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(Not) All Roads Lead to Rome: Ending Impunity for International Crimes in Southeast Asia

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More than a decade after its entry into force, the Rome Statute of the International Criminal Court ('ICC') is enjoying widespread global support. With 124 States Parties, as of 4 March 2016, more than 60 percent of states have joined this trend. Despite this global diffusion and normalisation of the norms of international criminal justice, states in Asia remain on the whole reluctant to join the Rome Statute. Only three of 11 states in the sub-region of Southeast Asia have ratified the Statute, significantly below the global average. Although Cambodia and Timor Leste were among the founding members of the ICC, they remained exceptions until recently. Thailand has signed, but hesitates to ratify the Rome Statute.

With the accession of the Philippines to the ICC Statute in 2011, a decade long stalemate in Southeast Asia seemed to have been broken. Importantly, the election of a Philippine Judge provided an opportunity for Southeast Asia to gain a visible presence at the seat of the ICC in The Hague. Discussions among policy-makers and legislators in Indonesia and Malaysia are signs of a slow but steady shift in attitudes. In 2011, the government of Malaysia affirmed its commitment to endorsing the instrument of accession to the Statute and the parliament has been considering implementing legislation for this purpose.[1] Importantly, the Indonesian government has on a number of occasions indicated that it is willing to accede to the Rome Statute. Although Indonesia has not yet realised this intention, the results of the 2014 elections in Indonesia renewed hopes that the possible accession of one of the world's most populous countries would tip the balance in the region toward positions more amenable to the norms of the Rome Statute.

In response to the region's underrepresentation among ICC States Parties, various governmental and non-governmental actors have undertaken substantial efforts to raise awareness of the Rome Statute and promote ratification in the region. Considering Southeast Asian states' longstanding emphasis on sovereignty and non-interference, however, the narrow focus on ratification, as the initial step towards expanding the Rome Statute's system to the region, may not be the most effective approach. Instead of viewing these states as international laggards, it may be time to draw upon the experiences and potential within the region to build a stronger foundation for the emerging regional consensus around international criminal accountability.

1. Recognising Experiences in the Region

Southeast Asia is no stranger to mass violence and large-scale human rights abuses. The impact of international crimes, including crimes against humanity, genocide and war crimes, is visible throughout the region. Countries that have experienced such mass atrocities appear to have been more amenable to supporting the Rome Statute's norms. Cambodia and Timor Leste have both endured mass violence to the extent that their development fell far behind that of their regional peers. Both countries were early signatories of the Rome Statute and both have initiated, with international assistance, localised accountability processes to prosecute alleged perpetrators. The experiences of the Serious Crimes Process in Timor Leste and the hybrid Extraordinary Chambers in the Courts of Cambodia ('ECCC') differed, but each faced various challenges related to funding, building human resources and technical capacity, political interference, engaging with affected local communities, as well as concerns about selective prosecutions and procedural fairness. However, they set important precedents as attempts to hold individuals accountable for international crimes in Southeast Asia.[2]

1 Assembly of States Parties, *Report of the Bureau on the Plan of action for achieving universality and full implementation of the Rome Statute of the International Criminal Court*, 2011, para. 14.

2 Lia Kent, "Interrogating the "Gap" Between Law and Justice: East Timor's Serious Crimes Process", in *Human Rights Quarterly*,

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Interestingly, some states that are not party to the Rome Statute have taken steps to enhance their domestic legal frameworks to allow national-level prosecutions of some international crimes. When adopting Law No. 26 of 2000 of the Human Rights Court (Law 26/2000) – at a time when the ICC was not yet established – Indonesia demonstrated that it was willing to investigate and prosecute perpetrators of crimes against humanity and genocide within special judicial chambers, including for crimes committed by state agents in East Timor. However, the proceedings in the *ad hoc* human rights courts failed to provide an example for accountability – all of the accused were eventually acquitted.[3]

The experiences in Indonesia, but also allegations of political interference at the ECCC in Cambodia, demonstrate that states in the region are increasingly willing to prosecute international crimes, but that national-level prosecutions remain contested and often fail to live up to international standards of justice. Yet these experiences also indicate that the underlying international justice norms are being gradually accepted, or at least engaged with, within the region. For instance, Indonesia has been drafting a new draft Criminal Code that would allow some international crimes to be prosecuted within national courts. Thus, Southeast Asia has experienced international crimes prosecutions, though there has been little cross-border sharing of the lessons and challenges to date.

2. Identifying and Sharing Lessons and Expertise within the Region

These observations reveal some interesting opportunities for constructive and forward-looking engagement and regional exchanges. For this purpose, attention should be directed to two specific aspects. First, the past experiences and capacities available within the region in prosecuting international crimes may provide potential for regional learning and exchanges that take account of the specific and diverse historical, political and development context in Southeast Asia. Why go to The Hague, Brussels or New York, if numerous positive and negative lessons can be learned from Dili, Phnom Penh, Jakarta or Manila?

Second, Southeast Asia comprises both parties and non-parties to the Rome Statute, a fact that provides important possibilities for intra-regional dialogue. Cambodia, Timor Leste and the Philippines have all ratified the Rome Statute, drafted implementing legislation and gathered their first experiences as members of the Assembly of State Parties. These two factors could be increasingly mobilised to enhance regional dialogue and sharing of knowledge and expertise. Regional workshops and seminars could provide opportunities for civil society and government representatives to better understand various actors' different priorities and understandings of international criminal justice.[4] Such intra-regional exchanges could raise awareness, provide a forum for reframed arguments that reflect and engage with the varying perspectives on accountability, help to correct widespread misunderstanding among key stakeholders about the ICC's purpose and mandate, and deflect an often-held opinion that these are ideas and values foreign to the region.

Furthermore, the region has witnessed the most significant regional integration process in Asia, which – in form of the Association of Southeast Asian Nations ('ASEAN') – has considerably accelerated over the past two decades. Importantly, the promotion of human rights norms and principles at the regional level is gaining momentum, most visibly manifested in the 2009 creation of an ASEAN Intergovernmental Commission on Human Rights ('AICHR') and the adoption of an ASEAN Declaration on Human Rights ('ADHR') in 2012. The ASEAN Political-Security Community Blueprint envisages a "rules-based community of shared values and norms". Although this development has not yet advanced the issue of accountability for breaches of international human rights and humanitarian law, it may provide a foundation for a future regional normative discourse, or even consensus, on the need to end impunity for international crimes. For instance, AICHR is currently preparing to conduct a thematic study on the "right to peace", as enshrined in the ADHR.[5] It will be interesting to see whether or how matters of accountability for international crimes feature in its final recommendations. Overall, such initiatives are relevant for a region where new demands for justice may arise in the near future, such as from Myanmar, which would require neighbouring states and ASEAN as a whole to develop appropriate responses that ensure long-term peace and stability in the region.

3. Engaging a Wide Range of Stakeholders and Building Domestic Capacities

It is important not to limit intra-regional exchanges to governments and foreign ministries, but to consider

2012, vol. 34, pp. 1021–1044; Christoph Sperfeldt, "From the Margins of Internationalised Criminal Justice. Lessons Learned at the Extraordinary Chambers in the Courts of Cambodia", in *Journal of International Criminal Justice*, 2013, vol. 11, pp. 1111–1137.

3 International Center for Transitional Justice and KontraS, *Derailed: Transitional Justice in Indonesia Since the Fall of Soeharto*, 2011, pp. 4, 37–62; David Cohen, *Intended to Fail: The Trials Before the* Ad Hoc *Human Rights Court in Jakarta*, Occasional Paper Series, International Center for Transitional Justice, New York, 2003.

4 Similar activities have been conducted in the past by the Coalition for the International Criminal Court.

5 Following a preparatory workshop in 2012, the first co-ordination meeting for the study was held in July 2014, see http://aichr.org/ai1ec_event/first-coordination-meeting-for-the-thematic-study-on-the-right-to-peace/?instance_id=, last accessed 14 June 2016.

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the diverse range of relevant stakeholders that exist in Southeast Asian societies. There is also a need for ongoing awareness-raising among key actors in the region as well as a targeted focus on building capacities for prosecuting international crimes through national jurisdictions. At a time when the ECCC in Cambodia will soon end its operations, Morten Bergsmo argues that "the era of international institution building for war crimes accountability is over; a new era of national capacity building has begun".[6] As this paradigm change slowly takes place in Southeast Asia, the time is ripe for more systematic efforts to identify, analyse and share documentation, investigation, prosecution and judicial experiences and expertise among a wide range of stakeholders within the region.

First, *legislators* will need to be involved, particularly in relation to ratification and drafting implementing legislation. While not all existing national implementing legislation in the region has employed the exact provisions of the Rome Statute,[7] the Philippine Act on Crimes Against International Humanitarian Law, Genocide and Other Crimes Against Humanity (RA 9851), enacted in December 2009, provides an example of legislation that comprehensively adopted Rome Statute definitions, including provisions regarding criminal and superior responsibility. Notably, the RA 9851 was implemented *before* the Philippines ratified the Rome Statute, just as Indonesia and also Vietnam have some legislative capacity to prosecute international crimes without being States Parties.[8] In addition, the Philippines government also passed an Act Defining and Penalizing Enforced or Involuntary Disappearance in 2012 (RA 10353), and a working group on ICC implementation consisting of representatives from relevant government agencies and civil society has considered further steps on domestic legislative implementation, including on the conscription of children in armed conflict.

Second, *judiciaries* and *prosecution services*, including investigators, should be involved early in any regional efforts. A recent study has demonstrated the diversity of legal education frameworks across the ASEAN region and the need for regional judicial training programmes.[9] Such initiatives could incorporate international criminal law training within broader legal capacity and rule of law programmes. Similarly, there is room for enhanced cross-regional police training and co-operation regarding international crimes investigations, similar to initiatives that combat transnational crime,[10] including as to best practice in handling internal inquiries. It is important to develop and publicise technical assistance programmes and tools. This may include regional capacity building initiatives, but also web-based programmes such as those developed and disseminated by the Case Matrix Network, which provide access to databases and other legal information tools to facilitate international crimes prosecutions.[11]

Third, in many Southeast Asian countries the *military* has proven to be the staunchest opponent to acceding to the Rome Statute, in particular in countries with ongoing armed conflicts, such as Thailand and Indonesia. Bringing current and future military cadres into the dialogue has not been an easy task. Potential openings exist, such as through the region's increasingly prominent role in global peace-keeping. Indonesia, Malaysia and the Philippines have made especially significant contributions to UN peace-keeping operations that deal with international crimes or their aftermath, including in situations before the ICC.[12] Indonesia is now leading efforts to establish a regional peace-keeping co-ordination capacity, which could assist militaries in the region to recognise the value of international humanitarian law standards and accountability for protecting peace-keepers – an opportunity which Indonesian civil society groups have already recognised.[13]

Fourth, *national human rights institutions* ('NHRI'), where they exist in the region, have often been at the forefront in bringing to light and investigating serious human rights violations.[14] For instance, Indonesia's Law 26/2000 empowers the country's national human rights commission, Komnas HAM, to conduct initial

6 Morten Bergsmo, "Complementarity and the Challenges of Equality and Empowerment", in *FICHL Policy Brief Series*, Torkel Opsahl Academic EPublisher, Oslo, 2011, no. 8, p. 1.

7 See Simon Meisenberg, "Complying with Complementarity? The Cambodian Implementation of the Rome Statute of the International Criminal Court", in *Asian Journal of International Law*, 2014, Firstview; Amnesty International, *International Criminal Court: Timor-Leste, Justice in the Shadow*, 2010.

8 See Arts. 341–343, Socialist Republic of Viet Nam, Penal Code, No. 15/1999/QH10 (http://www.legal-tools.org/doc/468ca2/).

9 See for instance Human Rights Resource Centre ('HRRC'), *Judicial Training in ASEAN: A Comparative Overview of Systems and Programs*, Konrad-Adenauer Foundation, Singapore, 2014, (available at http://www.kas.de/wf/doc/kas_37729-1522-2-30.pdf?140514083039, last accessed 14 June 2016).

10 ASEAN Plan of Action to Combat Transnational Crime, available at http://asean.org/?static_post=asean-plan-of-action-to-combat-transnational-crime, last accessed 14 June 2016.

11 See more about the Case Matrix Network at http://www.casematrixnetwork.org.

12 See Carl Thayer, "ASEAN and UN Peacekeeping", in *The Diplomat*, 25 April 2014.

13 HRRC, ELSAM, Indonesian CICC, *Progress Report: Indonesia Efforts to Ratify the 1998 Rome Statute of the International Criminal Court*, 2012, p. 10.

14 Six out of 11 states in the region have established NHRIs, which regularly meet and coordinate in regional forums. See more at Andrew Byrnes, Andrea Durbach, and Catherine Renshaw, "Joining the Club: The Asia Pacific Forum of National Human Rights Institutions, the Paris Principles, and the Advancement of Human Rights Protection in the Region", in *Australian Journal of Human Rights*, 2008, vol. 14, pp. 63–98.

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investigations into alleged cases of crimes against humanity and genocide and to make recommendations for prosecution to the Attorney General's Office. The case of Komnas HAM highlights the important role national human rights institutions in the region can play in investigating breaches of international criminal law. Despite these commendable efforts, Indonesia's Attorney General's Office has been reluctant to follow up Komnas HAM's findings and recommendations, often rendering the commission's work and the implementation of its novel mandate futile. Nevertheless, NHRIs will continue to play an important role in dealing with international crimes in the region, in particular where such commissions possess the relevant investigative powers.

Finally, and importantly, local and regional *civil society* networks can act both as advocates and mediators. International and regional groups such as the Coalition for the International Criminal Court and Parliamentarians for Global Action have acted as important conduits able to share different lessons and approaches to accountability across states. National associations such as the Philippines Coalition for the International Criminal Court and the Indonesian Civil Society Coalition for the International Criminal Court, as well as local non-government organisations and academics, have provided important information about how national contexts and populations might suggest various localised approaches.[15]

4. Is There More than One Road?

In its 2013 ASP statement, the Philippines observed that Rome may not have been built in a day, but "began its decay when it failed to be cognizant of the changing needs of the times". The Philippines therefore argued that States Parties "must help each other" to build state capacity, including through "the training of judges, prosecutors, the police and the military".[16] There are various ways to pursue accountability for international crimes, only one of which involves immediate ratification of the Rome Statute. Engaging with domestic actors around international criminal accountability issues – with ratification following in time – is one such option that may prevent standstill.

This paper demonstrates that there are tangible opportunities for building regional perspectives on international criminal accountability within Southeast Asia. These include targeted initiatives for experience-sharing and capacity building, as well as additional open-dialogue forums that engage a wide range of stakeholders, including legislators, judiciaries, military and police and local and international civil society. Opportunities for the relevant actors to openly discuss and seek to understand different experiences and perspectives from within the region could uncover additional possibilities for collaboration and perhaps even trigger innovative local initiatives for responding to the commission of international crimes. States in Southeast Asia have the opportunity to explore and discover various routes toward international criminal accountability.

15 For example, Philippine Coalition for the International Criminal Court, *Senate Concurrence on Rome Statute is a Vote for Justice*, 23 August 2011.

16 Statement of the Permanent Representative of the Philippines to the United Nations, New York, 21 November 2013, available at https://asp.icc-cpi.int/iccdocs/asp_docs/ASP12/GenDeba/ICC-ASP12-GenDeba-Philippines-ENG.pdf, last accessed 14 June 2016.

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