

INTERNATIONAL CRIMINAL LAW WITH ASIAN CHARACTERISTICS?

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Abstract

The history of international criminal law typically effaces Asian experience of the topic. This is partly because incidents such as the Tokyo Trial disclose racial and colonial biases that are now seen as embarrassing. Yet failing to engage with Asian experience also impoverishes our understanding of the possibilities and limitations of international criminal law. In particular, pragmatic adaptation of “universal” principles in various Asian jurisdictions offers a helpful lens through which to view the inherent tension between legitimacy and effectiveness in international criminal trials: the desire for legitimacy that goes beyond a state whose leaders may have engaged in unspeakable acts; the need for effectiveness at the local level if any resolution of a conflict is to be enduring. A more nuanced understanding may also help explain an apparent paradox: despite having a long tradition of restrictions on the conduct of hostilities, Asian states today are twice as unlikely to have accepted the jurisdiction of the International Criminal Court when compared with any other region.

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INTRODUCTION

The history of international criminal law has been, for the most part, a European tale. Though it was American insistence that prevented the summary execution of hundreds or thousands of German officers after the Second World War—an approach favored by Churchill and seriously contemplated by Stalin—the United States later backed away from serious engagement in international criminal law, concerned among other things that its own citizens should not be subject to its jurisdiction. The iconic venues of crimes and their prosecution are also European: Auschwitz and Nuremberg are the touchstones, with modern counterparts in Bosnia and The Hague. The result is that in most accounts, the non-European experiences of international criminal law tend to be treated as poorer and more troubled siblings. Lack of resources has bedeviled African tribunals in Rwanda and their hybrid counterparts in Sierra Leone and elsewhere. In Asia, political tensions have featured prominently—whether one is considering the International Military Tribunal for the Far East or the Extraordinary Chambers in the Courts of Cambodia.

Any survey of the troubled history of international criminal law highlights the difficulties facing the tribunals tasked with upholding it: often burdened with unrealistic expectations of punishing the guilty, resolving societal conflicts, deterring future misconduct, and providing an authoritative history of a traumatic period. Yet most renderings of that history overlook some of the important legal developments that have taken place outside Europe.

There is, however, much to learn from a closer examination of the Asian experiences of international criminal law. Not all of it is positive. But a clear-eyed view of this under-studied history offers a provocative lens through which to view the possibilities and limitations of this relatively new set of laws and institutions. In particular, the pragmatic adaptation of “universal” principles in various Asian jurisdictions illustrates the inherent tension between legitimacy and effectiveness in international criminal trials. On the one hand, such trials must aspire to a legitimacy that goes beyond a state whose leaders may have engaged in unspeakable acts. At the same time, those trials require sensitivity to local context if their results are to be effective and if any resolution they seek to impose is to be enduring.

It should be noted from the outset that the category “Asia” is not used here to suggest that there is a single Asian experience of or perspective on international criminal law. Nevertheless, as a loose regional grouping,¹ Asian countries arguably have the longest history of exposure to regulation of the laws of armed conflict and yet today are the least likely to have accepted the jurisdiction of the International Criminal Court (ICC). Whereas almost two-thirds of the states in Africa and more than three-quarters of those in Europe

¹ For present purposes, the Asia-Pacific Group at the United Nations will be taken to define the list of “Asian” countries. See the table in Appendix I.

and the Americas have ratified the Rome Statute², less than one-third of Asian states have done so.³ Understanding this reticence depends in part on understanding the history of how international criminal law came to be used after the Second World War and subsequently applied in selective cases through the end of the twentieth century and the beginning of the twenty-first.

To put that experience in context, this article first surveys briefly the European history of international criminal law. As we will see, that survey would commonly be regarded as a fairly complete history of the subject. Part 2 then considers the alternative history of international criminal law as it has been experienced in Asia, focusing on the international tribunals established after the Second World War, the more recent experiments with hybrid institutions, and a few cases of domestic prosecutions. Finally, Part 3 expands on the legitimacy-effectiveness dynamic and explores whether such an account can explain the ongoing wariness of Asian states to embrace international criminal law, either through implementing it in hybrid or domestic prosecutions or submitting themselves to the jurisdiction of the ICC.

I. EUROPE AND INTERNATIONAL CRIMINAL LAW

Before considering regional variation in the history of international criminal law, it is first necessary to determine the scope of our subject matter. "International criminal law" is a novel body of law that addresses an old problem. Historically, it might have been applied most properly to the crime of piracy—a problem that continues today, although it tends to be considered separately in treatments of international criminal law.⁴ Today, when we say "international criminal law," do we emphasize the "*international*" component: the institution that tries individuals not in a domestic court but a truly international tribunal? This appears to have been the view of the International Court of Justice in its 2002 *Arrest Warrant* case.⁵ Or do we stress the "*international criminal*" aspect, focusing on the individuals who commit acts that "shock the conscience" of humanity and may be put on trial by any right-thinking state? Or is our focus the body of "*international criminal law*," meaning that prosecutions must be for violations of treaties or customary international law?

² Statute of the International Criminal Court (Rome Statute), July 17, 1998, U.N. Doc. A/CONF.183/9, available at http://www.icc-cpi.int/nr/rdonlyres/e9a9eff7-5752-4f84-b994-0a655eb30e16/o/rome_statute_english.pdf.

³ See Table 1 in Part 2. Complete statistics are provided in Appendix I.

⁴ See, e.g., ROBERT J. BECKMAN & J. ASHLEY ROACH, NUS CENTER FOR INTERNATIONAL LAW, *PIRACY AND INTERNATIONAL MARITIME CRIMES IN ASEAN: PROSPECTS FOR COOPERATION* (2012).

⁵ *Arrest Warrant of 11 April 2000* (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, ¶ 61 (Feb. 14, 2002), available at <file:///Users/naralee/Downloads/5.%20Arrest%20Warrant%20of%2011%20April%202000.pdf>, (referring to "certain international criminal courts.")

This article will focus primarily on prosecutions of individuals by international institutions, as well as prosecutions by hybrid and, to a lesser extent, domestic institutions for violations of specific international crimes: in particular, aggression, war crimes, crimes against humanity, and genocide. Not coincidentally, these are the crimes now codified in the Rome Statute.⁶ What this means is that investigations and prosecutions at the domestic or international level for other wrongs will be excluded—notably piracy, slavery, torture, and other violations of human rights. These are worthy subjects of investigation and indeed of particular interest for how they have been interpreted and applied, or disregarded, in Asia.⁷ But that would be a topic for another article.

A. Medieval Europe to the First World War

The history of international criminal law, in particular war crimes, is inextricably bound to the history of war.⁸ Rules for the conduct of hostilities can be found in most ancient human civilizations⁹ and documented prosecutions of persons for violating accepted limitations on the conduct of armed conflict are found in the Middle Ages.¹⁰ Yet the history of *international* criminal law can be traced back only a few hundred years. One early example that is often cited—predictably, from Europe—is the trial of Peter Von Hagenbach in 1474, convicted by a tribunal of twenty-eight judges from Austria and its allies for crimes against the “laws of God and man” following his reign of terror over the citizens of Breisach.”

⁶ Rome Statute, *supra* note 2.

⁷ See, e.g., RANDALL PEERENBOOM, CAROLE J. PETERSEN & ALBERT H. Y. CHEN, *HUMAN RIGHTS IN ASIA: A COMPARATIVE LEGAL STUDY OF TWELVE ASIAN JURISDICTIONS, FRANCE, AND THE USA*, (2006).

⁸ Some passages in this section draw upon material first published as Simon Chesterman, *Never Again . . . and Again: Law, Order, and the Gender of War Crimes in Bosnia and Beyond*, 22 YALE J. INT’L L. 299 (1997) and Simon Chesterman, *No Justice Without Peace? International Criminal Law and the Decision to Prosecute, in CIVILIANS IN WAR* 145 (2001).

⁹ Examples of early writings on humanitarian limitations on the conduct of hostilities are found in Sun Tzu’s *The Art of War* written in the sixth century B.C. See SUN-TZU SUN PIN, *THE COMPLETE ART OF WAR* 462–66 (1996). In Ancient Greece, Herodotus describes an incident in which enemy envoys were killed as “confessedly a transgression of the [laws of men], as a law of the human race generally, and not merely as a law applicable exclusively to the barbarians.” M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 50 (2nd ed. 1999).

¹⁰ See generally M.H. KEEN, *THE LAWS OF WAR IN THE LATE MIDDLE AGES* (1965); THEODOR MERON, *HENRY’S WARS AND SHAKESPEARE’S LAWS: PERSPECTIVES ON THE LAW OF WAR IN THE LATER MIDDLE AGES* (1st ed. 1994).

¹¹ See, e.g., 2 GEORG SCHWARZENBERGER, *INTERNATIONAL LAW: AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* (1968). On the trial of von Hagenbach, See Gregory S. Gordon,

Yet international law as such did not meaningfully exist until Europe emerged from the medieval period and the vertically structured hierarchies under Pope and Emperor came to be replaced by the horizontally organized system of sovereign states, formally established in the 1648 Peace of Westphalia.¹² Laws governing the conduct of war continued to develop, but the content varied from state to state and prosecutions were inconsistent. One of the first attempts to formulate a codification of the laws of war was the U.S. Lieber Code,¹³ but it was not until the adoption of The Hague Conventions of 1899¹⁴ and 1907¹⁵ that the subjects of the international legal system agreed to international laws of war binding on state parties. At the same time, despite the lack of collective machinery to enforce the Conventions, there was evidence of a growing awareness of the humanitarian obligations on states and of demands for criminal sanctions in response to their violation.¹⁶

It was not until the First World War, however, that widespread calls were made for the trial of those responsible for perpetrating atrocities of unprecedented brutality. There were numerous instances of war crimes trials held by individual Allied States, but it was Turkey's attempts to exterminate the Armenians that garnered support for truly international action.¹⁷ Despite the significance of a declaration introducing the notion of "crimes against humanity,"¹⁸ the failure of the Allies to make good on their threats found a

The Trial of Peter von Hagenbach: Reconciling History, Historiography, and International Criminal Law, THE HIDDEN HISTORIES OF WAR CRIMES TRIALS 13 (2013).

¹² See generally Simon Chesterman, *An International Rule of Law?*, 56 AM. J. COMP. L. 331 (2008).

¹³ Instructions for the Government of Armies of the United States in the Field (Lieber Code), Apr. 24, 1863, available at <http://www.icrc.org/ihl/INTRO/110?OpenDocument>.

¹⁴ Convention (II) with Respect to the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land (1899 Hague Regulations), July 29, 1899, available at <http://www.icrc.org/ihl/INTRO/150?OpenDocument>.

¹⁵ Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land (1907 Hague Regulations), Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631, available at <http://www.icrc.org/ihl.nsf/INTRO/195>.

¹⁶ See, e.g., 1 JAMES WILFORD GARNER, INTERNATIONAL LAW AND THE WORLD WAR 19-35 (1920), available at <https://archive.org/details/internationallawoigarnuoft>; ERIK J. S. CASTRÉN, THE PRESENT LAW OF WAR AND NEUTRALITY 20-22 (1954).

¹⁷ ANTONIO CASSESE, HUMAN RIGHTS IN A CHANGING WORLD 71-74 (1990); cf. Vahakn N. Dadrian, *Genocide as a Problem of National and International Law: The World War I Armenian Case and Its Contemporary Legal Ramifications*, 14 YALE J. INT'L L. 221, 223-29 (1989).

¹⁸ BASSIOUNI, *supra* note 9, at 168.

monument in Hitler's chilling 1939 dictum: "Who, after all, speaks today of the annihilation of the Armenians?"¹⁹

The Treaty of Versailles, signed in 1919, had contained provisions for an international tribunal that was to try the German Emperor (*Kaiser*), though the Dutch authorities refused to extradite him and the proposed tribunal never met. Seventeen trials were later held in Leipzig; almost half ended in acquittals and the maximum sentence handed down was ten years.²⁰

B. Nuremberg

The Nuremberg trials of the major Nazi war criminals after the Second World War are rightly seen as a pivotal moment in international criminal law. In his opening arguments before the Tribunal on 21 November 1945, U.S. Chief of Counsel Justice Robert H. Jackson presented the trials as a historic victory for the rule of law:

That four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason.²¹

Even in the closing moments of the war, however, it was far from clear that the Allies would pursue legal avenues to punish the Nazi leadership. British Prime Minister Winston Churchill, for example, had favored the summary execution of fifty or so leading members of the Nazi apparatus. Stalin approved; in a "semi-jocular" recommendation he suggested that 50,000 German general staff officers be shot.²²

This exchange is commonly dismissed as an aberration, but it was a serious proposition at the time. Such an approach enjoyed the virtues of simplicity and candor. It would spare the Allies the tedious process of organizing the mechanisms and material necessary to present a watertight case, precluding legal rationalizations and dilatory tactics that the guilty might employ to delay their judgment. Crucially, the victors would not be required to "disguise a punishment exacted by one sovereign upon another by appeal to

¹⁹ KEVORK B. BARDAKJIAN, *HITLER AND THE ARMENIAN GENOCIDE* 6 (1985). Following the conclusion of the war, the Treaty of Sèvres, which included special provisions for the trial of those responsible for the Armenian massacre, was never ratified. The Treaty of Lausanne, which replaced it, included a "Declaration of Amnesty" for crimes committed during the war. See generally *Treaty of Peace with Turkey*, July 24, 1923, 28 LNTS 11.

²⁰ See Alan Kramer, *The First Wave of International War Crimes Trials: Istanbul and Leipzig*, 14 *EUROPEAN REV.* 441, 448 (2006).

²¹ 2 *Trial of the Major War Criminals Before the International Military Tribunal*, 99, (1947):9

²² TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* 29-30 (1992).

the neutral instrument of the law.”²³ In short, it would be framed as the conclusion of military activities rather than a trial that would be seen as “victor’s justice.”

That this extrajudicial course was avoided was largely due to American involvement. Henry L. Stimson, the U.S. Secretary for War, believed that a duly constituted international tribunal would have a greater effect on posterity; it would be harder for the Germans to claim (as they had of the Treaty of Versailles) that admissions of war guilt had been exacted under duress.²⁴ President Roosevelt wavered, but his successor, Harry S. Truman, had utter contempt for the British solution of summary executions. Stalin ended up supporting trials also, in part for the propaganda opportunities such a spectacle would offer.²⁵ In any event, the final decision to cede “Power . . . to Reason” was formalized on a particularly inauspicious date. In one of history’s more brutal ironies, the agreement that established the Nuremberg trials—power’s celebrated tribute to reason—was signed by the Allies within twenty-four hours of the United States dropping its second atomic bomb on Japan.

These debates highlight competing objectives in the Allies’ decision to prosecute the Nazi leadership for war crimes.²⁶ The retributive element was clear from the earliest preparations for war crimes trials. The second desired outcome of the Nuremberg trials was that they should serve a deterrent function. This stemmed in part from the view that the Second World War might have been prevented if the initiators of the First had been justly punished.²⁷ Similarly, the International Military Tribunal for the Far East and other war crimes tribunals allocating individual responsibility were expected to reach individual actors and, presumably, to deter other individuals from performing such acts in future.²⁸ The applicability of international law to individuals came to constitute the first of the “Nuremberg Principles” adopted

²³ Lawrence Douglas, *Film as Witness: Screening Nazi Concentration Camps Before the Nuremberg Tribunal*, 105 YALE L.J. 449, 457-58 (1995). In the case of the Israeli prosecution of Adolf Eichmann, the difficulties in extraditing him from Argentina led to “frequent” mention of the alternative of “kill[ing] him there and then, in the streets of Buenos Aires”: HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 265 (1963).

²⁴ GEOFFREY ROBERTSON, *CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE* 199 (1999).

²⁵ Francine Hirsch, *The Soviets at Nuremberg: International Law, Propaganda, and the Making of the Postwar Order*, 113 (3), AM. HIST. REV. 701, 703 (2008).

²⁶ It was understood that such prosecutions would also apply to the Japanese, but the emphasis was on the Nazi leadership.

²⁷ See Chesterman, *supra* note 8, at 304-05.

²⁸ See, e.g., Egon Schwelb, *Crimes Against Humanity*, 23 BRITISH YEARBOOK INT’L L. 178, 198-99 (1947).

in 1950.²⁹ Over the course of the trials in Nuremberg, this was justified by reference to the precedent established by piracy as an international crime,³⁰ to international duties that "transcend the national obligations of obedience imposed by the individual state,"³¹ and to the results that would flow from allowing individuals to hide behind the veil of sovereignty:

The principle of personal liability is a necessary as well as logical one if International Law is to render real help to the maintenance of peace. An International Law which operates only on states can be enforced only by war because the most practicable method of coercing a state is warfare. . . . Only sanctions which reach individuals can peacefully and effectively be enforced.³²

The Nuremberg trials thus marked a significant development in the law, but the political and historical circumstances that made them possible came to be seen as unique to the Second World War.³³ The trials presaged legal instruments codifying the crime of genocide in 1948³⁴ and the laws of war in 1949,³⁵ but attempts to create a comprehensive regime of individual criminality soon foundered. The International Law Commission adopted a Draft Code of Offenses against the Peace and Security of Mankind in 1954,³⁶ but then suspended work until 1983. With the notable exception of episodic national prosecutions of Nazi war criminals, the field of international criminal law remained essentially dormant in Europe for most of the latter half of the twentieth century.³⁷

²⁹ Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, July 29, 1950, 5 GAOR Supp. (No. 12), UN Doc. A/1316.)

³⁰ The analogy with piracy is questionable at the least; the prosecution of pirates falls within international criminal law as their crimes do not fall within the jurisdiction of any one state: See, e.g., A. Carnegie, *Jurisdiction over Violations of the Laws and Customs of War*, 39 BRITISH YEARBOOK INT'L L. 421 (1963).

³¹ 22 Trial of the Major War Criminals Before the International Military Tribunal, 466, (1948).

³² ROBERT H. JACKSON, THE NÜRNBERG CASE, 88, (1947).

³³ Indeed, early criticisms of the Yugoslav Tribunal argued that a juridical resolution to a conflict is possible only when "an army sits atop its vanquished enemy." Kenneth Anderson, *Nuremberg Sensibility: Telford Taylor's Memoir of the Nuremberg Trials*, 7 HARV. HUM. RTS. J. 281, 292 (1994).

³⁴ Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 UNTS 277.

³⁵ See Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), Aug. 12, 1949, available at <http://www.icrc.org/ihl/INTRO/375?OpenDocument> I Convention (IV) Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), Aug. 12, 1949, available at <http://www.icrc.org/ihl/INTRO/380>.

³⁶ [1954] 2 *Yearbook of the International Law Commission* 140.

³⁷ See TIMOTHY L. H. MCCORMACK & GERRY J. SIMPSON, THE LAW OF WAR CRIMES: NATIONAL AND INTERNATIONAL APPROACHES (1997).

C. The Former Yugoslavia

The political and legal impediments to international criminal prosecution after Nuremberg were overcome in 1993 when the United Nations Security Council adopted Resolution 827 establishing the International Criminal Tribunal for the former Yugoslavia (ICTY). As in the case of the Nuremberg Trials this was a quasi-judicial body, established by one group of states to try the nationals of others. Its creation was made possible by the conjunction of three factors: the unprecedented unanimity of the Security Council in the heady days of what U.S. President George H.W. Bush had termed the "new world order;" the savagery of such a conflict in Europe that recalled the images of Nazi concentration camps; and the frustration, particularly on the part of the United States, at the failure of other methods to stem the flow of blood.³⁸

This decision to commence prosecutions while the conflict continued was a substantial departure from the Nuremberg mold. Some commentators interpreted this as attempting to achieve through law what the international community was not prepared to achieve through force.³⁹ Others saw it as having far more modest goals. For instance, Richard Holbrooke, architect of the 1995 Dayton Accords, noted that the Tribunal was initially viewed as "little more than a public relations device."⁴⁰

The ineffectual response to the war in the former Yugoslavia was echoed in Rwanda with even more devastating consequences for the civilian population. After hand-wringing inaction during the genocide in April to July 1994, a parallel tribunal was created with almost undignified haste. The International Criminal Tribunal for Rwanda (ICTR) borrowed most of its Statute from the ICTY and shared the same Prosecutor—based over 4,000 miles away at the seat of the ICTY in The Hague. There are good reasons to believe that if a tribunal had not been created a year earlier to address the European atrocities, none would have been created to deal with Africa's.

A key difference between the tribunals was their political context. Whereas the Yugoslav Tribunal had ongoing jurisdiction over events in the former Yugoslavia, its Rwandan counterpart was limited to events that took place in 1994. The establishment of the ICTY was justified as a necessary step towards prosecuting those responsible for atrocities in the former Yugoslavia; given the military and political climate, it is unlikely that many such prosecutions would have taken place in Yugoslavia itself. The Rwandan Tribunal, by contrast, was established to try the perpetrators of the Tutsi genocide in Rwanda during 1994; the target population of these atrocities later held power in Rwanda and the country commenced its own trials. Indeed, Rwanda held a rotating seat on the Security Council and voted against the

³⁸ See, e.g., James Crawford, *Current Development: The ILC adopts a Statute for an International Criminal Court*, 89 AM. J. INT'L L. 404 (1995).

³⁹ Anderson, *supra* note 33, at 294.

⁴⁰ RICHARD HOLBROOKE, *TO END A WAR*, 189-90 (1998).

creation of the ICTR because of the decision to situate it in neighboring Tanzania.

D. International Criminal Court

The modest successes of the ICTY raised the comfort level of many states and encouraged activists to seek to establish a permanent court. Yet the political questions surrounding possible prosecutions remained. In the negotiations for the Rome Statute, one crucial question concerned the Court's relationship to the Security Council. The International Law Commission's 1994 draft had prohibited the commencement of a prosecution if it arose from a situation that was being dealt with by the Council under Chapter VII of the Charter, unless the Council decided otherwise.⁴¹ This gave each of the permanent five members of the Council an effective veto over prosecutions. The Statute as adopted reflects the "Singapore compromise" whereby the Council's negative veto was replaced by a positive arrangement, providing that the Council may defer investigation or prosecution for a period of twelve months by adopting a Chapter VII resolution.⁴²

This is not the place for an assessment of the ICC, but it is telling that some of the main criticisms of the Court's work to date are that it is unduly focused on African crimes.⁴³ Underlying this challenge is the perception that it reflects a European and colonial approach to Africa. In the meantime, the United States is gradually moving from seeking cast iron guarantees that no U.S. citizen would ever appear before the Court—with the prospect of a military strike on The Hague if one did—to reluctant acceptance that the ICC might in fact be useful in situations where more than sanctions are required but the use of force is politically or militarily impractical.⁴⁴ Meanwhile, Asian states have been largely absent from the discussions entirely and, as will be described later, Asia has by far the lowest proportion of states that accept the ICC's jurisdiction at all.⁴⁵

⁴¹ Report of the International Law Commission on the Work of Its Forty-Sixth Session, Draft Statute for an International Criminal Court, UN Doc. A/49/10 (1994).

⁴² See Lionel Yee, *The International Criminal Court and the Security Council: Articles 13(b) and 16*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE* (Roy S.K. Lee ed., 1999).

⁴³ See, e.g., Kurt Mills, "Bashir is Dividing Us": Africa and the International Criminal Court, 34(2) HUM. RTS. Q. 404 (2012).

⁴⁴ Cf. Stuart Ford, *How Leadership in International Criminal Law Is Shifting From the United States to Europe and Asia: An Analysis of Spending on and Contributions to International Criminal Courts*, 55 ST. LOUIS U. L.J. 953 (2011).

⁴⁵ See *infra* text accompanying note 51.

II. THE ASIAN EXPERIENCE

The foregoing examination of Europe and international criminal law is telling because — but for the passing mention of the Tokyo Trial and Rwanda, which were sideshows to the main events in Nuremberg and Yugoslavia — many observers would regard that European tale as a fairly complete history of international criminal law.⁴⁶ This Part surveys an alternative history of international criminal law as experienced in Asia. Unlike the European story, which is sometimes presented as a Whiggish narrative leading inevitably to the Rome Statute and the ICC,⁴⁷ the Asian experience is more problematic. — and, arguably, more interesting.

There is not time or space to do justice to the experience of regions other than Asia. In the strict area of international criminal law as defined for the purposes of this article,⁴⁸ however, that experience is limited. Africa, in addition to the ICTR, had the Special Court for Sierra Leone which might properly be regarded as a hybrid tribunal. The Lockerbie Trial of 2000, by contrast, involved a special court in the Netherlands applying Scots law on a U.S. airbase, so although the accused were two Libyan nationals it is not properly categorized as either “African” or truly international. Both Latin America and Africa have, of course, contributed greatly to our experience and understanding of transitional justice — most prominently in South Africa’s Truth and Reconciliation Commission. But, again, that is a distinct topic from international criminal law *sensu stricto*.⁴⁹

Even with regard to Asia, this article does not purport to be comprehensive and will only cover the post-war era. Yet two historical bookends are worth keeping in mind. The first is that one of the earliest examples of an attempt to formalize restrictions on the conduct of hostilities was the sixth century BC work of the Chinese general and philosopher Sun Tzu (孙子).⁵⁰ The second bookend is that, today, Asia has by far the lowest proportion of states accepting jurisdiction of the ICC of any region. Less than a third of Asian states have ratified the Rome Statute, compared with almost two-thirds in Africa and more than three-quarters of other regional groupings.⁵¹

⁴⁶ In light of the role of the United States in prosecuting World War II atrocities, it might be argued that the term “Western” should be preferred to “European.” Given the extent to which the practice of international criminal law has been focused on European geography and history, however, as well as the ongoing ambivalence of the United States towards international criminal law as it might apply to its own citizens, the term “European” will be used.

⁴⁷ See, e.g., BENJAMIN N. SCHIFF, BUILDING THE INTERNATIONAL CRIMINAL COURT (2008).

⁴⁸ See *supra* text accompanying notes 4–7.

⁴⁹ See, e.g., TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES (Neil J. Kritz ed., 1995).

⁵⁰ SUN-TZU, *supra* note 9.

⁵¹ See the summary in Table 1, *infra*, and the full data in Appendix I.

So one interesting question is why Asia, which arguably has the longest history of restraining the conduct of hostilities, is also the most reluctant to embrace the court that upholds such norms. The short answer is that such reticence is not limited to international criminal law. Asian countries also have by far the lowest rate of acceptance of the compulsory jurisdiction of the International Court of Justice (ICJ); they are least likely to have signed conventions such as the International Covenant on Civil and Political Rights (ICCPR) or the International Covenant on Economic, Social and Cultural Rights (ICESCR) — or to have joined the World Trade Organization (WTO). Asia also lacks a regional framework comparable to the African Union, the Organization of American States, or the European Union; in the United Nations, the “Asia-Pacific Group” of fifty-three states rarely adopts common positions on issues and discusses only candidacies for international posts.⁵² Those sub-regional groupings that do exist within Asia, such as the Association of Southeast Asian Nations (ASEAN), have tended to coalesce around shared national interests rather than shared identity.⁵³

Table 1 Percentage of UN regional groups that have accepted certain international obligations. Raw data is provided in Appendix I.

UN Regional Grouping	ICC (States Parties to the Rome Statute of the ICC)	ICJ (States that have accepted compulsory jurisdiction of the ICJ)	WTO (Member States of the World Trade Organization)	ICCPR (States Parties to the International Covenant on Civil and Political Rights)	ICESCR (States Parties to the International Covenant on Economic, Social and Cultural Rights)
Asia-Pacific	32%	15%	68%	66%	66%
Africa	63%	41%	78%	94%	89%
Eastern Europe	78%	30%	83%	100%	100%
Latin America & Caribbean States	82%	39%	97%	88%	85%
Western Europe and Others	86%	69%	90%	100%	93%

In part this is due to the diversity of the continent. Indeed, the very concept of “Asia” derives from a term used in Ancient Greece rather than any indigenous political or historic roots. Today, regional cohesion is complicated by the need to accommodate the great power interests of China, India, and

⁵² In 2011, the group was renamed the “Asia-Pacific Group.”

⁵³ See Kishore Mahbubani and Simon Chesterman, *Asia’s Role in Global Governance* (World Economic Forum, Singapore, January 2010), available at <http://ssrn.com/abstract=1541364>.

Japan.⁵⁴ But the limited nature of regional bodies is consistent with a general wariness of delegating sovereignty to international organizations.⁵⁵

It would be too much to suggest that Asia's experience with international criminal law defined attitudes towards international institutions more generally. Nevertheless, the extent to which that experience contributed to wariness or suspicion about international law is at least worth exploring.

A. Prosecutions After the Second World War

The most important and most problematic such experience concerns the various prosecutions after the Second World War. Allied military courts conducted 2,200 trials in Asia that sentenced around 3,000 Japanese to imprisonment and some 920 to death.⁵⁶ These tribunals had different legal and institutional bases. The International Military Tribunal for the Far East was established by special proclamation of the Supreme Commander Allied Powers (SCAP), General Douglas MacArthur.⁵⁷ In addition, however, the United States established military commissions based on the Articles of War adopted by Congress;⁵⁸ Australia and Canada adopted domestic legislation authorizing the creation of military courts;⁵⁹ Dutch colonial authorities enacted special decrees that authorized the establishment of temporary court-martials and war crime courts;⁶⁰ and China adopted legislation giving its courts a broad legal basis that included, in order of precedence, "international law, special war crimes rules, and provisions of Chinese common penal law."⁶¹

⁵⁴ See, e.g., David Arase, *Non-Traditional Security in China-ASEAN Cooperation: The Institutionalization of Regional Security Cooperation and the Evolution of East Asian Regionalism*, 50(4) *ASIAN SURVEY* 808 (2010).

⁵⁵ For a discussion of the changing attitudes towards the expanding role and power of ASEAN, see Simon Chesterman, *From Community to Compliance? The Evolution of Monitoring Obligations in ASEAN* (Cambridge University Press, forthcoming).

⁵⁶ PHILIP R. PICCIGALLO, *THE JAPANESE ON TRIAL: ALLIED WAR CRIMES OPERATIONS IN THE EAST, 1945-1951* xi (1979).

⁵⁷ NEIL BOISTER & ROBERT CRYER, *THE TOKYO INTERNATIONAL MILITARY TRIBUNAL: A REAPPRAISAL* 25 (2008).

⁵⁸ *Ex parte Quirin*, 317 U.S. 1 (1942). See also Louis Fisher, *Military Tribunals: Historical Patterns and Lessons* (Congressional Research Service, Washington, DC, RL32458, 9 July 2004), available at <http://www.fas.org/irp/crs/RL32458.pdf>; Robinson O. Everett, *The Role of Military Tribunals Under the Law of War*, 24 B.U. INT'L L.J. 1 (2006).

⁵⁹ War Crimes Act (Commonwealth of Australia, 1945); Respecting War Crimes (Canada, 1946).

⁶⁰ PICCIGALLO, *supra* note 56, at 175.

⁶¹ *Id.* at 159.

1. International Military Tribunal for the Far East

The Tokyo Trial was, of course, the most prominent of these proceedings but suffered in comparisons to Nuremberg. One can get a sense of the contrast from how *Time* magazine described the scene in 1946:

The International Military Tribunal in Tokyo looked last week like a third-string road company of the Nurnberg show . . . Much care had gone into fitting the courtroom with dark, walnut-toned paneling, imposing daises, convenient perches for the press and motion picture cameramen. The klieg lights suggested a Hollywood premiere. Nurnberg's impresarios had used simpler furnishings, relied on the majesty of the concept to set the tone. The German production had a touch of Wagner — elaborate vaunting of guilt, protestations of heroic innocence. Tokyo's had the flavor of Gilbert & Sullivan.⁶²

History has not always been kind to the Tokyo Trial — that is, when it was included in that history at all. Whereas the complete Nuremberg judgment was published in 1947 in both English and French, the full judgment of the Tribunal for the Far East remained available only in mimeograph form until 1977. Much of what has been written since the Tokyo Trial is highly critical of the “victor’s justice” that was seen to characterize the proceedings — with suggestions that the Trial was a means of extracting revenge for the “treacherous” bombing of Pearl Harbor, or expiating guilt for the use of atomic weapons in Japan.⁶³ If Nuremberg provided the moral and legal foundations for the modern prosecution of war crimes, Tokyo remained for many a shadowy reminder of its limitations.

In addition to the familiar criticisms of victor’s justice, the procedural flaws in Tokyo were also the subject of scathing criticism by Justice Pal and Justice Röling — including inequality of arms, lack of time, inadequate translation services, and limitations on defense witnesses among others.⁶⁴ But more relevant for our purposes, perhaps, was the extent to which colonialism and race played a role in Tokyo — in a way that they did not in Nuremberg. Though three Asian judges were appointed (from China, India, and the

⁶² *War Crimes*, *Time*, 20 May 1946, 24.

⁶³ See, e.g., PAUL W. SCHROEDER, *THE AXIS ALLIANCE AND JAPANESE-AMERICAN RELATIONS*, 1941 228 (1958); RICHARD H. MINEAR, *VICTORS’ JUSTICE: THE TOKYO WAR CRIMES TRIAL* (1971); *THE TOKYO WAR CRIMES TRIAL: AN INTERNATIONAL SYMPOSIUM* (C. Hosoya et al. eds., 1986); B.V.A. RÖLING & ANTONIO CASSESE, *THE TOKYO TRIAL AND BEYOND: REFLECTIONS OF A PEACEMONGER* 81 (1993).

⁶⁴ RÖLING & CASSESE, *supra* note 63, at 50-60; Sarah Finnin and Timothy L.H. McCormack, *Tokyo’s Continuing Relevance*, in *BEYOND VICTOR’S JUSTICE? THE TOKYO WAR CRIMES TRIAL REVISITED* 353, 354 (Yuki Tanaka, Timothy L.H. McCormack & Gerry J. Simpson eds., 2011).

Philippines) the majority of the Tribunal came from the United States and its Western allies. No legal representative was drawn from Malaysia, Singapore, Indonesia, Indochina, or Korea. Given the national independence movements then underway in various colonies of Britain, France, the Netherlands, and the United States, it was not surprising that Japanese responsibility towards Asia was framed in a manner that emphasized atrocities rather than colonialism.⁶⁵

Race also featured directly and indirectly. The Allied Powers claimed the right to speak for “civilization” in the Tokyo Trial. Though few would question that the crimes on trial would have been condemned by any civilization, the clear understanding was that “civilization” in this context meant modern European civilization.⁶⁶ Writing soon after the trials, two American authors criticized Soviet efforts to use them for political purposes, stating — without irony — that this was “incompatible with the Christian-Judaic absolutes of good and evil which were the foundation of the Tokyo and Nuernberg [sic] trials.”⁶⁷ Other scholars have discussed the role of race in specific trials, notably that of General Yamashita.⁶⁸

The political context of the Tokyo Trial also differed from Nuremberg. The decision to protect Emperor Hirohito and keep him on the throne, for example, was intended to facilitate the occupation of Japan. To this end, he was presented as having been manipulated by Japan’s military leaders; indeed, General MacArthur cultivated his image as a “peace monarch,” who voluntarily led his country in the formulation of its new constitution that renounced military force. Though the short term aim of encouraging cooperation with the occupying powers was achieved, the longer-term consequence was to absolve the Japanese people more generally of the need to reflect on the colonization and oppressive rule of Taiwan and Korea, and the atrocities perpetrated there, in China, and in other Asian states.⁶⁹ The consequences of this decision continue today, with periodic calls from China and other states for Japan to apologize repeatedly for its war-time activities, while nationalist sentiments within Japan manifest in the ritual of visiting the Yasukuni shrine to Japan’s war dead, including fourteen Class A war criminals.⁷⁰

As Barak Kushner and others have argued, it is not difficult to see how this foundation might lead to international criminal law being seen as a tool for selective engagement with domestic political processes — pursuing some

⁶⁵ Tanaka, McCormack & Simpson eds., *supra* note 64, at xxviii.

⁶⁶ ONUMA YASUAKI, *Beyond Victor’s Justice*, XI JAPAN ECHO 63 (1984).

⁶⁷ JOSEPH B. KEENAN & BRENDAN F. BROWN, *CRIMES AGAINST INTERNATIONAL LAW* vii (1950).

⁶⁸ See, e.g., Anne-Marie Prevost, *Race and War Crimes: The 1945 War Crimes Trial of General Tomoyuki Yamashita*, 14 HUM. RTS. Q. 303 (1992).

⁶⁹ Tanaka, McCormack & Simpson eds., *supra* note 64, at xxix; OTOMO YORKIO, *The Decision Not to Prosecute the Emperor*, in Tanaka, McCormack & Simpson eds., *supra* note 64.

⁷⁰ FUTAMARA MADOKA, *Japanese Societal Attitude Towards the Tokyo Trial: From a Contemporary Perspective*, in Tanaka, McCormack & Simpson eds., *supra* note 64, 35.

ends, such as the stabilization of post-conflict Japan, while effacing others, such as the ongoing liberation struggles in much of the region.⁷¹

2. Other Prosecutions by Western Allies

In addition to the Tokyo Trial, the Allies carried out other trials that typically attract even less attention than the International Military Tribunal for the Far East (IMTFE). The United States, for example, also staged important trials in the Philippines, notably the *Yamashita* case, as well as in China, the Pacific Islands and Yokohama.⁷² After the Philippines achieved independence on 4 July 1946, it continued its own prosecutions, though these were complicated by the political transition underway. Some trials were delayed, but the focus also shifted, as it did elsewhere, from the guilt of the Japanese to the responsibility of collaborators, some of whom remained politically active in independent Philippines.⁷³

Britain carried out trials in what were then its colonial territories. Twelve military courts were created in Rangoon, Hong Kong, Malaya, British North Borneo, and Singapore. Singapore also served as the venue for cases that could not be held elsewhere.⁷⁴ In total the British Eastern war crimes trials comprised 306 cases involving 920 accused; of these 279 were sentenced to death and a further 532 to prison terms.⁷⁵ This deeply under-studied phenomenon has only begun to receive the attention it warrants in Cheah Wui Ling's ongoing work on the subject.⁷⁶

In the six years after the conclusion of hostilities, Australia carried out 300 trials of 813 enemy nationals. Of those tried, 137 were executed. Trials took place in Darwin, Singapore, Hong Kong, Malaysia (Labuan), Papua New Guinea (Wewak, Rabaul, and Manus Island), and Indonesia (Morotai).⁷⁷ As with other tribunals, these included mass trials, but an Australian tribunal had the dubious distinction of being by far the largest, such as a trial begun in

⁷¹ See Barak Kushner, *Ghosts of the Japanese Imperial Army: The "White Group" (Baituan) and Early Post-war Sino-Japanese Relations*, 218, (suppl 8) PAST AND PRESENT 117, 119 (2013).

⁷² PICCIGALLO, *supra* note 56, at 68; ALLAN A. RYAN, *YAMASHITA'S GHOST: WAR CRIMES, MACARTHUR'S JUSTICE, AND COMMAND ACCOUNTABILITY* (2012).

⁷³ PICCIGALLO, *supra* note 56, at 185-200.

⁷⁴ *Id.* at 103.

⁷⁵ *Id.* at 120.

⁷⁶ See, e.g., CHEAH Wui Ling, *Post-World War II British "Hell-ship" Trials in Singapore: Omissions and the Attribution of Responsibility*, 8 J. INT'L CRIM. JUST. 1035 (2010).

⁷⁷ Narrelle Morris, *Unexpected Defeat: The Unsuccessful War Crimes Prosecution of Lt Gen Yamawaki Masataka and Others at Manus Island, 1950*, 11 J. INT'L CRIM. JUST. 591 (2013).

Ambon and concluded in Morotai of ninety-one Japanese officers charged collectively with mistreatment of Australian and Dutch prisoners of war.⁷⁸

Canada had also prepared to conduct war crimes trials, but ran into difficulties as the relevant regulations required that only senior officers in command of Canadian forces could convene Canadian military courts. As Canada did not have occupation forces in the region, it could only commence prosecutions with British and American cooperation. It was involved in prosecutions in Hong Kong and Tokyo.⁷⁹ New Zealand also participated in war crimes trials, but this appears to have been limited largely to the role of a “passive observer.”⁸⁰

The Dutch also had interests in the region, and indeed the Netherlands tried more Japanese accused than any other nation bar the United States. The legal basis for this was regulations applicable only to the Netherlands East Indies (that is, distinct from municipal law). In all there were 448 cases involving 1,038 accused, of which 236 were sentenced to death and 733 to prison.⁸¹

Another colonial power that held a far smaller number of trials was France. The reason for the small number of trials was partly the situation of post-war France, but also the quickly changing political landscape in Indochina — what is today Vietnam, Cambodia, and Laos. There were thirty-nine trials of 230 accused, with sixty-three death sentences and 135 prison terms.⁸²

3. Russia

Russia's role in post-war trials was, for a long time, viewed in the West either through the prism of the Cold War — or it was not viewed at all, due to the unavailability of materials.⁸³ Politics appears to have played an important role in shaping Russian approaches to the trials, in particular unhappiness with U.S. policies in the occupation of Japan.

In addition to criticism of the Tokyo Trial, however, Russia also convened an important trial in Khabarovsk, where twelve Japanese were charged with “manufacturing and employing bacteriological weapons”⁸⁴ — the only case in

⁷⁸ Georgina Fitzpatrick, *War Crimes Trials, “Victor’s Justice” and Australian Military Justice in the Aftermath of the Second World War*, in *THE HIDDEN HISTORIES OF WAR CRIMES TRIALS* 327, 336 (Kevin Jon Heller and Gerry Simpson eds., 2013).

⁷⁹ PICCIGALLO, *supra* note 56, at 140-41; See now *HONG KONG’S WAR CRIMES TRIALS* (Suzannah Linton ed., 2013).

⁸⁰ PICCIGALLO, *supra* note 56, at 141-42.

⁸¹ *Id.* at 174-84.

⁸² *Id.* at 201-08.

⁸³ See, e.g., *id.* at 145.

⁸⁴ *Id.* at 150.

which Japan's wartime biological program was the subject of criminal proceedings.⁸⁵ All twelve were convicted, but despite the seriousness of the charges, none was sentenced to death.⁸⁶

Another area in which Russia had played a significant role was the role of the criminologist Aron Naumovich Trainin. As Kirsten Sellars has observed, his scholarship on crimes against peace and complicity had a significant impact on the formulation adopted in both Nuremberg and Tokyo.⁸⁷

4. China

China had more victims of Japanese war crimes than any other nation and, from an early stage, expressed a determination to participate actively in the post-war prosecutions. China joined in the establishment of the UN War Crimes Commission and in 1944 established a Far Eastern Sub-Commission, based in Chongqing. Though much of the attention in China focused on the trials of local "puppets" — Chinese who had collaborated with Japan — tens of thousands of alleged crimes were documented. In part constrained by the internal convulsions going on at the time, the number of trials in the end was 605, with 883 accused of which 149 were sentenced to death and a further 355 to prison.⁸⁸

More than a thousand self-confessed Japanese war criminals remained in custody, but their fate was in limbo after Mao Zedong's forces drove out the Nationalists and declared the creation of the People's Republic of China in 1949. Parallel tribunals were eventually established in Shenyang and Taiyuan in June and July 1956. Yet the outcome initially appears astonishing: of 1,062 detainees, 1,017 were released without trial. Of the forty-five that actually faced trial, all were convicted but sentences ranged from eight to twenty years, with the eleven years since the end of the war retroactively applied. The extraordinary leniency is explicable only by Mao and Zhou Enlai's belief that geostrategic considerations demanded that China cultivate economic and political ties to Japan — even as it ran counter to domestic anti-Japanese sentiment.⁸⁹

⁸⁵ For a discussion of the failure to prosecute this at the Tokyo Trial, see Gerry Simpson, *Revisiting the Tokyo War Crimes Trial*, 78(4) *PACIFIC HISTORICAL REV.* 608, 613 (2009).

⁸⁶ PICCIGALLO, *supra* note 56, at 154.

⁸⁷ KIRSTEN SELLARS, "CRIMES AGAINST PEACE" AND INTERNATIONAL LAW 48-58 (2013).

⁸⁸ PICCIGALLO, *supra* note 56, at 158-73.

⁸⁹ Justin Jacobs, *Preparing the People for Mass Clemency: The 1956 Japanese War Crimes Trials in Shenyang and Taiyuan*, 205 *CHINA QUARTERLY* 152 (March 2011).

5. The Legacy of the Post-War Trials

The political legacy of the post-war trials in Asia is, therefore, richer than often believed but also deeply problematic.

Of particular interest to lawyers today is, among other things, the findings on command responsibility. A key reason for the distinctive approach at the IMTFE was factual. In Nuremberg the Nazi leadership had, conveniently, left significant amounts of evidence documenting orders to carry out acts that were international crimes. In Tokyo this was not generally the case. As a result, charges related to war crimes could not be based solely on explicit orders.⁹⁰ Count 54, for example, charged that the various defendants had “ordered, authorized and permitted” war crimes, but Count 55 used a more circuitous logic to allege that the defendants, being by virtue of their respective offices responsible for securing the observance of the said Conventions and assurances and the Laws and Customs of War in respect of the armed forces . . . deliberately and recklessly disregarded their legal duty to take adequate steps to secure the observance and prevent breaches thereof, and thereby violated the laws of war.⁹¹

Other areas of interest include the interpretation of aggression,⁹² conspiracy and joint criminal enterprise,⁹³ and the defense of superior orders.⁹⁴ As with command responsibility, some distinctions were driven by factual differences from Nuremberg, but the colonial and racial undercurrents also played a role.

This article will not attempt to examine in depth all of these doctrinal questions. An interesting underlying theme to consider, however, is the extent to which these legal divergences can be attributed to one or more of three possible causes. Was it simply a different fact pattern that emerged in Asia, forcing a reconsideration of the law in light of these new circumstances? Or did international law adapt to “local” norms and expectations, for example concerning attitudes to individual versus group responsibility? Or, more cynically, was law driven by political exigency — the need to ensure a swift and sure conclusion to the legal proceedings at the end of a bloody conflict?

In terms of the legacy of the post-war trials, one thing does seem clear: questions of legal doctrine were less significant in determining attitudes towards international criminal law than the political context within which the trials took place, with decolonization and race never far from the surface. That

⁹⁰ BOISTER & CRYER, *supra* note 57, at 227. Cf. Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 124-25 (2005).

⁹¹ IMTFE, Annex 6, Counts 54-55. See generally Gideon Boas, *Command Responsibility for the Failure to Stop Atrocities: The Legacy of the Tokyo Trial*, in Tanaka, McCormack & Simpson eds., *supra* note 64, 163.

⁹² BOISTER & CRYER, *supra* note 57, at 115-53.

⁹³ *Id.* at 206-27.

⁹⁴ *Id.* at 237-38.

political framing helps us understand the subsequent checkered history of trials for international crimes in Asia.

B. Hybrid Tribunals

Wariness about international trials and the question of control over proceedings in particular became a feature of subsequent experiments in Asia with international criminal trials. This section considers the group loosely characterized as “hybrid” tribunals in Timor-Leste, Cambodia, and Lebanon.⁹⁵

1. Timor-Leste: Special Panels of the Dili District Court (2000-2006)

In what is now Timor-Leste, the violence that accompanied the vote for independence in September 1999 led to calls by the International Commission of Inquiry on East Timor for an international tribunal to conduct prosecutions arising from atrocities committed after the plebiscite. On the same day, an Indonesian inquiry also recommended prosecutions of senior Indonesian military officials, but stated that they should be tried by Indonesia. Indonesian President Abdurrahman Wahid was reported to have said that he wanted to pre-empt an international tribunal by conducting a credible investigation and trial within Indonesia.⁹⁶ In response, the Secretary-General stated that the Security Council would “keep an eye on the process,” but did not plan to establish a tribunal.⁹⁷

Two major problems confronted these efforts to pursue accountability. The first was the fact that many alleged perpetrators were located within Indonesia. The second was that Timor-Leste lacked meaningful capacity to investigate or prosecute such crimes without international assistance.

The latter problem was partially addressed by creating Special Panels within the Dili District Court to try cases of “serious criminal offences” committed in 1999. The relevant offences were defined as genocide, war crimes, crimes against humanity, murder, sexual offences, and torture.⁹⁸ The Special Panels comprised one Timorese judge and two international judges,⁹⁹

⁹⁵ Lebanon is included based on its membership in the Asia-Pacific Group of nations at the United Nations.

⁹⁶ This is, to be fair, the purpose of the complementary jurisdiction of the International Criminal Court. See generally NIDAL JURDI, *THE INTERNATIONAL CRIMINAL COURT AND NATIONAL COURTS: A CONTENTIOUS RELATIONSHIP* (2011).

⁹⁷ See Seth Mydans, *Jakarta's Military Chiefs Accused of Crimes*, N.Y. TIMES, 1 February 2000; Seth Mydans, *Governing Tortuously: Indonesia's President Outflanks the General*, N.Y. TIMES, 15 February 2000.

⁹⁸ Regulation on the Organization of Courts in East Timor, 6 March 2000, UNTAET/REG/2000/11, s 10.

⁹⁹ Regulation on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, 6 June 2000, UNTAET/REG/2000/15.

though the lack of consultation with Timorese counterparts was the subject of criticism. A Serious Crimes Unit was also established within the Public Prosecution Service. As in the case of the Special Panels, this was dominated by international staff — which may have facilitated cooperation with peacekeepers and other international actors, but undermined local legitimacy.¹⁰⁰

A far greater problem was that the entire process depended on the good faith and cooperation of Indonesia, which had occupied Timor-Leste for quarter of a century. On any view, this was an optimistic premise from which to start.¹⁰¹ Subsequent assessments of the Timorese experience point to the disillusionment of many in the community to the meagre outcomes of the process, and the ongoing vocal calls for justice for crimes of the past.¹⁰²

2. Extraordinary Chambers in the Courts of Cambodia (2006—)

The Extraordinary Chambers in the Courts of Cambodia, better known as the Khmer Rouge Tribunal, was the product of far more protracted negotiations. After requesting assistance in 1997 to investigate and prosecute crimes committed under Pol Pot between 1975 and 1979, Cambodia later rejected the prospect of an ad hoc tribunal in the mold of the ICTY. In August 1999, the UN released plans for a joint Cambodian-international tribunal. The tribunal was to have applied Cambodian law, but with a foreign prosecutor and a majority of foreign judges. Prime Minister Hun Sen rejected the plan, insisting on co-prosecutors, one foreign and one Cambodian — effectively giving Cambodia a veto over prosecutions. This was unacceptable to UN negotiators; at the same time, China stated that it would veto any Security Council resolution that imposed a tribunal against Cambodia's wishes.

Agreement was ultimately reached in 2003 in a manner that largely acceded to Cambodia's wishes. The Tribunal's Web site delicately skirts the question of whether it is an international or domestic tribunal by saying that it is hybrid because of "certain special features" — a phrase that is not elaborated.¹⁰³ On the one hand, its jurisdiction covers violations of Cambodian laws as well as "international humanitarian law and custom, and international

¹⁰⁰ Caitlin Reiger and Marieke Wierda, *The Serious Crimes Process in Timor-Leste: In Retrospect* (International Center for Transitional Justice, New York, 2006), available at <http://www.ictj.org/sites/default/files/ICTJ-TimorLeste-Criminal-Process-2006-English.pdf>.

¹⁰¹ *Id.* at 40.

¹⁰² See, e.g., CHEAH Wui Ling, *Forgiveness and Punishment in Post-Conflict Timor*, 10 UCLA JOURNAL OF INTERNATIONAL AND FOREIGN AFFAIRS 297 (2005); Lia Kent, *Interrogating the Gap Between Law and Justice: East Timor's Serious Crimes Process*, 34 HUM. RTS. Q. 1021 (2012).

¹⁰³ See *Is the ECCC a Cambodian or an International Court?*, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA, <http://www.eccc.gov.kh/en/faq/eccc-cambodian-or-international-court>.

conventions recognized by Cambodia” in the period 1975-1979.¹⁰⁴ On the other, Cambodian judges constitute the majority in the pre-trial, trial, and appellate chambers,¹⁰⁵ though the two co-prosecutors are international and Cambodian.¹⁰⁶

The Tribunal has been marred by dysfunction and controversy. Well-intentioned efforts to allow victim participation quickly became unwieldy as victims attempted to take part in the trials.¹⁰⁷ Its first case was criticized for the apparent leniency meted out to one of the few people likely to stand trial.¹⁰⁸ Budgetary problems led to accusations of inefficiency. High-profile resignations and allegations of political influence continue to tarnish its reputation and, presumably, its legacy.¹⁰⁹ And, as is so often the case with transitional justice mechanisms, an underlying problem is the need to manage expectations about what any such institution can achieve in the first place.¹¹⁰

3. Lebanon: The Special Tribunal for Lebanon (2009—)

Though it is at the limit of what one might term “Asia,” the Special Tribunal for Lebanon — also known as the Hariri Tribunal — was established to prosecute those responsible for the 2005 assassination of the former Lebanese Prime Minister Rafic Hariri and twenty-two others.

Described as a “tribunal of international character,” it was originally devised at the request of the Lebanese government and modelled on the Special Court for Sierra Leone. Following disagreements with the Lebanese

¹⁰⁴ LAW ON THE ESTABLISHMENT OF THE EXTRAORDINARY CHAMBERS, WITH INCLUSION OF AMENDMENTS AS PROMULGATED ON 27 OCTOBER 2004 (Extraordinary Chambers in the Courts of Cambodia, Phnom Penh, NS/RKM/1004/006, 27 October 2004), available at http://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf, art 2.

¹⁰⁵ Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, art. 3, done at Phnom Penh, 6 June 2003, available at http://www.eccc.gov.kh/sites/default/files/legal-documents/Agreement_between_UN_and_RGC.pdf.

¹⁰⁶ *Id.*, art 6.

¹⁰⁷ Maria Elander, *The Victim's Address: Expressivism and the Victim at the Extraordinary Chambers in the Courts of Cambodia*, 7 INT'L J. TRANSITIONAL JUST. 95 (2013).

¹⁰⁸ See, e.g., Michael C. Witsch, *Legitimacy on Trial at the Extraordinary Chambers*, 26 TEMP. INT'L & COMP. L.J. 143 (2012).

¹⁰⁹ See, e.g., Hanna Bertelman, *International Standards and National Ownership? Judicial Independence in Hybrid Courts: The Extraordinary Chambers in the Courts of Cambodia*, 79 NORDIC J. INT'L LAW 341 (2010).

¹¹⁰ See, e.g., Farrah L. Tek, *Justice at the Extraordinary Chambers in the Court of Cambodia?*, 23 PEACE REV.: J. SOC. JUSTICE 431 (2011).

government, however, the Tribunal's mandate eventually had to be formalized through a Chapter VII Security Council resolution and its location was moved to the Netherlands. The "international character" of the Tribunal is the reverse of the ECCC: located outside the country in question, its trial and appeal chambers are designed to ensure a majority of international judges.¹¹¹ Its mandate, however, is to apply essentially Lebanese law¹¹² in prosecuting those responsible for the Hariri attack.¹¹³ Quite apart from its questionable inclusion in the category of "Asian," then, there is a real argument as to whether such a tribunal is an "international" tribunal at all.¹¹⁴

C. Domestic Tribunals

The boundaries of our subject matter become even more blurred when considering domestic tribunals applying — or purporting to apply — international criminal law. This section will touch on only a few interesting cases.

¹¹¹ S.C. Res 1757 (2007), Annex (30 May 2007). The Trial Chamber has three judges, one of whom should be Lebanese and two international; the Appeals Chamber has five judges, of whom two are Lebanese and three international.

¹¹² Statute of the Special Tribunal for Lebanon, S.C. Res 1757 (2007), Attachment, art 2 (30 May 2007): "The following shall be applicable to the prosecution and punishment of the crimes referred to in article 1, subject to the provisions of this Statute: (a) The provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism, crimes and offences against life and personal integrity, illicit associations and failure to report crimes and offences, including the rules regarding the material elements of a crime, criminal participation and conspiracy; and (b) Articles 6 and 7 of the Lebanese law of 11 January 1958 on 'Increasing the penalties for sedition, civil war and interfaith struggle'."

¹¹³ *Id.*, art 1: "The Special Tribunal shall have jurisdiction over persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafiq Hariri and in the death or injury of other persons. If the Tribunal finds that other attacks that occurred in Lebanon between 1 October 2004 and 12 December 2005, or any later date decided by the Parties and with the consent of the Security Council, are connected in accordance with the principles of criminal justice and are of a nature and gravity similar to the attack of 14 February 2005, it shall also have jurisdiction over persons responsible for such attacks. This connection includes but is not limited to a combination of the following elements: criminal intent (motive), the purpose behind the attacks, the nature of the victims targeted, the pattern of the attacks (modus operandi) and the perpetrators."

¹¹⁴ William A. Schabas, *The Special Tribunal for Lebanon: Is a "Tribunal of an International Character" Equivalent to an "International Criminal Court"?*, 21 LEIDEN J. INT'L L. 513 (2008). See also Michelle Burgis-Kasthala, *Defining Justice During Transition? International and Domestic Contestations over the Special Tribunal for Lebanon*, 7 INT'L J. TRANSITIONAL JUST. 497 (2013); José Alvarez, *Tadić Revisited: The Ayyash Decisions of the Special Tribunal for Lebanon*, 11 J. INT'L CRIM. JUST. 291 (2013).

1. Bangladesh (1973, 2009—)

Bangladesh's International Crimes Tribunal, established in 2009, is ostensibly an attempt to grapple with the traumatic history of the country's birth amid genocide in 1971.¹¹⁵ The legal framework is provided for by a 1973 law that was ground-breaking at the time for its inclusion of crimes against peace, war crimes, crimes against humanity, and genocide. Analogous, perhaps, to the decisions of the Chinese government with regard to Japanese war criminals,¹¹⁶ however, the desire to prosecute was overcome by the need to get along with more powerful neighbors. A coup in 1975 that saw the assassination of the prime minister and his family essentially ended considerations of prosecuting anyone for a generation.¹¹⁷ The question was resurrected in 2007 leading to an amendment to the legislation and the creation of the Tribunal. The timing and focus of the Tribunal has been criticized, however, as being both legally uncertain and politically opportunistic.¹¹⁸

2. Indonesia (2000—)

In parallel with the UN's episodic engagement with international crimes in Timor-Leste,¹¹⁹ Indonesia established an Ad Hoc Human Rights Court following the passage of Law 26/2000, with jurisdiction over "gross violations of human rights," defined as including crimes of genocide and crimes against humanity.¹²⁰ From the outset, the Court was criticized for procedural flaws and inadequate training, as well as possible links between the prosecutors and the military.¹²¹ In the end, of eighteen defendants only two were convicted — both ethnic Timorese. The outcome was severely criticized by Indonesian NGOs, the United States, the European Union and the UN¹²² — though Timor-Leste was muted in its criticism. "Almost everything for our daily needs comes from

¹¹⁵ SIMON CHESTERMAN, *JUST WAR OR JUST PEACE? HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW* 71-75 (2001).

¹¹⁶ See section II.A.4.

¹¹⁷ Suzannah Linton, *Completing the Circle: Accountability for the Crimes of the 1971 Bangladesh War of Liberation*, 21 CRIM. L.F. 191, 207 (2010).

¹¹⁸ See, e.g., Jhuma Sen, *The Trial of Errors in Bangladesh: The International Crimes (Tribunal) Act and the 1971 War Crimes Trial*, XIV(3) HARVARD ASIA QUARTERLY 33, 37 (2012).

¹¹⁹ See section II.B.1.

¹²⁰ Law No. 26/2000 Establishing the Ad Hoc Human Rights Court (Indonesia: 2000), art 7.

¹²¹ SUSAN HARRIS RIMMER, *GENDER AND TRANSITIONAL JUSTICE: THE WOMEN OF EAST TIMOR* 52 (2010).

¹²² *Id.* at 67-68.

Indonesia,” then Foreign Minister Jose Ramos-Horta was quoted as saying. “Therefore, if we have a bad relationship with Indonesia it will affect the living standard of the people of East Timor. The past is history now ... the future is more important.”¹²³

3. Iraq (2005—)

Brief mention should also be made of the Iraqi Special Tribunal, later rechristened the Supreme Iraqi Criminal Tribunal. Its first incarnation was established during the occupation of Iraq, under the auspices of the Coalition Provisional Authority. The Tribunal’s jurisdiction ran from the 1968 coup that brought Saddam Hussein to power until the date his regime fell in 2003. The crimes included genocide, crimes against humanity, war crimes, and certain violations of Iraqi law — in particular manipulation of the judiciary, squandering national resources, and the threat or use of armed force against an Arab country.¹²⁴

Most famously or notoriously, the Tribunal convicted Saddam Hussein and sentenced him to death. The Tribunal has been criticized for retaining the death penalty, but also for the lack of international judges and its questionable independence from U.S. and later Iraqi political interference.¹²⁵

4. Sri Lanka?

A final example, moving forward, may yet be Sri Lanka. At present, there seems little prospect of any meaningful transitional justice mechanism, let alone an internationalized one. The Lessons Learnt and Reconciliation Commission appointed by President Rajapaksa concluded its work in 2011 with a report that was deeply critical of the activities of the Tamil Tigers but found no wrongdoing on the part of the Sri Lankan military. (In fact the Commission did depart slightly from the government line that there had been zero civilian casualties killed by government forces, by at least acknowledging that some had been killed — accidentally — in crossfire.¹²⁶)

At an oral briefing of the Human Rights Council in September 2013, however, the Deputy High Commissioner for Human Rights stated that

¹²³ “East Timor’s foreign minister opposes rights tribunal,” *AP*, 8 September 2004.

¹²⁴ Coalition Provisional Authority, Statute of the Iraqi Special Tribunal (2003), arts 11–14.

¹²⁵ See Ilias Bantekas, *The Iraqi Special Tribunal for Crimes Against Humanity*, 54 *INT’L & COMP. L.Q.* 237 (2005).

¹²⁶ Report of the Commission of Inquiry on Lessons Learnt and Reconciliation (November 2011), at http://www.priu.gov.lk/news_update/Current_Affairs/ca201112/FINAL%2oLLRC%2oREPORT.pdf.

Regrettably, the High Commissioner detected no new or comprehensive effort to independently or credibly investigate the allegations which have been of concern to the Human Rights Council. She encourages the Government to use the time between now and March 2014 to engage in a credible national process with tangible results, including the successful prosecution of individual perpetrators, in the absence of which she believes the international community will have a duty to establish its own inquiry mechanisms.¹²⁷

The intimation of a deadline was immediately rejected by Sri Lanka, but sets up an interesting dynamic as there is more international scrutiny of Sri Lanka's actions — or inactions.

III. ASIAN CHARACTERISTICS?

The title of this article recalls the current official ideology of the Chinese Communist Party: socialism with Chinese characteristics (中国特色社会主义). Though sometimes regarded as mere labelling in a country that has clearly embraced market forces and encourages entrepreneurialism, socialism “with Chinese characteristics” actually highlights a key tension between the competing sources of legitimacy in China today: ideological purity that justifies one-party rule and economic pragmatism that has led to growth and prosperity.¹²⁸

There is a similar tension at the heart of international criminal law. Its legitimacy derives from its universal nature, but the vast majority of the laws were written in Europe, the most important trials took place in Europe, and the academic writing is published (for the most part) in Europe. These influences were apparent in the Tokyo Trial and feature in the more critical accounts that were written subsequently. To the extent that histories of international criminal law as it has been practiced in Asia efface colonialism and racism, they are incomplete. It is the modest hope of this article to contribute to a better understanding of that history.¹²⁹

But projects like this also highlight that Asian actors were not merely pawns in a colonial game. Even a brief account such as the one offered here shows that those actors were agents in their own right. In the post-war era, for example, various Asian states adopted a pragmatic approach to the role that international criminal law could play; focused, one could say, on “output”

¹²⁷ Address by Ms. Flavia Pansieri United Nations Deputy High Commissioner for Human Rights at the 24th session of the Human Rights Council (Office of the High Commissioner for Human Rights, Geneva, 25 September 2013), at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13820&LangID=E>.

¹²⁸ See generally HUANG YASHENG, CAPITALISM WITH CHINESE CHARACTERISTICS: ENTREPRENEURSHIP AND THE STATE (2008); Jane Golley, *Chinas Evolving Economic System: What's in a Name?*, 70 THE CHINA JOURNAL 188 (2013).

¹²⁹ The proceedings of the conference at which this article was first presented will be published in due course as a book edited by Kirsten Sellars.

legitimacy rather than input legitimacy. Such pragmatic adaptation of international norms to local political needs can be seen in the Chinese and Philippines approach to post-conflict trials in particular. China's initial hesitation to resolve the plight of Japanese prisoners is an example of an approach to atrocities that is often overlooked: rather than a choice between prosecutions and impunity, it is also possible to delay action. The subsequent decision to release the majority of those being held would appear to have been driven more by considerations of *realpolitik* than of justice, but also had to balance the need for regional stability against domestic sentiment.¹³⁰

This context, the tension between legitimacy and effectiveness, provides a useful lens through which to view the more recent experience of hybrid tribunals. Popular among donor governments because they are far cheaper than the international criminal tribunals established for the former Yugoslavia and Rwanda, they blur the line between the assertions that (i) a crime is so terrible that it transcends any one jurisdiction and (ii) primary responsibility to protect a population from genocide, war crimes, and crimes humanity lies with the state itself. Timor-Leste and Cambodia offer case studies of situations in which international aspirations and local needs diverged. In Timor-Leste, a lack of consultation meant that aspects of the criminal justice regime implemented were largely *irrelevant* to domestic concerns; in Cambodia, it may be argued that the ECCC has been made *subservient* to domestic political interests. The problems are still greater in domestic trials purporting to try international crimes, as seen in Bangladesh and Indonesia — and doubtless as will be seen in Sri Lanka.

From a European (or Western) perspective, it could be argued that many or all of these trials suffer from legitimacy deficits, because political calculations were made that ultimately trumped considerations of justice. Indeed, many of the trials have been criticized, in particular by Western governments and non-governmental organizations. Bangladesh's International Crimes Tribunal, for example, was initially supported by Human Rights Watch but was the subject of several campaigns through 2013 questioning the use of the death penalty, the failure to protect witnesses, and its independence from the political agenda of the government.¹³¹ The same Tribunal has also been criticized by the U.S. State Department,¹³² the European Union,¹³³ and the UN Special Rapporteur on extrajudicial, summary, or arbitrary executions.¹³⁴

¹³⁰ This was also true of the Chinese Nationalists. See Barak Kushner's description of the 1949 trial of Okamura Yasuji, which included the production of a note from the acting President of Nationalist China to the effect that "Prisoner Okamura Yasuji is of use, please find him not guilty": Kushner, *supra* note 71, at 122.

¹³¹ See Bangladesh: Post-Trial Amendments Taint War Crimes Process (Human Rights Watch, New York, 14 February 2013), at <http://www.hrw.org>; Bangladesh: Halt Execution of War Crimes Accused (Human Rights Watch, New York, 8 December 2013), at <http://www.hrw.org>; Bangladesh: Investigate Killing of Witness (Human Rights Watch, New York, 23 December 2013), at <http://www.hrw.org>.

¹³² Country Reports on Human Rights Practices for 2012: Bangladesh (U.S. State Department, Washington, DC, 2012), at <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dlid=204395>.

Concerns about losing control of criminal prosecutions or giving up sovereign control to outside powers are not, of course, unique to Asia. To be clear, it is not being suggested that there is a single set of “Asian characteristics” that explains the history of international criminal law as it has taken place in the region. Nevertheless, that history — in particular the Tokyo Trial and the other post-war trials across the region — explicitly framed international criminal law as a political rather than strictly legal phenomenon. Unlike Nuremberg, which became the founding myth of modern international criminal law, Tokyo’s embarrassing exception remained a marginal case to be framed according to the needs of the framer. This at least partly explains the manner in which more recent hybrid and domestic tribunals have sought to bend law to domestic political needs. It may also offer a partial explanation of ongoing wariness in the region about institutions that have the potential to be truly universal, such as the ICC. That wariness is not simply driven by fears that the institution will be dominated by European or American interests; it is also driven by fears that the institution may *not* be adaptable to local political concerns.

CONCLUSION

The history of international criminal law remains, of course, unfinished. This article has sought to foreground Asian experiences of the subject with a view to better illuminating the inherent tensions between legitimacy and effectiveness that have challenged many tribunals that sought to offer justice at a time when the traditional institutions of the state that would fulfil such a function either did not exist or could not be trusted. In so doing, it has also sought to illustrate the way in which Asia’s past experiences can help to understand — though not necessarily to justify — current practices in the area of international criminal law.

And so we end where we began, with the unfair burdens routinely placed on such trials. They are set the impossible task of determining the guilt or innocence of the individual defendant, recording an official history of the most traumatic events imaginable, and also marking a return to normality, to order, to law. They must also ensure that states and other stakeholders see them as legitimate, both in the sense that their origins are pure and their outcomes are sound. No trials can achieve such lofty goals. And yet somehow they must.

¹³³ European Parliament resolution on the situation in Bangladesh (2013/2561(RSP)) (European Parliament, Brussels, 13 March 2013), at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2FEP%2F%2FNONGSML%2BMOTION%2BP7-RC-2013-0133%2Bo%2BDOC%2BPDF%2BVo%2F%2FEN>.

¹³⁴ Report of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, Christof Heyns; Addendum: Observations on Communications Transmitted to Governments and Replies Received, UN Doc. A/HRC/23/47/Add.5, 31 (2013), at <http://documents.un.org>.

APPENDIX I: SELECTED INTERNATIONAL AGREEMENTS BY UN REGIONAL GROUPING¹³⁵

Table 2 Acceptance of certain international obligations by UN regional groups. Note that Kiribati is not a member of any regional group. See note 136.

State (sorted by UN regional groups)	UN Regional Grouping	ICC (States Parties to the Rome Statute of the International Criminal Court)	ICJ (States that have accepted compulsory jurisdiction of the International Court of Justice)	WTO (Member States of the World Trade Organization)	ICCPR (States Parties to the International Covenant on Civil and Political Rights)	ICESCR (States Parties to the International Covenant on Economic, Social and Cultural Rights)
Asia-Pacific						
Afghanistan	Asia-Pac	•			•	•
Bahrain	Asia-Pac			•	•	•
Bangladesh	Asia-Pac	•		•	•	•
Bhutan	Asia-Pac					
Brunei Darussalam	Asia-Pac			•		
Cambodia	Asia-Pac	•	•	•	•	•
China	Asia-Pac			•		•
Cyprus	Asia-Pac	•	•	•	•	•
Fiji	Asia-Pac	•		•		
India	Asia-Pac		•	•	•	•
Indonesia	Asia-Pac			•	•	•
Iran	Asia-Pac				•	•
Iraq	Asia-Pac				•	•
Japan	Asia-Pac	•	•	•	•	•
Jordan	Asia-Pac	•		•	•	•
Kazakhstan	Asia-Pac				•	•
Korea, Democratic People's Republic of	Asia-Pac				•	•
Korea, Republic of (South)	Asia-Pac	•		•	•	•
Kuwait	Asia-Pac			•	•	•
Kyrgyzstan	Asia-Pac			•	•	•
Laos	Asia-Pac			•	•	•
Lebanon	Asia-Pac				•	•
Malaysia	Asia-Pac			•		

¹³⁵ The five UN regional groups are Asia-Pacific, Africa, Eastern Europe, Latin America & Caribbean States, and Western Europe & Others.

State (sorted by UN regional groups)	UN Regional Grouping	ICC (States Parties to the Rome Statute of the International Criminal Court)	ICJ (States that have accepted compulsory jurisdiction of the International Court of Justice)	WTO (Member States of the World Trade Organization)	ICCPR (States Parties to the International Covenant on Civil and Political Rights)	ICESCR (States Parties to the International Covenant on Economic, Social and Cultural Rights)
Maldives	Asia-Pac	•		•	•	•
Marshall Islands	Asia-Pac	•	•			
Micronesia, Federated States of	Asia-Pac					
Mongolia	Asia-Pac	•		•	•	•
Myanmar	Asia-Pac			•		
Nauru	Asia-Pac	•				
Nepal	Asia-Pac			•	•	•
Oman	Asia-Pac			•		
Pakistan	Asia-Pac		•	•	•	•
Palau	Asia-Pac					
Papua New Guinea	Asia-Pac			•	•	•
Philippines	Asia-Pac	•	•	•	•	•
Qatar	Asia-Pac			•		
Samoa	Asia-Pac	•		•	•	
Saudi Arabia	Asia-Pac			•		
Singapore	Asia-Pac			•		
Solomon Islands	Asia-Pac			•		•
Sri Lanka	Asia-Pac			•	•	•
Syria	Asia-Pac				•	•
Tajikistan	Asia-Pac	•		•	•	•
Thailand	Asia-Pac			•	•	•
Timor-Leste	Asia-Pac	•	•		•	•
Tonga	Asia-Pac			•		
Turkmenistan	Asia-Pac				•	•
Tuvalu	Asia-Pac					
United Arab Emirates	Asia-Pac			•		
Uzbekistan	Asia-Pac				•	•
Vanuatu	Asia-Pac	•		•	•	
Vietnam	Asia-Pac			•	•	•
Yemen	Asia-Pac				•	•
Africa						
Algeria	Africa				•	•
Angola	Africa			•	•	•
Benin	Africa	•		•	•	•

State (sorted by UN regional groups)	UN Regional Grouping	ICC (States Parties to the Rome Statute of the International Criminal Court)	ICJ (States that have accepted compulsory jurisdiction of the International Court of Justice)	WTO (Member States of the World Trade Organization)	ICCPR (States Parties to the International Covenant on Civil and Political Rights)	ICESCR (States Parties to the International Covenant on Economic, Social and Cultural Rights)
Botswana	Africa	•	•	•	•	
Burkina Faso	Africa	•		•	•	•
Burundi	Africa	•		•	•	•
Cameroon	Africa		•	•	•	•
Cape Verde	Africa	•		•	•	•
Central African Republic	Africa	•		•	•	•
Chad	Africa	•		•	•	•
Comoros	Africa	•				
Congo, Democratic Republic of the	Africa	•	•	•	•	•
Congo, Republic of the	Africa	•		•	•	•
Côte d'Ivoire	Africa	•	•	•	•	•
Djibouti	Africa	•	•	•	•	•
Egypt	Africa		•	•	•	•
Equatorial Guinea	Africa				•	•
Eritrea	Africa				•	•
Ethiopia	Africa				•	•
Gabon	Africa	•		•	•	•
Gambia	Africa	•	•	•	•	•
Ghana	Africa	•		•	•	•
Guinea	Africa	•	•	•	•	•
Guinea- Bissau	Africa		•	•	•	•
Kenya	Africa	•	•	•	•	•
Lesotho	Africa	•	•	•	•	•
Liberia	Africa	•	•		•	•
Libya	Africa				•	•
Madagascar	Africa	•	•	•	•	•
Malawi	Africa	•	•	•	•	•
Mali	Africa	•		•	•	•
Mauritania	Africa			•	•	•
Mauritius	Africa	•	•	•	•	•
Morocco	Africa			•	•	•

State (sorted by UN regional groups)	UN Regional Grouping	ICC (States Parties to the Rome Statute of the International Criminal Court)	ICJ (States that have accepted compulsory jurisdiction of the International Court of Justice)	WTO (Member States of the World Trade Organization)	ICCPR (States Parties to the International Covenant on Civil and Political Rights)	ICESCR (States Parties to the International Covenant on Economic, Social and Cultural Rights)
Mozambique	Africa			•	•	
Namibia	Africa	•		•	•	•
Niger	Africa	•		•	•	•
Nigeria	Africa	•	•	•	•	•
Rwanda	Africa			•	•	•
São Tomé and Príncipe	Africa					
Senegal	Africa	•	•	•	•	•
Seychelles	Africa	•			•	•
Sierra Leone	Africa	•		•	•	•
Somalia	Africa		•		•	•
South Africa	Africa	•		•	•	
South Sudan	Africa					
Sudan	Africa		•		•	•
Swaziland	Africa		•	•	•	•
Tanzania	Africa	•		•	•	•
Togo	Africa		•	•	•	•
Tunisia	Africa	•		•	•	•
Uganda	Africa	•	•	•	•	•
Zambia	Africa	•		•	•	•
Zimbabwe	Africa			•	•	•
Eastern Europe						
Albania	East Eur	•		•	•	•
Armenia	East Eur			•	•	•
Azerbaijan	East Eur				•	•
Belarus	East Eur				•	•
Bosnia and Herzegovina	East Eur	•			•	•
Bulgaria	East Eur	•	•	•	•	•
Croatia	East Eur	•		•	•	•
Czech Republic	East Eur	•		•	•	•
Estonia	East Eur	•	•	•	•	•
Georgia	East Eur	•	•	•	•	•
Hungary	East Eur	•	•	•	•	•
Latvia	East Eur	•		•	•	•
Lithuania	East Eur	•	•	•	•	•
Macedonia,	East Eur	•		•	•	•

State (sorted by UN regional groups)	UN Regional Grouping	ICC (States Parties to the Rome Statute of the International Criminal Court)	ICJ (States that have accepted compulsory jurisdiction of the International Court of Justice)	WTO (Member States of the World Trade Organization)	ICCPR (States Parties to the International Covenant on Civil and Political Rights)	ICESCR (States Parties to the International Covenant on Economic, Social and Cultural Rights)
Former Yugoslav Republic of						
Moldova	East Eur	•		•	•	•
Montenegro	East Eur	•		•	•	•
Poland	East Eur	•	•	•	•	•
Romania	East Eur	•		•	•	•
Russia	East Eur			•	•	•
Serbia	East Eur	•			•	•
Slovakia	East Eur	•	•	•	•	•
Slovenia	East Eur	•		•	•	•
Ukraine	East Eur			•	•	•
Latin America & Caribbean States						
Antigua and Barbuda	Americas	•		•		
Argentina	Americas	•		•	•	•
Bahamas	Americas				•	•
Barbados	Americas	•	•	•	•	•
Belize	Americas	•		•	•	
Bolivia	Americas	•		•	•	•
Brazil	Americas	•		•	•	•
Chile	Americas	•		•	•	•
Colombia	Americas	•		•	•	•
Costa Rica	Americas	•	•	•	•	•
Cuba	Americas			•		
Dominica	Americas	•	•	•	•	•
Dominican Republic	Americas	•	•	•	•	•
Ecuador	Americas	•		•	•	•
El Salvador	Americas			•	•	•
Grenada	Americas	•		•	•	•
Guatemala	Americas	•		•	•	•
Guyana	Americas	•		•	•	•
Haiti	Americas		•	•	•	•
Honduras	Americas	•	•	•	•	•
Jamaica	Americas			•	•	•
Mexico	Americas	•	•	•	•	•

State (sorted by UN regional groups)	UN Regional Grouping	ICC (States Parties to the Rome Statute of the International Criminal Court)	ICJ (States that have accepted compulsory jurisdiction of the International Court of Justice)	WTO (Member States of the World Trade Organization)	ICCPR (States Parties to the International Covenant on Civil and Political Rights)	ICESCR (States Parties to the International Covenant on Economic, Social and Cultural Rights)
Nicaragua	Americas		•	•	•	•
Panama	Americas	•	•	•	•	•
Paraguay	Americas	•	•	•	•	•
Peru	Americas	•	•	•	•	•
Saint Kitts and Nevis	Americas	•		•		
Saint Lucia	Americas	•		•		
Saint Vincent and the Grenadines	Americas	•		•	•	•
Suriname	Americas	•	•	•	•	•
Trinidad and Tobago	Americas	•		•	•	•
Uruguay	Americas	•	•	•	•	•
Venezuela	Americas	•		•	•	•
Western Europe & Others						
Andorra	WEOG	•			•	
Australia	WEOG	•	•	•	•	•
Austria	WEOG	•	•	•	•	•
Belgium	WEOG	•	•	•	•	•
Canada	WEOG	•	•	•	•	•
Denmark	WEOG	•	•	•	•	•
Finland	WEOG	•	•	•	•	•
France	WEOG	•		•	•	•
Germany	WEOG	•	•	•	•	•
Greece	WEOG	•	•	•	•	•
Iceland	WEOG	•		•	•	•
Ireland	WEOG	•	•	•	•	•
Israel	WEOG			•	•	•
Italy	WEOG	•		•	•	•
Liechtenstein	WEOG	•	•	•	•	•
Luxembourg	WEOG	•	•	•	•	•
Malta	WEOG	•	•	•	•	•
Monaco	WEOG				•	•
Netherlands	WEOG	•	•	•	•	•
New Zealand	WEOG	•	•	•	•	•
Norway	WEOG	•	•	•	•	•

State (sorted by UN regional groups)	UN Regional Grouping	ICC (States Parties to the Rome Statute of the International Criminal Court)	ICJ (States that have accepted compulsory jurisdiction of the International Court of Justice)	WTO (Member States of the World Trade Organization)	ICCPR (States Parties to the International Covenant on Civil and Political Rights)	ICESCR (States Parties to the International Covenant on Economic, Social and Cultural Rights)
Portugal	WEOG	•	•	•	•	•
San Marino	WEOG	•			•	•
Spain	WEOG	•	•	•	•	•
Sweden	WEOG	•	•	•	•	•
Switzerland	WEOG	•	•	•	•	•
Turkey	WEOG			•	•	•
United Kingdom	WEOG	•	•	•	•	•
United States	WEOG			•	•	
Other						
Kiribati ¹³⁶	none					
Total as at end of 2013	193	121	70	155	167	161
Asia-Pacific	53	17	8	36	35	35
Africa	54	34	22	42	51	48
Eastern Europe	23	18	7	19	23	23
Latin America & Caribbean States	33	27	13	32	29	28
Western Europe & Others	29	25	20	26	29	27

¹³⁶ Kiribati is not a member of any regional group. Located in the Pacific, the fact that it has not accepted any of the international obligations being evaluated mean that if it were included for the purposes of this paper it would further lower the proportion of Asia-Pacific states that have done so.