



The Fight for Democracy

# Between Aspiration and Reality

15 Years of the International Criminal Court (ICC)

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The International Criminal Court (ICC) was created in 2002 as an instrument against atrocities “that have outraged the conscience of mankind”. More than 120 states have joined since then. The global criminal court continues, nonetheless, to struggle for acceptance. Influential stakeholders such as the USA, China and Russia have not joined the agreement to date, while others are already considering withdrawing from it. Now, where does the ICC stand 15 years after its founding?

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## Introduction

Franziska Rinke

Even now, 15 years after the Rome Statute entered into effect, the International Criminal Court (ICC)<sup>1</sup> is still struggling to gain worldwide acceptance. Although the ICC can list a number of judgments and criminal investigations in many parts of the world, the Court is still faced with huge challenges to this day.

On 17 July 1998, at the UN Conference of States in Rome, agreement was reached on creating an international criminal court. Known as the Rome Statute<sup>2</sup>, the treaty was signed by 139 states and entered into effect in 2002, enabling the ICC to begin its work in The Hague in 2003. In contrast to the International Court of Justice, it is not part of the United Nations, but an independent international organisation.<sup>3</sup> While before the International Court of Justice only states can form a party, the international legal and political achievement of the ICC is precisely that, by removing immunity, individuals must stand responsible before an independent judicial institution that is part of a community of states.<sup>4</sup> The ICC is not designed to replace or verify national law enforcement by any means; but only intervenes if the country affected is either unwilling or unable to prosecute crimes committed by its own nationals.<sup>5</sup> For this reason, the ICC’s jurisdiction is limited to particularly grave crimes: genocide, crimes against humanity, war crimes and – in future<sup>6</sup> – crimes of aggression<sup>7</sup> committed after the inception of the Rome Statute.<sup>8</sup>

So far, a total of 124 states have officially recognised the international treaty.<sup>9</sup> Not all signatory states have ratified the international treaty, however. In 2002, the USA officially announced its intention to not ratify it. At the end of last year, there were concerns about a number of states withdrawing, after Russia and then three African states (South Africa, Gambia and Burundi) had officially announced their withdrawal. These concerns did not prove out, however. Russia had never ratified the Rome Statute, so the declaration of its withdrawal has not caused any repercussions. Gambia reversed its decision at the start of the year and, in South Africa, the High Court has decided that the declaration by the South African government is unconstitutional.<sup>10</sup> Nonetheless, it is important to remember that other countries are openly considering a withdrawal<sup>11</sup> and that populous and emerging countries such as China and India are not among the signatory states.<sup>12</sup> Taking a glance at a map, it becomes apparent quickly that the ICC is restricted in its jurisdiction already in terms of its geographical range. This argument is often used by critics to question the overall significance and power of the ICC and to undermine the Court’s authority hence. We should not forget, though, that the Court can not only exercise its jurisdiction if a crime takes place within a state that recognises the ICC’s jurisdiction, but also where the alleged perpetrator holds the nationality of one of these states.<sup>13</sup>

In the 14 years of the Court’s existence, six<sup>14</sup> judgments have been pronounced. This is the reason for the accusations of inefficiency that is

frequently levelled at the institution. This criticism is voiced mainly due to the complexity of the procedure and the difficulty of obtaining evidence in crisis regions, and its success depends crucially on the aforesaid states' willingness to cooperate.<sup>15</sup> An investigation can be carried out on the initiative of a contracting state, the UN Security Council or the prosecuting authority itself. Investigations are currently being conducted in ten different cases, as part of which eight African countries are affected, whereby these were predominantly handed over by the African governments themselves.<sup>16</sup> The latest investigations have been initiated in Georgia. Preliminary examinations are currently taking place in eleven cases, including Afghanistan, Colombia, Ukraine, Iraq, Nigeria, Cambodia and Palestine.<sup>17</sup> Indeed this shows, on the one hand, that the ICC has not yet adequately fulfilled its goal to enforce international criminal law consistently across the whole world – and also that it cannot fulfil this objective. On the other hand, however, the outcry from a number of states at the end of last year is an indicator of the effectiveness of the International Criminal Court. After all, if these states did not fear any consequences of their actions, there would be no need for them to withdraw.

### **Within a few years, the ICC developed into a functioning institution.**

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The efforts to create an International Criminal Court go back to the period before the First World War. In the 20<sup>th</sup> century, shaped by two world wars, it was not until after the end of the Cold War that the political climate became favourable enough to actually lead to international agreement. Since then, the ICC has struggled to gain acceptance and finds itself in a constant interchange between national sovereignty and international criminal law. Many see themselves as bound by international criminal law only when it proves advantageous for them. Moreover, within the international framework

there is no option to force the contracting states to comply with any coercive measures. Rather, international criminal law is based on the trust that the states comply with it more or less voluntarily.

Despite all the difficulties, the Rome Statute constitutes the most important document regarding international criminal law, since, with the International Criminal Court, it has created an institution that is designed to implement this international criminal law. Within a few years, the ICC developed into a functioning institution. Many hopes were pinned to its founding, above all that of international peace, as lasting peace is not possible without justice.<sup>18</sup>

### **Africa South of the Sahara**

#### **Arne Wulff**

The latter was also an incentive for many African states to join the Rome Statute. Therefore, the relationship between Africa and the ICC developed initially along promising lines.<sup>19</sup> The fact that 34 of the 124 states who have ratified the treaty are on the continent of Africa not only proves their willingness to cooperate on international criminal law, but also their significance for the Statute and the ICC. This is also the reason the current discussion on the African states remaining in the ICC is being conducted with such compassion, both on the part of the advocates as well as the opponents. The discussion has sparked off over two events in the last few years.

The first concerns the charges levelled against the acting President and Vice-President of Kenya after the 2013 elections, Uhuru Kenyatta and William Ruto. They and others are accused of having been significantly involved in the escalation of violence that broke out after the 2007 presidential elections. This led to the death of more than 1,200 people and the deportation of hundreds of thousands more. For the first time in its history the ICC's prosecutors investigated on their own accord and, before the 2013 presidential elections took place, brought charges

of complicity to murder, deportation, rape and persecution. In December 2014, after a large number of investigations and hearings, the prosecuting authorities withdrew the charges against President Uhuru Kenyatta due to lacking cooperation on the part of the Kenyan government. The legal proceedings against Vice-President Ruto befell a similar fate. In April 2016 the Chamber responsible at the ICC decided to suspend the legal proceedings due to lack of evidence.<sup>20</sup> The second situation that caused a stir among many African heads of state was the charge brought against the Sudanese President, Omar Hassan Ahmad Al Bashir. Although wanted under an international arrest warrant due to crimes against humanity, war crimes and genocide, he travelled to a summit of the African Union (AU) in South Africa in June 2015. On appeal of the South African Litigation Center, the High Court of South Africa Gauteng Division decided to use preliminary injunction proceedings to prevent Al Bashir from leaving South Africa.<sup>21</sup> South Africa's government disregarded this though, and warranted him safe-conduct upon his departure.

It is those lawsuits against acting heads of state which, since 2016, have led to countries deciding to resign or announcing<sup>22</sup> resignation, as many government officials feel threatened themselves. The governments of the states in question furthermore took these events as an opportunity to push ahead with the installation of their own jurisdiction. This was decided at the AU summit in Malabo, Equatorial Guinea, in June 2014.<sup>23</sup> It included the renaming of the African Court on Human and People's Rights to the African Court of Justice, while simultaneously expanding it to include an International Criminal Law Section that, amongst other things, can prosecute and pass sentence on crimes against humanity, genocide and war crimes. The goal is to circumvent, as many African states see it, the present weaknesses of the Rome Statute. The Malabo Protocol in Article 46 A thus accords immunity to acting government officials that protects them from prosecution under criminal law.<sup>24</sup> Consequently, this type of African Court cannot be a sufficient replacement

for the ICC. Lastly, secure funding is needed for the African Court of Justice, particularly for the new criminal law chamber that is to be created, especially because conducting criminal investigations is extremely costly. In view of the fact that the African Court on Human and People's Rights is already underfunded, it is scarcely conceivable that the AU will raise the funds for the new chamber that is to be formed, including prosecuting authorities (Article 22 A). This last may also be the reason why the Malabo Protocol has been signed by only nine states so far – and why it has been ratified by none.<sup>25</sup>

It is becoming increasingly clear that some African states have manoeuvred themselves into a dead end in connection with the discussion around staying within the Rome Statute. On the one hand, they discredit the ICC as an instrument of neo-colonial interests that will damage the integrity of heads of state additionally<sup>26</sup>, yet on the other hand they have not succeeded in creating an adequate replacement through their own regional jurisdiction. The unprecedented campaign against the ICC, for example, which is being led by the governments of Kenya and South Africa in particular, but also those of Burundi and Uganda, is unlikely to have any consequences despite the AU repeatedly addressing this issue. Apart from the fact that every withdrawal requires an individual decision by the respective state in any case and cannot be substituted with AU resolutions, countries including Nigeria, Senegal, Cape Verde, Gambia, Liberia, Botswana, Malawi, Tanzania and the Democratic Republic of Congo have already made clear that they reject a withdrawal.<sup>27</sup> It is therefore as unlikely that we shall see an exodus of African states from the Rome Statute in the near future as it is that we shall see a serious African alternative to the ICC.

## Asia

[Gisela Elsner/Simon Bruhn](#)

Asia's attitude towards the ICC is reticent for the most part. This applies, too, for the ASEAN states (Association of South-East Asian Nations).

As a consequence only twelve countries in Asia have ratified the Rome Statute. Of these, Cambodia and the Philippines are the only two in the ASEAN region, together with Japan and South Korea in East Asia. It is remarkable, however, that Japan, South Korea and the Philippines are each represented by one of the 18 judges at Court.

Despite the 2003 official ASEAN announcement that the ICC was a positive element in the fight against impunity regarding crimes against humanity, war crimes and genocide,<sup>28</sup> this reserved stance is justified by various arguments.

The principles of state sovereignty and the resulting non-intervention in the internal affairs of another state play a large role for the reticence of South-East Asia. These principles are considered to be the essential foundation of intergovernmental relations with regard to the long colonial history of the region and the many foreign interventions in many ASEAN member states. At the same time, they serve as a pretext for concealing an unwillingness to bring the perpetrators prosecuted by the ICC to justice for the crimes they have committed. State sovereignty and a non-interventionist policy are largely and without complaint set aside in favour of, for instance, the WTO conflict resolution or the International Court of Justice. Moreover, most states in the region are committed to large parts of the Rome Statute already through the overlap with international criminal law, such as, for example, the Geneva Convention or the Convention on the Prevention and Punishment of the Crime of Genocide.

Furthermore, the contentious relationship between rule of law and peacekeeping is often cited. Those states that are engaged in internal conflicts, such as with or between rebel groups, are especially apprehensive about being restricted in their choice of conflict resolution measures within the scope of the ICC. When tackling conflicts against this backdrop the question is as to whether the principle of rule of law applies at any cost, or whether preserving

peace takes precedence over this. It would be counterproductive if, once internal conflicts were to subside, there were a fear of renewed unrest sparking once more due to the intense nature of the process.

Ultimately, the tiny number of cases that have been dealt with and resolved together with an apprehended focus on Africa, are certainly both decisive factors within Asia. The Court is regarded as inefficient here too and, in the absence of sufficient jurisdiction, criticised for the legal uncertainty in the interpretation of the Rome Statute.

While Japan and South Korea have been markedly engaged and actively involved since joining<sup>29</sup>, the Filipinos, who have traditionally been open-minded towards international legal obligations, have made a sharp U-turn under President Rodrigo Duterte. At the end of last year Duterte reacted to a critical statement by the prosecution authorities about his drugs policy with the announcement that he wanted to withdraw from the ICC.<sup>30</sup> The systematic homicides of Filipino drug dealers were brought to the attention of the ICC by the prosecution authorities as a possible case.<sup>31</sup>

The possible creation of an ASEAN Criminal Court is brought up in discussions from time to time.<sup>32</sup> There are, indeed, no official plans to proceed with this at present; it is to be expected, however, that the Member States would more favourably respond to having their own court for their approximately 650 million people than towards joining the ICC. A regional criminal court such as this would certainly have plenty of cases to attend to. Serious human rights violations occur again and again within ethnic conflicts, as is befalling for example the Muslim Rohingya people in Myanmar and neighbouring countries at the moment. Moreover, after the work of the Extraordinary Chambers in the Courts of Cambodia (ECCC) in Phnom Penh in prosecuting the Khmer Rouge for the crimes committed, this court could bring charges against other individuals responsible operating at lower levels down the chain of command.<sup>33</sup>







Loss of culture: 2016 Ahmad al-Faqi al-Mahdi, a member of the Islamist group Ansar Dine, was sentenced to nine years imprisonment for destroying cultural assets in Timbuktu. Source: © Joe Penney, Reuters.

Cambodia and the Asian region as a whole could therefore still come under the scrutiny of the ICC in other ways, too. In a policy paper on case selection and case prioritisation<sup>34</sup> from September 2016, the prosecution indicated that the offence of crimes against humanity, for example, would in future also draw on actions that accompany the destruction of the environment, the exploitation of natural resources, or the illegal and often forcible seizing of land (land grabbing) – a widespread problem in Asia.

### Latin America

#### Marie-Christine Fuchs

Although there has been a multitude of cases recorded concerning systematically committed crimes against humanity and war crimes

on the continent of Latin America over the past 20 years, e.g. the case of 43 students killed in Ayotzinapa, Mexico, which has still not been properly investigated by the State of Mexico, there is currently no ICC investigation pending against a Latin American country. In the past there were and have only been preliminary investigations in three cases on the continent of Latin America: in 2015 preliminary investigations were completed; they concerned the devastating human rights violations following the 2009 coup against the former president of Honduras, President Zelaya. The prosecution found insufficient evidence of crimes being systematically carried out against the civilian population and the opposition during the coup; this meant that the responsibility was not passed on to the ICC. Although terrible crimes are being committed in this poverty-ridden country, which has the

highest homicide rate in the world, the international community is paying little attention. The law enforcement authorities in the country are certainly not fully meeting their international obligations for prosecution and punishment as set out in the Rome Statute in terms of the situation in Honduras. In Venezuela, preliminary investigations were likewise carried out without these leading to an official investigative process. Only in Colombia are there ongoing investigations at present. Thus in Latin America, too, voices can be heard criticising the ICC's focus on African countries, having so far perceived its powers of crime intervention within Latin America as a "blunt sword".

In contrast to other regions of the world, the Latin American countries were filled with euphoria at the ICC's founding and had high hopes, even in its initial phase: out of 22 Latin American countries 17 countries<sup>35</sup> ratified the Rome Statute, including the most important countries in the region in geographic and economic terms, such as Brazil, Mexico, Argentina, Chile and Colombia. The majority of the Latin American signatory states did this immediately after signing the Rome Statute in 1998, most recently joined by El Salvador in March 2016.<sup>36</sup> Additionally, Latin America has always been well represented on the ICC through a multitude of judges from the continent. As well as this, the former President of the ICC, Silvia Fernández de Gurmendi, comes from Argentina.<sup>37</sup>

When it subsequently came to aligning national criminal law and criminal proceedings with the provisions of the Rome Statute, lower activism rates were already listed on the continent of Latin America. Only Argentina, Paraguay, Trinidad and Tobago and Uruguay have created cooperation norms accordingly and enshrined the complementary jurisdiction of the ICC in law. In Chile, Colombia and Costa Rica only cooperation norms were created.<sup>38</sup> In 2010, the only Latin American countries to adopt the newly created element of offence of aggression were Uruguay – frequently the continent's pioneer where rule of law is concerned – and Trinidad and Tobago.

As aforementioned, Colombia is the only Latin American country in which the ICC's prosecution authority is currently conducting an investigation. Hereof the ICC's prosecutors have been conducting preliminary investigations in Colombia since 2004. The ICC believes there is merit to the allegations that, since 2002 (when the Rome Statute and the consequent legitimisation of the ICC's jurisdiction came into effect) war crimes and crimes against humanity have been perpetrated by the Colombian military, paramilitary and FARC rebels. Due to the ICC's subsidiarity, no charge has as yet been made, since the Colombian prosecution office has been investigating since 2005 and, even before the "Special Jurisdiction for Peace", which is now to be formed, there was sentencing of the crimes committed, especially those perpetrated by the paramilitary and military.

### Initial euphoria in Latin America gave way to disillusionment.

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The opening of an official investigation by the ICC in Colombia is like a red rag to a bull in this region, however, and urges the authors of the transitional justice system created as part of the peace agreement made in 2016 with the FARC rebels to monitor its compliance with the standards of international criminal law closely. The compatibility of the amnesty law, which was adopted as part of the transitional justice system at the end of December 2016, with the provisions of the Rome Statute is under discussion.<sup>39</sup> Due to the existing uncertainties surrounding the transitional justice system in Colombia, in January of this year the ICC's Chief Prosecutor announced that the Court will intervene if the actual prosecution of war crimes and crimes against humanity by the "Special Jurisdiction for Peace" fail.

The case of Colombia shows very clearly that the stated acceptance of the ICC often reaches its limits also within Latin America if states are

actually to be held accountable and brought to justice. While the Court's help was valued in the discussions on the preparation of the peace agreement with FARC, and emphasis was put on the obligation towards the Court, the possible intervention by the ICC is at least partly perceived as interference with state sovereignty.

## Middle East/North Africa

Peter Rimmele / Anna Miriam Schütt

In countries in the Middle East and North Africa the ICC is met with scepticism and a sense of reserve. Although over the course of the Arab Spring many states announced they were joining the ICC, Tunisia and Jordan were the only two countries in the MENA region to actually join. Many other states (Egypt, Algeria, Bahrain, Israel, Yemen, Kuwait, Morocco, Oman, Syria and the United Arab Emirates) signed the Rome Statute but have not yet ratified it. Iraq, Qatar and Libya all rejected the Rome Statute outright.

This rejection on part of the governments in the Middle East and North Africa is opposed by over 300 civic organisations from the region that form part of the Coalition for the International Criminal Court (CICC).<sup>40</sup> Apart from this, national coalitions have formed in ten Arab states. These coalitions actively support the ratification of the Rome Statute and work on raising awareness of the ICC's work.<sup>41</sup>

As one of the few Arab member countries, Jordan takes an especially active role within the ICC. Between 2002 and 2005 Jordan occupied the Chair in the Assembly of States Parties to the Rome Statute (ASP) internally and actively supports the Trust Fund for Victims in accordance with Article 79 of the Rome Statute.

The state of Israel is a special case in the region. It initially rejected an accession to the ICC, then, in 2000, did in fact sign the Rome Statute, although it did not ratify it.<sup>42</sup> In 2002 Israel informed the UN Secretary-General that it no longer intended to remain a member of the ICC.

A controversy arose out of the accession of the Palestinian territories to the ICC. At the end of 2014, after the president of the Palestinian territories, Mahmoud Abbas, declared recognition of the ICC's jurisdiction and, in January 2015, submitted the ratification documents for the Rome Statute to the United Nations, the Palestinian Autonomous Territories became the 123<sup>rd</sup> member of the ICC on 1 April 2015. Their accession has enabled the ICC to prosecute crimes perpetrated by Palestinians or took place within Palestinian territories.<sup>43</sup> The accession of the Palestinian Autonomous Territories to the ICC led to irritation in Israel, since it now sees itself confronted with investigations in connection with Operation Protective Edge.<sup>44</sup> In response, Israel cancelled the transfer of tax funds to Palestinian authorities that had already been collected.<sup>45</sup> Indeed, rhetorically, Israel has of late taken, again a more moderate position towards the ICC<sup>46</sup>, yet this had negligible impact on Israel's fundamental attitude of rejecting it. On the one hand, Israel invokes the subsidiarity of the ICC, which would lead to the superiority of its own investigations regarding the 2014 Gaza war. On the other hand, Israel does not recognise Palestine as an independent state and therefore rejects Palestine joining.<sup>47</sup>

In Lebanon, as in many states within the region, there is a coalition that advocates the ICC; nonetheless, the Lebanese Republic has not signed the Rome Statute. There are various causes at play here. This could, on the one hand, be ascribed to the intense pressure from the USA not to sign the Rome Statute. The USA is concerned that, should Lebanon join the ICC, Israel would make accusations of war crimes in the context of the 2006 Lebanon war. On the other hand, like many governments in the region, Lebanese politicians might also be apprehensive of charges being brought against them. There is, therefore, great unwillingness on the part of these states to sign or ratify the Rome Statute.<sup>48</sup>

Moreover, often the view is taken that the ICC is just another instrument of international law under control of the world's superpowers.<sup>49</sup> The role of the Security Council in ICC investigations






Srebrenica: The offences committed during the war in Yugoslavia came too early for the ICC. Instead, they were prosecuted by the International Criminal Tribunal for the former Yugoslavia, an ad hoc Criminal Tribunal. [Source: © Damir Sagolj, Reuters.](#)

is met with particular criticism, because the five permanent members can influence the ICC by it in order to realise their own political goals and, under the pretext of protecting human rights, impose western values on the Middle East.<sup>50</sup> This attitude was clearly in evidence among many Arab states in the rejection of conviction of the Sudanese president, Umar al-Bashir, in 2009. At the same time, various actions by Israel are considered war crimes, which is why there is a perceived imbalance in the appraisal of Arabic-Muslim and Israeli-Western actions.<sup>51</sup> The result of the preliminary ICC investigations that have been taking place since January 2015 into the events in Gaza, the West Bank and East Jerusalem remains to be seen.<sup>52</sup>

The past few years have also seen a trend showing a positive attitude to the ICC, however. A first step to that effect was an ICC conference in Doha in 2011: while many Arab states had openly turned against the ICC two years previously and declared their support for Sudan, there were also numerous demonstrations of sympathy as well as constructive debates on the structure and operation of the ICC.<sup>53</sup> Interest continues to increase in the work of the ICC.<sup>54</sup>

Many are currently calling on the ICC to prosecute the crimes of the so-called Islamic State (IS) that have been perpetrated by IS fighters in recent years. This seems to be exactly the type of crime that the ICC was created to address.



The Chief Prosecutor announced publicly, however, that the ICC was neither authorised to prosecute war crimes in Iraq or Syria, nor would the ICC do this without authorisation from the UN Security Council.

## South-Eastern Europe

### Hartmut Rank

In contrast to Eastern Europe, for example, almost all south-eastern European countries have not only signed but also ratified the Rome Statute. The sole exception in the region is the Republic of Kosovo, which is not yet a contracting state. This is primarily due to its still limited recognition internationally.

At the end of the 20<sup>th</sup> century, due to the ethnic diversity and the associated armed conflicts, especially in the course of the disbanding of Yugoslavia, there were many offences from the catalogue of the Rome Statute in the south-eastern European region.<sup>55</sup> These were not directly prosecuted by the ICC, however, but mainly by the International Criminal Tribunal for the former Yugoslavia (better known under the colloquial moniker of the “Hague tribunal” or “Yugoslavia tribunal”), which was set up in 1993. This was due, in particular, to the fact that the requisite minimum figure of 60 ratifications of the Rome Statute was only reached in 2002. The ICC has no responsibility for offences perpetrated prior to this point in time.

The International Criminal Tribunal for the former Yugoslavia is an ad hoc criminal court that was set up directly by the United Nations<sup>56</sup> and therefore, unlike the ICC, is not based on its own international treaty. The legal successor to this non-permanent court is the International Residual Mechanism for Criminal Tribunals, which was set up in 2012 to bring an end to the work of various ad hoc criminal courts (among them that for the former Yugoslavia), in particular ongoing appeal proceedings.

The International Criminal Tribunal for the former Yugoslavia had a presence in the media over

several years: its most prominent defendant was probably the former Yugoslavian and later Serbian president, President Milošević. This court brought charges against more than 100 people and dozens were sentenced to prison sentences lasting many years.<sup>57</sup>

In comparison, the ICC has played virtually no role in south-eastern Europe’s legal practice up until now. It is therefore a fallacy to claim the ICC has been unsuccessful in the region. On the contrary, the work of the ad hoc criminal courts set up in the 1990s has had a direct effect on accelerating the truly difficult discussions on the creation of a permanent International Criminal Court.<sup>58</sup> The nearly universal ratification of the Rome Statute by the region’s states is proof of acceptance of the Court. Furthermore, to date three south-eastern European states (Albania, Croatia and Macedonia) have already ratified the necessary changes to the extension of the offence of aggression.<sup>59</sup>

Alongside the international courts described, there are also “internationalised” hybrid courts. These are national courts that pass judgement on war crimes with international participation. Thus there is the War Crimes Chamber in Bosnia-Herzegovina and, since the end of 2016, the Kosovo Specialist Chambers and Specialist Prosecutor’s Office in The Hague, which are engaged in reviewing the Kosovo war judicially with international participation.<sup>60</sup> Both types of courts are completely unconnected to the ICC, however, even if their primary objectives are similar.

Many of the still newly minted south-eastern European constitutions – like the German constitution – stipulate immunity for state officials. The Rome Statute does not recognise this type of privileged status for, for instance, heads of state, government officials, members of parliament or judges.<sup>61</sup> These regulations were problematic in countries where absolute immunity was stipulated, e.g. in Bulgaria. In 2003 Bulgaria changed its constitution because of this – but also especially in connection with the then ongoing EU accession negotiations.<sup>62</sup>

In Albania, by contrast, no change was made to the constitution as part of the adaptation to the Rome Statute.<sup>63</sup> In another decision from 2002, though, the Albanian constitutional court decided that the constitution was compatible with the Rome Statute.<sup>64</sup> The deciding factor in connection to this is whether immunity can be lifted under a specific set of conditions. If this is the case, it creates considerable potential for conflict in political terms, yet it suffices for the purposes of implementing the Rome Statute into national law.

## Conclusion

### Franziska Rinke

When one looks at the various parts of the world, one can see that the development of the ICC has been very different in different places. The states of Sub-Saharan Africa, South-East Europe and South America are strongly represented, whereas countries in Asia and the Middle East/North Africa approach the ICC with considerable scepticism. The problems and controversies in dealing with the ICC are, however, the same all over the world. In each case, the heart of the matter concerns the question of the individual state's sovereignty. There is talk of independent criminal courts that are restricted to individual regions as an alternative to the ICC; yet, so far, these have not managed to establish themselves either in Africa or Asia.

The amount of support the ICC receives from its member states and the extent to which it can free itself from the accusation of primarily only investigating crimes against humanity and other criminal offences on the continent of Africa, are decisive factors in determining its future. In addition, as victorious powers in the Second World War, the U.S. and Russia, ought especially to reconsider their position, as the ICC is also regarded as the "continuation of the legacy of Nuremberg".<sup>65</sup> The United States has even gone so far as to conclude bilateral agreements with over 100 countries that stipulate that Americans cannot be handed over to the jurisdiction of the ICC.<sup>66</sup> It is not enough to support proceedings

against the violation of law and justice only against third countries and to evade any potential violations of international jurisdiction by one's own citizens. There are serious human rights violations all over the world. The declared goal must therefore be for the ICC to be recognised by all states, in order to put its intended universal jurisdiction into practice.

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- 1 Official website of the ICC: <https://www.icc-cpi.int> [21 Jun 2017].
- 2 ICC 2011: Rome Statute of the International Criminal Court, in: <http://bit.ly/2rFKHPz> [21 Jun 2017].
- 3 Cf. Bundeszentrale für politische Bildung (German Federal Agency for Political Education, bpb) 2013: Internationale Gerichtsbarkeit, 11 Nov 2013, in: <http://bpb.de/52814> [21 Jun 2017]. The International Court of Justice was established in 1946 and is part of the United Nations and located in The Hague. It consists of 15 judges. Cf. Schneider, Gerd / Toyka-Seid, Christiane 2017: Internationaler Gerichtshof, bpb, in: <http://bpb.de/161246> [21 Jun 2017].
- 4 Cf. bpb, n. 3.
- 5 Annan, Kofi 2016: Gerechtigkeit ohne Grenzen, Süddeutsche Zeitung, 26 Nov 2016, in: <http://sz.de/1.3266629> [21 Jun 2017]; Art. 17 Para. 1 (a) Rome Statute, ICC, n. 2.
- 6 The crime of aggression was defined at the first Review Conference of the Rome Statute in Kampala in June 2010 with the consensus of the contracting states, and the very complicated conditions for the exercise of the jurisdiction were set forth at the same time. On 26 June 2016 Palestine became the 30<sup>th</sup> state to ratify the amendments to the Rome Statute, thus realising a necessary condition for jurisdiction over the crime of aggression. Furthermore, after 01 Jan 2017 a further resolution with a two-thirds majority of the contracting states is required in order to activate the jurisdiction. Cf. Federal Foreign Office 2015: Internationaler Strafgerichtshof, 15 Jul 2015, in: <http://bit.ly/1Glthqd> [21 Jun 2017]; ICC 2016: State of Palestine becomes thirtieth State to ratify the Kampala amendments on the crime of aggression, 29 Jun 2016, in: <http://bit.ly/2tNn9sX> [21 Jun 2017]; Art. 15<sup>bis</sup> Para. 2 and Art. 15<sup>ter</sup> Rome Statute, ICC, n. 2 (“The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.”); Art. 15<sup>bis</sup> Para. 3 Rome Statute, ICC, n. 2 (“The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.”).
- 7 For complete information on the definition and conditions of exercising jurisdiction cf. Ambos, Kai 2010: Das Verbrechen der Aggression nach Kampala, in: Zeitschrift für Internationale Strafrechtsdogmatik 5:11, pp. 649-668, in: <http://bit.ly/2sYTrol> [22 Jun 2017].
- 8 Cf. Art. 5 and 11 Rome Statute; ICC, n. 2; bpb, n. 3.
- 9 An overview of the states who have signed the Rome Statute can be found at UN: Treaty Collection, 10. Rome Statute of the International Criminal Court, <http://bit.ly/2sTIQLg> [21 Jun 2017].
- 10 The High Court of South Africa Gauteng Division declared the decision by the government in relation to the withdrawal from the Rome Statute to be unconstitutional because the government had failed to obtain a parliamentary resolution. Cf. The High Court of South Africa Gauteng Division, Pretoria, 22 Feb 2017, Case No: 83145/2016.
- 11 The governments of Kenya, Uganda and Namibia also declared their intention to leave the ICC, likewise the Philippines. See in the Asia section. Cf. Momoh, Mohammed 2016: Nigeria will not leave ICC, says Minister, in: The Standard, 29 Apr 2016, p. 42.
- 12 The two giants in Asia – China and India – were invited to attend the Assembly of States Party as observers. This does not seem to have led to greater probability of the Statute being signed though, which certainly prevents a more positive development in the region.
- 13 Cf. bpb, n. 3.
- 14 To date, there have so far been nine convictions and one acquittal. On 14 Mar 2012 the ICC enacted its first judgement against the former militia leader Thomas Lubanga Dyilo, who was given a 14 year prison sentence for recruiting and using child soldiers.
- 15 Cf. Hoven, Elisa 2017: Geschwächte Richter, in: Die Zeit, 5 Jan 2017, p. 14.
- 16 An overview of the “situations under investigation”: ICC, in: <https://icc-cpi.int/pages/situations.aspx> [21 Jun 2017].
- 17 An overview of the “preliminary examinations”: ICC, in: <https://icc-cpi.int/pages/preliminary-examinations.aspx> [21 Jun 2017].
- 18 “Lasting peace is not possible without justice. [...] Peace and justice are thus two complementary requirements, states the declaration of Kampala [...]”. Schabas, William A. 2013: Kein Frieden ohne Gerechtigkeit? Die Rolle der internationalen Strafsjustiz, Hamburg, p. 67.
- 19 Cf. Werle, Gerhard / Vormbaum, Moritz 2015: Afrika und der Internationale Strafgerichtshof, in JuristenZeitung 70:12, pp. 581-588, here: p. 581.
- 20 Cf. Spiegel Online 2016: Verbrechen gegen die Menschlichkeit: Haager Strafgericht beendet Prozess gegen Kenias Vize-Präsident, 5 Apr 2016, in: <http://spon.de/aeIx2> [21 Jun 2017].
- 21 “President Omar Al-Bashir of Sudan is prohibited from leaving the Republic of South Africa until a final order is made in this application, and the respondents are directed to take all necessary steps to prevent him from doing so.” The High Court of South Africa Gauteng Division, Pretoria, 14 Jun 2015, Case No: 27740/15.
- 22 See introduction.
- 23 Cf. AU 2014: Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 27 Jun 2014, in: <http://bit.ly/2sYtX7> [21 Jun 2017].



- 24 Direct quotation: “No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.” Cf. AU, *ibid.*, Art. 46 A<sup>bis</sup> Immunities.
- 25 Cf. AU, n. 23. Worth noting in this respect is that the states of Guinea-Bissau, Mauretania and São Tomé and Príncipe are not member states of the Rome Statute (UN, n. 9).
- 26 Tull, Denis M./Weber, Annette 2016: Afrika und der Internationale Strafgerichtshof. Vom Konflikt zur politischen Selbstbehauptung, SWP-Studie, German Institute for International and Security Affairs, Mar 2016, p. 16, in: <http://bit.ly/2rTTZML> [21 Jun 2017].
- 27 Cf. Momoh, n. 11, p. 42; cf. The Guardian 2017: African leaders plan mass withdrawal from International Criminal Court, 21 Jan 2017, in: <http://bit.ly/2keZSMK> [22 Jun 2017]; cf. Sendker, Marion 2017: Austritte beim IStGH. Nicht mehr als ein bedeutender Rückschritt (interview with Gerhard Kemp), Legal Tribune Online, 2 Jan 2017, in: [http://lto.de/persistent/a\\_id/21623](http://lto.de/persistent/a_id/21623) [22 Jun 2017].
- 28 “15 Ministers acknowledged that the establishment of the International Criminal Court is a positive development in the fight against impunity for crimes against humanity, war crimes and genocide.” Cf. ASEAN 2003: 14<sup>th</sup> EU-ASEAN Ministerial Meeting Brussels, 27-28 January 2003, in: <http://bit.ly/2rUtk1T> [22 Jun 2017].
- 29 Cf. Dukalskis, Alexander 2015: Northeast Asia and the International Criminal Court: Causes and Consequences of Normative Disposition, Seoul.
- 30 Cf. Frankfurter Allgemeine 2016: Auch Philippinen drohen mit Austritt aus Weltstrafgericht, Frankfurter Allgemeine, 17 Nov 2016, in: <http://faz.net/-hzv-8nh3b> [22 Jun 2017].
- 31 Cf. ICC 2016: Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda concerning the situation in the Republic of the Philippines, 13 Oct 2016, in: <http://bit.ly/2sTx96x> [22 Jun 2017]. Furthermore at the end of April it was announced that a Filipino lawyer was aiming to initiate proceedings against President Rodrigo Duterte at the ICC on account of targeted killings of drug dealers and petty criminals and had submitted extensive materials to the Court as evidence to this end. Cf. taz. die tageszeitung 2017: Anwalt will Präsident vor Gericht bringen, 25 Apr 2017, p. 11, in: <https://taz.de/15399657> [21 Jun 2017].
- 32 As an example in recent times cf. Hunt, Luke 2016: Time for an ASEAN Criminal Court? A look at a proposal for the regional grouping, The Diplomat, 16 Dec 2016, in: <http://bit.ly/2sX5qmc> [22 Jun 2017].
- 33 The ECCC (also known as the Khmer Rouge Tribunal, KRT) was established in 2006 jointly by the United Nations and Cambodia. It is composed of judges from Cambodia and elsewhere. It is limited to crimes by the key protagonists and leading members of the Khmer Rouge, as perpetrated between 17 Apr 1975 and 6 Jan 1979. The Khmer Rouge is estimated to have killed around 1.5 million people.
- 34 Cf. Office of the Prosecutor, ICC 2016: Policy Paper on Case Selection and Prioritisation, 15 Sep 2016, in: <http://bit.ly/2tRyoAt> [22 Jun 2017].
- 35 These are Argentina, Bolivia, Brazil, Chile, Costa Rica, Dominican Republic, Ecuador, El Salvador, Honduras, Colombia, Mexico, Paraguay, Peru, Puerto Rico, Uruguay, Venezuela and Panama (UN, n. 9).
- 36 Guatemala has so far only joined the Statute and has not ratified it. Haiti, Cuba, Nicaragua and Puerto Rico are missing entirely (UN, n. 9).
- 37 In 2003, when the ICC first began operating, it had judges from both Costa Rica and Bolivia. The first Chief Prosecutor came from Argentina.
- 38 Cf. Guevara Bermúdez, José Antonio 2014: La Corte Penal Internacional y América Latina y el Caribe, in: Anuario de Derechos Humanos, 10, pp. 17-33, here: p. 19.
- 39 According to the amnesty law, all political crimes perpetrated by the FARC rebels such as the Rebellion and the associated crimes are applicable for amnesty, though not crimes against humanity or serious war crimes. The Rome Statute prohibits an amnesty not only for serious war crimes, but also for any type of war crime. There is further potential for conflict between the regulations included in the Colombian peace agreement on the liability of superiors that many consider to be narrower as a consequence than the corresponding regulation in Art. 28 of the Rome Statute (ICC, n. 2). According to the peace agreement, those “top-ranking superiors” who, through negligence, were not aware of the crimes committed by their troops, should not be punished for the crimes of their subordinates. Art. 28 a) 1 of the Rome Statute (ICC, n. 2) allows for criminal liability, however.
- 40 Cf. Coalition for the International Criminal Court: Factsheet: The ICC and the Arab World, in: <http://bit.ly/2sXr3TG> [22 Jun 2017]. CICC is a coalition of over 2,500 non-governmental organisations around the world. As an NGO, CICC campaigns for a fair, effective and independent ICC and the ratification of the Rome Statute by other national governments.
- 41 Cf. *ibid.*
- 42 Cf. bpb, n. 3.
- 43 Cf. Levac, Alex 2015: Internationaler Strafgerichtshof: Das Ende der Straflosigkeit im Nahostkonflikt, Zeit Online, 24 Jan 2015, in: <http://bit.ly/2stlwTn> [22 Jun 2017].

- 44 “Operation Protective Edge” was a military operation by the Israeli Defence Force. It began on 8 Jul 2014 as a reaction to sustained rocket bombardment of Israel by Hamas and other militant Palestinian groups from the Gaza Strip and ended on 26 Aug 2014 with an indefinite ceasefire. The equivalent expressions “Gaza war” or “Gaza conflict” are often used to describe it.
- 45 Cf. Sinja, Shreeya 2015: Palestinians the International Criminal Court: What You Need to Know, *The New York Times*, 24 Jun 2015, in: <https://nyti.ms/2tQXqjn> [22 Jun 2017].
- 46 In 2016 the government spokesperson announced that Israel had nothing to conceal from the Court and would be pleased to show the Court how professionally and independently the Israeli legal system worked. Cf. JusticeInfo.net 2016: Israel forced to cooperate with the International Criminal Court, *JusticeInfo.net*, 8 Sep 2016, in: <http://bit.ly/2cES9E3> [22 Jun 2017].
- 47 Cf. Charney, Avi 2015: ICC Absurdity, *Arutz Sheva*, 28 Jan 2015, in: [http://ch7.io/dd-2\\$Fw](http://ch7.io/dd-2$Fw) [22 Jun 2017].
- 48 Cf. Young Initiative on Foreign Affairs and International Relations (IFAIR) 2011: ICC Ratification Patterns in the Middle East, 21 Nov 2011, in: <http://bit.ly/2sXbktZ> [22 Jun 2017]; cf. Jamshidi, Maryam 2012: The International Criminal Court and the Arab World, *open Democracy*, 4 Jul 2012, in: <http://bit.ly/2sDN86s> [22 Jun 2017].
- 49 Cf. Wander, Andrew 2009: Justice campaigners say US urged Lebanon not to join International Criminal Court, *The Daily Star Lebanon*, 12 Mar 2009, in: <http://bit.ly/2rFloxz> [22 Jun 2017].
- 50 Cf. IFAIR, n. 48; cf. Jamshidi, n. 48; cf. Abdellah, Mohamed 2008: Arab ministers criticize ICC Sudan charges, *Reuters*, 19 Jul 2008, in: <http://reut.rs/2sWqrxv> [22 Jun 2017].
- 51 Cf. Abedellah, *ibid.*; cf. Kersten, Mark 2011: The Arab World and the ICC: A New Chapter or Smoke and Mirrors?, *Justice in Conflict*, 30 May 2011, in: <http://bit.ly/2rY0kS4> [27 Jun 2017].
- 52 Cf. ICC: Preliminary examination Palestine, in: <https://icc-cpi.int/palestine> [22 Jun 2017]; Office of the Prosecutor, ICC 2016: Report on Preliminary Examination Activities 2016, 14 Nov 2016, in: <http://bit.ly/2ftv6iT> [22 Jun 2017].
- 53 Cf. ICC 2011: Newsletter May 2011 ASP Special Edition #6, in: <http://bit.ly/2tRtWBG> [22 Jun 2017]; cf. Kersten, n. 51.
- 54 The Hague Institute for Global Justice 2013: The International Criminal Court in the Middle East, 4 Mar 2013, in: <http://bit.ly/2rEWRsd> [22 Jun 2017].
- 55 When speaking of south-eastern Europe in the following, this refers in particular to these countries: Albania, Bosnia-Herzegovina, Bulgaria, Croatia, Kosovo, Macedonia, Montenegro, Republic of Moldova, Romania and Serbia.
- 56 UN: Resolution 825 (1993) from 25 May 1993 by the United Nations Security Council, in: <http://bit.ly/2sEAXqn> [22 Jun 2017].
- 57 United Nations International Criminal Tribunal for the former Yugoslavia 2016: Key Figures of the Cases, in: <http://icty.org/en/cases/key-figures-cases> [22 Jun 2017].
- 58 Wahl, Susen 2013: Osteuropa und die Zusammenarbeit mit Internationalen Strafgerichtshöfen, Berlin, p. 269.
- 59 UN: Treaty Collection, 10. b Amendments on the crime of aggression to the Rome Statute of the International Criminal Court, in: <http://bit.ly/2tR5Zuw> [22 Jun 2017]; pursuant to the concept of aggression cf. Ambos, n. 7, p. 649.
- 60 In January 2017 Dr. Ekaterina Trendafilova, a Bulgarian judge, was named President of the Kosovo Specialist Chambers. Cf. Hopkins, Valerie 2016: Bulgarian Judge appointed head of Kosovo Specialist Chambers, *Prishtina Insight*, 14 Dec 2016, in: <http://bit.ly/2sDQjeo> [22 Jun 2017].
- 61 Cf. Art. 27 Rome Statute, ICC, n. 2.
- 62 Cf. Wahl, n. 58, p. 426.
- 63 Cf. *ibid.*
- 64 Cf. *ibid.*
- 65 Cf. Sendker, n. 27.
- 66 This is possible in accordance with Art. 98 of the Rome Statute. Approx. 40 bilateral agreements are currently in force. Cf. Georgetown Law: Countries that have Signed Article 98 Agreements with the U.S., in: <http://bit.ly/2tQRAOR> [22 Jun 2017].