

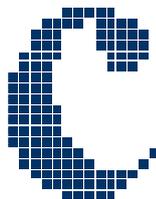
Conference Report
ASEFUAN Dialogues 2012
Re-emerging Asian Actors and International Law:
Asian and European Perspectives on the
International Criminal Court



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Conference Report

5th ASEFUAN Dialogues: “Re-emerging Asian actors and International Law: Asian and European Perspectives on the International Criminal Court”

Chair: dr. Bibi Van Ginkel (LLM), Senior Research Fellow at Clingendael

Speakers: dr. Gentian Zyberi (Defence Lawyer at the ICTY and Assistant Professor at University of Amsterdam), Tsuyoshi Ideta, LLM (First Secretary of the Embassy of Japan), Cary Scott-Kemmis (Second Secretary of the Embassy of Australia), Kirsten Meersschaert Duchens (Regional Coordinator for Europe at the Coalition for the ICC), Prof. Marlies Glasius (Special Chair Citizen Involvement in Conflict and Post-conflict situations at the Free University (VU) Amsterdam) and Anu Nagar (Legal Assistant at the Legal Advisory Section, Office of the Prosecutor at the ICC)

Participants: 30 representatives from Asia and Europe, from academia, civil society and government.

This conference took place under the Chatham House rules.

Asian actors re-emerging on the international stage and recent evolutions in international law and security pose new challenges to Asia-Europe cooperation in the field of international criminal law. This conference focused on two main topics: firstly the rise of Asian actors and its impact on the ICC and international criminal law, and secondly the challenges that lie ahead for the Court and the general application of international criminal law.

Asian and European Perspectives on the ICC

A first way of understanding the different Asian and European perspectives on the ICC is taking a look at the facts and figures. The proportion of Asian and European States that are party to the Rome Statute differs considerably. In total, there are 121 States party to the Rome Statute. Forty European States, the vast majority of European States and all EU members, are members to the ICC Statute. In contrast, only 18 Asian States are party to the ICC Statute, and significantly, some important regional Asian powers have chosen not to ratify the Rome Statute. A preliminary conclusion seems to be that European States are more favorable towards the supranational criminal law system. Reality seems to be however much more complex.



The group of Asian States that is not party to the ICC Statute is far from homogenous. It is therefore not really possible to talk about a regional or Asian perspective. Some elements of comparison between Asia and Europe however come to the foreground when we discuss the two region's differing levels of ratification of the Rome Statute. One motive for non-ratification of some Asian States might be fear of infringement of the ICC on a State's sovereignty. The principle of non-interference seems to still be more central in many Asian States' concept of international relations, than in European ones. Moreover, the ICC uses the concept of individual criminal responsibility, which might be perceived differently in Asia and Europe. Another reason would be that, in comparison with Europe, Asia has less experience with intensive regional cooperation, especially in the field of human rights, as Asia has not established a regional human rights system. Another motive would be – also in comparison with Europe - a reluctance to impose values on other States, even if the country itself subscribes to the values of democracy and human rights.

These regional concerns do not seem to be limited to Asia and would also only be a part of the explanation why there are less Asian ratifications of the Rome Statute. States might not ratify the Rome Statute for many other diverging reasons. The ICC mandate might be sometimes misinterpreted. Some States might be afraid that after ratification of the ICC Statute, their participation in international peacekeeping operations may lead to war crimes charges against their own nationals. In addition, the issue of complementarity seems to be not always correctly understood. Some States might also fear retroactive retribution. The functioning of the ICC would be another issue that plays into States' non-ratification. The yearly almost 10% increases in the ICC budget combined with perceptions of low output could also deter some States to consider Rome Statute ratification.

There are also Asian States that are not necessarily opposed to ratification, but it is not really a priority for them and they prefer to wait and see what other States do. They may lack political will or they may just be dealing with too many conflicting priorities. Another group of States have an intention to ratify, but are waiting for all internal measures to be taken to ensure that all implementing legal measures are in place. A last group of States is dealing with capacity restraints; they simply just do not possess the resources to implement the ratification process. With respect to this last group, the capacity-building role of countries in the region like Australia and New Zealand is important to mention.

We may conclude from the notion that different states have different reasons for not ratifying that it is not possible to pinpoint an “Asian perspective” on the ICC. The group of Asian States is very diverse and individual countries have different reasons for not having become a State party to the ICC. An additional issue that should be kept in mind is that international criminal justice is not foreign to Asia, we can for example refer to criminal courts that administer(ed) international criminal law in Cambodia, Bangladesh and East-Timor.

Challenges for the ICC and international criminal law

How does the limited number of Asian States who have ratified the Rome Statute impact the functioning of the ICC? The ICC can be effective without universal ratification, but it cannot guarantee universal protection. Lack of universal adoption of the Statute leads to impunity gaps, as non-ratifying countries can become safe havens for ICC fugitives. Moreover, it limits the scope of jurisdiction of the ICC, which means that international criminal law implementation is still dependent on political decisions (political will of individual nations or Security Council referrals). Additionally, the budget issue plays a role if the Court wants effective communication, in order to address (mis)perceptions and then encourage countries to ratify. The more cooperation with the ICC, the speedier the trials, the more efficient the ICC looks, the more cooperation it gets. More ratification is therefore needed for the ICC to enter a “virtuous cycle”. Increased ratification will lead to increased legitimacy of and confidence in the ICC within the international community and ultimately to real sustainability of the ICC.

The way forward depends on individual State situations, but generally dialogue and provision of information are two things that are considered essential to ensuring more ratifications of the Rome Statute. States must understand the mandate of the ICC and the benefits of being a State party – including the concept of complementarity. Civil society groups can play an important role in the promotion of ICC values, although they are larger and more numerous in Europe than in Asia. Capacity-building and contributing to regional human rights systems in Asia could be another avenue for ICC ratification, but it depends on the individual situations as many Asian States seem to still be focused on the traditional national legal system. In the meantime, a focus on maintaining and/or developing ICC cooperation with non-State parties seems essential. The focus should not solely be on ratification, but on cooperation within the whole international system. States share

responsibilities here, and Asian and European States possess the same values in this realm: endeavouring for human security, international peace, individual criminal accountability for mass atrocity crimes, and preventing international crimes.

Apart from partial ratification, the ICC and its functioning have been challenged on several other issues. Many of these matters may be related to the inflated expectations with which the ICC came into being. At its inception, the ICC was inter alia expected to end impunity, prevent serious international crimes and contribute to peace. Measured against these objectives, a young institution like the ICC could only fall short. The ICC issued its first verdict after ten years, and some accuse it of administering a very slow justice. One could say that it took the ICC ten years to grow up, and now it is time to enter the phase of consolidation for it to be really sustainable. In this regard, the ICC should become more efficient and effective. On the other hand, it might be noted that the ICC budget is still a lot smaller than e.g. the UN peacekeeping budget. Moreover, some would say that a price cannot be put on international justice.

Another challenge for the ICC – and other international criminal courts and tribunals – would be to improve its engagement and communication with the victims of international crimes. Improved outreach and accessibility of the Court would enhance its legitimacy and also lead to more ratification. One element of improving outreach would be making court decisions understandable for the average citizen. This means communicating in a culture-sensitive manner and being creative with media such as YouTube. The distance between the Court and the local populations should be smaller. The Special Court for Sierra Leone enjoyed large legitimacy with the local population because it was driven from the bottom-up by civil society. Going into the field to engage in dialogue with the local population would be an important element of outreach. Civil society could play an important role in this regard.