both with regard to its definition and the conditions under which the ICC could exercise jurisdiction.

When it comes to the definition—because the crime of aggression is essentially so close to *jus ad bellum*—there are so many uncertainties around this area of law. So being the biggest victim of the Japanese aggression during World War II, China has very good reason to see the criminalization of aggression under the jurisdiction of the ICC, but due to the uncertainty of the definition of ''aggression,'' China has reluctance to accept that definition as it currently stands, because it can be recalled to 1951 when the General Assembly adopted a resolution condemning China as an aggressor in the North Korea War, where China considered itself as having exercised collective self-defense.

So just an example, to see how this uncertainty surrounding the definition of aggression would have an impact on China's determination of accepting the definition of aggression as it currently stands.

* Assistant Professor of Law at Fudan University Law School.

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THOMAS KELLOGG

Let me interrupt there. You mentioned both the legal concerns and the policy concerns. I am going to mention a concern that I see that maybe you would classify as policy. I put it as a philosophical concern writ large, which is to say China obviously, in many, many areas of international law, takes a more traditional view of state sovereignty. And as you and I have discussed, there does seem to be an element of China's concern over encroachment of its state sovereignty here in an area of international law that is trying to innovate on that very concept. Do you think that is also in play here?

ZHU DAN

Yes. About the Chinese concern over state sovereignty, that plays an important role in China's approach towards the International Criminal Court because China's initial experience with international law starts, unfortunately, with the Opium War and unequal treaties. And then afterwards, the principle of sovereignty has become the most important concept in China's relationship with other states, and that is perfectly reflected in China's approach towards the ICC.

As I mentioned, China shared several concerns with the United States, and that is one aspect. But on the other side, China does share some concerns with developing countries, and these concerns are actually based on state sovereignty. One of those concerns is that China has reservations regarding the ICC's jurisdiction over crimes against humanity committed internally without any link to the conflict. That kind of concern is alluded to its domestic political situations, such as Taiwan, Tibet, or Xinjiang. And the other is concern about war crimes committed in internal armed conflict as well.

These issues are addressed by the Chinese authorities as legal issues, because when the Rome Statute was negotiated, all the state parties agreed that the Rome Statute was a codification of customary international law, especially when it comes to the definition of crimes against humanity and war crimes, and China obviously has a different view about the content of customary international law with regard to these two specific crimes.

So China shares a view with some developing countries that the ICC should not intervene in the internal conflict of a sovereign state. That is where the absolute concept of sovereignty plays an important role in China's approach towards the ICC.

THOMAS KELLOGG

Excellent. That leads well into my next question, which is to say, when you and I spoke in advance of this panel, and also reading some of your voluminous publications on this subject, I picked up a little bit of a strain of optimism, that you believe that China's approach to international criminal law and to the International Criminal Court may evolve in a positive, more engaged direction over time. Am I right in picking up that strain? And if so, why? We always like good news at ASIL, so feel free to provide some.

ZHU DAN

Yes, I think some of the Chinese concerns actually related to the uncertainty surrounding the Rome Statute. Since the court has been operating for more than ten years and some uncertainties have actually been clarified by the practice of the court, to some extent, some

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of the Chinese concerns have been alleviated. Let me just give you one example about the concept of complementarity.

When the court was negotiated, the complementarity doctrine was still a principle, and there were two criteria for determining complementarity. One is ability. The other is willingness. The concern back in 1998 for China was that the ICC would become a human rights court which would decide the domestic human rights protections of the accused to some extent. It was unclear in 1998 where the court would stand in these kind of situations—whether the ICC would step in when the right to a fair trial at the domestic level was not being protected by the states.

But just last year, in the Libya situation, the Appeals Chamber issued a decision which directly clarified the situation—that the fair trial of Saif Gaddafi, which was not protected or afforded at domestic level, would not ensure the ICC's interference. So that also clarified that the court would not be a human rights court of the traditional kind. On that point, I think China's concern would be addressed with the good performance of the ICC over time.

THOMAS KELLOGG

So you see some cautious cause for optimism there.

ZHU DAN

I am just saying that some of the concerns could be resolved over time. It depends on the political will of the Chinese authorities whether they are willing to subject their usage or military force to international adjudication or international scrutiny.

THOMAS KELLOGG

Let me ask you about one specific case that I have been following, and then I want to turn to Ji Li.

We just had the publication of the report by the UN Commission of Inquiry, the COI, on the situation of human rights in North Korea. And that report, for those who have not read it, documented extensive human rights abuses that the commission itself believed did rise to the level of crimes against humanity. And it made a series of recommendations for all of the different players involved, including the international community as a whole.

As you may know, one of the key recommendations was that the North Korean case be referred to the ICC for it to take action. And despite the fact that we had resolutions supporting the work of the COI at the UN Human Rights Council in Geneva, despite the fact that we had a similar resolution by the UN General Assembly, we recently heard from China that it would not allow the referral of North Korea to the ICC.

Would you agree that this particular case does indicate that, at least vis-à-vis longtime allies, political concerns are going to override any of the positive trends that you are seeing in terms of China's engagement with the ICC and international criminal justice more generally? Is that a fair statement?

ZHU DAN

I think when it comes to the DPRK of North Korea, China's approach, there are some policy considerations or some geopolitics, or maybe some national interests, but there are

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some other concerns which are included in the Chinese authorities' deliberation with policy towards whether we need Security Council referrals of the current situation to the ICC.

I think one of the concerns is that—we can look back at the past Security Council referral in the Libya situation. Actually, China did not stop or prevent the Security Council referring either the Darfur situation or the Libya situation. And China even went to actual staff which voted in favor of the Security Council resolution that authorized the use of force in the Libya situation, which is a clear implementation of the responsibility to protect. However, when the Chinese government made an assessment of its past endorsement of the Security Council intervention in these situations, it strikes me that some Chinese officials found that these resolutions were not implemented in the way that was envisaged. For example, the resolution which authorized the use of force in Libya, I think China was not alone in saying that NATO actually exceeded its mandate in implementing this resolution.

THOMAS KELLOGG

''Regime change,'' in a phrase, right?

ZHU DAN

Yes, I think that is the correct phrase. So I think that cast a shadow over future Chinese endorsement of the international community's interference in these kind of situations, either through Security Council authorization of the use of force or through referrals.

I think another policy concern is that China, as a permanent member of the Security Council, bears a special responsibility for the maintenance of international peace and security, and it may have a different view from other states when it comes to the relationship between peace and justice. So China has iterated on many occasions that it prefers peace over justice and the pursuit of justice should not run against the cause of peace. That is why China calls for deferrals of the situations in Kenya and Darfur. It has a slightly different view about how peace and justice work in practice.

And another point I would like to mention is why China has this selective approach towards the Security Council or the international community's interference in these kinds of situations. I think that is something inherent in the Rome Statute itself, because when the Rome Statute was adopted, they included the Security Council referrals in order to expand the court's jurisdiction over non-state parties, which were otherwise not subject to ICC jurisdiction.

So what kind of situation does the Security Council consider deserving of the ICC's intervention? It is essentially a political decision. While China considers it to be politically similar, it may involve some policy concerns and also maybe some legal justification. And I do not think China has any legal obligation to refer a situation like North Korea to the ICC, maybe some moral obligation.

That being said, I do acknowledge that China should play a greater role in the implementation of the principle of justice in the context of the Security Council interference in the situation of international crimes.

THOMAS KELLOGG

Okay, fair enough. Ji Li, you have been more than patient. Thank you for waiting for all of your distinguished panelists to put forward their views on the different subjects. I want to talk with you about China and the WTO. And here we have a success case, whereas with

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China and international criminal law we have China not a party to the ICC. At least since 2001, China has been a full member of the WTO and has certainly been an active player to greater or lesser degrees on a whole host of issues. Am I right in terms of my own view that China's engagement with the WTO is a success story both in terms of for China itself and in terms of engagement with international law?

Remarks by Ji Li[*]

Well, it depends on how you define success. If you define success as China being in compliance at a level not worse than other major members of the WTO, such as the EU and the United States—then yes, I would agree with you.

Thomas Kellogg

Yes.

Ji Li

I think China is—that it will be a—

Thomas Kellogg

China is just as successful as every other country.

Ji Li

Right, right.

Thomas Kellogg

No better, no worse.

Ji Li

Average. There is no exception for China.

Thomas Kellogg

Indeed. Indeed. And why is that? Why are you saying they are just average? What is on the negative side of the ledger?

Ji Li

Well, the negative side—it depends on your position. If you are an idealist, you would want China to be a role model, right?

[*] Associate Professor of Law at Rutgers Law School.

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