On the Principle of Complementarity in the Rome Statute of the International Criminal Court

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Abstract

The Rome Statute of the International Criminal Court (the Rome Statute or the Statute) entered into force on 1 July 2002, with the satisfaction of Article 126 of the Statute.\(^1\) Up until 24 September 2004, 139 States have signed the Statute and 97 States have become the Parties. Under such circumstances, China, as one of the permanent members of the Security Council of the United Nations and a non-party State playing a great role in international affairs, needs to acquire a better understanding and also makes a detailed study on the Statute. One of the most unique characters of the International Criminal Court (the ICC or the Court)—as reflected in the principle of complementarity—will be discussed and analysed in the following essay.

I. The meaning and the roles of the principle of complementarity

Paragraph 10 of the preamble of the Rome Statute emphasizes that “... the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions”; and Article 1 of the Rome Statute provides “An International Criminal Court is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this

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\(^1\) Article 126(1) provides that “This Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations”.

As the ICC was established through an international treaty—the Rome Statute—and most of the countries in the world involved in its drafting, the Court, on the one hand, has jurisdiction over the core crimes of international concern and, on the other, its power is limited by complementarity, i.e. the national jurisdiction comes first and ICC’s jurisdiction second. In the preamble of the Statute, the States Parties declare that they wish to establish a permanent court “to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes” and to ensure “their effective prosecution by taking measures at the national level and by enhancing international cooperation” and that the permanent court “shall be complementary to national criminal jurisdictions” in case trial procedures may not be available or may be ineffective. Thus, the basic idea for the complementarity is to maintain State sovereignty, under which “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”, to enhance the national jurisdiction over the core crimes prohibited in the Statute, and to perfect a national legal system so as to meet the needs of investigating and prosecuting persons who committed the international crimes listed in the Statute. Since the international criminal institutions and national courts have concurrent jurisdiction over the most serious crimes in violation of international criminal law and humanitarian law, there inevitably will be conflicts between the two jurisdictions. However, no such conflicts would occur in the case of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), as the establishment of the two Tribunals is a measure taken by the Security Council of the UN. The Statutes of the two Tribunals provide that “the International Tribunal shall have primacy over national courts”. Whereas the principle of complementary provided in the Rome Statute means that national courts have the priority to exercise jurisdiction over the crimes prohibited in the Statute, i.e. the ICC cannot exercise its jurisdiction over the crimes unless the State concerned is unable or unwilling to investigate or prosecute the crimes.

There are four scenarios in accordance with Article 17(1) in which the ICC cannot admit a case: (a) the case is being investigated or prosecuted by a State which has jurisdiction over it; (b) the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned (in these two cases, the ICC has to preclude the possibility that the State is unwilling or unable genuinely to carry out the investigation or prosecution before it can admit the case); (c) the person concerned has already been tried for conduct which is the subject of the complaint (the principle of ne bis in idem); and (d) the case is not of sufficient gravity to justify further action by the Court. Thus, the key consideration for the Court to admit a case is whether a State is unable or unwilling to investigate or

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3 Ibid., para.4.
4 Ibid., para.10.
5 Ibid., para.6.
6 Article 9(2) of the Statute of the ICTY and Art.8 of the ICTR Statute.
7 Cf. Art.17.
prosecute a case. The criteria for inability are clearly provided in Article 17(3) in a more objective way:

In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

The situation of inability does not only refer to the situation of national armed conflicts running for years or natural disasters causing the total or substantial collapse of its national judicial system, e.g. the chaos and war on the territory of the former Yugoslavia and of Rwanda during the 1990s, but also to that in which the national judicial systems have totally or substantially collapsed or are unavailable so that States are unable to carry out criminal proceedings. The inability in the latter case may refer to the lack of substantive law or the existing legislation that does not meet the standards of the recognized international human rights.

There are three types of unwillingness mentioned in Article 17. The first is that the proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court. When determining whether a State is unwilling, the ICC will mainly make a judgment on the intention of a State behind its trial procedure or decision-making. The second is that “there has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice”. However, the Statute does not give a definition on what an unjustified delay is but leaves it to the ICC to make a decision. The third is that “the proceedings were not or are not being conducted independently or impartially, 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”. This is because the Rome Statute requires all the States concerned, including non-party States, to follow the human rights standards and proceedings provided in the Statute, including the presumption of innocent, non-retroactivity ratione personae, ne bis in idem, the rights to have public hearings, choose lawyers at the accused’s free will and obtain legal assistance free of charge, and the rights to be informed, examine the witness, remain silent, not to be compelled to self-incrimination, etc.

One of the most important roles of the principle of complementarity is to encourage the State Party to implement the provisions of the Statute, strengthening the national jurisdiction over those serious crimes listed in the Statute. So long as the legal system of a State can efficiently investigate and prosecute the serious crimes prohibited in the Statute, the sovereignty of the State will remain unaffected, free of any interference by the ICC. But if a State is unwilling or unable to investigate or prosecute a case, the ICC will invoke the principle of complementarity to admit any case concerned and exercise jurisdiction over it. Therefore, the principle of complementarity has impact on a State’s implementation of international substantive criminal law, as well as on its exercise of jurisdiction in many aspects. First, a State Party should adopt legislation according to the requirement of complementarity
so as to allow its national courts to have jurisdiction over the crimes prohibited by the Statute. Generally speaking, if a State is preparing to ratify the Statute, it should examine its national legal system first, curing the defects of the system so that it is applicable to the international crimes prohibited in the Statute. In other words, in order to guarantee its basic rights to investigate and prosecute the crimes, as well as to avoid being declared as a State of inability, a State has to establish a legal system in conformity with the requirements of the Statute. Some of the State’s legislations and statements may be of good help in better understanding of the real role of complementarity. The German Government proclaimed in the Code of Crimes against International Law, that one of the aims of the legislation of such a Code is “to ensure, in the light of the complementary prosecutorial competence of the International Criminal Court, that Germany is always able to prosecute crimes within the jurisdiction of the ICC...”8 In its Progress Report on the ratification and implementation of the Rome Statute to the Council of Europe, the Spanish Government stated:

Above all, if a State Party wishes successfully to invoke the principle of complemen-
tary recognized by the Statute, according to which States have the primary responsi-
bility to prosecute international crimes, then it has to ensure that its law includes these crimes and that its courts have jurisdiction to deal over them.9

II. Complementarity requires the amendment of national legislation

Before the adoption and entry into force of the Rome Statute, a number of crimes and legal principles that were embodied in the Statute had been recognized under international law, international treaties, conventions and customary law. For example, the crime of genocide is prohibited in Article 5 of the 1948 Genocide Convention. War crimes are prohibited in Articles 49/ 50/ 129/146 of the Four 1949 Geneva Conventions and Articles 85-87 of the 1977 First Additional Protocol to the Geneva Conventions, and some of the crimes as components in crime against humanity are prohibited in Article 4 of the 1973 Apartheid Convention and Article 6 of the 1984 UN Torture Convention. Therefore, for these crimes, according to the principle of pacta sunt servanda, all State parties to the treaties mentioned above, no matter whether they are Parties to the Rome Statute or not, are clearly of obligation to adopt necessary and corresponding national legislations in conformity with these treaties.

As for the rest of the crimes, principles and jurisdictional regimes which are not included in the previous international treaties but included in the Statute, States also have obligation to adopt necessary and corresponding legislations under the principle of complementarity.

Theoretically speaking, the thrust of the principle of complementarity also demands States to punish the crimes listed in the Rome Statute by adopting the same substantive law of the

8 Gesetzentwurf der Budesregierung-Entwurf eines Gesetzes zur Einfuhrung des Volkerstrafgesetzbuchs (EGVSzGB) (http://www.bmj.bund.de/images/11222.pdf), 25.
Statute. Paragraph 4 of the Statute’s Preamble affirms that “the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation”. It is known to all that the Rome Statute is a codification of the existing customary international law. The Crimes of genocide, crime against humanity and war crimes have shocked the consciousness of mankind and affected the interests of the international community as a whole. Therefore, the prohibition of these crimes has become part of jus consens and every State has an obligatio erga omnes to punish them. From the point of view of naturalist theory of international law, a State also has the obligation to act in accordance with the customary international law. In this sense, Paragraph 6 in the Preamble of the Statute recalls that “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”, and such duty means the obligation for every State to establish jurisdiction over the crimes listed in the Rome Statute, disregarding whether this State is a contracting party to the Rome Statute or not.

Practically speaking, it is obvious that the ICC cannot prosecute all crimes committed. It is entirely necessary to obtain effective prosecution through the national level. Due to its restricted capacity and resources, the ICC can only deal with limited cases and has to rely on the direct enforcement through State Parties. From the judicial experience in the past, with the adequate law enforcement, the national prosecution is the most effective way to address issues of the punishment of international crimes, if the State has the political will to do so.

In order to ensure the implement of the Rome Statute, the principle of complementarity is actually an approach of “encouragement and punishment”, as put in a Chinese saying by Xian Li Hou Bing, which means “courtesy first and penalty second”. If there is an allegation that the crimes listed in the Statute happen, the ICC shall let the States which have the jurisdiction over the crimes address the issue first by prosecuting and punishing those who are responsible for the crimes. By doing so, the ICC put national judicial sovereignty at the first place so as to encourage the States to exercise their national criminal jurisdiction. However if the States concerned fail to do so or are unable or unwilling to do so, the ICC has the right to exercise its own jurisdiction over the crime in accordance with the principle of complementarity, acting against the will of the States. Therefore, the principle of complementarity only respects the judicial sovereignty of the willing and able States. At the same time, whenever the ICC exercises its jurisdiction, it implies a declaration of unwillingness and inability of the States with the jurisdiction over the crimes.

The precondition for a State to exercise her national criminal jurisdiction is to recognize that the crimes listed in the Rome Statute are crimes also punishable under her national legislation. If a State refuses to adopt national law by following the substantial law of the Statue and fails to punish the alleged offenders, the purpose and aims of the ICC will be defeated and the penalty side of the principle of complementarity will be applicable to the State concerned. If a State believes that the result of applying the substantive law of the Rome Statute is the same as that of applying the domestic law, this is a very unsafe and misleading conception.
In order to avoid especially being blamed with “inability” or “unwillingness” and to meet the requirement of the principle of complementarity, a State is of the obligation to amend both its national substantive law and procedure law.

As for the implementation of the substantive law, there are mainly three ways in the recent States’ practices:

(1) Drafting a new legislation, which is the safest and easiest way.
(2) Changing its existing criminal law by adopting the definitions of the crimes in the Statute.
(3) Applying the domestic law in prosecuting international crimes as ordinary offences.

It is submitted that, theoretically speaking, the standard to determine whether a State is unwilling is mainly judged from its subjective consciousness. Thus, if a State prosecutes a person who committed crimes prohibited by the Statute under ordinary domestic offences, and during the trial, the procedure is undertaken independently and fairly, without any unduly delay nor any subjective purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in Article 5, the ICC could not made a decision saying that such a State is unwilling to investigate or prosecute. However, in considering to meet the standards of complementarity, such an approach is more risky than the first two in the sense of the possibility of being named as a State of inability or unwillingness, since the degrees of condemnation and gravity between international crimes and ordinary crimes in domestic law are totally different.

As to procedure law, Article 17(2)(c) provides “The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstance, is inconsistent with an intent to bring the person concerned to justice”. The ICC will decide whether the situation of unwillingness exists “having regard to the principles of due process recognized by international law”.

The term “due process”, with its special meaning in common law, has to be that recognized by international law, i.e. the procedure that is only in conformity with national procedural law cannot be regarded as a due process, and it is the ICC that will determine whether a State’s criminal procedure, including non-party States’ criminal procedures, is in conformity with the principles of “due process” or not. The standards adopted by the ICC for its determination are “the minimum guarantees” provided by the International Covenant on Civil and Political Rights (ICCPR). 10

10 Cf. Arts 9 and 14 of the International Covenant of the Civil and Political Rights. These are as follows: Right to liberty: Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law; Right to be informed: Anyone who is arrested shall be informed, at the time of arrest, of the reason for his arrest and shall be promptly informed of any charges against him. During the trial, he is entitled to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; He has the right to have the free assistance of an interpreter if he cannot understand or speak the language used in court; Right to be brought before a judge: Anyone arrested or detained on a criminal charge shall be entitled to be brought promptly before a judge or other officer authorized by law to exercise judicial
III. A brief examination on China’s criminal law and criminal procedural law

It is necessary to look at the decision made by the Senegal Court of Appeal in Dakar quashing the indictment against Hissene Habre first, prior to the examination on the domestic law of China. In the case, the court pronounced that “The subject matter of this case is criminal justice, which is built on two basic sets of rules: firstly, substantive rules which define crimes and fix their penalties and secondly, procedural rules which determine jurisdiction, the institution of proceedings and the functioning of courts”, and that “Senegalese law does not at present contain any provision for the punishment of crimes against humanity, pursuant to the principle enshrined in Article 4 of the Criminal Code that crimes and punishments must be laid down by law; the Senegalese courts have no jurisdiction over the acts at issue”.11

A Chinese court will face exactly the same situation as the Senegalese Court, without amending her domestic laws, when a case related to charges of international crimes is brought to its attention. Article 9 of the Criminal Law of the People’s Republic of China (CCL) reads: “This Law shall be applicable to crimes which are stipulated in international treaties concluded or acceded to by the People’s Republic of China and over which the People’s Republic of China exercises criminal jurisdiction within the scope of obligations, prescribed in these treaties, it agrees to perform”.12 There are a lot of debates and controversies over the true meaning of this article. Some claim that it is the basis for China to exercise the so-called universal jurisdiction over international crimes; some believe that it is just a modality to carry out the obligations of the conventions to which China is a contracting party. The jurisdiction of a court, in simplest terms, is the capability to entertain a case.

Even if China is a Contracting Party to the ICC Statute and tries to exercise her jurisdiction by invoking this article of the CCL, China is still facing the problem of amending her domestic law. The essential issue lies in the capability to hear a case.

As for the substantive law, the core crimes, such as crimes of genocide, crimes against humanity, war crimes and crimes of aggression, have not yet been incorporated into China’s criminal law. If China became a Contracting Party to the Statute without amending her substantive laws and would try the above-mentioned crimes as ordinary crimes in her criminal code, she should be very careful with her trials and sentences. For instance, if a Chinese court tries rape committed in war time, which is characterized by the ICC as a crime against humanity according to Article 7(1)(g) of the ICC Statute, as the ordinary domestic crime of rape, the sentence of the latter crime will be much lighter than for a crime considered by the ICC to be most serious; in such a situation, degradation of the sentence would prove the inadequacy of the Chinese court to deal with the crime with the “most serious crimes of international concern” regulated in the Rome Statute. Therefore, the ICC is very likely to determine that China’s courts are “unable” to prosecute a perpetrator committing international crimes and takes over the jurisdiction. For another example, if a Chinese court tries genocide as an ordinary crime of murder in her domestic law, the degree of condemnation of the crime would be greatly reduced, since the victims of the crime are not only those in a particular case, but humankind as a whole. In *Prosecutor v. Erdemovic*, the Trial Chamber of the ICTY held in its Judgment that core crimes “transcend the individual because when the individual is assaulted, humanity comes under attack and is negated”.13

Thus, it is important to recognize the distinctive characters of international crimes and incorporate them into the domestic laws, for only in this way can those core crimes be properly prosecuted within the system and meaning of international criminal law and the national court be effectively functioning under the Statute.

As for the criminal procedure, the minimum guarantees in determination of any criminal charge against the accused embodied in Article 14(3) of the ICCPR as mentioned above are not a part of the Criminal Procedural Law of the People’s Republic of China (CCPL), since China is not yet a party to the Covenant. If a Chinese court tries the case in accordance with its domestic law, China might be regarded as an “unable” or “unwilling” State because of the consideration of having no proper due process of law. If China adopts a new procedure with “the minimum guarantees” for entertaining cases related to international crimes, there will be different treatments between the accused alleged of committing international crimes and of ordinary crimes in China’s domestic law. An absurd result might be that the more serious the crimes, the more favourable treatment one may get. For instance, China’s procedural law does not recognize the principle of non-self-incrimination. If the accused is alleged of committing an ordinary crime, he or she has to confess his or her own crime truthfully according to Article 93 of the CCPL.14 If he or she refuses to do so, there might be an aggravating

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13 ICTY, Judgment (Case IT-96–22-T), Trial Chamber, 29 November 1996, para.28.

14 Article 93 of the CCPL reads: “When interrogating a criminal suspect, the investigators shall first ask the criminal suspect whether or not he has committed any criminal act, and let him state the circumstances of his guilt or
factor in his or her sentence, whereas the one who is accused of committing international crimes shall enjoy the human right standard of non-self-incrimination and therefore receive better treatment.

Thus, if China is preparing to ratify the Rome Statute, she shall not only examine her substantive criminal law, but also her constitutional law and criminal procedural law. The most proper way to deal with such a matter for China would be to criminalize the acts within the jurisdiction of the ICC as genocide, crimes against humanity and war crimes, according to the definitions of the Statute. If her constitutional law or criminal procedure law is unable to ensure the “minimum guarantees” in the ICCPR, she will be more likely to be declared as a State unable or unwilling to investigate or prosecute and, consequently, the principle of complementarity will not apply to her.

IV. Complementary and jurisdiction over senior State officials

The Rome Statute requests States to remove criminal immunity under national law from government officials, including a head of State or government, a member of a Government or parliament, an elected representative or a government official. Article 27(1) provides: “This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence”. However, current general international law is still likely to provide immunity to incumbent government officials. The International Court of Justice (ICJ), in its Judgment in the Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) on 14 February 2002 (paragraph 58), maintains, on the one hand, the functional immunity of the official capacity and, on the other, proposes that there are exceptions to such immunity in four circumstances. The examples provided by the ICJ include cases before the ICTY, the ICTR and the Statute of ICC. The ICJ also quotes Article 27(2) of the Rome Statute, which provides the “immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person”. Thus, the judgment of the ICJ only reaffirms the

explain his innocence; then they may ask him questions. The criminal suspect shall answer the investigators’ question truthfully, but he shall have the right to refuse to answer any questions that are irrelevant to the case.”

15 Ibid., n.1.

16 First, such persons enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries’ courts in accordance with the relevant rules of domestic law. Secondly, they will cease to enjoy immunity from foreign jurisdiction if the State they represent or have represented decides to waive that immunity. Thirdly, after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister of Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity. Fourthly, the incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction.
restrictions on national jurisdiction over government officials, without any limitations to the ICC’s jurisdiction.\textsuperscript{17}

On the issue of privilege and immunity of persons with official capacity, Chinese law grants them absolute immunity. As for the diplomats, Article 11 of the CCL reads “... the problem of the criminal responsibility of foreigners who enjoy diplomatic privileges and immunities shall be resolved through diplomatic channels”,\textsuperscript{18} which means there might be no criminal proceedings against them in China’s domestic court, even if they are charged with very serious international crimes. Article 23 of the Regulations of the People’s Republic of China concerning Diplomatic Privilege and Immunity stipulates that “visiting heads of States or government, foreign ministers and other officials of comparable status from foreign States shall enjoy the privilege and immunities specified in the Regulation”.\textsuperscript{19} This article might be interpreted in such a way that visiting heads of States or government foreign ministers, as well as other officials of comparable status from foreign States, still enjoy immunity from China’s courts, even if they are charged with genocide, torture, crimes against humanity and war crimes. This might go contrary to Article 27 of the ICC Statute.

The principle of complementarity requires States to amend their national laws by rejecting immunity of government officials. If a State follows such request by adopting a procedure law to investigate and prosecute incumbent senior government officials in its national legal system, the ICC would not exercise its jurisdiction over a case concerned. If a State selects to do the opposite based on immunity, the relevant case would be admitted before the ICC for the reason of inability or unwillingness to investigate or prosecute. Since the ICC has jurisdiction over non-party States, China, as a non-party State who has no duty to amend her national law on immunity, might be regarded as a State of inability.

\section*{V. Complementarity and the procedure of challenges to the jurisdiction of the Court}

China, on the one hand, welcomes the principle of complementarity in the Rome Statute, making national jurisdiction a priority and regarding the principle of complementarity as the most important guiding principle in the Statute of the ICC which should be reflected in all the substantive provisions of the Statute.\textsuperscript{20} On the other, China is very much concerned with the procedure of challenges to the jurisdiction of the Court. Her major concern on the principle of complementarity is with the challenges to the jurisdiction of the Court or the

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\item \textsuperscript{17} Judgment, para.61.
\item \textsuperscript{18} Ibid., n.17.
\item \textsuperscript{19} The Regulations of the People’s Republic of China concerning Diplomatic Privilege and Immunity (Law Press China, 2001).
\item \textsuperscript{20} Speech by H.E. Mr Wang Guangya, Head of the Chinese Delegation to the Rome Conference, Vice-Minister of the Foreign Affairs of China. He said: “As the most important guiding principle of the Statute for the International Criminal Court, the principle of complementarity should be fully reflected in all substantive provisions of the statute. The ICC should also carry out its future work in strict accordance with this principle. The court can exercise its jurisdiction only with the consent of the countries concerned and should refrain from exercising such jurisdiction when a case is already being investigated, prosecuted or tried by a relevant country”.
\end{itemize}
admissibility of a case provided in Article 19. If the application of complementarity is under controversy, or a State is determined as the one of “inability” or “unwillingness”, the State may challenge the jurisdiction of the Court or the admissibility of a case before the ICC. However, China believes such procedure of challenges may cause problems.

Article 19(1) provides that “The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with Article 17”. If determined by the ICC to be unable or unwilling, a State may go to the Court, challenging its determination. Usually, in an ordinary criminal case, if jurisdiction of the court or the admissibility of a case is challenged in the court, the issue will be contested between the two parties—defendant and prosecutor. But in the procedure provided in Article 19, the subjects of the procedure will be the ICC as one party and a Sovereign State as another. It is true that every court shall have inherent power to decide its own jurisdiction, yet the case is not only related to the matter of jurisdiction, but also to the inability or unwillingness of a State. It is a dispute between a sovereign State and an international organization. Strictly speaking, it is a question of public international law, not international criminal law.

According to Article 19, the challenges may be made by an accused or a suspect, a State which has jurisdiction over a case and a State from which acceptance of jurisdiction is required under Article 12, i.e. a non-party State. As Article 19(3) provides that the Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility, the Prosecutor may also be a party of the litigation. It is not clear in the provisions of the Statute who—the Prosecutor or the State challenging the jurisdiction—will be responsible for the burden of proof. If the State is responsible for adducing evidence, then will the presumption that every State is supposed to be able and willing to investigate and prosecute the serious international crimes still be tenable?

The main purpose of the procedure of challenges is to find out whether the State concerned is able or willing to investigate and prosecute a suspect. In this circumstance, the State has to subject her whole legal system to the review by the Court, including substantive and procedure law. Some States, like China, may regard this proceeding as an interference with its criminal judicial sovereignty, since China always regards her legal system as a matter within her absolute sovereignty. As for the aspect of substantial law, if a State uses the approach of ordinary domestic offences to prosecute the crimes within the jurisdiction of the ICC, there is a great possibility that the case will be admitted by the ICC. As to the procedural law, if a State is not a party of the ICCPR, it has no obligation to legislate in her national law in accordance with the Convenant. Therefore, the criteria of human rights applied to defendants in its national proceedings will not meet the needs of the “minimum guarantee” of the Convention. If the challenging procedure of the ICC becomes a discussion on the situation of a State’s human rights, it would be a disaster for both the State itself and the ICC.

Under the principle of complementarity, the admissibility of each case by the ICC, not including the cases referred by the UN Security Council, implies that the State which has jurisdiction over the case is unable or unwilling to investigate or prosecute the suspect.
The ICC will review the whole legal system of the State, including her substantive law and procedural law. Some States might regard this procedure as that she herself is under trial, rather than an individual. Such a decision will have a great impact on the international image of the State and cause damage to the State politically, legally, diplomatically and economically. For a State, the consequence of such impacts and damage would be much greater than bringing a person to justice.

In summary, if China would like to become a Contracting Party to the Rome Statute, she has to review and revise her domestic law in a comprehensive way, especially her criminal law and criminal procedural law. As for the substantial law, the crimes of genocide, crimes against humanity and war crimes should be incorporated into China’s criminal law, since China has become a Contracting Party to many conventions of international criminal law, such as the Genocide Convention, Torture Convention, Four Geneva Conventions and their two Protocols. As for the procedural law, China has signed the ICCPR, though not yet ratified it. It is submitted that until China becomes a Contracting Party to the ICCPR, it is futile to talk about becoming a Contracting Party to the Rome Statute. At the same time, the ICC should be very cautious when dealing with the issue of a State’s inability or unwillingness, especially towards a non-party State. To be on the safe side, the ICC should not declare a State, especially a non-party State, to be one of inability or unwillingness unless absolutely necessary.