

ASIA PACIFIC CENTRE - RESPONSIBILITY TO PROTECT

THE ROME STATUTE IN THE ASIA-PACIFIC

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EXECUTIVE SUMMARY

Relatively few countries in the Asia-Pacific have signed and ratified the Rome Statute. The Rome Statute is the multilateral treaty that, among other things, establishes the International Criminal Court ('ICC'). The role of the ICC is to investigate and trial humanitarian atrocities. While the Asia-Pacific has not experienced conflict on the same scale as other parts of the world, it has still witnessed a number of atrocities. These include genocide, war crimes and crimes against humanity. Accordingly, the Court is highly relevant in the region, as a tribunal for the trial of crimes that domestic judiciaries are unable or unwilling to hear. While the ICC has suffered a number of blows in the past year, attitudes towards the Court remain generally positive in the Asia-Pacific. Key to the future success of the Court in the Asia-Pacific is the attitude of key regional players such as Australia, Indonesia and China. Specifically, this report recommends that: (1) state supporters of the ICC play a more active role in advocating for the Court, (2) that advocates portray the Court as a universal body; (3) that efforts be taken to raise public awareness about the Court; (4) that development agencies and donors support capacity building in relevant areas; and (5) that the values and spirit of the Court be disseminated across the region.

INTRODUCTION

The International Criminal Court is the pre-eminent institution for the trial of international criminal law matters. Its foundation lies in the military tribunals established in Nuremberg and Tokyo after World War II, and the concept of impartial adjudication of mass atrocities derived therefrom¹. The Court was established according to the Rome Statute, a multilateral treaty that entered into force on the 1st of July 2002 after the requisite 60 State ratifications². The treaty is so named after the location of the 1998 diplomatic conference where it was finalised³.

The permanent Court has jurisdiction over the crimes of genocide, crimes against humanity and war crimes. It combines law from the Convention on the Prevention and Punishment of the Crime of Genocide and the four Geneva Conventions⁴. An amendment to introduce an additional crime of aggression has not yet entered into force⁵. Pertinently, the ICC's jurisdiction only extends to crimes committed after the Rome Statute entered into force for the respective State Party.⁶ Its jurisdiction is also limited to conduct that occurred in the territory of a member State, or was committed by a member State's nationals⁷. The Court may also be granted jurisdiction by a declaration of acceptance made by a non-State Party, or referral by the United Nations Security Council⁸.

States Parties who signed the Rome Statute within the window of time between its opening for signature and entering into force are not under a legal obligation to ratify it. Ratification is a secondary step, after signature, that encumbers a State with the legal obligations enunciated within a treaty.⁹ Accordingly, many States have signed but not ratified the Rome Statute. Signature means that the State must refrain from acts that would defeat the treaty's object and purpose¹⁰. However, in the case of the Rome Statute, this is predominantly a symbolic gesture, as signature alone cannot grant the Court jurisdiction for the prosecution and trial of crimes.

States who wish to become parties to the Statute since its entry into force in 2002 must now accede. Accession means that States must bind themselves to the full terms of the treaty in a single act¹¹. In doing so, States Parties to the Rome Statute are prevented from accepting certain treaty provisions and not others¹².

Proceedings before the ICC are initiated by investigations¹³. Investigations can be instigated by referrals from States Parties or the UN Security Council¹⁴. The Rome Statute also grants prosecutors of the Court the proprio motu right to investigate a crime without a referral, potentially in response to information provided by individuals and Non-Governmental Organisations ('NGOs')¹⁵.

The powers of the ICC are, however, deliberately curtailed by the principle of complementarity. Complementarity is a concept that affords national courts priority in addressing crimes that fall within the jurisdiction of the ICC¹⁶. The ICC is therefore a 'court of last resort'. In this manner, States may preserve their sovereignty by implementing into domestic law the crimes outlined in the Rome Statute. Indeed, the ICC only exercises its jurisdiction where the relevant State Party is unwilling or unable to prosecute an alleged offender¹⁷.

A COURT UNDER CHALLENGE

The ICC is not free from political controversy. In 2016 three States, being South Africa, Burundi and Gambia, have officially sought to withdraw from the Court. This is the first such instance in the history of the Court. Withdrawal will become effective one year after notice is provided to the United Nations ('UN')¹⁸.

Foremost, South Africa notified the UN of its intention to leave the ICC in October 2016¹⁹. It cited a conflict between submitting to the Court's jurisdiction and fulfilling its role as a regional peace broker. However, in February 2017, the South African High Court ruled that withdrawal without parliamentary approval is unconstitutional²⁰. It remains to be seen whether a formal withdrawal from the court, with the approval of parliament, will still take place in the future.

Burundi, which is under preliminary examination for recent post-election violence, has also submitted its withdrawal to the UN²¹. Gambia announced it would leave the Court in November 2016²². However, it has since rescinded its notification of withdrawal²³. Kenya has tabled a Bill in Parliament to effect withdrawal. Namibia and Uganda have similarly critiqued the Court²⁴.

The common criticism levelled against the ICC is its ostensible bias against African States²⁵. It is argued that the Court is not truly international in character, but instead a way for Western nations to persecute African leaders without incurring responsibility in return. This view is reinforced by the fact that only Africans have been prosecuted before the Court²⁶.

However, the ICC has in fact initiated preliminary investigations into a number of other international situations²⁷. There is also an obvious jurisdictional counter-point that the majority of signatories to the Rome Statute are African States²⁸. Additionally, four of the proceedings commenced against African States were initiated by the States themselves (the Democratic Republic of the Congo, Uganda, the Central African Republic and Mali)²⁹.

Elsewhere in the world, Russia has signalled its intention to leave the ICC. This occurred a day before a report published by the ICC labelled the Russian annexation of Crimea as an occupation³⁰ and a day after the UN General Assembly's Human Rights Committee approved a resolution condemning Russia's 'temporary occupation of Crimea'³¹. The Russian foreign Ministry has called the Court 'one-sided and inefficient'³². Russia, like the US, has signed but not ratified the Rome Statute. This means that the Court never had jurisdiction even prior to the intention to leave. The announcement is therefore a symbolic one³³.

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Asia and the Middle East are the most under-represented regions in the ICC in terms of member States³⁴. There are currently no Asia-Pacific situations under investigation, at trial or concluded³⁵. Unfortunately, of those States Parties to the Rome Statute in the Asia-Pacific, very few have also implemented the Statute into domestic law.

The Association of Southeast Asian Nations ('ASEAN') has been important in promoting human rights norms in the Asia-Pacific region. For instance, the ASEAN Political-Security Community Blueprint 2025 outlines a commitment to regional cooperation and the strengthening of criminal justice systems³⁶. ASEAN has also created an ASEAN Intergovernmental Commission on Human Rights ('AICHR') in 2009 and an ASEAN Declaration on Human Rights ('ADHR') in 2012.

However, the AICHR lacks the functional capacity or mandate to protect human rights. It is intended to be 'consultative, non-confrontational and respectful of sovereignty and non-interference'³⁷. Only its mandate to promote human rights has been specifically outlined and it cannot receive individual complaints or critique the governments of States³⁸. Moreover, the ADHR has been criticised for actually undermining the universality of human rights³⁹, as it outlines the primacy of domestic laws over human rights⁴⁰.

In terms of positive trends in the region, all Asian States are States Parties to the four 1949 Geneva Conventions, which form the basis for the war crimes included in the Rome Statute⁴¹. The Asia-Pacific is also the fastest growing regional group of ICC States Parties⁴². The Philippines and Vanuatu were among the last six States to join the ICC.

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AUSTRALIA

Australia is a party to the Rome Statute. It signed on the 9th of December 1998 and deposited its instrument of ratification on the 1st of July 2002⁴³. Australia has implemented the Rome Statute into domestic law through the International Criminal Court Act 2002 (Cth) and the International Criminal Court (Consequential Amendments) Act 2002 (Cth). In doing so, it criminalised genocide for the first time⁴⁴. Australia made the following Declaration to the Rome Statute:

Australia notes that a case will be inadmissible before the International Criminal Court (the Court) where it is being investigated or prosecuted by a State. Australia reaffirms the primacy of its criminal jurisdiction in relation to crimes within the jurisdiction of the Court. To enable Australia to exercise its jurisdiction effectively, and fully adhering to its obligations under the Statute of the Court, no person will be surrendered to the Court by Australia until it has had the full opportunity to investigate or prosecute any alleged crimes. For this purpose, the procedure under Australian law implementing the Statute of the Court provides that no person can be surrendered to the Court unless the Australian Attorney-General issues a certificate allowing surrender. Australian law also provides that no person can be arrested pursuant to an arrest warrant issued by the Court without a certificate from the Attorney-General.

Australia further declares its understanding that the offences in Article 6, 7 and 8 will be interpreted and applied in a way that accords with the way they are implemented in Australian domestic law.

Australia's Declaration is an example of the prioritisation of State sovereignty that typifies many States' relationship with the ICC. It is common for States to support the concept of an international criminal justice system that prosecutes the commission of atrocities. However, a number of States are reticent to relinquish their own nationals, particularly government officials, to an international body without domestic oversight.

Australia's Declaration also conforms with its broader attitude towards public international law. According to Australia's municipal law, rules of international law do not provide actionable bases for breaches of legal rights before Australian courts, unless they have been incorporated into domestic legislation⁴⁵. As far as Australia's attitude towards international law is concerned, domestic parliamentary implementation and judicial interpretation are paramount. The second aspect of the Declaration reflects this position to some extent.

Australia has otherwise made significant contributions to the ICC. It has been a major financial donor, advocated for the Court's activities and provided investigative assistance⁴⁶. Australia has the potential to fulfil an even greater leadership role in the Asia-Pacific in the future by encouraging its regional neighbours to ratify and implement the Rome Statute⁴⁷.

BRUNEI DARUSSALAM

Brunei Darussalam is not a party to the Rome Statute. Brunei Darussalam's primary objection to acceding to the Rome Statute is a concern that its sovereignty will be infringed⁴⁸. Rome Statute article 27 conflicts with the absolute immunity of the Sultan, which is preserved by the Constitution of Brunei Darussalam⁴⁹. Article 27(1) states, *inter alia*, that the Statute applies 'equally to all persons without any distinction based on official capacity.' There is also a concern that implementation of the Rome Statute would be difficult, since the offences of genocide, crimes against humanity and war crimes are not defined under domestic law⁵⁰.

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CAMBODIA

Cambodia signed the Rome Statute on the 23rd of October 2000 and deposited its instrument of ratification on the 11th of April 2002.⁵¹ Cambodia has implemented a hybrid domestic-international tribunal, referred to as the Extraordinary Chambers in the Courts of Cambodia ('ECCC')⁵². In June 2003 the United Nations and the Cambodian government agreed to the establishment of the international court within the domestic Cambodian legal system⁵³. The tribunal is staffed by both international and municipal judicial and administrative representatives⁵⁴.

During the Khmer Rouge's period of governance, an estimated 1.7 million Cambodians died⁵⁵. The ECCC was instituted as a response to the genocide enacted by the Khmer Rouge regime between 1975 to 1979,⁵⁶ some 30 years after the fact⁵⁷. Its role is to try atrocities committed by senior members of the Khmer Rouge regime.

The operations of the ECCC have not been without criticism⁵⁸. The persistent risk of hybrid courts is that they are more vulnerable to domestic influence than wholly international bodies. The ECCC has been particularly subject to allegations of interference with judicial investigation. Additionally, progress towards strengthening human rights under the current government has been lethargic at best⁵⁹. In fact, the current government has been accused of systematic human rights violations including extra-judicial killings and torture⁶⁰. The ECCC is also encumbered by the fact that Cambodia had not domestically criminalised genocide, crimes against humanity and war crimes at the time of the Khmer Rouge regime⁶¹. It has since criminalised such offences in November 2009, largely in compliance with the Rome Statute⁶². However, there do remain a number of related offences that are not criminalised, such as sexual crimes, use of child soldiers and the use of prohibited weapons⁶³.

In July 2010 the ECCC handed down its first verdict against Kaing Guek Eav. This represented both a practical and symbolic success for the court, which has struggled with high costs and slow processing of matters⁶⁴. In 2014 the General Assembly approved increased funding for the court⁶⁵. The ECCC has also engaged with the Cambodian population, by televising trial proceedings⁶⁶, involving the Cambodian judiciary in decisions and allowing victims to participate as full parties⁶⁷. While not without its challenges, the establishment of a hybrid tribunal to prosecute serious crimes sets an important precedent for the Asia-Pacific region⁶⁸.

CHINA, PEOPLE'S REPUBLIC OF

China is not a party to the Rome Statute. However, it has consistently maintained an interest in international criminal law frameworks. This is of particular importance, since China is the only Asia-Pacific State with a permanent seat on the UN Security Council. China has showed varying support for the establishment of the International Criminal Tribunal for the former Yugoslavia⁶⁹ and the International Criminal Tribunal for Rwanda⁷⁰. It has also abstained from the vote referring the situation in Darfur to the ICC⁷¹ and voted in favour of the resolution referring the situation in Libya to the ICC⁷².

China actively participated in the creation of the ICC⁷³. However, it ultimately voted against the Rome Statute at the conclusion of the Rome Conference⁷⁴. It was one of only seven States, and the only one from the Asia-Pacific⁷⁵. It is the only multilateral treaty that China has voted against⁷⁶. During this formative period, and in discussions since, China has promoted a model of the ICC that gives the court limited, non-mandatory jurisdiction.

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China's rejection is notable for being made in the same year that it signed the International Covenant on Civil and Political Rights⁷⁷. What might appear to be a bipolar attitude can be explained by China's imperative to preserve its sovereignty from foreign intervention. Chinese representatives have stated explicitly that China 'opposes foreign intervention in a state's internal affairs on the pretext of implementing a universal human rights standard.'⁷⁸ This same interest might explain China's aversion to submitting itself to any of the bases of jurisdiction of the International Court of Justice⁷⁹ and international adjudication more generally. An example of the latter is the recent South-China Sea arbitration decision⁸⁰. The decision against China's position has been perceived by the Chinese administration as encroachment by the Western international order on matters of Chinese sovereignty.

In line with this attitude, China has expressly objected to the article 15 power within the Rome Statute. Article 15 empowers a prosecutor to initiate an investigation *proprio motu*. China has argued that such a provision effectively endows an individual with the same power as a member State of the UN Security Council⁸¹. China has also objected to the current definition of the crime of aggression⁸². China has argued that, in a similar vein to the *proprio motu* power, the ICC's ability to exercise jurisdiction over the crime of aggression infringes upon the role of the UN Security Council to find whether an act of aggression has been committed⁸³. China has also argued that the definition, and the status of the crime in the proposed amendment to the Rome Statute, is legally ambiguous⁸⁴. Nevertheless, China has worked with the Preparatory Commission of the ICC⁸⁵, has observed the meetings of the Assembly of States Parties, the discussions of the Special Working Group on the Crime of Aggression, and the negotiations of the Kampala Review Conference⁸⁶.

Commentators have pointed out that, should the definition of certain crimes have a wider ambit than being restricted to simply war-like scenarios, (like the inclusion of 'domestic armed conflicts in article 7) then China's conduct in relation to separatists in Nepal and Taiwan might fall within the Court's jurisdiction⁸⁷.

FIJI

Fiji signed the Rome Statute on the 29th of November 1999 and deposited its instrument of ratification on the same date.

INDONESIA

Indonesia is not a party to the Rome Statute. It had pledged to ratify the treaty by 2008, but in 2013 formally rescinded the undertaking⁸⁸. While there are some positive indications under the current administration that Indonesia may yet accede to the Rome Statute, it is unlikely to do so in the near future⁸⁹. Although the reason for Indonesia's withdrawal and continued ambivalence towards the Court is unclear, a likely explanation is pressure from the Indonesian military and Ministry of Defence⁹⁰. Despite the non-retroactive nature of the ICC's jurisdiction, it has been suggested that the military may be wary of incurring what it perceives as liability under the Rome Statute for past conduct⁹¹. Indonesia has also publicly expressed a position that prioritises State sovereignty over international legal obligations multiple times⁹².

Indonesia has historically witnessed a number of human rights abuses. Between 1967 and 1998 the Suharto regime arbitrarily detained, tortured and murdered persons deemed opponents of the State⁹³. Since the Suharto regime ended Indonesia has become significantly more democratised. In doing so it has displayed some interest in prosecuting crimes against humanity and genocide⁹⁴. Before the establishment of the ICC it adopted Law No 26 of 2000 of the Human Rights Court, which

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implemented Rome Statute crimes under domestic law⁹⁵. The law also empowers the national human rights commission to conduct preliminary investigations into alleged cases of crimes against humanity and genocide and to make recommendations for prosecution to the Attorney-General's Office. However, recommendations are rarely followed up by the Office⁹⁶.

In 1999 East Timor voted in favor of independence from Indonesia⁹⁷. The vote was organised by the UN after nearly 25 years of Indonesian annexation, a period during which up to 200,000 East Timorese died⁹⁸. After the referendum, elements of the Indonesian military⁹⁹ and Indonesian-backed militia forces killed approximately 2000 people, committed extensive acts of slavery and sexual violence¹⁰⁰, and displaced over 250,000 persons¹⁰¹. A UN-appointed commission of inquiry found that there was evidence that crimes against humanity had been committed, and that an ad hoc tribunal ought to be established in order to prosecute those responsible¹⁰². The UN Security Council implemented the United Nations Transitional Administration in Timor-Leste, and a hybrid criminal tribunal operating under Indonesian law¹⁰³. The UN has described Indonesia's patchwork legal response to the violence in East Timor as 'manifestly inadequate'¹⁰⁴. Following such criticism, Indonesia and East Timor established a joint Commission on Truth and Friendship, which found that Indonesian authorities had participated in crimes against humanity¹⁰⁵. However, Indonesia's lack of subsequent support has rendered the result largely perfunctory.

Corruption and state-sponsored violence are also still present in Indonesia today¹⁰⁶. The criminal justice system has little interest in human rights cases and specialised military courts have a tendency to enforce limited sentences or acquit alleged offenders¹⁰⁷. Crimes committed under the Suharto regime have also failed to be meaningfully addressed¹⁰⁸.

With respect to the ICC, its detractors in Indonesia point to Law No 26 as a compromised means of preserving State sovereignty while enforcing ICC norms¹⁰⁹. The greatest disparity between domestic Indonesian law and the Rome Statute is the inadequate criminal procedural law in Indonesia¹¹⁰. In terms of procedure, the most obvious lacuna is lack of entrenchment of the right to fair trial.

Should Indonesia ratify the Rome Statute, it will serve a significant symbolic purpose as an endorsement from one of the rising powers in the Asia-Pacific. Indonesia's Law No 39 of 1999 Concerning Human Rights also has the effect that ratification of the Rome Statute would be automatically legally binding domestically.

JAPAN

Japan deposited its instrument of accession to the Rome Statute on the 17th of July 2007¹¹¹. It has incorporated the Rome Statute into domestic legislation¹¹².

KIRIBATI

Kiribati is not a party to the Rome Statute.

KOREA, DEMOCRATIC PEOPLE'S REPUBLIC OF

The Democratic People's Republic of Korea (or North Korea) is not a party to the Rome Statute. The State has been accused of a number of violations of human rights and crimes against humanity for several decades. For instance, throughout the 1960's and 1970's North Korea abducted several Japanese and South Korean nationals¹¹³. The crimes are alleged to have taken place on the territories of the respective States¹¹⁴. Both States have condemned the activity, but have thus far not brought proceedings before the ICC.

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In December 2010 the ICC launched a preliminary investigation into whether North Korea had committed crimes on South Korean territory. The conduct in question was the alleged launch of a torpedo at the South Korean warship Cheonan and shelling of Yeonpyeong Island¹¹⁵. While the ICC has reserved the right to reopen an investigation if new evidence is presented¹¹⁶, the preliminary investigation did not find sufficient basis for an exercise of the Court's jurisdiction. The attack on the Cheonan was judged to not constitute a war crime because it '...was directed at a lawful military target and would not otherwise meet the definition of the war crime of perfidy as defined in the Rome Statute.'¹¹⁷ It was also found that there was insufficient evidence to establish a 'reasonable basis to believe that the attack [on Yeonpyeong Island] was intentionally directed against civilian objects or that the civilian impact was expected to be clearly excessive in relation to the anticipated military advantage.'¹¹⁸

By contrast, a UN commission inquiry in 2013 found 'reasonable grounds to believe that crimes against humanity have been committed' according to policies of senior members of the North Korean government against its civilians¹¹⁹. In 2015, the United Nations General Assembly passed a resolution by majority vote condemning North Korea's human rights abuses¹²⁰. Nineteen States (including China) voted against it, while 48 abstained. The UNGA has passed ten such resolutions with respect to North Korea previously. The resolution also recommended that the UN Security Council refer the situation in North Korea to the ICC¹²¹. A referral is unlikely to occur while China can veto it. Accordingly, senior members of the North Korean government are unlikely to face prosecution, even if further ICC investigations reveal convincing evidence of crimes being perpetrated.

KOREA, REPUBLIC OF

The Republic of Korea (or South Korea) signed the Rome Statute on the 8th of March 2000 and deposited its instrument of ratification on the 13th of November 2002¹²². It also ratified the Agreement on the Privileges and Immunities of the International Criminal Court on the 18th of October 2006¹²³. It implemented the Rome Statute into domestic legislation on the 21st of December 2007 as Law No 8719, Act on the Punishment, etc. of Crimes within the Jurisdiction of the International Criminal Court. South Korea has strongly supported the ICC since its creation and throughout its operation. Its legislative implementation of the Rome Statute was the product of the research and recommendations of a task force consisting of legal experts and government officials¹²⁴. Despite the fact that the South Korean Constitution provides the Rome Statute with 'the same force and effect of law as domestic laws'¹²⁵, further legislation was required to outline certain requirements with respect to sentencing. Such terms are absent from the treaty. South Korean Song Sang-Hyun was formerly president of the ICC.

Despite being a strong proponent of the ICC, the Republic of Korea is not without criticism. The Truth and Reconciliation Commission of Korea, which operated between 2005 and 2010, has revealed widespread summary executions, mass killings, torture and forced disappearances of political dissidents throughout the latter half of the 20th Century¹²⁶. An estimated 100,000 individuals were executed between 1945 and 1993 under authoritarian South Korean military regimes¹²⁷. US allied forces were also found to have killed civilians¹²⁸. A number of other commissions have been instituted, though none more effective than the TRCK. Earlier commissions such as the Presidential Truth Commission on Suspicious Deaths in 2001 and the Commission for Restoring Honor and Compensation for Victims of Democratisation Movements were less effective due to the statute of limitations and a less expansive mandate¹²⁹. Concerns remain over the many incidents of government violence that have not been addressed since the TRCK concluded its investigations in 2010.

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LAOS, PEOPLE'S DEMOCRATIC REPUBLIC OF

The People's Democratic Republic of Laos is not a party to the Rome Statute. It has previously expressed support for accession, but the domestic legal system needs further development before the Statute can be effectively implemented¹³⁰. Considering its reticence to adopt any individual human rights complaint mechanism, it is also possible that the government is concerned that accession will also unduly infringe upon its sovereignty¹³¹.

MALAYSIA

Malaysia is not a party to the Rome Statute. There has been some positive movement towards accession and domestic implementation of the treaty¹³², such as a public affirmation made in 2011¹³³. However, it does not appear that Malaysia will become a State Party any time in the immediate future¹³⁴. Malaysia has adopted a cautious approach. It has stated its support for the Court and its commitment to the ideals of the Rome Statute but wants to observe how the Statute is implemented by other States before doing so itself¹³⁵. There are also concerns that the Rome Statute conflicts with immunity of the monarchy¹³⁶, that the UN Security Council referrals may be politically motivated¹³⁷ and that complementarity is not defined by the Statute¹³⁸.

MONGOLIA

Mongolia signed the Rome Statute on the 29th of December 2000 and deposited its instrument of ratification on the 11th of April 2002¹³⁹. It also signed the Agreement on the Privileges and Immunities of the International Criminal Court on the 4th of February 2003¹⁴⁰.

MYANMAR

Myanmar is not a party to the Rome Statute. Ongoing human rights violations against the ethnic Rohingya population, including military offensives and the mass displacement of civilians, are a cause for concern and potential violations of international humanitarian law¹⁴¹. Allegations have been made by UN officials that ethnic cleansing and crimes against humanity have been committed against the Rohingyas¹⁴². Up to 90,000 refugees remain in border camps and despite a ceasefire agreement with armed border groups, conflict has continued¹⁴³. The peace process will require a resolution of these ongoing issues, in addition to reconciling the interests of a number of disparate ethnic groups¹⁴⁴.

NAURU

Nauru signed the Rome Statute on the 13th of December 2000 and deposited its instrument of ratification on the 12th of November 2001¹⁴⁵.

NEW ZEALAND

New Zealand signed the Rome Statute on the 7th of October 1998 and deposited its instrument of ratification on the 7th of September 2000¹⁴⁶. It also ratified the Agreement on the Privileges and Immunities of the International Criminal Court on the 14th of April 2004¹⁴⁷. New Zealand implemented the Rome Statute into domestic law through the International Crimes and International Criminal Court Act 2000. It has made the following declaration to the Rome Statute:

1. The Government of New Zealand notes that the majority of the war crimes specified in article 8 of the Rome Statute, in particular those in article 8 (2) (b) (i)-(v) and 8 (2) (e) (i)-(iv) (which relate to various kinds of attacks on civilian targets), make no reference to the type of the weapons employed to commit the particular crime. The Government of New Zealand recalls that the fundamental princi-

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ple that underpins international humanitarian law is to mitigate and circumscribe the cruelty of war for humanitarian reasons and that, rather than being limited to weaponry of an earlier time, this branch of law has evolved, and continues to evolve, to meet contemporary circumstances. Accordingly, it is the view of the Government of New Zealand that it would be inconsistent with principles of international humanitarian law to purport to limit the scope of article 8, in particular article 8 (2) (b), to events that involve conventional weapons only.

2. The Government of New Zealand finds support for its view in the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons (1996) and draws attention to paragraph 86, in particular, where the Court stated that the conclusion that humanitarian law did not apply to such weapons “would be incompatible with the intrinsically humanitarian character of the legal principles in question which permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future.”

3. The Government of New Zealand further notes that international humanitarian law applies equally to aggressor and defender states and its application in a particular context is not dependent on a determination of whether or not a state is acting in self-defence. In this respect it refers to paragraphs 40-42 of the Advisory Opinion in the Nuclear Weapons Case.

Unlike Australia's Declaration, New Zealand has not sought to limit the effect of ratifying the Rome Statute. Instead, the Declaration seeks to ensure that the scope of the treaty is broad enough to encompass non-conventional weaponry. New Zealand has made particular reference to nuclear weapons. This is unsurprising, given the State's anti-nuclear proliferation stance and previous involvement in matters before the International Court of Justice concerning the use of nuclear weapons¹⁴⁸.

PALAU

Palau is not a party to the Rome Statute.

PAPUA NEW GUINEA

Papua New Guinea is not a party to the Rome Statute. The decision of the ICC to broaden its scope of investigations to crimes committed during peace time, including ‘land grabs’ and illegal exploitation of natural resources is of particular pertinence to Papua New Guinea, should it ever accede to the Rome Statute¹⁴⁹.

PHILIPPINES, THE REPUBLIC OF

The Philippines signed the Rome Statute on the 28th of December 2000 and deposited its instrument of ratification of the Rome Statute on the 30th of August 2011¹⁵⁰. The Philippine Act on Crimes Against International Humanitarian Law, Genocide and Other Crimes Against Humanity (RA 9851), enacted in December 2009 before entry into the Rome Statute, is an effective replication of many of its provisions under domestic law¹⁵¹.

Ratification of the treaty is a positive step towards reinforcing justice in a State that has committed serious crimes against civilians since at least the new millennium. For instance, the Philippine military has been accused of committing over one thousand extrajudicial killings and more than two hundred enforced disappearances between 2001 and 2009¹⁵².

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More recently, the Philippines has been the subject of controversy surrounding President Rodrigo Duterte 'crackdown on drugs'. In response to alleged corruption and an unencumbered narcotics trade, Duterte has encouraged the extrajudicial killing of persons associated with drug dealing throughout the State¹⁵³. So far, in excess of 6,000 persons are estimated to have been killed¹⁵⁴. In response, Chief Prosecutor of the ICC Fatou Bensouda made a public statement that the Court may have jurisdiction to prosecute Duterte and senior officials for their roles in inciting or condoning the mass killings¹⁵⁵. She stated that 'any person in the Philippines who incites or engages in acts of mass violence including by ordering, requesting, encouraging or contributing, in any other manner, to the commission of crimes within the jurisdiction of the ICC is potentially liable to prosecution before the Court.'¹⁵⁶ Such conduct would fall within article 25(3)(b) of the Rome Statute. Article 25(3)(b) states that a person shall be criminally responsible where they order, solicit or induce the commission of a crime which in fact occurs or is attempted. Chief Prosecutor Bensouda has also intimated that a preliminary investigation may be launched should the situation in the Philippines worsen.

Following the removal of Russia's signature from the Rome Statute, and in rebuttal to the ICC statement, Duterte has stated that the Philippines may withdraw from the treaty. He called the Court 'useless' and Western-centric, arguing that 'only the small ones like us are battered.'¹⁵⁷ Additionally, it may be difficult to establish a case in circumstances where the State-sanctioned violence is occurring in the context of police raids that follow established protocol¹⁵⁸.

SAMOA

Samoa signed the Rome Statute on the 17th of July 1998 and deposited its instrument of ratification of the Rome Statute on the 16th of September 2002¹⁵⁹. It has also ratified the Amendment to Article 8 of the Rome Statute on the 25th of September 2012¹⁶⁰. It ratified the Amendments on the Crime of Aggression on the same date. Samoa acceded to the Agreement on the Privileges and Immunities of the International Criminal Court on the 8th of April 2016¹⁶¹. It has implemented the Rome Statute into domestic legislation¹⁶². Samoa actively participated in the negotiating and drafting of the Rome Statute¹⁶³.

SINGAPORE

Singapore is not a party to the Rome Statute. During its first Universal Periodic Review, Singapore ostensibly accepted a recommendation from France to ratify the Statute¹⁶⁴. It has not yet done so. It was, however, involved in the negotiations preceding the treaty. Its primary contribution was a critical proposal to reduce the possibility of UN Security Council interference with prosecutions¹⁶⁵. The permanent five members were in favor of a provision that required affirmative approval before a prosecution was commenced¹⁶⁶. Singapore's proposal was to allow a prosecutor to proceed unless the Security Council deferred a case by resolution. This has the effect that instead of veto powers preventing investigations into permanent member States, any veto will prevent an attempted resolution deferring an investigation. This eventually became the current Article 16 of the Statute, which preserves the effect of Singapore's original proposal¹⁶⁷.

The reticence of Singapore to accede to the Rome Statute can likely be explained by its support of the death penalty. During the Rome Conference in 1988, Singapore argued that there was 'no international consensus' on its abolition¹⁶⁸. Singapore's Penal Code does, however, include a crime of genocide¹⁶⁹.

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SOLOMON ISLANDS

The Solomon Islands signed the Rome Statute on the 3rd of December 1998 but have not ratified it¹⁷⁰. They have incorporated some of the crimes under domestic law, such as genocide¹⁷¹.

THAILAND

Thailand signed the Rome Statute on the 2nd of October 2000, but has not ratified it¹⁷². Thailand has previously expressed concern regarding the immunity of heads of state relative to article 27¹⁷³. Further, it has stated that joining the ICC is a financial burden that takes money away from other worthwhile investments¹⁷⁴. The government has also objected to the characterisation of non-international armed conflicts as war crimes¹⁷⁵. This introduces liability for military members involved in internal security matters.

Successive Thai administrations have argued that the Court should be granted jurisdiction to investigate one another. There have been calls to grant the Court jurisdiction to investigate the deaths of civil protestors under one government, and extrajudicial killings against persons involved in the drug trade under another¹⁷⁶. However, thus far no arrangement has been made.

TIMOR LESTE, DEMOCRATIC REPUBLIC OF

Timor-Leste deposited its instrument of acceptance of the Rome Statute on the 6th of September 2002¹⁷⁷. Following the atrocities committed in Timor Leste by Indonesian forces, the UN Transitional Administration in East Timor established the Special Panels of the Dili District Court¹⁷⁸. The hybrid International-East Timorese tribunal operated from 2000 to 2006 with jurisdiction over genocide, war crimes, crimes against humanity, murder, sexual offences and torture¹⁷⁹. 55 trials were held by the special panels resulting in 84 convictions¹⁸⁰. However, the efficacy of the tribunal was severely curtailed by a lack of cooperation on behalf of Indonesia to surrender guilty offenders. It also failed to adjudicate any proceedings against those most responsible for the 1999 violence¹⁸¹.

TONGA

Tonga is not a party to the Rome Statute. In reporting to the Human Rights Council in 2013 it stated that it was considering accession¹⁸². Indeed, the Attorney-General's Office has sought assistance from the International Committee of the Red Cross in drafting a proposal for Cabinet¹⁸³. Factors that have militated against accession to the Statute are creating an effective legislative framework for the domestic implementation of the Rome Statute and the cost of legislative review.¹⁸⁴

TUVALU

Tuvalu is not a party to the Rome Statute. It has considered acceding to the Rome Statute, with some domestic support¹⁸⁵. Tuvalu is also making efforts to increase protections of human rights, including gender equality.

VANUATU

Vanuatu deposited its instrument of accession to the Rome Statute on the 2nd of December 2011¹⁸⁶. It is hoped that Vanuatu's accession will encourage other Pacific Island States to join the Court¹⁸⁷.

VIETNAM

Vietnam is not a party to the Rome Statute. However, it has shown some support for accession¹⁸⁸ and possesses some capacity to prosecute international crimes¹⁸⁹. Vietnam was engaged in drafting

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the Rome Statute in 1998, and has attended sessions and meetings of ICC bodies on a number of occasions¹⁹⁰. The Ministry of Justice has also sought support from the European Union in evaluating the possibility of accession and domestic implementation of the Statute¹⁹¹. Inconsistencies between the provisions of the Statute and domestic penal law, such as the absence of a double-jeopardy rule domestically, are potential impediments to accession¹⁹².

During and after the Vietnam War, both sides accused the other of committing war crimes and crimes against humanity¹⁹³. However, conduct such as the distribution of gas and defoliants¹⁹⁴, torture and mistreatment of prisoners of war¹⁹⁵ would not fall within the jurisdiction of the ICC. Even if Vietnam acceded to the Rome Statute, the provisions would not retroactively apply.

THEMES IN THE ASIA PACIFIC

The prevention of external interference in matters of domestic governance is a concept of particular importance to States with colonial pasts throughout the Asia-Pacific¹⁹⁶. During the creation of the ICC, Indonesia, Malaysia,¹⁹⁷ the Philippines, Thailand,¹⁹⁸ and Vietnam¹⁹⁹ all stressed the importance of preserving sovereignty²⁰⁰. Indeed, the first ASEAN Heads of Government Summit in 1976 emphasised the fundamental principles of independence, sovereignty and non-interference in the internal affairs of member States²⁰¹. These principles are now enshrined in article 2(2) of the ASEAN Charter. The 1993 Bangkok Declaration of Asian States reaffirmed these principles and 'the non-use of human rights as an instrument of political pressure'²⁰².

This necessarily places the ICC in direct opposition to the political and security imperatives of many Asia-Pacific governments. The concept of a supranational body that can engage in proprio motu investigations and prosecutions of members of government is an unpalatable proposition to many²⁰³. In fact, the scope of the proprio motu power was opposed by Indonesia, Malaysia and Thailand at the Rome Conference, among others²⁰⁴. Moreover, the militaries of many Southeast Asian States involved in recent or ongoing conflicts have strongly opposed the Rome Statute. Participation of armed forces in foreign conflicts also places even the most domestically stable States at risk of prosecution.

Creating a sufficient legislative framework to domestically implement the treaty is a common problem among Asia-Pacific States. Although the Statute applies irrespective of such a framework, the principle of complementarity dictates that States would get a 'first go' at resolving crimes before they are dealt with by the ICC. Geographic isolation also correlates with a lower incidence of ICC membership. This is particularly pertinent to, and evidenced by, the limited number of States Parties to the Rome Statute in the Asia-Pacific²⁰⁵. Other factors that reduce the likelihood of a State joining the ICC include the need for judicial capacity building, constitutional constraints, prioritisation of other initiatives and general lack of political will²⁰⁶. Conversely, factors suggested to effect the likelihood of a State ratifying the Rome Statute include civil conflict in neighbouring States²⁰⁷, the presence of wars in a region²⁰⁸ and regional trends in treaty ratification²⁰⁹.

THEMES IN THE ASIA-PACIFIC

Another common theme in the Asia-Pacific is its aforementioned status as the fastest growing region for States Parties to the Rome Statute. This may be due to a number of factors. Both international and domestic civil society organisations have increased pressure on Asia-Pacific States to join the Court. Groups such as the Coalition for the International Criminal Court (CICC) and Parliamentarians for Global Action (PGA) have encouraged governments in the region to accede and increase human rights protections. Former President of the International Criminal Court, Judge Sang-Hyun Song also made it a priority to involve more Asia-Pacific States in the Court²¹⁰. Following meetings with him, both the Philippines²¹¹ and Maldives²¹² joined the Court. The trend also follows a growing international consensus on accepting human rights regimes and the role of the ICC in international affairs. Such a positive trend is demonstrated by the attitudinal shift of UN Security Council members from the creation of the Court to the situation in Libya.

There are also trends observable between sub-groups or sub-regions in the Asia-Pacific. In terms of 'Western' nations, both Australia and New Zealand were early adopters of the Rome Statute. This is likely a consequence of their active participation in UN norm-setting bodies and shared appreciation of human rights. Both nations have strong ethical stances that participation in the ICC aligns with. Unfortunately, however, the enthusiasm to submit to the Court's jurisdiction by both States has not spread to other States in the region.

With respect to Pacific Island States, the lack of States Parties to the Rome Statute can be explained by a number of factors. As discussed, geographical isolation means that there is no risk of neighbouring conflicts spilling into their territory. Similarly, there is a lack of pressure from neighbours to prevent such transboundary conflict. Moreover, Pacific Islands States have historically had little internal pressure to accede to the Rome Statute, while experiencing external pressure from the US to minimise their obligations under the treaty. The Bush Administration sought to establish a framework of bilateral 'impunity agreements' in 2002 that would prevent US nationals in the territories of other States from being surrendered to the Court²¹³. These treaties have been popular among Pacific Island and Southeast Asian States. Relevantly, States within the Asia-Pacific party to an impunity agreement include Bangladesh, Bhutan, Cambodia, East Timor, Fiji, Kiribati, Laos, Marshall Islands, Micronesia, Nauru, Nepal, Palau, Papua New Guinea, the Philippines, Singapore, Solomon Islands, Sri Lanka, Thailand, Tonga, Tuvalu²¹⁴. That said, the US has since abandoned its policy of bilateral agreements and no longer opposes ratification of the Rome Statute by other States²¹⁵.

In its recent history, Southeast Asia has witnessed all manner of human rights abuses, movement of refugees and mass atrocities. While some States have made arrangements to remedy past abuses, such as Cambodia, many others have not. The preservation of sovereignty is, as discussed, a matter of high priority for many Southeast Asian States, to the extent that it supersedes human rights considerations.

Unsurprisingly, therefore, the concept of hybrid tribunals has been popular in Southeast Asia. The process of establishing such institutions is not an easy one. Criticism has been particularly focused on the alleged occurrence of interference in proceedings by domestic forces. This phenomenon is, unfortunately, not unique from the experience of the ICC itself. However, the ICC remains a superior option in most circumstances. Throughout its history of operations, it has avoided the politicisation that can undermine hybrid tribunals. As an ostensibly objective institution, the ICC has an easier task of ensuring a fair trial for both victims and the accused. It also has the benefit of experience, legitimacy and budgetary support.

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Nevertheless, the creation of hybrid institutions establishes an important precedent for a region lacking in any substantial recognition of human rights or international crimes²¹⁶. Their operation, while potentially flawed, represents a significant step towards greater recognition of justice for victims of serious crimes and human rights abuse. They also herald what may become a new era of 'national capacity building'²¹⁷ that binds future administrations and reduces prevailing conceptions of the imperviousness of state sovereignty²¹⁸.

While Southeast Asia is in desperate need of a stronger rights framework, past statements made by both Indonesia and Malaysia in favour of joining the Court provide some hope that these key States may yet accede to the Rome Statute. If that was to take place, other members of ASEAN may follow suit.

In Northeast Asia, States like Japan and South Korea have also been heavily involved in the creation of the Court. They have both shown great leadership in joining the ICC, and encouraging the development of regional norms that invoke principles of the Court²¹⁹. However, there remain States whose absence from the Court is significant. Both North Korea and China are unlikely to ever accede to the Rome Statute in its current form. Due to its position in the UN Security Council and broader economic and military strength, China is highly unlikely to be pressured into joining the treaty unless there is a radical change in domestic policy. Similarly, North Korea's isolationist stance and aversion to acknowledging human rights abuses leaves the possibility of its accession extremely remote. This is unsurprising, but unfortunate, as the notoriety of North Korea and size of China create symbolic lacunae in the jurisdictional reach of the ICC that somewhat undermines its stature.

While there remain significant steps that must be taken before the Asia-Pacific can be considered to be legally committed to the prevention and prosecution of atrocities, the overall trend is a positive one. The imperative to establish universal acceptance of ICC norms is made all the more important by the violent history of many States in the region.

RECOMMENDATIONS

1. Advocates for the Court

Major States that have ratified the Convention, notably Australia, Cambodia, Japan, Korea (Republic of) and New Zealand, have an important role to play in encouraging non-member States in the region to ratify the Rome Statute if they have signed it, and otherwise accede to the treaty if not.

2. The Court as a Universal Body

In advocating for the ICC, it is important to emphasise that the Court is not merely a Western project aimed at bullying developing nations, as has been suggested. Preliminary investigation into the UK's involvement in the conflict in Iraq is an example of Western individuals not having impunity from the Court's jurisdiction.

3. Awareness Raising

It is also important to educate States about the role of the ICC and the precise limits on its jurisdiction relevant to State sovereignty. Emphasising the principle of complementarity as an effective means of preserving sovereignty within the official framework of the Court is essential. Further, it is worth reinforcing to States the temporal limits on the Court's jurisdiction. While less palatable, if it means that a State will accede to the Rome Statute, then it is a justifiable tactic. It is also worth noting that the proprio motu power has only been used once, after significant discussion and agreements with Kenyan government representatives. It followed pressure from both national and international NGO's and the UN²²⁰. The extant workload of the Court and its limited resources mean that such a power is unlikely to be used against States in the Asia-Pacific. Moreover, the preliminary investigations of the Court can actually serve to assist national proceedings, by giving States the opportunity to remedy issues themselves before the ICC steps in²²¹.

States should also be reminded that, as the application of the Rome Statute spreads, if they desire a means of directly influencing the development of the international criminal law framework then they must become States Parties. Becoming a State Party to the Rome Statute entitles a State to join in Assembly of State Parties ('ASP') meetings. The ASP is heavily involved in the ongoing operations of the Court. The ASP approves the Court's budget, considers 'any question relating to non-cooperation' and can adopt amendments to the Rome Statute²²².

4. Capacity Building

It is essential that States be encouraged and supported to establish their own effective domestic systems that, at the very least, criminalise those crimes outlined in the Rome Statute and establish procedures for cooperation with the ICC. This both prevents the Court from intervening in domestic affairs and establishes essential norms independent of the ICC framework. Effective national systems that facilitate the investigation, prosecution and adjudication of genocide, war crimes, crimes against humanity and aggression are much needed even among member States. Statutorily defined means of compliance with ICC judicial orders and arrest warrants are also critical to the operation of the Court²²³.

RECOMMENDATIONS

Advocates could support legal training and educational forums in order to foster national capacity building. Such initiatives can be targeted at both lawyers and judges of member and non-member States alike²²⁴. They could also support the various NGOs that already work to educate States about the ICC and collect information on atrocities occurring in the Asia-Pacific. Such groups have already distributed reports to United Nations bodies and other States. They have proven essential in the gathering of evidence and monitoring the progression of conflicts.

5. Disseminate and Spread the Court's Values

With States that are unlikely to ever join the ICC, a better option than pressing for accession may be emphasising the importance of the norms and values of the court. States that are wary of the Court's reach can simply amend their existing domestic law to better align with the Rome Statute²²⁵. This is a compromise that can ensure a State's sovereignty is protected while getting minimal, much-needed protections in place for its populace, such as through the domestic criminalisation of genocide and war crimes.

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