

SIGN UP OR SIGN OFF— ASIA’S RELUCTANT ENGAGEMENT WITH THE INTERNATIONAL CRIMINAL COURT

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International Criminal Court (ICC) supporters argue that there is a need to achieve universal ratification so that the majority of mankind will no longer remain outside the protection of the ICC. In the Asia/Pacific region there is a relatively low accession rate of nation states to the Rome Statute. This paper proposes a taxonomy of resistance to ratification in the region, recognizing that in speculating on the reasons for resistance to the ratification of international criminal justice mechanisms—from the local to the global—across Asia and the Pacific, there is a risk in both over emphasizing cultural and political difference and at the same time seeking universal themes at the expense of real jurisdictional peculiarities. After sketching this taxonomy, the paper in part meets the paradox that in Africa and South America, where similar features of possible resistance exist, the ratification process has been much more widespread.

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I. INTRODUCTION

The permanent International Criminal Court (ICC) was created in 1998,² but for it to grow into a credible global justice institution capable of enforcing international criminal law (ICL) and manifesting international criminal justice (ICJ), ratification of the Rome Statute needs to approach a universal international commitment. Aspirations for the court to act as a deterrent and ensure an end to impunity cannot even be seriously argued for unless both widespread ratification and active cooperation are achieved. Without these foundations the formal aims are not available for evaluation beyond the terms of politicized process initiation and selective prosecution.³

This article examines the reasons for reluctance to ratify the Rome Statute in specific politico-cultural contexts. The discussion begins at the general level by looking at issues that determine the initiation of ICC procedures: the activation

2 Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (July 17, 1998) ["Rome Statute"].

3 For a discussion of both these issues, see MARK FINDLAY, *INTERNATIONAL AND COMPARATIVE CRIMINAL JUSTICE: A CRITICAL INTRODUCTION*, ch. 3 (Routledge 2013).

of an investigation and thereafter prosecution at the ICC level and its politicized nature because of the United Nations (UN) Security Council's (UNSC) sectarian influence. The paper then sets forth how the UN and Member States themselves have firewalled exceptions for those involved in peacekeeping operations, UN-sanctioned or otherwise, from effective ICC accountability. The analysis then takes its regional/cultural (rather than hegemonic/political) location in the Asia-Pacific region where there is marked resistance to ratification. This enables a general sketching of resistance variables in specific contextual conditions, which might be countered by those who advance the essential nexus between universal ratification and achieving the deterrent aims of the ICC.

In “un-signing”⁴ the United States (US) from the ICC's Rome Statute, former President George W. Bush referred to “a bunch of fellas over there who want to try our boys.”⁵ Against the fantasy of the US's military personnel being indicted before the ICC, the US Senate passed the *American Service-Members Protection Act*⁶ in part as a reassertion of autonomy and sovereignty in the face of the ICC's jurisdiction. Since then the American position has moved from hostility to selective co-operation.

It could be convincingly argued that world powers with wide international exposure, entanglements and presence at many levels that might cut across the ICC's mandate would be wary of a politicized international court.⁷ And there can be little doubt that the refusal of the US, China, India and Russia to accept the ICC's jurisdiction has had a heavy negative influence on less powerful states already uncertain of the extending impact of international law and its institutions.

It is recognized even by its detractors that today the ICC has an urgent role to play in rescuing citizens who are being brutalized by their own governments.⁸ Further, religious and cultural diasporas across regions such as Asia are at risk that their critical cultural essence and legal traditions may be sidelined through an international court and its legal process developing without their influence.

I have argued that it is critical for criminal justice paradigms other than those in civil or common law systems—particularly the hybrid traditions across Asia and

4 In 2000 former US President Bill Clinton signed the treaty in terms that the US should have the chance to observe and assess the functioning of the court over time before choosing to become subject to its jurisdiction; he nevertheless indicated he would not send it to the Senate for ratification. His successor George W. Bush “unsigned” the treaty in 2002 by informing the UN that the US did not intend to become a party and did not recognize any legal obligations arising from its earlier signature.

5 Referenced in James Carroll, Op Ed: *Much to Gain for US in World Court*, BOSTON GLOBE, Mar. 26, 2012, available at <http://www.bostonglobe.com/opinion/2012/03/25/much-gain-for-world-court/o5RSzho03iGpSfnC8tNYUI/story.html>.

6 American Service-Members' Protection Act of 2002 (H.R. 4775), Public Law No. 107-206.

7 See generally FINDLAY, *supra* note 3, ch. 3.

8 Carroll, *supra* note 5.

the Pacific—to engage with the ICC so that otherwise absent procedural influences on the development of ICL and process can authenticate the aim of a holistic global criminal law.⁹ With greater and more representative procedural integration comes increased legitimacy and diminished potential for hegemonic capture. The Coalition for the ICC¹⁰ and its Asian branch¹¹ declare that it is only through the widest ratification¹² of the Rome Statute that an independent court will be ensured and the end to impunity prevails.¹³

The analysis to follow does not propose either the negative influence of reluctant and self-interested global superpowers or national and regional ambivalence as the reason for why Asia and the Pacific are so poorly represented among the ICC Member States. The explanations are much more localized and specific, ranging from incapacities to enact empowering legislation to profound political misgivings that go back to pre-independence and through colonial foundations. This paper suggests that for any successful policy to be sustained ensuring a wider regional inclusion in the ICC mission, it first must confront and address the specific national motivations to decline, and then by drawing out common themes of reluctance that span the region, meet these reservations with legitimacy rather than promise.¹⁴ Having achieved this understanding it is then possible to craft arguments in favor of ratification that will make inclusion in the ICC more relevant for the region and more beneficial for the development of holistic and inclusive ICJ and jurisprudence. The push for ratification from the ICC and the Coalition must not appear to be another phase of western colonization but as an opportunity for Asian and Pacific traditions to reach their appropriate level of

9 See generally Mark Findlay, *The Challenges for Asian Jurisdictions in the Development of International Criminal Justice*, 32 SYDNEY L. REV. 215 (2010).

10 Coalition for the International Criminal Court website, at <http://www.iccnw.org/>.

11 Coalition for the International Criminal Court website, Asia and the Pacific region, at <http://coalitionfortheicc.org/?mod=region&idureg=7>.

12 Out of the 24 countries in Asia, only 9 (Afghanistan, Bangladesh, Cambodia, Maldives, Mongolia, the Philippines, the Republic of Korea, Timor-Leste and Japan) have ratified the Rome Statute. The Asian region remains significantly under-represented at the Court, although civil society has been strong in advocating for international justice and the rule of law across the continent. Of the ICC States Parties, only the Republic of Korea has enacted implementing legislation. Afghanistan is taking appropriate steps in coordination with civil society groups to initiate their implementing legislation process, and Mongolia set up a working group on the ICC to discuss and follow up on ICC implementation some years ago, but the process has been stalled for some time. Cambodia and Timor-Leste have similarly moved slowly in effectively carrying out their emergent obligations under the Rome Statute. In the region, only the Republic of Korea has ratified the Agreement on the Privileges and Immunities of the Court (APIC). Although Mongolia is a signatory, it still needs to move forward and ratify this crucial instrument.

13 Coalition for the International Criminal Court Asia Pacific Regional Strategy Meeting, Quezon City, The Philippines (Apr. 11-12, 2011), at http://www.iccnw.org/documents/CICC_Asia_RSM_April_2011_Final_Recommendations.pdf.

14 MARK FINDLAY & RALPH HENHAM, *BEYOND PUNISHMENT: ACHIEVING INTERNATIONAL CRIMINAL JUSTICE*, ch. 8 (Palgrave Macmillan 2009).

recognition in a new global justice ordering.

2. VIEW FROM THE TOP—WHY SIGN UP?

In his recent delivery of the Wallace Wurth Memorial Lecture,¹⁵ the President of the ICC Judge Sang-Hyun Song quite consciously laid out the pitch for joining the Member States. In the audience there were representatives of Asian and Pacific governments that have yet to ratify the Rome Statute and many aspects of the argument were addressed to them.

The President's case was as follows:

- The preventive influence of the ICC is a most attractive capacity for justice and peacemaking.
- In particular, deterrence, timely intervention, the independence of preliminary investigation, contributing to medium term stabilization and longer term equitable development,¹⁶ victim empowerment through participating in trial justice in their own right, and victim assistance to recognize non-retributive victim needs,¹⁷ each advance this preventive capacity.
- The role of the court in norm setting embodies its greatest potential influence for peacemaking. In this role the court recognizes the distance between international treaties and local norms that needs to be bridged.
- Complementarity¹⁸ supports the peace and justice efforts of civil society emerging from post-conflict struggles by conceding to the nation state the right and the primary duty to investigate and prosecute crimes that are within the jurisdiction of the ICC. Complementarity also links into the deterrent function by facilitating the local prosecution of such crimes with the capacity building consequences that this offers, thereby carrying through the expressive function of the ICC when the international legal norms of the Rome

15 Judge Sang-Hyun Song, *From Punishment to Prevention: Reflections on the Future of International Criminal Justice*, Wallace Wurth Memorial Lecture, Univ. of New South Wales, Sydney (Feb. 14, 2012), available at <http://www.icc-cpi.int/NR/rdonlyres/29D0B2A7-71D4-457A-B9A3-9AC4E78DD968/284266/1202141CCCPresidentUNSWWallaceWurthmemoriallecture.pdf>.

16 See *World Bank Development Report: Conflict, Security and Development*, The International Bank for Reconstruction and Development / The World Bank (2011) (identifying transitional justice as forestalling cycles of violence in post conflict contexts), available at http://siteresources.worldbank.org/INTWDRS/Resources/WDR2011_Full_Text.pdf.

17 The judge referred to 40,000 direct beneficiaries of the reparation process of the ICC in association with initiatives of governments such as the US, targeting victims of sexual violence in the Central African Republic.

18 For a detailed discussion of this concept, see FINDLAY, *supra* note 3, ch. 3.

Statute are translated into domestic norms of that state.

- Even with the domestic justice systems of states carrying out the investigation and prosecution of crimes within the purview of the ICC, the ICC provides a safety net ensuring accountability of states in terms of their criminal justice capacity and service delivery.
- The ICC recognizes the need for state co-operation to give the ICC the power to arrest, the ability to collect evidence and to encourage witness testimony.
- In addition, there is a need to achieve universality so that the majority of mankind presently outside the Rome Statute's protection will not remain outside the protection of the ICC.

In his closing remarks, the President reiterated his realistic understanding that the on-the-ground potentials and the stakeholder legitimacy of ICJ are critical to its success. For this reason how the potential and legitimacy of global justice institutions and processes are viewed in different cultural and political settings and histories may explain the erratic take-up of ICC membership. As such, a bottom-up analysis of resistance to ratification is necessary if the ICC is to construct a more effective and convincing push for universal ratification.

However, the forces waged against the nature and jurisdiction of the ICC cannot be presumed to be equally, consistently or universally opposed to the intervention of ICJ for the maintenance of global ordering. A brief consideration of the UNSC's powers as they relate to international criminal justice (referring matters to the ICC, authorizing peacekeeping missions, and controlling the *ad hoc* International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR)), taken together with the ongoing cases relating to Darfur, Sudan, reveals just how complex can be the contradictory tensions between the appearance of non-engagement projected through non-ratification, and the national or hegemonic self-interest behind the activation of international crime control on a case-by-case basis for invoking the process otherwise reviled. In introducing these considerations it is also important to understand what motivates international criminal prosecutions, and alternatively what brands them and the justice process they initiate politicized and partial.

3. INTERNATIONAL CRIMINAL JUSTICE PROSECUTION TRIGGERS

ICL operates in a complex reality of international relations. Decisions to prosecute provide a telling example of how ICL (and its rules and procedures) manifests

itself as part of international relations power balancing.¹⁹ For example, the trigger for initiating prosecution before the ICC occurs via a referral by the UNSC, or from a State Party, as provided for in the Rome Statute, representing a countermeasure to the Prosecutor's otherwise independent exercise discretion.²⁰ The UNSC can also request that the Prosecutor not commence an investigation or prosecution for a period of 12 months (a delaying or prohibition tactic which can be renewed).²¹ As such the UNSC is *politically* connected with the ICC through its initiation and sponsorship power, by referring matters for investigation and prosecution,²² and deferring the investigation or prosecution of a matter for a set or ongoing period.²³ This powerful dominion exercised by the UNSC Members and exacerbated through the self-interest behind the veto power, potentially has the consequence of investing in the permanent members of the UNSC—in particular the US and China—the power to control referrals (through a resolution referring a case to the ICC, vetoing any such resolutions against their interests, or should an investigation or prosecution be initiated by any means, deferring the commencement or process at their pleasure).²⁴

The inextricable link between the ICC and the UNSC identifies the inevitable nexus between the formal operations of ICJ and sectarian global political hegemony.²⁵ The power of referral or deferral emanating from the UNSC in particular justifies suspicion about the extent of prosecutorial independence to evaluate and determine these referrals.²⁶ Such reservations have grounding in the political expedience of UNSC power constellations, demonstrated by the UNSC's resolve to make peacekeepers in the former Yugoslavia immune from ICC prosecution.²⁷ UNSC resolutions excluding the ICC's jurisdiction over peacekeepers from

19 See generally Mark Findlay & Clare McLean, *Emerging International Criminal Justice*, 18:3 CURRENT ISSUES CRIM. J. 457 (2007).

20 Rome Statute, *supra* note 2, art. 13(b).

21 *Id.* art. 16.

22 *Id.* art. 13(b). Note as well that State parties (arts. 13(a), 14(1)), and the Prosecutor (art. 15(1)) can also refer matters to trigger the ICC jurisdiction.

23 The UNSC is empowered to do this under UN Charter, Ch. VII. United Nations, *Charter of the United Nations*, 24 October 1945, I UNTS XVI. The ICC requirement to abide by such Security Council Resolution arises from the Rome Statute art. 16.

24 See generally David Scheffer, *The United States and the International Criminal Court*, 93:1 AM. J. INT'L L. 12 (1999).

25 FINDLAY, *supra* note 3, ch. 3.

26 See generally Chris Gallavin, *Prosecutorial Discretion within the ICC: Under the Pressure of Justice*, 17:1 CRIM. L.F. 43 (2006).

27 See generally Neha Jain, *A Separate Law for Peacekeepers: The Clash between the Security Council and the International Criminal Court*, 16:2 EUR. J. INT'L L. 239 (2005).

non-party states in Bosnia and Herzegovina²⁸ were made in response to the US threatening to veto the renewal of the UNSC's mission in Bosnia and Herzegovina if the resolution was not made.²⁹ Similar UNSC resolutions provided immunity to peacekeepers in the conflict in Liberia, deployed to secure the country for humanitarian assistance and prepare for future UN forces with stabilization duties.³⁰ So evidenced, the UNSC potentially holds the power to determine whose actions are included or excluded from accountability before the ICC, through authorizing those operating with immunity for UN intervention purposes.³¹

The influence of the UNSC is even more pronounced over the *ad hoc* tribunals, established as a subsidiary of the UNSC, which can disband them at any time. Ultimately, the UNSC's determination of the scope of a tribunal's investigation and prosecution mandate and its capacity to define its temporal jurisdiction and terminate its hearings (for the ICTY and ICTR, in respect of new cases, as of 2012) mean that the very exercise of ICJ is hegemonically dependent.³²

4. NON-RATIFICATION BUT STANDING AND UTILITY?

The UNSC adopted a similar resolution as that indemnifying troops in the former Yugoslavia conflict, covering non-Sudanese officials in the operations in Darfur (originally authorized by the UNSC and the African Union). The resolution provided that those personnel would be (if at all) subject to the exclusive jurisdiction of their home state, and thus protected from ICC prosecution.³³ In practice, however, the reality of politically selective prosecution and specific offence and proof limitations governing the ICC's jurisdiction at large, might make these UNSC resolutions less than necessary. That being so, the resolutions still represent attempts to circumscribe the jurisdiction of international courts and tribunals in a manner that suggests primary motivation by

28 Security Council Resolution 1422 requested the ICC exercise its discretion under Art 16 to refrain from the commencing investigation or prosecution of any case involving actions related to operations authorised by the United Nations for a 12-month period. This period was subsequently renewed in Security Council Resolution 1487. See *United Nations Peacekeeping*, UN Doc. S/RES/1422 (2002); *United Nations Peacekeeping*, UN Doc. S/RES/1487 (2003).

29 Jain, *supra* note 27.

30 Security Council Resolution 1497 however was stronger than that of 1422. It provides exclusive jurisdiction of the contributing sovereign states over their staff, for an indefinite period. See UN Doc. S/RES/1497 (2003).

31 Megan Bastick, Karin Grimm & Rahel Kunz, *Sexual Violence in Armed Conflict: Global Overview and Implications for the Security Sector*, Geneva Centre for the Democratic Control of Armed Forces (2007), available at http://www.essex.ac.uk/armedcon/story_id/sexualviolence_conflict_full%5B1%5D.pdf.

32 See generally Vesselin Popovski, *International Criminal Court: A Necessary Step Towards Global Justice*, 31:4 SECURITY DIALOGUE 405 (2000).

33 United Nations Security Council Resolution 1593, UN Doc. S/RES/1593 (2005). For more detail see Gallavin, *supra* note 26.

the hegemonic politics of international relations, specifically, the conditions and negotiation strategies adopted by Member States including the US for their contributions to humanitarian aid and peacekeeping, as they seek to protect their personnel from prosecution by the ICC. In the future, this feature of security trade-off at the UNSC level either may not be quite as blatant or intractable, as the UN moves away from its military intervention model for peacekeeping in preference for broader-based justice resolutions.³⁴

The question of standing for accused persons in the international criminal tribunals and permanent court is also dependent on the way in which they become identified and produced as part of the investigation and prosecution process. In domestic criminal justice, the institutionalization of complex policing arrangements means that a suspect goes through a standardized and detailed process of investigation before being arrested and charged. However, at the international level, the pathway of suspect identification and processing is less formalized and predictable because of difficulties with policing (heavily reliant as it is on nation states and mutual assistance) and with countervailing tensions associated with jurisdictional autonomy that militate against cooperation. Accused persons can be offered up by a Member State to the ICC, identified by a UNSC referral, or the independent prosecutor can issue an arrest warrant that requires the accused to be presented for the investigation and trial process. Yet, as certain recent celebrated instances indicate, if accused persons can use their political status or their domestic and regional authority to resist the process of indictment at the national and international levels, then the production of that accused before an international tribunal or court is much more complicated and deeply problematic.³⁵

The reasoning behind a UNSC referral can also be revealing when reflected against national interest and international relations alignments. Despite its rejection of the jurisdiction of the ICC over its citizens, the US pushed through the UNSC a referral to the ICC for the prosecution of the President of Sudan. As a result, the ICC has sought the indictment of Sudan's President Omar Bashir since 2005 for his involvement in alleged war crimes and crimes against humanity in the Darfur region.³⁶ However, in July 2008 the African Union, in a meeting of heads of African states, resolved to call for the ICC to suspend its action and instead permit an African-led investigation. Since then, numerous African States—Chad, Kenya, Djibouti, and Malawi—have refused to comply with their ICC Member

34 John Boonstra, *Tension Between Peace and Justice*, UN DISPATCH, Feb. 28, 2008, at <http://www.undispatch.com/tension-between-peace-and-justice>.

35 See, e.g., Bernard Momanyi, *Kenya Seeks Delay to ICC Trials*, ACR Issue 366, IWPR, Oct. 17, 2013, available at <http://iwpr.net/report-news/kenya-seeks-delay-icc-trials>.

36 President Bashir was referred to the ICC by the United Nations Security Council, as Sudan is not a Member State.

State obligations such as arrest requests for Bashir when he was present in their country. The ICC judges have reported these countries to the UNSC and the ICC Assembly of State Parties, but no action has since been taken.³⁷ Most recently in December 2011, the ICC reminded Malawi of the International Court of Justice *Arrest Warrant Case* that confirmed that the principle in international law providing immunity for former or sitting Heads of State does not apply to prevent criminal prosecution by an international court regardless of whether the alleged offending state is a Member State to the ICC.³⁸

5. NATIONAL V. GLOBAL INTERESTS — STORIES OF POLITICAL EXPEDIENCY

As indicated above, when an offence within the subject matter jurisdiction of the ICC is committed in a territory or by a State Party, that State Party can refer the accused for prosecution by the ICC,³⁹ or the Prosecutor may initiate her own investigation of that crime which may commence, provided the Pre-Trial Chamber grants authorization.⁴⁰ In addition, the UNSC can refer the matters to the ICC,⁴¹ and non-state parties can accept the jurisdiction of the ICC on a case-by-case basis.⁴² One of the foundational concerns held by those states that have resisted the ICC jurisdiction is that the independent Prosecutor may use her discretion to charge military personnel who have been involved in UN peacekeeping missions or in a military intervention designed to secure the regional and international interests.

Obviously, the US has a large exposure in these areas. As well as not being a State Party to the Rome Statute, under the Bush Administration the US also struck a raft of bi-lateral agreements requiring that signatory states promise not to surrender US citizens or employees to the ICC, and thereby restricting the ICC jurisdiction and indemnifying US military forces.⁴³ The US sought these agreements to avail

37 ICC judges Dismiss Legality of African Union Decision on Bashir, Refer Malawi's Non-Compliance to UNSC, SUDAN TRIBUNE, Dec. 13, 2011, at http://www.sudantribune.com/spip.php?iframe&page=imprimable&id_article=40980.

38 Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09 (PTC I, Dec. 12, 2011); Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, 2002 I.C.J. 3 (Feb. 14, 2002).

39 Rome Statute, *supra* note 2, arts. 13(a), 14.

40 *Id.* arts. 13(c), 15.

41 *Id.* art. 13(b); Charter of the United Nations, ch. VII.

42 Rome Statute, *supra* note 2, art. 12(3).

43 See generally Scheffer, *supra* note 24; Markus Benzing, *US Bilateral Non-Surrender Agreements and Article 98 of the Statute of the International Criminal Court: An Exercise in the Law of Treaties*, 8:1 MAX PLANCK YEAR BOOK UN L. 181 (2004), available at http://www.mpil.de/files/pdf1/mpunyb_benzing_8.pdf; Judith G. Kelley, *Who Keeps International Commitments and Why? The International Criminal Court and Bilateral Non-surrender Agreements*, 3:101 AM. POLI SCI REV. 573 (2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=943711.

itself of the exemption from jurisdiction, set out in the Rome Statute at Article 98(2), which provides that the ICC “may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.”⁴⁴ These agreements were fortified by the US’s offer of military assistance and other forms of financial aid, and conversely the US’s threatened withdrawal of military aid from recipient states that refused to sign non-surrender agreements.⁴⁵

More particularly, the UNSC also expressed its concern about the protection of states involved in UN peacekeeping operations. Crucial to this concern about autonomy and the protection of military personnel was the fear that the independent Prosecutor would proceed against powerful states without recognition of the UN’s political interests in military intervention.

In the ways discussed above, the dominant world powers treat ICJ as secondary to their own national interests, and this is not only witnessed in the autonomy arguments of those states that refuse to accept ICC jurisdiction.⁴⁶ Co sequentially, pressure transfers onto international organizations and the non-governmental organization (NGO) community to genuinely contribute to ICJ beyond the limitations of domestic and regional considerations.⁴⁷ This has already been particularly the case with the ICC Prosecutor’s constant and sometimes controversial reliance on NGO field intelligence and intervention to critically facilitate the identification of witnesses and the supply of testimony.⁴⁸ From the foundation of the ICC at the Rome Conference, “the relationship between the ICC and NGOs has probably been closer, more consistent, and more vital to the ICC than have analogous relations between NGOs and any other international organization,” with all the problems this can entail.⁴⁹

44 Rome Statute, *supra* note 2, art. 98(2).

45 See Kelley, *supra* note 43, at 573. Note however, due to security concerns, the US did not withdraw military aid from all those states that refused to sign agreements not to surrender US citizens to ICC jurisdiction.

46 See generally JASON RALPH, *DEFENDING THE SOCIETY OF STATES: WHY AMERICA OPPOSES THE INTERNATIONAL CRIMINAL COURT AND ITS VISION OF WORLD SOCIETY* (New York: Oxford Univ. Press 2007).

47 See the International Center for Transitional Justice website, <http://ictj.org/about>.

48 Article 54(3)(c) of the Rome Statute gives the Prosecutor the power to seek the cooperation of any State or intergovernmental organisation or arrangement in accordance with its respective competence and/or mandate. Rome Statute, *supra* note 2.

49 See generally BENJAMIN SCHIFF, *BUILDING THE INTERNATIONAL CRIMINAL COURT* (Cambridge Univ. Press 2008). For a discussion of the problematic consequences of this dependency for the production of truthful witness testimony, see generally Mark Findlay & Sylvia Ngane, *The Sham of the Moral Court: Testimony Sold as the Spoils of War*, 1:1 *GLOBAL J. COMP. L.* 73 (2013).

Justifications for the conclusion that ICJ is politically expedient in its inception, activation and renunciation include:

- That commonly purported justifications, such as the end to impunity, disguise less altruistic motivations. This duplicity is demonstrated by the intensely selective nature of prosecutions determined by and on behalf of ICJ. Such selectivity was evident from the early days of ICJ in its present epoch. In the Tokyo war crimes trials for instance, Emperor Hirohito, known to be the inspiration behind terrible crimes, was not charged, as it was feared to do so would delay the cessation of war in the Pacific.⁵⁰
- The circumspection surrounding purported altruistic motivations as to why states would create national and international prosecution institutions that might end up turning against them. The US, for instance, has withheld its formal involvement in the ICC in part out of concern that the ICC acts on the mandate and interests of the UNSC, and due to the contrary application of the UNSC veto powers by contesting superpowers,⁵¹ US interests may not always accord with ICC indictments. The strange flipside of this concern is that as a permanent member of the UNSC itself, the US can also apply the veto at least to protect its interests against indictment. Despite such partiality in reservations, one might say that many of those nation states that support the ICC do so as they believe that the ICC will never be turned against the interests of the powerful.

The temptation lies to extrapolate from the political nature of the ICC and the associated reservations of superpowers, and formulate some similar reasoning as to why nation states in the Asia/Pacific region are reluctant to accede to the court's jurisdiction. I suggest below that there are more interesting and convincing historical, cultural, anthropological and social conditions that might provide a more persuasive explanation.

6. REASONS FOR NON-RATIFICATION IN THE REGION — STATE SENSITIVITIES AND REGIONAL RELUCTANCE

Throughout Asia and the Pacific the contemporary face of criminal justice is etched by:

50 See generally ARNOLD BRACKMAN, *THE OTHER NUREMBERG: THE UNTOLD STORY OF THE TOKYO WAR CRIMES TRIALS* (1987).

51 The UNSC operates with the capacity for permanent Member States to veto Council resolutions. This sometimes leads to a "stand-off" between members trying to utilise referral powers, and those resisting the referral.

- European colonial traditions;
- indigenous and migratory cultural influences;
- the pressures of subsistence and trade economies;
- the clash of home-grown and introduced religions;
- the obligations of tribal loyalty and filial piety; and
- the relentless advance of modernization and materialism.⁵²

The impact of these forces has been neither even nor consistent. What remains constant is the dislocation between the institutions of state-based criminal justice and the processes of traditional dispute resolution and decision-making. Endeavor to overlay this with the “one-size-fits-all” package of global justice and it is not difficult to see how the fissures of resistance would open wide.⁵³

In identifying the reasons for resistance to the ratification of ICJ mechanisms—local to the global—across Asia and the Pacific, there is a risk in both over emphasizing cultural and political differences while at the same time seeking universal themes at the expense of real jurisdictional peculiarities. A way around this is to suggest a *taxonomy of reluctance* that recognizes critical influences over modern criminal justice in the region. In putting together this skeleton, it is necessary to reflect in passing, even if only for the purposes of summary, on the disconnect between formalized justice processes (as exhibited in the ICC) and indigenous or embedded manners of resolving conflict in the cultures of this region. Such dissonance in the way justice is determined, adjudicated and resolved might even be enough to suggest why some states and cultures are disinterested in the global alternative especially when it is so foreign to the experience of their people.

6.I. Relevance?

Particularly in the Pacific there are perceived many greater global crises than those revealed through the crimes in the ICC jurisdiction, which small nation states would prioritize against their limited capacity for international engagement. Small Pacific Island states have identified global warming and rising sea levels as the main issue for social “justice” that they consider requiring urgent action by institutions of the international community. Political leaders and their people in the Pacific are perplexed that the environmental degra-

52 See generally Mark Findlay, *Decolonising Restoration and Justice: Restoration in Transitional Cultures*, in *RESTORATIVE JUSTICE: PHILOSOPHY TO PRACTICE* 185 (Heather Strang & John Braithwaite, eds., William Morrow & Co. 2000).

53 *PEACE OPERATIONS AND ORGANIZED CRIME: ENEMIES OR ALLIES?* (James Cockayne & Adam Lupel eds., Routledge 2011).

dation that threatens the displacement of nations and cultures is not seen as a “crime against humanity” or that such displacement, through no fault of island inhabitants, does not qualify as cultural “genocide.”⁵⁴

In a region where “aid dependency” features to support many fragile economies and political regimes, relations beyond the nation state are fostered by bilateralism rather than multilateralism. Internationalism is not necessarily complementary with the economic interactions that benefit the North World in terms of trade and resources and obligate the South World through debt slavery and aid reliance.

Another relevant issue, particularly as it relates to small Pacific Island States and to under resourced or emerging Asian jurisdictions, is limited legislative capacity. Many administrations have very restricted legislative services that—when it comes to UN convention ratification—need to be rationed against state priorities for international engagement.

ICC ratification advocates need to substantiate a global criminal justice system that helps rather than burdens these small states with their concerns.

6.2. Global Reach

The “dead hand” of differential superpower influence (economically and diplomatically) in the region is commonly represented by international organizations and agencies in the pursuit of modernization as socio-economic development.⁵⁵ Due to the nature of this development policy, cultures of dependency have replaced colonial administration and obligation, advancing the culturally destructive impacts of aid allocation, trade exploitation, and exchange capitalism in subsistence economies. Rather than socio-economic development promoting inclusion within the positive dimensions of globalization across the region, colonial histories of bilateralism pervade foreign and commercial relations within and outside Asia and the Pacific. Particularly when nation states are weak or disaggregated, bilateral dependencies and obligations can stand in the way of ICJ whereby powerful North World states can bargain to require the endorsement of their own autonomy and national interest in return for economic or military favors.

What makes the absence of global reach a particular problem in the Asia-Pacific region is a significant number of micro political units, or macro states with enormous domestic challenges (e.g. food sustainability, cultural cohesion, environmental depletions), coupled with a distinct absence of regional political or economic

54 See generally Clement Tisdell, *Global Warming and the Future of Pacific Island Countries*, 35:12 INT’L J. SOC. ECON. 889 (Oct. 2008).

55 MARK FINDLAY, *THE GLOBALISATION OF CRIME: UNDERSTANDING THE TRANSITIONAL RELATIONSHIPS OF CRIME IN A GLOBAL CONTEXT*, Ch. 2 (Cambridge Univ. Press 1999).

solidarity that might argue for global inclusion, or at least collectively counter the risk from North World exploitation. Particularly when it comes to the commercial depletion of natural resources, the region has suffered the negative impact of globalization while at the same time being largely excluded from its material benefits. In such a situation there is little popular taste for internationalism, or any prevailing and genuine faith in international justice paradigms.

This reluctance is compounded by an inadequate understanding of how the ICC operates, and more specifically the principle of complementarity. Even when a state has ratified the Rome Statute, its national courts will still have the jurisdiction to investigate and prosecute the crimes that are within the purview of the ICC. It is only if its own domestic justice mechanisms are unable or unwilling to perform such functions will the ICC step in to initiate its own investigations and processes.⁵⁶ Therefore, the ICC still has to communicate with that state and make a determination on a case-by-case basis notwithstanding ratification. ICC membership will also not derogate from the autonomy of functioning national legal systems in that citizens have no standing to bring cases directly to the ICC.⁵⁷

Ramification advocates, therefore, should endeavor to clarify the practical circumscription of ICC jurisdiction, or have the circumstances necessary for the activation of its jurisdiction more clearly defined. Such specification would have the effect of mollifying the misconception on the part of suspicious states that membership in the ICC would add another set of external obligations over which they have no administrative as well as political influence.

6.3. Post-Colonial Hangover

It would be fair to say that, as with most post-colonial regions, in recently independent states in Asia and the Pacific region there is reflected a residual fear of “westernization.” Tensions are obvious between the resilience of strong indigenous cultures, and the demands of cash economies. The spread of religious fundamentalism across the region has also tended to vilify western culture.

To particularize this post-colonial resentment, the relatively recent memory of the colonial excesses exacted through the mechanisms of criminal justice, resonate throughout the independence histories of the region. State-sponsored criminal justice institutions and processes have come to

56 See Rome Statute, *supra* note 2, art. 17.

57 Usman Hamid, *Why Indonesia, Asia Must Ratify the Rome Statute*, JAKARTA POST, Nov. 15, 2011, available at <http://www.thejakartapost.com/news/2011/11/15/why-indonesia-asia-must-ratify-rome-statute.html>.

represent, and perpetuate through elitist post-colonial administrations, the discriminatory dominion of the powerful over the populous rather than any system of universal justice.

In Asia and the Pacific ancient routes of migration meant that indigenous cultures were exposed to a constant transition of colonization. Add to this the unique treasures of trade that attracted the West to the East and it is not hard to understand why, when the bonds of colonial rule are released, there is no eagerness to compromise hard-fought-for autonomy in return for a notion of westernized justice that could represent just another layer of imperial influence.

Because Asian cultures in particular have been suspicious about, and therefore misunderstanding of internationalization or polarity that is interpreted as westernization, transitional or developing Asian economies have adapted western administration and commercial organization to suit their own priorities. Despite the language of constitutional legality, in many Asian political and social frameworks individualized rights that are said to underpin principled western criminal justice models may not be valued above communitarian cohesion. Pacific Island tribalism has similar priorities.

Pacific Island states usually retain the trappings of Westminster parliamentary government. However, as these frameworks are so often ill suited to social organizations with intricate bonds of obligation and clan duty, traditional ties of community cohesion have become perverted through corruption and exploitation.⁵⁸ Corrupt political elites have a vested interest in distancing any intrusive institutions of international governance and accountability, such as ICJ claims to be.⁵⁹

If the institutions of ICJ and the international governance mechanisms that sponsor them are viewed by the small Asia Pacific States in particular as the representatives of global political and economic hegemony, then they will be avoided as such. For post-colonial states in Africa and in South America that might share the same reservations, those torn by internal military and political struggle or ravaged by secessionist movements may be willing even to engage hegemonic dominion in the hope of political preferment or conflict resolution through the criminalization of their enemies.

It is only through communication and consultations with Member States that organic developments of ICJ occur through its institutions, and as the ICC is to some extent subordinated to the interests of powerful states such as the permanent members of the UN, it also needs to be open to influences from small or less hegemonic

58 See generally Mark Findlay, *Misunderstanding Corruption and Community: Comparative Cultural Politics of Corruption Regulation in the Pacific*, 2:1 ASIAN J. CRIMINOLOGY 47 (June 2007).

59 See generally MARK FINDLAY, *GOVERNING THROUGH GLOBALISED CRIME* (Willian Publishing 2008).

states and their procedural traditions.⁶⁰ The ICC can take the UN's intimated transition towards broader-based justice paradigms as a cue to situate ICJ in the most culturally inclusive (rather than politically selective) processes of justice delivery. The new inclusivity approach complements the need for developments in substantive ICL and procedure that recognize collective liability, criminal organizations, and the resultant responsibilities of offender communities to communities of victims.⁶¹

6.4. Normative Identity

The terms "Asian values" or the "Pacific way" are commonly employed when explaining the determination of political autonomy and regional engagement across the region. In a governance sense, this attempt to link the conceptualization of nationhood with fundamental traditions is more than cultural relativity. For instance, if one examines the development of hybrid criminal justice traditions in Asia and the Pacific, these are explained at least in part by different notions of justice and of citizen responsibility than those that may prevail in North World or westernized justice paradigms, which are the predominant models for ICJ. Again, normative distinction as an explanation for reluctance to engage with ICJ might be countered by the many examples in Africa and South America where nation states equally jealous of their post-colonial sovereignty and autonomy have signed up to the Rome Statute. What else influences the Asian and Pacific normative exceptionalism?

Digging deeper into normative identity at a nation state level presents the danger in generalizing normative enunciation across such a culturally and developmentally diverse region. Recognizing this, and looking at the constitution of those states in the region that remain outside the ICC, post-colonial cultural and political stability is not uncommon. The embedding of an independent political identity within long established cultural foundations, even in the more volatile post-colonial states in Asia and the Pacific, is regularly endorsed through strong centralist or paternalist political frameworks that celebrate sovereignty. The relatively weak regional political and economic alliances in Asia and the Pacific are a further evidence of resilient and prevailing nation state autonomy.

To meet such concerns, the ICC can do more to demonstrate how ratification of the Rome Statute underscores and not subverts nation state autonomy by paying attention to the aspects and peculiarities of the until-now unrepresented justice paradigms. Engagement with the ICC is an opportunity for Asian and Pacific Island states to assert their normative identity by influencing the development of a global criminal jurisprudence.

60 See generally Findlay, *supra* note 9.

61 See generally *id.*

In the case of China, the Confucian and communist ascription to social order above the individual, as recognized in their system of criminal law (imperial and modern), has provided fertile soil from which communitarian resolution practices such as victim participation in both mediation and the trial process, and victims' right to compensation, have grown.⁶² Therefore, entry of China into the ICC debate, bringing with it collective and communitarian rights consideration, holds enormous potential for collective crime prevention and aggregated social order to assume a greater place in ICJ.

6.5. Constitutional Legality

Another frame of reference that might explain the reluctance to engage with ICJ across the region is constitutional legality. Asian and Pacific Island states recurrently demonstrate dismal human rights records by UN standards, despite the proliferation of sophisticated constitutions with human rights charters and leadership codes that appear "rights focused." This paradox might be explained by both the problematic application of Westminster parliamentarianism, and the underdeveloped or corrupted stages of representative democracy. Another explanation, in states such as China, is a disconnect between the discourse of constitutionalism and the perseverance of administrative traditions that rely on non-accountable and expansive individualized discretion.

The heavy emphasis on humanitarian rights principles that underpins the formal institutions of ICJ does not sit well with political frameworks that do not respect rights protection in practice, and instead rely on cultural and political informalities (such as clan loyalties), which frustrate accountability for rights violations. Again, what might distinguish any such regional reluctance based on the rights dilemma from other regions where states have signed the Rome Statute while also devaluing rights and political accountability, is the marked absence of any Asian regional rights superstructure, combined with recent history of political regimes that operated (and some continue to operate) systematic rights repression.

It is anticipated that the intervention of the ICC will be both more likely and more attractive for states when their domestic criminal justice capacity—and more particularly the place of the trial process within constitutional legality—is fragile, strained or compromised and dependent. Interestingly, despite the varied levels of economic development and political competence, nation states across the Pacific and Asia (perhaps as a consequence of colonial control policies) often exhibit relatively well-resourced, centralized and

62 See generally *id.*

resilient criminal juridical institutions and traditions. It may provide some comfort for states reluctant to concede to international jurisdiction that the state's formal justice processes possess the capacity to manage their own affairs for crimes within the ICC's jurisdiction.

6.6. Executive Discretion

Aligned with the final observation above, many nation states in Asia and the Pacific region have suffered under recent dictatorships or military governance, and a history of coups. Centralist governance frameworks in China, India, Pakistan and Indonesia have meant that the majority of the world's population has been administered with a tight hand of centralist government.

In such regimes a residually powerful security sector in the military and police proliferates. Governance through fear of the consequences of opposition or dissent for the individual citizen has meant that a healthy adversarialism is scarce in civil society. Freedom of expression, independent media, and alternative political organization are restricted. Communities become compliant. In such governance environments, administrative discretion is centralized, pervasive, and largely not responsible to the people but to the powerful. Therefore practices of impunity are tolerated because the leadership of such states are often themselves perpetrators of serious crimes, whether through action or omission. The invitation to participate in a justice process that has the potential to require international accountability above the interests of the nation state is, not surprisingly, unlikely to be attractive for governments dedicated to the denial of domestic accountability obligations.

6.7. Civil Society

Throughout the Asia Pacific region, the immaturity of civil society as a political force has meant that grassroots support for ICJ is difficult to muster.⁶³ Tribalism, caste and cultural hierarchies have tended to mechanically stratify civil society and prevent organic movements of victims that would pressure for ICJ engagement. In this political environment, NGOs have been frequently restricted, and the fracture of oppositional political movements has made the growth of domestic agitation for ICJ difficult.

A unique feature of civil society in the region has been its complacency. This is not always a consequence of fear through repression. In the case of Singapore, for instance, authoritarian governance has been imposed and maintained through ma-

63 Coalition for the International Criminal Court website, *A Universal Court with Global Support*, at <http://www.iccnw.org/?mod=ratimp>.

terialist and economic advancement. Society in such circumstances complies with government as it perceives in non-compliance a risk to socio-economic benefit. In addition, although the wealth gap in Singapore is one of the starkest world-wide, the doctrine of meritocracy transposes responsibility for wealth creation onto the individual within society, dispossessing the state of any duty to redress the balance and to become the obvious focus for the dissent of the disadvantaged.

The complex webs of obligation and patronage are another characteristic of compliant civil society. Stimulated by commodity and cash economy development models, these relationships may also foster corruption that in turn controls civil society through the giving and receiving of advantage.

Common to both centralist and paternalist states in the region is the manner in which they effectively exclude civil society from participatory governance or fail to activate inclusion beyond the obligations that the state identifies.⁶⁴ These obligations are designed to complement core cultural beliefs that necessitate compliance and that, when required, enforce conservative adherence to the established order.

Ratification advocates should work through civil society in oppressive state regimes to exploit the accountability and governance potential of ICJ, embodied in institutions such as the ICC.⁶⁵ Such a push can also come from academia and the media, which play a role in cultivating the potential of civil society activism.

7. CONCLUSION

In endeavoring to understand the relatively low accession rate to ICC Member State standing across the Asia Pacific region, this paper has located a range of explanations in social and cultural contexts, rather than essentially focusing on political determinations. The hypothesis is that the social conditions resistant to engagement with ICJ, prevailing in the nations states across the region, can be identified, distinguished and, if possible, addressed by the forces promoting ICC membership. However some of these conditions, such as relevance and capacity, require much more developmental and political adjustment than mere promotion of the values of ICJ can attain. Such adjustment would be necessary within states, and from the formal institutions of ICJ as well, if engagement in the region is to be made more viable and more attractive.

The development of nation state receptivity to the benefits of global governance that institutions like the ICC can and should offer, holds out an associated

64 Elizabeth Kamaldin, *Singapore Needs to Change Its Filial-piety Mindset*, ASIAONE, Oct. 10, 2012, at <http://www.asiaone.com/News/Latest%2BNews/Singapore/Story/AIStory20121010-376608.html>.

65 See generally FINDLAY, *supra* note 59, ch. 9.

challenge for public international law. Due to the determination to individualize international criminal liability, the fundamental bonds (and essential purposes) of public international law can be envisaged beyond state-to-state relationships. The individualization of liability through international criminal prosecution also goes beyond the individualized rights paradigms of international humanitarian law. Developments in ICL and ICJ (as modes of global governance) have increased the utility of public international law to address many of the “big issue” divergent concerns of states in the Asia Pacific region that are multi-polar and not only bilateral. International law can be reinvigorated for these states as a medium for individualizing and aggregating responsibility, and seeking out redress where responsibility has too long been denied by the hegemonic interests behind the limited interpretation of public international law and its potential outreach. Membership in international justice alliances can now be argued to bring with it the more inclusive benefits of global governance.

