International Criminal Law in Southeast Asia: Beyond the International Criminal Court

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International Criminal Law in Southeast Asia: Beyond the International Criminal Court

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The underrepresentation of Asian states as parties to the Rome Statute has elicited concerns that the region is significantly falling behind in developing and enforcing international criminal justice. This view accords significance to ratification of the Rome Statute as the primary measure of a country's willingness to give effect to the norms protected by international criminal law. However, the development of international criminal justice mechanisms and substantive law has not entirely escaped Southeast Asia, which has seen the adoption of a spectrum of approaches to international criminal justice, including the establishment of international(ised) criminal institutions, Rome Statute ratifications, and the adoption of domestic legislation addressing international crimes – as well as other transitional justice procedures.

This thesis identifies the laws and institutions for prosecuting international crimes in Southeast Asia and considers the arguments presented by different actors to influence states' approaches toward international criminal justice. It suggests that a linear account of these developments as deriving from externally driven norm diffusion is incomplete. Instead, drawing particularly on the experiences of Cambodia, the Philippines and Indonesia, this thesis argues that states, international organisations and non-state actors in Southeast Asia have engaged in a process of localisation leading to the adaptation of the international criminal justice norm. The development of mechanisms for prosecuting international crimes across Southeast Asia challenges assumptions about the temporal progression of norm diffusion, spatial designations between 'local' and 'international' ideas and actors, and the direction in which ideas and influences evolve across the world.

This thesis makes significant and original contributions to knowledge by applying a 'localisation' framework to analyse debates about international criminal justice, including with reference to three case studies, and by extending and updating earlier surveys of international criminal laws in Southeast Asian states.

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• E. Palmer, (2015), "Localizing International Criminal Accountability in Cambodia", 16(1) *International Relations of the Asia-Pacific* 97-135.

Reports and Blogs:

• S. Williams and E. Palmer (2016) "Global focus: Will President Duterte face court for his bloody war on drugs?" 28 *LSJ: Law Society of NSW Journal* 22-23, available at <http://www.law.unsw.edu.au/news/2016/11/will-president-duterte-face-court-his-bloodywar-drugs>.

• C. Sperfeldt and E. Palmer, (2016), "(Not) All Roads Lead to Rome: Ending Impunity for International Crimes in Southeast Asia", 66 *FICHL Policy Brief Series*, available at <http://www.legal-tools.org/en/doc/b31325/>.

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• "Constructing International Criminal Justice across Time and Space", Fourth Annual International Criminal Law Workshop: "The Politics of International Criminal Law", University of Western Australia, September 2016.

• "International Criminal Law in Cambodia and Indonesia: How Civil Society Mediates Change", ANZSIL Annual Conference Post-Graduate Workshop, University of Wellington, July 2015.

• "Local Agents of International Criminal Law in Cambodia and Indonesia: How Civil Society Mediates Change", International Studies Association Annual Convention, New Orleans, February 2015.

• "Localising International Criminal Law in Cambodia", International Criminal Law Workshop, University of New South Wales, September 2014.

• "Localizing International Criminal Accountability in Southeast Asia", Asia-Pacific Rim Universities Doctoral Students Conference, University of Indonesia, Jakarta, August 2014.

• "International criminal law in South East Asia: Beyond the International Criminal Court", International Criminal Law Workshop, University of Melbourne, September 2013.

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To Cub… may you discover a world of complexity and joy; a source of endless fascination and learning. Our love for you holds galaxies and is always right *here*.

Abstract

International Criminal Law in Southeast Asia: Beyond the International Criminal Court

The underrepresentation of Asian states as parties to the Rome Statute has elicited concerns that the region is significantly falling behind in developing and enforcing international criminal justice. This view accords significance to ratification of the Rome Statute as the primary measure of a country's willingness to give effect to the norms protected by international criminal law. However, the development of international criminal justice mechanisms and substantive law has not entirely escaped Southeast Asia, which has seen the adoption of a spectrum of approaches to international criminal justice, including the establishment of international(ised) criminal institutions, Rome Statute ratifications, and the adoption of domestic legislation addressing international crimes – as well as other transitional justice procedures.

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This thesis makes significant and original contributions to knowledge by applying a 'localisation' framework to analyse debates about international criminal justice, including with reference to three case studies, and by extending and updating earlier surveys of international criminal laws in Southeast Asian states.

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Table of Abbreviations

ADHOC	Cambodian Human Rights and Development Association (Association pour les droits de l'Homme et le développement au Cambodge)
AICHR	ASEAN Intergovernmental Commission on Human Rights
AJAR	Asia Justice and Rights
ASEAN	Association of Southeast Asian States
ASP	Assembly of States Parties to the International Criminal Court
AU	African Union
BIA	Bilateral Immunity Agreement
CARHRIHL	Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law
CAT	Convention against Torture
CAVR	Commission for Reception, Truth, and Reconciliation
CHRAC	Cambodian Human Rights Action Committee
CICC	Coalition for the International Criminal Court
CNRP	Cambodia National Rescue Party
CoPP	Communist Party of the Philippines
CPP	Cambodian People's Party
CRC	Convention on the Rights of the Child
CRP	Community Reconciliation Process
CTF	Indonesia East Timor Commission of Truth and Friendship
DC-Cam	Documentation Center of Cambodia
DK	The Democratic Kampuchea regime
DND	Department of National Defense, the Philippines
DPR	People's Representative Council / House of Representatives, Indonesia (Dewan Perwakilan Rakyat Republik Indonesia)
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECCC Agreement	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, 6 June 2003
ECCC Law	Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, 27 October 2004
ELSAM	Institute for Policy Research and Advocacy (Lembagi Studi dan Advokasi Masyarakat)
EPJUST I and II	European Union–Philippines Justice Support Programmes I and II
EU	European Union
FIDH	International Federation for Human Rights (Fédération internationale des ligues des droits de l'homme)
FUNCINPEC	National United Front for an Independent, Neutral, Peaceful, and Cooperative Cambodia (Front uni national pour un Cambodge indépendant, neutre, pacifique et coopératif)
GONGO	Government Organized Non-Government Organisation

ICC	International Criminal Court
ICRC	International Committee of the Red Cross
ICSCICC	Indonesian Civil Society Coalition for the ICC
ICTJ	International Center for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL Act	An Act Defining and Penalizing Crimes against International Humanitarian Law, Genocide and Other Crimes Against Humanity, Organizing Jurisdiction, Designating Special Courts, and for Related Purposes, Republic of the Philippines Act 9851
IKOHI	Indonesian Association of Families of the Disappeared (Ikatan Keluarga Orang Hilang Indonesia)
ILC	International Law Commission
IMTFE	International Military Tribunal for the Far East
IPT	International People's Tribunal for 1965, held November 2015, The Hague
JSMP	Justice System Monitoring Programme
KKPK	Coalition for Justice and Truth Seeking (Koalisis Keadilan dan Pengungkapan Kebenaran)
Komnas Perempuan	National Commission on Violence Against Women (Komisi Nasional Anti Kekerasan Terhadap Perempuan)
Komnas-HAM	National Commission on Human Rights, Indonesia (Komisi Nasional Hak Asasi Manusia Republik Indonesia)
KontraS	Commission for Disappearances and Victims of Violence (Komisi untuk Orang Hilang dan Korban Tindak Kekerasan)
KPN	National Commission of Inquiry (Komisi Penyelidik Nasional)
KPP-HAM	Commission on the Human Rights Violations in East Timor (operated by Komnas-HAM)
KPTKA	Komisi Independen Pengusutan Tindak Kekerasan diAceh (Independent Commission for the Investigation of Violence in Aceh)
KUHAP	Kitab Undang-undang Hukum Acara Pidana (Criminal Procedures Code, Indonesia)
KUHDT	Kitab Undang-Undang Hukum Disiplin Tendara (Military Disciplinary Law, Indonesia)
KUHP	Criminal Law Code, Indonesia (Kitab Undang-Undang Hukum Pidana)
KUHPM	Military Criminal Law Code, Indonesia (Kitab Undang-Undang Hukum Pidana Militer)
KWAT	Kachin Women's Association Thailand
LAN	Legal Aid Network
Lao PDR	Lao People's Democratic Republic
LICADHO	Cambodian League for the Promotion and Defense of Human Rights (La Ligue Cambodgienne pour la Promotion et la Défense des Droits de l'Homme)
LPSK	Lembaga Perlindungan Saksi dan Korban (Institute for the Protection of Witnesses and Victims)
MILF	Moro Islamic Liberation Front

MNHRC	Myanmar National Human Rights Commission
MNLF	Moro National Liberation Front
MPR	People's Consultative Assembly, Indonesia (Majelis Permusyawaratan Rakyat Republik Indonesia)
NAM	Non-Aligned Movement
ND-Burma	Network for Human Right Documentation - Burma
NDF	National Democratic Front
NGO	Non-governmental organisation
NHRI	National Human Rights Institution
NPA	New People's Army
PAHRA	Philippine Alliance of Human Rights Advocates
PCICC	Philippine Coalition for the International Criminal Court
PGA	Parliamentarians for Global Action
PKI	Communist Party of Indonesia (Partai Komunis Indonesia)
PRK	People's Republic of Kampuchea
PRT	People's Revolutionary Tribunal
SCAP	Supreme Commander for the Allied Powers
SCSL	Special Court for Sierra Leone
SCU	Serious Crimes Investigation Unit
SELDA	Association of Ex-Detainees against Detention and Arrest (Samahan ng Ex-detainees Laban sa Detensyon at Aresto)
Special Panels	Special Panels in the District Court in Dili
STL	Special Tribunal for Lebanon
TNI	Indonesian National Army (Tentara Nasional Indonesia)
TRC	Truth and Reconciliation Commission
TWAIL	Third World Approaches to International Law
UN	United Nations
UNTAC	United Nations Transitional Authority in Cambodia
UNTAET	United Nations Transitional Administration in East Timor
UPR	Universal Periodic Review
US	United States
VOC	United [Dutch] East India Company (Vereenigde Oost-Indische Compagnie)
WCA	*War Crimes Act 1945* (Cth) (Australia)
WWII	World War II
YLBHI	Indonesian Legal Aid Foundation (Yayasan Lembaga Bantuan Hukum Indonesia)

List of Tables and Figures

Glossary

Note on Spelling

The spelling of names and places across Southeast Asia varies in English. This thesis endeavours to use common spellings and the names of places at a given time, for example, as typically used in media and NGO reports. For instance, 'East Timor' is used until 'Timor-Leste' achieved independence, 'Myanmar' is used for contemporary 'Burma' and 'Suharto' and 'Sukarno' are used for Indonesia's Presidents.

- *'Acceptance'* is understood as involving actors 'internalising' norms by feeling bound 'to obey' or comply with a particular norm or interpretation as part of its [or their] internal value set'.[1]
- *'Adaptation'* involves 'external norms' being 'reconstructed to fit with local beliefs and practices even as local beliefs and practices may be adjusted in accordance with the external norm'.[2] Where suggested by the context, this thesis also uses 'adaptation' in its ordinary broader sense of changing or altering, rather than only referring to this phase of Acharya's framework.
- *'Amplification'* occurs where new 'instruments and practices [i.e., including laws] are developed from the syncretic normative "universalization" framework in which local influences remain highly visible'.[3]
- '*Approach'*, '*framework*', '*perspective'* and '*theory'* are used generally and interchangeably in this thesis to describe different theoretical structures and methods for understanding phenomena, including the diffusion and reconstruction of norms.
- *'Civil society'* refers to professional associations, community groups, women's organisations, trade unions, 'humanitarian aid organizations, associations of survivors and family members of victims, human rights and development NGOs, lawyers, academic, mental health and medical associations, and religious

[1] Harold Hongju Koh, 'Why Do Nations Obey International Law?' (1997) 106 *Yale Law School Legal Scholarship Repository* 2599-2659, 2646.
[2] Amitav Acharya, 'How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism' (2004) 58(2) *International Organization* 239-275, 251.
[3] Ibid, 251.

organizations'.[4] It does not typically refer to political groups, but in Southeast Asia, there may be close relationships between political organisations, the government and various civil society actors.

- *'Direction'* or *'directionality*' indicates the movement of ideas and actors across both time and space, but is also used in its generic sense where suggested by the context.

- '*Discourse*' is used in this thesis interchangeably with 'debate' and 'discussion' and is not intended to convey a fixed or specific theoretical meaning, for e.g., with reference to the work of Michel Foucault.

- *'Framing'* describes the processes by which actors attempt to 'call attention to issues or even "create" issues by using language that names, interprets, and dramatizes them' in different ways to 'create alternative perceptions of both appropriateness and interest'.[5]

- '*Identities'* are considered to arise and develop from changing social norms, experiences, relationships and contextual factors.

- '*Influence'* suggests a 'causal relation' between two or more actors or events, recognising that influence 'is not something that is either had or not had, it comes in degrees'.[6]

- *'International crimes'* is often used to convey variety of criminal behaviour that may occur across borders, including drug trafficking and financial crimes, as well as the commission of atrocities beyond those included in the Rome Statute. However, in this thesis 'international crimes' refers only to those criminal activities that could meet the ICC's jurisdiction and admissibility criteria, including its 'substantially the same conduct' standard,[7] though not jurisdictional requirements as to territory as at 31 December 2016. That is, international crimes involve conduct that could be characterised as the crime of genocide, crimes against humanity, and war crimes.

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[4] Naomi Roht-Arriaza, 'Civil Society in Processes of Accountability' in M Cherif Bassiouni (ed), *Post-Conflict Justice*, International and Comparative Criminal Law Series (Transnational Publishers, 2002) 97-114, 98.
[5] Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52(4) *International Organization* 887-917, 897.
[6] Marlies Glasius, *Foreign Policy on Human Rights: It's Influence on Indonesia under Soeharto* (Hart, 1999), 15.
[7] See *Prosecutor* v *Ruto, Kosgey and Sang*, Case No. ICC-01/09-01/11 OA, Appeals Chamber, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", 30 August 2011, para. 1.

- *'International criminal justice'*, *'international criminal accountability'* and '*international criminal responsibility'* are considered in this thesis to be subjective phrases holding contested meanings. Where used in a general way, these phrases are used interchangeably to refer to the determination of individual criminal responsibility through holding legal trials for international crimes. This does not require the trials to have been held within international courts; it is assumed that domestic, regional, or internationalised courts, tribunals or chambers can all be possible venues for delivering international criminal justice, though the 'normalised' perception of international criminal justice emphasises some level of international involvement in such prosecutions – especially via the Rome Statute and ICC (see section 2, chapter 1).

- '*International criminal law'* is used to refer to substantive international criminal laws. Although the scope of international criminal law is subject to debate, unless otherwise specified, in this thesis this term refers to the laws set out in the Rome Statute and its Elements, as well as law derived from the subsidiary sources referred to in Article 21 of the Rome Statute, including applicable treaties and the principles and rules of international law including the established principles of the international law of armed conflict and, as a subordinate source, general principles of law derived from national laws of the legal systems of the world.

- '*Local'* is recognised as a subjective perspective or viewpoint and as short-hand for a cluster of possible such perspectives.[8] Homogeneous localities rarely, if ever, exist in culturally constructed communities of intersecting ethnic, socio-economic, gender, racial and political identities.[9] Likewise, 'international', 'global' and 'Western' are labels with uncertain meaning and 'external' influences may very often be wielded through 'internal' processes. In this thesis, 'local' is generally used to refer to actors or events at the national or domestic level, since it focuses on government-established criminal law responses (though 'local' also refers to districts or communities where the context suggests). However, local actors may have, for example, been educated or lived overseas, are not necessarily representative of other local actors, and hold shifting and dynamic views (see chapter 7).

[8] Rosalind Shaw and Lars Waldorf, 'Introduction: Localizing Transitional Justice' in Rosalind Shaw, Lars Waldorf and Pierre Hazan (eds), *Localizing Transitional Justice: Interventions and Priorities after Mass Violence* (Stanford University Press, 2010) 3-36, 6

[9] Sally Engle Merry, 'Rights Talk and the Experience of Law: Implementing Women's Human Rights to Protection from Violence' (2003) 25 *Human Rights Quarterly* 343-381.

- '*Mechanism'* is used throughout this thesis to refer to institutional (organisational) structures for addressing the commission of crimes as well as the adoption of legislation. 'Mechanisms' predominantly encompasses state-created legal institutions and legal avenues, such as domestic or international courts, but where context suggests may also include non- or quasi-legal and community-developed 'mechanisms', such as community reconciliation programs or truth commissions.

- '*Norm'* is used in this thesis to reflect collective, behavioural intersubjective beliefs about what is 'appropriate' behaviour in a given context.[10] Purely for stylistic reasons, 'idea' and 'concept' are also sometimes used interchangeably, even though norms generally encompass social understandings, whereas ideas and concepts may be held 'privately'.

- '*Norm of international criminal justice*' involves determining individual criminal responsibility through holding 'fair' legal trials for international crimes and arguably anticipates international involvement in such prosecutions. This 'norm' encompasses ratifying the Rome Statute, incorporating its provisions into domestic law, and investigating and prosecuting international crimes using international criminal law – perhaps (or even hopefully) leading to convictions.[11]

- '*Prelocalisation'* involves local actors offering 'resistance to new external norms because of doubts about the norms' utility and applicability and fears that the norms might undermine existing beliefs and practices'.[12] This 'may lead to localization if some local actors begin to view the external norms as … contribut[ing] to the legitimacy and efficacy of extant institutions without undermining them significantly'.[13]

- '*Rejection'* means a failure to adopt or comply with certain principles.

- '*Resistance*' includes public or non-public opposition by state or other actors toward concepts (or actors), as well as 'processes in which … small-scale … agencies … have an impact on power, on norms, civil society, the state, and on the international'.[14]

[10] See Finnemore and Sikkink (n 5).
[11] See section 2, chapter 1.
[12] Acharya (n 2), 251.
[13] Ibid.
[14] Oliver P Richmond, 'Critical agency, resistance and a post-colonial civil society' (2011) 46(4) *Cooperation and Conflict* 419-440, 428.

- '*Southeast Asia*' is a constructed concept, deriving from historic events and labels.[15] However, it is considered in thesis to include the eleven nations falling within the United Nations (UN) category of South-Eastern Asia: Brunei Darussalam, Cambodia, Indonesia, The People's Democratic Republic of Laos (Lao PDR), Malaysia, Myanmar, the Philippines, Singapore, Thailand, Timor-Leste, and Vietnam (the ASEAN members plus Timor-Leste).

- '*Space*' incudes any physical area or expanse, but 'space' is also considered to be constructed within, and able to constrain, social and power structures. This thesis does not engage with the relationships and differences between 'space' and 'place'.[16]

- '*State', 'country*' and '*nation*' are used interchangeably in the political sense rather than to refer to 'nations' as communal groups with particular constructed identities,[17] while it is assumed that an executive government makes decisions (at least notionally) on behalf of the population based on state policies. In some contexts, 'states' may be used to refer to the key government decision-makers, such as state representatives, members of the executive or in non-democracies, controlling 'elites'.

- '*Time'* is defined as a 'finite extent or stretch of continued existence, as the interval separating two successive events or actions, or the period during which an action, condition, or state continues; a finite portion of time…'[18] Thus, 'time' involves a 'period' or 'stretch' within, or surrounding which, events take place, although actions may also occur 'at' a particular time.

[15] Donald E Weatherbee, *International Relations in Southeast Asia: The Struggle for Autonomy* (Rowman & Littlefield, 2009), 7.
[16] See Luke Bennett and Antonia Layard, 'Legal Geography: Becoming Spatial Detectives' 9(7) *Geography Compass* (2015) 406-422, 408.
[17] Sheila L Croucher, 'Perpetual Imagining: Nationhood in a Global Era' (2003) 5(1) *International Studies Review* 1-24.
[18] Oxford English Dictionary.

Chapter 1 – Introduction

> 'After all, *international justice should not be regarded as a concept foreign to this part of the world* … All Asian countries, without exception, are states parties to the four Geneva Conventions, and have thereby agreed to criminalise the grave breaches defined in those treaties, which form a major part of the war crimes contained in the Rome Statute, and to prosecute the perpetrators... However, some persistent obstacles remain, often due to misunderstandings... Clarifying these matters is crucial for *progress* to occur.'[1]

> '…we can't continue with this … *one dimensional* kind of: bring it to court and what justice means is legal justice. Justice … can be achieved only … through a combination of different interventions and measures.'[2]

> '…we talk about all these things and then we ask people to also remember that there is *no set chronology or order for how things should happen*…'[3]

> ''Rome was not built in one day. True Indeed. But it can also be said that Rome began its decay when it failed to be cognizant of the changing needs of the times.'[4]

1. Introduction

Atrocities have been committed in Southeast Asia in the past and, as elsewhere in the world, may be perpetrated in future.[5] Yet, by the end of 2016, 124 of 193 United Nations (UN) member states had ratified the Rome Statute of the International Criminal Court (ICC), compared to just three of the 11 states[6] in Southeast Asia.[7] The underrepresentation of states in Southeast Asia as parties to the Rome Statute has elicited concerns that the region is 'seriously lagging behind in international criminal law'.[8] Apparently, the 'nations of Asia must ratify the Rome Statute and become full members in the international pursuit

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[1] Sang-Hyun Song, 'International Criminal Court-Centred International Criminal Justice and Its Challenges' (2016) 17(1) *Melbourne Journal of International Law* 1-14, 8, emphasis added.
[2] Interview I14, emphasis added.
[3] Interview M1, emphasis added.
[4] Republic of the Philippines, 'Statement by H.E. Libran N. Cabactulan, Permanent Representative of the Republic of the Philippines to the United Nations, General Debate, 12th session of the Assembly of States Parties' (21 November 2013) <https://asp.icc-cpi.int/iccdocs/asp_docs/ASP12/GenDeba/ICC-ASP12-GenDeba-Philippines-ENG.pdf>.
[5] Though see Alex J Bellamy, 'Atrocity Prevention: From Promise to Practice in the Asia Pacific' (2016) 8(2-3) *Global Responsibility to Protect* 180-199, 187.
[6] See Glossary.
[7] Southeast Asia is considered in thesis to include the eleven nations falling within the United Nations (UN) category of South-Eastern Asia: Brunei Darussalam, Cambodia, Indonesia, The People's Democratic Republic of Laos (Lao PDR), Malaysia, Myanmar, the Philippines, Singapore, Thailand, Timor-Leste, and Vietnam (the ASEAN members plus Timor-Leste).
[8] Sang-Hyun Song, 'Role of Asian Lawyers in the Emerging System International Criminal Justice' (10 October 2011) <https://www.icc-cpi.int/iccdocs/PIDS/press/WU99/111010ICCPresidentkeynotespeech.pdf>, 2.

of justice against war criminals'.[9] This view suggests that ratifying the Rome Statute is the primary measure to give effect to the 'norms' – or intersubjective beliefs about what is 'appropriate' behaviour[10] – promoted by international criminal law.[11] From that perspective, the states in Southeast Asia appear to have rejected a 'norm of international criminal justice', which centres upon prosecuting international crimes, often with international involvement, especially through ratifying the Rome Statute and incorporating its provisions into domestic law.[12]

However, Sikkink and Payne have observed that while 'the trend toward domestic human rights prosecutions has been most pronounced in Latin America and in Central and Eastern Europe… the percentage of prosecutions in Asia is the third largest… and the number of domestic human rights prosecutions in Asia now appears to be increasing more than in other regions.'[13] In fact, most Asia-Pacific countries that have experienced conflict in recent decades have held related trials.[14] While Sikkink and Payne's statistics focus on human rights prosecutions, they suggest that regional approaches to international criminal justice may be more complex than the low level of Rome Statute ratification suggests. This presents a question: how have actors within Southeast Asia engaged with 'international criminal justice',[15] including by adopting laws and institutions to prosecute international crimes, both in accordance with and beyond the Rome Statute framework?

This thesis analyses how Southeast Asian states have developed laws and institutions for prosecuting international crimes. It shifts discussions about international criminal justice in Southeast Asia beyond debates about acceding to the Rome Statute, by emphasising the complex ways in which states and other actors adapt conceptions of international criminal justice. It explores these issues by considering the development of international criminal laws and institutions in Southeast Asia from World War II (WWII) until 30 November 2016. It then analyses three case studies (Cambodia, the Philippines and Indonesia) in more detail by applying an international relations 'localisation' approach, which considers

[9] Richard J Goldstone, 'South-East Asia and International Criminal Law' (2011) <http://www.fichl.org/fileadmin/fichl/documents/FICHL_OPS/FICHL_OPS_2_Goldstone_EN.pdf>, 19.
[10] Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52(4) *International Organization* 887-917; see Glossary.
[11] See Glossary.
[12] See section 2.
[13] Leigh A Payne and Kathryn Sikkink, 'Transitional Justice in the Asia-Pacific: Comparative and Theoretical Perspectives' in Renée Jeffery and Hun Joon Kim (eds), *Transitional Justice in the Asia-Pacific* (Cambridge University Press, 2014) 33-60, 38.
[14] 69 per cent of 'transitional countries', ibid, 41.
[15] See section 2 and Glossary.

how various actors reconstruct international norms in different contexts.

Legal researchers have increasingly been called upon to 'explain what they do in terms accessible to outsiders'.[16] This includes a demand for legal academics to support their claims using cross-disciplinary methods, perhaps especially where the field of law concerned is more closely or overtly directed toward questions of social policy,[17] or for PhD research, which may be held to broader scholarly standards.[18] By addressing 'international law' as a social construct,[19] this thesis responds to a central issue for international criminal *law* – analysis of national international criminal justice laws and mechanisms, and their adoption – with reference to social sciences approaches, especially from the international relations field. In doing so, it draws on a tradition of socio-legal research that cements the use of inter-disciplinary methodologies within the legal field (and thus, for a legal thesis),[20] even though such methods are – perhaps surprisingly given the relationship between international criminal law and policy questions about responding to social disruption – only more recently gaining traction within international criminal law scholarship.[21]

This thesis concludes that the laws and institutions for prosecuting international crimes in Southeast Asia reflect the adaptation, rather than acceptance or rejection,[22] of the international criminal justice norm by state and non-state actors in various locations. These findings challenge dominant explanations of how norms such as international criminal justice are diffused over *time*; conceptual divisions between 'local' and 'international' *spaces*; and the *direction* in which ideas are transmitted.[23]

Section 2 of this chapter provides an overview of the sources and scope of 'international

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[16] Theunis Roux, 'Judging the Quality of Legal Research: A Qualified Response to the Demand for Greater Methodological Rigour' 24 *Legal Education Review* 173-200, 173.
[17] Ibid, 177.
[18] Ibid, 181.
[19] See Carlo Focarelli, *International Law as a Social Construct: The Struggle for Global Justice* (Oxford University Press, 2012); and as to the relationship between international law and international politics, see Alexander Wendt, *Social Theory of International Politics* (Cambridge University Press, 1999), 2, 280-281, 290. .
[20] See Simon Halliday and Patrick D Schmidt, 'Introduction: Beyond Methods – Law and Society in Action', in *Conducting Law and Society Research: Reflections on Methods and Practice* (Cambridge University Press, 2009) 1-13.
[21] Michelle Burgis-Kasthala, 'Scholarship as Dialogue? TWAIL and the Politics of Methodology' (2016) 14(4) *Journal of International Criminal Justice* 921-937; Sarah M H Nouwen, ''As You Set out for Ithaka': Practical, Epistemological, Ethical, and Existential Questions about Socio-Legal Empirical Research in Conflict' (2014) 27(1) *Leiden Journal of International Law* 227-260.
[22] 'Acceptance', 'rejection' and 'adaptation' are discussed in chapter 2 and see Glossary.
[23] 'Time', 'space' and 'direction' are discussed in chapter 2 and see Glossary.

criminal justice' and positions the focus of this thesis – criminal 'mechanisms'[24] – within the broader realm of transitional justice. Sections 3 and 4 review the literature associated with international criminal justice, in particular the ICC, and transitional justice in the broader Asia-Pacific region. It places this thesis within a subset of research considering legal responses to international crimes in states in Southeast Asia. Section 5 then sets out the approach and questions addressed by this thesis, while section 6 provides a summary of the structure, findings, and significance of this research.

2. The Norm of International Criminal Justice

Recent decades have seen the unprecedented development of substantive international criminal law and of norms favouring the prosecution of individuals for international crimes before international tribunals.[25] Terms such as 'international criminal justice', 'international criminal law', or 'international criminal accountability' often refer to substantive legal principles, such as specific crimes, modes of responsibility or trial procedures. They may also encompass various ideas about the need to 'end impunity' for atrocity crimes, normally through criminal procedures – possibly delivered by the ICC, or with international involvement.[26] Mégret identifies an *'international criminal justice project*' that 'includes a series of recognizable features, including the centrality of individual guilt, the need to respect the rights of the defence both procedurally and substantively, a commitment to international institutions of criminal justice, and a rhetoric that foregrounds the needs of "humanity" over sovereignty'.[27] This version of international criminal justice, or 'norm', promotes the investigation and prosecution of (and potential convictions for) international crimes with reference to international institutions and laws.

Scholars have recognised that the use of 'international' or 'internationalised' institutions to prosecute individuals for crimes against humanity, war crimes, and genocide might be

[24] Including both laws and institutions created by law, see Glossary.
[25] Michael J Struett, *The Politics of Constructing the International Criminal Court: NGOs, Discourse, and Agency* (Palgrave Macmillan, 2008).
[26] See Glossary; Gideon John Boas, 'What is International Criminal Justice, in 'What's in a Word: The Nature and Meaning of International Criminal Justice'' in Gideon Boas, William A Schabas and Michael P Scharf (eds), *International Criminal Justice: Legitimacy and Coherence* (Edward Elgar, 2012) 1-24; ibid.
[27] Frédéric Mégret, 'International Criminal Justice: A Critical Research Agenda' in Christine Schwöbel (ed), *Critical Approaches to International Criminal Law* (Routledge, 2014) 17-53, 17; see also Kathryn Sikkink and Hun Joon Kim, 'The Justice Cascade: The Origins and Effectiveness of Prosecutions of Human Rights Violations' (2013) 9(1) *Annual Review of Law and Social Science* 269-285, 271.

considered 'normalised',[28] particularly since the establishment of the ICC.[29] Although international law recognises individual criminal responsibility for other serious crimes such as terrorism or significant drug or environmental offences,[30] the Rome Statute currently provides the ICC with jurisdiction in respect of crimes against humanity, war crimes, and genocide.[31] As this thesis investigates the adaptation of a norm that centres upon the Rome Statute, it analyses the laws and institutions for prosecuting these 'core' or *'international crimes*' in Southeast Asia. That is, it addresses those criminal acts or omissions that involve substantially the same conduct as the crimes currently within the jurisdiction of the ICC.[32]

However, international criminal law extends beyond the Rome Statute. For instance, the ICC Chambers first draw upon the Rome Statute, its Elements of Crimes and procedural rules, but then, where appropriate, 'applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict', and finally, general principles of law.[33] The ICC must interpret and apply the law in a manner that is consistent with international human rights law,[34] and international tribunals have historically referred to human rights cases.[35] Thus, international criminal law rests upon the uncomfortable tripod of 'the "universalist" aspirations of public international law, the humanist dimensions of human rights law and the legality and fairness-oriented foundations of criminal law'.[36] International criminal procedures also draw upon common and civil law traditions. As a result, international criminal law has

[28] Frédéric Mégret, 'In defense of hybridity: towards a representational theory of international criminal justice' (2005) 38(3) *Cornell International Law Journal* 725-751; see also Charlotte Epstein, 'The postcolonial perspective: an introduction' (2014) 6(2) *International Theory* 294-311.
[29] Struett (n 25), 19.
[30] Steven R Ratner, Jason S Abrams and James L Bischoff, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (Oxford University Press, 2009), 10.
[31] The ICC may potentially have jurisdiction over aggression in future and 'crimes against peace' have been prosecuted in the region following World War II. This thesis therefore focuses on the current 'core' crimes, but takes note of domestic legislation that might to apply to aggression, such as 'crimes against peace' in Article 341 of Vietnam's Penal Code, No. 15/1999/QH10.
[32] See *Prosecutor* v *Ruto, Kosgey and Sang*, Case No. ICC-01/09-01/11 OA, Appeals Chamber, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", 30 August 2011, para. 1.
[33] Article 21, Rome Statute of the International Criminal Court, adopted 17 July 1998, entered into force 1 July 2002 (Rome Statute).
[34] Article 21(3), ibid.
[35] Carsten Stahn and Larissa van den Herik, ''Fragmentation', Diversification and '3D' Legal Pluralism: International Criminal Law as the Jack-in-the-Box?' in Carsten Stahn, Larissa van den Herik and Nico Schrijver (eds), *The Diversification and Fragmentation of International Criminal Law* (Grotius Centre for International Legal Studies, 2012) 21-90, 48-49.
[36] Ibid, 23.

overlapping and shifting boundaries.[37] Indeed, its intersections with different legal fields arguably 'constitute a rather uncomfortable combination of inherently different types of law'.[38]

International criminal law also has a variety of purposes. The use of international crimes mechanisms may address deterrence, retributive, or expressive goals.[39] To those priorities could be added political concerns, such as to ensure international peace and security. Holding criminal trials might contribute to reconciliation,[40] or endorse victims' experiences by according responsibility to identifiable individuals, or by awarding reparations.[41] They may produce documentary, forensic and testimonial evidence to uncover the 'truth' of what occurred and to document it for posterity, although scholars have questioned the ability of courts to provide 'authoritative historical accounts'.[42] While international criminal law provides the framework for investigating, as well as prosecuting, international crimes, a normative emphasis upon 'ending impunity' means that international criminal mechanisms are sometimes criticised for a failure to secure timely *convictions* of international crimes.[43]

One way that states can demonstrate that they embrace international criminal justice is by ratifying the Rome Statute.[44] The ICC was developed in response to concerns about

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[37] Ratner, Abrams and Bischoff (n 30),10.
[38] Elies van Sliedregt, *Individual Criminal Responsibility in International Law,* (Oxford University Press, 2012), 8.
[39] Mark A Drumbl, *Atrocity, punishment, and international law* (Cambridge University Press, 2007).
[40] Office of the President of the General Assembly, 'Thematic Debate "Role of International Criminal Justice in Reconciliation", UN Headquarters, 10 April 2013, President's Summary' (10 April 2013) <http://www.un.org/en/ga/president/67/issues/icj/Intl%20Criminal%20Justice%20Thematic%20Debate%20PGA's%20Summary.pdf>.
[41] Conor McCarthy, *Reparations and Victim Support in the International Criminal Court* (Cambridge University Press, 2012).
[42] Following Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin Classics, 1963); see Elizabeth Drexler, 'Fatal Knowledges: The Social and Political Legacies of Collaboration and Betrayal in Timor-Leste' (2013) 7(1) *International Journal of Transitional Justice* 74-94, 77.
[43] E.g., International Center for Transitional Justice (ICTJ) and KontraS, 'Derailed: Transitional Justice in Indonesia Since the Fall of Soeharto' (March 2011) <http://ictj.org/sites/default/files/ICTJ-Kontras-Indonesia-Derailed-Report-2011-English_0.pdf>; Elizabeth Peet, 'Why is the International Criminal Court So Bad at Prosecuting War Criminals?' *The Wilson Quarterly* (15 June 2015) <http://wilsonquarterly.com/stories/why-is-the-international-criminal-court-so-bad-at-prosecuting-war-criminals/>; Human Rights Watch, 'Cambodia: Khmer Rouge Convictions 'Too Little, Too Late': Political Interference, Delays, Corruption Make Tribunal a Failure' (8 August 2014) <http://www.hrw.org/news/2014/08/08/cambodia-khmer-rouge-convictions-too-little-too-late>.
[44] Regarding Rome Statute ratification generally, see Beth A Simmons and Allison Danner, 'Credible Commitments and the International Criminal Court' (2010) 64(2) *International Organization* 225-

political interference in domestic trials and in light of the complexity and expense of establishing the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR).[45] However, there is growing awareness of the challenges faced by the ICC, including as to the ICC's focus on Africa,[46] victims procedures,[47] and legitimacy.[48] The ICC confronts limitations in prosecuting international crimes. It faces resource and time constraints,[49] relies upon state cooperation[50] and is vulnerable to Security Council influence.[51] It is also subject to jurisdictional and admissibility restrictions, including the concept of complementarity. This principle provides that, among other requirements, a case is only admissible before the ICC if a state with jurisdiction is unable or unwilling genuinely to investigate or prosecute the person for 'substantially the same conduct as alleged in the proceedings before the [ICC]' (or where the state investigated the person but decided not to prosecute due to its unwillingness or inability to do so).[52]

The content of any international criminal justice 'norm' has also been contested. Principles of international criminal law can be traced to the Renaissance, or even earlier, including in Asia.[53] However, international criminal law institutions were largely developed in a Eurocentric manner, despite the important influence of other states.[54] International

256; Jay Goodliffe et al, 'Dependence Networks and the International Criminal Court' (2012) 5(1) *International Studies Quarterly* 131-147.

[45] Ratner, Abrams, Bischoff (n 30), 252.

[46] As at 31 October 2016, the situations under investigation before the ICC included Uganda, the Democratic Republic of the Congo, Central African Republic, Darfur in Sudan, Kenya, Libya, Côte d'Ivoire, Mali, and Georgia. The only matter concerning a state in Southeast Asia was the preliminary examination into the vessels of Comoros, Greece and Cambodia in relation to the incident involving an Israeli raid upon a 'humanitarian aid flotilla' aiming to reach Gaza, which had not proceeded to an investigation and did not address Cambodian state activity. See Edwin Bikundo, 'The International Criminal Court and Africa: Exemplary Justice' (2012) 23(1) *Law and Critique* 21-41; Kurt Mills, '"Bashir is Dividing Us": Africa and the International Criminal Court' (2012) 34(2) *Human Rights Quarterly* 404-448.

[47] McCarthy (n 41).

[48] Steven C Roach, 'Legitimising negotiated justice: the International Criminal Court and flexible governance' (2013) 17(5-6) *The International Journal of Human Rights* 619-632.

[49] Payam Akhavan, 'The Rise, and Fall, and Rise, of International Criminal Justice' (2013) 11(3) *Journal of International Criminal Justice* 527-536.

[50] Sarah M H Nouwen and Wouter G Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan' (2011) 21(4) *European Journal of International Law* 941-965, 964; Roach (n 48), 620.

[51] Catherine Gegout, 'The International Criminal Court: limits, potential and conditions for the promotion of justice and peace' (2013) 34(5) *Third World Quarterly* 800-818; Nouwen and Werner, ibid; Benjamin Schiff, 'The ICC's Potential for Doing Bad When Pursuing Good' (2012) 26(1) *Ethics & International Affairs* 73-81, 80.

[52] Article 17, Rome Statute; *Ruto, Kosgey and Sang* (n 32), para. 1.

[53] Simon Chesterman, 'Foreword', in Kirsten Sellars (ed), *Trials for International Crimes in Asia* (Cambridge University Press, 2015), ix.

[54] Simon Chesterman, 'International Criminal Law with Asian Characteristics?' (2014) *NUS Law Working Paper* 2014/002.

criminal law has increasingly been considered a predominantly Africa-focused 'project' given the ICC's attention toward that continent[55] and related literature has mostly focused on crimes committed in Africa and Europe.[56] However, Third World Approaches to International Law (TWAIL) scholars have drawn attention to the importance of colonial and post-colonial experiences, including of individuals throughout the broader 'Third World' (rather than just states) in understanding and evaluating international law.[57] Critical international criminal law literature has also challenged progressive narratives of the history of international criminal law, with 'wariness in regard to absolute moral sentiments which emanate from [international criminal law's] centre, The Hague…'[58]

Others have argued that the norm of international criminal justice has particular content, for example, an emphasis upon the Rome Statute, which might constrain the possibility of developing alternative approaches to international crimes beyond the ICC framework.[59] This has resulted in a growing focus on the relationship between international criminal law and domestic legal systems.[60] While there have been concerns about the potential for the 'fragmentation' of international criminal law,[61] scholars have also considered the processes by which domestic jurisdictions both influence and apply international law through the lens of 'pluralism'.[62] This perspective suggests that international and domestic approaches to international criminal law are not inherently conflicting, but are dynamic and able to 'co-exist as part of the fabric of a single, coherent system'.[63]

Thus, a 'normalised' meaning of '*international criminal justice*'[64] (the '*norm of international*

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[55] See, generally, n 46.
[56] Renee Jeffery and Hun Joon Kim, 'Introduction', in Renee Jefferey and Hun Joon Kim (eds), *Transitional justice in the Asia-Pacific* (Cambridge University Press, 2014) 1-31, 2-3.
[57] Burgis-Kasthala, (n 21); Antony Anghie and B S Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts' (2003) 2 *Chinese Journal of International Law* 77-103.
[58] Christine Schwöbel, 'Introduction', in Christine Schwöbel, (ed), *Critical Approaches to International Criminal Law: An Introduction* (Routledge, 2014) 1-14, 11.
[59] Christian de Vos, 'All roads lead to Rome: implementation and domestic politics in Kenya and Uganda' in Christian De Vos, Sara Kendall and Carsten Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press, 2015) 379-407; Cassandra Steer, 'Legal Transplants or Legal Patchworking? The Creation of International Criminal Law as a Pluralistic Body of Law' in Elies van Sliedregt and Sergey Vasiliev (eds), *Pluralism in International Criminal Law* (Oxford University Press, 2015) 39-67, 59.
[60] Naomi Roht-Arriaza, 'Just a 'Bubble'? Perspectives on the Enforcement of International Criminal Law by National Courts' (2013) 11(3) *Journal of International Criminal Justice* 537-543.
[61] See Stahn and van den Herik (n 35).
[62] Stahn and van den Herik (n 35); Elies van Sliedregt and Sergey Vasiliev (eds), *Pluralism in International Criminal Law* (Oxford University Press, 2015).
[63] Steer (n 59), 56.
[64] See Glossary.

criminal justice') involves determining individual criminal responsibility through holding 'fair' legal trials for international crimes.[65] It does not require trials to have been held within international courts or only at the ICC, but arguably anticipates international involvement in such prosecutions.[66] This 'norm' encompasses ratifying the Rome Statute, incorporating its provisions into domestic law,[67] and investigating and prosecuting international crimes using international criminal law – perhaps (or even hopefully) leading to convictions. This thesis critiques and examines engagement with this particular representation of 'the norm of international criminal justice'. However, it argues that 'international criminal justice' is also a subjective phrase – the meanings of which are contested – and that a variety of actors adapt this 'norm' in different ways.

3. Mechanisms for Prosecuting International Criminal Justice

Ratner, Abrams and Bischoff point out that the 'goals of individual accountability can be reached by numerous paths, and those who choose to give inordinate focus to one set of mechanisms are missing the opportunity to learn from other experiences at the domestic and international level'.[68] This view suggests that there is not necessarily one option for responding to international crimes. For instance, focusing only upon Rome Statute ratification could divert attention from other possibilities for addressing the complex situations where international crimes have been committed. These include regional human rights institutions, the establishment of other international crimes mechanisms, domestic prosecutions under universal, treaty-based, territorial or personal jurisdiction, or non-criminal responses. These options are potentially important given the barriers to ICC prosecutions mentioned above. It is also unlikely that the Security Council would refer a situation within Southeast Asia to the ICC Prosecutor, since China and other states have opposed initiatives to do so in the past.[69] The issues of sovereignty and non-interference discussed later in this thesis also suggest that it would be surprising if a state in Southeast

[65] See Mégret (n 27).
[66] Mégret (n 28); even if only via a broader 'positive' or 'proactive' complementarity role from the ICC (see Roht-Arriaza (n 60); William W Burke-White, 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice' (2008) 49(1) *Harvard International Law Journal* 53-108) or through the establishment of internationalised or international tribunals.
[67] See Kamari Maxine Clarke, *Fictions of justice: the International criminal court and the challenges of legal pluralism in sub-Saharan Africa* (Cambridge University Press, 2009), 141.
[68] Ratner, Abrams, Bischoff (n 30), 18.
[69] E.g. United Nations, 'Security Council Fails to Adopt Draft Resolution on Myanmar, Owing to Negative Votes by China, Russian Federation, Press Release SC/8939' (12 January 2007) <http://www.un.org/press/en/2007/sc8939.doc.htm>.

Asia were to 'self-refer' a situation to the ICC, unless an ICC investigation would foreseeably promote internal stability, development, or other domestic priorities.

Regional courts such as the European Court of Human Rights and Inter-American Court of Human Rights have been established in the human rights realm. These courts consider violations of human rights by states, rather than by individuals, although there has been some overlap in terms of the conduct forming the subject of disputes.[70] Regional human rights instruments and institutions also exist within Southeast Asia, namely the Association of Southeast Asian Nations (ASEAN) Declaration and the ASEAN Intergovernmental Commission on Human Rights, but these are far from developing any regional court,[71] let alone one which might prosecute international crimes, and so are not analysed in this thesis.[72]

Another possibility is to establish new international crimes mechanisms. Resistance to the establishment of additional ad hoc tribunals like the ICTY and ICTR, which had proved expensive, recognition that the ICC would have only prospective and limited jurisdiction, as well as other factors such as a preference for geographically closer trials, contributed to the development of 'internationalised' tribunals.[73] These include the Special Panels in the District Court in Dili, East Timor (Special Panels) and the ECCC.[74] While internationalised mechanisms have different characteristics, each combines international and national staff, some international administration and funding, and some trials have taken place in the state where crimes occurred.[75] Such tribunals could be established in Southeast Asia in future and have been proposed (in the Asia-Pacific) for Sri Lanka.[76] However, it is impossible to ascertain the likelihood of future ad hoc or internationalised courts being established and so only pre-existing regional internationalised tribunals – the Special Panels and the ECCC – are discussed in this thesis.

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[70] Steven Freeland, 'The Internationalization of Justice - a Case for the Universal Application of Criminal Law Norms' (2007) 4 *New Zealand Yearbook of International Law* 45-65, 59-60.
[71] See Andrew Byrnes, Andrea Durbach and Catherine Renshaw, ''A tongue but no teeth?': the emergence of a regional human rights mechanism in the Asia Pacific region.' (2009) 31(3) *Sydney Law Review* 211-238, from 218; Amitav Acharya, *The Making of Southeast Asia: International Relations of a Region* (Institute of Southeast Asian Studies Publishing, 2012).
[72] Section 4.1, chapter 3.
[73] Ratner, Abrams, Bischoff (n 30), 174, 274.
[74] Sarah Williams, *Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictional Issues* (Hart Publishing, 2012), 64.
[75] Ibid, 202.
[76] UN Human Rights Council, 'Report of the OHCHR Investigation on Sri Lanka (OISL)', UN Doc. A/HRC/30/CRP.2, 16 September 2015, <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session30/Documents/A_HRC_30_CRP_2.docx>.

The exercise of universal jurisdiction, for example in the *In re Pinochet* case, is controversial outside treaty-based jurisdiction.[77] The existence of any duty to prosecute serious international crimes on this basis is even more so.[78] Other concerns such as the possibility of becoming embroiled in regional or national political debates, the need for state cooperation, and respect for state sovereignty, also limit states' exercise of universal jurisdiction.[79] The potential for future prosecutions based upon universal jurisdiction is difficult to predict, but is unlikely in Southeast Asia for the reasons mentioned.[80]

Arguably, states may not bear a customary legal obligation to prosecute human rights violations, even including *jus cogens* norms,[81] although the UN Security Council has occasionally called for the prosecution of some forms of serious violence.[82] However, treaties may require states to try or extradite individuals for certain crimes – examples include the Convention against Torture (CAT), Geneva Conventions, and Genocide Convention.[83] All states in Southeast Asia have ratified the Geneva Conventions and most the CAT and Genocide Convention (see Table 4, chapter 3). Thus all are obligated to prosecute certain crimes, whether or not they have also ratified the Rome Statute, at least where suspected perpetrators are located in their territories. Still, even where states are arguably subject to a 'duty' to prosecute or extradite individuals for international crimes, it can be politically and practically infeasible to do so.[84] In such cases, the ICC might have jurisdiction, potentially through the Security Council referring the situation to the ICC Prosecutor, or there may other available avenues for responding to the criminal conduct. That said, domestic criminal law systems provide the primary avenue for prosecuting international crimes alongside the ICC framework, including pursuant to the ICC's complementarity principle. Indeed, the Rome Statute preamble suggests that 'it is the duty

[77] Ibid, 180-184; see *In re Pinochet*, Spanish National Court, Criminal Division (Plenary Session) Case 19/97, 4 November 1998; Case 1/98, 5 November 1998; Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge University Press, 2005), 94; Dalila Hoover, 'Universal jurisdiction not so universal: time to delegate to the International Criminal Court?' (2011) 8(1) *Eyes on the ICC* 73-105.
[78] M Cherif Bassiouni (ed), *Introduction to Criminal Law: Second Revised Edition* (Martinus Nijjoff Publishers, 2013), 133; but see ibid, 109.
[79] See Hoover (n 77), 75.
[80] Though possible, see section 4, chapter 3.
[81] See Bassiouni (n 78), 934-935; Cryer (n 77); Ratner, Abrams, Bischoff (n 30), 170; e.g. *Prosecutor v Anto Furundzija*, Case No. IT-95-17/1-T, Trial Chamber, Judgement, 10 December 1998, para. 156.
[82] For example in UNSCR Resolution 1272 (1999) the Council 'Condemn[ed] all violence … in East Timor … and demand[ed] that those responsible for such violence be brought to justice'.
[83] E.g., Articles 4, 7, Convention against Torture (CAT): see Hoover (n 77).
[84] Maximo Langer, 'Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes' (2011) 105 *American Journal of International Law* 1-49.

of every State to exercise *its* criminal jurisdiction over those responsible for international crimes'.[85] States are therefore expected to prosecute alleged perpetrators of international crimes where they have jurisdiction.

The Rome Statute crimes encompass a range of conduct – such as murder, rape and slavery – that is addressed by national criminal legislation as "ordinary" crimes, including in Southeast Asia.[86] In order to fulfil the elements of the crimes of genocide, crimes against humanity, or war crimes, however, these criminal activities must have, for example, taken place within a specific broader setting or pattern, or with particular intent (such as to destroy a particular group). This distinction between international crimes that 'shock the conscience of humanity'[87] and domestic crimes arguably elevates crimes committed in certain contexts to a special status: 'international'.[88] In reality, however, 'international' crimes do not have to be prosecuted internationally, or using international crimes offences.[89] This may somewhat blur the distinction between international and national crimes.[90] Assessing a states' capacity to prosecute conduct that might amount to genocide, crimes against humanity, or war crimes therefore requires examining both legislation that specifically addresses international crimes and other criminal laws.

An extensive field of 'transitional justice' has developed alongside international criminal laws and institutions. Like 'international criminal justice', transitional justice is a contested concept. Generally speaking, transitional justice 'can be described as a legal-policy debate that seeks to resolve certain dilemmas, arising at moments of national crisis, about how to deal with serious crime'.[91] Transitional justice may be offered as an 'instruction manual' for responding to mass atrocities, with a 'toolbox' 'to help 'fulfil the

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[85] Emphasis added. Though see Cryer (n 77), 144.
[86] See chapter 3 and annex 3.
[87] Preamble, Rome Statute.
[88] Beatrice Pisani, 'The Rome Statute and Domestic Proceedings for Ordinary Crimes: The (In)Admissibility of Cases before the International Criminal Court' in Carsten Stahn, Larissa van den Herik and Nico Schrijver (eds), *The Diversification and Fragmentation of International Criminal Law* (Grotius Centre for International Legal Studies, 2012), 461-480, 465.
[89] *Prosecutor* v *Lubanga*, Case No. ICC-01/04-01/06, Pre-Trial Chamber I, Decision Concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo, 24 February 2006, para. 31 suggested an 'international' element was not required for domestic prosecutions to restrict ICC admissibility; ibid; see also *Ruto, Kosgey and Sang* (n 32), para. 1. It may be that the ICC will take a different approach in cases of alleged genocide, which neither of these cases addressed.
[90] Pisani (n 88); Kirsten J Fisher, 'The Distinct Character of International Crime: Theorizing the Domain' (2009) 8(1) *Contemporary Political Theory* 44-67.
[91] Susan Kemp, 'The Diversification and Fragmentation of International Criminal Law' in Larissa van den Herik and Carsten Stahn (eds), *The Diversification and Fragmentation of International Criminal Law* (2012) 247-285, 254.

norm' of "justice" – one tool being international criminal law prosecutions.[92] Arguably, the 'ICC is seen as the key enforcement mechanism for these norms'.[93] However, truth commissions, amnesties, civil society forums such as peoples' tribunals, lustration, security sector reform, and other community reconciliation and memorial projects are all transitional justice mechanisms.[94]

This thesis does not address the dispute as to whether criminal or non-criminal mechanisms are most appropriate in responding to atrocities. Instead it asks how (and why) various criminal processes have been adopted and adapted in various contexts. That said, it also refers to non-criminal responses including truth commissions and the reports of national human rights commissions and fact-finding groups, as well as civil society forums, particularly where they perform a quasi-judicial role. These mechanisms may influence state responses to international crimes, in particular by gathering evidence of crimes, recommending that individuals be tried, or publicising the harms suffered by victims in ways that indirectly encourage prosecutions. They also form part of broader debates that contest, reframe and reconstruct the norm of international criminal justice.

There are therefore multiple possible reactions to the commission of international crimes, ranging from no response (or amnesties), to the establishment of international criminal tribunals. Each of these responses, including amnesties, is found in both international practice and transitional justice approaches.[95] However, this thesis is concerned with the international criminal justice norm, which favours ratifying and implementing the Rome Statute and the prosecution of international crimes, typically with some international involvement.[96] It therefore focuses upon how (and why) various *criminal* processes have been adopted and adapted in various contexts in Southeast Asia.

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[92] Susan Harris-Rimmer, *Gender and Transitional Justice: The Women of East Timor*, (Routledge, 2010), 19; see also Rosalind Shaw and Lars Waldorf, 'Introduction: Localizing Transitional Justice' in Rosalind Shaw, Lars Waldorf and Pierre Hazan (eds), *Localizing Transitional Justice: Interventions and Priorities after Mass Violence* (Stanford University Press, 2010) 3-36, 3.
[93] Kristen Campbell, 'Reassembling International Justice: The Making of 'the Social' in International Criminal Law and Transitional Justice' (2013) 8(1) *International Journal of Transitional Justice* 53-74, 55.
[94] Jeffery and Kim (n 56), 1.
[95] Ibid; Ruti G Teitel, *Transitional Justice* (Oxford University Press, 2000), 52-62.
[96] See section 2.

4. International Criminal Justice in Southeast Asia

The Rome Statute and ICC provide only one mechanism for responding to the commission of international crimes. Yet much of the recent scholarly attention specifically addressing international criminal law across Southeast Asia has been directed towards the region's engagement with the ICC, or lack thereof. Toon's analysis of why states in Southeast Asia have not ratified the Rome Statute reveals their concerns about 'harassment suits' related to domestic unrest, political manoeuvring, sovereign rights, US pressure, and insufficient domestic infrastructure or legislative support to apply the Statute.[97] She suggests that some states may have adopted a 'wait and see' attitude or simply prioritise other issues. The presence of ongoing conflicts within Asia may also contribute to a reluctance to facilitate prosecutions. Freeland points out that states within the Asia-Pacific region, while heterogeneous, tend to prefer to address human rights abuses within domestic jurisdictions.[98] However, Kapur argues that the values of non-interference and sovereignty are not necessarily inconsistent with the Rome Statute's principle of complementarity.[99] The advantages for Southeast Asian states that accede to the Rome Statute are described as including finding a 'seat at the table', contributing to the 'evolution of internationalized justice',[100] building support for human rights in the region, and providing an alternative enforcement mechanism.

Thus, there is now a body of research positing plausible reasons for the region's low level of ratifications.[101] This thesis draws on this literature, but takes a different approach by considering how Southeast Asian states *have* participated and *are* participating in the project of international criminal justice. It considers the issue of ratification within a

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[97] Valeriane Toon, 'International Criminal Court: Reservations of Non-State Parties in Southeast Asia' (2004) 26(2) *Contemporary Southeast Asia* 218-232.

[98] Freeland, Steven, 'Towards Universal Justice - Why Countries in the Asia-Pacific Region Should Embrace the International Criminal Court' (2007) 5 *New Zealand Journal of Public International Law* 49-76, 54; Steven Freeland, 'International Criminal Justice in the Asia-Pacific Region: The Role of the International Criminal Court Treaty Regime' (2013) 11(5) *Journal of International Criminal Justice* 1029-1057.

[99] Amrita Kapur, 'Asian Values v. The Paper Tiger: Dismantling the Threat to Asian Values Posed by the International Criminal Court' (2013) 11(5) *Journal of International Criminal Justice* 1059-1090.

[100] Freeland (2007) (n 98), 70-71.

[101] See also Mark Findlay, 'The Challenge for Asian Jurisdictions in the Development of International Criminal Justice' (2010) 32(2) *Sydney Law Review* 215; Mark Findlay, 'The Challenge for Asian Jurisdictions in the Development of International Criminal Justice' (2010) 32(2) *Sydney Law Review* 215; Mark Findlay, 'Sign Up or Sign Off — Asia's Reluctant Engagement with the International Criminal Court' (2014) 1(1) *Cambodia Law and Policy Journal* 49-62; Lasse Schuldt, 'Southeast Asian Hesitation: ASEAN Countries and the International Criminal Court' (2015) 16(1) *German Law Journal* 75-105.

broader framework, which encompasses the domestic implementation and enforcement of laws for prosecuting international crimes, as well as other responses.

Beyond this ICC-focused literature, previous research has provided detailed and comprehensive studies of transitional justice mechanisms established within particular countries in the Asia-Pacific region. Totani, Piccigallo, and Boister and Cryer have provided important analyses of the International Military Tribunal for the Far East, highlighting themes of politicisation and selectivity that are echoed in Southeast Asian responses to international criminal justice today.[102] Others have undertaken comprehensive examinations of the establishment of the ECCC[103] and the various bodies addressing violations in Indonesia and East Timor.[104] Individual country studies have investigated the transitional justice and customary mechanisms that exist beyond the Rome Statute framework, and the place of international law in characterising particular behaviours as crimes that must be prosecuted.[105]

A prominent exception to the dearth of cross-regional or comparative work is Linton's rigorous analysis of the ECCC, the Special Panels in East Timor and Indonesia's human rights tribunals[106] and her 2010 review of post-conflict justice in twelve Asian countries.[107] Linton lays much of the groundwork for this project by detailing the structure and challenges faced by these accountability mechanisms. Kim and Jeffrey's edited

[102] Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal - A Reappraisal* (Oxford University Press, 2008); Philip R Piccigallo, *The Japanese on Trial: Allied War Crimes Operations in the East, 1945-1951* (University of Texas Press, 1979); Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II* (Harvard University Press, 2008).
[103] See chapter 4.
[104] East Timor was renamed 'Timor-Leste' in September 2002 when it joined the UN. 'East Timor' is generally used in relation to events before 2002 and 'Timor-Leste' thereafter. See e.g., Suzannah Linton, 'East Timor and Accountability for Serious Crimes' in M Cherif Bassiouni (ed), *International Criminal Law* (Koninklijke Brill, 2008) 257-282; Richard Burchill, 'From East Timor to Timor-Leste: A Demonstration of the Limits of International Law in the Pursuit of Justice' in Jose Doria, Hans-Peter Gasser and M Cherif Bassiouni (eds), *The Legal Regime of the ICC: Essays in Honour of Prof. I.P. Blishchenko* (Koninklijke Brill, 2009) 255-296; ICTJ and KontraS (n 43); Harris-Rimmer (n 92).
[105] E.g., Harris-Rimmer (n 92), 16; Jiwon Suh, *The Politics of Transitional Justice in Post-Suharto Indonesia* (PhD Thesis, Ohio State University, 2012); Ross Grantham Westoby, *Influencing official and unofficial justice and reconciliation discourse in Cambodia: the role of local non-state actors and institutions* (PhD Thesis, University of Queensland, 2013).
[106] Suzannah Linton, 'Putting Things Into Perspective: The Realities of Accountability in East Timor, Indonesia and Cambodia' (2005) 3(182) *Maryland Series in Contemporary Asian Studies Series* 1-88. Anja Jetschke also addresses the evolution of human rights norms in the Philippines and Indonesia in *Human Rights and State Security: Indonesia and the Philippines* (University of Pennsylvania Press, 2011).
[107] Including Cambodia, Indonesia, Timor-Leste, and the Philippines: Suzannah Linton, 'Post Conflict Justice in Asia' in M Cherif Bassiouni (ed), *The Pursuit of International Criminal Justice: A World Study on Conflicts, Victimisation and Post-Conflict Justice* (Intersentia, 2010) vol 2, 515-753, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2036245>.

collection, *Transitional Justice in the Asia-Pacific*,[108] also analyses the various transitional justice mechanisms adopted in the broader Asia-Pacific region (predominantly outside the ICC system). It finds 'that the use of more synthetic and holistic accountability models is a feature of transitional justice in the Asia-Pacific', often including 'new and innovative measures'.[109] The theoretical approach and methods adopted in this thesis, and its focus upon Southeast Asia, supplements this literature. However, it does so by applying the 'localisation' approach discussed in chapter 2, with the aim of understanding how various actors may resist and adapt various approaches to prosecuting international crimes within diverse contexts.

5. Thesis Approach and Research Questions

This thesis considers state and other actors' engagement with international criminal justice in Southeast Asia. It does so by reviewing the laws and institutions established within the region since WWII to prosecute international crimes, as well as key themes and experiences that accompanied these developments. However, bearing in mind the limitations of focusing only upon the Rome Statute and international criminal law (see section 2), it also uses three qualitative case studies[110] to demonstrate various actors' adaptation of the norm of international criminal justice in more depth.

In order to undertake this analysis, the thesis applies and tests an international relations 'localisation' theoretical framework.[111] This approach is related to constructivist theories, which explain how norms may be diffused to states through socialisation, often proceeding from the adoption of international norms in treaties, to states' internalisation of them in domestic law and practice.[112] As discussed in chapter 2, such theories suggest that norms are diffused over time, between different spaces (international and local), and largely in a direction (across time and space) from the 'international' arena toward recipient states or locals. Constructivist norm diffusion analysis has historically focused on successful norm diffusion cases, rather than addressing how actors might 'resist' or 'adapt'

[108] Jeffery and Kim (n 56).
[109] Hun Joon Kim and Renee Jeffery, 'Conclusion' in Renee Jeffery and Hun Joon Kim (eds), *Transitional Justice in the Asia Pacific* (Cambridge University Press, 2014) 259-280, 263.
[110] See section 3.3, chapter 2.
[111] Amitav Acharya, 'How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism' (2004) 58(2) *International Organization* 239-275.
[112] See chapter 2.

norms.[113] However, 'localisation' anticipates that rather than passively receiving or completely rejecting foreign norms, 'local' actors can draw on local experiences to reconstruct them in new ways.

The concept of 'localisation', as adapted in this thesis, does not prescribe a particular outcome, or propose that actors or states in Southeast Asia (or elsewhere) should act in a certain way or adopt specific norms. Rather, it offers a structure for exploring how actors within the region: resist norms with reference to 'prelocalisation' experiences; use 'local initiative' to reframe norms; and more extensively 'adapt' and reconstruct norms in light of local contexts – leading to the 'amplification' of this process in the form of new institutions and practices. The 'localisation' framework does have limitations, as discussed in chapters 2, 7 and 8. In particular, localisation is expected to be a largely progressive process and conceptually divides 'local' and 'international' actors and norms. However, it helpfully directs attention toward historic experiences, emphasises 'local' agency, recognises the role of non-state civil society actors, and acknowledges that norms can be resisted and adapted in multiple ways. This approach provides scope to explore engagement with international criminal justice in Southeast Asia beyond the Rome Statute framework.

This thesis asks what laws and institutions exist across Southeast Asia to prosecute international crimes and evaluates whether these represent the acceptance, rejection, or adaptation of normalised conceptions of international criminal justice. It approaches this inquiry with reference to a 'localisation' framework, which suggests the following questions:

A. *Prelocalisation*. What prominent experiences have accompanied the development of international criminal justice mechanisms in Southeast Asia since WWII?

B. *Local initiative and Adaptation*. How have different actors, including international organisations, other states, state authorities, and civil society representatives, attempted to influence[114] ideas about how international criminal justice is implemented through laws and institutions in selected states in Southeast Asia? That

[113] Acharya (n 111); Jeffrey W. Legro, 'Which norms matter? Revisiting the "failure" of internationalism' (1997) 51(1) *International Organization* 31-64, 34; see chapter 2; Glossary.
[114] See Glossary.

is, how have these actors attempted to accept, resist, reframe, or reconstruct international criminal justice in light of 'local' beliefs and practices?

C. *Amplification*. What options exist to prosecute international criminal conduct committed in Southeast Asian states?
    a. What institutions for prosecuting international crimes – such as international, internationalised, or special chambers – have been established?
    b. What are the possibilities for prosecuting international crimes under existing (or proposed) domestic legislation?
    c. In relation to these mechanisms:
        a. How do their crimes provisions compare to 'normalised' conceptions of international legal justice, as set out in the Rome Statute?
        b. Do they display or represent new instruments or practices in which local influences remain visible, such as domestic criminal codes incorporating international crimes in modified form, or particularly adapted accountability mechanisms?
        c. How have these laws have been enforced?

D. *Localisation.* What does a theoretical approach concerned with the localisation of norms contribute to analysing how international criminal justice mechanisms have been (or might be) adapted in Southeast Asian states?

This thesis argues that various actors have engaged, in a process of adapting the norm of international criminal justice. This gives rise to several further issues discussed in chapter 7. These include whether regional states have accepted the norm of international criminal justice over time; who and what ideas might be categorised as belonging to particular 'spaces', such as the 'local' or 'international'; and whether it is possible to determine the direction in which influence or ideas about prosecuting international crimes has flowed.

6. Thesis Overview and Research Significance

In order to address questions A-D above using the 'localisation' approach, the thesis is structured as follows. Chapter 2 explores the contribution of international relations theories of constructivism to analysing the diffusion of norms such as international criminal justice. It then presents the particular framework explored in this thesis, which considers how concepts are 'localised' through a process involving prelocalisation, local

initiative, adaptation, and amplification. This perspective invites the application of qualitative research methods. As explained in chapter 2, this thesis therefore responds to the research questions by identifying the laws and institutions for prosecuting international crimes across the region, but supplements this doctrinal approach using case studies that draw on thematic document analysis and semi-structured interviews. This does not neglect the legal character of the questions being considered – which relate, fundamentally, to the adoption of laws and legal mechanisms – but recognises the influence of the broader social and political environment within which these laws are situated.[115]

In order to address research questions A and C, above, in particular, chapter 3 provides an overview of the historical experiences of international criminal justice within states in Southeast Asia. Chapters 4 to 6 then consider how a range of actors have engaged with international criminal justice using three case studies: Cambodia, the Philippines and Indonesia. These chapters identify key experiences of international criminal justice and 'prelocalisation' issues in each state (question A); examine how local and international actors have presented various arguments using 'local initiative' to 'adapt' the concept of international criminal justice in different contexts (question B); and analyse the laws and institutions for prosecuting international crimes in each state – the 'amplification' of the localisation process (question C). The final part of each case study chapter and chapter 7 analyses the significance of these findings for localisation and constructivist approaches toward the diffusion of norms (question D).

Applying a localisation framework allows this thesis to confirm that a range of actors engage with 'international criminal justice' throughout Southeast Asia. However, rather than rejecting the ICC-prosecution focused norm, or accepting it over time through a process of socialisation, they have taken a variety of approaches. International states and organisations have influenced the laws and institutions for prosecuting international crimes across Southeast Asia, but domestic officials and varied civil society actors have also adapted these mechanisms in diverse and dynamic ways. However, it is also conceptually and practically difficult to categorise norms and actors as belonging to either local or international spaces, although social and political structures are important. This challenges the localisation approach, which emphasises the influence of 'local' actors and focuses on the adaptation of 'external' norms.

[115] Roux (n 16).

This thesis contests assumptions about how time, space and the direction of influence shape approaches toward international criminal justice. It argues that the laws and institutions for prosecuting international crimes in Southeast Asia reflect the adaptation of the international criminal justice norm by diverse state and other actors in various locations.

Finally, chapter 8 identifies several implications of this analysis that reconceptualise approaches to norm diffusion in practice. These include the importance of recognising: existing laws, institutions, and civil society initiatives that encourage the prosecution of international crimes throughout Southeast Asia; the complexity and array of such projects and the actors delivering them; and the potential for multiple and dynamic conceptions of international criminal justice.

This research is significant and original as it:

1) Provides an overview of the laws and institutions in Southeast Asia for prosecuting international crimes, thereby addressing the imbalance in existing literature toward Euro-centric and African-focused analysis of international criminal legal developments;
2) Applies and tests a theory of localisation to a topic which this framework has not previously addressed, namely international criminal justice in Southeast Asia;
3) Challenges the localisation framework by analysing laws relating to the same norm across separate case study states, in particular by introducing the concepts of time, space, and direction in this context – and contends that they are embedded in constructivist and related theoretical approaches (including localisation) toward understanding states' compliance with international law;
4) Examines the resistance of states and other actors to substantive international criminal laws or the norm of international criminal justice, in contrast to constructivist norm diffusion analysis which has historically focused on cases of successful norm diffusion;[116]
5) Moves beyond a state-centric approach to examine the arguments and strategies by which various actors, including from civil society, aim to influence responses to international crimes committed in Southeast Asia;
6) Analyses the experiences that accompanied the development of international criminal justice mechanisms in Southeast Asia since WWII, including regional states'

[116] Legro (n 113), 34.

engagement with the ICC, to identify historic and persistent influences that may affect different understandings of international criminal justice; and

7) Shifts attention from the ICC to other potential mechanisms for prosecuting international crimes in Southeast Asia.

This thesis also uncovers areas for further research that could contribute to understanding the development of international criminal law beyond Southeast Asia. These include comparative regional analysis employing a modified localisation approach, as well as additional exploration of the interaction of the ICC and its complementarity principle within Southeast Asia, including in non-Rome Statute party states.

7. Conclusion

This chapter reviewed the content of the norm of international criminal justice, introduced the existing literature concerning international criminal justice in Southeast Asia, and outlined this thesis' research questions, structure, and the significance of its findings concerning the adaptation of international criminal justice. The next chapter describes the 'localisation' approach in more detail and explains why it is a useful framework for exploring the engagement of states and other actors with international criminal justice in Southeast Asia.

Chapter 2 - Localising International Criminal Justice

1. Introduction

International criminal law shifted the historic emphasis of international law on state responsibility toward a focus upon holding individuals accountable for their crimes, often with international involvement and in post-conflict settings. This trend, or 'norm cascade',[1] has been described as being 'embodied' in the establishment of the International Criminal Court (ICC), its principle of complementarity, and the ratification of the Rome Statute by states across the world.[2] The same period saw the proliferation of theoretical 'approaches'[3] to international law, including (despite early divisions between the two 'disciplines')[4] with reference to international relations scholarship.[5]

This chapter analyses 'constructivist' approaches toward the expansion of international criminal justice. It explains why this thesis applies a theoretical framework that emanates from Acharya's observation that states in Southeast Asia have historically adapted external norms in light of local practices and identities (see section 2.4).[6] This 'localisation' theory highlights how actors within states and institutions reconstruct ideas to generate new and possibly innovative approaches to certain problems. Finally, it introduces the methodology adopted in this thesis for examining how states in Southeast Asia have developed laws and institutions for prosecuting international crimes.

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[1] Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52(4) *International Organization* 887-917, 893.
[2] Michael J Struett, *The Politics of Constructing the International Criminal Court: NGOs, Discourse, and Agency* (Palgrave Macmillan, 2008), 23; Benjamin Schiff, *Building the International Criminal Court* (Cambridge University Press, 2008), 257.
[3] 'Approach', 'framework', 'perspective' and 'theory' are used interchangeably in this thesis to describe different theoretical structures and methods for understanding phenomena, including the diffusion and reconstruction of norms, see Glossary.
[4] David J Bederman, 'Constructivism, Positivism, and Empiricism in International Law' (2000-2001) 89 *The Georgetown Law Journal* 469-499; Harold Hongju Koh, 'Why Do Nations Obey International Law?' (1997) 106 *Yale Law School Legal Scholarship Repository* 2599-2659, 2615-2616.
[5] See Anne-Marie Slaughter, Andrew S Tulumello and Stepan Wood, 'International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship' (1998) 92(3) *American Journal of International Law* 367-387; Bederman, ibid.
[6] Amitav Acharya, 'How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism' (2004) 58(02) *International Organization* 239-275, 270.

2. International Relations and International Law

Generally speaking,[7] realist and rationalist international relations theorists expect states to make decisions based on their security and material interests, whereas liberals promote a 'universal condition' whereby international organisations and states advance a globalised world order.[8] For example, realists might consider domestic international crimes laws to result from geopolitical and security relationships, such as pressure from military powers like the United States (US). Rationalists would expect states to employ a cost-benefit analysis taking into account material self-interest when considering prosecuting international crimes. However, rationalist and realist frameworks are challenged by states' acceptance of the ICC, as it lacks great power support and it is unlikely that exposing states' officials to possible prosecution will benefit states materially.[9] A liberal approach could emphasise the role of democracies and institutional governance in fostering the rule of law and human rights,[10] but provides limited scope to investigate '*resistance'* toward international criminal justice.[11]

Constructivist approaches stemmed from post-structuralist and reflectivist critiques of the emphasis on economic or military interests in international relations.[12] Constructivists do not negate the importance of material and instrumental concerns, but suggest that

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[7] Terms such as 'realist', 'rationalist' 'constructivist' and 'liberal' do not have fixed meanings, but are used in the general senses offered in Slaughter, Tulumello and Wood, ibid, 386, 372 and Jeffrey T Checkel, 'Why Comply? Social Learning and European Identity Change' (2001) 55(3) *International Organization* 553-588, 553.

[8] Andrew Moravcsik, 'The New Liberalism' in Christian Reus-Smit and Duncan Snidal (eds), *The Oxford Handbook of International Relations*, The Oxford Handbooks of Political Science (Oxford University Press, 2009) 234-254, 234.

[9] Struett (n 2), 16-17 and 24; Schiff (n 2) , 65, 254 – although enriched or 'thin' rationalist approaches may incorporate the importance of norms: Kenneth W Abbott, 'Enriching Rational Choice Institutionalism for the Study of International Law' (2008) 5(1) *University of Illinois Law Review* 5-46. Mathew Davies, 'ASEAN and human rights norms: constructivism, rational choice, and the action-identity gap' (2013) 13(2) *International Relations of the Asia-Pacific* 207-231, argues that a rationalist approach is more useful for explaining ASEAN states' approach to human rights norms than constructivism. See also Caroline Fehl, 'Explaining the International Criminal Court: A 'Practice Test' for Rationalist and Constructivist Approaches' (2004) 10(3) *European Journal of International Relations* 357-394.

[10] See Slaughter, Tulumello and Wood (n 5).

[11] In this thesis, 'resistance' includes state and non-state opposition toward concepts or actors as well as 'processes in which … small-scale … agencies … have an impact on power, on norms, civil society, the state, and on the international': Oliver P Richmond, 'Critical agency, resistance and a post-colonial civil society' (2011) 46(4) *Cooperation and Conflict* 419-440, 428; see Glossary.

[12] Alexander Wendt, 'Anarchy is what states make of it: the social construction of power politics' (1992) 46(2) *International Organization* 391-425; see also Emanuel Adler, 'Seizing the Middle Ground: Constructivism in World Politics' (1997) 3(3) *European Journal of International Relations* 319-363; Martin Weber, 'Between "Isses" and "Oughts": IR Constructivism, Critical Theory, and the Challenge of Political Philosophy' (2013) 20(2) *European Journal of International Relations* 516-543, 520;.

'normative and ideational structures are as important' in decision-making processes, including by shaping how material factors are interpreted.[13] Thus, agents and social structures are inter-related: actors interact with(in) structures, while social interactions ascribe meaning to actors' material contexts and 'identities'.[14] Actors then 'do what they see as appropriate … in a specific type of situation'.[15] The broad array of constructivist perspectives typically identifies relationships between widely held intersubjective ideas (norms),[16] such as 'international criminal justice', and legal or institutional compliance.

However, the boundaries of 'constructivist' scholarship are ambiguous and the literature voluminous.[17] One branch includes norm diffusion and process-oriented frameworks for explaining legal compliance. Legal process-oriented constructivist scholars view international legal compliance as being a product of the legitimacy[18] or 'fairness of international rules themselves'.[19] Stages of interaction ('discourse')[20] and interpretation (of the global norm) are expected to encourage states to internalise norms. To gain the norm's *acceptance*,[21] the 'aim is to "bind" that other party to obey the interpretation as part of its internal value set', ideally without 'coercion',[22] but through voluntary conversion. Thus, Goodman and Jinks suggest that the way to 'influence states' to comply with a treaty regime is through a process of 'acculturation' that encourages states to conform to a reference group.[23] These approaches indicate the conservative potential of

[13] Christian Reus-Smit, 'The Politics of International Law', in Christian Reus-Smit (ed), *The Politics of International Law* (Cambridge University Press, 2004) 14-44, 21.
[14] See Glossary.
[15] James G March and Johan P Olsen, 'The Logic of Appropriateness' in Robert E Goodin, Michael Moran and Martin Rein (eds), *The Oxford Handbook of Public Policy* (Oxford University Press, 2008) 689-708.
[16] Martha Finnemore and Kathryn Sikkink, 'Taking Stock: The Constructivist Research Program in International Relations and Comparative Politics' (2001) 4 *Annual Review of Political Science* 391-416.
[17] Ibid.
[18] Jutta Brunnée and Stephen J. Toope present an interactional theory of international law that recognises the role of non-state actors in building legal compliance through building reciprocal understandings, see *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press, 2010), 45.
[19] Koh (n 4), 2601.
[20] 'Discourse' is used in this thesis interchangeably with 'debate' and 'discussion' and is not intended to convey a fixed or specific theoretical meaning, for e.g., with reference to the work of Michel Foucault; see Glossary.
[21] See Glossary.
[22] Koh (n 4), 2646.
[23] Ryan Goodman and Derek Jinks, 'How to Influence States: Socialization and International Human Rights Law' (2004) 54(3) *Duke Law Journal* 621-703.

constructivist perspectives that explain how (external) normative arguments should change (internal) state policies.[24]

In the human rights realm, constructivist transnational advocacy scholars have developed multi-layered theoretical frameworks for understanding legal obligation. Keck and Sikkink used a 'boomerang' model to explain how domestic groups work with transnational advocacy networks of NGOs, states and intergovernmental organisations to encourage states to protect human rights,[25] while Risse and Sikkink proffered a 'spiral' framework to explain how such networks influence the integration of human rights norms through stages of adaptation, moral discourse and institutionalisation.[26]

Alternatively, states might '*reject*'[27] international norms (through a failure to adopt or comply with relevant principles) if there is a lack of domestic 'cultural match'[28] with local political and social structures. State's public positions of support for a norm may differ from actual actions within that state, creating what has been called an 'action-identity' gap,[29] 'institutionalization-implementation' gap,[30] 'decoupling',[31] or a form of 'ritualism'.[32] For instance, states may ratify international law treaties without enforcing their provisions domestically. International relations approaches suggest that this might occur because states lack capacity to implement the international norm;[33] enforcement is not in states' interests and the ratification was purely instrumental;[34] or there is a lack of 'norm

[24] Martti Koskenniemi, 'Law, Teleology and International Relations: An Essay in Counterdisciplinarity' (2012) 26(1) *International Relations* 3-34, 16, despite an early constructivist commitment to objectivity, see Weber (n 12), 520.
[25] Margaret E Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Cornell University Press, 1998).
[26] Thomas Risse and Kathryn Sikkink, 'The Socialization of International Human Rights Norms into Domestic Practices: Introduction' in Thomas Risse, Stephen C Ropp and Kathryn Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press, 1999) 1-38.
[27] See Glossary.
[28] Jeffrey T Checkel, 'Norms, Institutions, and National Identity in Contemporary Europe' (1999) 43(1) *International Studies Quarterly* 83-114, 87.
[29] Davies (n 9); Alan Collins, 'Norm diffusion and ASEAN's adoption and adaption of global HIV/AIDS norms' (2013) 13(3) *International Relations of the Asia-Pacific* 369-397.
[30] Alexander Betts and Phil Orchard, 'Introduction: The Normative Institutionalization-Implementation Gap' in Alexander Betts and Phil Orchard (eds), *Implementation and World Politics: How International Norms Change Practice* (Oxford University Press, 2014) 1-26.
[31] Ryan Goodman and Derek Jinks, 'Incomplete Internalization and Compliance with Human Rights Law' (2008) 19(4) *European Journal of International Law* 725-748.
[32] Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (Cambridge University Press, 2015).
[33] Goodman and Jinks (n 31).
[34] Risse and Sikkink (n 26) argue that 'instrumental adaptation … is a typical reaction of norm-violating governments in early stages of the socialization process', 12.

entrepreneurs' able to 'vernacularise' or translate the norms in a manner that renders them acceptable to local audiences.[35]

Such approaches often have a commitment toward the socialisation of particular norms, such as encouraging states to comply with international human rights law, and have been relatively dominant ('mainstream') in describing how international norms spread.[36] As Zimmerman observes, '[w]hen viewed through the norm socialization lens, the outcomes of norm diffusion [other than acceptance] can only ever be described as deficient, never as different'.[37] However, critical and post-colonial scholars have critiqued 'mainstream' or 'first wave'[38] constructivist literature through pointing to the 'norm diffusion' embodied by colonialism, which 'bore all the trappings of 'appropriateness",[39] as well as the 'contiguity between liberalism and constructivism' in favouring universalisms.[40] Others have emphasised the 'value-laden quality of criminal law' in and of itself, and the significance of power relationships in exercising justice.[41]

In summary, a constructivist approach is concerned with identities and the role of social norms – such as the importance of ending impunity for international crimes – and legal norms including substantive case law and treaties, in shaping state behaviour. While 'the field of international criminal justice has been largely insulated from constructivist analysis of justice processes',[42] these approaches suggest that states can be socialised into internalising particular understandings of 'international criminal justice', especially via

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[35] Peggy Levitt and Sally Merry, 'Vernacularization on the ground: local uses of global women's rights in Peru, China, India and the United States' (2009) 9(4) *Global Networks* 441-461.
[36] See Weber (n 12). For a discussion of the problematic nature of the term 'mainstream', but its use as a 'convenient and economizing notion' for dominant forms of argumentation, see Jean d'Aspremont, 'Martti Koskenniemi, the Mainstream, and Self-Reflectivity' (2016) 29(3) *Leiden Journal of International Law* 625-639, 627-628.
[37] Lisbeth Zimmermann, 'Same Same or Different? Norm Diffusion Between Resistance, Compliance, and Localization in Post-conflict States' (2014) 17(1) *International Studies Perspectives* 98-115, 103.
[38] Amitav Acharya, *Rethinking Power, Institutions and Ideas in World Politics: Whose IR?* (Routledge, 2014), 185.
[39] Charlotte Epstein, 'The postcolonial perspective: an introduction' (2014) 6(2) *International Theory* 294-311, 301.
[40] Ibid, 298.
[41] Kenneth W Abbott, 'International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts' (1999) 93(361) *American Journal of International Law* 361-379, 375; see Ronen Palan, 'A world of their making - an evaluation of the constructivist critique in International Relations' (2000) 26(4) *Review of International Studies* 575-598; Richard Price and Christian Reus-Smit, 'Dangerous Liaisons?: Critical International Theory and Constructivism' (1998) 4(3) *European Journal of International Relations* 259-294.
[42] Leila Ullrich, 'Beyond the 'Global–Local Divide': Local Intermediaries, Victims and the Justice Contestations of the International Criminal Court' (2016) 14(3) *Journal of International Criminal Justice* 543-568, 567.

joining treaties such as the Rome Statute. Alternatively, states may reject norms where they conflict with local practices. Constructivist frameworks are useful for analysing states' approaches toward the prosecuting international crimes. Nevertheless, the following section introduces several further implications of such scholarship for the field of international criminal justice. These are grouped as relating to time (teleology), the location of ideas and actors (space), and the direction of influence (directionality).

2.1. Temporal Aspects

Through its instruments, principles and arguments, 'international law is a shaper of time and a divider of times'.[43] '*Time'* is understood here as involving a 'period' or 'stretch' within, or surrounding which, events take place, although actions may also occur 'at' a particular time.[44] Time lacks normative content, in the sense that the passage of time in and of itself does not connote an improvement in the events or actions that it bounds. However, Koskenniemi observes a teleology specific to international law, in that 'legal argument creates a temporal sequence in which the past informs the present, while the future serves as the ideal of the present, its standard of criticism'.[45] One narrative of international criminal law arguably presents the ICC as 'not simply a high point of international criminal law but something of an end-point, too (the domestic finally ceding to the international)'.[46]

Of particular relevance for this thesis, constructivist scholars often describe states' adoption of international legal obligations as proceeding along 'a linear scale from resistance to norm adoption',[47] beginning with discourse, followed by the adoption of a global international legal regime, and ending with the internalisation of the relevant principles (see Figure 1).[48] Constructivists recognise that socialisation is not a simple

[43] Fleur Johns, 'The Temporal Rivalries of Human Rights' (2015) 23(1) *Indiana Journal of Global Legal Studies* 39-60. In relation to time and history(/ies), see e.g. Gerry Simpson, 'Linear law: The history of international criminal law', in Christine Schwöbel (ed), *Critical Approaches to International Criminal Law: An Introduction* (Routledge, 2014) 159-179; Matthew Craven, Malgosia Fitzmaurice and Maria Vogiatzi, *Time, History and International Law* (Martinus Nijhoff, 2007); Anne Orford, 'International Law and the Limits of History', in Wouter Werner, Alexis Galán, and Marieke de Hoon (eds), *The Law of International Lawyers: Reading Martti Koskenniemi* (Cambridge University Press, forthcoming).
[44] Oxford English Dictionary; see Glossary.
[45] Koskenniemi (n 24), 16.
[46] Gerry Simpson, *Law, War & Crime: War Crimes, Trials and the Reinvention of International Law* (Polity, 2007), 34.
[47] Zimmermann (n 37), 102.
[48] See also Betts and Orchard (n 30).

process and many acknowledge that 'the spread of norms based on persuasion by good arguments is a highly improbable occurrence', as it takes place within diverse structural contexts.[49] However, depending on the normative perspective of the author, the hope and expectation is typically that socialisation will eventuate in normative change. Thus, Risse and Sikkink, 'do not suggest that the causal arrows always point in one direction, as in "norms lead to change in interests"',[50] but argue that even 'instrumental adoption of human rights norms … sets into motion a process of identity transformation…'[51] Similarly, international criminal law obligation may be cast as evolving through socialisation toward legal adoption (via ratification of the Rome Statute), the implementation of international criminal laws, and internalisation of these norms within domestic contexts.[52] This thesis addresses only this aspect of 'temporality':[53] the anticipation of linear progress from rejection toward acceptance of the norm of international criminal justice.

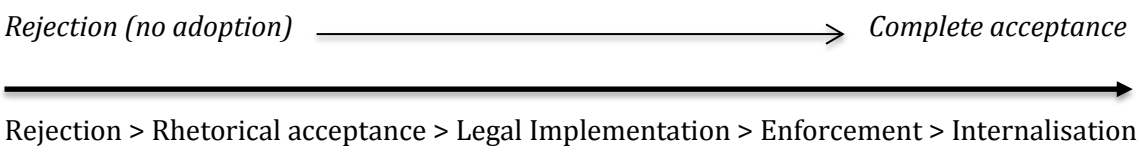

Figure 1: Stages to Norm Adoption in International Relations Norm Research.
Reproduced (modified) from Zimmerman (n 37), 103.

The focus upon how states progress from rejection toward the internalisation of norms is a product of the question such scholars are addressing: how do states comply with international laws? Posing this question casts states as the primary actors in diffusing and accepting norms, albeit with some recognition of the role of transnational advocacy networks and civil society actors as 'norm entrepreneurs' (see below). Further, norm diffusion scholars have tended to focus on apparently 'ethically good' norms, such as the protection of human rights and prosecuting serious violations,[54] so that resistance appears as a negative and potentially temporary aberration that may be overcome through

[49] Nicole Deitelhoff and Lisbeth Zimmermann, 'From the Heart of Darkness: Critical Reading and Genuine Listening in Constructivist Norm Research: A Reply to Stephan Engelkamp, Katharina Glaab, and Judith Renner' (2014) 10(1) *World Political Science Review* 17-31, 20.
[50] Risse and Sikkink (n 26), 9.
[51] Ibid, 10.
[52] See Zimmermann (n 37), 103.
[53] Though see chapters 7 and 8 for further discussion.
[54] Jeffrey T Checkel, 'The Constructivist Turn in International Relations Theory' (1998) 50(2) (January) *World Politics* 324-348, 339; Finnemore and Sikkink (n 16), 404.

additional socialisation.[55] A concern to explain why the spread of international criminal justice might have stalled in the Asia region has led scholars to ask 'What are the main factors inhibiting the other Southeast Asian states from accepting the [ICC]?'[56] or to discuss 'possible reasons for this reluctance on the part of Asia-Pacific countries to embrace the Court'[57] – and then to address such concerns.[58] That is, to consider how these states could progress from rejecting international criminal justice toward accepting it over time.

However, this perspective limits the opportunity to explore how states might take alternative routes toward enforcing international criminal law, or why they might prioritise other goals. Within the transitional justice scholarship, Hinton argues that 'transitional justice time is a highly normative concept of past and present',[59] that 'suggests a teleology of movement from a contaminated pre-state' of violence 'to a purified post-state of a modern liberal democratic order', with a tribunal 'serving as the mechanism of change'.[60] By contrast, a post-colonial perspective, for example, is 'acutely sensitive to the extent to which the past bears upon the present in ways that defy any attempt to package it away into neatly sequential analytical categories or 'stages''.[61] That is, historic experiences can shape contemporary laws and legal enforcement in important, but dynamic and potentially unpredictable, ways. This thesis scrutinises this notion of temporal progress in its investigation of the responses to the international criminal justice norm in Southeast Asia.

[55] See Risse and Sikkink (n 26), 10; Amitav Acharya, 'The R2P and Norm Diffusion: Towards A Framework of Norm Circulation' (2013) 5(4) *Global Responsibility to Protect* 466-479, 469; Richmond (n 11).
[56] Valeriane Toon, 'International Criminal Court: Reservations of Non-State Parties in Southeast Asia' (2004) 26(2) *Contemporary Southeast Asia* 218-232, 219.
[57] Steven Freeland, 'International Criminal Justice in the Asia-Pacific Region: The Role of the International Criminal Court Treaty Regime' (2013) 11(5) *Journal of International Criminal Justice* 1029-1057, 1031.
[58] See also the intention to 'examine the reasons for reluctance to ratify the Rome Statute in specific politicocultural contexts', Mark Findlay, 'Sign up or Sign off – Asia's reluctant engagement with the International Criminal Court' (2013) 13(44) *Sydney Law School Legal Studies Research Paper*, 3.
[59] Alexander Laban Hinton, 'Transitional Justice Time: Uncle San, Aunty Yan, and outreach at the Khmer Rouge Tribunal' in Deborah Mayersen and Annie Pohlman (eds), *Genocide and Mass Atrocities in Asia: Legacies and Prevention*, (Routledge, 2013) 86-98, 87.
[60] Ibid, 94.
[61] Epstein (n 39), 307; Michelle Burgis-Kasthala, 'Scholarship as Dialogue? TWAIL and the Politics of Methodology' (2016) 14(4) *Journal of International Criminal Justice* 921-937.

2.2. Spatial Aspects

Analysing the spread of international criminal justice, especially through Rome Statute ratification across the world, requires a *spatial* awareness. On one hand, related advocacy often appears non-grounded, taking place through online press releases, petitions and social media campaigns. The Rome Statute also arguably promotes a vision of international criminal justice that defies spatial boundaries. It addresses crimes which are 'of concern to the international community as a whole' – and of which, in a sense, we are all victims.[62] On the other hand, there is increasing recognition that international criminal justice comprises aspects of locality, perspective, or geography.[63] Crimes are perpetrated, documented and prosecuted by courts in specific locations with geographic jurisdictions; court rooms divide participants from observers;[64] perpetrators and survivors of international crimes (and those who are both) reside in particular countries; national laws are made in capital cities; and protests take place in carefully selected locations. Colonial histories may also have enduring effects on legal systems, national identities, and economic contexts.[65] Further, the principle of complementarity rests upon a distinction between domestic territorial jurisdictions and the ICC, to be resolved via the operation of the complementarity principle.

Legal geographers have argued that law is inherently related to notions of space, including via legally designating boundaries, such as between the 'public' and 'private', as well as through the ways in which 'legal spaces are embedded in broader social and political claims'.[66] 'Space',[67] from this perspective, not only suggests a physical area or expanse, but is also constructed within, and can constrain, social and power structures. A spatial awareness recognises that 'even the initial characterization of [an] issue must take place

[62] See Sara Kendall and Sarah Nouwen, 'Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood' (2013) 24 *Legal Studies Research Paper Series, University of Cambridge.*
[63] See e.g., Susanne Buckley-Zistel, 'Frictional spaces: Transitional justice between the global and the local,' in Annika Björkdahl et al (eds), *Peacebuilding and Friction: Global and Local Encounters in Post Conflict-Societies* (Routledge, 2016) 17-31; Rachel Hughes, 'Ordinary theatre and extraordinary law at the Khmer Rouge Tribunal' (2015) 33 *Environment and Planning D: Society and Space* 714-731; Ullrich (n 42); Annelise Riles 'The View from the International Plane: Perspective and Scale in the Architecture of Colonial International Law' (1995) 6(1) *Law and Critique* 39-54; and for background Tayyab Mahmud, 'Geography and International Law: Towards a Postcolonial Mapping' (2007) 5(2) *Santa Clara Journal of International Law* 525-562.
[64] See Buckley-Zistel, ibid, 19 in relation to the ECCC.
[65] Mahmud (n 62).
[66] Nicholas K Blomley, *Law, Space and the Geographies of Power* (Guilford Press, 1994), xi; Luke Bennett and Antonia Layard, 'Legal Geography: Becoming Spatial Detectives' 9(7) *Geography Compass* (2015) 406-422.
[67] See Glossary.

from the *situated viewpoint* of one system or another'.[68] Different actors may take different positions as to whether a given matter pertains to international criminal justice (or, for instance, human rights, development, or conflict resolution) depending on their background, training and location. For example, this author's background inevitably influenced the focus of this research upon international criminal justice, the choice to approach this topic with reference to particular international relations frameworks, and its analysis.[69] Spatial considerations are important in this thesis as it explores responses to international criminal justice within certain spaces – states in Southeast Asia – and adopts a theoretical approach that explores interactions between 'local' and 'international' norms and actors.

Scholars often identify different 'levels'[70] of engagement with norms such as international criminal justice, including 'international', 'regional', and 'local' ideas and actors. Constructivist scholarship has demonstrated the important role of transnational advocacy networks and 'norm entrepreneurs' in diffusing norms.[71] Acharya has drawn attention to the especially important role of 'credible local actors' and 'the divide between transnational actors who operate across continents and time zones and local actors … who are situated within single time zones and marginalized locations'.[72] These divisions between local and international actors highlight the importance of perspective and may foreground colonial experiences.[73] Some scholars have also acknowledged the potential benefits of customary or traditional ('local') justice measures.[74] In particular, post-colonial,

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[68] Karen Knop, Ralf Michaels and Annelise Riles, 'From Multiculturalism to Technique: Feminism, Culture, and the Conflict of Laws Style' (2012) 64 *Stanford Law Review* 588-656, 634, emphasis added; Riles (n 63).
[69] Burgis-Kasthala (n 61).
[70] For a critique in the human rights field, see Mark Goodale, 'Ethical Theory as Social Practice' (2006) 108(1) *American Anthropologist* 25-37; and in peacebuilding, Annika Björkdahl et al, 'Introduction: Peacebuilding through the Lens of Friction' in Annika Björkdahl et al (eds), *Peacebuilding and Friction: Global and Local Encounters in Post Conflict-Societies* (Routledge, 2016) 1-16.
[71] Keck and Sikkink (n 25).
[72] Amitav Acharya, 'Local and Transnational Civil Society as Agents of Norm Diffusion' (1-3 June 2012) <http://amitavacharya.com/sites/default/files/Local%20and%20Transnational%20Civil%20Society%20as%20Agents%20of%20Norm%20Diffusion.pdf>.
[73] Epstein (n 39), 303; Mahmud (n 62).
[74] Renée Jeffery and Hun Joon Kim, 'Introduction' in Renée Jefferey and Hun Joon Kim (eds), *Transitional justice in the Asia-Pacific* (Cambridge University Press, 2014), 1-31, 17; Alexander Laban Hinton, 'Introduction: Toward an Anthropology of Transitional Justice' in Alexander Laban Hinton (ed), *Transitional Justice: Global Mechanisms and Local Realities after Genocide and Mass Violence* (Rutgers University Press, 2010) 1-22; Rosalind Shaw and Lars Waldorf, 'Introduction: Localizing Transitional Justice' in Rosalind Shaw, Lars Waldorf and Pierre Hazan (eds), *Localizing Transitional Justice: Interventions and Priorities after Mass Violence* (Stanford University Press, 2010) 3-36, 4.

'anti-liberal',[75] and anthropology scholars have demonstrated how international criminal justice mechanisms can fail to integrate local concerns and even cause harm.[76] In contrast, customary approaches to dispute resolution and reconciliation may offer advantages, including flexibility and legitimacy, and still provide some accountability for perpetrators.[77]

However, this 'local turn' has been criticised for 'romanticising the local',[78] risking the marginalisation of some groups,[79] and failing to recognise how the global and local spheres are 'intertwined'.[80] Even beginning to analyse issues in terms of their 'global' or 'local' aspects arguably requires taking a particular perspective and adopting an assumed sense of 'scale',[81] as if there were '"authentic" local values that could be rediscovered and then strengthened only through careful listening'.[82] Any such artificially distant point of view rests upon contestable assumptions and subjectivities, including for this author.[83] Others may 'reify the 'global' or 'local' as self-evident categories for making sense of the ICC's relationship with affected communities'.[84] These classifications can represent processes of exclusion and inclusion that establish 'an implicit dichotomy between good global/universal norms and bad regional/local norms',[85] which are expected to 'clash'.[86]

In response, some scholars have pointed out that, in practice, the boundaries between actors and norms blur and shift rather than being 'fenced off by some form of boundary'.[87] Indeed, 'the things we call "global" are often circulating locals',[88] while 'if the local is

[75] Buckley-Zistel (n 62).
[76] See the contributions in Rosalind Shaw, Lars Waldorf and Pierre Hazan (eds), *Localizing Transitional Justice: Interventions and Priorities After Mass Violence* (Stanford University Press, 2010) and e.g., Elizabeth Drexler, 'The Failure of International Justice in East Timor and Indonesia' in Alexander Laban Hinton (ed), *Transitional Justice: Global Mechanisms and Local Realities after Genocide and Mass Violence* (Rutgers University Press, 2010) 49-66; Kamari Maxine Clarke, *Fictions of justice: the International criminal court and the challenges of legal pluralism in sub-Saharan Africa* (Cambridge University Press, 2009).
[77] For a discussion of the advantages and limitations of customary approaches, see Shaw and Waldorf (n 74), 14-20.
[78] See Björkdahl et al (n 70), 11.
[79] Shaw and Waldorf (n 74), 16.
[80] Björkdahl et al (n 70), 10, see also Buckley-Zistel (n 62), 18.
[81] Riles (n 63).
[82] Deitelhoff and Zimmerman (n 49), 23.
[83] Section 3.2.
[84] Ullrich (n 42), 549.
[85] Acharya (n 38),185.
[86] Shaw and Waldorf (n 74), 5.
[87] Buckley-Zistel (n 62), 22.
[88] Sally Engle Merry, 'Transnational Human Rights and Local Activism: Mapping the Middle' (2006) 108(1) *American Anthropologist* 38-51, 40, see also Björkdahl et al (n 70), 4.

constructed over *space and time*, so is the global'.[89] Thus, it may be argued that transitional justice derived from practices in Nuremberg and Tokyo that were located in a particular 'space and time', but have since been reproduced to represent 'pervasive global norm[s]'.[90]

Further, actors and ideas labelled state, non-state, local, or global, can engage and intersect, rather than clash, even if this interaction involves some friction.[91] Homogeneous localities rarely, if ever, exist in communities of intersecting ethnic, socio-economic, gender, racial and other identities. There may be as many local meanings of 'international criminal justice' as there are identities within one location, ethnic grouping, or individual.[92] This suggests that spatial designations such as local or global may be better understood as dynamic and mutually reinforcing social constructions than firm categories.

This thesis therefore uses the terms 'local', 'international' and 'global' with these qualifications in mind,[93] including to explore how apparently 'local' or 'international' ideas about international criminal justice might relate to the mechanisms for prosecuting international crimes in Southeast Asia. This provides an opportunity to examine the accuracy and helpfulness of such geographic characterisations for discussing international criminal justice in the region.[94]

2.3. Directional Aspects and Local Agency

Constructivist approaches often include assumptions about the movement of ideas across both time and space, or *directionality* – especially that 'global' influence flows *toward* the 'local'.[95] This aspect is not the same as the concern with teleology, which addressed the presumption of progression over time. Rather, notions of direction address the trajectory of ideas across and between constructed spaces. 'Local' events can 'become international'[96] through the ICC launching an investigation into a situation, perhaps

[89] Buckley-Zistel (n 62), 24, emphasis added.
[90] Ibid, 24.
[91] See Anna Lowenhaupt Tsing, *Friction: An Ethnography of Global Connection* (Princeton University Press, 2005); Shaw and Waldorf (n 74), 5.
[92] Levitt and Merry (n 35). See also Felix Anderl, 'The Myth of the Local' 11(2) *The Review of International Organizations* 197-218: localisation may be instrumental and ritualistic; Kristen Campbell, 'Reassembling International Justice: The Making of 'the Social' in International Criminal Law and Transitional Justice' (2013) 8(1) *International Journal of Transitional Justice* 53-74, 57; Deitelhoff and Zimmerman (49), 23.
[93] See Glossary.
[94] See chapter 7.
[95] Deitelhoff and Zimmerman (49), 22; i.e., 'a norm travels from A to B', Anderl (n 92), 200.
[96] Riles (n 63), 41.

encouraged by transnational advocacy networks. However, directional normative change is implied even where civil society actors encourage the transmission of *international* norms to *recipient* states both 'from above' and 'from below'.[97] It is relatively rare to consider how 'local' actors and concepts, especially in developing states, contribute toward international norm-making processes.[98] Still less common is an investigation of how structural and power dynamics influence – and are affected by – the agency of such actors (see below).[99]

The concept of directionality indicates that 'questions about norm diffusion in world politics are not simply about whether and how ideas matter, but also which and whose ideas matter'.[100] Scholars and civil society actors often consider how international organisations and states can best disseminate the international norms represented by the Rome Statute to recipient states and communities, albeit potentially with the assistance of credible local mediators – such as national members of the Coalition for the International Criminal Court (CICC).[101] The influence of international actors and legal regimes, including via ICC outreach and broad notions of complementarity,[102] may be emphasised over the agency and alternative approaches of others.[103] This may be manifested in a preference for domestic international crimes legislation to be modelled as closely upon the Rome Statute as possible,[104] or in advocacy for *international* criminal justice responses to the commission of international crimes, such as via the ICC or internationalised tribunals.

This thesis demonstrates how actors within and outside Southeast Asia have sought to develop (or resist) laws and institutions for prosecuting international crimes over time and across different spaces. As discussed below and in chapter 7, it retains a sense of directionality, in that it is concerned with how actors have responded to and adapted a

[97] Risse and Sikkink (n 26), 18.
[98] Though see Amitav Acharya, 'Norm Subsidiarity and Regional Orders: Sovereignty, Regionalism, and Rule-Making in the Third World' (2011) 55(1) *International Studies Quarterly* 95-123; Merry (n 88); Levitt and Merry (n 35).
[99] See Richmond (n 11).
[100] Acharya (n 98), 239.
[101] E.g. Michael Bluman Schroeder and Alana Tiemessen, 'Transnational Advocacy and Accountability: From Declarations of Anti-Impunity to Implementing the Rome Statute' in Alexander Betts and Phil Orchard (eds), *Implementation and World Politics: How International Norms Change Practice* (Oxford University Press, 2014) 50-67.
[102] E.g. Luke Moffett, 'Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and The Hague' (2015) 13(2) *Journal of International Criminal Justice* 281-311.
[103] For a general discussion of postcolonial agency and hybridity, see Homi K Bhabha, *The Location of Culture* (Routledge, 1994).
[104] See Carsten Stahn, 'Justice civilisatrice? The ICC, post-colonial theory, and faces of 'the local'' in Christian De Vos, Sara Kendall and Carsten Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press, 2015) 46-84.

'norm of international criminal justice' that, for example, promotes the Rome Statute (see chapter 1). However, it also challenges and draws attention to some of the problematic aspects of a directional analysis.

2.4. The Localisation of Norms

International relations scholar Amitav Acharya draws upon constructivist theories,[105] but emphasises the agency of 'local' actors in adapting norms, including via 'localisation', with reference to 'Southeast Asian histiographical concepts'.[106] This approach seeks to move away from an external/good, internal/bad dichotomy by explaining how 'credible local actors', including from civil society, adjust concepts using their awareness of local conditions. To do so, actors reshape both the norm itself (the international idea) and local practices.[107] Thus, the process is one of mutual *adaptation* rather than one-sided *adoption*. Adaptation involves 'external norms' being 'reconstructed to fit with local beliefs and practices even as local beliefs and practices may be adjusted in accordance with the external norm'.[108] That is, ideas are reconstructed both from the 'outside-in' and the 'inside-out', especially through the agency of local actors. By emphasising this *dual* influence, the localisation approach challenges the 'directional' (external-to-local) emphasis discussed above. Nevertheless, localisation focuses upon how 'external' norms are received and adapted 'internally', meaning that it is still directed toward understanding how international ideas flow toward states and individuals to an extent.

Processes of localisation depend on 'the legitimacy and authority of key norm-takers, the strength of prior local norms, the credibility and prestige of local agents, indigenous cultural traits and traditions, and the scope for grafting and pruning presented by foreign

[105] Acharya does not necessarily consider himself a 'constructivist', although this approach and particularly the emphasis on ideas, identities and culture, forms the genesis of his work on localisation, Amitav Acharya, 'Constructivism and the Study of Global IR' (30 April 2013) <http://amitavacharyaacademic.blogspot.com.au/2014/02/constructivism-and-study-of-global-ir.html>.
[106] Amitav Acharya, 'How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism' (2004) 58(02) *International Organization* 239-275, 244.
[107] In Acharya (n 98), 219, Acharya qualifies his view of localisation as representing a situation where 'local actors are *always* norm-takers', rather than norm-rejecters, and sets out a process of 'norm subsidiarity' to explain how norms may be resisted; see also Acharya (n 55). However, localisation suggests that there may be circumstances where norms are *not* effectively localised (and are, in that sense, rejected), for instance, where pre-existing incompatible norms are very strong, or there is a lack of credible local mediators.
[108] Acharya (n 106), 251.

norms'.[109] It involves four stages: *prelocalisation* (during which norms are resisted and contested), *local initiative* (where local actors 'frame'[110] external norms to create some value for local audiences), *adaptation* (reconstructing norms through 'grafting' them to existing practices, or 'pruning' to select elements that 'fit' local conditions)[111] and finally, *amplification*, where new practices and institutions are developed in which local influences remain highly visible.[112]

Acharya argues that localisation is likely where credible local actors see an opportunity to incorporate useful ideas that improve, rather than undermine, existing institutions. In this way, local '[b]orrowing supplements, rather than supplant[s] an existing norm hierarchy'.[113] Local civil society might decide to *adapt*, rather than adopt, an international concept where, for example, it seems removed from local priorities; is difficult to explain; could be adjusted to become more practically useful; represents double standards or primarily serves others' interests (including donors); or could be managed differently so as to maintain or improve relationships with domestic authorities.[114] Alternatively, actors may attempt to export norms, such as sovereignty or extant domestic practices, in a process of 'subsidiarity' that aims to 'create rules with a view to preserve their autonomy from dominance, neglect, violation, or abuse by more powerful central actors'.[115]

Acharya has paired the concepts of localisation and subsidiarity within a theory of 'norm circulation'.[116] Norm circulation involves the 'creation and diffusion' of norms in a 'two-way process' in which global norms are contested and adapted (localised), while 'local feedback is repatriated back to the wider global context along with other locally constructed norms' (subsidiarity).[117] Circulation is a broader concept concerned with the sources, contexts, agency, and contestations involved in creating norms, rather than the process of examining norm adaptation, which remains the province of localisation. Thus, this thesis is concerned with the narrower process of localisation described in the above

[109] Acharya (n 106), 247-248.
[110] See Glossary.
[111] This thesis also uses 'adaptation' in its broader sense of changing or altering, rather than only referring to this phase of Acharya's framework, see Glossary.
[112] Acharya (n 106), 251; Glossary.
[113] Acharya (n 106), 251.
[114] Acharya (n 72), 4.
[115] Acharya (n 98), 97.
[116] Acharya (n 55), 469.
[117] Ibid.

paragraphs, although there is scope to further analyse the concepts of subsidiarity and circulation in future research.[118]

Variations of Acharya's localisation concept have been used to explain how ASEAN has adapted norms of collective security,[119] HIV/AIDS[120] and the trade in small arms,[121] through a process in which credible local actors reframe and reconstruct norms, as well as local beliefs. Acharya's localisation framework has largely been applied at the regional – particularly ASEAN – level. This thesis focuses on mechanisms developed by states, rather than ASEAN (although chapters 3, 7 and 8 include some general comments about regional themes). However, localisation and subsidiarity concepts have also been applied outside Southeast Asia[122] and to single country situations.[123]

This thesis supplements the emerging localisation literature by analysing the adaptation of a particular international norm across several states. However, it applies and tests a simplified interpretation that draws upon Acharya's four aspects of localisation (prelocalisation, local initiative, adaptation and amplification) and its emphasis on local agency to explore engagement with international criminal justice in Southeast Asia. This technique (referred to in this thesis as the '*localisation framework*' or 'approach')[124] has several benefits.

First, it allows this thesis to consider the role of *non-state* actors, including those located within Southeast Asia, in promoting the prosecution of international crimes. International relations approaches can diminish the influence of these actors by addressing the question of why *states* comply with international law, although constructivist theories incorporate transnational advocacy networks and the ways in which civil society representatives act as 'norm entrepreneurs'.

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[118] See section 3.1, chapter 7; section 3.3, chapter 8.
[119] Acharya (n 106).
[120] Collins (n 29).
[121] David Capie, 'Localization as Resistance: The Contested Diffusion of Small Arms Norms in Southeast Asia' (2008) 39(6) *Security Dialogue* 637-658.
[122] E.g., see Anderl (n 92); Paul Williams, 'The "Responsibility to Protect", Norm Localisation, and African International Society' (2009) 1(3) *Global Responsibility to Protect* 392-416; Michael Arndt, *India's Foreign Policy and Regional Multilateralism* (Palgrave Macmillan, 2013); Kohei Imai, 'Turkey's Norm Diffusion Policies toward the Middle East: Turkey's Role of Norm Entrepreneur and Norm Transmitter' (2011) 42 *Turkish Yearbook of International Relations* 27-60; a redeveloped approach is applied in Karisa, Cloward, *When Norms Collide: Local Responses to Activism against Female Genital Mutilation and Early Marriage* (Oxford University Press, 2015).
[123] E.g., Imai (Turkey) and Arndt (India), ibid.
[124] See Glossary.

Second, notwithstanding the issues discussed in chapter 7, the localisation framework builds upon such constructivist approaches by emphasising the influence and agency of '*local* actors' based within particular locations. Acharya suggests that NGO representatives and other influential actors based within countries will 'often resist, redefine, and contextualize the agenda of outside [actors] and even proposed alternatives when asked to follow concepts and agendas which are inconsistent with their prior beliefs and practices'.[125] As Stahn has observed, approaches that consider the 'local' can highlight 'that social reality is more complex, and often more messy, than articulated in the language of law and justice.'[126]

Third, the localisation framework moves beyond a binary conception of compliance within which states reject or accept international norms, ideally progressing from the rejection toward internalisation over time. Instead, it considers how laws and institutions that represent *adapted* approaches to international and local norms might be developed. Although localisation is expected to occur in a progressive manner, it provides scope to challenge assumptions about the direction of norm diffusion.

Fourth, the localisation approach does not discount material or economic factors, but examines how ideas drawn from varied experiences and structures might converge through processes of adaptation. It therefore provides a starting point for exploring and challenging dominant assumptions about processes of norm diffusion, while recognising the importance of history and context.

This 'localisation approach' anticipates the dynamic, mutually constitutive adaptation of the norm of international criminal justice by state and non-state actors. It provides a framework for understanding state representatives and other actors (including in Southeast Asia) as holding agency, so that rather than uncritically accepting or rejecting notions of international criminal justice, they shape and even export norms, resulting in the development of varied accountability mechanisms. It therefore corresponds to the central aim of this thesis: to consider engagement with the norm of international criminal justice and the laws and institutions for prosecuting international crimes in Southeast Asia, including beyond the Rome Statute framework.

[125] Acharya (n 72), 1.
[126] Stahn (104), 83.

2.5. Time, Space and Direction and International Criminal Justice

In summary, analyses of norm diffusion and the spread of international criminal justice tend to anticipate that states should progress – potentially with the engagement of (non-state) norm entrepreneurs – from a beginning point (impunity) toward an end: the acceptance of international norms (international criminal justice). If states do not appear to be implementing such principles by adopting and enforcing the necessary laws, this could indicate the rejection of the international norm, or that internalisation is still in process. This view suggests that the goals of international criminal justice are achieved over *time* through interaction between *spatially* differentiated actors and ideas, which encourages the external idea to flow in the *direction* of receiving locals. All three aspects suggest a linear path where, with the possible influence of civil society, outsider states move from rejecting the Rome Statute toward inclusion within the ICC framework, represented by ratification or (at least) the adoption of domestic laws that closely replicate the international model.

The localisation framework introduced above challenges the assumption that external norms and actors are the predominant influences upon local action. However, localisation also has limitations. It still anticipates a process of norm adaptation that is essentially teleological: it 'is an evolutionary or "everyday" form of progressive norm diffusion'.[127] While the attention toward local agency and prelocalisation experiences can draw attention to postcolonial histories and power structures, as well as to the circulatory 'feedback loops' provided by local agency,[128] this progressive aspect suggests that localisation might challenge, but fail to overcome, 'the neat sequencing at work in … the liberal arrow of progress' that 'underwrites norms constructivism'.[129] Further, almost by definition, localisation maintains a spatial distinction between 'local' and 'international' actors. Finally, Acharya's approach retains a focus on 'norms' and much of the mainstream constructivist vocabulary – it is thus open to criticisms that it 'does not go far enough' in challenging mainstream instrumentality.[130]

This thesis explores how states in Southeast Asia have developed mechanisms for prosecuting international crimes since World War II. In doing so, it *tests* the usefulness of a

[127] Acharya (n 106), 252.
[128] Acharya (n 55).
[129] Epstein (n 39), 308.
[130] Ayşe Zarakol, 'What made the modern world hang together: socialisation or stigmatisation?' (2014) 6(2) *International Theory* 311-332, fn 43, 328.

localisation framework for analysing states' approaches toward the international criminal justice norm. It contends that aspects of time, space and direction all relate to states' development of laws and institutions for prosecuting international crimes.

3. Method and Regional Focus

Rather than suggesting a particular way to perform research, a constructivist approach makes contingent claims and 'opens up a set of issues'.[131] Despite this, since Checkel bemoaned the lack of empirical support for constructivist claims,[132] scholars have taken up that challenge and called for more attention to be devoted to how ideas spread.[133] Similarly, this thesis applies qualitative methods to analyse international criminal justice in Southeast Asia using a localisation framework.

Qualitative researchers 'stress the socially constructed nature of reality, the intimate relationship between the researcher and what is studied, and the situational constraints that shape inquiry' and 'seek answers to questions that stress how social experience is created and given meaning'.[134] This thesis does not seek to establish actual causation, in the sense of demonstrating that specific actors or arguments directly altered states' laws, and therefore does not adopt a formal process-tracing approach.[135] However, '*influence'* is addressed in this thesis and is understood as involving a broadly 'causal relation' between two or more actors or events, in which influence 'is not something that is either had or not had, it comes in degrees'.[136] In particular, this thesis considers how different individuals and groups *attempt* to influence the laws and institutions for prosecuting international crimes – and relates these arguments both to historic experience and legal mechanisms.

The multi-networked nature of norm modification does not lend itself to formal modelling or statistical testing, whereas the use of case studies can provide nuanced insights and

[131] Finnemore and Sikkink (n 16), 396.
[132] Checkel (n 54).
[133] Finnemore and Sikkink (n 16); e.g. the contributions in Thomas Risse, Stephen C Ropp and Kathryn Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press, 1999).
[134] Norman K Denzin and Yvonna S Lincoln (eds), *The Sage Handbook of Qualitative Research* (Sage, 2011), 8.
[135] E.g., Struett (n 2) and Acharya (n 106). On the dangers of constructivist attempts to establish causation, see Bederman (n 4), 496.
[136] Marlies Glasius, *Foreign Policy on Human Rights: It's Influence on Indonesia under Soeharto* (Hart, 1999), 15.

illustrations of state (and other actors') behaviour.[137] This thesis undertakes a regional overview of international crimes laws in Southeast Asia and then uses three case studies to analyse how states and other actors have engaged with notions of international criminal justice in more detail. Acharya's localisation framework was developed with reference to Southeast Asia, so the region offers a relevant locus for exploring this theory's application toward international criminal justice.

Southeast Asia[138] provides an opportunity to analyse states' approaches to international criminal justice within a geographic grouping that comprises some overlapping priorities and historical features, but also demonstrates different economic, political and cultural contexts and varied civil society engagement in legal processes.[139] Regional states appear to represent a diverse range of attitudes towards international criminal law, as well as the Rome Statute, from somewhat supportive to – perhaps in the majority of cases[140] – oppositional. Further, examining the reception of international criminal justice in Southeast Asia may very slightly redress the imbalance of international criminal law scholarship, which has mostly focused on Africa and Europe.[141]

3.1. Comparing Laws and Self-reflection

This thesis does not compare different states' laws concerning international crimes in the manner of comparative law scholarship – or view these laws as necessarily comparable.[142] However, it does 'compare' (in a generic sense) states' legislation to the Rome Statute – as the primary instrument representing the norm of international criminal justice, rather than because the Statute represents the highest 'benchmark' for prosecuting international crimes. It also identifies different states' approaches toward prosecuting international crimes. Compiling this analysis allows a reader to draw cross-state comparisons, although this is not the primary goal of this thesis.

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[137] Andrew Bennett and Colin Elman, 'Case Study Methods in the International Relations Subfield' (2007) 40(2) *Comparative Political Studies* 170-195, 171; consistent with Hun Joon Kim and Renée Jeffery, 'Conclusion' in Renée Jeffery and Hun Joon Kim (eds), *Transitional Justice in the Asia Pacific* (Cambridge University Press, 2014) 259-280, 273.
[138] See Glossary.
[139] Addressed in chapters 3 and 8.
[140] See Freeland (n 57); Toon (n 56).
[141] Jeffery and Kim (n 74), 3.
[142] See Geoffrey Samuel, *An Introduction to Comparative Law Theory and Method* (Hart Publishing, 2014), Chapter 1, regarding the difficulty of defining comparative law; David Kennedy, 'The Methods and the Politics' in Pierre Legrand and Roderick Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press, 2003) 345-433, 355.

Given this potential for comparison, however, it is worth noting that this thesis takes a broadly functional approach to analysing states' relevant mechanisms and how they are enforced.[143] That is, it asks what laws and institutions could perform the function of prosecuting international crimes. It focuses upon *laws*, in the sense of legislation, as opposed to informal policies, social rules, or religious principles. However, rather than analysing only national legislation concerning genocide, war crimes and crimes against humanity, general criminal code provisions and some other domestic laws are also considered. Moreover, the localisation approach recognises that legislation is situated within political and social structures, so that related institutions, norms and non-legal forums are also mentioned.[144]

This thesis begins with the assumption that 'similar problems may lead to different solutions',[145] but considers 'international criminal justice' to be a contested concept, rather than a 'problem' that necessarily exists in a defined form in all cases.[146] This perspective suggests the potential for pluralism in states' approaches toward international criminal law, as well as for these mechanisms to have unexpected consequences.[147] Some comparative lawyers argue that it is not possible to compare legal systems because of the inherent subjectivities of the observer, while others suggest that only deep immersion into foreign legal 'cultures'[148] will suffice. All researchers who claim to interpret legal phenomena – perhaps particularly those from outside post-colonial states – can replicate 'a much older distribution of power, steeped in colonial, paternalist relations, between those who have the power/knowledge to speak, and those who are, once again, spoken about or for'.[149]

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[143] There are a variety of functional methods of comparative law, though most consider that institutions 'are comparable if they ... fulfil similar functions in different systems', Ralf Michaels, 'The Functional Method of Comparative Law' in Reinhard Zimmermann and Mathias Reimann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006) 339-382, 342.
[144] See section 3, chapter 1.
[145] Michaels (n 143), 358.
[146] Ibid, 366.
[147] Or 'latent functions', ibid, 361; see Mireille Delmas-Marty, 'The Contribution of Comparative Law to a Pluralist Conception of International Criminal Law', (2003) 1(1) *Journal of International Criminal Justice* 13-25; Elies van Sliedregt and Sergey Vasiliev, 'Pluralism: A New Framework for International Criminal Justice' in Elies van Sliedregt and Sergey Vasiliev (eds), *Pluralism in International Criminal Law* (Oxford University Press, 2015) Chapter 1.
[148] On the problematic nature of dealing with 'culture', see Michaels (n 143), 362, 379; and regarding comparative legal cultures see Colin B Picker, 'Comparative Legal Cultural Analyses of International Economic Law: A New Methodological Approach' (2013) 1(1) *The Chinese Journal of Comparative Law* 21-48.
[149] Epstein (n 39), 305.

Constructivists consider cultures to represent social constructions that shape, and are shaped by, various actors. Both observers and participants in legal systems may therefore conceive of 'culture' (or context) and its relationship to law in different ways. Yet, this need not inhibit either type of actor from contributing valuable analysis of laws or legal institutions. Indeed, Michaels has argued that 'once the futile hope to grasp any holistic 'essence' of culture is given up, a functionalist outsider's account need not be inferior to a culturalist insider's account; it just highlights a different perspective' – that is, 'an observer's perspective [provides] an alternative to, not a substitute for, the participant's perspective'.[150]

However, inevitably the author's lack of specialised knowledge of all Southeast Asian states' legal structures, languages, or histories, as well as time and resource restraints, limits the ability of this research to present detailed comparisons or evaluations of different states' legislation – or to promote policy development. It cannot substitute for a participant's in-depth knowledge, but aims to provide a complementary assessment. Moreover, the author's international criminal law and international relations education has shaped the focus of this research, which openly aims to draw attention to approaches to international criminal justice 'beyond the ICC' – not necessarily to *promote* the prosecution of international crimes by other means, but to generate space for discussion about alternative and even resistant possibilities for responding to serious acts of violence of many kinds.

With these limitations and normative precursors in mind, this thesis examines how different actors have offered arguments about international criminal justice and identifies laws and institutions for prosecuting international crimes in Southeast Asia. It argues that various actors within and beyond Southeast Asia have engaged, and are engaging, in a process of adapting the norm of international criminal justice. Nevertheless, this undertaking does have implications for those promoting international crimes prosecutions, as discussed in chapter 8.[151]

[150] Michaels (n 143), 365.
[151] See Kennedy (n 142), regarding the potential political implications of even 'non-political' comparative legal analysis.

3.2. Case Studies and Research Scope

This research combines a regional overview with narrative country-based case studies: Cambodia, the Philippines and Indonesia. Any case study selection process is inherently subjective. Klotz argues that since constructivist research has now established the significance of norms, fruitful studies ought to provide more detailed claims through 'carefully paired comparisons or a larger set of cases', ideally based upon 'least likely' or 'easy' scenarios.[152] Cambodia and Indonesia represent appropriate case studies by providing a cross-section of internationalised and domestic justice mechanisms (the ECCC and Law 26/2000) and different approaches to the Rome Statute. An overview of international criminal law developments within Southeast Asia would not be complete without reviewing the relevant events and mechanisms in these two countries, although each might be placed on different parts of a 'norm diffusion spectrum' – Cambodia as a relatively 'easy' study given its range of international crimes mechanisms (and an 'easy' study for localisation) and Indonesia 'less likely'. The Philippines case contributes complementary insights to Cambodia and Indonesia because, while its legislation and status as a Rome Statute party may suggest it is also an 'easy' study, the Philippines has not hosted an international(ised) or special domestic crimes tribunal and continues to experience episodes of armed conflict and state violence.

All states could provide useful information about engagement with international criminal justice. For example, Vietnam and Lao PDR have experienced conflict and while, like Brunei, these states may not host international criminal accountability mechanisms in the near future, Vietnam has adopted international crimes into domestic legislation. Myanmar has been subject to international sanctions and investigation reports that provide a rich opportunity to consider how and why responsibility for international crimes has been debated, but has failed to result in any legal response to date, although events continue to evolve. Singapore and Malaysia have some relevant legislation, but a relatively peaceful history in past decades provides less opportunity to explore how the norm of international criminal justice has been adapted. Thailand is a useful point of comparison as it has not ratified the Rome Statute or passed legislation specifically making international crimes domestic offences, but there was an attempt to provide amnesties to those involved in 'Red Shirt protests' in 2010, a civil-society-led request for the ICC to review that period, as well as internal investigations into violence in 2013-2014. No legal mechanisms have yet

[152] Audie Klotz, 'Introduction' in Audie Klotz and Deepa Prakash (eds), *Qualitative Methods in International Relations: A Pluralist Guide* (Palgrave Macmillan, 2008) 1-7, 53.

been established to consider these events as international crimes in Thailand, although it is possible this will occur in the medium-term. Hence, while it is possibly a fruitful area for future analysis, it is too soon to meaningfully analyse debates about of the norm of international criminal justice in that country. For all of these states, there is also either insufficient access to domestic legislation or documented descriptions of debates concerning international criminal justice (including in English), or events appeared to be moving too quickly when the case studies were selected in 2013. The internationalised tribunals established within Timor-Leste, the Special Panels, are mentioned in chapters 3 and 6. Timor-Leste perhaps most warranted further review, potentially as another 'easy' study, since it also is a Rome Statute party and has domestic international crimes legislation. However, to allow space and diversity to consider another internationalised structure (the ECCC in Cambodia), which operated in a very different context to the only domestic special chambers in the region (under Law 26/2000 in Indonesia), and to allow discussion of a state without such a special mechanism (the Philippines), Timor-Leste was not used as a standalone case study. However, Chapter 3 still provides an overview of the mechanisms for prosecuting international crimes in these other Southeast Asian states.

The cases are similar in some respects – for example, all states have international crimes legislation. However, these countries exhibit a range of different mechanisms for international criminal justice, as displayed in Table 1.

State	**Rome Statute Ratification**	**International crimes in domestic legislation**	**Specially established mechanism**
Cambodia	11 April 2002	Articles 183-194 Criminal Code, ECCC Law	ECCC
Indonesia	***No***	Law 26/2000 (limited scope)	Ad Hoc Human Rights Courts
Philippines	30 August 2011	Republic Act No. 9851, 2009	***No***

Table 1: Case Study Overview

Cambodia[153] has ratified the Rome Statute and established an internationalised tribunal, the ECCC, alongside implementing national legislation. On the other hand, the ECCC has faced accusations of political interference and has endured budgetary and procedural challenges, suggesting that its establishment is not a clear case of linear norm internalisation. This case study provides the opportunity to examine how Cambodia has

[153] Chapter 4.

implemented Rome Statute provisions and engaged with the ICC, as well as to consider how international criminal justice can be adapted outside the ICC (including through the ECCC and domestically) in challenging political circumstances. Further, the ECCC's 'internationalised' structure presents a form of legal adaptation that might be considered an outcome of localisation.

The Philippines[154] ratified the Rome Statute in 2011, having signed it in 2000. In contrast to earlier parties Timor-Leste and Cambodia, the Philippines had not previously hosted an internationalised or domestic tribunal. Ratification of the Statute *followed* the adoption of domestic international crimes legislation[155] after lengthy campaigns by civil society and within the government, and the establishment of various monitoring bodies. This case study therefore provides an opportunity to analyse the role of such 'credible local actors' and whether the adoption of national legislation and ratification of the Rome Statute involved the acceptance of the international criminal justice norm.

Indonesia[156] has not ratified the Rome Statute, though in the past its leaders indicated a commitment to doing so. Indonesia's Law No. 26 of 2000 (26/2000) allowed the prosecution of crimes against humanity and genocide[157] and a draft criminal code also includes international crimes.[158] Law 26/2000 tribunals were established to consider crimes in East Timor, the Abepura case in Papua[159] and Tanjung Priok, though none tried crimes in Aceh, for instance. These efforts have been criticised as procedurally flawed, ritualistic and biased.[160] This case study provides an opportunity to evaluate Indonesia's engagement with international criminal justice outside the Rome Statute framework. Indeed, it may seem as if Indonesia has effectively rejected the norm of international criminal justice.

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[154] Chapter 5.
[155] Republic of the Philippines, *Republic Act No. 9851, An Act Defining and Penalizing Crimes Against International Humanitarian Law, Genocide and Other Crimes Against Humanity, Organizing Jurisdiction, Designating Special Courts, and for Related Purposes*, 11 December 2009.
[156] Chapter 6.
[157] Republic of Indonesia, *Law No. 26 Year 2000 Concerning Human Rights Courts*, 23 November 2000.
[158] Supriyadi Widodo Eddyono, Wahyudi Djafar and Bernhard Ruben Fritz Sumigar, 'Indonesian Penal Code Reform: Challenges in Reforming Criminal System and Protecting Civil Liberties' (November 2015) <http://icjr.or.id/data/wp-content/uploads/2016/03/Envisioning-Indonesian-Penal-Code-Reform.pdf>.
[159] The Makassar Human Rights Court on the Abepura Case.
[160] See chapter 6.

Case studies cannot be comprehensive and are more useful to explore and illustrate principles than to provide 'descriptive accuracy'.[161] They are 'helpful where the aim is to look for evidence in relation to the questions "why" and "how" rather than "what"'.[162] The case studies are time-bound, since this research captures the use of justice mechanisms for international crimes following World War II until 30 November 2016, with the main focus falling upon the period beginning with the final Rome Statute negotiations in 1998.

3.3. Documents

This thesis adopts the position that identities, norms and interests are mutually constituted,[163] meaning that states or regions may be considered 'socially constructed'.[164] This perspective recognises that state representatives and residents hold their own intersectional identifications and changing ideas about the content of any state 'identity'. If state identities are not given but instead result from interactions, then there is no real question of what states 'think', but only of what their representatives say or do – and what individuals perceive to be the state 'position'. [165] While it may be the case that 'what states do should matter a lot more than what they say'[166] – and official statements often differ from actual policy – practice must often be established from reports and other communications. Similar considerations apply to non-state organisations.

This thesis relies upon a wide variety of documents, including academic literature, NGO reports, legislation and case law, government foreign affairs statements (including before treaty bodies), UN Security Council, General Assembly and Human Rights Council Resolutions and documents, records from the negotiations of the Rome Statute, as well as relevant news reports. Legal materials, including English translations, were obtained through online sources (as indicated in the List of Laws and Cases). This material was examined to ascertain how international crimes might be prosecuted under national laws.

The themes and arguments presented in the case studies about responding to

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[161] Raymond L Bryant, *Nongovernmental Organisations in Environmental Struggles: Politics and the Making of Moral Capital in the Philippines* (Yale University Press, 2005), 58.
[162] Ibid.
[163] The word "other" without capitalisation is not used here to depict a particular Lacanian meaning, and encompasses the symbolic "Other" of subjectively shared meanings and values.
[164] Amitav Acharya, *The Making of Southeast Asia: International Relations of a Region* (Institute of Southeast Asian Studies Publishing, 2012), 23.
[165] See Epstein (n 39).
[166] Bederman (n 4), 494.

international crimes (or serious human rights violations that might amount to such crimes) were identified through basic thematic coding of NGO, international organisation, and government materials. These themes were also developed with reference to the regional historic experiences of international criminal justice identified from secondary literature in chapter 3 and in the first sections of each case study chapter.

This process was necessarily selective because not all documentary material could possibly be analysed. Further, each document, including legal texts and official statements made before international institutions, reflects the particular preferences and contexts of its authors[167] and are subjectively interpreted, while 'real' positions may not be reflected in official statements. This is one reason to supplement and triangulate documentary materials with interviews, but interviews do not entirely supplant these concerns and include their own limitations. However, this thesis was focused on the public discourse about international criminal justice, so actors' choices to deploy particular arguments and certain language were often of primary interest, rather the document's factual accuracy concerning policies or events, for example.

3.4. Interviews

Interviews predominantly supplemented the documentary analysis by helping to identify general themes and arguments about international crimes, particularly for the case studies. To understand how attitudes toward international criminal justice have developed, it would be helpful to compare interview responses with past conversations – perhaps prior to the adoption of any domestic legislation or internationalised institutions. Instead, it was necessary to rely upon earlier documents in order to make time comparisons and triangulate interview findings, even though these documents were made and prepared for different purposes.

Interviews were conducted pursuant to UNSW Australia ethics approval and policies and conducted anonymously.[168] Subjects were purposively sampled to capture members of local and international civil society and official institutions who may have engaged in debates about international criminal justice in the case study states. However, it was

[167] Anne Orford, 'On international legal method' (2013) 1(1) *London Review of International Law* 166-197; Dorothy Smith, *Texts, Facts, and Femininity: Exploring the Relations of Ruling* (Routledge, 1993).
[168] Number 14 084.

difficult to access government representatives, including those directly involved with drafting legislation, and so the majority of interviewees were from civil society.[169] This provided a potentially biased selection of opinions, since most supported the general concept of prosecuting human rights violations.

A small number of interviews were also complicated by the use of translators (in one interview) and language difficulties, although nearly all interviewees were confident English speakers. This reflected the fact that most held advocacy roles requiring international engagement, but also indicates that interviews were selective. Given the focus of this thesis on international crimes laws and institutions, a practical and ethical decision was made to concentrate on interviewing those most directly engaged with international criminal justice mechanisms, and this limitation is acknowledged.

As Kvale puts it, 'knowledge in a research interview is constituted by the interaction itself, in the specific situation created between an interviewer and an interviewee', in the sense that information is constructed in a mutual manner.[170] Despite efforts to maintain objectivity and contribute to a relaxed and open atmosphere, interviews would have been affected by subjectivity on the part of both parties, possibly contributed to by the author's Australian and legal background. However, interviewees appeared overwhelmingly candid. The preparation and self-evaluation exercise undertaken before and after most (especially early) interviews also helped to identify areas for improvement.[171] Interviews were transcribed by the author and coded using a basic thematic analysis approach using NVivo software.

4. Conclusion

This chapter reviewed the contribution of international relations, especially constructivist, theories for understanding how international 'norms' such as international criminal justice are diffused. It identified certain assumptions about time, space and the direction of influence that are embedded particularly in 'mainstream' explanations of how states progress toward internalising norms. A 'localisation' framework was offered as one way to supplement such approaches, although it retains some similar structural features. This thesis draws upon documents and interviews to explore how states have developed

[169] See annex 2.
[170] Steiner Kvale, *Doing Interviews* (Sage Publications, 2008), 14.
[171] See annex 2.

mechanisms for prosecuting international crimes in Southeast Asia, with particular reference to three case studies. This analysis challenges expectations of temporal progression, spatial designations, and notions of the direction of influence.

In order to undertake this task, chapters 3-6 are divided into four key sections that relate to the theoretical approach. First, each chapter considers whether events have progressed from a 'prelocalisation' position of rejecting international criminal justice toward acceptance over time. Second, the localisation framework acknowledges that the 'spread [of] transnational norms can be undertaken either by local or foreign entrepreneurs', although it suggests that 'diffusion strategies that accommodate local sensitivity are more likely to succeed'.[172] Thus, sections concerning 'international states and organisations' are included in each of the case study chapters, alongside an analysis of government and civil society statements. The chapters also discuss whether and how actors have made more extensive attempts to reconstruct ideas about international criminal justice through 'adaptation'. Third, each chapter compares the laws and institutions for prosecuting international crimes committed in states in Southeast Asia to the Rome Statute – as the primary instrument promoted by the normalised approach toward international criminal justice (rather than as a benchmark).[173] This analysis allows this thesis to identify whether these mechanisms represent the acceptance or rejection of the norm, or might instead 'amplify' reconstructed norms. Fourth, the chapters end by identifying how the localisation approach contributed to analysing the laws and institutions for prosecuting international crimes in each state. This structure facilitates this thesis' investigation of how states and other actors engage with international criminal justice by emphasising historic experiences and advocacy throughout and beyond Southeast Asia.

[172] Acharya (n 106), 249.
[173] Stahn (104).

Chapter 3 - International Criminal Justice in Southeast Asia

1. Introduction

This chapter provides an overview of international criminal law in Southeast Asia. It demonstrates that there has been engagement with international criminal justice across the region and reveals key issues of international interference, selectivity, stability, and sovereignty, which are further developed in subsequent case study chapters. Section 2 addresses the first question of this thesis: it considers international criminal law developments in Southeast Asia since World War II (WWII) and prior to the establishment of the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY, ICTR), and identifies 'prelocalisation' themes that accompanied these events. Section 3 introduces how international actors, Southeast Asian states, and civil society have engaged with international tribunals since the 1990s, including during the negotiations for the Rome Statute. It thereby begins to address the second question of this thesis – how have actors sought to use 'local initiative' and 'adapt' the mechanisms for prosecuting international crimes perpetrated in the region? This question is taken up further in subsequent chapters. Section 4 turns to the third question: it reviews the laws and institutions for prosecuting international crimes in Southeast Asia. It considers whether they might 'amplify' norms reconstructed through a process of localisation, but concludes that more detailed analysis is required to address this question. This chapter therefore provides regional context for reviewing the adaptation of international criminal justice in Southeast Asia, but these processes are explored in more detail using the three case studies.

2. Historic Engagement with International Criminal Law

2.1. International Interference

From an ancient law against cannibalism in the Shun Period, to Sun Tzu, Sima and the Wei Liaozi military commentary of 350BCE, Chinese thinkers placed constraints upon waging war.[1] The Laws of Manu in India 'laid down some of the earliest foundations of

[1] Liu Daqun, 'Chinese Humanitarian Law and International Humanitarian Law' in Carsten Stahn, Larissa Herik and Nico Schrijver (eds), *The Diversification and Fragmentation of International Criminal Law* (Grotius Centre for International Legal Studies, 2012) 349-359, 353.

humanitarian rules for armed conflict'.[2] Within the smaller part of Asia now known as Southeast Asia, many regions were historically influenced by Chinese and Indian cultures. They hosted Hindu and Buddhist kingdoms by the ninth century and Islam spread to the region by the late 11th century.[3] Yet historian Anthony Reid suggests that actors tended to adapt external norms to local circumstances, retaining autonomy and cultural differentiation.[4]

In the colonial era, Britain controlled most of what is now Myanmar, Brunei Darussalam, Malaysia and Singapore. French Indochina extended through Laos, Cambodia and Vietnam, while the Dutch and Portuguese claimed modern-day Indonesia and Timor-Leste. The Spanish ruled over the Philippines until it was ceded to the United States following the Spanish-American war, leaving only Siam, now Thailand, independent.[5] The period of colonial occupation entailed the commission of what might now be termed 'international crimes' across the region.[6] Further, colonial domination restricted regional contributions to the formative period of modern international law leading toward the establishment of the UN.[7]

Anti-colonial movements evolved in the early twentieth century, but foreign control persisted until Japan advanced through much of Southeast Asia in WWII, in many cases offering states independence. Most Southeast Asian states ended colonialism in the following decades, although Brunei Darussalam's independence (from the British) was only recognised in 1984, and Timor-Leste's in 2001. Thus, there have been experiences of

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[2] Sang-Hyun Song, 'Preventive Potential of the International Criminal Court' (2013) 3(2) *Asian Journal of International Law* 203-213, 211.
[3] Milton Osborne, *Southeast Asia: An Introductory History* (Allen & Unwin, 2010), 23.
[4] Anthony Reid, *A History of Southeast Asia: Critical Crossroads* (Wiley Blackwell, 2015); Ibid, 6, 23-24. There were differences between upland and lowland peoples and less autonomy during China's intermittent rule of Vietnam until the 16th century, Kenneth Christie and Denny Roy, *The Politics of Human Rights in East Asia* (Pluto Press, 2001), 104.
[5] However, Thailand still experienced constraints on its autonomy, Donald E Weatherbee, *International Relations in Southeast Asia: The Struggle for Autonomy* (Rowman & Littlefield, 2009), 7.
[6] Kerstin von Lingen and Robert Cribb, 'Justice in Time of Turmoil: War Crimes Trials in Asia in the Context of Decolonization and Cold War' in Kerstin von Lingen (ed), *War Crimes Trials in the Wake of Decolonization and Cold War in Asia, 1945-1956: Justice in Time of Turmoil* (Palgrave Macmillan, 2016) 1-23, 16; e.g., Larissa van den Herik, 'Addressing 'Colonial Crimes' through Reparations? Adjudicating Dutch Atrocities Committed in Indonesia' (2012) 10(3) *Journal of International Criminal Justice* 693-705.
[7] M Sornarajah, 'The Asian Perspective to International Law in the Age of Globalization' (2001) 5 *Singapore Journal of International & Comparative Law* 284-313. However, individuals from Southeast Asia have contributed significantly to the United Nations – for example, from 1961 to 1971, Burmese diplomat U Thant was the third Secretary-General and the first non-European to hold that post.

intra-regional and international engagement across Southeast Asia, but also of conflict and international occupation.

2.2. World War II War Crimes Trials in Southeast Asia

Initiatives such as ratifying the Rome Statute or establishing domestic international crimes institutions in Southeast Asia build on a history of international criminal legal engagement since WWII. The United States, Australia, China, France, the Netherlands, United Kingdom, and the Philippines prosecuted more than 5500[8] Japanese soldiers and alleged collaborators under national legislation (see Table 2). These experiences may have affected Southeast Asian states' more recent approaches toward international criminal justice.

Table 2: Allied Prosecutions of International Crimes Post WWII[9]

	No. of trials	No. of accused	No. convictions	Percentage Guilty	Death penalty
IMTFE	1	28	25[10]	89%	7
British trials (Hong Kong, Singapore etc)	306	920	811	88%	265
United States (Yokohama and Manila)	474	1409	1229	87%	163
Australia	296	924	644	70%	148
The Netherlands	448	1038	969	93%	236
France[11]	39	198	198	100%	63
Philippines	72	169	133	79%	17
China	605	883	504	57%	149
Total	*2241*	*5569*	*4488*	*81%*	*1041*

On the international level, the Charter for the International Military Tribunal for the Far East (IMTFE) was modelled on the Charter for the International Military Tribunal in Nuremberg. It provided jurisdiction to 'punish Far Eastern war criminals … charged with

[8] Sandra Wilson, 'After the Trials: Class B and C Japanese War Criminals and the Post-War World' (2011) 31(2) *Japanese Studies* 141-149, reports 5677 B and C class trials, 142.
[9] Source: Caroline Pappas, *Law and Politics: Australia's War Crimes Trials in the Pacific, 1943-1961* (PhD Thesis, University of New South Wales, 1998), 101, with additional IMTFE statistics inserted, see also ibid.
[10] Two who died during proceedings and one was admitted to a psychiatric institution.
[11] Ann-Sophie Schoepfel-Aboukrat cautiously reports more recent research that 230 Japanese war ciminals were tried in Indochina, in: 'The War Court as a Form of State Building: The French Prosecution of Japanese War Crimes at the Saigon and Tokyo Trials' in Morten Bergsmo, Wui Ling Cheah and Ping Yi (eds), *Historical Origins of International Criminal Law: Volume 2* (Torkel Opsahl Academic EPublisher, 2014) 119-141, 120.

offenses which include Crimes against Peace', conventional war crimes and crimes against humanity.[12] 'Far Eastern war criminals' was not intended to cover Allied soldiers and although the IMTFE theoretically had jurisdiction in respect of mid- and low-level perpetrators, it focused on "A" class government and military leaders – whereas "B" and "C" class trials were held separately, mostly by Allied states.[13] This narrow focus was politically pragmatic; swift trials were considered crucial to ensure Japan's democratisation and demilitarisation.[14] IMTFE judges came from Australia, Canada, China, France, India, the Netherlands, New Zealand, the Soviet Union, the United Kingdom (UK), the United States (US) and the Philippines (the only Southeast Asian state represented).[15] Twenty-eight high-level Japanese defendants were tried, all of whom were convicted, including for crimes committed in Southeast Asia.[16]

However, the IMTFE faced several criticisms. It dispensed with certain procedural rules, for instance by allowing the presentation of documentary evidence in lieu of an eyewitness.[17] Broad approaches to command responsibility and conspiracy also attracted critique from some judges.[18] Justice Pal's dissenting judgment rebuked the hypocrisy of charging crimes against peace following colonial domination, through which he suspected the Allies sought to criminalise conflict that challenged the colonial status quo.[19]

As the Cold War shifted priorities away from prosecuting Japanese leaders, some viewed the trials as a 'political failure'.[20] The day after seven IMTFE accused were executed, 17 were released and by 1958 all those remaining in custody were free.[21] The IMTFE contributed to the law surrounding superior responsibility in a non-European context. It also reinforced many findings at Nuremberg through reaching similar legal conclusions,

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[12] Article 5, Charter of the International Military Tribunal for the Far East, 19 January 1946; for background, see e.g. Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal - A Reappraisal* (Oxford University Press, 2008); Philip R Piccigallo, *The Japanese on Trial: Allied War Crimes Operations in the East, 1945-1951* (University of Texas Press, 1979); Kirsten Sellars, 'William Patrick and "Crimes Against Peace" at the Tokyo Tribunal, 1946–1948' (2011) 15(2) *Edinburgh Law Review* 166-196.
[13] See Emmi Okada, 'The Australian trials of Class B and C Japanese war crime suspects, 1945-51' (2009) 16 *Australian International Law Journal* 47-80; Wilson (n 8), 142.
[14] Piccigallo (n 12), 15, 44; Von Lingen and Robert Cribb (n 6), 17.
[15] See chapter 5.
[16] Except for two who died during proceedings and one admitted to a psychiatric institution. Seven were sentenced to death; Table 2.
[17] Boister and Cryer (n 12), Chapter 4; Akira Nakamura (ed), *International Military Tribunal for the Far East: Dissentient Judgment of Justice Pal* (Kokusho-Kankokai Inc, 1999), 141-174.
[18] See Boister and Cryer (n 12), Chapter 8; Sellars (n 12).
[19] Nakamura (n 17), 114-117; Sellars (n 12), 190.
[20] Sellars, quoting a British official, (n 12), 194.
[21] Boister and Cryer (n 12), 317-318.

including with regard to the scope of 'crimes against peace'.[22] Yet its longer-term regional impact remains less certain. The failure to address Japanese Emperor Hirohito's culpability or to prosecute certain crimes – including regarding the 'comfort women' system and the use of biological and nuclear weapons – left silences that have only partially been addressed through relatively recent civil society initiatives.[23]

Allied powers were responsible for prosecuting war crimes committed in areas of the Asia Pacific within their control. For example, the returning British colonial administration held trials across British territories, such as in Hong Kong, based on the 1945 Royal Warrant and the Manual of Military Law of 1929, as well as British criminal law principles. The motivations for conducting these trials were mixed, with historical files suggesting that in Hong Kong the UK 'pursued war crimes prosecutions as a means of reasserting its authority and reclaiming prestige over its colonial territories',[24] even if there was also a desire to see justice served. Apart from the political complexities of prosecuting individuals who collaborated with the Japanese to seek independence from colonial control, judgments lacked detailed reasoning and procedural rules eased the admission of hearsay. Similar legal and political issues arose during the trials held in Singapore[25] and Rangoon.[26]

The US-administered Yokohama trials were held under the authority of the Supreme Commander of the Allied Powers. Of a number of US trials held in Manila, the *Yamashita* decision discussed in chapter 5 was influential at Nuremberg and the IMTFE, despite some concerns about the trial's fairness.[27] As noted in chapter 6, following WWII, returning Dutch rulers prioritised investigating Indonesian independence movements suspected of collaborating with the Japanese. These trials were selective and involved fair trial issues.[28] France administered WWII prosecutions including at the French Permanent Military

[22] Ibid, Chapter 11.
[23] See section 3.4.
[24] Suzannah Linton, 'Rediscovering the War Crimes Trials in Hong Kong, 1946–48' (2012) 13(2) *Melbourne Journal of International Law* 284-348, 291; see generally, Suzannah Linton (ed), *Hong Kong's War Crimes Trials* (Oxford University Press, 2013).
[25] Yuma Totani, *Justice in Asia and the Pacific region, 1945-1952: Allied war crimes prosecutions* (Cambridge University Press, 2014), 129-155.
[26] Ibid, 77-101; Robert Cribb, 'The Burma Trials of Japanese War Criminals, 1946-1947' in Kerstin von Lingen (ed), *War Crimes Trials in the Wake of Decolonization and Cold War in Asia, 1945-1956: Justice in Time of Turmoil* (Palgrave Macmillan, 2016) 117-142.
[27] Section 2.1, chapter 5.
[28] Robert Cribb, 'Avoiding Clemency: The Trial and Transfer of Japanese War Criminals in Indonesia, 1946–1949' (2011) 31(2) *Japanese Studies* 151-170; Lisette Schouten, 'Colonial Justice in the Netherlands Indies war crimes trials', in Kirsten Sellars (ed), *Trials for International Crimes in Asia* (Cambridge University Press, 2015) 75-99.

Tribunal in Saigon. These notionally adopted the procedures for war crimes trials held in France, but were complicated by Vietnam's declaration of independence. The trials aimed 'to reaffirm [France's] sovereignty over Indochina' by demonstrating values of fairness and justice,[29] but also had selective jurisdiction.[30] Still, the Allied WWII trials did address some crimes committed against Southeast Asian civilians (rather than only Europeans)[31] and arguably benefited from 'the collaboration of local people who suffered from Japanese aggression'.[32] This suggests a role for local actors, even if the trials were driven by broader political and legal concerns.

This short overview of the prosecution of WWII crimes in Southeast Asia reveals a substantial history of international crimes prosecutions. However, as Chesterman observes, their legacy is 'richer than often believed but also deeply problematic'.[33] The trials' history of selectivity, political influence, and procedural inconsistencies is echoed in critiques of international criminal justice today.[34] Southeast Asian leaders were also largely not invited to influence the evolving substantive principles of international criminal law. The experience that externally imposed justice mechanisms bind political motivations to prosecutions may have made it less inviting for Southeast Asian states to embrace international criminal justice after the post-war period.

2.3. Regional Stability

The Cold War years saw widespread upheaval throughout Southeast Asia, characterised by the commission of human rights violations and, in some cases, international crimes. Struggles for independence were often associated with internal conflict and in many cases attempts to establish democracies were followed by a turn to more authoritarian rule.[35] Political and ethnic separatism has been a feature of many non-international conflicts across Southeast Asia, including after the establishment of independent states based on

[29] Schoepfel-Aboukrat (n 11), 129.
[30] Ibid.
[31] Von Lingen and Robert Cribb (n 6),12.
[32] Hayashi Hirofumi, 'British War Crimes Trials of Japanese' (2001) 31 *Nature-People-Society: Science and the Humanities*, 31 July 2001, <http://www.geocities.jp/hhhirofumi/eng08.htm>.
[33] Simon Chesterman, 'International Criminal Law with Asian Characteristics?' (2014) *NUS Law Working Paper* 2014/002, 24.
[34] Section 2, chapter 1.
[35] Amitav Acharya, *The Making of Southeast Asia: International Relations of a Region* (Institute of Southeast Asian Studies Publishing, 2012), 129-130.

colonial boundaries.[36] Efforts to resolve internal disputes can still be complicated by perceptions that international crimes prosecutions conflict with goals of stability.[37]

In comparison to WWII, few international crimes mechanisms were established to respond to international crimes in this period.[38] One exception was the 1979 People's Revolutionary Tribunal (PRT) considered in chapter 4, which tried the two most prominent leaders of 'the Democratic Kampuchea regime' (DK) in Cambodia, Pol Pot and Ieng Sary. The relative lack of prosecutions in the latter part of the twentieth century mirrored the situation elsewhere in the world,[39] until the ICTY was established in 1993. Further, Cold War geopolitics were not conducive to securing accountability for international crimes, as superpowers jostled for regional dominance by supporting repressive regimes, including DK and those led by Suharto and Marcos.[40] Thus, international political interference within Southeast Asia remained a feature of the Cold War period.

As for intra-regional disputes, there have been disagreements concerning colonial land and maritime boundaries, such as between Thailand and Cambodia relating to the Preah Vihear temple,[41] and as to the delimitation of maritime zones in the Gulf of Thailand. There has therefore been some willingness to resolve territorial disputes peacefully,[42] but the possibility of international conflict remains, for instance, in the South China Sea.[43] Thus,

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[36] E.g., conflict with separatist groups from the Pattani Sultanate in Thailand, or South Maluku, Aceh, and Papua in Indonesia, see Weatherbee (n 5), 148-159.
[37] See e.g., Elizabeth Drexler, *Aceh, Indonesia: Securing the Insecure State,* (University of Pennsylvania Press, 2008); Patrick Pierce and Caitlin Reiger, 'Navigating Paths to Justice in Myanmar' (International Center for Transitional Justice (ICTJ), July 2014) <http://www.ictj.org/publication/navigating-paths-justice-myanmars-transition>.
[38] There were exceptions, e.g., the UK Privy Council heard appeals in *Public Prosecutor v Oie Hee Koi (and associated appeals)*, 1 All E.R. 419 [1968], 4 December 1967, concerning the status of two captured 'Chinese Malays' (who landed in Malaysia alongside Indonesian forces during the *Konfrontasi*) as prisoners of war under Malaysia's Geneva Conventions Act 1962.
[39] Though see, e.g., *Prosecutor v Klaus Barbie*, Case No. 83-93194, Supreme Court (Criminal Law Chamber), France, 6 October 1983.
[40] See e.g., Anja Jetschke, *Human Rights and State Security: Indonesia and the Philippines* (University of Pennsylvania Press, 2011), 120 regarding the US' changing attitude towards Marcos in the Philippines; Tom Fawthrop and Helen Jarvis, *Getting Away with Genocide?: Cambodia's Long Struggle Against the Khmer Rouge* (UNSW Press, 2005).
[41] *Temple of Preah Vihear (Cambodia v. Thailand)*, Judgments of 26 May 1961, 15 June 1962; *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Judgment of 11 November 2013.
[42] *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgments of 23 October 2001, 17 December 2002; (n 41).
[43] For one view, see Robert D Kaplan, 'The South China Sea is the Future of Conflict', *Foreign Policy* (15 August 2011) <http://foreignpolicy.com/2011/08/15/the-south-china-sea-is-the-future-of-conflict/>; though see *The Republic of Philippines v The People's Republic of China*, Case No. 2013-19,

Southeast Asia has not only experienced international crimes in the past, but exhibits some potential for future internal and international conflicts in which atrocities might take place.

2.4. ASEAN and Sovereignty

ASEAN was created in the post-colonial period from 'shared interests derived from generalized perceptions of the regional international environment' arising out of the post-Sukarno conflict within Indonesia, Indonesia's '*Konfrontasi*' opposition to the creation of Malaysia, and the Second Indochina War.[44] ASEAN's purposes included to 'promote regional peace and stability',[45] though as discussed below and in chapters 7 and 8, ASEAN has not encouraged international crimes prosecutions (but has not overtly opposed them either). All Southeast Asian states are ASEAN members today, except Timor-Leste.[46]

Sovereignty held particular significance for newly independent Southeast Asian states in the post-colonial period. In this context, ASEAN prioritised non-interference over promoting accountability for international crimes. ASEAN decision-making is consensus-driven and decentralised, sometimes leaving the association open to accusations it has 'moved at the pace of its slowest member',[47] but ensuring relatively consistent member support for ASEAN initiatives. During the 1970s and 1980s, ASEAN did not criticise the DK regime in Cambodia or Indonesia's tactics in Papua or East Timor.[48] ASEAN was more expressive when it opposed Vietnam's 1979 intervention in Cambodia, calling an emergency meeting in support of Cambodia's right to self-determination, while Indonesia and Malaysia argued that ASEAN should call 'for an end to Soviet influence in Vietnam'.[49] Yet, in general, ASEAN focused on enhancing trade and economic cooperation rather than international criminal justice.

The 1990s saw the advancement of the international criminal justice norm, particularly through the establishment of the ICTY and ICTR and Rome negotiations. This was also a

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Permanent Court of Arbitration, Award, 12 July 2016; Jane Perlez, 'Prospect of Philippine Thaw Slows China's Plans in South China Sea', *New York Times* (24 September 2016) <http://www.nytimes.com/2016/09/25/world/asia/philippines-south-china-sea.html?_r=0>.

[44] Weatherbee (n 5), 72.

[45] The ASEAN Declaration (Bangkok Declaration), 8 August 1967.

[46] Timor-Leste has observer status and is a member of the ASEAN Regional Forum.

[47] Weatherbee (n 5), 101.

[48] 'East Timor' is generally used in relation to events before 2002 and 'Timor-Leste' thereafter.

[49] Weatherbee (n 5), 82.

turbulent period in Southeast Asia as many states endured the Asian currency crisis and its disastrous economic consequences. However, ASEAN favoured 'constructive engagement' when considering admitting Myanmar into the Association, although it appeared to employ a more active approach in postponing Cambodia's admission after Hun Sen's coup in 1997.[50] These were alterations in pitch rather than reflecting a meaningful change in ASEAN's approach to internal affairs. The promotion by some leaders of 'Asian values' in opposition to human rights norms[51] and relative silence concerning Indonesia's actions in East Timor in 1999 suggested that ASEAN had not changed its preference for non-intervention in order to prioritise international criminal justice.[52]

Despite ASEAN's restrained approach focused upon sovereignty and non-interference in the 1990s, the following section shows that Southeast Asian states largely supported global developments in international criminal justice in this period, though under certain conditions. However, since then, there have continued to be allegations of the commission of international crimes in many states in Southeast Asia. For example, the Special Rapporteur for Myanmar has noted reports of 'widespread and systematic human rights violations faced by the Rohingya [minority group] for decades'.[53] In September 2016, the ICC Prosecutor noted she was 'closely following' reports of alleged extrajudicial killings of suspected drug dealers and users in the Philippines.[54] Moreover, historic crimes remain a contemporary matter of political significance in some states, including in Cambodia and Indonesia (see chapters 4 and 6). Thus, international criminal justice remains a relevant issue in Southeast Asia.

There is experience of international crimes being perpetrated and prosecuted across Southeast Asia, although trials tended to involve political concerns including international involvement, legal and procedural challenges, and selectivity, while there has been a

[50] Hitoshi Nasu, 'Revisiting the Principle of Non-Intervention: A Structural Principle of International Law or a Political Obstacle to Regional Security in Asia?' (2013) 3(1) *Asian Journal of International Law* 25-50, 39.
[51] See Daniel Bell and Joanne R Bauer (eds), *The East Asian challenge for human rights* (Cambridge University Press, 1999).
[52] Nasu (n 50), 40-41.
[53] Yanghee Lee, 'Report of the Special Rapporteur on the situation of human rights in Myanmar', UN Doc. A/HRC/31/71, 18 March 2016, <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session31/Documents/A.HRC.31.71_AEV.docx>, para. 38.
[54] Office of the Prosecutor, 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda concerning the situation in the Republic of the Philippines' (13 October 2016) <https://www.icc-cpi.int/Pages/item.aspx?name=161013-otp-stat-php>.

regional preference for protecting sovereignty. These themes are also evident in many states' approaches toward the increasing number of international criminal tribunals established from the 1990s.

3. Local Initiatives and Adaptation

This section considers how different actors have engaged with international crimes issues across Southeast Asia and particularly with the international criminal mechanisms developed since the 1990s. It addresses international states and organisations (3.1), states in Southeast Asia (3.2), and 'civil society'[55] (3.3).

3.1. International States and Organisations: International Crimes Tribunals

International, including intergovernmental, actors have monitored alleged international crimes and serious human rights violations across Southeast Asia and promoted the prosecution of international crimes. States in the region have participated in the UN Human Rights Council's Universal Periodic Review (UPR) process; UN Special Rapporteurs and commissions have investigated violence in the region;[56] and international states and NGOs have also reported incidents of violence.[57]

However, not all international states or organisations have consistently favoured prosecuting international crimes. The Security Council has not established international tribunals in Southeast Asia, despite UN expert recommendations in the late 1990s and early 2000s to create 'ad hoc' tribunals to consider crimes in Cambodia and East Timor.[58] Possible reasons include 'donor fatigue', as the ICTY and ICTR were expensive and at that time were experiencing significant delays.[59] The Security Council may also have prioritised conflicts where its lack of prevention or timely response had been most criticised.

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[55] See Glossary.
[56] E.g., Lee (n 53); Philip Alston, 'Promotion and Protection of all Human Rights, Civil, Political and Cultural Rights, Including the Right to Development: Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions', UN Doc. A/HRC/8/3/Add.2, 16 April 2008, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G08/130/01/PDF/G0813001.pdf?OpenElement>.
[57] E.g., Human Rights Watch, 'World Report 2016', for instance, regarding Vietnam, see <https://www.hrw.org/world-report/2016/country-chapters/vietnam>; Lee (n 53), para. 60.
[58] Section 3.1, chapter 4; Section 2.4, chapter 6.
[59] Caitlin Reiger and Marieke Wierda, 'The Serious Crimes Process in Timor-Leste: In Restrospect' (ICTJ, March 2006) <http://www.ictj.org/sites/default/files/ICTJ-TimorLeste-Criminal-Process-2006-English.pdf>, 8.

China and other states have opposed the investigation and prosecution of international crimes in Southeast Asia, for example in relation to crimes in Cambodia[60] and Myanmar.[61] In the early 2000s, the US encouraged states in Southeast Asia to sign Bilateral Immunity Agreements (BIAs), under which the parties agree not to surrender nationals of either party to the ICC (see Table 3). Thus, while international actors have sometimes investigated violence in Southeast Asia and encouraged the prosecution of international crimes committed in the region, this position has not been uniform. This complicates efforts to delineate between international and 'local' approaches to the international criminal justice norm.

Table 3: Bilateral Immunity Agreements in Southeast Asia[62]

Country	**Date(s) of Agreement(s)**	**Reciprocal[63]**
Brunei Darussalam	3-Feb-04, 3-Mar-04	
Cambodia	27-Jun-03	
Indonesia		
Lao People's Democratic Republic	24-Dec-03	
Malaysia		
Myanmar		
The Philippines	9-May-03, 13-May-03	
Singapore	17-Oct-03	
Thailand	13-Jun-03	
Timor-Leste	23-Aug-02	
Vietnam		

[60] Section 3.1, chapter 4.
[61] United Nations, 'Security Council Fails to Adopt Draft Resolution on Myanmar, Owing to Negative Votes by China, Russian Federation, Press Release SC/8939' (12 January 2007) <http://www.un.org/press/en/2007/sc8939.doc.htm>.
[62] American Non-Governmental Organizations Coalition for the International Criminal Court (AMICC), 'Countries Concluding Bilateral Immunity Agreements' (2011) <http://www.amicc.org/usicc/bialist>.
[63] Indicates that the US has agreed not to surrender nationals of this country to the ICC, ibid.

3.2. Southeast Asian Authorities

States in Southeast Asia have also engaged with notions of international criminal justice. The case studies provide more detailed examples, but this section considers two broad processes: Southeast Asian support for the international criminal tribunals established in the 1990s and early 2000s; and public positions indicated during the Rome Conference, during which the ICC's Rome Statute was negotiated.

3.2.1. Support for International Tribunals

There has not yet been a uniform approach toward international criminal justice or transitional justice across Southeast Asia. Regional states have generally supported international criminal tribunals, although no Southeast Asian states were members of the Security Council when it unanimously adopted Resolution 877 (1993) establishing the ICTY, nor when the ICTR was established in 1994.[64] Later that decade, the Security Council – including Indonesia and Malaysia – unanimously adopted Resolution 1272 (1999) to establish the United Nations Transitional Administration in East Timor (UNTAET).

The Security Council also unanimously adopted Resolution 1315 in 2000, which requested the Secretary-General to negotiate an agreement for the Special Court for Sierra Leone (SCSL). There were no Southeast Asian states on the Security Council at that time, though China voted in favour of the resolution. In 2007, Indonesia abstained on Security Council Resolution 1757 establishing the Special Tribunal for Lebanon (STL), saying: 'impunity must not be tolerated; justice must prevail. Those who are found responsible … must therefore be brought to justice. Indonesia is committed to support the pursuit of truth and justice'. However, Indonesia argued, based on Article 2(7) of the Charter, that the United Nations (UN) must not 'intervene in matters that are essentially within the domestic jurisdiction of any State'.[65] Thus, Indonesia noted concerns about state sovereignty as the STL was established.

Southeast Asian states generally supported the international 'ad hoc' tribunals once they were established. Funding for the ICTY and ICTR has been included within UN

[64] China abstained on the ICTR vote on the basis that Rwandan approval was essential, Resolution 955 (1994), S/RES/955.
[65] United Nations Security Council, 5685th meeting, UN Doc. SPV.5685, 30 May 2007, 3. China also abstained, noting the lack of universal support for the tribunal in Lebanon and that, in China's view, its establishment was 'Lebanon's internal affair', 4.

contributions, but Cambodia and Malaysia also provided voluntary donations to the ICTY.[66] The ICTY's permanent judges included Lai Chand Vohrah from Malaysia[67] and Amarjeet Singh of Singapore was an ad litem judge, though there were no judges from Southeast Asia at the ICTR.[68] In 1998, Malaysia denounced the Federal Republic of Yugoslavia for not cooperating with the ICTY, saying its 'non-compliance and obstruction … clearly undermined international law' and '… should not be tolerated any further'.[69] These strong statements arguably related to Malaysian domestic political interests in ensuring the appropriate prosecution of crimes committed against Bosnian Muslims by a tribunal it had promoted.[70]

However, opportunities to participate in internationalised tribunals have rarely been taken up. There are no Southeast Asian judges on the benches of the SCSL or STL, for example, nor lead Prosecutors. It seems no state has provided voluntary contributions to either tribunal. Japan is the largest donor to the ECCC, but other than Malaysia and Thailand, no Southeast Asian states have contributed funding.[71] This might reflect capacity constraints, but the fact that states such as Singapore have not financially supported the ECCC suggests a level of ambivalence toward it.[72] In general, however, states in Southeast Asia have not opposed the establishment or operation of international or internationalised criminal tribunals.

3.2.2.The Rome Statute and the ICC

As noted throughout this thesis, regional engagement with international criminal justice extends beyond states' relationships with the ICC. However, this section focuses on Southeast Asian states' positions during and immediately following the Rome Statute negotiations as one example of the official stances taken by many states in relation to prosecuting international crimes. Most Southeast Asian states participated in the Rome

[66] ICTY, 'Support and Donations', <http://www.icty.org/sid/16>.
[67] From the broader Asian region, Asoka de Zoysa Gunawardana (Sri Lanka), O-Gon Kwon (Republic of Korea) and Liu Daqun, Haopei Li and Wang Tieya (China).
[68] Liu Daqun (China) was a judge and Seon Ki Park (Republic of Korea) an ad litem judge.
[69] United Nations, 'Assembly Will Hold Special Session from 26 to 30 June 2000 in Geneva to Assess Implementation of 1995 Social Summit Commitments', UN Press Release GA/9507, 19 November 1998, <http://www.un.org/press/en/1998/19981119.ga9507.html>.
[70] See Azlizan Mat Enh, 'Malaysia's Foreign Policy towards Bosnia-Herzegovina 1992-1995' (2010) 18(2) *Pertanika Journal of Social Science and Humanities* 311-320.
[71] See ECCC, 'ECCC Financial Outlook' (31 March 2016) <https://www.eccc.gov.kh/sites/default/files/Financial%20Outlook%2031%20March%202016-final_0.pdf>.
[72] Kevin Ponniah, 'Charity begins elsewhere', *The Phnom Penh Post* (4 September 2014) <http://phnompenhpost.com/national/charity-begins-elsewhere>.

Statute negotiations, although their priorities were not always reflected in the final draft. When the UN's Sixth Committee considered the 1994 International Law Commission (ILC) draft for a Statute, Malaysia cosponsored a draft resolution convening a committee to discuss establishing a court.[73] A Preparatory Committee met in 1996, 1997 and 1998 and was open to all members of the UN and special agencies. Singapore was among the states that submitted the most proposals for draft articles and Malaysia co-chaired the informal group for organisational questions.[74]

With two exceptions, all Southeast Asian states sent delegations to the 1998 Diplomatic Conference that followed the Preparatory Committee and finalised the Rome Statute. The exceptions were Cambodia, which faced resource constraints, and Myanmar, which was relatively isolated at the time.[75] No Southeast Asian states became 'Vice-Presidents' of the Conference, as these posts were allocated on a broader regional basis, but the Philippines was appointed to the drafting committee.[76]

During treaty negotiations, states may advocate a particular legal position that they would not wish to be applied to them in practice. Further, all Southeast Asian states are members of the Non-Aligned Movement (NAM) and some statements related to NAM objectives.[77] However, Southeast Asian states evidently supported an independent court that respected the primacy of national jurisdictions. Indonesia's representative argued that in 'drafting the Statute, the Conference must uphold the principle of respect for national sovereignty'.[78] Indonesia promoted a narrow understanding of the complementarity principle where 'the Court would act … only when national justice systems were unavailable to do so'[79] and a prosecutor would not enjoy *proprio motu* investigation powers.[80] Malaysia also argued that the Court 'should complement and not replace

[73] This draft resolution was replaced and eventually adopted by the General Assembly as A/RES/49/53, which called for the formation of an ad hoc committee to further consider establishing the court.
[74] Singapore submitted 9 of 53 proposals during just the first session in 1996: UN General Assembly, 'Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I (Proceedings of the Preparatory Committee during March-April and August 1996)', UN Doc. A/51/22, 1996, <http://www.legal-tools.org/uploads/tx_ltpdb/doc21323.pdf>.
[75] Timor-Leste had not yet gained independence.
[76] United Nations, 'Summary records of the plenary meetings and of the meetings of the Committee of the Whole (Volume II), United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court', UN Doc. A/CONF.183/13 (Vol.11), 15 June - 17 July 1998, <http://legal.un.org/icc/rome/proceedings/contents.htm> (Rome Conference).
[77] E.g., Rome Conference (n 76): the Philippines, 82; Vietnam, 111; Indonesia, 337.
[78] Ibid, 73.
[79] Ibid, 73.
[80] Ibid, 200.

national courts', so that 'it was of paramount importance that the Court be truly independent, fair, effective and efficient'.[81] Thailand and Vietnam's delegates made similar statements.[82]

The Philippines favoured an independent prosecutor with *proprio motu* powers, but still suggested that 'national judicial systems should have primacy' and the ICC should only act when 'national institutions did not exist, could not function or were otherwise unavailable'.[83] However, the Philippines eventually voted in favour of the broader conception of complementarity finally included in the Statute.[84] Thus, even during the late 1990s, Southeast Asian states supported establishing an international criminal court. They nevertheless made clear their strong preference for respecting the primacy of national jurisdictions and state consent.

Southeast Asian states supported the ICC exercising jurisdiction in respect of genocide, war crimes and crimes against humanity, but also asked for other crimes to be included. Singapore was 'dismayed' that the use of chemical and biological weapons was excluded at the final stages of the negotiations.[85] Indonesia favoured incorporating a crime of aggression and argued that if 'the new reality could be accepted in the context of defining crimes against humanity, it should also be accepted with regard to the use of nuclear weapons'[86] – hinting at the selectivity involved in excluding such conduct from the court's jurisdiction. Thailand also promoted the inclusion of aggression[87] and drug trafficking.[88] For Vietnam, 'it would be unacceptable … for aggression not to be included',[89] but also, 'serious consideration should be given to including economic and other blockades' as inhumane acts.[90] The Philippines had also sought the inclusion of aggression,[91] drug trafficking and terrorism.[92] In the closing stages of the Diplomatic Conference, Malaysia agreed that the 'core crimes of genocide, war crimes and crimes against humanity should

[81] Ibid, 109.
[82] Ibid, 106, 194 (Thailand), 111 (Vietnam).
[83] Ibid, 82.
[84] Ibid, 122.
[85] Ibid, 124. Apparently this was a backlash to non-nuclear states' arguments against the double standards of criminalising chemical and biological weapons but not the use of nuclear weapons, see David Scheffer, *All the Missing Souls: A Personal History of the War Crimes Tribunals,* Human Rights and Crimes Against Humanity (Princeton University Press, 2012), 225.
[86] Rome Conference (n 76), 165.
[87] Ibid, 176, 291.
[88] Ibid, 135, 176.
[89] Ibid, 178.
[90] Ibid, 287.
[91] Ibid, 292, 340.
[92] Ibid, 292.

be included', despite having expressed reservations about this scope during the Preparatory Committee meetings. Malaysia 'did not, however, support the inclusion of the so-called treaty crimes' such as drug trafficking, 'because they were best left to the *national* courts'.[93]

Singapore played a significant role during the Diplomatic Conference. Not only did its representatives submit various proposals regarding the substantive draft Articles, but Singapore proposed a change to Article 16 to allow the Security Council to defer ICC proceedings. This change, with amendments from Canada, proved a turning point in the negotiations.[94] However, when it came time to vote on the draft Statute, Singapore believed the final text reflected a negotiated compromise in which 'many small States were not involved'.[95] Similarly, Indonesia was apprehensive that '[o]ver-politicization had added to the difficulties of the negotiating process' and eroded the complementarity provisions.[96] These concerns about consultation and politicisation echo the experiences of many Southeast Asian states with the implementation of international criminal justice after WWII. No Southeast Asian states mentioned the IMTFE during negotiations, even though similar concerns surrounding the IMTFE – including selectivity and the importance of sovereignty – resurfaced in their comments at Rome. It seems states preferred to focus on the future operation of the ICC, or perhaps did not view the IMTFE as a legitimate or positive example upon which to draw.

Southeast Asian states did not necessarily have their core concerns reflected in the Rome Statute as finally adopted. Although aggression was included in the Statute, it remained undefined until the 2010 Review Conference (see below) and will not be prosecuted until some time after January 2017.[97] The Statute does not address drug trafficking, the use of nuclear weapons and many other crimes. The principle of complementarity addressed concerns about the primacy of national jurisdictions to a degree, but states such as Malaysia, Vietnam, Indonesia and Thailand had favoured a consent-based or opt-in/out procedure.

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[93] Ibid, 109, emphasis added.
[94] Michael J Struett, *The Politics of Constructing the International Criminal Court: NGOs, Discourse, and Agency* (Palgrave Macmillan, 2008), 129; Scheffer (n 85), 416.
[95] Rome Conference (n 76), 124.
[96] Ibid, 73.
[97] After two-thirds of Rome Statute States Parties activate the ICC's jurisdiction over aggression.

The conference closed on 17 July 1998 after 120 states voted in favour of the Rome Statute. Seven states voted against its adoption and 21 abstained.[98] The identity of the voters was not recorded, but some states announced their positions, including the Philippines (in favour) and Singapore (abstained). Several or more Southeast Asian states likely abstained, especially those emphasising the importance of consent-based jurisdiction such as Indonesia, Malaysia, Vietnam and Thailand, even though Southeast Asian states had been in favour of establishing a Court in principle.

Brunei Darussalam, Indonesia, Lao PDR, Philippines and Thailand all contributed delegations to the Preparatory Commission for the ICC held in early 1999, which developed the Court's Rules of Procedure and Evidence and Elements of Crimes. The Rome Statute entered into force on 1 July 2002, by which time the Philippines had signed the Statute (on 28 December 2000) and Cambodia had ratified on 11 April 2002. Timor-Leste acceded to the treaty shortly afterward, on 6 September 2002. After a long period of internal negotiations (discussed in chapter 5), the Philippines ratified the Statute on 30 August 2011, leaving Southeast Asia with a very low level of participation relative to other regions (27 versus 64 per cent, see Table 4), despite their engagement during the Rome Conference.

Southeast Asian states continued their involvement with developing the substantive provisions of the Rome Statute. Indonesia and the Philippines sent large delegations to the 2010 Review Conference in Kampala as observer states and Lao PDR and Malaysia sent several representatives.[99] Indonesia stated that 'achieving universality of the Rome Statute should be a vital goal of this Review Conference to ensure the broadest jurisdiction and support and cooperation from the international Community', although it also emphasised the importance of the complementarity principle.[100]

Thus, Southeast Asian states have supported international criminal justice mechanisms in intergovernmental fora, though generally on the basis that the tribunals exercise justice impartially and the states' concerned consent to the exercise of jurisdiction. However, in comparison to other regions such as Africa, Europe and Latin America, Southeast Asia has

[98] Rome Conference (n 76), 121.
[99] ICC, 'Delegations to the Review Conference of the Rome Statute of the International Criminal Court', ICC Doc. RC/INF.1, 26 August 2010, <https://asp.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-INF.1-reissued-ENG-FRA-SPA.pdf>.
[100] Republic of Indonesia, 'Statement by Mr. Mulya Wirana, Head of Indonesian Delegation to the Review Conference of the Rome Statute, Kampala, 31 Mei - 11 June 2010', <https://asp.icc-cpi.int/iccdocs/asp_docs/RC2010/Statements/ICC-RC-gendeba-Indonesia-ENG.pdf>.

had fairly limited involvement with ICC operations, as only three states are Rome Statute parties. There has not been a common ASEAN position encouraging regional or universal ratification, as in the European Union[101] and, initially, the African Union.[102] Yet, there has still been significant engagement with the notion of international criminal justice, including by civil society actors.

3.3. NHRIs and Civil Society

Alongside the development of laws and institutions to prosecute international crimes (see section 4), National Human Rights Institutions (NHRIs) have been established across the region[103] and collaborate via networks such as the Asia Pacific Forum.[104] NHRIs may in some cases investigate human rights violations, including the commission of international crimes. Wolman has pointed out that NHRIs' close ties to local groups including NGOs and government representatives mean they 'are in a strong position to play a leading role in elucidating the details of what localized Asian conceptions of human rights values can look like'.[105] This influence could extend to contributing toward or adapting norms of international criminal justice, as discussed in chapters 5 and 6, although NHRIs may also lack the independence or the resources to do so effectively.

For example, Indonesia's Komnas-HAM has produced several influential reports recommending prosecutions for international crimes and documented violence committed during 1965 (see chapter 6).[106] Since being established in 2011, the Myanmar National

[101] Although there have been challenges, see Olympia Bekou, 'Mainstreaming Support for the ICC in the EU's Policies' (European Union, 2014) <http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/433844/EXPO-DROI_ET(2014)433844_EN.pdf>.
[102] African Union, 'Statement by Mr. Ben Kioko, Legal Counsel of the African Union Commission on Behalf of the AU Commission, at the Review Conference of the Rome Statute of the International Criminal Court (ICC), Kampala, Uganda, 31 May-11 June 2010' (2010) <https://asp.icc-cpi.int/iccdocs/asp_docs/RC2010/Statements/ICC-RC-gendeba-AfricanUnion-ENG.pdf>.
[103] The National Human Rights Commission of Thailand, Philippines Commission on Human Rights, Komnas-HAM, Timor-Leste Office of the Provedor for Human Rights and Justice, Myanmar National Human Rights Commission, and Human Rights Commission of Malaysia.
[104] Andrew Byrnes, Andrea Durbach and Catherine Renshaw, ''A tongue but no teeth?': the emergence of a regional human rights mechanism in the Asia Pacific region.' (2009) 31(3) (June) *Sydney Law Review* 211-238.
[105] Andrew Wolman, 'National Human Rights Commissions and Asian Human Rights Norms' (2013) 3(1) *Asian Journal of International Law* 77-99, 78.
[106] Though see Suzannah Linton, 'Accounting for Atrocities in Indonesia' (2006) 11 *Singapore Year Book of International Law* 199-241, 206, regarding concerns about Komnas-HAM's independence.

Human Rights Commission (MNHRC) has received thousands of complaints,[107] the vast majority of which reportedly related to land disputes.[108] It has investigated several high profile human rights violations and even recommended the investigation and prosecution of members of the military.[109] Civil society actors suggest the MNHRC has 'done little to bring accountability to the perpetrators'[110] and Myanmar's leaders, including since the November 2015 elections, do not appear to have embraced the norm of international criminal justice.[111] However, it may be that, with civil society support, official actors and the MNHRC could contribute toward prosecuting serious violations and international crimes in future.

Some members of civil society[112] have also engaged with the ICC. Southeast Asian NGOs have submitted statements to ICC Assembly of States Parties (ASP) meetings,[113] including from non-states parties such as Thailand.[114] Thai civil society actors also sent communications to the ICC Prosecutor about the deaths of 89 individuals during the 2010

[107] Myanmar National Human Rights Commission, 'Statement by Myanmar National Human Rights Commission on the occasion of the International Human Rights Day which falls on 10 December 2015 Statement No (16/2015)' (10 December 2015) <http://www.mnhrc.org.mm/en/statement-by-myanmar-national-human-rights-commission-on-the-occasion-of-the-international-human-rights-day-which-falls-on-10-december-2015-statement-no-162015/>.
[108] Myanmar Eleven, 'Land grabbing top the list of rights violations', *The Nation*, 3 September 2014 <http://www.nationmultimedia.com/aec/Land-grabbing-top-the-list-of-rights-violations-30242458.html>.
[109] E.g., Myanmar National Human Rights Commission, 'The inquiry report of the Myanmar National Human Rights Commission into the death of Ko Aung Naing (a) Ko Aung Kyaw Naing (a) Ko Par Gyi' (2 December 2014) <http://www.mnhrc.org.mm/en/2014/12/the-inquiry-report-of-the-myanmar-national-human-rights-commission-into-the-death-of-ko-aung-naing-a-ko-aung-kyaw-naing-a-ko-par-gyi/>.
[110] Burma-Myanmar UPR Forum, '2nd Cycle Universal Periodic Review: Myanmar UPR 2015: Information on the Status of the Human Rights Situation in Myanmar' (2015) <https://www.upr-info.org/sites/default/files/general-document/pdf/upr_advocacy_factsheets_-_myanmar2015.pdf>.
[111] See Yanghee Lee, 'End of mission statement by the Special Rapporteur on the situation of human rights in Myanmar', 1 July 2016, <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20224&LangID=E#sthash.sJlBP0Hc.dpuf>.
[112] See Glossary.
[113] E.g., FORUM-Asia, 'Intervention at the General Debate on Behalf of Asian Forum for Human Rights and Development (FORUM-Asia), Steering Committee Member of the Coalition for the International Criminal Court and its Focal Point for Asia-Pacific' (2013) <https://asp.icc-cpi.int/iccdocs/asp_docs/ASP12/GenDeba/ICC-ASP12-GenDeba-AsianForum-ENG.pdf>; Philippine Coalition for the International Criminal Court (PCICC), 'Breakthrough in Asia-Pacific for Effective Prosecution' (20 November 2015) <https://asp.icc-cpi.int/iccdocs/asp_docs/ASP14/GenDeb/ASP14-GenDeb--NGO-PCICC-ENG.pdf>.
[114] Thai Alliance for Human Rights, 'The International Criminal Court's 12th Assembly of States Parties' (21 November 2013) <https://asp.icc-cpi.int/iccdocs/asp_docs/ASP12/GenDeba/ICC-ASP12-GenDeba-ThaiAlliance-ENG.pdf>.

Red Shirt protests in 2011.[115] The former President of the ICC attended regional forums organised by Parliamentarians for Global Action (PGA) and the Coalition for the International Criminal Court (CICC) promoting the ratification of the Rome Statute.[116] The case study chapters also discuss how various groups have documented crimes, advocated for the international crimes prosecutions, and monitored trials.

These activities often involve civil society representatives based within Southeast Asia drawing on 'local'[117] initiatives to promote the norm of international criminal justice. This includes linking accountability goals to other topical subjects in the region, such as preventing mass atrocities,[118] or developing 'political will' through parliamentary briefings and attempting to '[e]nsure that accession to, or ratification of, the Rome Statute is seen as a tool to strengthen the national legal system, the Rule of Law and the independence of the judiciary'.[119] However, some actors have moved beyond promoting the prosecution of international crimes via the Rome Statute.

3.4. Local Adaptation

This thesis focuses on legal, and therefore state-developed, accountability mechanisms.[120] However, it also explores how regional actors have responded to alleged international crimes in a variety of ways that 'adapt' the concept of international criminal justice. This includes 'grafting' aspects of the norm on to existing practices, or 'pruning' it to select elements that 'fit' local conditions.[121] Section 4 mentions several mechanisms that reflect some, but not all aspects of the international criminal justice norm. Further, transitional justice activities have supplemented mechanisms focused on international crimes.

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[115] The Nation, 'Handing 2010 cases over to ICC discussed', *The Nation*, (27 November 2012) <http://www.nationmultimedia.com/politics/Handing-2010-cases-over-to-ICC-discussed-30195102.html>.
[116] E.g., Sang-Hyun Song, 'Keynote address Second Asia-Pacific Consultation on the Universality of the Rome Statute of the International Criminal Court Parliamentarians for Global Action & Parliament of Malaysia' (9 March 2011) <https://www.icc-cpi.int/NR/rdonlyres/0BD8BB10-C186-4EEE-8D0D-B8C3E53AD234/283100/110309ICCPresidentSongKeynoteatPGAAsiaPacificConsu.pdf>.
[117] See Glossary.
[118] E.g., International Coalition for the Responsibility to Protect, '#R2P Weekly: 16 – 20 November 2015' (20 November 2015) <https://icrtopblog.org/2015/11/20/r2p-weekly-16-20-november-2015/>.
[119] Working Group of the Consultative Assembly of Parliamentarians for the ICC on the Rule of Law, 'Kuala-Lumpur Action Plan to Promote the Universality of the Rome Statute of the ICC in the Asia-Pacific' (9-10 March 2011) <http://www.pgaction.org/pdf/pre/Kuala-Lumpur%20Action%20Plan%20to%20promote%20the%20Universality%20of%20the%20Rome%20Statute%20of%20the%20ICC.pdf>, 1.
[120] Section 3, chapter 1.
[121] See Glossary.

For example, alongside the Special Panels in the District Court in Dili (Special Panels) that prosecuted international crimes in Timor-Leste,[122] in 2001 the Commission for Reception, Truth and Reconciliation (CAVR) was established by UNTAET with a truth-telling, victim support and reconciliation function.[123] Its Community Reconciliation Program (CRP) incorporated local forgiveness practices into its public hearings concerning low-level perpetrators. The CRP heard approximately 1400 minor criminal matters, working alongside the Special Panels on the basis of a Memorandum of Understanding. Although the CAVR process was problematic in many respects,[124] the CRP received some positive feedback[125] and CAVR's final report, *Chega!*, provided an advocacy tool for civil society.[126]

Some NGOs in Southeast Asia have established various forums such as 'peoples' tribunals', which are not legal or criminal processes, but which have addressed international criminal matters.[127] These include the Tokyo Women's Tribunal, Kuala Lumpur War Crimes Tribunal, Women's Hearings in Cambodia and International People's Tribunal regarding the 1965 violence in Indonesia. As one example, the Tokyo Women's Tribunal was established to redress the failure to prosecute the large-scale recruitment of women into brothels and sexual slavery during WWII. The nine prosecution teams included groups from Indonesia, Malaysia, East Timor and the Philippines. The Tribunal was not established with legal jurisdiction and held no power to enforce its judgments. However, it created important records[128] and drew attention toward the lack of jurisprudence

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[122] United Nations Transitional Administration for East Timor (UNTAET), *Regulation No. 15 of 2000 On The Establishment of Panels with Exclusive Jurisdiction Over Serious Criminal Offences*, 6 June 2000 (Regulation 15/2000).
[123] UNTAET, *Regulation No. 10 of 2001 On The Establishment of a Commission for Reception, Truth and Reconciliation in East Timor*, 13 July 2001 (Regulation 10/2001).
[124] Simon Robins, 'Challenging the Therapeutic Ethic: A Victim-Centred Evaluation of Transitional Justice Process in Timor-Leste' (2012) 6(1) *International Journal of Transitional Justice* 83-105; see section 2.4, chapter 6.
[125] Ibid.
[126] Lia Kent, 'Local Memory Practices in East Timor: Disrupting Transitional Justice Narratives' (2011) 5(3) *International Journal of Transitional Justice* 434-455, 450.
[127] See Gabrielle Simm and Andrew Byrnes, 'International Peoples' Tribunals in Asia: political theatre, juridical farce or meaningful intervention?' (2014) 4(1) *Asian Journal of International Law* 103-124.
[128] Tina Dolgopol, 'The Judgment of the Tokyo Women's Tribunal' (2003) 28(5) *Alternative Law Journal* 242-249; see also Kim Puja, 'Global Civil Society Remakes History: "The Women's International War Crimes Tribunal 2000"' (2001) 9(3) *Positions: East Asia Cultures Critique* 611-620; Nicola Henry, 'Memory of an Injustice: The "Comfort Women" and the Legacy of the Tokyo Trial' (2013) 37(3) *Asian Studies Review* 362-380; 'Transcript Of Oral Judgment delivered on 4 December 2001 by the Judges of the Women's International War Crimes Tribunal on Japan's Military Sexual Slavery' (4 December 2001) <http://www.iccwomen.org/wigjdraft1/Archives/oldWCGJ/tokyo/summary.html>.

addressing sexual violence in the years following WWII.[129] Such informal mechanisms provide an alternative type of 'justice' that can be more accessible than legal trials, even if not entirely desirable or preferable to all parties.

As discussed further in the case study chapters, where conduct occurs that might be labelled an international crime, such as extrajudicial killings, torture, or enforced disappearances, actors within Southeast Asia have pursued inter-community dialogue, institutional reform projects, ASEAN advocacy, or actions within domestic legal systems.[130] These initiatives promote broad notions of accountability, reconciliation and reparation, institutional reform, ending impunity for human rights violations, and access to justice. They align with the international criminal justice norm[131] in some respects by advancing these goals, but do not necessarily rely upon *prosecuting* perpetrators for crimes against humanity, genocide, or war crimes before an international or domestic tribunal.

4. Mechanisms for Prosecuting International Crimes in Southeast Asia

This section identifies the legal mechanisms for international crimes prosecutions in Southeast Asia. 'Mainstream' constructivist perspectives suggest that international norms may be internalised over time through ratifying treaties such as the Rome Statute and incorporating their terms into national laws, but generally devote less consideration to how states practically implement or enforce such norms.[132] In reality, ratifying treaties does not ensure their content is incorporated into domestic law, or applied. As Hafner-Burton points out: '[c]ountries are good at joining treaties, but bad at honoring commitments'.[133] That said, the ICC's complementarity principle and the international criminal justice norm might motivate governments to enact domestic international crimes

[129] Transcript of Oral Judgment, ibid, para. 74. The Tokyo Women's trials were framed as a 'continuation' of the IMTFE trials, see para 15.
[130] Sections 3 of chapters 4-6; see also generally, Renée Jeffery and Hun Joon Kim (eds), *Transitional Justice in the Asia-Pacific* (Cambridge University Press, 2014); for e.g. regarding ASEAN, Advocacy Forum et al, 'Statement Calling for ASEAN and AICHR to End Enforced Disappearance in South East Asia' (11 May 2015) <http://focusweb.org/content/statement-calling-asean-and-aichr-end-enforced-disappearance-south-east-asia>.
[131] As defined in section 2, chapter 1
[132] Alexander Betts and Phil Orchard, 'Introduction: The Normative Institutionalization-Implementation Gap' in Alexander Betts and Phil Orchard (eds), *Implementation and World Politics: How International Norms Change Practice* (Oxford University Press, 2014) 1-26.
[133] Emilie M Hafner-Burton, *Making Human Rights a Reality* (Princeton University Press, 2013), 2.

laws and enforce them.[134] The localisation framework suggests that local initiative and adaptation may lead to new instruments *and practices*. Thus, localisation may involve the adoption of new institutions and laws, but also variations from the 'norm' in the manner of their enforcement.

The first part of this section (4.1) reviews the incorporation of international crimes into national law in Southeast Asia. The second surveys some examples of how states' domestic criminal legislation might allow the prosecution of the underlying conduct addressed by international criminal law (4.2). The third section identifies the institutions established within Southeast Asia since the 1998 adoption of the Rome Statute that have attempted to enforce international criminal law via prosecutions (4.3).

4.1. International and Regional Mechanisms

As discussed in chapter 1, it is difficult to assess the likelihood of new international(ised) tribunals being established to prosecute crimes committed in Southeast Asia in future.[135] There may be potential to prosecute some international crimes under universal jurisdiction legislation within the region, but this has not occurred to date.[136] There is also no regional human rights court. The ASEAN Intergovernmental Commission on Human Rights (AICHR) was established in 2009 following extensive negotiations. AICHR can promote human rights norms, with possible longer-term impacts on regional approaches to international crimes,[137] but has no mandate to pursue justice for human rights violations or international crimes. AICHR has been called a 'window-dressing' exercise[138] and in the context of ASEAN's preference for non-interference, it is unlikely that a regional

[134] Amrita Kapur, 'Asian Values v. The Paper Tiger: Dismantling the Threat to Asian Values Posed by the International Criminal Court' (2013) 11(5) *Journal of International Criminal Justice* 1059-1090; Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge University Press, 2005), 171.
[135] Section 3, chapter 1.
[136] E.g., see section 4.2.1.1, 4.2.1.2 and 4.2.2.1 regarding Timor-Leste, Singapore and Malaysia; Brunei Darussalam's *Geneva Conventions Order*, No. S40, 30 May 2005; and e.g., *Prosecutor v Abilio Jose Osorio Soares,* Case No. 01/PID.HAM/AD.Hoc/2002/ph.JKT.PST, Ad Hoc Tribunal for East Timor, Judgment, 7 August 2002; *Kuroda v Rafael Jalandoni*, GR No. L-2662, Supreme Court, Republic of the Philippines, 26 March 1949, suggest some possibility for prosecuting international crimes committed outside of the state's territory and by a non-national.
[137] E.g., via information-gathering, such as under paragraph 4.10 of the AICHR Terms of Reference, which allows AICHR to 'obtain information from ASEAN Member States on the promotion and protection of human rights'.
[138] Asia Forum for Human Rights and Development (FORUM-Asia), 'Still Window-Dressing: A Performance Report on the Third Year of the ASEAN Intergovernmental Commission on Human Rights (AICHR) 2011-2012' (2013) <http://www.forum-asia.org/uploads/publications/2013/June/Still-Window-Dressing-final-ready-for-print.pdf>.

human rights court will be established in the near term, let alone a regional international crimes tribunal.

This chapter has already noted the relatively few Rome Statute ratifications in Southeast Asia. Indeed, the Southeast Asian region exhibits relatively low participation in international human rights and humanitarian law treaties (see Tables 4 and 5). While all eleven Southeast Asian states are parties to the Geneva Conventions, only seven have ratified the Genocide Convention, six Additional Protocol I, and five Additional Protocol II. This is significantly lower than global rates. There is particularly low membership of treaty regimes with stronger enforcement mechanisms, such as the Convention against Torture (CAT) and its Optional Protocol. This perhaps reflects states' reluctance toward mechanisms that may be perceived as interfering in domestic affairs.

Brunei Darussalam, Myanmar and Singapore have the lowest ratification levels, whereas the three Rome Statute parties – Cambodia, the Philippines and Timor-Leste – have adopted the highest number of international humanitarian and human rights treaties in Southeast Asia. This is consistent with the literature associating human rights treaty ratifications with a greater willingness to prosecute serious violations of human rights (and international crimes).[139] However, enforcement of international crimes laws in these states remains limited and even non-party states may have the capacity to prosecute international crimes within domestic jurisdictions.

4.2. International Crimes Laws in Southeast Asia

Tables 6 and 7 in annex 3 detail the scope to prosecute international crimes under Southeast Asian states' domestic legislation. This includes crimes that are specifically described as crimes against humanity, war crimes, or genocide, as well as domestic provisions that may have relevance for underlying criminal conduct, such as murder or rape. This section and the annex do not address military,[140] procedural, extradition, and

[139] Leigh A Payne and Kathryn Sikkink, 'Transitional Justice in the Asia-Pacific: Comparative and Theoretical Perspectives' in Renée Jeffery and Hun Joon Kim (eds), *Transitional Justice in the Asia-Pacific* (Cambridge University Press, 2014) 33, 45.

[140] States in Southeast Asia have military courts with jurisdiction predominantly over military service offences such as mutiny, looting, misconduct, or disobedience, e.g., Brunei-Darussalam, *Revised 1984 Royal Brunei Armed Forces Act*, chapter 149; Indonesia, *Law No. 31 of 1997 Concerning the Trial of the Military*; Malaysia, *Armed Forces Act 1972*, Act 77; Singapore, *Armed Forces Act*, Act No. 7 of 1972; Thailand, *Act on the Organization of the Military Court 1955, B.E. 2498*; Vietnam, *Ordinance on the Organization of Military Courts 2002, No. 4/2002/QH11*. Such legislation may

ICC cooperation laws,[141] penalties, victim provisions, and broader questions relating to judicial structures and human rights, or analyse modes of liability and defences in any detail. However, they respond to question C in this thesis[142] by identifying the laws that could be used to prosecute international crimes within Southeast Asia.

The Rome Statute provides only one potential comparison for states' international crimes legislation and does not necessarily parallel customary international law.[143] However, the Statute provides an accessible measure for demonstrating the domestic legal capacity to hold individuals accountable for international crimes in Southeast Asia.[144] Further, the content of and differences between the laws – such as the definitions utilised for international crimes – may demonstrate lawmakers' acceptance or adaptation of international criminal justice principles drawn from the 'normalised' Rome Statute structure. This section discusses several examples of the domestic scope for prosecuting international crimes in select Southeast Asian states that are not case studies. Subsequent chapters provide detailed discussion of the Cambodian, Philippines and Indonesian legislation.

4.2.1.Domestic International Crimes Legislation

Whether or not states are subject to obligations to prosecute certain activities under treaties or customary international law,[145] such prosecutions in practice require legislation that clearly criminalises the conduct.[146] In addition to the three case study states (Cambodia, the Philippines and Indonesia), three other states in Southeast Asia have specific legislation to allow more than one offence of genocide, crimes against humanity, or war crimes to be prosecuted nationally: Timor-Leste, Singapore, and Vietnam (see

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provide an avenue for avoiding prosecution under civilian legislation, for instance in Myanmar, where Courts Martial have exclusive jurisdiction over all cases involving military perpetrators, see Articles 20(b), 319, *Constitution of the Republic of the Union of Myanmar 2008*.

[141] No Southeast Asian state has specific laws to facilitate cooperation with the ICC, though draft legislation is pending in the Philippines, see chapter 5.

[142] Section 6, chapter 1.

[143] See e.g., Cryer (n 134), 173-176; Antonio Cassese, *International Criminal Law* (Oxford University Press, 2008), 123; William A Schabas, *An Introduction to the International Criminal Court* (Cambridge University Press, 2011), 58-59.

[144] Section 6, chapter 1; section 3.2, chapter 2; Schabas, ibid, 58-59. See section 3.3, chapter 7 regarding the implications of this comparison.

[145] See section 4, chapter 1.

[146] Cryer (n 134), 172.

annex 3).[147] Only three of these six states are parties to the Rome Statute, indicating the scope for legal engagement beyond its framework.

4.2.1.1. Timor-Leste

Timor-Leste ratified the Rome Statute on 6 September 2002 and has included international crimes in its 2009 Penal Code.[148] The Code extends jurisdiction to crimes committed outside Timor-Leste where the state 'has an obligation to try' the crimes under an international convention or treaty[149] and where a perpetrator of international crimes outside Timor-Leste is within the country and cannot be extradited.[150] In some respects the international crimes provisions in the Penal Code expand upon the Rome Statute, the Genocide Convention, and Regulation 15/2000, which accorded the Special Panels with jurisdiction over genocide, crimes against humanity and war crimes.[151] For instance, the definition of 'genocide' in the Penal Code does not include those 'puzzling words' 'as such'[152] and the Penal Code includes a broad array of activities beyond the acts that can constitute genocide under the Rome Statute.[153]

There is some different wording. For example, the Penal Code includes genocide involving 'separation of members of the group into another group *by violent means*' in Article 123(1)(d),[154] but does not explicitly include the Rome Statute's 'forcibly transferring children'. The crimes against humanity article incorporates certain of the Rome Statute's Article 7(2) definitions, including those of enforced disappearances and apartheid, with some departures. For instance, the definition of torture omits the CAT and Rome Statute exclusion of 'pain or suffering arising only from … lawful sanctions'.[155] The Code also

[147] Not including grave breaches of the Geneva Conventions, e.g., see sections 4.2.1.2 and 4.2.2.1 regarding Singapore and Malaysia.
[148] Timor-Leste, *Penal Code*, Decree-Law No. 19/2009 (Timor-Leste Code).
[149] Articles 8(e) and 9, ibid.
[150] Article 8(b), ibid.
[151] Regulation 15/2000 (n 122).
[152] Schabas (n 143), 106; given *Prosecutor v Akayesu*, Case No. ICTR-96, *Trial* Chamber I, Judgement, 2 September 1998, paras 520-522, excluding these words arguably removes an obstacle to conviction, see Amnesty International, 'International Criminal Court: Timor-Leste, Justice in the Shadow' (28 June 2010) <https://www.amnesty.org/en/documents/asa57/001/2010/en/>, 8.
[153] E.g., Article 123, Timor-Leste Code (n 148) includes 'widespread confiscation or seizure of property'; 'spread of an epidemic that may cause the death of members'; and 'prohibition of members of the group from carrying out certain trade, industrial or professional activities'.
[154] Emphasis added.
[155] Article 124(f), Timor-Leste Code (n 148); see also Article 167.

includes a list of 'crimes against peace and freedom', including terrorism, incitement to war, and religious or racial discrimination.[156]

Like the international crimes provisions, Timor-Leste's Penal Code's criminal responsibility sections all broadly reflect the Rome Statute's modes of liability, although the superior responsibility provision may be more limited.[157] The Code includes Rome Statute protections for the principle of legality and *ne bis in idem*,[158] as well as a comparable range of defences.[159] However, it allows for amnesty and pardon[160] and does not exclude international crimes from the potential operation of either. On the other hand, the crimes of genocide, crimes against peace and humanity and war crimes are all exempted from the limitations period.[161] Thus, there is legislation to prosecute international crimes committed in Timor-Leste, which is close to, but does not mirror the Rome Statute.

4.2.1.2. Singapore

Singapore is not party to the Rome Statute, but (like Malaysia[162] and Brunei Darussalam[163]) incorporated the Geneva Conventions by passing the *Geneva Conventions Act* in 1973,[164] meaning that grave breaches are offences within Singapore (whether committed within or outside the country). Singapore also amended various laws to implement the Optional Protocol to CRC on the Involvement of Children in Armed Conflict.[165] Section 130D of the Singapore Penal Code[166] criminalises genocide using the Rome Statute and Genocide Convention definition.[167] The Constitution supports such laws

[156] Articles 131-135, ibid.
[157] See Articles 15, 29-31, 136 (regarding military commanders), ibid; Amnesty International (n 152).
[158] Articles 1-3, ibid.
[159] Articles 17-18, 20-21, 43-45, ibid. Children under 16 are exempted from liability, whereas Article 26 of the Rome Statute excludes jurisdiction where the offender is less than 18.
[160] Article 118-122, ibid.
[161] Article 117, ibid.
[162] See section 4.2.2.1.
[163] Brunei Darussalam, *Geneva Conventions Order* (n 136).
[164] Singapore, *Geneva Conventions Act,* Ordinance 15 of 1973, Revised 1985.
[165] Singapore, 'Annex A: Singapore's Initial Report to the Committee on the Rights of the Child on the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Conflict' (December 2011) <http://app.msf.gov.sg/Portals/0/Summary/pressroom/15%20Dec%20CRC%20Media%20Release_Annexes.pdf>.
[166] *Penal Code*, Ordinance 4 of 1871, Revised 2008 (Singapore Penal Code).
[167] The amending Bill notes: 'Clause 28 inserts a new Chapter VIB on "Genocide". The new Chapter gives greater effect to the Convention on the Prevention and Punishment of the Crime of Genocide

by protecting the liberty of persons and the prohibition of slavery and banishment.[168] Thus, although it is not a state party to the Rome Statute, Singapore has legislation that could allow the prosecution of grave breaches and genocide before its domestic courts. Further, the *Mutual Assistance in Criminal Matters Act* of 2000 allows Singapore to provide assistance to international criminal tribunals[169] and regulations were adopted to allow cooperation with the ICTY and ICTR.[170]

4.2.1.3. Vietnam

Vietnam's Penal Code[171] includes international crimes with different definitions to those in the Rome Statute, having been adopted prior to the establishment of the ICTY and ICTR.[172] Article 341 makes propagating or inciting aggressive wars a crime. Genocide and crimes against humanity are partially integrated as acts of 'annihilating en-mass population in an area, destroying the source of their livelihood, undermining the cultural and spiritual life of a country, upsetting the foundation of a society with a view to undermining such society, as well as other acts of genocide or acts of ecocide'.[173] Various war crimes are listed in Article 343, including murder of civilians, wounded persons, and prisoners of war; looting property; and 'the use of banned war means or methods, and/or … other acts in serious violation of international laws or international treaties which Vietnam has signed or acceded to', thus encompassing the grave breaches provisions. The Code also includes crimes such as ill-treatment of prisoners of war and other military crimes,[174] although a range of offences such as torture, slavery and enforced disappearances are absent.

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approved by the General Assembly of the United Nations on 9th December 1948 by making the commission of genocide an offence…', *Penal Code (Amendment) Bill No. 38/2007*.
[168] Articles 9-10, *Constitution of the Republic of Singapore, 9 August 1965*.
[169] *Mutual Assistance in Criminal Matters Act,* Revised 2001, Chapter 109a.
[170] *Mutual Assistance in Criminal Matters (International Criminal Tribunals) Regulations*, GN No. S 368/2001, Revised 2003.
[171] *Penal Code,* No. 15/1999/QH10 (Vietnam Code). Revisions to the Code were under consideration as at 30 November 2016 and the author had not obtained an English translation of the text. The discussion here refers to the unrevised Code. See Republic of Vietnam Ministry of Justice, 'The draft of 2015 Penal Code (amended) submitted for consideration' (24 October 2016) <http://moj.gov.vn/en/Pages/ministry-of-justices-activities.aspx?ItemID=3188>.
[172] See John Quigley, 'Viet Nam's First Modern Penal Code' (1988) 9(2-3) *New York School Journal of International and Comparative Law* 143-193, 193, discussing the *Penal Code of the Socialist Republic of Vietnam*, enacted 27 June 1985. In this earlier version of the Code, Article 277 addressed 'undermining peace and committing aggression', 278 crimes against humanity, and 279 war crimes.
[173] Article 342, Vietnam Code (n 171).
[174] See generally Chapter XXIII, ibid.

Thus, more than half (six) of the states in Southeast Asia have some capacity to prosecute crimes against humanity, genocide, or war crimes domestically. Brunei Darussalam and Malaysia also have legislation implementing the Geneva Conventions' grave breaches provisions.[175] Although the provisions differ from the Rome Statute, states in Southeast Asia have some capacity to prosecute international crimes.

4.2.2.Domestic "Ordinary" Criminal Legislation

Even where international crimes have not been incorporated into national law, every state in Southeast Asia criminalises conduct that could form the underlying acts of international crimes, such as rape or murder (see annex 3). These cover most, though not all, of the conduct addressed by international criminal law. However, such crimes do not include all of the elements of the international crimes, such as the requirement that a crime against humanity be widespread or systematic, or that genocide be committed with an intent to destroy a population. Different actors (including victims) might debate the significance of these additional elements, depending on the circumstances surrounding the criminal activity. For the purposes of complementarity, the ICC is unlikely to require domestic prosecutions for offences that are identical to those in the Rome Statute.[176] This section considers three examples of countries' domestic criminal legislation and their potential use to prosecute international crimes: Malaysia (as its Penal Code is almost identical to those of Brunei Darussalam, Myanmar, and Singapore), Lao Peoples Democratic Republic (Lao PDR) and Thailand.

4.2.2.1. Malaysia

Section 3(2) of Malaysia's *Geneva Conventions Act 1962* allows grave breaches committed outside Malaysia to be prosecuted domestically, though with a narrow interpretation of the extraterritorial application of these crimes.[177] Malaysia's Penal Code[178] derives from the Indian Penal Code of 1860, which was applied in British colonial territories (annex 3 displays the similarities with other regional states). The Code includes various offences that reflect the underlying conduct of some international crimes, such as homicide,

[175] See (n 136).
[176] See section 3, chapter 1.
[177] Government of Malaysia, 'Malaysia's Comments on the Scope and Application of the Principle of Universal Jurisdiction: Pursuant to GA Resolution 64/117 of 16 December 2009' (16 September 2009) <http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Malaysia.pdf>.
[178] *Penal Code (An Act Relating to Criminal Offences) 1976*, Act 574 (Malaysia Code).

murder, causing miscarriage without a woman's consent, wrongful restraint and confinement, criminal force and assault, slavery, torture, unlawful compulsory labour, and rape. Chapter VI includes the crime of waging war, akin to aggression. Articles 295-298A encompass causing 'disharmony, disunity, or feelings of enmity, hatred or ill-will' on the grounds of religion, which may apply to similar conduct to the international crime of persecution.

The Code includes omissions whenever it refers to acts, which could facilitate the liability of superiors, and similar, or possibly broader, liability to that encompassed by Article 25(3) of the Rome Statute.[179] However, the Code does not explicitly deal with command responsibility or superior orders, leaving some ambiguity since it is an offence to disobey the order of a public servant.[180] It is criminal to make statements with intent to cause a class or community to commit any offence against another class or community, or to incite violence,[181] which could encompass conduct covered by the Rome Statute's incitement to commit genocide.

The Code includes various defences similar to the Rome Statute.[182] There is no limitation period for prosecuting crimes in Malaysia and in 1993, as the relationship between the government and monarchy deteriorated, the Constitution was amended to remove the monarch's immunity from prosecution[183] – that is, for primarily domestic reasons. Articles 38 and 42 of the Constitution give the Conference of Rulers, monarch and head of state the ability to grant pardons, reprieves and respites, including for international crimes. Malaysia's laws could therefore allow conduct that might amount to international crimes to be prosecuted, including as grave breaches of the Geneva Conventions.[184]

[179] See Articles 38, 107-120, ibid. E.g., two or more persons are involved in a criminal conspiracy under Article 120A and B if they agree to do an illegal act, or an act by illegal means, if one does something beyond making the agreement.
[180] See for example Article 188, ibid. Disobeying a 'lawful command' is an offence under Section 50, *Armed Forces Act 1972*.
[181] Section 505(c), Malaysia Code (178).
[182] E.g., Articles 76, 79, 82-85, 96-106, ibid.
[183] HP Lee, 'Hereditary Rules and Legal Immunities in Malaysia' (1993) 12(2) *University of Tasmania Law Review* 323-336.
[184] Section 3, *Geneva Conventions Act 1962*.

4.2.2.2. Lao People's Democratic Republic

The Penal Law of Lao PDR (Lao Law)[185] includes a crime of 'territorial violation' where an armed person enters Lao PDR 'affecting the national security', as well as insurrection-type offences 'against a friendly country'[186] and chemical weapons crimes.[187] The Law addresses conduct such as torture, murder, battery, rape, the trade and abduction of people, discrimination against ethnic persons and women, and other acts such as the desecration of corpses and destruction of artefacts. The modes of liability in the Lao Law[188] and exemptions from liability[189] broadly encompass those in the Rome Statute. However, a limitation period does apply.[190] Article 67 of the Constitution allows the President, and Article 53(new) the National Assembly, to grant amnesties,[191] while the Lao Law recognises that punishments can be lifted by a pardon.[192] Thus again there is some legal scope for prosecuting criminal conduct that might amount to international crimes, though with limitations, including the lack of specific 'international crimes' and the potential application of amnesties.

4.2.2.3. Thailand

Torture, brutal acts and punishment by cruel or inhumane means are prohibited under Thailand's Constitution adopted by referendum in August 2016.[193] The Penal Code includes acts intended to cause any part of the country to 'descend under the sovereignty of any foreign state, or to deteriorate the independence of the State'[194] and crimes of 'terrorization',[195] but crimes against humanity, genocide and war crimes are not criminalised as such. Offences of murder, bodily harm, sexual intercourse without consent (though with a marital rape exclusion), and enslavement, could partly address international criminal conduct where committed against or by a Thai person. The Code's

[185] *Penal Law 2005*, No. 12/NA (Lao Law).
[186] Articles 59 and 70, ibid.
[187] Article 80(new) ibid.
[188] See Articles 9-17(new), ibid.
[189] See Articles 7(new) and treatment provisions in chapter 8, ibid.
[190] Article 51, ibid.
[191] *Constitution of the Lao People's Democratic Republic 2003*, No. 25/NA (Lao Constitution).
[192] Article 50, Lao Law (n 185).
[193] Section 28, *Draft Constitution of the Kingdom of Thailand 2016*, ICJ, International IDEA (Australia) and the Office of the United Nations Resident Coordinator in Thailand unofficial translation, <http://www.un.or.th/2016-thailand-draft-constitution-english-translation/> (Thailand Constitution).
[194] See Section 119, *Criminal Code of Thailand 1956*, B.E. 2499.
[195] Sections 135/1-135/4, ibid.

modes of liability[196] and exclusions of liability[197] provisions broadly encompass those in the Rome Statute. Section 95 provides for limitation periods of up to 20 years and the King has the power to grant pardons under section 179 of the 2016 Constitution.[198] Thailand's view with respect to head of state immunity, at least for international crimes, has been that it 'is indeed not subject to dispute'.[199]

4.2.3.Summary: Prosecuting International Crimes in Southeast Asia

The above section and annex 3 demonstrate that there are domestic legal frameworks that might be relevant for prosecuting international crimes in Southeast Asia, although domestic international crimes legislation does not replicate the Rome Statute crimes. Further, three states do not have any specific international crimes legislation (Lao PDR, Thailand and Myanmar), even if they have other laws that might be relevant for prosecuting similar conduct. Apart from the absence of international crimes and their additional elements, in many jurisdictions there is scope for immunities, the provision of amnesties and pardons, statutory time limitations, and different modes of liability that may not facilitate the prosecution of commanders. Further, these "ordinary" criminal provisions do not represent active engagement with the norm of international criminal justice or the ICC, since they typically derive from domestic circumstances.

However, these discrepancies between domestic legislation and the Rome Statute framework do not indicate the complete rejection of the norm of international criminal justice, either. The laws at least comply with the expectation that states have legislation to prosecute international criminal conduct (even if they were adopted with domestic offences in mind). This is consistent with the localisation framework, which suggests that the adaptation process involves the selection of some, but not all, elements of certain norms. However, localisation ends with amplification through '[n]ew instruments *and practices*'.[200] This suggests there is a need to further analyse such laws and their

[196] See Chapters 5-6, Title I, see also Title V, ibid.
[197] E.g., Chapter 4, Title 1, ibid.
[198] Section 125, Thailand Constitution (n 193).
[199] Permanent Mission of Thailand to the United Nations, 'Statement by His Excellency Mr. Norachit Sinhaseni Ambassador and Permanent Representative of Thailand to the United Nations before the Sixth Committee of the 68th Session of the United Nations General Assembly Agenda Item 81: Report of the International Law Commission on the work of its sixty-fifth sessions (Part I)' (30 October 2013) <https://papersmart.unmeetings.org/media2/703717/thailand.pdf>.
[200] Amitav Acharya, 'How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism' (2004) 58(02) *International Organization* 239-275, 251.

enforcement, including through more detailed case studies. The next section introduces the mechanisms specifically established within Southeast Asia to prosecute international crimes.

4.3. Enforcement

Southeast Asia has not hosted any international criminal tribunals like the ICTY or ICTR, but has been the site of international crimes trials, including before the first model for an internationalised tribunal, the Special Panels, as well as at the ECCC and within Indonesia. The involvement of both international and domestic actors was crucial to the establishment and operation of these institutions (see chapters 4 and 6). In other situations where international crimes are alleged to have occurred, such as in Myanmar, such mechanisms have not been established, indicating that responses have been somewhat selective. Yet even where trials have occurred, there has been a preference in the region for state-managed accountability responses that are adapted to local political and cultural contexts.

4.3.1. Crimes Committed in East Timor

The responses to violence surrounding the 'consultation' regarding East Timor's independence illustrate a range of potential approaches to international criminal justice, particularly where two states are involved. Two UN inquiries into the violence of that period[201] were matched by Indonesia's own Commission on the Human Rights Violations in East Timor (KPP HAM) (operated by the Indonesian National Commission on Human Rights, Komnas-HAM).[202] The UN recommended establishing an international human rights court resembling the ICTY and ICTR, but this did not receive an enthusiastic

[201] United Nations, 'Situation of human rights in East Timor, Report on the joint mission to East Timor undertaken by the Special Rapporteur of the Commission on Human Rights on extrajudicial, summary or arbitrary executions, the Special Rapporteur of the Commission on the question of torture and the Special Rapporteur of the Commission on violence against women, its causes and consequences, in accordance with Commission resolution 1999/S-4/1 of 27 September 1999', UN Doc. A/54/660, 10 December 1999 (1999 UN Report); International Commission of Inquiry on East Timor, 'Report of the International Commission of Inquiry on East Timor to the Secretary General', UN Doc. A/54/726, S/2000/59, 31 January 2000.

[202] Commission to Investigate Human Rights Violations in East Timor, 'KPP-HAM Executive Summary Report on the investigation of human rights violations in East Timor' (31 January 2000) <https://www.unsw.adfa.edu.au/school-of-humanities-and-social-sciences/sites/default/files/documents/KPP-HAM.pdf>.

international response.[203] Indonesia favoured domestic trials, although there was considerable scepticism about its government's ability to provide sufficient accountability.[204] Ultimately, the world's first internationalised mechanism, the Special Panels, and a national 'ad hoc' tribunal managed by Indonesia were established, alongside other transitional justice mechanisms. The Special Panels and Law 26/2000 trials are discussed further in chapter 6, but political and competing priorities, including within domestic contexts, and fair trial issues shaped the outcomes for both the Indonesian and internationalised criminal responses.[205]

4.3.2.Cambodia: the ECCC

Other than the 1979 PRT trials mentioned in section 2.3, there was no attempt to prosecute international crimes committed during the DK regime, until the ECCC – an internationalised tribunal combining Cambodian and international participation – was established in 2004. The ECCC is discussed in detail in chapter 4. Like the Indonesian and Timor-Leste initiatives, the ECCC has frequently been at the point of financial crisis, as well as being plagued by allegations of corruption[206] and political interference.[207] The ECCC reflects the context of its negotiated establishment as an adaptation to domestic and international political influences. Yet it is also an example of genuine judicial proceedings being held within a country where crimes were perpetrated, albeit many years later, despite largely foreseeable funding, political, procedural, and legal hurdles.

5. Analysis: International Criminal Justice in Southeast Asia

It is perilous to generalise about diverse Southeast Asia, but certain themes have reappeared throughout this overview of international criminal law in the region. The first section highlighted aspects of what the localisation framework casts as 'prelocalisation' contestation toward the international criminal justice norm. Southeast Asia has a history of engagement with international criminal law, with extensive experience not just of the commission of crimes, including in internal conflict and during international occupation,

[203] Reiger and Wierda (n 59); section 3.1.
[204] 1999 UN Report (n 201), para. 73.
[205] Reiger and Wierda (n 59).
[206] Open Society Justice Initiative, 'Corruption Allegations at Khmer Rouge Court Must Be Investigated Thoroughly' (14 February 2013) <http://www.opensocietyfoundations.org/press-releases/corruption-allegations-khmer-rouge-court-must-be-investigated-thoroughly>.
[207] Alexandra Kent, 'Friction and Security at the Khmer Rouge Tribunal' (2013) 28(2) *Journal of Social Issues in Southeast Asia* 299-328.

but of international crimes trials and advocacy. However, that experience has not always been positive for states, victims or defendants. There has been a history of externally imposed justice arising from political motives, procedural shortcomings and accusations of double standards or selectivity.

These experiences have not been conducive to embracing the ICC. Generally states in Southeast Asia have not obviously 'accepted' the norm of international criminal justice over time. Yet, actors across the region, including within civil society, have drawn on 'local initiative' and attempted to 'adapt' notions of international criminal justice, including by arguing in favour of the principle of sovereignty and the inclusion of a wider range of crimes at Rome, as well as through diverse civil society activities. These have included reporting incidents of violence, promoting the ICC, cross-regional forums, and non-legal community initiatives. The influence of such actors will be elaborated upon in the following chapters.

Over half of regional states have passed legislation that specifically addresses more than one international crime, usually with some variations from the Rome Statute. These include Cambodia, the Philippines and Indonesia (the case study states), as well as Timor-Leste, Singapore, and Vietnam. This section briefly considers whether states across the region (other than the case study states) have accepted, or rejected, the norm of international criminal justice, which was described in chapter 1 as involving the implementation and prosecution of international crimes laws.[208]

Timor-Leste has paid its contributions to the ICC, participated in ASP sessions, and at the 2011 ASP urged states parties to 'fully and effectively support the Court in delivering justice to victims'.[209] It appears to have formally accepted the norm of international criminal justice, although its legislation differs from the Rome Statute in some respects. Singapore played a crucial role in establishing the ICC, even though it has not yet ratified the Rome Statute, and domestic laws address grave breaches and genocide.[210] As a

[208] See section 2, chapter 1.
[209] Democratic Republic of Timor-Leste, 'Statement by H.E. Ms. Sofia Borges Ambassador and Permanent Representative of the Democratic Republic of Timor‐Leste to the United Nations at the General Debate of the Tenth Session of the Assembly of States Parties to the Rome Statute' (14 December 2011) <https://asp.icc-cpi.int/iccdocs/asp_docs/ASP10/Statements/ICC-ASP10-GenDeba-Timor-Leste-ENG.pdf>, 3; section 4.2.1.1.
[210] Sections 3.2.2; 4.2.1.2.

developed country that has not been engaged in recent armed conflicts,[211] there does not appear to have been significant civil society pressure for it to join the ICC.[212] It is likely that acceding to the Rome Statute represents a low priority for the government, rather than indicating complete rejection of the norm of international criminal justice.

Vietnam is another state with international crimes legislation, although that legislation predates the ICTY and ICTR. Vietnam has stressed the need for ICC decisions, including referrals, to be made case-by-case and 'free from politicization'.[213] In its 2009 UPR report Vietnam said it took 'keen interest in the Rome Statute' but was 'making careful material and legal internal preparations before considering its accession…'[214] In the 2014 UPR, Vietnam accepted a recommendation that it ratify the Statute,[215] although not to fully implement its provisions.[216] It is unlikely that Vietnam will adopt the Rome Statute provisions into national law in the near future, as it already has legislation that could support domestic prosecutions of international crimes. However, its laws do not reflect the rejection of the norm of international criminal justice.

As for states without such international crimes legislation, in 2005 and 2017 the Brunei Darussalam government was preparing a report regarding accession to the Rome Statute[217] and the President of the ICC visited in 2011.[218] However, there is no indication

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[211] For background, see generally Jason Lim and Terence Lee (eds), *Singapore: Negotiating State and Society, 1965-2015* (Routledge, 2016).
[212] Though Coalition for the ICC (CICC) has called upon Singapore to ratify, as it has for all states in the region, e.g. CICC, 'Global Coalition Calls on Singapore to Accede to Rome Statute: Civil Society Says Singapore and ASEAN Member States Should Support a Strong ICC' (2 October 2012) <http://www.theonlinecitizen.com/2012/10/04/civil-society-says-singapore-and-asean-member-states-should-support-a-strong-icc/>; and there have been ICC-related events held in Singapore, e.g. Think Centre, 'Seminar on the International Criminal Court: Tentative Programme' (28 August 2004) <http://www.thinkcentre.org/article.php?id=2435>.
[213] Permanent Mission of the Socialist Republic of Viet Nam to the United Nations, 'Statement by H.E. Ambassador Bui The Giang, Deputy Permanent Representative of Viet Nam, at the GA's Plenary Meeting on Responsibility to Protect (R2P)' (24 July 2009) <http://www.vietnam-un.org/en/vnun.php?id=151> and see misgivings regarding the ICC arrest warrant issued against Sudan's President Al-Bashir, 'International Court issue arrest warrant for Sudan President: Ministry of Foreign Affairs' (5 March 2009) <http://www.vietnam-un.org/en/news.php?id=76>.
[214] Vietnam, 'Report of the Working Group on the Universal Periodic Review, Viet Nam, Addendum', UN Doc. A/HRC/12/11/Add.1, 16 September 2009, 7.
[215] Vietnam, 'Report of the Working Group on the Universal Periodic Review, Viet Nam, Addendum', UN Doc. A/HRC/26/6/Add.1, 20 June 2014, 4: recommendations 143.24-143.26.
[216] Ibid, 8: recommendation 143.27.
[217] Coalition for the International Criminal Court, *Updates on Brunei Darussalam* (31 December 2005) Coalition for the International Criminal Court, <http://www.iccnow.org/?mod=newsdetail&news=47>.
[218] Coalition for the International Criminal Court, *Global Coalition Calls on Brunei Darussalam to Join the International Criminal Court* (5 September 2012) <http://www.iccnow.org/documents/Brunei_Press_Release_-_FINAL.pdf>.

of any priority being accorded to becoming an ICC member.[219] Brunei Darussalam's Penal Code[220] and *Geneva Conventions Order* of 2005, which addresses grave breaches,[221] will likely provide the only domestic legislative framework for any relevant prosecutions. Brunei Darussalam's leaders do not appear to overtly oppose international criminal justice, but have not adopted domestic international crimes laws.

Myanmar is not party to the Rome Statute, although, possibly in response to international pressure for the Security Council to refer the situation in Myanmar to the ICC,[222] Myanmar took the unusual step of sending a delegate to the 2009 ASP.[223] Its domestic legislation does not facilitate the prosecution of international crimes. Article 204 of Myanmar's Constitution provides the military with a direct role in providing amnesties[224] and Article 445 has been interpreted as amounting to an immunity for past crimes.[225] In January 2016, Parliament provided the outgoing President with immunity from prosecution for 'any actions' undertaken during his term, 'in accordance with the law'.[226] However, even before the election of Myanmar's National League for Democracy government in late 2015,

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[219] Brunei Darussalam rejected recommendations that it ratify the Statute in its 2014 UPR response, Brunei Darussalam, 'Report of the Working Group on the Universal Periodic Review, Brunei Darussalam, Addendum', UN Doc. A/HRC/27/11/Add.1, 10 September 2014, 2-3: recommendations 113.10-113.11, 113.20-113.21.

[220] *Geneva Conventions Order 2005*, S40/2005, issued under Article 83(3) *Constitution of Brunei Darussalam*, No. S 97/59, Revised 2011 (under emergency powers).

[221] *Penal Code*, Cap. 22 of 1951, Revised 2001.

[222] Burma Campaign UK, 'UK Government Supports Burma Regime Referral to International Criminal Court' (25 March 2010) <http://burmacampaign.org.uk/uk-government-supports-burma-regime-referral-to-international-criminal-court/>; Lucia Kubosova, 'EU assembly seeks criminal trial for Burmese junta', *EU Observer* (23 May 2008) <https://euobserver.com/foreign/26201>; Brendan Nicholson, 'Canberra urged to uphold vow to act on Burma crimes', *The Age* 2 June 2008 <http://www.theage.com.au/national/canberra-urged-to-uphold-vow-to-act-on-burma-crimes-20080601-2kju.html>.

[223] International Criminal Court, 'Delegations to the seventh session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, The Hague, 14-22 November 2008', ICC Doc. ICC-ASP/7/INF.1, 8 April 2009, <https://asp.icc-cpi.int/iccdocs/asp_docs/ICC-ASP-7-INF.1.pdf>.

[224] Burma Lawyers' Council, 'Revealing Burma's System of Impunity: A Briefer for the Commission of Inquiry Campaign' (9 September 2011) <http://burmacampaign.org.uk/reports/revealing-burmas-system-of-impunity-a-briefer-for-the-comission-of-inquiry-campaign/>.

[225] E.g., ibid, 2; though see ICTJ, 'Impunity Prolonged: Burma and its 2008 Constitution' (9 January 2009) <https://www.ictj.org/publication/impunity-prolonged-burma-and-its-2008-constitution>, 33; International Bar Association Human Rights Institute, 'The Rule of Law in Myanmar: Challenges and Prospects' (December 2012) <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=DEBA1058-8D8D-47E3-B8DB-1BA2BA82E40E>, 55.

[226] Amnesty International, 'Myanmar: Scrap or Amend New Law that Could Grant Immunity to Former Presidents' (28 January 2016) <https://www.amnesty.org/en/press-releases/2016/01/myanmar-scrap-or-amend-new-law-that-could-grant-immunity-to-former-presidents/>.

there was significant civil society engagement with justice and accountability issues[227] and Myanmar ratified the Optional Protocol to the Convention on the Rights of the Child and signed the International Covenant on Economic, Social and Cultural Rights earlier that year.[228] Still, serious violations of human rights continued to be reported in Shan and Rakhine provinces in 2016.[229] Most recently, the government supported an investigation into violence in Rakhine province led by former UN Secretary-General Kofi Annan. Myanmar has not accepted the norm of international criminal justice insofar as it requires the domestic enactment of international crimes laws, although the government may decide to do so in future.

Lao PDR has not signed or ratified the Rome Statute, but in 2008 said it was closely following the ICC's activities and that the 'grave crimes stipulated in the Statute are undesirable for the international community as well as the Lao PDR'.[230] In its response to the 2010 UPR, Lao PDR said it 'supports the principles enshrined in the ICC Statute' and that ratification was 'in line with the Government's policies', but more time was needed to improve penal laws and judicial capacity before joining the Court.[231] CICC and other international actors have supported this process, including by translating ICC materials and providing ICC content for school curriculums.[232] Lao PDR has engaged with and does not publicly reject the norm of international criminal justice, but has not implemented the Rome Statute provisions into domestic law.

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[227] Just in relation to sexual violence crimes, of numerous reports see e.g. Shan Women's Action Network (SWAN) and Shan Human Rights Foundation, 'Licence to Rape' (May 2002) <http://burmacampaign.org.uk/media/License_to_rape.pdf>; Women's League of Burma, 'Same Impunity, Same Patterns: Sexual abuses by the Burma Army will not stop until there is a genuine civilian government' (January 2014) <http://womenofburma.org/wp-content/uploads/2014/01/SameImpunitySamePattern_English-final.pdf>. See also Network for Human Right Documentation-Burma (ND-Burma), 'About Us' <http://nd-burma.org/about-us/>.
[228] See Table 4.
[229] Hannah Hindstrom and Kutkai, 'Burma's Transition to Civilian Rule Hasn't Stopped the Abuses of Its Ethnic Wars', *Time* (1 April 2016) <http://time.com/4277328/burma-myanmar-suu-kyi-ethnic-wars/>; BBC, 'Myanmar wants ethnic cleansing of Rohingya - UN official', *BBC News* (24 November 2016) < http://www.bbc.com/news/world-asia-38091816>.
[230] Lao People's Democratic Republic, 'Statement by Mrs Viengvone Kittavong, Deputy Director General, Department of Treaties and Law, Ministry of Foreign Affairs, Lao People's Democratic Republic, Assembly of States Parties to the Rome Statute of the International Criminal Court, 7th Session, General Debate' (15 November 2008) <https://asp.icc-cpi.int/iccdocs/asp_docs/library/asp/ICC-ASP-ASP7-GenDebe-Lao-ENG.pdf>.
[231] Lao People's Democratic Republic, 'Report of the Working Group on the Universal Periodic Review, Lao People's Democratic Republic, Addendum', UN Doc. A/HRC/15/5/Add.1, 14 September 2010, 2.
[232] CICC, '2013 Status of the Rome Statute Around the World' (2013) <http://archive.iccnow.org/documents/RomeStatuteUpdate_2013_web.pdf>, 51.

Thailand signed the Rome Statute on 2 October 2000.[233] Civil society activities[234] and some political developments appeared to indicate that Thailand's support for international criminal justice was accelerating in the mid-2010s, despite concerns about protecting head of state immunity.[235] However, such progress has stalled alongside internal unrest and increasing military power, particularly since 2014.[236] This highlights the complexity involved in locating states along a spectrum progressing from the rejection of international norms toward internalisation, as situations change.

Many states in Southeast Asia have not ratified the Rome Statute, adopted its substantive laws, or established institutions to prosecute international crimes that might indicate their acceptance of the international criminal justice norm (according to mainstream constructivist accounts). As the next chapters will discuss, where formal legal mechanisms have been adopted through negotiations, as in Cambodia, there have been political compromises, procedural issues and practical challenges such as gathering evidence. The establishment of domestic justice mechanisms, including in Indonesia, resulted in similar issues.

Still, all states have legislation that could allow the prosecution of the underlying conduct addressed by international criminal law, and most include more than one international crime as a domestic offence. There has also been significant state and civil society engagement with international criminal justice across Southeast Asia. Further, many states in the region have not experienced international crimes recently and thus should not be expected to have prosecuted such crimes, although, as elsewhere, there is potential for future violence. Rather than states accepting or rejecting international criminal justice outright, or over time, they take a range of dynamic positions. This suggests that 'localisation' may have occurred. However, this chapter has not analysed the arguments surrounding international criminal justice, or the processes by which related laws and institutions have been developed (via prelocalisation resistance, local initiative, adaptation, and amplification), in detail.

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[233] See CICC, 'Asia-Pacific Update' (June 2012), 12; although Thailand rejected UPR recommendations to ratify: Thailand, 'Report of the Working Group on the Universal Periodic Review, Thailand, Addendum', UN Doc. A/HRC/19/8/Add.1, 6 March 2012, 3.
[234] See section 3.3 and The Nation, (n 115).
[235] CICC, 'Asia-Pacific Update' (December 2011).
[236] See Paul Chambers and Napisa Waitoolkiat, 'The Resilience of Monarchised Military in Thailand', (2016) 46(3) *Journal of Contemporary Asia* 425-444.

6. Conclusion

This chapter analysed the historical and legal context for the international criminal justice initiatives that exist within Southeast Asia. It presented a challenging picture of international interference and politicisation, selectivity, and tensions between seeking justice, maintaining sovereignty and ensuring internal stability (see section 2). This suggests that there has not been a linear progression toward accepting the international criminal justice norm across the region over time. Rather, a variety of diverse actors located within and outside Southeast Asia have engaged in relevant debates.

However, this high level overview does not permit one to draw further conclusions about the process of localising international criminal justice within states in Southeast Asia. It has relied upon a review of legislation and public statements, but, for example, has not assessed the importance of 'credible local actors' in shaping the establishment of laws and institutions for prosecuting international crimes, as suggested by the localisation framework, or scrutinised the temporal and spatial nature of this engagement. The following three chapters take up these themes and consider approaches toward prosecuting international crimes in Cambodia, the Philippines, and Indonesia in more depth.

Table 4: Southeast Asia: Ratification/Accession - International Human Rights and Humanitarian Law Instruments[1]

	Rome Statute	Genocide Convent.[2]	Convent'n Against Torture	OPCAT	Geneva Conventions I-IV	Add'nal Protocol 1	Add'nal Protocol 2	Add'nal Protocol 3	Hague Cultural Property 1954	Optional Protocol to CRoC (children)	Stat Limits War Crimes and CAH
Brunei Darussalam	No	No	Signed 22/09/15^	No	14/10/91	14/10/91	14/10/91	No	No	17/05/16^	No
Cambodia	11/04/02	14/10/50	15/10/92	30/03/07	8/12/58	14/01/98	14/01/98	No	4/04/62	16/07/04^	No
Indonesia	No	No	28/10/98^	No	30/09/58	No	No	No	10/01/67	24/09/12^	No
Lao PDR	No	8/12/50	26/09/12^	No	29/10/56	18/11/80^	18/11/80	No	No	20/09/06^	28/12/84^
Malaysia	No	20/12/94	No	No	24/08/62	No	No	No	12/12/60	12/04/12^	No
Myanmar	No	14/03/56	No	No	25/08/92	No	No	No	10/02/56	Signed 28/09/15	No
The Philippines	30/08/11	7/07/50	18/06/86	17/04/12^	6/10/52	30/03/12^	11/12/86	22/08/06	No	26/08/03^	15/05/73
Singapore	No	18/08/95	No	No	27/04/73	No	No	7/07/08	No	11/12/08^	No
Thailand	Signed 2/10/00	No	2/10/07^	No	29/12/54	No	No	No	2/05/58	27/02/06^	No
Timor-Leste	6/09/02	No	16/04/03	Signed 16/9/05	8/05/03	12/04/05	12/04/05	29/07/11	No	2/08/04^	No
Viet Nam	No	9/06/81	5/02/15^	No	28/06/57^	19/10/81	No	No	No	20/12/01^	6/05/83^
Ratifications	*3*	*7*	*7*	*2*	*11*	*6*	*5*	*3*	*5*	*10*	*3*
Per cent	**27.3%**	**63.6%**	**63.6%**	**18.2%**	**100.0%**	**54.5%**	**45.5%**	**27.3%**	**45.5%**	**90.9%**	**27.3%**
World %	64.2%	76.2%	82.9%	43.0%	100.0%	90.2%	87.0%	37.8%	65.8%	86.0%	28.5%

[1] Updated 28 December 2016. Source: UNTC, ICRC. ^Reservation or declaration.
[2] Date of deposit/notification.

Table 5: Southeast Asia: Ratification/Accession – International Human Rights Law Instruments[1]

	ICESCR	ICCPR	CEDAW	CRoC	Enforced Disappear-ances	Suppress'n of Apartheid
Brunei Darussalam	No	No	24/05/06^	27/12/95^	No	No
Cambodia	26/05/92	26/05/92	15/10/92	15/10/92	27/06/13	28/07/81
Indonesia	23/02/06^	23/02/06^	13/09/84^	5/09/90	Signed 27/9/10	No
Lao People's Democratic Republic	13/02/07	25/09/09^	14/08/81	8/05/91	Signed 29/9/08	5/10/81
Malaysia	No	No	5/07/95^	17/02/95^	No	No
Myanmar	Signed 16/07/15	No	22/07/97^	15/07/91	No	No
The Philippines	7/06/74	23/10/86	5/08/81	21/08/90	No	26/01/78
Singapore	No	No	5/10/95^	5/10/95^	No	No
Thailand	5/09/99^	29/10/96^	9/08/85^	27/03/92^	Signed 9/01/12	No
Timor-Leste	16/04/03	18/09/03	16/04/03	16/04/03	No	No
Viet Nam	24/09/82^	24/09/82^	17/02/82^	28/02/90	No	9/06/81
Total	7	7	11	11	1	4
Per cent	**63.6%**	**63.6%**	**100.0%**	**100.0%**	**9.1%**	**36.4%**
World %	**85.0%**	**87.0%**	**97.9%**	**100.0%**	**28.0%**	**56.5%**

[1] Updated 31 December 2016. Source: UNTC. ^Reservation or declaration.

Chapter 4 – Engaging with International Criminal Law alongside an Internationalised Tribunal: Cambodia

Timeline 1 – Cambodia

1863 French Protectorate of Cambodia
1941-1945 WWII, Vichy French and Japanese occupation
1945 Japan dissolves French administration
1946-1950 French war crimes trials
1946-1954 First Indochina War
1953 French Protectorate dissolved
1953 Cambodia gains independence
1955 King Norodom Sihanouk abdicates and becomes Prime Minister
1959 US attempt overthrow of Prince Norodom Sihanouk
1960s US bombing during Second Indochina War (1955-1975)
1970 General Lon Nol coup (with US support)
1970-1975 internal conflict between Lon Nol and Khmer Rouge forces
1975-1979 Democratic Kampuchea
1979 Vietnam controls Cambodia as the People's Republic of Kampuchea
1979 People's Revolutionary Tribunal tries Ieng Sary and Pol Pot *in absentia*
1980s, 1990s internal conflict with Democratic Kampuchea forces
1985 Hun Sen becomes Prime Minister
1989 Cambodia renamed State of Cambodia, Vietnam forces withdraw
1991 Paris Peace Accords
1992 UNTAC established
1993 Cambodian general elections: Hun Sen and FUNCIPEC coalition formed
1993 Monarchy restored
1994 US Cambodia Genocide Justice Act funds documentation of DK crimes
1994 Law to Outlaw the Democratic Kampuchea Group (amnesty)
1996 Ieng Sary pardoned
1997 Hun Sen coup (ASEAN membership postponed)
1997 Hun Sen requests assistance to try senior Khmer Rouge leaders
1997 Khmer Rouge 'People's Tribunal of Anglong Veng' 'tries' Pol Pot for killing Son Sen
1998 Pol Pot dies in hiding
1999 Cambodia joins ASEAN
2001 ECCC Law found Constitutional (Constitutional Council Decision 040/002/2001, 12 February 2001)
2001 Circular concerning preservation of remains of the victims of the genocide …
2002 United Nations pulls out of ECCC negotiations
2002 Cambodia ratifies Rome Statute
2002 Royal Decrees: Use and Protection Red Cross or Red Crescent Emblem and Recognition of Cambodian Red Cross
2003 ECCC UN Agreement signed
2004 ECCC Law amended and promulgated
2005 ECCC Agreement enters into force
2006 ECCC commences operations
2006 Ta Mok dies
2007 ECCC Internal Rules adopted
2007 Detention by the ECCC of Duch, Nuon Chea, Ieng Sary, Ieng Thirith, Khieu Samphan
2008 Closing Order for Duch (Case 001)
2010 Duch guilty of crimes against humanity (Case 001 Trial Judgment)
2011 Closing Order for Nuon Chea, Khieu Samphan, Ieng Sary, Ieng Thirith (Case 002)
2012 Case 001 Appeal Judgment affirms Duch's conviction
2012 Preah Vihear tension eases with Thailand
2013 Mass protests surround contested elections
2013 Ieng Sary dies
2014 Nuon Chea and Khieu Samphan sentenced to life imprisonment (Case 002/01 Trial Judgment)
2014 Case 003 and 004 charges announced
2015 Ieng Thirith dies
2016 Political commentator Kem Ley assassinated
2016 Case 002/01 Appeal Judgment

1. Introduction

Chapters 4, 5 and 6 use case studies to analyse how Cambodia, the Philippines and Indonesia have engaged with international criminal justice by developing laws and institutions for prosecuting international crimes.[1] Drawing on the localisation framework and methodology outlined in chapter 2, each case study chapter: first, considers histories of prosecuting alleged international crimes[2] in the selected country (question A); second, demonstrates how different actors have attempted to influence the laws and institutions for prosecuting international crimes (question B); and third, identifies these international crimes mechanisms (question C). The final section of each chapter debates the usefulness of the localisation framework as demonstrated by that case study (question D).

This chapter examines Cambodia's experiences with international criminal justice. Cambodia has faced both internal and external conflict spanning a period of more than thirty years, up until the late 1990s. This time frame encompassed the Second Indochina (Vietnam) War and internal conflict both before and after the period of 'the Democratic Kampuchea regime' (DK), from 1975 until Vietnam gained control of Cambodia in 1979. During DK, up to a quarter of Cambodia's population died as a result of killings, torture, forced transfer, starvation and forced labour.[3] In the 1990s, as the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY, ICTR) were beginning their operations, international attention turned toward securing accountability for DK-era crimes, including the possible establishment of international criminal mechanisms.

An internationalised criminal tribunal, the ECCC, was established under Cambodian law in 2004,[4] but also operates pursuant to an agreement with the UN (ECCC Agreement).[5] As at 30 November 2016, the ECCC had convicted three defendants for charges including crimes against humanity and grave breaches of the Geneva Conventions – and further trials and

[1] The benefits (and limits) of using case studies were noted in chapter 2, but the advantages include allowing a qualitative exploration of different principles in various contexts, rather than comprehensively reporting factual events.
[2] See Glossary.
[3] David Chandler, *A History of Cambodia* (Silkworm Books, 2008), 259; Ben Kiernan, 'The Demography of Genocide in Southeast Asia: The Death Tolls in Cambodia, 1975-79, and East Timor, 1975-80' (2003) 35(4) *Critical Asian Studies* 585-597, 586.
[4] *Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea*, amended 27 October 2004, NS/RKM/1004/006 (ECCC Law).
[5] 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, 6 June 2003 (ECCC Agreement).

investigations were ongoing. This may appear to indicate that Cambodia's leaders have accepted the norm of international criminal justice, at least for historic crimes. Yet the reality is more complex. When measured against the 'normalised' conception of international criminal justice (see chapter 1), the ECCC's 'shortcomings and weaknesses continue to hamper its effectiveness'.[6] Key actors within the government have sometimes displayed opposition to the ECCC.[7] It is also a court with selective jurisdiction – being focused on the historical period of DK.

In relation to contemporary or prospective crimes, Cambodia has ratified the Rome Statute[8] and incorporated international crimes into domestic legislation, including into its Criminal Code.[9] Despite this apparent acceptance of the norm of international criminal justice, the Cambodian government has been accused of significant human rights violations, including the alleged commission of crimes potentially within the jurisdiction of the ICC.[10] No significant action has been taken by national authorities to prosecute this conduct.

The Cambodia case study therefore allows this thesis to examine approaches toward international criminal justice developed in response to historic, as well as contemporary, allegations of international crimes – including after a state has ratified the Rome Statute, when it incorporates international crimes laws into domestic legislation, and as it prosecutes international crimes (or decides not to).[11] Section 2 examines the history of international crimes trials in Cambodia. It shows that Cambodia does not provide an example of progression toward acceptance, or complete rejection, of the norm of

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[6] Heather Ryan, 'New Year, Same Problems at ECCC' (Open Society Justice Initiative (OSJI), 9 January 2014) <http://www.ijmonitor.org/2015/01/new-year-same-problems-at-eccc/?utm_source=International+Justice+Monitor&utm_campaign=ffd58c2e08-khmer-rouge&utm_medium=email&utm_term=0_f42ffeffb9-ffd58c2e08-49422597>.
[7] Alexandra Kent, 'Friction and Security at the Khmer Rouge Tribunal' (2013) 28(2) *Journal of Social Issues in Southeast Asia* 299-328; Shannon Maree Torrens, 'Allegations of Political Interference, Bias and Corruption at the ECCC' in Simon Meisenberg and Ignaz Stegmiller (eds), *The Extraordinary Chambers in the Courts of Cambodia: Assessing their Contribution to International Criminal Law* (TMC Asser Press, 2016) 45-76.
[8] On 11 April 2002.
[9] *Criminal Code of the Kingdom of Cambodia 2010*, translation by Bunleng Cheung (Criminal Code).
[10] Global Diligence, 'Communication Under Article 15 of the Rome Statute of the International Criminal Court The Commission of Crimes Against Humanity in Cambodia July 2002 to Present', Executive Summary (7 October 2014) <https://www.fidh.org/IMG/pdf/executive_summary-2.pdf>.
[11] While some of the background materials in this chapter draw on a scoping article initially published in 2015, Emma Palmer, 'Localizing international criminal accountability in Cambodia' (2015) 16(1) *International Relations of the Asia-Pacific* 97-135, the overall analysis has been significantly redeveloped and updated here.

international criminal justice. Section 3 demonstrates that international and Cambodian government actors have influenced Cambodia's laws and institutions for investigating and prosecuting international crimes, while civil society actors draw on diverse sources in related advocacy. Section 4 then examines the key features of these mechanisms. Section 5 analyses the previous sections using the localisation framework and argues that Cambodia's interaction with international criminal justice disturbs assumptions about the way legal norms are diffused over time (teleology) and from certain locations outside Cambodia (spaces) to within the country (direction).

2. Historic Engagement with International Criminal Law

This section examines the historic development of international criminal justice mechanisms in Cambodia with two main aims. First, the localisation framework considers how local actors might resist external norms 'because of doubts about the norms' utility and applicability and fears that the norms might undermine existing beliefs and practices'.[12] This section seeks to identify such 'prelocalisation' concerns with reference to Cambodia's engagement with international criminal justice. Second, as discussed in chapter 2, constructivist approaches indicate that international norms may be diffused through the ratification of multilateral treaties, implementation of international law into national legislation, and the enforcement of those laws. This suggests a relatively linear progression from ratification toward the acceptance of international norms.[13] It is impossible to comprehensively discuss the complex historical and political situation in Cambodia here. However, this section proceeds in a largely chronological manner to consider whether Cambodia's approach to prosecuting international crimes has progressed from a position of resistance toward acceptance of the norm of international criminal justice.

2.1. Sovereignty and Security: French Occupation, WWII, the Democratic Kampuchea regime and People's Republic of Kampuchea

The territory of modern-day Cambodia has been the site of external interference, often associated with armed conflict and violence, such as during the French colonial period and

[12] Amitav Acharya, 'How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism' (2004) 58(2) *International Organization* 239-275, 251.
[13] Lisbeth Zimmermann, 'Same Same or Different? Norm Diffusion Between Resistance, Compliance, and Localization in Post-conflict States' (2014) 17(1) *International Studies Perspectives* 98-115, 102.

Cambodian *Issarak* movement.[14] During WWII the Japanese abolished the French protectorate, following which French administrators arrested Buddhist nationalist leader Son Ngoc Thanh as a 'war criminal' in one of relatively few post-WWII trials held in Indochina.[15] As indicated in chapter 3, the Indochina trials were selective and faced administrative and political challenges, including those arising from 'the perceived collaboration of the French Indochinese government with Japan until March 1945'.[16]

Cambodia's independence was formally recognised in 1953, within a period of conflict involving both internal and international actors that continued for subsequent decades (see Timeline 1). As mentioned above, DK was established in 1975. These events were central to Cold War geopolitics.[17] In that context, after Vietnam gained control of Cambodia in 1979, a Khmer Rouge coalition retained Cambodia's seat at the United Nations (UN) until 1991, despite emerging evidence of atrocities. The 'United Nations and Western powers did little in response to mounting evidence of [DK] atrocities … China did worse, emerging as the Pol Pot regime's main external sponsor…'[18] Meanwhile, conflict between the Vietnam-backed People's Republic of Kampuchea (PRK) government – succeeded by the State of Cambodia – and Khmer Rouge forces continued in the 1980s and 1990s (see below).

These dynamics may have encouraged Cambodia's subsequent leaders, many of whom were involved in these events, to hold a 'perception of [Cambodia's] vulnerability to both foreign interference and domestic conflict'.[19] However, individuals such as Sihanouk were also able to foster relations with China, the Soviet Union, and ASEAN and Western states.[20] This history suggests two themes that have resurfaced in later debates about international

[14] For an overview of Cambodia's history, see *Prosecutor v Nuon Chea and Khieu Samphan*, Case No. 002, Trial Chamber, Case 002/01 Judgement, 7 August 2014 (Case 002/01 Judgment), paras 41-94.
[15] Elizabeth Becker, *When the War Was Over: Cambodia and the Khmer Rouge Revolution* (Public Affairs, 1998), 49-52; see Ann-Sophie Schoepfel-Aboukrat, 'The War Court as a Form of State Building: The French Prosecution of Japanese War Crimes at the Saigon and Tokyo Trials' in Morten Bergsmo, Wui Ling Cheah and Ping Yi (eds), *Historical Origins of International Criminal Law: Volume 2* (Torkel Opsahl Academic EPublisher, 2014) 119-141. For an opinion of the long-term impact of this period, see Steve Heder, 'The 'traditions' of impunity and victors' justice in Cambodia', *The Phnom Penh Post* (19 February 1999) <http://www.phnompenhpost.com/national/traditions-impunity-and-victors-justice-cambodia>.
[16] Schoepfel-Aboukrat, ibid, 128; see section 2.2, chapter 3.
[17] Becker (n 15), 387.
[18] John Ciorciari and Anne Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia (Law, Meaning, and Violence)* (University of Michigan Press, 2014), 15; Andrew Mertha, *Brothers in Arms: Chinese Aid to the Khmer Rouge, 1975-1979* (Cornell University Press, 2014).
[19] Sorpong Peou, 'Cambodia After the Cold War: The Search for Security Continues' (1995) Working Paper No. 96 *Centre of Southeast Asian Studies* 1-13, 1.
[20] Ibid, 12.

criminal justice in Cambodia: first, the importance of Cambodia's sovereignty, stability and security from international interference; and second, the selectivity of international attitudes toward the commission of international crimes.

2.2. Politicisation and Rule of Law: The Peoples' Revolutionary Tribunal

The PRK's conviction of former DK leaders Pol Pot and Ieng Sary for the crime of genocide[21] in 1979 could only have strengthened any view held by Cambodia's leaders that international criminal justice can be political. The PRK established the Peoples' Revolutionary Tribunal (PRT) without any pre-existing legal infrastructure – it is estimated only six to ten lawyers survived DK and the judicial system had been dismantled.[22] In the West the proceedings were largely rejected as a 'show trial' in the midst of Cold War opposition to the PRK.[23] While some concerns may have stemmed from unfamiliarity with civil law procedures,[24] the defendants were also tried *in absentia* with inadequate procedural protections.[25] Recent criticisms of the ECCC – and international criminal law more generally – echo earlier criticisms that the PRT was politicised, involved selective temporal and personal jurisdiction, and presented due process concerns.[26] Still, the PRT was one of the first tribunals to prosecute the crime of 'genocide' under the

[21] *People's Revolutionary Tribunal Held in Phnom Penh for the Trial of the Genocide Crime of the Pol Pot - Ieng Sary Clique,* August 1979, Judgement, 29-30.
[22] Dolores A Donovan, 'Cambodia: Building a Legal System from Scratch' (1993) 27(2) *The International Lawyer* 445-454, 445.
[23] See e.g. Group of Experts for Cambodia, 'Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135', 18 February 1999, <https://www.legal-tools.org/en/doc/3da509/>, para. 43; Rachel Hughes, 'Ordinary theatre and extraordinary law at the Khmer Rouge Tribunal' (2015) 33 *Environment and Planning D: Society and Space* 714-731; Suzannah Linton, 'Post Conflict Justice in Asia' in M Cherif Bassiouni (ed), *The Pursuit of International Criminal Justice: A World Study on Conflicts, Victimisation and Post-Conflict Justice* (Intersentia, 2010) vol 2, 515-753, pdf from <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2036245>, 47.
[24] Tom Fawthrop and Helen Jarvis, *Getting Away with Genocide?: Cambodia's Long Struggle Against the Khmer Rouge* (UNSW Press, 2005), 47.
[25] Ibid; Frank Selbmann, 'The 1979 Trial of the People's Revolutionary Tribunal and Implications for ECCC' in Simon Meisenberg and Ignaz Stegmiller (eds), *The Extraordinary Chambers in the Courts of Cambodia: Assessing their Contribution to International Criminal Law* (TMC Asser Press, 2016) 77-102.
[26] E.g., Human Rights Watch, 'Cambodia: Khmer Rouge Convictions 'Too Little, Too Late': Political Interference, Delays, Corruption Make Tribunal a Failure' (8 August 2014) <http://www.hrw.org/news/2014/08/08/cambodia-khmer-rouge-convictions-too-little-too-late>; see section 2, chapter 1; Hughes (n 23); and on the relationship between 'show trials' and international criminal justice, see Gerry Simpson, *Law, War & Crime: War Crimes, Trials and the Reinvention of International Law* (Polity, 2007).

Genocide Convention[27] and the first international crimes prosecution in Southeast Asia to involve the significant influence of another Southeast Asian state.

The PRT convictions helped to justify Vietnam's occupation of Cambodia and established the 'dominant narrative of the Khmer Rouge era, with a handful of absent, demonic perpetrators and millions of innocent victims'.[28] Though the PRK appears to have detained some lower-ranking Khmer Rouge cadres,[29] the focus of the PRT upon the highest leadership (the 'Pol Pot – Ieng Sary clique')[30] was further maintained in Cambodia's education system[31] and criminal laws during the PRK period, which linked opposition to the Vietnamese regime with Pol Pot.[32]

2.3. Stability, Peace and Development: UNTAC and Elections

In contrast to the PRK's emphasis on having ended DK, the period following Vietnam's withdrawal from Cambodia in 1989 and the establishment of the United Nations Transitional Authority in Cambodia (UNTAC) in 1992 (see Timeline), involved a policy of 'collective amnesia' as the Khmer Rouge period was removed from public discourse and educational programs.[33] Elections in 1993 resulted in a power-sharing agreement between Hun Sen's Cambodian People's Party (CPP) and FUNCINPEC,[34] led by one of Sihanouk's sons, Norodom Ranariddh. Both parties competed for the support of Khmer

[27] See William Schabas, *Genocide in international law: the crime of crimes* (Cambridge University Press, 2000) regarding earlier genocide cases. The PRT definition of genocide differed from that in the Genocide Convention, see William A Schabas, 'Problems of International Codification - Were the Atrocities in Cambodia and Kosovo Genocide' (2001) 35(2) *New England Law Review* 287-302, 289. Tara H Gutman, 'Cambodia, 1979: Trying Khmer Rouge leaders for genocide' in Kirsten Sellars (ed), *Trials for International Crimes in Asia* (Cambridge University Press, 2016) 167-190, 180, considers whether this may have been a translation issue.
[28] David Chandler, 'Will There Be a Trial for the Khmer Rouge?' (2000) 14 *Ethics & International Affairs* 67-82, 73.
[29] Linton (n 23), 49; e.g., Vannak Huy, 'Him Huy Needs Justice' (2002) 28 (April) *Searching for the Truth* 28-29.
[30] *Decree Law No. 1, Establishment of People's Revolutionary Tribunal at Phnom Penh to Try the Pol Pot – Ieng Sary Clique for the Crime of Genocide*, 15 July 1979.
[31] Alex L Hinton, 'Truth, Representation and the Politics of Memory after Genocide' in Alexandra Kent and David Porter Chandler (eds), *People of Virtue: Reconfiguring Religion, Power and Moral Order in Cambodia* (Nias Publishing, 2008) 62-81, 70.
[32] Evan Gottesman, *Cambodia after the Khmer Rouge: inside the politics of nation building* (Yale University Press, 2003), 241.
[33] David Chandler, 'Cambodia Deals with its Past: Collective Memory, Demonisation and Induced Amnesia' (2008) 9(2-3) *Totalitarian Movements and Political Religions* 355-369, 355.
[34] National United Front for an Independent, Neutral, Peaceful, and Cooperative Cambodia in English, commonly known as its acronym FUNCINPEC.

Rouge members[35] and the government granted amnesties to Khmer Rouge defectors in 1994.[36]

Yet the emphasis on reintegration was not just propounded by the Cambodian government – nor was it uncontested. During the preceding years of the Paris Peace negotiations, 'no Western states' had supported prosecuting DK crimes[37] and proposals to refer to 'genocide' in the peace agreement were rejected.[38] China and some other states continued to oppose trials during the negotiations between the Cambodian government and the UN to establish the ECCC (see section 3.1).[39] Meanwhile, the continued presence of Khmer Rouge forces in border areas presented a challenge for Cambodia's stability, albeit one of declining importance following the pardon granted to Ieng Sary in 1996. Thus, Cambodian approaches to international criminal justice were formulated in an atmosphere of military insecurity.[40]

By the late 1990s, Cambodia had experienced decades of conflict during which international aid had been politically and practically complicated to deploy.[41] However, a significant amount of assistance was provided to Cambodia following the establishment of UNTAC, including for rule of law and judicial development, though much was diverted as the result of corruption and inefficiencies.[42] In June 1997, apparently with international encouragement, Cambodia's Prime Ministers requested the UN's assistance to prosecute international crimes committed during DK.[43] In July 1997, Hun Sen's Cambodian Peoples

[35] MacAlister Brown and Joseph J Zasloff, *Cambodia Confounds the Peacemakers 1979-1998* (Cornell University Press, 1998), 251.
[36] *Law to Outlaw the Democratic Kampuchea Group*, 14 July 1994.
[37] Kirsten Ainley, 'Transitional Justice in Cambodia: The Coincidence of Power and Principle' in Renée Jeffery and Hun Joon Kim (eds), *Transitional Justice in the Asia-Pacific* (Cambridge University Press, 2014) 125-156, 145.
[38] Fawthrop and Jarvis (n 24), 100.
[39] Craig Etcheson, 'The Politics of Genocide Justice in Cambodia' in Cesare Paolo R Romano, Andrae Nollkaemper and Jann K Kleffner (eds), *Internationalized Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo, And Cambodia* (Oxford University Press, 2004) 181-232, 193.
[40] Sorpong Peou, 'The Limits of Collaborative Action on Criminal Justice in East Asia' in Sorpong Peou (ed), *Human Security in East Asia: Challenges for Collaborative Action* (Routledge, 2009) 108-124, 122.
[41] Fawthrop and Jarvis (n 24), 65-66.
[42] Carmen Malena and Kristina Chhim, 'Linking citizens and the state: an assessment of civil society contributions to good governance in Cambodia' (The World Bank, February 2009) <http://documents.worldbank.org/curated/en/2009/02/10745236/linking-citizens-state-assessment-civil-society-contributions-good-governance-cambodia>.
[43] United Nations, 'Identical letters dated 23 June 1997 from the Secretary-General addressed to the President of the General Assembly and to the President of the Security Council', UN Doc. A/51/930 S/1997/488, 24 June 1997, <http://www.eccc.gov.kh/sites/default/files/June_21_1997_letters_from_PMs-2.pdf>; Thomas Hammarberg, 'How the Khmer Rouge Tribunal Was Agreed: discussions between the Cambodian

Party (CPP) ousted Ranariddh and the FUNCIPEC party, after which some international aid to Cambodia was suspended.[44] In this context of recent instability, the CPP therefore sought to secure Cambodia's (and the government's) security and redevelopment. International crimes trials provided one potential route toward securing both goals (see section 3.2).[45]

2.4. Independence and Engagement: ECCC Negotiations

In 1998, the UN General Assembly asked the Secretary-General to appoint a Group of Experts to 'evaluate the existing evidence [of DK crimes] and propose further measures'.[46] There is insufficient scope to detail the history of the negotiations to establish the ECCC that followed the Experts' report, as many others have done,[47] though some relevant arguments are drawn upon in section 3. The discussions were complex: they dealt with Cambodian and international law and occurred during the extensive upheaval and aftermath of the CPP taking power (with ongoing concerns about how to manage remaining Khmer Rouge forces and defectors), alongside disagreements between UN actors and representatives of various states about the discussions and proposed outcomes. They were also acrimonious, with 'stalemates' contributed to by both the UN and Cambodian negotiators.[48] However, alongside these challenging discussions, after 2001 the government and judiciary undertook a number of actions that indicated an interest in prosecuting international crimes (see Timeline). In 2002, Cambodia became the first country in Southeast Asia to ratify the Rome Statute. Cambodia's Supreme Court also

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government and the UN (2001) <http://www.d.dccam.org/Tribunal/Analysis/How_Khmer_Rouge_Tribunal.htm>; Steve Heder, 'A Review of the Negotiations Leading to the Establishment of the Personal Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia' (1 August 2011) <http://www.cambodiatribunal.org/sites/default/files/A%20Review%20of%20the%20Negotiations%20Leading%20to%20the%20Establishment%20of%20the%20Personal%20Jurisdiction%20of%20the%20ECCC.pdf>.

[44] Human Rights Watch, 'Cambodia: Aftermath of the Coup' (1 August 1997) <http://www.refworld.org/docid/45cb0fbb2.html>.

[45] Etcheson (n 39), 202.

[46] United Nations General Assembly, 'Situation of human rights in Cambodia', UN Doc. A/RES/52/135, 27 February 1998, para. 16.

[47] See e.g. Hammarberg, (n 43); Heder (n 43); Fawthrop and Jarvis (n 24); David Scheffer, *All the Missing Souls: A Personal History of the War Crimes Tribunals,* Human Rights and Crimes Against Humanity (Princeton University Press, 2012), 341-405; David Scheffer, 'The Extraordinary Chambers in the Courts of Cambodia' in M Cherif Bassiouni (ed), *International Criminal Law: International Enforcement* (Martinus Nijhoff Publishers, 2008) 219-255. For links to detailed chronologies, see Cambodia Tribunal Monitor, 'Chronology & Negotiating History' <http://www.cambodiatribunal.org/history/tribunal-background/chronology-negotiating-history/>.

[48] Hammarberg, (n 43); Scheffer (2012), ibid.

upheld the conviction of a Khmer Rouge General, Nuon Paet, for a 1994 attack on a train that killed 'at least 13 Cambodians' and in which 'three western tourists and some Cambodians [were] taken hostage'.[49] Soon after, Khmer Rouge Colonel Chhouk Rin was convicted for his role in the incident. These developments – which took place during the ECCC negotiations – may have been directed toward an international audience.[50] Still, the trials arguably also 'appeared to indicate a willingness by the authorities to get serious about Khmer Rouge prosecutions, albeit belatedly and following sustained pressure from the foreign embassies and families of the victims'.[51] Ung Choeun (known as Ta Mok) and the leader of the S-21 security centre, Kaing Ghek Iev (Duch), were later captured and indicted 'for crimes against domestic security with the intention of serving the policies of the Democratic Kampuchea group' and genocide.[52]

After further discussions and the adoption of the ECCC Agreement in 2003, a *Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea* (ECCC Law)[53] was amended in 2004. The ECCC was established as an 'internationalised' tribunal with national and international co-prosecutors, co-investigating judges, and investigating, trial and appeals judges (there are now also international and national civil party lead co-lawyers). The ECCC has jurisdiction only over crimes committed during DK and is therefore limited to prosecuting historic incidents (see section 4.2). In later years the Cambodian government resisted the ECCC's investigations of the former Commander of the Democratic Kampuchea Navy and several other mid-level commanders (in Cases 003 and 004).[54]

2.5. Social Structures: Power, Buddhism and the Military

Cambodia adopted laws that would allow forward-looking prosecutions by amending, with French assistance, its Criminal Procedures Code and Criminal Code to incorporate

[49] Fawthrop and Jarvis (n 24), 166.
[50] Linton (n 23), 48.
[51] Fawthrop and Jarvis (n 24), 194.
[52] Royal Government of Cambodia, 'The Khmer Rouge Trial Task Force Indictments and Detention Orders, Ung Choeun, known as Ta Mok, and Kaing Khek Iev, known as Duch' (19 February 2004) <www.cambodia.gov.kh/krt/english/indictments.htm>.
[53] See (n 4).
[54] See section 3.2; Hun Sen quoted in Joel Brinkley, 'Justice Squandered: Cambodia's Khmer Rouge Tribunal', *World Affairs* (September/October 2013) <http://www.worldaffairsjournal.org/article/justice-squandered-cambodia%E2%80%99s-khmer-rouge-tribunal>.

international crimes in 2007[55]and 2009,[56] respectively. However, there are ongoing concerns about judicial independence in Cambodia.[57] In 2007, scholar and NGO worker Urs argued that 'donors continue to spend tens of millions of dollars a year on rule of law promotion efforts in Cambodia and yet fail to disrupt the power structure that prevents fair trials'.[58] These influences include hierarchies within the government and society, as well as the enduring impact of religious and historic Khmer teachings.

Culture is a 'fuzzy and difficult area',[59] including in Cambodia. Yet constructivists as well as social anthropologists have argued that normative orders are 'socially and culturally positioned'[60] and thus important to consider. The issue of seeking justice for DK crimes 'touches the hearts of each and every person in Cambodia'[61] and is therefore affected by intersecting individual, social and cultural backgrounds. For example, for many in Cambodia, where officially 97 per cent of the population are Buddhists,[62] understandings of international criminal justice may be influenced by Buddhist tradition.

Thus, some scholars have suggested that international crimes prosecutions might conflict with 'non-legalistic traditions that offer alternatives to the pursuit of peace'[63] or a Buddhist 'mindful understanding of the past'.[64] Others have indicated that prosecuting only the most senior leaders of DK might be consistent with traditional patron-client relationships,[65] a 'stay in your place' mentality,[66] or of Buddhist 'Karmic justice' in the next life.[67] It has also been suggested that victims are more interested in learning the truth

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[55] *Criminal Procedure Code of Kingdom of Cambodia 2007*, translation by Bunleng Cheung.
[56] Criminal Code (n 9).
[57] International Bar Association Human Rights Institute, 'Justice versus corruption: Challenges to the independence of the judiciary in Cambodia' (September 2015) <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=fb11e885-5f1d-4c03-9c55-86ff42157ae1>.
[58] Tara Urs, 'Imagining Locally-Motivated Accountability for Mass Atrocities: Voices from Cambodia' (2007) 7 *International Journal of Human Rights* 61-99, 64.
[59] Ross Grantham Westoby, *Influencing official and unofficial justice and reconciliation discourse in Cambodia: the role of local non-state actors and institutions* (PhD Thesis, University of Queensland, 2013), 55.
[60] Alexandra Kent, 'Reconfiguring Security: Buddhism and Moral Legitimacy in Cambodia' (2006) 37(3) *Security Dialogue* 343-361, 345.
[61] Etcheson (n 39), 181.
[62] Central Intelligence Agency, 'The World Factbook: Cambodia' (10 November 2016) <https://www.cia.gov/library/publications/the-world-factbook/geos/cb.html>.
[63] Peou (n 40), 121.
[64] Hinton (n 31), 79.
[65] Urs (n 58), 79-82; Malena and Chhim (n 42), 4-5.
[66] Urs (n 58), 64.
[67] Sophal Ear, 'Khmer Rouge Tribunal vs. Karmic Justice', *The New York Times* (17 March 2010) <http://www.nytimes.com/2010/03/18/opinion/18iht-edear.html>; see Tallyn Gray, 'Justice and the Khmer Rouge: concepts of just response to the crimes of the Democratic Kampuchean regime in

about DK and understanding its crimes ('Why did Khmer kill Khmer?'), than in securing retribution.[68] Across the transitional justice field, following the UNTAC period, 'non-governmental organizations proliferated in Cambodia and discourses of reconciliation, human rights, and justice were localized, often in Buddhist terms, in another reworking of the genocidal past'.[69]

Still, the relationship between Buddhism and passivity or submission is contested.[70] The disruption of colonial control and DK, which outlawed religion, also complicates the identification of traditional values, power hierarchies, and identities in Cambodia.[71] Further, there were not always clear boundaries between 'victims' and 'perpetrators'.[72] Many Cambodians (including Hun Sen) were DK cadres or, like Sihanouk and his family, were otherwise implicated in the regime. Cambodia's history of insecurity may also have promoted the significance of the military for some officials and members of the public.

Despite these complexities, power relationships, including within the CPP, are 'characterized by extreme levels of executive control'.[73] The possibility that judges have viewed their role as 'subordinates of the Executive' has also been offered as a potential barrier to judicial reform in Cambodia.[74] These cultural and social dynamics have therefore provided an important – but complicated – context for developing mechanisms for prosecuting international crimes in Cambodia.

Further, elections in 2013 were surrounded by violence[75] and opposition leaders and activists have been exiled, arrested and even assassinated. There are accusations that the current administration and security forces are involved in the ongoing commission of international crimes, including forcible transfers associated with land grabbing estimated

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Buddhism and the Extraordinary Chambers in the Courts of Cambodia at the time of the Khmer Rouge tribunal' (2012) 36 *Working papers in Contemporary Asian Studies, Lund University*.
[68] Urs (n 58), 74.
[69] Hinton (n 31), 66.
[70] See, e.g., Jeff Haynes, *Religion in Global Politics* (Routledge, 2014) 207-208.
[71] Michael Vickery, *Cambodia 1975-1982* (George Allen and Unwin, 1984), 177.
[72] Julie Bernath, ''Complex Political Victims' in the Aftermath of Mass Atrocity: Reflections on the Khmer Rouge Tribunal in Cambodia' (2015) 10(1) *International Journal of Transitional Justice* 46-66.
[73] Urs (n 58), 63.
[74] Ibid, 64.
[75] Human Rights Watch, 'Cambodia: Investigate Killing and Injuries of Election Protesters' (17 September 2013) <http://www.hrw.org/node/119020>.

to have affected up to 770,000 Cambodians (see below).[76] These incidents have involved the use of Cambodia's courts to prosecute political opponents and critics of the CPP, in the same period as the ECCC has pressed on with prosecuting DK crimes.

2.6. Summary: History

Cambodia's government was eventually willing to allow the prosecution of DK crimes through establishing a past-focused internationalised mechanism focused on a small number of perpetrators. It also adopted laws that could allow for prosecutions of crimes committed in future. However, '[r]ather than its leaders feeling vulnerable to prosecution or being socialised into observing human rights and democracy norms, Cambodia seems to be regressing in its human rights record'.[77] The government has reportedly obstructed some ECCC prosecutions, and is alleged to have facilitated the ongoing commission of international crimes. The next section demonstrates how the principles of sovereignty, selective justice, stability, development, and the other social structures discussed above, have been drawn upon and contested by a variety of actors seeking to shape international criminal justice in Cambodia.

3. Local Initiatives and Adaptation

The second question posed in this thesis is how state and other actors in Southeast Asia have influenced conceptions of international criminal justice. This section does not proceed chronologically. Instead, it draws on public statements and interviews predominantly from after the ECCC negotiations began, analysed using thematic coding, to identify the use of *local initiative* by international actors (3.1), Cambodia's government leaders (3.2), and civil society actors (3.3), as well as efforts to *adapt* perceptions of international criminal justice in Cambodia (in 3.4). It suggests that a variety of actors have engaged in debates about prosecuting international crimes committed in Cambodia.

[76] Global Diligence (n 10); Luke Hunt, 'Cambodia's Ruling Elite One Step Closer to International Court', *The Diplomat* (16 September 2016) <http://thediplomat.com/2016/09/cambodias-ruling-elite-one-step-closer-to-international-court/>.
[77] Ainley (n 37), 154.

3.1. International States and Organisations

International states and organisations have shaped the implementation of international criminal justice in Cambodia in diverse ways. Nonetheless, statements by actors involved with Cambodia's international criminal justice processes have addressed some common themes, including the importance of independence, due process concerns, and reconciliation considerations.

Despite an initial lack of interest on the part of some international actors in pursuing accountability for DK crimes,[78] once engaged, many argued that international criminal justice in Cambodia must take place in an 'impartial' or 'independent' manner. This did not mean independent from international influence, but, on the contrary, that external personnel and governance would be critical. The US originally sought a tribunal established by the UN Security Council[79] and the Group of Experts recommended establishing a 'United Nations tribunal' similar to the ICTY and ICTR, located in the Asia Pacific, but not in Cambodia.[80] For various reasons, this option was not popular,[81] but the UN remained concerned about potential political interference in and the corruption of Cambodia's judicial system. The UN pulled out of negotiations in 2002, stating that any court must demonstrate 'independence, impartiality and objectivity'.[82] Thus, UN and some international actors considered international criminal justice to require external control.[83]

Some states, including Russia, Brazil, and other Latin American states, initially opposed establishing an international criminal tribunal without Cambodia's consent.[84] China's UN delegates 'pursued an aggressive lobbying strategy, attempting to kill the tribunal before it [was] born'.[85] Other actors adjusted their position as to how international criminal justice should be pursued in relation to Cambodia. Human Rights Watch argued that in the same

[78] Section 2.3.
[79] Scheffer (2012) (n 47), 364.
[80] Group of Experts for Cambodia (n 23), para. 179.
[81] Scheffer (2012) (n 47), 367; Hammarberg, (n 43).
[82] United Nations, 'Statement by UN Legal Counsel Hans Corell: Negotiations between the UN and Cambodia regarding the establishment of the court to try Khmer Rouge leaders' (8 February 2002) <http://www.un.org/news/dh/infocus/cambodia/corell-brief.htm>; see also United Nations Secretary-General, 'Report of the Secretary-General on Khmer Rouge trials', UN Doc. A/57/769, 31 March 2003, 7, 11.
[83] See also Amnesty International, 'Kingdom of Cambodia: Amnesty International's position and concerns regarding the proposed "Khmer Rouge" tribunal' (24 April 2003) <https://www.amnesty.org/en/documents/asa23/005/2003/en/>; Human Rights Watch, 'Serious Flaws: Why the U.N. General Assembly Should Require Changes to the Draft Khmer Rouge Tribunal Agreement' (2003) <http://www.hrw.org/legacy/backgrounder/asia/cambodia043003-bck.pdf>.
[84] Scheffer (2012) (n 47), 370.
[85] Etcheson (n 39), 194.

week of the ICC's inauguration in 2003, other ICC 'member states such as France, Japan, the US, Australia and India have supported the Cambodian government's position and consistently pressured the United Nations to make unprincipled concessions'. [86]

The concerns of the Group of Experts and the UN Secretariat have been partly vindicated. Various actors – especially international NGOs – have consistently criticised the Cambodian government for interfering with ECCC proceedings.[87] For instance, in Cambodia's 2010 UPR report, Belgium 'noted with concern cases of political influence and corruption at the Extraordinary Chambers'.[88] On the other hand, in 2013 the US State Department concluded that 'there was no evidence' that 'public comments by government leaders on matters related to the ECCC's jurisdictional mandate' had 'inhibited the work of the court'.[89] Thus, international actors continue to debate whether 'independent' international criminal justice can be delivered in a localised manner in Cambodia.

When the General Assembly, with Cambodian support,[90] asked the Secretary-General to resume negotiations to establish a Cambodian tribunal in 2003, he was requested to ensure the ECCC would operate with 'justice, fairness and due process of law' and in an 'efficient and cost-effective' manner.[91] The ECCC Agreement requires that unless there is ambiguity, the ECCC procedures 'shall be in accordance with Cambodian procedural law', but also requires the ECCC to exercise 'jurisdiction in accordance with international standards of justice, fairness and due process of law'.[92] International NGOs have monitored and criticised the ECCC's procedures against international norms.[93] The ECCC

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[86] Human Rights Watch (n 83), 2.
[87] Human Rights Watch (n 26); Mark S Ellis, 'Safeguarding Judicial Independence in Mixed Tribunals: Lessons from the ECCC and Best Practices for the Future' (International Bar Association, September 2011) <http://www.ibanet.org/Document/Default.aspx?DocumentUid=5398D4A3-D767-4B2E-83AF-CB4F564DDD16>; see also Cambodian Human Rights Action Committee (CHRAC), 'CHRAC welcomes the most recent developments in Cases 003 and 004' (5 March 2015) <http://www.adhoc-cambodia.org/press-release-chrac-welcomes-the-most-recent-developments-in-cases-003-and-004/>; Torrens (n 7).
[88] UN Human Rights Council, 'Report of the Working Group on the Universal Periodic Review: Cambodia', UN Doc. A/HRC/13/4, 4 January 2010, para. 29, similar statements were made by the Netherlands, para. 44.
[89] United States Department of State, 'Cambodia 2013 Human Rights Report' (2013) <http://www.state.gov/documents/organization/220395.pdf>, 18.
[90] Fawthrop and Jarvis (n 24), 195.
[91] United Nations General Assembly, 'Resolution adopted by the General Assembly on the report of the Third Committee, 57/228, Khmer Rouge trials', UN Doc. A/RES/57/228, 27 February 2003; see also United Nations Secretary General (n 82), 5.
[92] Article 12, ECCC Agreement (n 5).
[93] E.g., David Cohen, Melanie Hyde and Penelope Van Tuyl, 'A Well-Reasoned Opinion? Critical Analysis of the First Case Against the Alleged Senior Leaders of the Khmer Rouge (Case 002/01)' (East-West Center, Asian International Justice Initiative, WSD Handa Center, 2015)

has struggled to secure sufficient funding, both from international actors and, at times, the Cambodian government.[94] It has now undergone extensive restructuring in an attempt to improve efficiency.[95] However, debates about the ECCC's expense and duration continue, as it has convicted three individuals (in two judgments) in ten years.

International actors hoped that the ECCC would support Cambodia's reconciliation, peace, and judicial reform.[96] In 2003, the UN General Assembly recognised 'the legitimate concern of the Government and the people of Cambodia in the pursuit of justice and national reconciliation, stability, peace and security'.[97] According to the Japanese Ambassador, international crimes trials would 'play an important role as a catalyst for strengthening Cambodia's general judicial system, providing a good model in legal proceedings based on due process, efficient administration and support systems'.[98] This was also expected to take place through training Cambodian lawyers and judges working at the ECCC. French and Japanese lawyers assisted with revising Cambodia's domestic criminal law, which came to include international crimes.[99] The UN Office of the High Commissioner for Human Rights has assisted with legal and judicial reform, including via ECCC legacy programmes.[100] Such activities attempt to enhance the ECCC's positive impact

<http://www.eastwestcenter.org/system/tdf/private/cohen-wellreasoned2015.pdf?file=1&type=node&id=35372>; Ellis (n 87); Human Rights Watch (n 26); Open Society Justice Initiative, 'Performance and Perception: The Impact of the Extraordinary Chambers in the Court of Cambodia' (February 2016) <https://www.opensocietyfoundations.org/reports/performance-and-perception-impact-extraordinary-chambers-court-cambodia>. Though there was a lack of international criticism in Cambodia's 2014 UPR, UN Human Rights Council, 'Report of the Working Group on the Universal Periodic Review: Cambodia', UN Doc. A/HRC/26/16, 27 March 2014.

[94] Ciorciari and Heindel (n 18), 99; ECCC, 'UN General Assembly approves US$ 15.5 million funding reserve' (26 May 2014) ECCC <http://www.eccc.gov.kh/en/articles/un-general-assembly-approves-us-155-million-funding-reserve>.

[95] Stuart White, 'KRT trims budget by millions', *The Phnom Penh Post*, 20 March 2014 <http://www.phnompenhpost.com/national/krt-trims-budget-millions>.

[96] Group of Experts for Cambodia (n 23), para. 43.

[97] Preamble to the ECCC Agreement (n 5).

[98] Quoted in Cat Barton, 'KR Trial Holds Promise for Court Reform', *The Phnom Penh Post*, 10 March 2006, <http://www.phnompenhpost.com/national/kr-trial-holds-promise-court-reform>, see Urs (n 58), 63. For a more recent restatement of these hopes, see European Union, 'Multiannual Indicative Programme 2014-2020 for the European Union's cooperation with the Kingdom of Cambodia' (2014) <https://eeas.europa.eu/delegations/cambodia/documents/eu_cambodia/2014_2020_mip_final_en.pdf>, 11.

[99] Ministry of Justice Japan, 'Projects and Activities for Each Recipient Country', http://www.moj.go.jp/ENGLISH/m_housouken05_00005.html>; Siphana Sok, *Role of Law and Legal Institutions in Cambodia* (PhD .Thesis, Bond University, 2008), 175-176;.

[100] United Nations, 'Role and achievements of the Office of the United Nations High Commissioner for Human Rights in assisting the Government and people of Cambodia in the promotion and protection of human rights', UN Doc. A/HRC/24/32, 19 September 2013,

on the judiciary in Cambodia, even if their success is debateable.[101] Thus, some international actors have pressured for fair international crimes trials and have provided critical financial and other assistance to support the ECCC's operations and broader impact.

In summary, in debates surrounding international criminal justice in Cambodia, the UN, international NGOs and some states have emphasised the principles of independence and due process. However, there are multiple perspectives of what 'international criminal justice' might involve in Cambodia. These are further exposed in the following analysis of Cambodian government statements.

3.2. Cambodian Authorities

Members of the Cambodian government probably held different individual opinions, but the majority of CPP members appear to have supported establishing a tribunal with at least some international elements[102] – although Party decision-making responsibility rested in few hands.[103] In comparison to the emphasis of many international actors on prosecuting DK crimes with international management and due process, the CPP-led government promoted 'win-win' and 'triangle' strategies. These responded to the country's violent past by promoting development by ensuring peace and stability, Cambodia's international reintegration, and protecting Cambodia's legitimacy as a sovereign state.[104] Each of these principles has been invoked in government statements regarding international criminal justice.

3.2.1.Institutional Development

<http://cambodia.ohchr.org/WebDOCs/DocReports/3-SG-RA-Reports/A_HRC_24_32_ENG_SG_report_2013.pdf>.

[101] See Stephen McCarthy and Kheang Un, 'The evolution of rule of law in Cambodia' (2015) *Democratization* 1-22; Urs (n 58). E.g., 'So the same judges sitting at the ECCC, when they go to their own bench, they [do] not apply international law. So maybe this kind of thing you need to be more exposure, more networking among judges so that they can start demanding that they can start using it…', Interview C6.

[102] Etcheson (n 39), 184.

[103] Fawthrop and Jarvis (n 24), 187.

[104] Hun Sen, 'Address on "Challenges and Promises of ASEAN Integration: A Cambodian Perspective"', *Cambodia New Vision* (11 March 2002) <http://cnv.org.kh/address-on-challenges-and-promises-of-asean-integration-a-cambodian-perspective/> (ASEAN Address).

When Hun Sen requested the UN's assistance to prosecute DK-era crimes, he noted that 'Cambodia does not have the resources or expertise to conduct this very important procedure'.[105] Establishing a tribunal may have been viewed as one, though not necessarily the only, way to access additional international funding for these purposes and to foster Cambodia's development. This was particularly likely following Hun Sen's coup, when states such as the US needed to demonstrate to domestic constituents that Cambodia was a valid aid recipient.

However, Cambodia received assistance from states both opposed to and in favour of an international tribunal. It is not clear whether Cambodia's leaders' greater financial incentives were to accept a tribunal established by the UN Security Council or to accept aid from China and others that opposed international crimes trials.[106] Cambodia has now experienced consistent economic growth for many years and receives significant foreign investment, especially from China.[107] Development challenges persist, especially concerns about neo-patrimonial governance and corruption,[108] but in general there may be declining material motivations for pursuing international criminal justice.

3.2.2.Peace and Stability

Cambodia's leaders have also presented economic prosperity, institutional development, and 'justice' as being interrelated with securing Cambodia's stable peace.[109] In 1999, Hun Sen stated that '[n]ational reconciliation and peace are indispensable requirement[s] of the Cambodian nation and people …'[110] In Tokyo in 2001, Hen Sen claimed 'peace cannot last without justice. Therefore, Cambodia is determined to close the darkest chapter of its own history and look forward toward progress, prosperity and democracy'.[111]

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[105] United Nations (n 43).
[106] Fawthrop and Jarvis (n 24), 178.
[107] World Bank, 'Cambodia' <http://data.worldbank.org/country/cambodia>.
[108] Global Witness, 'Hostile Takeover: How Cambodia's ruling family are pulling the strings on the economy and amassing vast personal fortunes with extreme consequences for the population' (7 July 2016) <https://www.globalwitness.org/en/reports/hostile-takeover/>; Malena and Chhim (n 42).
[109] E.g., 'Peace, stability and national reconciliation are *sine qua non* conditions for economic development and poverty alleviation for the people…', Kingdom of Cambodia, 'Aide-Memoire on Report of the Group of Experts for Cambodia of 18 February 1999' (17 March 1999) <https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2016-09-20%2022:21/D181_2.16_EN.PDF> (Aide-Memoire), 2.
[110] Hun Sen, 'Aide Memoire: An Analysis on Seeking a Formula for Bringing Top KR Leaders to Trial' (1999) 14 (January) *Cambodia New Vision* 1-2 <http://cnv.org.kh/cnv_html_pdf/cnv_14.PDF>.
[111] Hun Sen, 'Opening Address at the Cambodia Consultative Group Meeting, Tokyo, 12 June 2001' (2001) 41 (June) *Cambodia New Vision* 1-2 <http://cnv.org.kh/cnv_html_pdf/cnv_41.PDF> (Tokyo

'Peace' has encompassed the government's own legitimacy and political stability. Hun Sen's preference was to prosecute only the top Khmer leaders, given the widespread involvement of the population in the criminal conduct[112] or, at least, with some association to DK. This included members of the current government including Hun Sen himself who had defected from DK.[113] On the other hand, the 1979 PRT had already identified and labelled a 'clique' of responsible senior leaders (Pol Pot and Ieng Sary), providing a narrative that could support peace as well as the government's stability. A tribunal would potentially mean the 'government is now allowed to say, "Look, we're not the Khmer Rouge"'[114] and also 'use [a tribunal] as a gun to threaten the Khmer Rouge'.[115]

'Stability' was deployed to present a version of international criminal justice that must only pursue peace by focusing on the responsibility of a select group of individuals – to the extent that, now that Cambodia's conflict was over, further trials (beyond the ECCC's first two cases 001 and 002) should not be pursued. Minister of Information Khieu Kanharith reportedly explained in 2010 that the 'purpose of forming the court was to seek justice for victims and guarantee peace and stability in society' and '[i]f the court walks farther than that, it will fall.'[116] Thus, peace, reconciliation and stability have been important elements of the Cambodian government's statements about international criminal justice.

3.2.3.Democracy and Human Rights

Government statements during the ECCC negotiations also emphasised Cambodia's desire to re-join the international community as a human rights-respecting democratic state. Cambodia's reports to international treaty bodies have often mentioned the ECCC,[117] suggesting that Cambodia's leaders expect that establishing an international criminal tribunal buttresses its democratic credentials. As Hun Sen told the UN General Assembly in relation to the draft ECCC Agreement: 'We are back on the international scene and have become a proud member of ASEAN'.[118] Thus, international crimes trials offered

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Address). See also Hun Sen, 'Address of Samdech Hun Sen to the United Nations General Assembly's Millennium Summit, 8 September 2000' (2000) 32 (September) *Cambodia New Vision* 1-4 <http://cnv.org.kh/cnv_html_pdf/cnv_32.PDF> (Millennium Address).

[112] Ciorciari and Heindel (n 18), 30.

[113] Ibid, 17.

[114] Interview C2.

[115] Interview C4.

[116] Cheang Sokha and James O'Toole, 'Hun Sen to Ban Ki-moon: Case 002 last trial at ECCC', *The Phnom Penh Post* (27 October 2010) <http://www.phnompenhpost.com/national/hun-sen-ban-ki-moon-case-002-last-trial-eccc>; see also Brinkley (n 54).

opportunities to contribute to all three arms of the 'triangle strategy': apart from providing one avenue for material benefits (aid), accountability could help peacefully distance the government from DK and provide 'a way for Cambodia to become a fully accepted member of the international community'.[119]

3.2.4.Sovereignty and Double Standards

However, consistent with the experiences discussed in section 2.1, the Cambodian government tried to navigate the tension between inviting international criminal justice approaches and avoiding interference by emphasising Cambodia's sovereignty.[120] As stability returned to Cambodia, Hun Sen promoted the use of Cambodian courts to prosecute former DK leaders.[121] Cambodian leaders also drew attention to the double standards involved when international actors argued that international control of Cambodia's international crimes trials would ensure impartiality.[122] Hun Sen argued: 'If foreigners have the right to lack confidence in Cambodian courts … we have the right to lack confidence in an international court'.[123] The same argument was deployed to counter the plans for additional Case 003 and 004 indictments at the ECCC. Hun Sen warned: 'The UN and the countries that supported Pol Pot to occupy Cambodia's seat at the UN from 1979 to 1991 should be tried first. They should be sentenced more heavily than Pol Pot'.[124] In this manner, government statements about international criminal justice directed attention toward politicisation, selectivity and the importance of protecting Cambodia's sovereignty.

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[117] E.g., albeit in response to questions about the ECCC, UN Committee against Torture, 'Consideration of reports submitted by States parties under article 19 of the Convention: Second periodic report of States parties due in 1997: Cambodia', UN Doc. CAT/C/KHM/2, 2 February 2010.
[118] Millennium Address (n 111).
[119] Craig Etcheson, *After the killing fields: lessons from the Cambodian genocide* (Praeger, 2005), 44. An NGO representative opined that Cambodia joined the ICC because 'Cambodia always want[s] … to be first to have their name in the world. They also join everything… World Trade Organisation, ASEAN, OPEC, ratif[y] it…', Interview C1.
[120] E.g., Hun Sen claimed that '[f]ollowing the 1998 elections … we conducted a "win-win" policy leading to reach genuine national reconciliation *without external influences*', ASEAN Address (n 104), see also Tokyo Address (n 111).
[121] Aide-Memoire (n 109), 3
[122] E.g., ibid.
[123] Terry McCarthy, 'Hun Sen: Cambodia's Mr Justice?' *Time* (22 March 1999) <http://content.time.com/time/world/article/0,8599,2040423,00.html>. During the ECCC negotiations, Foreign Minister Hor Namhong asked, 'But what has the international community been doing vis-à-vis the Khmer Rouge lately?', quoted in Hammarberg, (n 43).
[124] Quoted in Brinkley (n 54).

The themes presented in this section were summarised in Deputy Prime Minister Sok An's speech to Cambodia's National Assembly when Cambodia eventually ratified the ECCC Agreement. He pointed out that: 'even before [seeking UN assistance], our Government has held to the following principles as its guiding lights'. These were: first, 'to provide justice' to victims; second 'to maintain peace, political stability and national unification', and third, 'respect for our national sovereignty'.[125] In this way, Cambodian government actors proffered a perspective of international criminal justice that would embrace the principles of justice, stability, reintegration, and sovereignty. More recently, however, the Cambodian government has also professed its respect for 'the due process of law and the independence of the judiciary' at the ECCC.[126] These debates are therefore ongoing. They also involve contributions from a range of non-state, as well as official actors.

3.3. Civil Society

A thriving network of Cambodian NGOs emerged in the 1990s, many of which were beneficiaries of foreign funding alongside UNTAC.[127] Yet a history of repression also resulted in relatively 'low levels of associational activity' and some reluctance to challenge authorities.[128] Although civil society actors offered to assist with drafting legislation and provided 'moral support to the UN' during the ECCC negotiations,[129] there were few opportunities to act as norm entrepreneur 'mediators' until the Court was being established.[130] Cambodian-based civil society actors have pursued international criminal justice through documenting crimes, monitoring, promoting, and assisting the ECCC. Many work with international partners and some have also submitted communications to the ICC.

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[125] Sok An, 'Presentation by Deputy Prime Minister Sok An to the National Assembly on Ratification of the Agreement between Cambodia and the United Nations and Amendments to the 2001 Law concerning the establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea' (2004) <https://www.eccc.gov.kh/sites/default/files/legal-documents/Sok_An_Speech_to_NA_on_Ratification_and_Amendments-En.pdf>.
[126] E.g., Cambodia, 'National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Cambodia', UN Doc. A/HRC/WG.6/18/KHM/1, 21 November 2013, 10.
[127] Christoph Sperfeldt, 'Cambodian civil society and the Khmer Rouge Tribunal' (2012) 6(1) *International Journal of Transitional Justice* 149-160, 150.
[128] Malena and Chhim (n 42), 4, 8.
[129] Peou (n 40), 114; including political actors, see e.g. Vong Sokheng, 'Ranariddh prefers UN trial role', *The Phnom Penh Post* (12 April 2002) <http://www.phnompenhpost.com/national/ranariddh-prefers-un-trial-role>.
[130] Fawthrop and Jarvis (n 24), 187.

3.3.1.Court and Community Engagement

In the late 1990's, some NGOs in Cambodia that received international funding pursued strategies that would appear 'objective' in an attempt to establish their credibility.[131] For example, the Documentation Center of Cambodia (DC-Cam), which was established by Yale University's Genocide Program but became an independent NGO in 1997, began organising the substantial archives of DK. This made it difficult to ignore the scale of the crimes and contributed to the impetus for an accountability mechanism.[132] As one former NGO worker explained, 'You cannot first come in and say we want to try this person, that's not going to work. You start with collecting documents. That is the first step in any situation'.[133] This experience has been exported through DC-Cam collaboration with the Network for Human Rights Documentation-Burma (ND-Burma).[134]

Organisations like Asian International Justice Initiative's KRT Trial Monitor, Youth for Peace, Cambodian Human Rights and Development Association (ADHOC), and the Cambodian Defenders Project have also monitored and critiqued ECCC proceedings.[135] The ECCC's victim (civil party) participation and judicial and non-judicial reparations mandate was developed with NGO assistance.[136] Civil parties, including from diaspora communities in France and the US, have participated in trials and proposed reparations projects. The lawyers for civil parties are Cambodian and international. With their assistance, civil parties propelled the inclusion of additional gender-based violence charges at the ECCC, for example.[137] Cambodia-based NGOs have also been integral to the consultation, design, and implementation of the ECCC's victim participation and reparations processes, including by providing community contacts and facilitating meetings.[138]

Court outreach services draw on local knowledge to publicise the ECCC's activities in a community-relevant manner, including by engaging with Buddhist monks to use their

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[131] Interview C4.
[132] Etcheson (n 39), 201.
[133] Interview C4.
[134] International Centre for Transitional Justice, 'DC-Cam to Help Burma Record Rights Abuses' (8 May 2013) <https://www.ictj.org/news/dc-cam-help-burma-record-rights-abuses>.
[135] E.g., CHRAC (a coalition of 21 NGOs), 'CHRAC Expresses Concern over the Emerging Conflict between Co-Investigating Judges' (9 December 2011) <http://www.chrac.org/en/pdf/12_09_2011_CHRACstatement_En.pdf>; CHRAC (n 87).
[136] Christoph Sperfeldt, 'Collective Reparations at the Extraordinary Chambers in the Courts of Cambodia' (2012) 12(3) *International Criminal Law Review* 457-490.
[137] Silke Studzinsky, 'Neglected Crimes: The Challenge of Raising Sexual and Gender-Based Crimes before the Extraordinary Chambers in the Courts of Cambodia' in Susanne Buckley-Zistel and Ruth Stanley (eds), *Gender in Transitional Justice* (Palgrave Macmillan, 2011), 88.
[138] Sperfeldt (n 136); Case 002/01 Judgment (n 14), paras 1109-1164.

'standing in this society … to complement the Court proceedings'.[139] The ECCC's nationally administered Victims' Support Service has also brought more than 300,000 Cambodians to observe court proceedings.[140] NGOs have developed television, radio and other community education formats that explain and promote ECCC proceedings to the Cambodian public.[141]

Civil society activities have also included at least some attempt by ADHOC to discuss the ICC and the international crimes in Cambodia's Criminal Code, although 'participants seem[ed] more interested in the Khmer Rouge past than in a distant institution in The Hague'.[142] Thus various actors have used local initiatives to contextualise the norm of international criminal justice predominantly with reference to a domestic and past-focused mechanism, the ECCC, and have transported these experiences to promote justice in other contexts.

3.3.2.Partnering with International Actors

A former NGO actor argued that to be successful in promoting DK trials, Cambodian NGOs needed 'a very good team' but 'not only from the local but from international. Without the support from the international … it's very difficult to operate in this environment because the opposition and the government may play against you easily.'[143] Cambodian civil society is sometimes described as being 'donor-driven' and 'Phnom Penh centred' rather than having evolved from an activist social base.[144] Few, if any, of the transitional justice projects discussed in this chapter could have been undertaken without international

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[139] ECCC, 'ECCC Reaches Out to Buddhist Monks' (10 August 2011) <http://www.eccc.gov.kh/en/articles/eccc-reaches-out-buddhist-monks>; Sperfeldt (n 136); Sperfeldt (127); Ignaz Stegmiller, 'Legal Developments in Civil Party Participation at the Extraordinary Chambers in the Courts of Cambodia' (2014) 27(2) *Leiden Journal of International Law* 465-477.
[140] ECCC, 'The Court Report: December 2015' (December 2015) <http://www.eccc.gov.kh/en/articles/court-report-december-2015>, 9.
[141] Christoph Sperfeldt, Melanie Hyde and Mychelle Balthazard, 'Voices for Reconciliation: Assessing media outreach and survivor engagement for Case 002 at the Khmer Rouge Trials' (East-West Center, WSD Handa Center for Human Rights & International Justice, February 2016) <http://www.eastwestcenter.org/publications/voices-reconciliation-assessing-media-outreach-and-survivor-engagement-case-002-the>.
[142] Michaela Raab and Julian Poluda, 'Justice for the Survivors and for Future Generations ADHOC's ECCC / ICC Justice Project December 2006 – March 2010' (ADHOC, European Union, 2010) <http://www.adhoc-cambodia.org/wp-content/uploads/2013/08/ADHOC_KRT_evaluation_RaabPoluda_final003201.pdf>, 3.
[143] Interview C4.
[144] Malena and Chhim (n 42), 8.

finance and seconded international staff.[145] However, this does not detract from the crucial role of local actors in initiating community projects, seeking out funding, and contributing to these activities.[146] Indeed it is difficult to draw clear boundaries between 'local' and 'international' norm entrepreneurship in Cambodia.

Cambodian NGOs have collaborated in initiatives aimed at addressing atrocities committed subsequent to DK, including possible prosecutions before the ICC. For example, Forum Asia credited Cambodian organisations ADHOC and the Cambodian League for the Promotion and Defense of Human Rights (LICADHO), as well as the European Union, Norwegian Embassy, and others for having 'paved the way' for Cambodia's ratification of the Rome Statute in 2002.[147] In 2005, the International Federation for Human Rights (FIDH), with the support of the European Union, held a round table with ADHOC and LICAHDO to discuss the implementation of the Rome Statute[148] and ADHOC held a subsequent workshop in 2012.[149] In these cases, local NGOs in Cambodia worked with international partners to encourage support for new international crimes laws.

International criminal law has also been used to advocate for contemporary accountability, so that both the ECCC's past-focused prosecutions and the ICC may have a future impact.[150] A former NGO representative thought that the indirect influence of prosecuting the former regimes is 'invisible but it's very powerful. People know that if you do something wrong, something's going to happen to you, no matter how long after the event [it is].'[151] This was also a reason for implementing the Rome Statute, which could send 'a strong signal to future perpetrators of the most heinous crimes that impunity will no longer be tolerated'.[152]

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[145] Jorn Dosch, 'The Role of Civil Society in Cambodia's Peace-building Process: Have Foreign Donors Made a Difference?' (2012) 52(6) *Asian Survey* 1067-1088; Sperfeldt (n 127), 154-155.
[146] Dosch, ibid, 1085.
[147] FORUM-ASIA, 'Cambodia - 1st ASEAN Country to Ratify International Criminal Court Treaty' (27 November 2001) <http://archive.iccnow.org/documents/PRFoumAsiaRatificationCambodia_en.pdf>.
[148] International Federation for Human Rights (FIDH), 'Implementation of the Rome Statute in Cambodian Law' (March 2006) <http://www.fidh.org/IMG/pdf/cambodge443angformatword.pdf>, 5.
[149] ADHOC, 'Workshop – 10th Anniversary of the entry into force of the Rome Statute of the International Criminal Court' (2 July 2012) <http://www.adhoc-cambodia.org/?p=1798>.
[150] In relation to post-election violence in early 2014, one NGO representative suggested considering 'whether or not [the] ICC can remind [the authorities] "you need to strengthen the rule of law"', Interview C6.
[151] Interview C4.
[152] FIDH, 'Civil Society Urges the Cambodian Government to fully Implement the Statute of the International Criminal Court' (12 May 2006) <https://www.fidh.org/en/region/asia/cambodia/eccc/Civil-Society-Urges-the-Cambodian>.

In recent years, local and international groups have submitted communications to the ICC Prosecutor under Article 15 of the Rome Statute alleging that members of Cambodia's political elite are guilty of international crimes.[153] For example, in 2014, the political opposition, Cambodia National Rescue Party (CNRP), announced a complaint submitted by Global Diligence, assisted by the former Head of Defence Support Section at the ECCC, Richard Rogers, addressing land confiscations.[154] In September 2016, Rogers reportedly planned to ask the ICC to include the murder of Cambodian opposition figure Kem Ley in its investigations.[155] He also argued that the ICC Prosecutor's stated prioritisation of land related crimes should encourage her to focus upon the Cambodia allegations.[156]

As at 30 November 2016, the outcome of these communications remained unknown. The Cambodian government had so far deflected the communications as a political and potentially 'defaming'[157] 'joke'.[158] Officials do not appear to have taken further action to investigate the relevant conduct – for instance, under Cambodia's domestic international crimes legislation. However, apart from the Article 15 communications, it seems that local NGOs attempt to address concerns about 'land grabbing' with a human rights, development or domestic property law, rather than international criminal law, focus, including because of the immediate need to defend and protect land activists who are

[153] E.g., by Khmer National Liberation Front (KNLF): Samean Yun and Joshua Lipes, 'Cambodia: Hun Sen accused of 'crimes against humanity'', *Radio Free Asia* (3 July 2013) <http://www.rfa.org/english/news/cambodia/complaint-07032013183524.html>; and World Organization for Human Rights: Lauren Crothers, 'Hun Sen Accused of Genocide in ICC Complaint', *The Cambodia Daily* (21 March 2014) <http://www.cambodiadaily.com/archives/hun-sen-accused-of-genocide-in-icc-complaint-54669/>.
[154] Meas Sokchea, 'ICC complaint to lay shootings at PM's feet', *The Phnom Penh Post* (7 January 2014) <http://www.phnompenhpost.com/national/icc-complaint-lay-shootings-pm%E2%80%99s-feet>; Global Diligence (n 10).
[155] Associated Foreign Press, 'Kem Ley Murder May Become Part of ICC Case Against Cambodia's 'Ruling Elite'', *Radio Free Asia* (6 September 2016) <http://www.rfa.org/english/news/cambodia/kem-ley-murder-may-become-09062016145507.html>.
[156] Global Diligence, 'Land grabbers may end up in The Hague: Global Diligence welcomes the ICC Prosecutor's new case selection policy' (15 September 2016) <http://www.globaldiligence.com/2016/09/15/land-grabbers-may-end-up-in-the-hague-global-diligence-welcomes-the-icc-prosecutors-new-case-selection-policy/>.
[157] Yun and Lipes (n 153).
[158] Kevin Ponniah, 'Complaint filed at ICC', *The Phnom Penh Post* (8 October 2014) <http://www.phnompenhpost.com/national/complaint-filed-icc>; Phan Soumy, 'CPP 'Not Worried' About International Court's Decision', *The Cambodia Daily* (19 September 2016) <https://www.cambodiadaily.com/news/cpp-not-worried-regarding-international-courts-decision-118149/>.

themselves subject to domestic prosecutions.[159] NGOs rarely publicly link the ECCC's conviction of DK leaders for forcible transfers[160] to contemporary accusations of forced evictions in Cambodia,[161] although contemporary land disputes partly derive from historic events.[162] Thus, civil society actors have worked with international actors and organisations to promote international criminal justice, especially at the ECCC and in relation to ratifying and implementing the Rome Statute, but also continue to pursue domestic and alternative avenues for advocacy.

3.3.3.International Selectivity and Impartiality: Double Standards

Some civil society actors retain concerns about double standards and the selective application of international criminal justice. One NGO representative explained that 'we hope the Prosecutor and ICC [can] somehow ensure the equality before the law. [So that it] doesn't matter whether this is in [the] African continent' or there are 'financial constraint[s]', the ICC would provide even treatment to all States Parties.[163] This may be linked to historic experience, since the slowness of the international community to respond to Khmer Rouge crimes suggests to some that the ICC would also be slow to pursue prosecutions.[164] Another interviewee also observed that the 'ICC is not as strong as domestic court[s], because it doesn't have the police'.[165]

If the ICC does not decide to investigate crimes in Cambodia, there may also be fears that Cambodian authorities will use the Article 15 communications as an excuse *not* to respond to complaints within the domestic legal system, which have faced significant challenges, including as to the security of activists.[166] One NGO representative suggested that 'if you

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[159] E.g. Cambodian League for the Promotion and Defense of Human Rights (LICADHO), 'Land Grabbing & Poverty in Cambodia: The Myth of Development' (May 2009) <https://www.licadho-cambodia.org/reports/files/134LICADHOREportMythofDevelopment2009Eng.pdf>; Global Diligence (n 10); see Sokbunthoeun So, 'Land Rights in Cambodia: An Unfinished Reform', (2010) 97 *AsiaPacific Issues* < http://www.eastwestcenter.org/publications/land-rights-cambodia-unfinished-reform>.

[160] *Prosecutor v Nuon Chea and Khieu Samphan*, Case No. 002, Supreme Court Chamber, Appeal Judgement, 23 November 2016 (Appeal Judgment).

[161] Though see LICADHO (n 159), 27.

[162] So (n 159), 2; Interview C1.

[163] Interview C6.

[164] 'Even [the] ICC... Relating [its situation] to [the] Khmer Rouge as example… The leader[s] during [the time of Khmer Rouge] power, nobody accepted [a court] then. But when they have no power, they'll arrest [them]…. And that's the challenge you see?', Interview C1.

[165] Interview C1.

[166] E.g., Global Witness, 'Lengthy Jail Sentence for Cambodian Activist Highlights Worsening State Repression Amidst Land Grab Crisis' (1 October 2012)

relodge [your complaint] at the national court system they will say "refer to [the] ICC, ICC said there is no problem". So … It's a shelter somehow to those kinds of criminals'.[167] He argued that the ICC would not deter contemporary crimes unless it could address the 'gap', where although international crimes have been committed (for political, gravity or evidentiary reasons) the ICC seems 'too high' or 'too far'.[168] Otherwise, 'you create a lot of expectations and then nothing happens'.[169]

Thus at least some local NGO actors challenge the ICC's selectivity and ask it to do more. Just as Hun Sen once argued that the UN 'should play a crucial role in preventing conflicts',[170] an NGO actor asked: 'we know ICC is an international criminal law court, it is a permanent court, it is a court. But can they do more than a court? For example on prevention issues, can they do it?'[171] The argument that the ICC could do more in Cambodia promotes the importance of international criminal institutions. The documentation, monitoring, victims and outreach activities mentioned above support the prosecution of international crimes in trials before the ECCC. In these ways, actors have used local initiative to promote the 'norm' of international criminal justice in Cambodia.

3.4. Local Adaptation

The previous section explained how international states and organisations, Cambodian authorities, and local NGOs have influenced Cambodia's approach to prosecuting international crimes. This section explores how various actors have also aimed to move beyond translating international norms for domestic adoption by further *adapting* understandings of international criminal justice in Cambodia.

3.4.1. Other Priorities and Institutional Reform

International criminal justice has been associated with Cambodia having 'turned a corner of history, putting firmly behind the darkness of its recent past history and emerging into

<https://www.globalwitness.org/en/archive/lengthy-jail-sentence-cambodian-activist-highlights-worsening-state-repression-amidst-land/>; Global Diligence (n 10), paras 25-26.
[167] Interview C6.
[168] Ibid.
[169] Ibid; Interview C1.
[170] Millennium Address (n 111).
[171] Interview C6.

a new dawn of its future'[172] and thereby contributing to development goals. However, some actors have focused on other priorities, such as access to justice, resolving land disputes, children and women's rights, and issues such as torture and forced confessions.[173]

Cambodia's domestic international crimes laws are arguably relatively complete,[174] so that one NGO representative speculated that some civil society actors 'may say that "I've done my job because genocide, war crimes, crimes against humanity has been codified in the Penal Code already, Cambodia has already signed, ratified the ICC, that's all"'.[175] Instead, it may be broader issues of judicial independence that present the remaining barriers to international criminal justice and other reforms. As one actor put it, '[w]e have good law but enforcement'[176] is the problem. Thus, rather than only advocating for the government to 'end impunity' or working with the ECCC, many NGOs focus on judicial capacity building or provide legal aid and community education.[177] Much of this training might be considered development work and covers a variety of justice and human rights areas.

Law students are a particular focus. An educator who has worked at international crimes tribunals, believes that encouraging students to think 'critically' 'will have a far greater impact than working at the ECCC, [it's] not even close'.[178] Another NGO representative agreed that 'the only hope may be the younger generation' and school curriculum changes 'the only entry point where international criminal law can be more referred to or can be more researched…'[179] Thus, particularly as Cambodia has a high proportion of younger people, long-term strategies aimed at the youth and judiciary are a focus for activities that may adapt initiatives favouring international criminal justice for broader purposes.[180]

[172] ASEAN Address (n 104).
[173] As one NGO representative explained, 'the high profile issue[s] in Cambodia … the children, land and women', Interview C1. See Malena and Chhim (n 42) regarding social accountability initiatives.
[174] See section 4.
[175] Interview C6.
[176] Interview C1.
[177] Interview C5.
[178] Interview C2.
[179] Interview C6.
[180] See Westoby (n 59), 182-193.

3.4.2.Community-Developed Projects and Dialogue

The Group of Experts found little Cambodian interest in establishing a truth commission and heard that any 'commission could not be a substitute for trials'.[181] However, there have been extensive local memorial and other transitional justice activities in Cambodia.[182] DC-Cam has worked to document and exhibit the history of atrocities, including by promoting the construction of a large 'Institute'. In 2011, the Cambodian Defenders Project organised a series of Women's Hearings where survivors and witnesses publicly shared accounts of sexual violence committed during DK.[183] The Hearings and related projects arguably demonstrated that 'many small and localized initiatives can … be equally important to more grandiose undertakings such as the establishment of an internationalized criminal tribunal'.[184] Yet alongside recommendations for governments, civil society and international organisations, expert panels at the Hearings also suggested that the ECCC investigate and prosecute sexual violence crimes.[185] Thus, these forums did not represent a substitute for international crimes prosecutions, but adapted some of their features.

NGO advocacy often refers to the ECCC and the ICC as the venues for international criminal justice and the Rome Statute as a model for legislation.[186] However, some responses to international crimes have been adjusted to incorporate 'local' Buddhist or cultural views. This may have arisen from a perception expressed by one international actor based in Cambodia that:

> In [the Cambodian public's] mind [the ECCC accused] were already guilty. And a lot of that stems from a sort of different sense of justice that we have in the West. And there's no concept of trials so they're like, why are these people getting treated so well when the common criminal who steals a chicken or a moto is tortured, beaten and thrown in terrible prisons for years and these people get to live in nice cushy digs, air conditioning, things like that.[187]

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[181] Group of Experts for Cambodia (n 23), para. 202, see also Linton (n 23), 54, though the South African model was countenanced by the Cambodian government, see Hammarberg, (n 43).
[182] See Westoby (n 59).
[183] Beini Ye, 'Transitional Justice Through the Cambodian Women's Hearings' (2014) 5 *Cambodia Law and Policy Journal* 23-38.
[184] Farrah Tek and Christoph Sperfeldt, 'Justice and Truth-Seeking for Survivors of Gender-based Violence Under the Khmer Rouge' in Phillip Tolliday, Maria Palme and Dong-Choon Kim (eds), *Asia-Pacific between Conflict and Reconciliation* (Vandenhoeck & Ruprecht, 2016) 125-138, 135; Ye, ibid.
[185] E.g., Cambodian Defenders Project, 'Women's Hearing with the Young Genderation (sic): Panel Statement' (24 September 2013) <http://gbvkr.org/wp-content/uploads/2013/11/Women-Hearing-2013-Panel-Statement-EN-final.pdf>, 5.
[186] E.g. FIDH (n 148 and 152).
[187] Interview C2.

There are indications of a shift toward international NGOs preferring to support community-derived ('bottom-up') initiatives that encourage dialogue about past crimes, rather than focusing only upon prosecutions,[188] albeit often still linked to the ECCC. The ECCC Chambers have approved reparations projects including memorials and public exhibitions, as well as initiatives that claim to be 'culturally adapted',[189] including community self-help groups and testimonial therapies.[190]

Some local and international actors have also initiated or supported creative projects with broader goals than seeking prosecutions, such as an annual 'peace walk', pagodas, theatre, exhibitions, oral history, and radio programs.[191] One NGO has trained Buddhist monks 'to be more effective in their ability to encourage people to talk and share'[192] and thereby equip them to contribute to community stability and reconciliation. Another project adapted television programs about the ECCC proceedings to 'create environments favourable for longer-term reconciliatory processes *beyond the ECCC*'.[193] One Cambodia researcher has found that '[d]ialogue, between individuals and across communities as a whole, is considered crucial in creating a *space* in which reconciliation can occur'.[194] Similarly, for an international actor, 'I view it and other people do too as a battle over space between the government and civil society'.[195] While the ECCC has contributed to securing such 'space', these attempts continue to be challenging, especially since the Cambodian government has recently tightened restrictions on NGO activities.[196]

It seems that international attention and the establishment of the ECCC has attracted international expertise and funding toward prosecuting international crimes in Cambodia. However, actors within Cambodia have also engaged in diverse alternative initiatives that broaden and adapt understandings of international criminal justice, including to promote broader contemporary institutional reforms and reconciliation.

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[188] Malena and Chhim (n 42), 8; Westoby (n 59), 46.
[189] Transcultural Psychosocial Organization (TPO Cambodia), 'Promoting healing and reconciliation in Cambodia through psychosocial interventions' <https://tpocambodia.org/promoting-healing-and-reconciliation/>.
[190] Case 002/01 Judgment (n 14), para. 1131.
[191] See Westoby (n 59).
[192] Ibid, 174.
[193] Sperfeldt, Hyde and Balthazard (n 141), 7, emphasis added.
[194] Westoby (n 59), 48, emphasis added.
[195] Interview C2.
[196] Human Rights Watch, 'World Report: Cambodia' (2016) <https://www.hrw.org/world-report/2016/country-chapters/cambodia>.

3.5. Summary: Local Initiative and Adaptation

International and government actors have discussed international criminal justice in Cambodia with reference to independence, due process, sovereignty, selectivity, reconciliation, peace and stability, reintegration, and development issues. Civil society actors from around the world have advocated for prosecuting international crimes and have assisted the ECCC through documentation, monitoring, working with civil parties and community outreach. To do so, NGOs have engaged international partners and organisations, including by submitting communications to the ICC.

However, some have also taken up advocacy in other priority areas or have turned their attention toward educating future generations, judicial reform, and broader reconciliation initiatives. Thus, both international and Cambodia-based actors have been engaged in debates about prosecuting international crimes that occurred in the past, as well as in relation to contemporary or future violations. The remainder of this chapter turns to the possible influence of these processes upon Cambodia's mechanisms for prosecuting international crimes.

4. Mechanisms for Prosecuting International Crimes in Cambodia

This section addresses the third question pursued in this thesis. It identifies the laws and institutions for prosecuting international crimes in Cambodia. Cambodia has a civil law legal system partly derived from the colonial French protectorate period, although colonial and DK upheavals have contributed to obscurity about the exact content of Cambodian law.[197] There are several avenues for responding to international crimes committed in Cambodia. First, there may be international mechanisms. Cambodia has ratified most international human rights and humanitarian law treaties, including the Rome Statute (4.1). Second, Cambodia passed the ECCC Law in 2004 (4.2). Third, Cambodia has included international crimes in its Criminal Code (4.3). Finally, amnesties and pardons have been provided in the past and may still be available, including for

[197] A modified version of the French criminal code, the 1956 Criminal Law, was adopted post-independence. A 1954 Code of Military Justice included some offences against wounded or dead soldiers. The 1980 PRK Decree Law 2 remained the only criminal 'law' (see Gottesman (n 32), 241) until UNTAC adopted 'Provisions relating to the Judicial and Criminal Law and Procedure Applicable in Cambodia during the Transitional Period of 1992'. See Brad Adams, 'Cambodia's Judiciary: Up To The Task?' in Jaya Ramji and Beth Van Schaak (eds), *Bringing the Khmer Rouge to Justice: Prosecuting Mass Violence before the Cambodian Courts* (Edwin Mellen Press, 2005) 127-167; FIDH (n 148), 14; Group of Experts for Cambodia (n 23), para. 157.

international crimes (4.4).

4.1. International Mechanisms

A new internationalised tribunal or other states' universal jurisdiction might be deployed to prosecute international crimes committed in Cambodia in future. The ICC may also have jurisdiction over such crimes committed after 1 July 2002. However, Cambodia has not adopted specific legislation relating to cooperating with the ICC or ratified the Agreement on Privileges and Immunities of the Court, which may complicate its cooperation with any ICC investigation. Given the uncertainty of these possibilities, they are not addressed further here.[198]

Cambodia has also ratified the four Geneva Conventions and a number of other relevant international humanitarian law and human rights treaties, including Additional Protocols I and II.[199] In 2007, Cambodia's Constitutional Council drew on Article 31 of the Constitution to suggest that 'law' in Cambodia includes international human rights treaties to which it is a party,[200] though Article 31 also says that the 'exercise of such rights and freedom shall be in accordance with the [Cambodian] law'. Still, the situation for humanitarian law treaties is unclear, as is the question of which laws take precedence where domestic legislation is inconsistent with international treaty obligations.[201] In practice Cambodia has adopted domestic legislation to implement its obligations under international treaties.[202] Legislation has also been passed to address international criminal law.

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[198] See section 3, chapter 1.
[199] See Tables 3 and 4, chapter 3.
[200] *Kingdom of Cambodia Constitutional Council Decision 092/003/2007*, Case No. 131/003/2007, 26 June 2007, see Article 31 of the *Constitution of the Kingdom of Cambodia 1993*; FIDH (n 148), 16. This interpretation was suggested in Committee on the Elimination of Discrimination Against Women, 'Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women: Combined fourth and fifth periodic reports of States parties Cambodia', UN Doc CEDAW/C/KHM/4-5, 24 September 2011, 23, albeit regarding a ratified treaty. Cambodia's other reports suggest that the Constitution 'recognizes and respects human rights' in accordance with the terms of Article 31, see e.g. Cambodia (n 126), para. 86.
[201] Kuong Teilee, 'Cambodian Constitutional Provisions on Treaties: A Story of Constitutional Evolution Beyond Rhetoric' (2010) 1 *Cambodian Yearbook on Comparative Legal Studies* 1-16. In *Prosecutor v Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007/ECCC/TC, Trial Chamber, Decision on the Defence Preliminary Objection Concerning the Statute of Limitations of Domestic Crimes, 26 July 2010 (Statutory Limitations Decision), para. 39 the Trial Chamber found that Article 15 of ICCPR was applicable to the ECCC because of Article 33new, ECCC Law (n 4).
[202] E.g., *Law on the Prohibition of Chemical, Nuclear, Biological and Radiological Weapons*, 3 December 2009; *Law on the Protection of Cultural Heritage*, 25 January 1996.

4.2. The ECCC Law

The ECCC Law is a Cambodian law providing for 'Extraordinary Chambers' to be established within Cambodia's court structure. However, as discussed, the ECCC is an 'internationalised' tribunal. It has narrow jurisdiction to prosecute the 'senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian laws related to crimes, international humanitarian law, and international conventions recognized by Cambodia' committed between 17 April 1975 and 6 January 1979.[203] Article 12 of the ECCC Agreement provides that ECCC procedures 'shall be in accordance with Cambodian law'[204] and the ECCC Law provides that ECCC trials are to be conducted 'in accordance with existing procedures in force' and 'international standards of justice, fairness and due process of law'.[205]

The ECCC Law provides the Court with jurisdiction to try crimes of homicide, torture, and religious persecution included in the 1956 Penal Code,[206] but not other Cambodian national crimes, including, for example, sexual violence crimes. Cambodia's Constitutional Council suggested that the ECCC's jurisdiction and removal of statutory limitation periods did not breach provisions in the 1956 Penal Code concerning the non-retroactive application of criminal law.[207] However, the ECCC Trial Chamber was unable to agree that it could apply the 1956 law, partly due to a dispute as to when Cambodia's devastated judicial system became capable of prosecuting international crimes.[208]

The ECCC may also prosecute the crimes of genocide,[209] crimes against humanity,[210] grave breaches of the Geneva Conventions,[211] the destruction of cultural property during armed conflict,[212] and 'crimes against internationally protected persons pursuant to the Vienna Convention of 1961 on Diplomatic Relations',[213] though not the crime of aggression.[214] The

[203] Article 2 new, ECCC Law (n 4).
[204] ECCC Agreement (n 5).
[205] Article 33new, ECCC Law (n 4).
[206] Article 3, ibid.
[207] *Kingdom of Cambodia Constitutional Council Decision 040/002/2001,* Case No. 038/001/2001, 12 February 2001; Statutory Limitations Decision (n 201), para. 6.
[208] Statutory Limitations Decision (n 201). Cases 003 and 004, which remain at pre-trial stage, currently include violations of the 1956 Code, however.
[209] Article 4 ECCC Law (n 4).
[210] Article 5 ibid.
[211] Article 6 ibid.
[212] Article 7 ibid.
[213] Article 8 ibid.

definition of genocide is adopted from the Genocide Convention.[215] While Cambodia had ratified the Rome Statute by the time the amended Law was adopted in 2004, the Law largely replicates the crimes against humanity provisions from the earlier ICTY and ICTR Statutes.[216] These appeared a more appropriate starting point for determining the content of international criminal law in the late 1970s than the more recent Rome Statute.[217] Thus, the Law does not include the additional definitions included in Article 7(2) of the Rome Statute, nor, for example, its range of sexual and gender-based violence crimes.[218] It also omits the war crimes included in the Rome Statute or Additional Protocols beyond the grave breaches,[219] including those committed in a non-international armed conflict, which arguably had less certain status in customary international law during the relevant period. Linton observes that this omission could have been explained if the DK period was considered an international conflict. However, this was 'not consistent with the aims and objects of the drafters' who did not want the full period of Cambodia's war from 1970 or earlier, when international actors were implicated in the conflict, 'opened up to scrutiny'.[220]

The ECCC Law does not address modes of liability, though the Chambers have drawn on ICTY and ICTR jurisprudence to justify reliance upon the first two forms of 'joint criminal enterprise' (but not the third).[221] Like the ICTY and ICTR Statutes, no defences are included and Article 29(4) of the ECCC Law confirms there is no defence of superior orders. Thus, the Chambers refer to the relevant domestic laws for the period under examination, including the defences in the 1956 Penal Code.[222] The ECCC Law involved the establishment of a new institution for prosecuting past international crimes in Cambodia.

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[214] See Suzannah Linton, 'Putting Things Into Perspective: The Realities of Accountability in East Timor, Indonesia and Cambodia' (2005) 3(182) *Maryland Series in Contemporary Asian Studies Series* 1-88.
[215] Ratified by Cambodia 14 October 1950.
[216] E.g., the ECCC Law has no requirement for crimes against humanity to occur during an armed conflict, as in Article 5 of the Statute for the International Criminal Tribunal for the former Yugoslavia (ICTY Statute), but does require that crimes against humanity involve an 'attack directed against any civilian population, on national, political, ethnical, racial or religious grounds', as does Article 3 of the Statute for the International Criminal Tribunal for Rwanda (ICTR Statute), but not the ICTY Statute.
[217] The UN Secretary General suggested that crimes in the ICTY Statute were all recognised in customary international law, UN Secretary-General, 'Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)', UN Doc. S/25704, 3 May 1993, para. 34.
[218] Sarah Williams and Emma Palmer, 'The Extraordinary Chambers in the Courts of Cambodia: Developing the Law on Sexual Violence?' (2015) 15(3) *International Criminal Law Review* 452-484.
[219] Cambodia became a party to the first two Protocols in 1998.
[220] Linton (n 214), 47.
[221] Appeal Judgment (n 160), paras 768-810.
[222] E.g., Statutory Limitations Decision (n 201), para. 553 regarding duress, and see Linton (n 214), 36.

However, as discussed in section 5, it was adapted in various ways, including in its temporal, personal and subject-matter jurisdiction.

4.3. Domestic Criminal Legislation

Cambodia's 2010 Criminal Code (Code) includes crimes that could encompass similar conduct to international crimes, including murder, torture and 'barbarous' acts, violence, rape and sexual assault, illegal arrest or detention, and discrimination.[223] Cambodia's legal Commission of the National Assembly also drafted international crimes provisions for this Code and the 2007 Criminal Procedures Code, reportedly with the assistance of French lawyers.[224] Thus, the Code includes crimes against humanity, genocide and war crimes and provides jurisdiction where there is a link to Cambodian territory, victims or perpetrators, though it does not confer universal jurisdiction.[225] Article 7 clarifies that the Code is to be interpreted in light of its provisions, 'subject to international treaties' (such as the Rome Statute) and Article 8 suggests that the Code should not prevent victims of international humanitarian law violations from pursuing prosecutions under other relevant laws – for example, the ECCC Law.

The Code draws on the Rome Statute crimes provisions with minor variations.[226] It extends liability to 'legal entities' (but not the state).[227] Like the ECCC Law, the Code does not include the definitions contained in Article 7(2) of the Rome Statute regarding crimes against humanity, leaving scope for courts to interpret terms such as 'deportation or forcible transfer of population' in context. The crime against humanity of persecution does not extend to grounds other than 'political, racial, national, ethnic, cultural, religious or gender',[228] though this is more expansive than the ECCC Law, which only referred to 'political, racial, and religious grounds'.

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[223] Criminal Code (n 9); annex 3.
[224] FIDH (n 148), 50.
[225] Articles 19-20, 22, Criminal Code (n 9), although it extends to crimes committed by Cambodians overseas or by a foreigner against Cambodian victims, 'against the security of' Cambodia, or where the offence was committed against a Cambodian diplomatic or consular agent or premises or related to counterfeiting (Article 22).
[226] See Simon M Meisenberg, 'Complying with Complementarity? The Cambodian Implementation of the Rome Statute of the International Criminal Court' (2014) 5(1) *Asian Journal of International Law* 123-142. For example, the definition of genocide in Article 183(4), Criminal Code (n 9), includes 'imposing *forceful* measures *or voluntary means* intended to prevent births'.
[227] Articles 187, 192, 198, Criminal Code (n 9).
[228] I.e., excluding 'or other grounds that are universally recognized as impermissible under international law' as in Article 7(1)(h) of the Rome Statute. Article 188(8), ibid.

The grave breaches provision in Articles 193 of the Code is adopted in similar form to Article 8(2)(a) of the Rome Statute although – as in the ECCC Law – Articles 193(5)-(7)[229] refer to 'civilians' rather than 'protected persons'. This could exclude such crimes committed against medical and religious personnel and the unlawful deportation, transfer or confinement of non-civilians.[230] The ECCC Law only included these grave breaches, whereas Article 194 of the Code merges Article 8(2)(b) and (c) of the Rome Statute in prohibiting a list of war crimes in both international and non-international conflicts. It omits some of the Rome Statute violations, such as enlisting or conscripting children under the age of 15, the use of prohibited weapons other than poison, sexual violence war crimes, and declaring that no quarter will be given.[231] Finally, providing a foreign state with 'the means of undertaking hostilities or aggressions' is punishable under the Code,[232] though it includes neither aggression nor crimes against peace.

The Code includes criminal responsibility provisions that are similar to the Rome Statute.[233] For example, co-perpetrators are those who 'by mutual agreement, commit the relevant criminally prohibited act', or 'attempt to commit a felony',[234] which, by focusing on the agreement, appears to reflect a lower culpability threshold than Article 25 of the Rome Statute. Moreover, the Code criminalises planning to commit genocide or crimes against humanity, including participating in a group or organisation to do so.[235] It also includes the 'incitement … to discriminate, to be malicious or violent against a person or a group of persons because of their membership or nonmembership of a particular ethnicity, nationality, race or religion'.[236] These provisions suggest incitement to commit genocide,[237] but appear broader. On the other hand, the Code does not include an explicit superior responsibility provision.

The Code has includes various defences, such as in relation to mental disorders[238] and self-defence.[239] As to superior orders, Article 32 says that perpetrators of genocide, crimes

[229] Equivalent to Article 8(2)(a)(v)-(vii), Rome Statute.
[230] Meisenberg (n 226), 129-131. However, the chapeau of Article 193, Criminal Code (n 9), refers to acts committed against 'persons or properties protected by Geneva Convention[s]', which could protect a broader range of victims.
[231] Meisenberg ibid, 134.
[232] Article 444, Criminal Code (n 9).
[233] See Meisenberg (n 226), 135.
[234] Article 26, Criminal Code (n 9).
[235] Articles 185 and 190, ibid.
[236] Article 496, ibid.
[237] Article 25(3)(e), Rome Statute.
[238] Article 31, Criminal Code (n 9).
[239] Article 33, ibid.

against humanity *or war crimes* 'shall not, under any circumstances' be exempted from responsibility because the act was authorised or not prohibited by law or performed subject to an order, which goes beyond Article 33 of the Rome Statute and Article 17 of the 1997 military law,[240] but reflects Article 29(4) of the ECCC Law[241] and the position in customary international law.[242]

Cambodia has not ratified the 1968 Convention on the Non-Applicability of Statutes of Limitations on War Crimes and Crimes Against Humanity,[243] but the Code[244] and Criminal Procedures Code[245] provide that the limitations periods do not apply for genocide, war crimes, or crimes against humanity.[246] However, the Code does not establish any special chambers or mechanism for investigating and prosecuting international crimes and Cambodia's Criminal Procedures Code does not include specific procedures for prosecuting international crimes.[247] In summary, Cambodia's domestic laws reflect the scope of the Rome Statute, despite some departures and more progressive provisions. Still, there are avenues to exclude perpetrators of international crimes from criminal sanction.

4.4. Amnesties and Immunities

Amnesties and pardons have been employed by Cambodia in the past, including for DK defectors in the *Law to Outlaw Democratic Kampuchea Group* in 1994, and a Royal Amnesty was issued for Ieng Sary in 1996. This was reflected in Article 40 *new* of the ECCC Law, which allowed the ECCC to determine the scope of any previous pardons or amnesties. In a decision demonstrating the potential for friction between Cambodian laws and the international criminal justice norm, the ECCC Pre-Trial Chamber found that Ieng

[240] *The Law on General Statutes for the Military Personnel of the Royal Cambodian Armed Forces*, CS/RKM/1197/005, 6 November 1997.
[241] ECCC Law (n 4); *Prosecutor v Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007/ECCC/TC, Trial Chamber, Judgment, 26 July 2010, para. 552.
[242] Paola Gaeta, 'The defence of superior orders: the statute of International Criminal Court versus customary international law' (1999) 10(1) *European Journal of International Law* 172-191.
[243] The provisions of this Convention may not reflect customary international law and are unlikely to apply where states have inconsistent legislation, see Steven R Ratner, Jason S Abrams and James L Bischoff, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (Oxford University Press, 2009), 160.
[244] Article 143, Criminal Code (n 9).
[245] Article 9, Criminal Procedure Code (n 55).
[246] See section 4.2 in relation to the ECCC Trial Chamber's disagreement as to the application of statutory limitation periods: Statutory Limitations Decision (n 201).
[247] Other than in relation to provisional detention in Articles 210 and 608, possibly influenced by ECCC decisions, e.g., *Prosecutor v Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007/ECCC/TC, Trial Chamber, Decision on Request for Release, 15 June 2009.

Sary's prior conviction before the PRT, the Royal Amnesty granted in 1996, and the amnesty law of 1994 did not prevent his prosecution.[248]

The position within domestic courts for future prosecutions under the Criminal Code is unclear. Article 90 new (4) of the Constitution allows the National Assembly to adopt a general amnesty and Article 149 of the Code confirms that this encompasses expunging convictions, but does not prevent victims from seeking compensation for the damage they have suffered.[249] Similarly, Article 27 of the Constitution allows the King to commute sentences and grant pardons. While the Rome Statute provides that it applies to Heads of State and other officials,[250] within Cambodia the King is considered inviolable under Article 7 of the Constitution, although the monarch's role today is predominantly formal. The question of the compatibility of Article 7 with Article 27 of the Rome Statute does not appear to have been addressed when Cambodia ratified the Rome Statute or amended the Code, possibly because the pre-eminence of the Constitutional position was considered 'clear' to parliamentarians.[251] Articles 80 and 104 of the Constitution also provide members of the National Assembly and senators with parliamentary immunity.[252] Thus – reflecting concerns about Cambodia's stability – amnesties, pardons, and limited immunities may still operate with respect to prosecuting international crimes in Cambodian Courts.

4.5. Enforcement

Cambodia has been the site of international crimes trials at the PRT and at the ECCC, the latter of which has now convicted three individuals (two remain on trial for additional crimes) and continues to investigate a further four.[253] In doing so, due to the requirements of the ECCC Agreement and ECCC Law, the ECCC has made use of Cambodian domestic law,

[248] *Prosecutor v Ieng Sary*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC75), Pre-Trial Chamber, Decision on Ieng Sary's appeal against the closing order D427/1/30, 11 April 2011, para. 175.
[249] Articles 149-151, Code.
[250] Article 27, Rome Statute and on the position more generally, see e.g. Dapo Akande and Sangeeta Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2010) 21(4) *European Journal of International Law* 815-812; Ratner, Abrams and Bischoff (n 243), 156, 158*;* and at the International Court of Justice, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002.
[251] FIDH (n 148), fn 4.
[252] However, Article 126 of the Constitution provides that government members are not immune for crimes committed in the course of their duties. Note that parliamentary immunities are not necessarily respected, see Human Rights Watch, 'Cambodia: Drop Case Against Opposition Leader' (6 September 2016) <https://www.hrw.org/news/2016/09/06/cambodia-drop-case-against-opposition-leader>.

although its judicial officers adopted ECCC-specific 'Internal Rules' that drew on both Cambodian and international procedures.[254] The relationship between Cambodian and international legal principles has sometimes presented complexities, as in relation to amnesties[255] and the detention of the ECCC accused by the Cambodian Military Court until their transfer to the ECCC in 2007.[256] In Case 001, the ECCC Trial Chamber found that the 'ECCC Law not only authorizes the ECCC to apply domestic criminal procedure, but also obligates it to interpret these rules and determine their conformity with international standards'.[257] Thus, international human rights and criminal laws have been enforced by the ECCC, though with reference to domestic laws and procedures.

There have been a number of other trials related to human rights violations that might be considered international crimes,[258] including: the Paet trial referred in section 2.4, the 2006 conviction of military and police personnel for 62 extrajudicial killings, another case in 2006 in which six police officers were found guilty of torture and, since the new Code was promulgated, a 2010 case involving police, military police and soldiers charged with arbitrary killings, and a range of other prosecutions for offences such as physical assault and forced confessions.[259] In 2013, a town governor, Chhouk Bandith, was convicted of causing bodily harm under the Code for shooting garment workers in Svay Rieng Special Economic Zone during protests in 2012. His co-defendant, a Police Chief, was found guilty of the lesser charge of 'illegal use of a weapon'. Both convictions were upheld on appeal and Bandith turned himself in to authorities in 2015.[260] Such cases have not involved Cambodia's international crimes legislation, but suggest that domestic courts may, on occasion, hear cases brought for serious harms perpetrated by officials. Then again, these trials are the exception and criticisms of their fairness, selectivity and political interference continue to be directed toward the Cambodian judiciary, as well as at the

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[253] Meas Muth, Ao An and Yim Tith. Investigations were concluded against Im Chaem, but an indictment or decision not to proceed further had not been issued at 30 November 2016.
[254] See e.g., Yuval Shany, 'Seeking Domestic Help: The Role of Domestic Criminal Law in Legitimizing the Work of International Criminal Tribunals' (2013) 11 *Journal of International Criminal Justice* 5-26 regarding the use of domestic criminal law in relation to the joint criminal enterprise doctrine.
[255] *Prosecutor v Ieng Sary* (n 248).
[256] E.g., *Prosecutor v Kaing Guek Eav alias Duch* (n 247).
[257] Ibid, 15.
[258] It is beyond the scope of this thesis to undertake a detailed analysis of whether such acts would constitute international crimes, but they do provide examples of conduct that, on its face, could be investigated as such.
[259] For a list of relevant prosecutions, see Transitional Justice Research Collaborative, 'Cambodia' <https://transitionaljusticedata.com/browse/index/Browse.countryid:19>.
[260] May Titthara, 'Bandith's behind bars', *The Phnom Penh Post* (10 August 2015) <http://www.phnompenhpost.com/national/bandiths-behind-bars>.

ECCC.[261]

To summarise, Cambodia's legislation for prosecuting international crimes was closely modelled upon the Rome Statute. Some deviations, particularly in the ECCC Law, might be explained by legal doctrines such as the non-retroactive application of criminal laws, or as reflecting customary international law and Cambodia's treaty obligations. Other adaptations – including the restrictive approach to war crimes and defences, inclusion of corporate liability for international crimes, the ECCC Law's narrow jurisdiction, and the retention of pardons and immunities – might more helpfully be explained by reflecting, as in the next section, on Cambodia's historic experiences and the engagement of international and Cambodian state and non-state actors.

5. Analysis: Localising International Criminal Justice in Cambodia

This chapter identified the role of sovereignty, selectivity, stability, reconciliation, development and rule of law issues, as well as traditional social structures, with respect to Cambodia's responses to international crimes. It then presented corresponding arguments and strategies deployed by a range of actors in relation to international criminal justice in Cambodia, before outlining its relevant legal mechanisms. This section investigates how processes of 'localisation' involving prelocalisation (5.1.1), local initiative, and adaptation (5.1.2) may have been amplified through new laws and institutions (5.1.3). It then discusses the challenges involved in applying that framework in Cambodia (5.2).

5.1. Prelocalisation Resistance

In the localisation framework discussed in Chapter 2, *prelocalisation* occurs when new, external ideas and institutions are initially resisted. These 'external norms' can become influential where apparent limitations in the existing normative order mean 'local actors begin to view the external norms as having a potential to contribute to the legitimacy and efficacy of extant institutions without undermining them significantly'.[262] Section 2 explained that experiences of international politics, selective justice, internal conflict, under-development, and religious and other social norms have accompanied responses to international crimes in Cambodia. For instance, the country has experienced external

[261] See McCarthy and Un (n 101).
[262] Acharya (n 12).

restrictions upon its sovereignty, including those imposed by France, Japan and Vietnam. International crimes prosecutions at the PRT were selective and politicised – criticisms that now confront the ECCC[263] – while most states were initially reluctant to prosecute former Khmer Rouge members. In this context, as conflict subsided and international pressure to initiate trials emerged, Cambodia's leaders' pursued a form of justice for historic crimes that would uphold the principles of non-interference, stability and development, and adopted legislation with prospective jurisdiction that might also support these goals. However, these constructions of international criminal justice have also been dynamic and contested by a number of actors. The next section analyses how this adaptation took place.

5.2. Local Initiative and Adaptation

While international norm entrepreneurs can attempt to 'spread transnational norms', the localisation framework suggests that approaches 'that accommodate local sensitivity', especially where international proponents 'act through local agents', are more likely to succeed.[264] Local contributions go beyond attempts to persuade state actors to adopt international norms through socialisation. Instead, actors identify international norms that might assist their various goals and (using local initiative) reframe the international norms. Local actors may also alter the foreign idea by picking out the elements considered desirable for their context and discarding other aspects (adaptation). In this process, the agency of local actors – albeit acting within material and social constraints – is significant. Even where local actors lack technical capacity and rely on international funding, they may still contest international norms or restructure them. For example, local NGOs may resist or adjust new ideas that they consider involve double standards, are inappropriate for local contexts, hard to explain, or of less relevance than other goals.[265]

This approach helps to explain the contribution of various actors to Cambodia's international criminal justice mechanisms. Some, but not all, foreign states and international NGOs demanded international criminal justice for DK crimes and opposed a Cambodian-managed tribunal. However, Cambodian NGOs lacked access to the ECCC

[263] Section 2.2.
[264] Acharya (n 12), 249.
[265] Amitav Acharya, 'Local and Transnational Civil Society as Agents of Norm Diffusion' (1-3 June 2012) <http://amitavacharya.com/sites/default/files/Local%20and%20Transnational%20Civil%20Society%20as%20Agents%20of%20Norm%20Diffusion.pdf>.

negotiations. Thus, though locally based efforts to document international crimes were important,[266] the mediation of *local* norm entrepreneurs was less significant in establishing the ECCC than the localisation framework suggests by its focus upon 'credible local actors'. The lack of avenues for local NGOs to 'localize a normative order… by building congruence with outside ideas',[267] especially within socio-cultural power hierarchies,[268] could help explain the extended duration and animosity of the ECCC negotiations.

On the other hand, the Cambodian *state* actors who developed the ECCC draft agreement restructured notions of international criminal justice by incorporating elements that supported their priorities of sovereignty, stability and development. For example, the aspects of international criminal justice involving some international involvement, due process rights, and limited jurisdiction over senior leaders were accepted. However, Cambodia's leaders rejected the idea that international crimes trials would be internationally managed, while the incorporation of laws and procedures both for the ECCC and in the Criminal Code involved further adaptation (see next section). Thus, 'local' actors also deeply influenced Cambodia's approach to international criminal justice.

Other motivations for localisation can be that 'it is difficult to explain ideas to a particular audience' or 'local NGOs feel they can strengthen and make a norm more relevant and effective by adding new local dimensions to them'.[269] Since the ECCC has been operational, Cambodia-based actors, with international engagement, have monitored proceedings, provided evidence for trials, and deployed local language and community knowledge to assist with outreach and consultations for reparations measures.[270] In this way, actors of varied nationalities have adapted the international criminal justice emphasis on 'ending impunity' to discuss broader notions of judicial development in Cambodia, including in relation to contemporary allegations of violence. These actors have utilised international funding to pursue these activities, but have also applied 'local initiative' by drawing on local contexts.[271]

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[266] See section 3.3.1.
[267] Acharya (n 12), 249.
[268] Malena and Chhim (n 42), 7; section 2.5.
[269] Amitav Acharya, 'Local and Transnational Civil Society as Agents of Norm Diffusion' (Paper presented at the Global Governance Workshop, University of Oxford, UK, 1-3 June 2012) <http://amitavacharya.com/sites/default/files/Local%20and%20Transnational%20Civil%20Society%20as%20Agents%20of%20Norm%20Diffusion.pdf>, 4.
[270] Section 3.3.1.
[271] Section 3.3.2.

In Cambodia, understandings of international criminal justice are not necessarily transferred in one direction (from the 'outside-in', or 'inside-out'), but involve multiple debates and influences. The barriers to bringing land grabbing and other human rights cases in domestic courts have led civil society groups to contribute to Article 15 communications to the ICC Prosecutor. However, the outcomes will be slow and submissions to the ICC might even create a 'shelter' for perpetrators of international crimes who do not expect the ICC to take action and in the meantime restrict domestic proceedings.[272] Section 3.3.3 showed how some local actors appreciate that international actors and organisations – such as the ICC – are subject to political dynamics and capacity constraints. Of course, NGOs might gratefully receive training or consultation from the ICC.[273] However, some do not find the ICC relevant to their work, lack awareness of it, or focus on other priorities.[274] This shows that local actors can be motivated to act as norm localisers (rather than acceptors) when they 'perceive selectivity, double standards and hypocrisy', or simply, 'despite seeing merit in new ideas, find them to be too far removed from the local context and need'.[275]

Consequently, as described in section 3.4, actors have explored alternative approaches for responding to international crimes. ECCC staff and NGO actors teach international criminal law at universities and law schools, but also do so to address rule of law and human rights issues and train students to think critically.[276] Community projects draw on Buddhist concepts and pursue varied social justice and institutional objectives.[277] Through such legal and community engagement, a variety of actors have adapted international, state, and community notions of international criminal justice. These processes of adaptation are also evident from Cambodia's mechanisms for prosecuting international crimes.

5.3. Amplification

The localisation framework suggests that as norms are reshaped in Southeast Asia, they may be *amplified* in new or modified institutions and practices 'in which local influences

[272] Interview C6.
[273] Interview C6.
[274] Section 3.3.3.
[275] Acharya (n 12), 4.
[276] Section 3.4.1.
[277] Section 3.4.2.

remain highly visible'.[278] This section concludes that the ECCC is an exemplar of localisation's convergence between 'local' concerns and selected aspects of 'normalised' international criminal justice.[279] Cambodia's Criminal Code amendments (considered below) were modelled on the Rome Statute but also included slight adaptations.[280]

The ECCC has jurisdiction to prosecute international crimes, though not aggression or war crimes apart from grave breaches, but also includes other crimes under Cambodian and international law. Cambodian and international hopes that the ECCC might build domestic capacity and support Cambodia's sovereignty were reflected in the Court's internationalised structure, which draws on Cambodian and international law and employs national and international staff. Amplification is also evident in the ECCC's limited jurisdiction to prosecute senior leaders for crimes committed between 17 April 1975 and 6 January 1979. The Cambodian government might have been open to wider temporal jurisdiction,[281] but this restricted scope was more comfortable for the foreign governments implicated in the Cambodian conflicts.[282] While the UN had sought a broader personal jurisdiction, the narrow approach also suited the Cambodian government's 'narrative of rescue'[283] and thereby its own future stability. For all parties, this jurisdiction could reflect one tenet of the norm of international criminal justice, 'the idea that certain individuals are *particularly* to blame'.[284]

Focusing on this period presented other temporal issues. In contrast to notions of international criminal law as progressive[285] – the ECCC must apply its jurisdiction using historically recognised crimes, rather than more recent developments in international criminal law jurisprudence. While the ECCC has been heavily criticised, it operates largely within fair trial standards.[286] The ECCC prosecutions might suggest that the government at least supported pursuing past-focused trials. However, the adapted nature of the ECCC's

[278] Acharya (n 12), 251.
[279] Section 2, chapter 1.
[280] Section 4.3.
[281] Hammarberg, (n 43). Linton observes that 'the RGC did attempt to widen the temporal jurisdiction to 1970-1998 which would have brought in acts that would meet the General Assembly's 1974 definition of aggression, but it seems that this was simply a negotiating tactic' partly because 'it have brought the wrath of the USA, China and Vietnam down on the government', Linton (n 214), 50.
[282] Ciorciari and Heindel (n 18), 29.
[283] Ainley (n 37), 149 (concerning the ECCC's establishment in general); see also Heder (n 43).
[284] Frédéric Mégret, 'What Sort of Global Justice is 'International Criminal Justice'?' (2015) 13(1) *Journal of International Criminal Justice* 77-96, 84, emphasis in original.
[285] See section 2.1, chapter 2.
[286] See Appeal Judgment (n 160), paras 109-239.

legal framework and the government's opposition toward prosecuting more than the initial small group of ECCC accused do not indicate that Cambodia's leaders were willing to adopt 'normalised' understandings of international criminal justice, even for earlier crimes. Instead, the ECCC represents a set of instruments that borrowed from notions of international criminal justice, but 'in which local influences remain highly visible', as well as historic experiences.[287]

In relation to contemporary or future crimes, Cambodia's development of domestic international crimes legislation and practice also does not clearly represent the wholesale rejection, or acceptance, of the norm of international criminal justice. Cambodia's Criminal Code – with prospective jurisdiction – was closely modelled on the Rome Statute. While its extension of liability to legal entities, as well as the exclusion of particular definitions and war crimes, was partly adapted to local contexts, this included an element of international (especially French) engagement alongside the ECCC.[288]

However, this legislation is difficult to explain without recognising the agency of Cambodian state and NGO actors. The new offences came alongside other amendments to the Code that were condemned as infringing on human rights, particularly freedom of speech.[289] The comparative success of including international crimes provisions was 'widely seen as a result of ADHOC advocacy, described by international partners as the most consistent and best heard voice defending the Rome Statute in Cambodia'.[290] The Code's (albeit minor) deviations from the Rome Statute could make it difficult for national proceedings to provide a barrier for ICC prosecutions based on the principle of complementarity,[291] making it hard to understand the legislation as purely a 'performance' for the ICC.[292] Amnesties, pardons and immunities continue to have potential application to international crimes, which may reflect adaptions to local norms about royalty, social hierarchies and Buddhist conceptions of forgiveness.

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[287] Acharya (n 12), 241.
[288] E.g., FIDH implied that the extension of criminality to legal entities may have involved international influence from French advisors rather than only an adaption to local priorities concerning corporate liability, (n 148), 49-50.
[289] E.g., Cambodian League for the Promotion and Defense of Human Rights (LICADHO), 'New Penal Code a Setback for Freedom of Expression Issues' (9 December 2010) <http://www.licadho-cambodia.org/pressrelease.php?perm=233>.
[290] Raab and Poluda (n 142), 2.
[291] Meisenberg (n 226).
[292] See Christian De Vos, 'All roads lead to Rome: implementation and domestic politics in Kenya and Uganda' in Christian De Vos, Sara Kendall and Carsten Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press, 2015) 379-407, 405.

Still, the practice of the ECCC and the more recent allegations of international crimes being committed in Cambodia,[293] despite the Criminal Code's international crimes laws, suggest that attitudes toward the norm of international criminal justice might differ for different events over different time periods. This is consistent with Zimmerman's suggestion that resistance, adaptation, or adoption of norms reoccurs over time in localisation, as successive laws are proposed, passed and implemented (or repealed), rather than progressing in a linear manner.[294] Cambodia's innovative, but imperfect, international criminal laws and institutions have not evolved in one direction, from ratification toward accepting normalised ideas of international criminal justice, via the influence of international actors upon receptive 'locals'. Instead, Cambodia's leaders and civil society actors continue to engage with this norm in a locally adapted manner.

5.4. Limitations of the Localisation Framework

The localisation framework tested in this chapter has limitations. First, it is not the only way to explore Cambodia's engagement with international criminal justice. For example, this chapter identified security and development as important factors, which supports a realist approach. However, Cambodia's lack of resources offered several routes toward redevelopment and security.[295] During the period of most direct international engagement with Cambodia's government functions after UNTAC was established, Cambodia's leaders initially followed a strategy of reintegration and amnesty (in opposition to the international criminal justice norm), while also seeking international assistance. However, faced with persistent security and development challenges, the Cambodian government decided to pursue the establishment of an international criminal tribunal and to ratify and implement the Rome Statute. This was not necessarily the only option,[296] but it did provide an opportunity to protect Cambodia's peace, political stability and – with negotiation – sovereignty (see section 3.2). From that perspective, it is more accurate to consider that Cambodia's material and security situations provided contexts within which its leaders viewed pursuing international criminal justice as the most appropriate course of action.

[293] See sections 2.5; 3.3.2.
[294] Zimmerman (n 13).
[295] See Etcheson (n 39), 202.
[296] See Hammarberg, (n 43).

Even today, one international civil society actor argues that Cambodia's attitude toward international criminal justice 'comes down to the donors and money … it would be very interesting to see what would happen if the government was indicted and formally investigated by the ICC. Right, would they cooperate? Probably not'.[297] From this perspective, an ICC investigation could create a clash between material needs and the norm of international criminal justice. A similar tension may have already arisen with the Case 003 and 004 investigations.[298] However, Cambodia's leaders have historically interpreted such apparent conflicts as opportunities for adaptation in light of varied normative and material priorities.

This presents a second issue: that Cambodia's engagement with international criminal justice challenges constructivist models of *temporal* progress and normative models of a 'transitional justice time'.[299] In Cambodia's case, this expectation is depicted in ECCC outreach pamphlets illustrated with images of a liberal democratic future consisting of factories and electricity, as well as the ECCC's early slogan of 'Moving Forward Through Justice'.[300] Instead, the previous section discussed how Cambodia's approach to investigating or prosecuting serious violence does not suggest progression toward accepting the norm of international criminal justice (or simple rejection).

A third implication relates to *space*. If 'localisation' is given 'special normative value', this may simplify notions of what 'local' means, when identities are in reality complex.[301] For instance, Buddhist norms continue to influence the discourse surrounding international criminal justice in Cambodia,[302] but overly generalising the significance of such cultural or religious practices could lead to essentialism. The perception of some that Cambodians prefer forgiveness and reconciliation or – paradoxically – have 'a different sense of justice' in which ECCC prosecution appears 'cushy', demonstrates this danger.[303] In particular, the intersecting accounts of DK survivors and younger generations are highly complex, especially given the lack of clear divisions between victims and perpetrators and the

[297] Interview C2.
[298] See Michael Karnavas, 'Inducing Case 003 Outcome: US Purse Strings Wielded As A Whip', *The Cambodia Daily* (6 July 2016) <https://www.cambodiadaily.com/opinion/inducing-case-003-outcome-us-purse-strings-wielded-as-a-whip-115088/>.
[299] Alexander Laban Hinton, 'Transitional Justice Time: Uncle San, Aunty Yan, and outreach at the Khmer Rouge Tribunal' in Deborah Mayersen and Annie Pohlman (eds), *Genocide and Mass Atrocities in Asia: Legacies and Prevention* (Routledge, 2013) 86-98.
[300] Ibid.
[301] Zimmerman (n 13), 105.
[302] Eg, Ear (n 67); Gray (n 67); Urs (n 58).
[303] Section 3.4 and Interview C6; see also Urs (n 58).

occurrence of intergenerational trauma.[304] Focusing on local actors could also obscure the possible criminal responsibility of international perpetrators (including other Khmer Rouge cadres).[305]

Finally, the localisation framework suggests that local actors seek to appear neutral and not influenced by outside 'stooges' to ensure their credibility with state actors and facilitate the spread of norms.[306] In contrast, Cambodian NGOs utilise treaty body reporting processes and frequently work with international partners.[307] It seems that local influence in part comes from the ability to deploy international funding and to draw on international expertise. Cambodian ECCC personnel, witnesses and civil parties influence international criminal law through their daily work. Yet international expatriates working for the ECCC and Cambodian NGOs, the substantial Cambodian diaspora, and Cambodians who have been educated overseas, all contribute to debates about international criminal justice. This complexity challenges expectations that norms are diffused in an external-to-local *direction*. Ideas come from many places – the Transcultural Psychosocial Organisation of Cambodia's testimonial therapy project is rooted in Buddhist practice, but was reportedly informed by international programs.[308] The adoption of national laws modelled on the Rome Statute, though with some adaptations, may or may not have restrained the scope to develop more creative legislative approaches,[309] but NGOs have still used local initiative and drawn on cultural and religious practices to explore community-based reconciliation processes.

This intersection between international actors and networks, NGOs and Cambodian civil society demonstrates the importance of holding loose understandings of 'local' and 'international' categories. Moreover, these temporal and spatial aspects are related. For instance, the ECCC's narrow temporal and personal jurisdiction arguably demonstrates

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[304] E.g., consider the multiple perspectives of male and female survivors of forced marriage (many of whom remain married) and their children, or members of the 'Vietnamese' ethnic groups who lost Cambodian citizenship during DK, see Bernath (n 72); Westoby (n 59), 188; Theresa de Langis, Judith Strasser, Thida Kim, Sopheap Taing, 'Like Ghost Changes Body: A Study on the Impact of Forced Marriage under the Khmer Rouge Regime' (TPO Cambodia, October 2014) <https://kh.boell.org/sites/default/files/forced_marriage_study_report_tpo_october_2014.pdf>.
[305] Alexander Laban Hinton, 'Introduction: Toward an Anthropology of Transitional Justice' in Alexander Laban Hinton (ed), *Transitional Justice: Global Mechanisms and Local Realities after Genocide and Mass Violence* (Rutgers University Press, 2010) 1-22, 10 (referring to Drexler's contribution in the same volume, see bibliography).
[306] Acharya (n 12), 251,
[307] Section 3.3.2.
[308] The organisation was also initially founded as a branch of 'TPO International', based in the Netherlands, TPO Cambodia, 'About Us' <http://tpocambodia.org/tpo-about/>.
[309] See de Vos (n 292).

that a 'danger of localizing transitional justice… is that these mechanisms may inadvertently create a narrative that localizes the origins and dynamics of a conflict and thereby ignores the larger context in which it emerged' – a danger for all international crimes trials with defined remits.[310] In Cambodia's case, focusing on DK may sideline atrocities and 'every day' harm experienced in the surrounding conflicts and today. Therefore, the localisation framework's trajectory from prelocalisation to amplification and its emphasis upon the 'local' are illustrative, but should not obscure the complex relationships between different ideas and actors.

6. Conclusion

The application of the localisation framework in this chapter highlights how interactions between different perspectives did not result in Cambodia simply adopting the UN preference for an internationally controlled tribunal (or others' preference for no tribunal) to respond to DK crimes. Instead, local actors transformed an international concept for local use, while some international actors changed their perception of what form of international criminal justice might be appropriate as a localised structure became more popular. Even recently, internationalised tribunals such as the ECCC have been discussed as possible models for other regional contexts, such as in Sri Lanka, demonstrating how local adaptations may influence global norms.[311] Cambodia's leaders also adjusted their conceptions of sovereignty and peace, which came to be understood as goals that could be supported by international criminal justice, and passed legislation for prosecuting future international crimes. The localisation framework not only emphasises local agency in this process, but also highlights how local actors can reshape the set of possible outcomes – in this case, resulting in the novel internationalised structure of the ECCC, alongside new Cambodian international crimes laws in the Criminal Code.

Thus, even where ratification of an international treaty is followed by implementation in national laws and domestic prosecutions over time, this is not necessarily the product of a binary choice between rejecting and accepting international norms. Yet nor is it a linear process that results in the development of new or changed modes of behaviour, laws or formal institutions over *time*. Instead, as suggested by Zimmerman,[312] contestation

[310] Hinton (n 305).
[311] Human Rights Council, 'Report of the OHCHR Investigation on Sri Lanka (OISL)', UN Doc. A/HRC/30/CRP.2, 16 September 2015.
[312] Zimmermann (n 13).

continues at the points of implementation into law and enforcement – and beyond.[313] Indeed, this chapter also demonstrated the challenge involved in allocating, as it attempted to, labels of 'local' or 'international/global/transnational' to either actors or norms. Thus, *spatial* categories are difficult to allocate or maintain in practice. This chapter shows how actors interact within varied historic, political and material structures. This creates barriers for some actors and friction between different understandings of international criminal justice. Cambodia's laws and institutions have been influenced by those who draw upon these contexts to contest and adapt understandings of international criminal justice in light of varied and dynamic local priorities. Thus, external actors did not simply diffuse international criminal justice in one *direction* for local recipients to accept or reject.

Cambodia continues to face challenges in securing international criminal justice. This does not indicate that the process of localisation is incomplete, but that adaptation is always occurring. Further, even though Cambodia is a Rome Statute party, most of this engagement with international criminal law has taken place beyond the ICC. The next chapter turns to another Rome Statute party, the Philippines, to explore how actors engage with international criminal law in a different context, including after the implementation of international criminal law into domestic legislation.

[313] Acharya (n 12), 253.

Chapter 5 – Implementing International Criminal Accountability in the Philippines

Timeline 2 – The Philippines

1896 Revolution against Spanish rule
1898 Philippines revolutionaries declare independence
1898 The Philippines ceded by Spain to the United States
1899-1902 Philippine American War
1935 Presidential Elections and approval of Bill of Rights
1942-1945 WWII and Japanese occupation
1943 Japan grants the Philippines independence
1945 US-administered Manila WWII trials (e.g., *Yamashita*)
1946 US grants the Philippines independence: The Republic of the Philippines formed
1947 Executive Order No. 68 provides for further WWII trials (e.g., *Kuroda*)
Cold War internal conflicts between government forces and separatist and communist groups
1965 Marcos becomes President
1972 Martial law imposed
1973 Constitution affords Marcos significant power
1980 Permanent Peoples' Tribunal hears case against Marcos
1981 Martial law ends
1982 Presidential Decree 1850: members of armed forces, police, firemen etc only prosecuted by courts martial (repealed 1991)
1983 Assassination of opposition figure Benigno Aquino
1986 Marcos accepts US asylum offer in 1986 following 'EDSA' 'People Power' revolution
1986 Corazón Aquino becomes President
1986 Executive Order No. 8 creates the Presidential Commitee on Human Rights
1987 Constitution adopted, providing for Ombudsman and Commissionon Human Rights
1987 Commission on Human Rights Established by Executive Order No. 163
1990 Military officials convicted of Aquino's murder
1991 NDF Declaration of Undertaking to Apply International Humanitarian Law
1991 'Joint Circular on Adherence to IHL and Human Rights': 'human rights-related incidents' should be investigated or prosecuted
1992 ATCA case awards compensation to Marcos victims (*Hilao v Estate of Ferdinand Marcos*)
1992 Fidel Ramos becomes President
1996 'Final Peace Agreement' with the MNLF (facilitated by Indonesia)
1998 Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law (CARHRIHL)
1998 Joseph Estrada becomes President
2000 The Philippines signs the Rome Statute
2001 Protests following suspension of Estrada impeachment proceedings, Estrada stands down
2001 Gloria Arroyo becomes President
2001 Drafting of an international humanitarian law bill commences
2001-2010 Oplan Bantay Laya - military operation against terrorism
2001 MILF 'Agreement on peace between the government of the Republic of the Philippines and the Moro Islamic Liberation Front'
2002 MILF 'Implementing Guidelines on the Humanitarian, Rehabilitation and Development Aspects of the GRP-MILF'
2003 The Philippines signs Non-Surrender Agreement with the US regarding the ICC
2003 Civil society petition for Rome Statute ratification in *Sen. Aquilino Pimentel, Jr. et al. v. Office of the Executive Secretary et al*
2003 'Oakwood' army mutiny
2006 Melo Commission and Task Force Usig investigate media killings
2007 Human Rights Offices established
2008 Separate peace negotiations with MILF and NPA break down
2008 UN Special Rapporteur on Extrajudicial Killings, Philip Alston, issues report
2009 Republic Act 9851 regarding International Humanitarian Law adopted
2009 Maguindanao (Ampatuan) Massacre
2010 Prosecutors bring (but also drop some) murder charges regarding Maguindanao massacre
2010 Benigno (Noynoy) Aquino III becomes President
2010 Andal Ampatuan Jnr tried for organising Maguindanao killings
2011 Rome Statute ratification
2012 Administrative Order No. 35 creates Inter-Agency Committee on Extra-Legal Killings
2013 Typhoon Haiyan affects millions
2014 Comprehensive Agreement on Bangsamoro between government and MILF
2015 Mamasapano clash kills militia
2016 Rodrigo Duterte becomes President, killings of alleged drug users and dealers escalate
2016 ICC Prosecutor issues statement regarding extrajudicial killings in the Philippines

1. Introduction

The Philippines signed the Rome Statute on 28 December 2000, adopted international crimes legislation in 2009, and ratified the Rome Statute in 2011. Although the Philippines has not established an international crimes mechanism comparable to the Extraordinary Chambers in the Courts of Cambodia (ECCC), institutional developments and public statements by Philippines' leaders have in the past indicated support for the norm of international criminal justice. However, the lack of enforcement of the Philippines' international crimes legislation and events since President Duterte took office suggest that the government of the Philippines has not fully accepted the norm of international criminal justice.

This chapter follows the same structure as chapters 3-4. Section 2 outlines the history of international criminal justice in the Philippines to identify prelocalisation themes. Section 3 draws on documents and interviews to explore how actors have used local initiative to debate the laws and institutions for investigating and prosecuting international crimes. Section 4 examines the key features of these mechanisms, which continue to be discussed and developed. Section 5 then analyses whether approaches to international criminal justice in the Philippines have involved processes of localisation.

2. Historic Engagement with International Criminal Law

This section identifies several themes emerging from the history of international criminal justice in the Philippines, including the importance of independence, peace, human rights, and engagement with international law, although these principles are also contested. It generally proceeds chronologically, from colonial occupation to 30 November 2016. It is not exhaustive, but demonstrates that events in the Philippines have not proceeded on a 'linear scale from resistance' to international criminal justice, toward 'norm adoption'.[1]

[1] Lisbeth Zimmermann, 'Same Same or Different? Norm Diffusion Between Resistance, Compliance, and Localization in Post-conflict States' (2014) 17(1) *International Studies Perspectives* 98-115, 102.

2.1. Sovereignty and Independence: Colonialism and WWII

Spain ceded the Philippines to the United States (US) in 1898, the same year that Philippine revolutionary forces declared independence (see Timeline 2). After the Philippine-American War of 1899-1902 and an unstable political period of US control, elections were held in 1935 (making the Philippines arguably 'the oldest democracy in the region') and a new Constitution with a 'Bill of Rights' was approved.[2] Nonetheless, the Philippines remained a US colony when Japan invaded in 1942. As a result, although the Philippines' 'mixed' legal system has a 'civil law' emphasis upon codification from the Spanish colonial period, it has also been influenced by US common law, as well as local conditions.[3] The latter elements include *Katarungan Pambarangay* ('*barangay*': village or district), Islamic (Sharia Courts) and indigenous legal systems.

Japanese forces occupied the Philippines until February 1945, though Japanese authorities granted notional independence in 1943. The occupying forces perpetrated crimes including sexual violence and torture.[4] Philippine resistance movements fought alongside American forces to overcome Japanese occupation, which strengthened Philippine-US ties but also contributed to nationalism and a shift toward a greater 'identification with Asian states and peoples'.[5] The WWII period also resulted in the evolution of international criminal law. The Philippines was the only Southeast Asian state with a national appointed as a judge at the IMTFE, probably because the US retained authority there.[6] Eighty-seven war crimes trials were carried out in the Philippines based on a US law allowing for such trials to be authorised by military command.[7] In one such trial, General Yamashita Tomoyuki, a commander of the Japanese 14th Army that invaded and occupied the

[2] Anja Jetschke, 'Linking the Unlinkable? International Norms and Nationalism in Indonesia and the Philippines' in Steve C. Ropp, Kathryn Sikkink and Thomas Risse-Kappen (eds), *The power of human rights: international norms and domestic change* (Cambridge University Press, 1999) 134-171, 136.
[3] Petra Mahy and Jonathan P Sale, 'Classifying the Legal System of the Philippines: A Preliminary Analysis with Reference to Labor Law' (2012) 32(1-2) *Philippine Journal of Labor and Industrial Relations* 1-28.
[4] See e.g. Bernard Victor Aloysius Röling and C F Rüter, *The Tokyo judgment: the International Military Tribunal for the Far East (I.M.T.F.E.), 29 April 1946-12 November 1948* (University Press Amsterdam, 1977), 988; *Isabelita C Vinuya et al v The Honorable Executive Secretary Alberto G Romulo et al*, G.R. No. 162230, Supreme Court, Republic of the Philippines, 28 April 2010 (*Vinuya*); Reynaldo C Ileto, 'World War II: Transient and Enduring Legacies for the Philippines' in David Koh Wee Hock (ed), *Legacies of World War II in South and East Asia* (Institute of Southeast Asian Studies, 2007) 74-91, 75.
[5] Ileto, ibid, 75.
[6] See Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal - A Reappraisal* (Oxford University Press, 2008), 43, the Philippines and India were both then under (US and UK) colonial authority, so the appointments arguably aimed to increase those countries' representation.
[7] Yuma Totani, *Justice in Asia and the Pacific region, 1945-1952: Allied war crimes prosecutions* (Cambridge University Press, 2014), 21 (86 'additional' trials apart from Yamashita's).

Philippines,[8] was prosecuted for unlawfully disregarding and failing to discharge his duty as a commander and sentenced to death. The trial was criticised on procedural grounds[9] and Yamashita (unsuccessfully) petitioned for writs of *habeas corpus* and prohibition before the Philippines[10] and US Supreme Courts.[11] Nevertheless, the application of command responsibility in the *Yamashita* decision influenced proceedings at Nuremberg, the IMTFE, and subsequent trials in the Philippines and beyond.[12]

After the US recognised the Philippines' independence in 1946, Philippine courts 'inherited the American prosecutorial work' and conducted 72 further WWII-related trials for crimes committed against Americans and Filipinos under Executive Order No. 68 of 1947.[13] These included the trial of General Kuroda Shigenori, another commander of the Japanese 14th Army. The Philippines Supreme Court found that the Hague and Geneva Conventions formed 'part of the law of our nation even if the Philippines was not a signatory to the conventions'.[14] Kuroda was found guilty and sentenced to life imprisonment, but was granted a presidential pardon in 1951 and died in Japan in 1954.

Domestic politics and evolving geopolitical relations with Japan may have influenced Kuroda's trial, which seems to have benefited from the Filipino participants' desire to exhibit the fair operation of the newly independent country's justice system.[15] The Kuroda hearing took approximately three times as long as that of Yamashita and raised fewer concerns about fairness than the US-administered proceedings.[16] Yamashita's and Kuroda's different trials illustrate that internationally implemented accountability will not necessarily produce fairer trials than locally managed mechanisms, though both were affected by political concerns. In summary, the Philippines has fought for independence,

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[8] Later the 14th Area Army, see Totani, ibid, 22.
[9] Ann Marie Prevost, 'Race and War Crimes: The 1945 War Crimes Trial of General Tomoyuki Yamashita' (1992) 14(3) *Human Rights Quarterly* 303-338; Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (Alfred A Knopf, 1992) and see the opinions of Justices Murphy and Rutledge, *In re Yamashita*, GR No 327 U.S. 1 (1946), US Supreme Court, 4 February 1946 (*In re Yamashita*).
[10] *Yamashita v Styer*, GR No. L-129, Supreme Court, Republic of the Philippines, 19 December 1945.
[11] *In re Yamashita* (n 9).
[12] Command responsibility was incorporated into the Rome Statute and Statutes for the ICTY and ICTR; see Antonio Cassese, *International Criminal Law* (Oxford University Press, 2008), 237-239; compare Franklin A Hart, 'Yamashita, Nuremberg and Vietnam: Command Responsibility Reappraised' (1980) 62 *Naval War College International Law Studies* 397-414.
[13] Totani (n 7), 22; *Executive Order No. 68, Establishing a National War Crimes Office and Prescribing Rules and Regulations Governing the Trial of Accused War Criminals*, 29 July 1947.
[14] *Kuroda v Rafael Jalandoni*, GR No. L-2662, Supreme Court, Republic of the Philippines, 26 March 1949.
[15] Totani (n 7), 54.
[16] Ibid.

has a mixed legal system that historically included a Bill of Rights, and has historically prosecuted international crimes before both US military commissions and post-independence Philippines courts.

2.2. Peace and Justice: Marcos and Civil Society

Following independence in 1946, the Philippines drew upon its 1935 Constitution to build democratic institutions.[17] However, there were tensions between the goals of peace and justice. The Philippines experienced non-international armed conflict between government forces and separatist groups, including the Moro National Liberation Front (MNLF) and a breakaway group, the Moro Islamic Liberation Front (MILF). This conflict has very old roots stemming from Spanish efforts to secure control over Islamic sultanates in Maguindanao in the fifteenth and sixteenth centuries[18] – and is not entirely resolved.[19] During the Cold War, the Philippines was implicated in 'a U.S.-led anticommunist struggle'[20] against the New People's Army (NPA, the armed wing of the Communist Party of the Philippines, CoPP), National Democratic Front (NDF) and aligned groups, some of which still claim to fight a 'people´s war against US imperialism'.[21]

Ferdinand Marcos became President in 1965 and imposed martial law in 1972.[22] During this time corruption and a range of government measures compromised the independence of the judiciary, in particular the executive's ability to replace Supreme Court judges and to demand and hold letters of resignation from lower court judges.[23] Under Marcos' government, the Philippines experienced economic crisis alongside serious human rights violations such as extrajudicial killings.[24] These abuses were concentrated in some of the

[17] As amended on 18 June 1940 and 11 March 1947 (superseding the 1943 Constitution as approved by the Preparatory Committee on Philippine Independence, 4 September 1943 during Japanese occupation).
[18] Anthony Reid, *A History of Southeast Asia: Critical Crossroads* (Wiley Blackwell, 2015), 112.
[19] The related 'Bangsamoro' peace process remains ongoing.
[20] Raymond L Bryant, *Nongovernmental Organisations in Environmental Struggles: Politics and the Making of Moral Capital in the Philippines* (Yale University Press, 2005), 62.
[21] National Democratic Front of the Philippines, 'Aim to Win Greater Victories in People´s War Message of the Central Committee in Celebration of the 47th Founding Anniversary of the NPA' (29 March 2016) <http://www.philippinerevolution.net/statements/20160329_aim-to-win-greater-victories-in-people-s-war-message-of-the-central-committee-in-celebration-of-the-47th-founding-anniversary-of-the-npa>. See also Virginia Leary, A A Ellis and Kurt Madlener, 'The Philippines: Human Rights After Martial Law' (International Commission of Jurists, 1984), 12.
[22] Leary, Ellis and Madlener, ibid.
[23] Leary, Ellis and Madlener, ibid, 64-81.
[24] Reid (n 18), 359.

poorest regions, where the NPA/CoPP/NDF[25] and MNLF/MILF were most active.[26] Indeed, human rights violations were often linked to development concerns, including through the arrest and intimidation of trade union activists.[27]

Many states and other actors were initially slow to criticise Marcos. However in the late 1970s the International Commission of Jurists and Amnesty International reported significant violations of human rights law including 'torture, abductions and killings of dissidents by military units',[28] while the Permanent Peoples' Tribunal heard a case (brought by the NDF and MNLF) against Marcos in 1980. The US Carter administration contributed some pressure toward the regime to cease human rights violations and the Reagan administration, while more supportive of Marcos, also recommended reforms, including that elections be held.[29] Despite the challenging environment, NGOs such as Task Force Detainees of the Philippines were founded during the Marcos regime, as trust in the state declined and organisations and church groups carried out important community functions[30] and forged links with diaspora and international civil society.[31]

While Marcos announced some amnesties for political detainees in the late 1970s,[32] the ending of martial law in 1981 secured neither accountability for human rights violations nor the independence of the judiciary,[33] while the economic situation failed to improve.[34] The public assassination of opposition figure Senator Benigno Aquino in 1983 (which was widely attributed to the government, but officially blamed on communists)[35] further

[25] These groups are structurally separate, but related, see Philip Alston, 'Promotion and Protection of all Human Rights, Civil, Political and Cultural Rights, Including the Right to Development: Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions' UN Doc. A/HRC/8/3/Add.2, 16 April 2008, fn 4.
[26] Leary, Ellis and Madlener (n 21), 14.
[27] Ibid, 14, 11, 90-100.
[28] Amnesty International, 'Report of an Amnesty International Mission to the Republic of the Philippines, 22 November-5 December 1975' (1977); Amnesty International, 'Amnesty International Report 1979' (1979) <https://www.amnesty.org/download/Documents/204000/pol100011979eng.pdf>, 108-109; see William J Butler, John P Humphrey and G E Bisson, 'The Decline of Democracy in the Philippines' (International Commission of Jurists, 1977).
[29] Anja Jetschke, *Human Rights and State Security: Indonesia and the Philippines* (University of Pennsylvania Press, 2011), 107-126.
[30] Bryant (n 20), 63; Leonora C Angeles, *The Quest for Justice: Obstacles to the Redress of Human Rights Violations in the Philippines* (University of the Philippines Press, 1994), 52.
[31] Jetschke (n 29), 97.
[32] Amnesty International (1979) (n 28), 108; section 4.2.
[33] Leary, Ellis and Madlener (n 21).
[34] Jetschke (n 29), 123.
[35] Marcos established investigative commissions, the second of which, the Agrava Board, which attributed the assassination to the military, but did not accord individual responsibility – see Jetschke (n 29), 124. A trial during Corazón Aquino's administration found sixteen soldiers

stimulated Philippine civil society, as international support for Marcos waned.[36] After widespread public protests known as the 'People Power' or 'EDSA' Revolution, Marcos accepted a US offer for asylum in 1986. As civil society and popular opposition to Marcos escalated in this period, Philippine and international actors had criticised the regime with reference to human rights standards.[37]

2.3. Democracy and Human Rights after Marcos

The election of Benigno Aquino's widow, Corazón Aquino, as President in 1986 enhanced the formal importance of human rights for the Philippine state. The government released political prisoners and ratified international human rights and humanitarian law instruments.[38] The 1987 Constitution 'adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations'.[39] It also protects a range of human rights in Articles III and XIII, forbids torture,[40] and established an Ombudsman to investigate complaints against public officials.[41] A Presidential Committee on Human Rights investigated crimes perpetrated during Marcos' regime[42] and was later replaced by the Commission on Human Rights as a Constitutionally established 'independent office' – a NHRI.[43] In 1991, a 'Joint Circular on Adherence to IHL and Human Rights' suggested that 'human rights-related incidents allegedly committed by' the armed forces or police should be investigated or prosecuted.[44]

(including a General) guilty for their role in the plot: New York Times, '16 Sentenced to Life for Killing Aquino', *The New York Times* (29 September 1990) <http://www.nytimes.com/1990/09/29/world/16-sentenced-to-life-for-killing-aquino.html>; Suzannah Linton, 'Post Conflict Justice in Asia' in M Cherif Bassiouni (ed), *The Pursuit of International Criminal Justice: A World Study on Conflicts, Victimisation and Post-Conflict Justice* (Intersentia, 2010) vol 2, 515-753, pdf from <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2036245>, 193.

[36] Ibid, 126.

[37] Ibid, 185.

[38] Angeles (n 30); see Tables 3 and 4, chapter 3.

[39] Article II(2), *The Constitution of the Republic of the Philippines 1987* (Constitution).

[40] Article III(12), ibid.

[41] Article XI(5-14), ibid, see also *An Act Providing for the Functional and Structural Organization of the Office of the Ombudsman, and for Other Purposes*, Republic Act No. 6770, 17 November 1989.

[42] The Commission was created by Article XIII(17), Constitution, but formally established on 5 May 1987 by *Executive Order No. 163, Declaring the Effectivity of the Creation of the Commission on Human Rights as Provided for in the 1987 Constitution*.

[43] See *Executive Order No. 163*, ibid.

[44] International Committee of the Red Cross (ICRC), 'Philippines: Practice Relating to Rule 158, Prosecution of War Crimes, Customary IHL' (2016) <https://www.icrc.org/customary-ihl/eng/docs/v2_cou_ph_rule158>.

Aquino's presidency thus 'started with great expectations for social change'.[45] However, the Presidential Committee investigations did not lead to prosecutions for international crimes that may have occurred during Marcos' regime.[46] Moreover, political violence did not cease. One reason was that much of the military had been trained under and had supported the Marcos regime[47] and, after its collapse, the 'military structure, its mentality, culture and problems, remain[ed] intact'.[48] Aquino's administration initially denied responsibility for disappearances and killings by vigilante groups, but such 'civilian self-defense' organisations were later endorsed as protecting communities from communism.[49] The government also discredited critical local human rights NGOs by claiming they were aligned with communist groups.[50]

Nonetheless, coalitions and networks such as the Philippine Alliance of Human Rights Advocates (PAHRA) built ties between local and international civil society actors and secured increased funding.[51] NGOs and the Commission on Human Rights documented ongoing human rights violations including enforced disappearances, killings and torture – and the lack of corresponding accountability,[52] including for crimes committed by non-state actors.[53] Thus, civil society highlighted the gap between the Philippines' embrace of international legal instruments concerning human rights and international humanitarian law and the reality of continuing violence.

Fidel Ramos became President in 1992 and 'made human rights reforms an important pillar of his reform program'.[54] Many NGOs adopted a strategy of 'critical engagement: a process whereby an NGO works simultaneously with and against state agencies'.[55] This included providing education about international humanitarian law as these principles were incorporated into official policies.[56] In 1996, the NDF made a 'Declaration of

[45] Bryant (n 20), 64.
[46] Although see Linton (n 35), 193-197.
[47] Linton (n 35), 193.
[48] Angeles (n 30), 109.
[49] Ibid, 28; Jetschke, (n 29), 181-185.
[50] Jetschke (n 29), 187.
[51] Bryant (n 20), 64.
[52] For statistics, see Angeles (n 30), 22-25.
[53] Human Rights Watch, 'Human Rights Watch World Report 1990: An Annual Review of Developments and the Bush Administrations Policy on Human Rights Wordwide' (January 1991), 312.
[54] Jetschke (n 29), 195.
[55] Bryant (n 20), 66.
[56] E.g. Soliman M Santos Jr, 'Correspondents' Reports: The Philippines' (2003) 6 *Yearbook of International Humanitarian Law* 561-578, 571; Rebecca D E Lozada et al (eds), *Itaguyod ang IHL: Sibilyan Pangalagaan - Towards a Philippine Program of Action on Effecting International*

undertaking' to apply international humanitarian law (following a declaration regarding Common Article 3 and Additional Protocol II in 1991) in which it stated that the NDF had gained the status of belligerency, which has been a contentious issue.[57] The government secured a Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law (CARHRIHL) with the NDF in 1998,[58] and an agreement to respect international humanitarian law with MILF in 2001,[59] though debates about MILF's 'belligerent' status also continued in subsequent years.[60] Despite these agreements, extrajudicial killings and torture perpetrated by state and non-state actors continued, while corruption in the judiciary remained[61] and amnesties were awarded (see section 4.3). Private claims for reparation launched in this period also met with challenges.[62] While a class action on behalf of approximately 10,000 Philippine nationals in the US

Humanitarian Law, Proceedings of the Second National Summit on International Humanitarian Law in the Philippines, 11 December 2012, Manila (Zoom Printing, 2013), 30-33, see also *Memorandum Order No. 259 Requiring Education and Training of Law Enforcement, Police, Military and Prison Personnel*, 7 February 1995.

[57] ICRC, 'Philippines, Application of IHL by the National Democratic Front of the Philippines: NDFP Declaration of Undertaking to Apply the Geneva Conventions of 1949 and Protocol I of 1977, 5 July 1996' (31 January 2012) <https://www.icrc.org/casebook/doc/case-study/philippines-ihl-ndfp-case-study.htm>; Cong Corrales, 'Army questions 'belligerency posturing' of NDF', *Minda News* (22 September 2011) <http://www.mindanews.com/top-stories/2011/09/army-questions-%E2%80%98belligerency-posturing%E2%80%99-of-ndf/>, see also National Democratic Front of the Philippines, 'Character of the Armed Conflict and the Basic Conflicting Parties' (2003) <http://members.casema.nl/ndf/peace/on_peace/framework03.html>, in which NDF claims belligerency was granted in the mid 1980s.

[58] The NDF had declared its intention to abide by international humanitarian law in 1991 and 1996, see Alston (n 25), fn3; ICRC (n 57).

[59] 'Agreement on peace between the government of the Republic of the Philippines and the Moro Islamic Liberation Front', signed 22 June 2001 and see 'Implementing Guidelines on the Humanitarian, Rehabilitation and Development Aspects of the GRP-MILF Tripoli Agreement on Peace of 2001' signed 7 May 2002; Alston (n 25), fn 3.

[60] Soliman M Santos Jnr, '"Belligerency status" concept is obsolete - Atty. Soliman M. Santos, Jr.', *ABS CBN News* (9 August 2008) <http://news.abs-cbn.com/views-and-analysis/08/09/08/%E2%80%9Cbelligerency-status%E2%80%9D-concept-obsolete-atty-soliman-m-santos-jr>, e.g., *The Province of North Cotabato v The Government of the Republic of the Philippines Peace Panel on Ancestral Domain*, G.R. Nos. 183591, 183572, 183893 and 183951, Supreme Court, Republic of the Philippines, 14 October 2008, Separate Concurring Opinion, Puno CJ.

[61] Bureau of Democracy Human Rights and Labor, 'The Philippines Country Report on Human Rights Practices for 1997' (US Department of State, 30 January 1998) <http://1997-2001.state.gov/www/global/human_rights/1997_hrp_report/philippi.html>.

[62] E.g., *Rogelio Aberca et al v Maj. Gen. Fabian Ver et al*, GR No. 166216, Republic of the Philippines Supreme Court, Decision, 14 March 2012.

courts secured an award for damages under the US Alien Tort Claims Act in 1992,[63] Philippine courts have not enforced the judgment.[64]

Further, the uneven impact of economic development meant that communist and socialist groups retained supporters. The conflict between the military and MILF also escalated during Joseph Estrada's Presidency (1998-2001), and intensified after Gloria Macapagal-Arroyo (Arroyo) became President in 2001, as the 'War on Terror' attracted greater US military support during a military operation named 'Oplan Bantay Laya'.[65] There were allegations that both state and non-state actors violated international humanitarian law in this period.[66] Thus, human rights and international humanitarian law formed a crucial part of Philippine domestic political discourse. However, ongoing conflict led to compromises in ensuring accountability where these principles were violated.

2.4. Implementation, but not Enforcement: Arroyo and New Legislation

Arroyo was President from 2001 until 2010, during which time the Philippines passed domestic international crimes legislation. Inter-agency consultations on an international humanitarian law bill had commenced in 2001 and from 2002 the Philippine Red Cross National IHL Committee[67] directed the drafting process in consultation with Philippines and international civil society and government stakeholders, with some assistance from the International Committee of the Red Cross (ICRC).[68] On 12 August 2003 (International Humanitarian Law Day), Representative Lozada announced the introduction of an 'Omnibus IHL Bill' addressing international crimes.[69]

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[63] E.g., *In re Estate of Ferdinand E Marcos Human Rights Litigation: Agapita Trajano; Archimedes Trajano v Ferdinand E Marcos and Imee Marcos-Manotoc*, Case No. 91-15891, 978 F.2d 493, US Court of Appeals, Ninth Circuit, 21 October 1992; *Maximo Hilao v Estate of Ferdinand Marcos*, No. 95-15779, US Court of Appeals, Ninth Circuit, 17 December 1996.
[64] Mary Ann LL Reyes, 'No Enforceable Right', *The Philippine Star* (21 February 2016) <http://www.philstar.com/business/2016/02/21/1555089/no-enforceable-right>; *Priscilla C Mijares et al v Hon. Santiago Javier Ranada et al*, GR No. 139325, Republic of the Philippines, Supreme Court, 12 April 2005.
[65] Santos Jr (n 56), 570; Ibon Foundation (ed), *Oplan Bantay Laya: The US-Arroyo Campaign of Terror and Counterinsurgency in the Philippines* (2010).
[66] E.g., Ibon Foundation, ibid; regarding NPA violations: Bureau of Democracy Human Rights and Labor, '2003 Country Reports on Human Rights Practices: Philippines' (25 February 2004) <http://www.state.gov/j/drl/rls/hrrpt/2003/27786.htm>.
[67] Established in 2000 by decision of the Philippine National Red Cross.
[68] The Philippines Thirteenth Congress, 'Draft Explanatory Note (for a "Philippine Statute on Crimes Against International Humanitarian Law")', copy on file with author (Draft Explanatory Note).
[69] House Bill No. 6298, discussed in Santos Jr (n 56), 577.

However, these initiatives stalled. The Philippines had signed a 'Non-Surrender Agreement' with the US in May 2003 pursuant to which each party agreed not to hand over nationals to an international tribunal without consent,[70] though the Philippines government emphasised that this did 'not in any way prevent us from becoming a state party to the ICC Statute'.[71] In July, a civil society group filed a petition for *mandamus* to compel the transmission of the signed Rome Statute to the Philippines Senate for ratification,[72] but the Supreme Court determined that it had no jurisdiction to make such an order.[73]

The government favoured preserving independence and internal stability in its approach toward international criminal justice. During its time on the Security Council, in 2004 the Philippines advised that justice for perpetrators of crimes in Timor-Leste should be carried out 'bearing in mind the views, sensitivities and cooperation of the parties concerned'.[74] In 2005, the Philippines 'lauded' the efforts of the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY, ICTR) to refer cases to national courts and confirmed that the Philippines understood these courts as being 'designed to promote peace' and 'foster reconciliation'.[75]

The Arroyo administration established a police investigative body, 'Task Force Usig' in 2006, and the 'Melo Commission' investigated the killing of journalists and activists. However, the Commission concluded that while evidence suggested that certain

[70] See *Bayan Muna v. Alberto Romulo and Bias F. Ople, Supreme Court*, GR No. 159618, Republic of the Philippines, Supreme Court, 1 February 2011.
[71] Quoted in Santos Jr (n 56), 570, though see Carlos H Conde, 'World Briefing Asia: Philippines: International Court Questioned', *The New York Times* (6 September 2002) <http://www.nytimes.com/2002/09/06/world/world-briefing-asia-philippines-international-court-questioned.html>.
[72] Santos Jr (n 56), 579.
[73] *Sen. Aquilino Pimentel, Jr. et al. v. Office of the Executive Secretary et al*, GR No. 158088, Supreme Court, Republic of the Philippines, Decision, 6 July 2005.
[74] United Nations Security Council, 'Security Council Speakers Support Extension of Timor-Leste Mission for Final Six Months, Until 20 May 2005', (15 November 2004) <http://www.un.org/press/en/2004/sc8243.doc.htm>.
[75] United Nations Security Council, 'Presidents, Prosecutors of Rwanda, Former Yugoslavia Tribunals Brief Security Council on Progress in Implementing Completion Strategies' (15 December 2005) <http://www.un.org/press/en/2005/sc8586.doc.htm>. See also ICTY, 'Comments by Judge Theodor Meron, President of the International Criminal Tribunal for the former Yugoslavia, to the United Nations Security Council 23 November 2004' (29 November 2004) <http://www.icty.org/en/press/comments-judge-theodor-meron-president-international-criminal-tribunal-former-yugoslavia>.

individuals were responsible for some crimes,[76] there was no 'official or sanctioned' military policy to illegally 'liquidate' activists.[77] Human Rights Watch reported that it 'could not identify a single successful prosecution for any of the political killings … cited by local civil society and human rights groups'.[78] In 2007 the Armed Forces of the Philippines and Philippines National Police established human rights offices. However, in 2008, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, produced a highly influential[79] report detailing the 'extrajudicial executions of leftist activists in the Philippines'.[80] It noted that the 'many measures that have been promulgated by the Government … are encouraging' but had 'yet to succeed' and made a number of institutional recommendations.[81]

These initiatives focused on human rights, extrajudicial killings and enforced disappearances, which were generally not labelled as international crimes.[82] However, international and national civil society actors continued to draft 'international humanitarian law' bills (see section 3.3). Eventually, Congress passed international criminal law legislation in December 2009 (see section 4.2).[83] Despite these developments, the Arroyo administration's political will to secure justice for either contemporary or historic international crimes remained ambiguous. Fifty-eight people were murdered, including 32 journalists, in the 'Maguindanao massacre'[84] of 23 November 2009, reportedly 'the largest number of journalists murdered in a single incident worldwide'.[85] The killings were attributed to the Ampatuan family, 'one of the most powerful and abusive state-backed militias in the Philippines'[86] and prosecution efforts proceeded

[76] Jose A R Melo et al, 'Independent Commission to Address Media and Activist Killings, Created under Administrative Order No. 157 (s. 2006), Report' (22 January 2007) <http://pcij.org/blog/wp-docs/melo_commission_report.pdf>, 51-58.
[77] Ibid, 50.
[78] Human Rights Watch, 'Scared Silent: Extrajudicial Impunity for Extrajudicial Killings in the Philippines' (June 2007) <http://www.hrw.org/reports/2007/06/27/scared-silent-0>, 48.
[79] See section 3.1.
[80] Alston (n 25), 2.
[81] Ibid, 3.
[82] Though Alston noted that the CPP/NPA/NDF use of 'people's courts' may constitute a war crime, see ibid, 3, and encouraged the prosecution of extrajudicial executions, 24.
[83] *An Act Defining and Penalizing Crimes against International Humanitarian Law, Genocide and Other Crimes Against Humanity, Organizing Jurisdiction, Designating Special Courts, and for Related Purposes*, Republic Act 9851, 11 December 2009 (IHL Act).
[84] Also known as the 'Ampatuan massacre'.
[85] Article 2, 'Article 2 Special Report: The Philippines' Hollow Human Rights System' (2012) 11(2-3) *Article 2*, 25.
[86] Human Rights Watch, '"They Own the People" The Ampatuans, State-Backed Militias, and Killings in the Southern Philippines' (16 November 2010) <https://www.hrw.org/report/2010/11/16/they-own-people/ampatuans-state-backed-militias-and-killings-southern-philippines>, 4.

slowly.[87] In relation to historic crimes, in the *Vinuya* case of 2010, the Supreme Court held there was no valid remedy in Philippine law for the 'comfort women' who had experienced sexual violence during the Japanese occupation, since the Court could only 'urge and exhort the Executive Department to take up the petitioner's cause' with Japan,[88] which the Department had not done. Alongside these challenges, at least since the Philippine Coalition for the International Criminal Court (PCICC) was established in September 2000, local NGOs and other actors had unsuccessfully sought ratification of the Rome Statute.[89] Despite some institutional developments, there was a failure to prosecute either historic or more recent alleged international crimes.

2.5. Ratification and Engagement with the ICC

A new opportunity was presented by the election of Benigno Aquino III (Corazón's son) in June 2010.[90] In his first State of the Nation address Benigno Aquino observed that 'the attainment of true justice does not end in the filing of cases, but in the conviction of criminals'.[91] Various stakeholders agreed to work towards forming a national monitoring mechanism on extra-legal killings and enforced disappearances[92] and the government ratified the Rome Statute on 30 August 2011, following the significant engagement of civil society and Philippines Senators.[93] Administrative Order No. 35 in 2012 created an 'Inter-Agency Committee on Extra-Legal Killings, Enforced Disappearances, Torture and other Grave Violations of the Right to Life, Liberty and Security of Persons' to combat the 'impression of a culture of impunity' by investigating unresolved historic and

[87] Aie Balagtas See et al, 'Slow pace of justice dismays int'l media group', *The Philippine Daily Inquirer* (24 November 2015) <http://newsinfo.inquirer.net/741801/slow-pace-of-justice-dismays-intl-media-group#ixzz42SItPPQF>; Juan E Méndez, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment', UN Doc. A/HRC/28/68/Add.1, 5 March 2015, para. 434.
[88] *Vinuya* (n 4) (Motion for Consideration was denied 14 August 2014).
[89] See section 3.3.
[90] Human Rights Watch, '"No Justice Just Adds to the Pain" Killings, Disappearances, and Impunity in the Philippines' (2011) <http://www.hrw.org/node/100305/section/4>, 4; Nikko Dizon and Alex Pal, 'Aquino vows closure to human rights killings', *Philippine Daily Inquirer* (1 June 2010) <http://theinquirerfrontpage.blogspot.com.au/2010/06/june-1-2010.html>; Philippine Coalition for the International Criminal Court (PCICC), 'Letter to His Excellency Benigno C Aquino, Jr' (14 October 2010), copy on file with author (B Aquino Letter).
[91] Benigno S Aquino III, 'State of the Nation Address', *Philippine Daily Inquirer* (25 July 2011) <http://newsinfo.inquirer.net/29633/state-of-the-nation-address>.
[92] Republic of the Philippines, 'National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Philippines', UN Doc. A/HRC/WG.6/13/PHL/1, 19 March 2012, paras 49-51.
[93] Senate of the Philippines, Legarda Lauds Fellow Senators for International Criminal Court Treaty's Swift Approval', and 'Co-Sponsorship Speech, Senator Loren Legarda' (17 August 2011) <http://www.senate.gov.ph/press_release/2011/0817_legarda1.asp>.

contemporary cases.[94] In 2014, the government and MILF secured the Comprehensive Agreement on the Bangsamoro, a framework peace agreement in which 'the Parties acknowledge[d] their responsibilities to uphold the principles of justice'.[95]

However, there were accusations of further human rights violations.[96] The deaths of state officers, separatist fighters and civilians during an anti-terrorism operation in Mamasapano in 2015 highlighted the potential domestic relevance of international criminal law (see section 4.4). Moreover, after President Rodrigo Duterte took office in June 2016, thousands of alleged drug users and criminals were killed without trial.[97] Possibly in response to NGOs and the Commission for Human Rights raising the prospect of an ICC investigation,[98] in October 2016, the ICC Prosecutor noted that 'any person in the Philippines who incites or engages in acts of mass violence … is potentially liable to prosecution before the Court'.[99] However, the Chairperson of the Commission for Human Rights continued to complain of harassment by the President,[100] who threatened to withdraw the Philippines from the ICC.[101] At the 2016 ICC Assembly of States Parties (ASP), the Philippines' delegate was 'very concerned about the decision of some States Parties to withdraw from the Rome Statute', but argued that 'legitimate police operations against drug offenders' do not qualify as an international crime and reminded the ASP that

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[94] *Administrative Order No. 35, Creating an Inter-Agency Committee on Extra-Legal Killings, Enforced Disappearances, Torture and other Grave Violations of the Right to Life, Liberty and Security of Persons*, 22 November 2012.
[95] 'Comprehensive Agreement on the Bangsamoro', (27 March 2014) <http://www.gov.ph/2014/03/27/document-cab/>.
[96] E.g., Philippine UPR Watch, 'Philippine UPR Watch: Submissions to the United Nations Human Rights Council (UNHRC) for the Universal Periodic Review (UPR) of the Philippines During the 13th UPR Session (May - June 2012)' (2012) <https://philippineuprwatch.files.wordpress.com/2012/05/upr-report_orgs-summaries.pdf>.
[97] Statistics vary, e.g., Associated Foreign Press, 'Philippine anti-crime crusade death toll hits 2,400', *Straits Times* (4 September 2016) <http://www.straitstimes.com/asia/se-asia/philippine-anti-crime-crusade-death-toll-hits-2400>; Perfecto T Raymundo, 'Drug war stats: 1,138 killed, 17,319 arrested, says PNP' Philippine Star (17 September 2016) <http://www.philstar.com/headlines/2016/09/17/1624693/drug-war-stats-1138-killed-17319-arrested-says-pnp>.
[98] Jefferson Antiporda, 'Int'l court can look into drug killings — CHR', *The Manila Times* (23 August 2016) <http://www.manilatimes.net/intl-court-can-look-into-drug-killings-chr/281635/>.
[99] ICC Office of the Prosecutor, 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda concerning the situation in the Republic of the Philippines' (13 October 2016) <https://www.icc-cpi.int/Pages/item.aspx?name=161013-otp-stat-php>.
[100] Patricia Lourdes Viray, 'De Lima challenges Duterte's immunity', *The Philippine Star* (7 November 2016) <http://www.philstar.com/headlines/2016/11/07/1641379/de-lima-challenges-dutertes-immunity>.
[101] Euan Black, 'Duterte's threat to withdraw the Philippines from the International Criminal Court marks further shift East' *Southeast Asia Globe* (21 November 2016) <http://sea-globe.com/philippines-icc/>; Reuters, ''Western court threats are bullsh*t, European lawyers stupid': Duterte on possible indictment', *Reuters* (28 November 2016) <https://www.rt.com/news/368468-duterte-court-threats-stupid/>.

the Philippines is 'willing and able to prosecute' Rome Statute crimes.[102] Thus, while the Philippines has adopted international crimes legislation and ratified the Rome Statute, the impact of these laws and other mechanisms upon practice and future enforcement is evolving.

2.6. Summary: History

The norm of international criminal justice has not been accepted in the Philippines over time through ratifying and implementing international treaties. Rather, this section indicates two approaches toward international criminal justice that continue to lie in tension. The first advances the Philippine's global reputation as a state with an influential civil society and favourably recalls the country's history of developing international criminal law and resisting governments that fail to respect human rights. The second appreciates that the Philippines is a post-colonial country that has experienced internal unrest, in which securing stability could conflict with concerns about justice. International and national state and non-state actors have attempted to influence these dual characterisations in various ways.

3. Local Initiatives and Adaptation

The Asia Human Rights Commission (an NGO) has suggested that the Philippines demonstrates how the 'strengthening of a legal framework fails to displace, if not restructure, flaws in the process of investigation, prosecution and adjudication of cases'.[103] Implementing the norm of international criminal justice requires officials to accept ideas about how judicial processes 'should' work, including to overcome gaps between laws and practice. Mainstream constructivist approaches anticipate that such adjustment can result from international actors persuading local actors, including through the mediation of 'norm entrepreneurs', to adopt external norms.[104] In localisation, actors use *local initiative* to reframe and *adapt* norms. This section considers how international (3.1), government and other official actors (3.2), and civil society (3.3) have attempted to influence

[102] Republic of the Philippines, 'Statement of the Philippines, General Debate of the 15th Assembly of States Parties to the Rome Statute of the International Criminal Court' (17 November 2016) <https://asp.icc-cpi.int/iccdocs/asp_docs/ASP15/GenDeba/ICC-ASP15-GenDeba-Philippines-ENG.pdf> (15th Assembly Statement).
[103] Asian Human Rights Commission, 'Philippines: 'Licenced' to Torture, Kill & to Silence the Oppressed' (December 2013) <http://www.humanrights.asia/resources/hrreport/2013/AHRC-SPR-001-2013.pdf/view>, 2.
[104] See chapter 2.

international criminal justice in the Philippines, including by advancing new laws and working toward their enforcement, as well as undertaking more adaptive approaches (3.4). As in the last chapter, it proceeds by group rather than in a chronological manner and relies upon public statements and interviews.

3.1. International States and Organisations

International state and non-state actors have influenced the Philippines' engagement with international criminal law since the WWII trials. The technical assistance provided by the ICRC during the drafting of the IHL Act has been mentioned.[105] Further, the Philippines government undertook a number of initiatives following Alston's 2008 report, such as establishing an armed forces human rights office.[106] A Filipino civil society representative attributed these developments to 'the strength of the social movements',[107] but also to what another called Alston's 'controversial report, which embarrassed the Philippines'.[108]

Some internationally funded projects pursue international criminal justice goals, but are framed as institutional projects deriving from pre-existing national initiatives.[109] Other states have attempted to influence the Philippines' domestic approach to international criminal justice more overtly. For example, following the 'Maguindanao massacre' mentioned above, Australia called for the Philippines to 'ensure alleged perpetrators of serious human rights violations are brought to justice',[110] while a Malaysia-led group investigated the Mamasapano incident and recommended that 'combatants found to have committed crimes, should be prosecuted accordingly and penalized'.[111] A Special Envoy of Swiss Federal Department of Foreign Affairs has also chaired a 'Transitional Justice and

[105] Section 2.4.
[106] Philip Alston, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, Addendum, Follow-up to country recommendations – Philippines', UN Doc A/HRC/11/2/Add.8, 29 April 2009.
[107] Interview P5.
[108] Interview P4.
[109] E.g., European Union–Philippines Justice Support Programmes (EPJUST I and II), aimed at improving access to justice, 'fighting impunity' – especially for extrajudicial killings and enforced disappearances, and enhancing transparency, including via the national monitoring mechanism, 'About EPJUST-II' <http://www.epjust2.com/index.php/about-epjust-ii>.
[110] Australian Permanent Mission Geneva, 'Universal Periodic Review of the Philippines Statement by Australia' (29 May 2012) <http://geneva.mission.gov.au/gene/Statement330.html>, though see, New Matilda, 'How we're Helping the Philippines in its Dirty War', *New Matilda* (12 September 2008) <https://newmatilda.com/2008/09/12/how-were-helping-philippines-its-dirty-war/>.
[111] International Monitoring Team, 'Verification and Assessment Report - Ceasefire Violations Mamasapano Incident January 25, 2015' (5 April 2015) <http://archive.peace.gov.ph/resources/verification-and-assessment-report-%E2%80%93-ceasefire-violations-mamasapano-incident-january-25>, 17.

Reconciliation Commission' related to the conflict with MILF, which has various aims, including addressing human rights violations.[112] Interestingly, the ICC was not mentioned in the 2008 Working Group report for the Philippines' Universal Periodic Review (UPR),[113] though in 2012 many states commended the Philippines' 2011 ratification of the Rome Statute.[114] Still, foreign states – alongside NGOs – had sponsored several local forums to discuss ratifying the Rome Statute.[115]

On the other hand, the US retains significant influence and a strong military presence in the Philippines extended by the 2014 Enhanced Defense Cooperation Agreement.[116] The US probably discouraged the Philippines from ratifying the Rome Statute when negotiating the 2003 Non-Surrender Agreement,[117] though the Obama administration did not oppose the ICC in recent years.[118] Thus, international actors have taken varied approaches toward international criminal justice in the Philippines, although many have focused on institutional reform and monitoring international crimes.

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[112] Office of the Presidential Adviser on the Peace Process, 'Switzerland chairs the Transitional Justice and Reconciliation Commission under the Comprehensive Agreement on the Bangsamoro' (30 September 2014) <http://archive.peace.gov.ph/features/switzerland-chairs-transitional-justice-and-reconciliation-commission-under-comprehensive>.

[113] UN Human Rights Council, 'Universal Periodic Review: Report of the Working Group on the Universal Periodic Review: The Philippines', UN Doc A/HRC/8/28, 23 May 2008.

[114] UN Human Rights Council, 'Report of the Working Group on the Universal Periodic Review: Philippines', UN Doc A/HRC/21/12, 9 July 2012.

[115] E.g., Parliamentarians for Global Action, 'Briefing of the Senate Foreign Relations Committee by Judge Song, President of the ICC' (7 March 2011) <http://www.pgaction.org/es/news/briefing-of-the-senate-foreign-relations-committee-by-judge-song.html>; a conference sponsored by Friedrich Ebert Stiftung on the Asia-Europe Dialogue on Human Rights and the ICC on 11 October 2004, and a meeting held by the Philippine Judicial Academy, Supreme Court and Embassy of Italy on 25-26 September 2008, see PCICC, 'Time to Uphold the Rule of Law: An Update on the Philippines and the International Criminal Court' (2011), copy on file with author, (Time to Uphold Report).

[116] 'Agreement between the Government of the Republic of the Philippines and the Government of the United States of America on Enhanced Defense Cooperation' (29 April 2014), <http://www.gov.ph/2014/04/29/document-enhanced-defense-cooperation-agreement/>, upheld in *Rene A.V. Saguisag, et al. vs. Executive Secretary Paquito N. Ochoa, Jr., et al./Bagong Alyansang Makabayan (Bayan), et al vs. Department of National Defense Secretary Voltaire Gazmin, et al.* G.R. No. 212426 & G.R. No. 212444, Supreme Court, Republic of the Philippines, 12 January 2016.

[117] Conde (n 71).

[118] E.g., United States, 'Intervention of the United States observer delegation, Fourteenth session of the Assembly of States Parties' (19 November 2015) <https://asp.icc-cpi.int/iccdocs/asp_docs/ASP14/GenDeb/ASP14-GenDeb--OS-USA-ENG.pdf>.

3.2. The Philippines Authorities

The Philippines government has propounded its support for international criminal justice and 'fighting impunity'.[119] Reflecting the themes identified in section 2, official statements, especially since Benigno Aquino's administration, emphasise the Philippines' human rights achievements and the importance of civil society, as well as its development needs and the tensions between peace and justice.

3.2.1. Support for International Criminal Justice

Government statements have stressed that the Philippines has secured significant progress in protecting international human rights and humanitarian law.[120] The Philippines' statement at the 2010 Kampala Review Conference for the ICC recalled that WWII trials in the Philippines 'established the principle of command responsibility for war crimes' and that its support for the ICC was 'anchored on the policy enshrined in the Philippine Constitution … guaranteeing full respect for human rights'.[121] In 2015, the Philippines government successfully nominated Raul Pangalangan[122] to replace Philippines Senator Miriam Defensor Santago as an ICC judge, affirming 'its continuing support' for the ICC.[123] The Philippines' statements at the ASP consistently call for other states, especially in the Asia-Pacific, to ratify the Rome Statute.[124]

The government has also acknowledged the role of civil society's international criminal justice advocacy. At the Kampala ICC Review Conference, the Philippines statement

[119] Republic of the Philippines, 'Statement at the General Debate of the 13th Assembly of States Parties to the Rome Statute of the International Criminal Court' (11 December 2014) <https://www.un.int/philippines/statements_speeches/statement-general-debate-13th-assembly-states-parties-rome-statute-international> (13th Assembly Statement).
[120] Republic of the Philippines, 'Statement by H E Libran N Cabactulan, Permanent Representative, Philippine Mission to the United Nations at the 10th Session of the Assembly of States Parties' (14 December 2011) <http://www.iccnow.org/documents/ICC-ASP10-GenDeba-Philippines-ENG.pdf> (10th Assembly Statement).
[121] Republic of the Philippines, 'Review Conference of the Rome Statute of the International Criminal Court' (1 October 2010) <http://archive.iccnow.org/documents/ICC-RC-gendeba-Philippines-ENG.pdf> (Kampala Statement).
[122] A former Dean of the law school at the University of Philippines, PCICC co-chair and Philippines delegate at the Rome Conference.
[123] ICC Assembly of States Parties, 'Election of a judge to fill a judicial vacancy of the International Criminal Court', ICC Doc ICC-ASP/13/14, 14 April 2015, 10.
[124] E.g., Republic of the Philippines (n 119, though see n 102); Republic of the Philippines, 'Statement of the Philippines, General Debate at the 14th session of the Assembly of States Parties of the Rome Statute of the International Criminal Court' (19 November 2015) <https://asp.icc-cpi.int/iccdocs/asp_docs/ASP14/GenDeb/ASP14-GenDeb-Phillippines-ENG.pdf>.

mentioned trainings undertaken 'in partnership with civil society groups'[125] and at the first ASP the Philippines attended as a state party, its representative gave 'special thanks' to the Coalition for the International Criminal Court (CICC), including in the Asia Pacific, and PCICC, mentioning that '[t]hey were with us through the entire process of ratification'.[126] The Department of Justice, Department of National Defense (DND), Department of Foreign Affairs and Office of the Solicitor General were all represented in a working group alongside civil society that developed draft ICC implementation and cooperation legislation filed in 2016 (see section 4.2).[127] Thus, at least during Benigno Aquino's administration, the Philippines supported the ICC as a global and civil society initiative to end impunity of which it is part. However, the Duterte administration appears unlikely to develop this relationship.[128]

3.2.2.Sovereignty and Sensitivity toward Development

The Philippines has also consistently mentioned development and peace-related concerns in its statements about international criminal justice. While government statements have perhaps not emphasised the principle of sovereignty to the same degree as other states in Southeast Asia,[129] the Philippines consistently argues for a broad interpretation of the complementarity principle that is, in particular, sensitive toward developing and conflict-affected nations. Thus, the Philippines' statements suggest the ICC should help states to 'strengthen [their] domestic capability to devise their *own system* of protecting its citizens'[130] and assist with 'the training of judges, prosecutors, the police and the military'.[131] Its Kampala statement asked the Conference to review the potential use of amnesties since 'the conviction of a perpetrator will bring justice to the victims and end impunity, but it will not necessarily usher [in] peace and stability to conflict-affected

[125] Kampala Statement (n 121).
[126] 10th Assembly Statement (n 120).
[127] *House Bill No. 2835, An Act in Compliance by the Republic of the Philippines with its Obligations under the Rome Statute of the International Criminal Court and for Other Purposes,* filed 10 August 2016 (ICC Cooperation Bill)*; House Bill No. 3834, An Act Amending Republic Act 9851 "An Act Defining and Penilizing Crimes Against International Humanitarian Law, Genocide and Other Crimes Against Humanity, Organizing Jurisdiction, Designating Special Courts, and for Related Purposes"*, filed 10 August 2016 (IHL Amendment Bill).
[128] Black (n 101).
[129] See section 3.2.2, chapter 3.
[130] Emphasis added.
[131] Republic of the Philippines, 'Statement by H.E. Libran N. Cabactulan, Permanent Representative of the Republic of the Philippines to the United Nations, General Debate, 12th session of the Assembly of States Parties' (21 November 2013) <https://asp.icc-cpi.int/iccdocs/asp_docs/ASP12/GenDeba/ICC-ASP12-GenDeba-Philippines-ENG.pdf> (12th Assembly Statement).

areas'.[132] Further, in the context of African Union opposition to the ICC in 2013, the Philippines argued that 'justice can be particularly complicated and difficult in countries affected if not devastated by violence', cautioning that 'Rome was not built in one day', but 'began its decay when it failed to be cognizant of the changing needs of the times'.[133] Most recently, at the 2016 ASP, the Philippines' delegate responded to the ICC Prosecutor's indication that she was monitoring drug-related deaths by asking for 'a chance to make complementarity work'.[134]

3.2.3.Implementation by the Armed Forces

State and non-state security actors have also officially supported accountability initiatives. The DND has provided international humanitarian law and human rights education programmes at least since 1992.[135] Several offices consider discipline and ethical issues, including the Office of the Inspector General, Office of Ethical Standards and Public Accountability, and Office of the Judge Advocate General.[136] In 1999, the DND and Department of Foreign Affairs were appointed as co-chairs of an International Humanitarian Law 'ad hoc' Committee to manage International Humanitarian Law Day programs 'in collaboration' with the ICRC, Philippine National Red Cross and civil society.[137] The DND declared its support for ratifying the Rome Statute as early as 2001,[138] though in practice officials opposed the idea until shortly before ratification in 2011.[139] At a seminar in 2012, Brigadier General Domingo Tutaan Jr. explained that 'our vision is really to have zero reports of IHL violations' and 'join our hands together in ending impunity as far as IHL violations are concerned'.[140] Still, it is also clear that the military (and police) in the Philippines have not uniformly complied with national laws or their own policies, nor secured accountability for violations of such instruments.[141]

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[132] Kampala Statement (n 121).
[133] 12th Assembly Statement (131).
[134] 15th Assembly Statement (n 102).
[135] PCICC, 'For Hope & Human Dignity: A Primer on the International Criminal Court for the Security Sector' (2008) (For Hope Report), 34; Santos Jr (n 56), 571; Memorandum Order 259 (n 56).
[136] For Hope Report, ibid, 33.
[137] *Executive Order No. 134, Declaring August 12, 1999 and Every 12th day of August thereafter as International Humanitarian Law Day*, 31 July 1999.
[138] Time to Uphold Report (n 115).
[139] Ceres P Doyo, 'PH as a state party to the International Criminal Court', *Phiippine Daily Inquirer* (16 February 2011) <http://humanfacebyceres.blogspot.com.au/2011/02/ph-as-state-party-in-international.html>.
[140] Lozada et al (n 56), 33.
[141] See section 2 and section 4.3; Human Rights Watch, 'World Report: Philippines' (2016) <https://www.hrw.org/world-report/2016/country-chapters/philippines>.

Though positions shift and differ, the Philippines armed forces and peace negotiators engage with international criminal justice, including through educational initiatives, monitoring violations, and drafting relevant laws. Yet despite this 'socialisation' of the norm of international criminal justice, enforcement remains a challenge (see section 4.3). This is despite significant and often inventive advocacy from Philippine civil society.

3.3. Civil Society

Despite its history of conflict and military dictatorship, 'the Philippines are renowned for the size and the sophistication of their NGO sector.'[142] As elsewhere, however, Philippine civil society has diverse aims.[143] NGOs related to church groups have utilised community networks to document human rights violations,[144] while survivors of political oppression have established NGOs such as SELDA[145] and Karapatan.[146] Political elites have also created NGOs that 'mimic the form and style of regular NGOs',[147] while Corazón Aquino's endorsement of 'vigilante' groups has been mentioned. A number of individuals influence international criminal justice in the Philippines too, crossing between politics, NGO-work, the judiciary, and academia.[148]

This section focuses on advocacy surrounding the Philippines' ratification of the Rome Statute as an example of how civil society in the Philippines promoted international criminal justice. It therefore concentrates on human rights NGOs and especially the PCICC network, alongside the international coalition, CICC – whose regional coordinator during these discussions was from the Philippines. These organisations are not necessarily representative of Philippine civil society, but illustrate how some groups have used local

[142] Bryant (n 20), 61; see Teresa S Encarnacion Tadem (ed), *Localizing and Transnationalizing Contentious Politics: Global Civil Society Movements in the Philippines* (Lexington Books, 2009).
[143] See Gerard Clarke, *Civil society in the Philippines: theoretical, methodological and policy debates* (Routledge, 2013).
[144] Such as Task Force Detainees of the Philippines – initially a task force for the Association of Religious Superiors in the Philippines - and Ecumenical Movement for Justice and Peace; Angeles (n 30), 45, though in recent years the some church groups have reportedly become 'more conservative', Interview P6.
[145] *Samahan ng Ex-detainees Laban sa Detensyon at Aresto* (Association of Ex-Detainees against Detention and Arrest).
[146] Alliance for the Advancement of Peoples Rights.
[147] Bryant (n 20), 68.
[148] These include Senators Loren Lezarda and Miriam Defensor Santiago, civil society actors such as Evelyn Serrano (formerly of CICC), Rebecca Lozado (of PCICC), Ruben Carranza (International Centre for Transitional Justice) and academic lawyers, such as Judge Raul Pangalangan and (now) Congress Representative H. Harry Roque (Philippines Law Center Institute of International Legal Studies at the University of the Philippines and Centre For International Law).

initiative to reflect the themes identified in section 2 in their arguments about international criminal mechanisms.

3.3.1.Consistency with Existing and International Laws

Civil society actors helped to draft domestic international crimes legislation prior to ratification of the Rome Statute. A Philippines-based international organisation representative explained, 'those who were lobbying for the Rome Statute felt that … if the Philippines would never ratify the Rome Statute at least we would have a domestic law that deals with the same issues'.[149] Civil society moved from framing the proposed legislation as being consistent with the Geneva Conventions and Additional Protocol II[150] (so as not to appear to circumvent executive ratification processes),[151] to returning to the Rome Statute model. One draft bill argued, 'if Congress can … copy U.S. laws without a prior ratification process, then it should be able to also copy international laws without a prior ratification process'.[152] International instruments were crucial and international actors provided support, but local actors drove the implementation and ratification process. In particular, PCICC, representing its NGO members, 'pursued the campaign for more than a decade, which included filing a *mandamus* case before the Supreme Court urging it to compel the Executive to transmit the ratification papers to the Senate'.[153]

3.3.2.Democracy and Human Rights Credentials

Once the IHL Act was passed, NGOs framed ratification as complementing the Philippines' identity as a human rights respecting state. When Benigno Aquino became President, it was argued that the Philippines' history of 'people power' movements showed how it could be a 'shining example for other countries' and by ratifying the Rome Statute the Philippines would be 'reaffirming its adherence to the rule of law and to justice as a way to

[149] Interview P3.
[150] E.g., *Senate Bill No. 2135, Thirteenth Congress of the Republic of the Philippines, Second Regular Session*, 26 September 2005.
[151] This remained a concern and the passing of the Act prior to ratifying the Rome Statute was considered an 'exceptional situation', see Tathiana Flores Acuña, 'Definitions of Genocide and Crimes Against Humanity: And as applied in The Philippines RA No. 9851' (2013) *The Journal for Social Era Knowledge* <http://www.synaptiqplus.com/journal-cover-fall-2013/definitions-of-genocide-and-crimes-against-humanity-in-the-philippines-ra-no-9851>.
[152] The Philippines Thirteenth Congress, (n 68), 3.
[153] CICC, 'Asia-Pacific Update' (December 2011), 4; *Pimentel, Jr. et al. v. Office of the Executive Secretary* (n 73).

lasting peace'.[154] PCICC recalled that 'the concept of command responsibility actually derives from the famous Yamashita' case, so that now it was simply 'time for us to update our own laws to keep abreast of the highest standards of humanitarian protection'.[155] Indeed, ratifying the Rome Statute would 'put the Philippines in high standing among nations that respect human rights, uphold the rule of law and promote international justice'.[156] These arguments paved the way for the government to ratify the Statute as 'a democracy that champions international law'.[157]

3.3.3.Sovereignty, Independence and Protecting Filipinos

Civil society actors sometimes conceded that international criminal justice could involve double standards. At a seminar in 2006, Raul Pangalangan (then co-chair of the PCICC), noted that internationalised tribunals like the ECCC were in reality 'custom-tailored' for both United Nations (UN) and domestic politics.[158] In fact, he argued that the ECCC was established 'because the UN did not trust local justice and this is a problem … not unique to Cambodia.'[159]

To respond to ICC opponents asking, 'Are we shipping off our own countrymen to be tried in The Hague?'[160] advocates took several approaches. They suggested that ratifying the Statute would help to safeguard soldiers deployed overseas and millions of Filipinos working offshore.[161] Witness and victim protection has been a serious issue in the Philippines,[162] so the Rome Statute's victim protection and participation provisions were mentioned.[163] It was also argued that '[u]nder the treaty's complementarity principle, the

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[154] CICC, 'Letter to Her Excellency Gloria Macapagal Arroyo, Re: Ratification of the Rome treaty of the International Criminal Court', 14 April 2008, copy on file with author (Arroyo Letter), 2; For Hope Report (n 135), 25.
[155] PCICC, 'In Search for Justice: Commemorating 60 years of the Geneva Conventions' (12 August 2009) <https://pcicc.wordpress.com/2009/08/12/in-search-for-justice-commemorating-60-years-of-the-geneva-conventions/>.
[156] For Hope Report (n 135), 26.
[157] Department of Foreign Affairs, 'Philippines deposits instrument of ratification for Rome Statute of the International Criminal Court' (31 August 2011) <http://www.gov.ph/2011/08/31/philippines-deposits-instrument-of-ratification-for-rome-statute/>.
[158] Ibid, 7.
[159] Ibid, 8.
[160] Interview P2.
[161] For Hope Report (n 135), 24; PCICC, 'Senate Concurrence on Rome Statute is a Vote for Justice' (23 August 2011) <http://pcicc.wordpress.com/2011/09/07/senate-concurrence-on-rome-statute-is-a-vote-for-justice/>.
[162] Human Rights Watch (n 90).
[163] For Hope Report (n 135), 25.

ICC strengthens [a] member state's sovereignty as it recognizes the state's prerogative to try cases using its domestic judicial system and national legislation.'[164] The ICC would arguably support the domestic legal system and encourage the professionalisation of the Philippines security sector, while respecting the state's independence.[165]

3.3.4.Peace and Justice

One argument suggested that the ICC could contribute to securing peace because it could prosecute both state and non-state actors. Pangalangan argued that the ICC would 'de-politicize the prosecution of military abuses and shift these proceedings purely to legal standards' and 'by focusing on the individual, the ICC is able to avoid the more ideological debate on whose cause is right and whose cause is wrong'.[166] The Commission for Human Rights echoed this argument.[167] The idea that the 'ICC is created to end impunity and human rights abuses committed by both state and non-state actors' also indicated that it could 'be a deterring factor for further commission of crimes…' or prevent criminals finding a 'haven' of impunity in the Philippines,[168] as Japanese perpetrators of sexual slavery had in WWII.[169]

3.3.5.Enforcement and Engagement with International Mechanisms

Following ratification, some actors provided training to state and non-state security actors and the judiciary about their legal obligations.[170] Many NGOs have also documented

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[164] Arroyo Letter (n 154), 1.
[165] For Hope Report (n 135), 25-26.
[166] Ibid, 6.
[167] Leila M de Lima, 'Keynote Speech On the Occasion of the Third General Assembly of the Peace Advocates for Truth, Healing and Justice, Bantayog ng mga Bayani, Quezon Avenue, Quezon City, 5 September 2009' (5 September 2009) <http://www.chr.gov.ph/MAIN%20PAGES/speeches/lmdl_spch17Sept09_3rdGenAs.htm>. Another actor remembered that 'security like[d this argument] a lot because they are always complaining that "you're always talking about our human rights violations". So in this case they are happy: state and non-state', Interview P5.
[168] For Hope Report (n 135), 25.
[169] CICC, 'Global Coalition Urges the Philippines to Ratify the Rome Statute' (1 February 2011) <http://archive.iccnow.org/documents/URC_Press_Release_Philippines-_Feb_2011_final.pdf>.
[170] E.g., Supreme Court of the Philippines Philippine Judicial Academy, 'Special Course on International Criminal Law and Security' (January 2016) <http://philja.judiciary.gov.ph/assets/files/pdf/icl.pdf>; ICRC, 'Philippines: trial court judges learn about international humanitarian law' (20 June 2012) <https://www.icrc.org/eng/resources/documents/news-release/2012/philippines-news-2012-06-20.htm>. The government also arranged training for law enforcement investigators and prosecutors, Mindanao Examiner Desk, 'Gov't trains prosecutors, police investigators on int'l humanitarian law' *Mindanao Examiner* (26 November 2013)

extrajudicial killings and disappearances (commonly known as 'salvaging'), torture, forcible transfers and evacuations ('hamletting' - where civilians were forced to move to new 'hamlets'), sexual violence, and other acts that could represent the underlying conduct of international crimes. They have publicised such violations in reports, media releases and submissions to international mechanisms.[171] Civil society actors have also discussed submitting communications to the ICC Prosecutor regarding enforced disappearances and extrajudicial killings committed in the Philippines since ratifying the Rome Statute,[172] including under Duterte's presidency.[173]

Thus, civil society actors in the Philippines have encouraged authorities to adopt the principles of international criminal justice through emphasising: the Rome Statute's consistency with Philippine and international law; the potential to present the Philippines as a human rights protecting state; that the Rome Statute preserves sovereignty and can also protect Filipinos; the possibility for the ICC to aid the peace process; and the persistence of legislative and enforcement gaps. However, civil society actors in the Philippines recognise that the Rome Statute is not the only way to respond to international crimes.

3.4. Local Adaptation

The previous section highlighted how international, official, and civil society actors have attempted to influence the Philippine's engagement with international criminal justice. This section identifies several ways in which actors have attempted to move beyond implementing the normalised version of international criminal justice in the Philippines, at least by challenging its emphasis upon international prosecutions, such as before the ICC.

<http://mindanaoexaminer.com/govt-trains-prosecutors-police-investigators-on-intl-humanitarian-law/>.

[171] E.g., Karapatan, '2015 Karapatan Year-end Report on the Human Rights Situation in the Philippines' (13 July 2016) <http://karapatan.org/2015+Human+Rights+Report>; UN Human Rights Council, 'Compilation prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, Philippines', UN Doc A/HRC/WG.6/13/PHL/2, 30 March 2012.

[172] Anecdotally, in 2014 local and international civil society actors discussed seeking an ICC investigation regarding extrajudicial killings and enforced disappearances (potentially based on the notion of disappearances being continuing crimes).

[173] Section 2.5.

3.4.1.Institutional Reform: Improving Domestic Processes

Improving domestic legal avenues for prosecuting international crimes is consistent with the Rome Statute and the principle of complementarity. Following ratification, the Second National Summit on International Humanitarian Law held in December 2012 identified a need to train investigators and prosecutors, develop standardised data clearinghouses, enhance witness protection, and build the capacity of forensic experts and doctors.[174] At the 2015 ASP, PCICC observed that the 'prosecution of crimes … will be the testament of how justice has consolidated, of whether "positive complementarity" is taking root. IHL cases have been filed but prosecutions of such remain very low'.[175] PCICC asked the ICC to provide access to its 'various mechanisms and resources', which regional civil society was 'banking on' to help.[176] Whether or not this was a realistic request, it suggested that the ICC might be most useful if it could facilitate domestic prosecutions.

However, civil society actors have pursued the objective of prosecuting violent state conduct within the Philippines for decades.[177] While PCICC and others engage with the ICC, many actors recognise the primary role of the domestic system to an extent that minimises the ICC's significance. As one international organisation representative explained, 'I don't think… ratification of the Rome Statute changes much in terms of the strategy that should be adopted … because … what will be utilised here? It would be Republic Act 9851' (the IHL Act).[178] Therefore, some civil society actors remain focused on improving national judicial processes, which face several challenges.[179]

NGO representatives have argued that police are unwilling to investigate the military (in a 'command conspiracy' contrasted to 'command responsibility')[180] and witnesses face security threats. The Department of Justice has been accused of withdrawing charges against higher-ranking military officers or failing to include international crimes charges

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[174] Lozada et al (n 56).
[175] PCICC, 'Breakthrough in Asia-Pacific for Effective Prosecution' (20 November 2015) <https://asp.icc-cpi.int/iccdocs/asp_docs/ASP14/GenDeb/ASP14-GenDeb--NGO-PCICC-ENG.pdf>, 1.
[176] Ibid, 1.
[177] See e.g., Angeles (n 30); Leary, Ellis and Madlener (n 21).
[178] Interview P3.
[179] See section 4.4.
[180] Human Rights Online Philippines, '[Statement] PAHRA disagrees with Chito Gascon's assessment of the present human rights situation' (15 October 2015) <https://hronlineph.com/2015/10/15/statement-pahra-disagrees-with-chito-gascons-assessment-of-the-present-human-rights-situation/>.

filed against lower ranked soldiers.[181] Anecdotally, prosecutors are less willing to bring charges under the IHL Act because of the need to prove additional elements – prosecuting kidnapping without ransom or murder is sufficiently challenging, even if this would not provide the symbolism of an international crime prosecution. An NGO representative explained that not only are there 'few lawyers who actually know IHL', when asking the Department of Justice about the lack of prosecutions,

> they say, "But just file a case, no one's filing", but it's like a chicken and egg! Who will file a case when you have witnesses dying? On the other hand, if we don't file a case … how can we say [to victims], "We need you to be strong"?'[182]

Thus, civil society actors work toward developing domestic institutional processes for investigating and prosecuting international crimes, without necessarily referring to the ICC or Rome Statute.

3.4.2.Community-Developed Projects and Other Priorities

Some NGOs have further adapted the concept of international criminal justice beyond what is typically addressed by international criminal law. An NGO representative explained that some community stakeholders 'were not really happy with a punitive justice' or 'were saying "We supported the Rome Statute because it's the most available … but of course we still want to find other ways or other kinds of justice, like transitional justice, restorative justice'. [183] For example, PCICC aims to create awareness for the ICC, build support for the Rome Statute, and 'promote the integration' of ICC principles in the domestic legal system.[184] Yet in 2009 (still prior to ratification), PCICC commenced a project called 'Building Bridges for Peace' to 'foster a process of change in areas struggling with social unrest and armed conflict'.[185] Even though PCICC did not traditionally focus on land rights, communities consulted during the process 'identified land rights as key to peacebuilding'.[186] A report from the subsequent project hints at the links between justice and land disputes, being titled: 'Laying justice on the Ground: Moving from Land Disputes to Land Rights'.[187] The first project 'framed its work from a rights perspective, guided by

[181] Karapatan, 'Stop absolving human rights violators, Karapatan tells DOJ' (12 May 2015) <ttp://www.karapatan.org/Stop+absolving+human+rights+violators%2C+Karapatan+tells+DOJ>.
[182] Interview P5.
[183] Interview P5.
[184] PCICC, 'About PCICC' <https://pcicc.wordpress.com/about/>.
[185] PCICC, 'Building Bridges for Peace' (2012) <https://pcicc.files.wordpress.com/2012/03/bpp2012_8_5x9_final_becky1.pdf>, 4.
[186] Ibid, 4.
[187] PCICC, 'Laying Justice on the Ground: Moving from Land Disputes to Land Rights' (2014), copy on file with author.

human rights and international humanitarian law standards'[188] and the 'Laying Justice' report refers to 'conflict transformation and governance',[189] rather than international criminal law.

3.4.3.Alternative Spaces for Public Dialogue

As another example of an adapted approach, many NGOs appreciate the opportunity to engage with human rights offices and other monitoring mechanisms,[190] as well as forums such as 'community based dialogues' on human rights issues.[191] These can raise awareness of human rights and violent incidents, but also provide a 'venue for dialogue' and 'collective formation of public proposals'.[192] Community forums underpin a 'top-level policy dialogue' with army and police leaders about the 'major human rights issues, *coming from the ground*'.[193] Similarly, human rights and international humanitarian law training of state actors has become 'more targeted' through using familiar examples, since 'a law is only good when you can apply it practically on the ground'.[194]

However, some actors have become frustrated with the slow impact of these forums, which may even crowd out other priorities. In the human rights field, though in relation to securing accountability for serious violence, one civil society actor saw 'human rights orientation seminars to members of the Armed Forces of the Philippines' and police as 'a waste of time' designed to 'make it appear that they're really doing something' – possibly to secure military aid.[195] This actor was in favour of the 'education, mobilisation, and organising of peoples', but not as a top-down process, or via 'parachuting' in to document violations. Instead, she argued, NGOs must 'invit[e] [individuals] to be human rights defenders themselves'.[196] This approach also recognises that the Philippines' legal achievements 'were not really driven by … the main officials changing their mindsets… it's because of the people who have fought for all these laws'.[197] As Human Rights Watch noted in 2012, '[i]f progress [on cases] has been made, it is often because of the perseverance

[188] PCICC (n 185), 7.
[189] PCICC (n 187), 4.
[190] Interview P4.
[191] E.g., Hanns Seidel Foundation Philippines, 'Community-based Dialogue Sessions on Human Rights' (October 2008) <http://www.hss.de/southeastasia/en/philippines/news-events/2008/community-based-dialogue-sessions-on-human-rights.html>.
[192] Ibid.
[193] Interview P4, emphasis added.
[194] Interview P3.
[195] Interview P6.
[196] Interview P6.
[197] Interview P6.

and courage of family members, rather than aggressive action by police and prosecutors'.[198]

Community action may involve local discussion, potentially within *barangay*-level or indigenous dispute settlement forums, including structures responding to clan conflicts (known as *pangayaw, rido*, or by other terms). These might, for example, exile a member of the community who has committed a crime such as murder or rape as a member of a paramilitary group,[199] or more broadly attempt to resolve the conflict.[200] Stakeholders have also developed structured forums with international scope. For instance, a group of largely international NGOs organised an International Peoples Tribunal in Washington DC in 2015, following a Permanent Peoples' Tribunal session concerning the Arroyo administration held in 2007. The 2015 indictment mentioned violations of international humanitarian law, war crimes and crimes against humanity with reference to the Rome Statute.[201] Thus, actors developed non-legal mechanisms to 'prosecute' human rights violations – adapting some of the language and processes of international crimes trials to serve broader advocacy purposes.

Section 3.3 demonstrated how Philippine civil society advocated for enforcing international criminal law by reframing the international criminal justice norm in light of local context. This section has shown that at least some actors interpret international criminal justice as requiring broader changes to the domestic judicial system or NGO strategies. In each case, Philippines-based actors have engaged international actors and ideas in a process that is neither driven 'inside-out' nor 'outside-in', but involves ongoing engagement.

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[198] Human Rights Watch, 'Philippines: Two Years Under Aquino, Abuses Go Unpunished' (27 June 2012) <https://www.hrw.org/news/2012/06/27/philippines-two-years-under-aquino-abuses-go-unpunished>.
[199] Interview P6.
[200] See Wilfredo Magno Torres III (ed.), 'Rido: Clan Feuding and Conflict Management in Mindanao' (The Asia Foundation, 2007), <https://asiafoundation.org/resources/pdfs/PHridoexcerpt.pdf>; The Asia Foundation, 'Conflict Management Program in the Philippines: A Semi-Annual Report from The Asia Foundation to the United States Agency for International Development 01 January 2005 – 30 June 2005' (2005), <http://pdf.usaid.gov/pdf_docs/Pdacf153.pdf>.
[201] IBON International, 'Documents of the International Peoples' Tribunal' (2015), <https://internationalpeoplestribunaldotorg.files.wordpress.com/2015/11/ipt-2015-book-interactive-v4.pdf>.

4. Mechanisms for Prosecuting International Crimes in the Philippines

The Philippines legal system provides several avenues to respond to international crimes. The current, 1987, Constitution includes a Bill of Rights and Article II(2) 'adopts the generally accepted principles of international law as part of the law of the land'.[202] Many international criminal and humanitarian law treaties, including the Rome Statute, have been ratified (section 4.1). The Philippines also has the capacity to prosecute international crimes under national legislation (4.2). Section 4.3 addresses amnesties and immunities and 4.4 discusses attempts to seek accountability for international crimes through Constitutional and criminal avenues.

4.1. International Mechanisms

The ICC has jurisdiction to prosecute crimes committed within the Philippines after Rome Statute ratification on 30 August 2011, subject to the relevant Statute provisions. However, legislation to facilitate the Philippines' cooperation with the Court remained pending at 30 November 2016.[203] Crimes committed in the Philippines might also be prosecuted under other states' universal jurisdiction legislation, or before an international(ised) tribunal established with or without UN assistance. However, this possibility is not addressed here.[204]

4.2. Domestic Legislation

There are several options for prosecuting conduct that could be characterised as an international crime under the Philippines domestic legislation. First, underlying criminal conduct could be prosecuted under the Philippines Penal Code, for example as murder,[205] homicide,[206] illegal detention,[207] slavery,[208] or rape.[209] Second, apart from Executive Order No. 68 to prosecute 'all Japanese accused of war crimes committed in the Philippines',[210]

[202] Article VII(21), Constitution (n 39).
[203] ICC Cooperation Bill (n 127), pending with the Committee on Justice since 17 August 2016, <http://www.congress.gov.ph/members/search.php?id=roque-h&pg=billsmain#tab>.
[204] See section 4, chapter 1.
[205] Article 248, *An Act Revising the Penal Code and Other Penal Laws 1930,* Act No. 3815, 8 December 1930 (Penal Code).
[206] Article 249, ibid.
[207] Article 267, ibid.
[208] Article 272, ibid.
[209] Article 335, ibid.
[210] See (n 13).

other laws specifically address conduct that might form an international crime. For example, legislation was passed in 2009 to allow the prosecution of torture and other cruel, inhuman and degrading treatment (Torture Act)[211] and in 2012 the perpetration of enforced or involuntary disappearances was made a crime under the Enforced Disappearances Act.[212] These Acts were passed prior to the Philippines ratifying the Convention Against Torture (in 2012) and the International Convention for the Protection of All Persons from Enforced Disappearance (not yet ratified). Third, the IHL Act incorporated war crimes, genocide, and crimes against humanity into Philippines law before the government ratified the Rome Statute. All of this legislation has prospective operation. This section focuses on the IHL Act.

Due to the controversy concerning the status of non-state actors in Philippine internal conflicts,[213] section 2(g) of the IHL Act confirms that it 'shall not affect the legal status of the parties to a conflict, nor give an implied recognition of the status of belligerency'. While a draft allowed for universal jurisdiction,[214] section 17 provides the state with jurisdiction over the crimes addressed by the Act 'regardless of where the crime is committed', where perpetrated by military or civilian persons who are Philippine citizens, present in the Philippines, or who are alleged to have committed the crime against a Philippine citizen.[215]

The Act comprehensively adopts the Rome Statute crimes. Most of the definitions in Article 7(2) of the Rome Statute regarding crimes against humanity are provided in section 3 of the IHL Act[216] and also apply to war crimes and genocide. There are some minor differences between the crimes provisions in the Rome Statute and IHL Act. For example, the IHL Act's crime against humanity of '*arbitrary* deportation or forcible transfer of population' is defined identically to the Rome Statute's 'deportation or forcible transfer',[217] though the different name might suggest an additional requirement of

[211] *An Act Penalizing Torture and other Cruel, Inhuman and Degrading Treatment or Punishment and Prescribing Penalties Therefor*, Republic Act No. 9745, 10 November 2009 (Torture Act).
[212] *An Act Defining and Penalizing Enforced or Involuntary Disappearance*, Republic Act No. 10353, 21 December 2012 (Enforced Disappearances Act).
[213] Section 2.3.
[214] Article 40, *Senate Bill No. 2135* (n 150).
[215] The legislation thus encompasses passive personality jurisdiction, which is not typical under Philippines law, see Article 2, Penal Code (n 205).
[216] While section 3 does not mention 'gender', it defines terms such as 'armed conflict', 'military necessity', and 'superior' consistently with international law. E.g., compare the definition of 'armed conflict' in the IHL Act (n 83) to Article 1 of Additional Protocol II and Article 8(2)(f), Rome Statute.
[217] This discrepancy remains in the IHL Amendment Bill (n 127).

arbitrariness, at least for deportation.[218] However, a change from the grave breach of '*unlawful* deportation' to '*arbitrary* deportation' could represent a lower threshold.[219] These distinctions are unlikely to be crucial in practice, but were considered important due to the practice of forced evacuations known as 'hamletting' in the Philippines and frequency of incidents causing internal displacement.[220] The definition of 'forced pregnancy' in the Act also omits the Rome Statute's qualification that the 'definition shall not in any way be interpreted as affecting national laws relating to pregnancy'.[221]

Section 4(a) of the IHL Act includes delay in repatriating prisoners of war and other protected persons in an international armed conflict as an additional 'grave breach of the Geneva Conventions' not included in the Rome Statute. Subsection (b) covers the crimes found in common Article 3 of the Conventions. Section 4(c) then sets out crimes drawn from Articles 8(2)(b), (c) and (e) of the Rome Statute,[222] without distinction as to whether they were committed in a national or international armed conflict.[223] The ICRC apparently recommended this structure based on the legislation of some European states and Canada.[224] This merge expanded the number of crimes considered relevant in the Philippines, as the country 'deal[s] primarily with non-international armed conflicts'.[225]

Another departure is found in Section 4(c)(24). It retains the Rome Statute's age limit of 15 years for conscription, enlistment or recruitment into the armed forces, but provides a higher age of 18 for using children in hostilities and recruiting children 'into an armed

[218] In Section 6(d), IHL Act (n 83), compare Article 7(1)(d), Rome Statute.
[219] Section 4(a)(6), IHL Act, ibid, compare Article 8(2)(a)(vii). However, the IHL Amendment Bill (n 127) reverses this discrepancy.
[220] This accords with the explanation offered by Interview P2 that the latter change would cover a situation such as in Lanao, where 'this displacement happened in such a way that was intentional, but not to the higher standard [of] forcible transfer'.
[221] Section (3)(j), IHL Act (n 83), compare Article 7(2)(f), Rome Statute. The IHL Amendment Bill (n 127) reinserts this qualifier.
[222] With the addition of launching an attack against works containing dangerous forces and ordering the displacement of the population without security or imperative military reason.
[223] Though section 4(c) IHL Act (n 83) requires that they be considered 'within the established framework of international law'.
[224] Draft Explanatory Note (n 68).
[225] Interview P2. E.g., section 4(c)(6) of the IHL Act is consistent with Article 15 of Additional Protocol II, though it is not included in the Rome Statute. Section 4(c)(7) is drawn from Additional Protocol I and Article 8(2)(b)(v) of the Rome Statute, but here with extension to non-international armed conflict and with the additional wording 'making non-defended localities or demilitarized zones the object of attack'. This is consistent with some state practice, see ICRC, 'Customary IHL' (2016) <https://www.icrc.org/customary-ihl/eng/docs/home>, Chapter III, Section C. An earlier draft included 'IHL Violations Based on Philippine Experience' ostensibly drawn from the CARHRIHL, such as 'practices that cause of allow the forcible evacuations or forcible reconcentration of civilians involved in military or imperative military reasons', Article 11(7), Draft Explanatory Note, ibid, though this overlapped with the other crimes.

group other than the national armed forces'.[226] The higher age limit was derived from the Optional Protocol to the CRC,[227] but a lower age of 15 was considered necessary for state forces 'because the Philippine Military Academy can recruit from high school'.[228]

Section 5 of the IHL Act extends the crime of genocide to acts committed against a 'social or any other similar and permanent group', but otherwise reflects the Rome Statute provision. Similarly, section 6 addresses crimes against humanity and includes the crime of persecution on the ground of 'sexual orientation or other grounds that are universally recognized as impermissible in international law'.[229]

In relation to criminal responsibility, section 8 of the Act is modelled on Article 25 of the Rome Statute. To confirm the approach in the *Yamashita* case, section 10 provides for superior[230] responsibility. Section 12 adopts the Rome Statute position of allowing a limited defence of superior orders. The Act also includes provisions for witness and victim protection and for a legal representative to present victims' 'views and concerns',[231] whereas victim participation is not provided for in the general Rules of Criminal Procedure.[232] Further, 'in addition to existing provisions in Philippine law and procedural rules', the Act provides for reparations ordered 'directly against a convicted person'.[233] No 'trust fund' is established under this legislation, though the government could legislate for state-paid reparations, as it did in 2013 in relation to the Marcos regime.[234]

Thus, the IHL Act reflects the provisions in the Rome Statute with some minor differences. Other Bills seeking to amend the IHL Act have been submitted since the Rome Statute was ratified.[235] An inter-agency and civil society working group tasked with drafting an

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[226] Compare Sections 8(2)(b)(xxvi) (international armed conflict) and 8(2)(e)(vii) (non-international armed conflict), Rome Statute.
[227] Draft Explanatory Note (n 68).
[228] Interview P5, though the Academy requires applicants to be graduates and enlistment is open to male citizens aged eighteen to thirty years, section 27, *An Act to Provide for the National Defense of the Philippines, Penalizing Certain Violations Thereof, Appropriating Funds Therefor, and for Other Purposes*, Commonwealth Act No. 1, 21 December 1935 (National Defense Act).
[229] Section 6(h), IHL Act (n 83), see Acuña (151).
[230] In conjunction with the definition of 'superior' in section 3(r), IHL Act, ibid.
[231] Section 13, IHL Act, ibid.
[232] *Revised Rules of Criminal Procedure*, 1 December 2000.
[233] Section 14, IHL Act (n 83).
[234] E.g., the Philippines government passed the *Human Rights Victims Reparation and Recognition Act*, Republic Act 10368, 25 February 2013 in relation to crimes committed under Marcos, allocating 10 billion pesos to approximately 10,000 victims eligible to claim compensation.
[235] E.g., to give 'Philippine authorities the full jurisdiction over suspected or accused persons covered under the said law, regardless of an ongoing investigation or prosecution of another court or international tribunal', *Senate Bill No. 1290, Sixteenth Congress of the Republic of the Philippines,*

amendment to the IHL Act and an ICC cooperation bill initially reviewed foreign and model legislation, especially for the cooperation component. However, the process was considered by one participant to be 'a one hundred per cent Filipino endeavour' because 'we have enough… international criminal law experts that we didn't really need input from the outside'.[236]

The resulting IHL Amendment Bill aims to bring the IHL Act closer to the Rome Statute.[237] Though some in the working group argued that 'the Rome Statute is one standard, we cannot go lower than that, [but] we can go higher than that',[238] the Bill's explanatory memorandum argues that upon ratification, the Philippines was obligated to adopt the Rome Statute terms.[239] This means that ratifying the Rome Statute might indirectly *narrow* the scope of the Philippines' legislation. For example: the Bill removes two of the IHL Act's three additional war crimes;[240] divides the war crimes provisions into those committed in an international or national armed conflict (thereby reducing the number of crimes applicable in the latter, more common, situation in the Philippines);[241] and removes the inclusion of 'social or any other similar stable and permanent group' in the Act's definition of genocide.[242] Still, the Bill incorporates the Rome Statute's Elements of Crimes 'to assist in the application and interpretation of the crimes',[243] while the crime of persecution based on sexual orientation remains. The provision on superior responsibility was not altered, because, as one participant explained, 'we're actually very proud that one of the first command responsibility cases actually stemmed from the Philippines'.[244] Thus, the Rome Statute may limit the progressiveness of the Philippine's revised international crimes laws in some respects. Debates concerning how to best legislate for international crimes in the Philippine context therefore continue.

First Regular Session, 13 August 2015.
[236] Interview P2, though the ICRC had also formed part of the group.
[237] IHL Amendment Bill (n 127), 1.
[238] Interview P5.
[239] IHL Amendment Bill (n 127), 1.
[240] Regarding repatriations and attacks against dangerous forces. The introduction to the IHL Amendment Bill, ibid, 2, suggests that the additional provision regarding ordering displacement was also to be removed, but it appears to be retained in draft sections 4(c)(xv) (international conflict) and 4(d)(viii) (non-international conflict).
[241] The employment of poison, gases and bullets that expand or flatten in a non-international armed conflict (addressed by Article 8(2(d) of the Rome Statute) is also omitted from the relevant section in the IHL Amendment Bill (n 127) (draft section 4(d)).
[242]One actor argued that the inclusion of other stable groups was 'one of the reasons why our law is quite good', but 'unfortunately … their tendency is really to hue as closely as possible to the Rome Statute', Interview P5.
[243] Section 13, IHL Amendment Bill (n 127).
[244] Interview P2.

4.3. Amnesties and Immunities

Reflecting tensions between peace and justice, amnesties have been used in the Philippines for political and other crimes, including for separatist groups since the 1970s and 1980s,[245] and official security actors.[246] However, such amnesties typically do not cover 'crimes against chastity, rape, torture, kidnapping for ransom, use and trafficking of illegal drugs and other crimes for personal ends'.[247] The President retains power under the 1987 Constitution to grant pardons as well as, with Congress approval, amnesties[248] and the IHL Act does not exclude their potential operation for crimes against humanity, genocide, or war crimes. In contrast, the Torture Act and Enforced Disappearances Act stipulate that perpetrators 'shall not benefit from any special amnesty law or similar measures'.[249] Section 9 of the IHL Act confirms the irrelevance of official capacity *except* for 'the established constitutional immunity from suit of the Philippine President during his/her tenure', or immunities arising from international law.[250]

Finally, the IHL Act does not clarify that the usual statutory limitation periods (of up to 20 years)[251] do not apply to international crimes, although the Philippines is a party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, which should remove the applicability of these limits.[252] Overall, the Philippines has a robust legal framework for prosecuting international crimes that occur domestically or (when perpetrated by or against a Philippine citizen) overseas.

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[245] See ICRC, 'Philippines: Practice Relating to Rule 159: Amnesty' (2016) <http://www.icrc.org/customary-ihl/eng/docs/v2_cou_ph_rule159_sectionb>.
[246] Ibid.
[247] Ibid.
[248] Amnesties require the agreement of the majority of Congress, Article VII(19), Constitution (n 39).
[249] Section 16, Torture Act (n 211); section 23, Enforced Disappearances Act (n 212).
[250] Note that the 1987 Constitution does not explicitly provide for Presidential immunity, however the Supreme Court has suggested that such immunity would still apply, see *Maximo V Soliven et al v Hon. Ramon P Makasiar*, GR No. 82585, Republic of the Philippines, Supreme Court, 14 November 1988; and even that this is 'settled in jurisprudence', *Rodolfo Noel Lozada Jr et al v President Gloria Macapagal Arroyo et al*, GR Nos. 184379-80, Republic of the Philippines, Supreme Court, 24 April 2012.
[251] Article 90, Penal Code (n 205).
[252] Ratified in 1973. If a victim 'surfaces alive', the Enforced Disappearances Act has a limitation period of 25 years from their reappearance, see section 22, (n 212).

4.4. Enforcement

Despite these laws, Philippine courts have failed to convict perpetrators for serious human rights violations that might constitute international crimes.[253] In 2008, Alston noted that the 'criminal justice system's failure to obtain convictions and deter future killings should be understood in light of the system's overall structure'.[254] Today that structure includes a variety of bodies. The Philippine National Police and National Bureau of Investigation investigate crimes in the Philippines, while the IHL Act specifies that the Police, the Department of Justice and the Commission for Human Rights 'or other concerned law enforcement agencies shall designate prosecutors or investigators' for crimes under the Act.[255] Other bodies monitor the prosecution of alleged international crimes, including the Commission of Human Rights, Ombudsman, national monitoring mechanism and inter-agency committee.

As mentioned in section 3.3, civil society actors report a number of challenges in bringing international crimes cases. These include security fears, difficulties gathering evidence, and delays. These barriers have affected the investigation and prosecution of incidents occurring before the IHL Act was enacted in December 2009, such as the Maguindanao massacre of 2009, where lawyers for an NGO, Centerlaw, have participated as private prosecutors alongside public prosecutors in the criminal case.[256] In 2006, the Melo Commission named General Jovito Palparan as potentially responsible for numerous killings and disappearances,[257] yet he was promoted during Arroyo's administration. In 2007, the families of Sherlyn Cadapan and Karen Empeño, who had been abducted and disappeared, filed a petition for *habeas corpus*. Despite reports of military interference,[258] in 2011 the Supreme Court ordered the immediate release of the two women and named Palparan as among those apparently responsible.[259] However, the military denied having them in custody and Palparan went into hiding. He was eventually arrested in Manila in

[253] Amnesty International, 'Philippines 2015/2016' (23 February 2016) <https://www.amnesty.org/en/countries/asia-and-the-pacific/philippines/report-philippines/>.
[254] Alston (n 25), 45.
[255] Section 17, IHL Act (n 83).
[256] Center for International Law, 'Advocacy Cases' (2016) <http://centerlaw.org/blog/advocacy-cases/>.
[257] Melo et al (n 76), Palparan himself claimed that 'I did not kill them. I just inspired [the triggermen]', see Human Rights Watch (n 78), 15.
[258] Human Rights Watch, 'Philippines: Arrest Ex-General Accused of 'Disappearances': Palparan's Prosecution Key to Ending Impunity' (31 January 2012) <https://www.hrw.org/news/2012/01/31/philippines-arrest-ex-general-accused-disappearances>.
[259] *Rogelio Boac et al. v Erlinda Cadapan et al.*, G.R. Nos. 184461-62, 184495, 187109, Republic of the Philippines, Supreme Court, 31 May 2011.

2014 and his trial for kidnapping and illegal detention was ongoing at 30 November 2016. Human Rights Watch observed that it 'took five years … for Palparan to be charged but [that he was eventually charged] is really due to the efforts of the victims' families'.[260]

Since the IHL Act entered into force, as one civil society representative put it in 2014, 'we have the law, we have IHL Day, of course we have all these treaties signed earlier: Geneva Conventions, Genocide, everything. But in terms of testing the justice system … we have one case where the current IHL Law is referred to'[261] – the *Bayan Muna* case. In that case in 2011, the Supreme Court rejected an argument that the Philippine-US Non-Surrender Agreement 'defeat[ed] the object and purpose' of the Rome Statute.[262] The Supreme Court refused to find that section 17 of the IHL Act[263] required the Philippines to surrender suspects to the ICC, because, the Court suggested, 'there is 'no overwhelming consensus, let alone prevalent practice… that the prosecution of internationally recognized crimes of genocide, etc. *should be handled by a particular international criminal court*'.[264]

Constitutional and civil cases have also involved international criminal law issues, such as the *Vinuya* 'comfort women' case mentioned in section 2.5.[265] In a number of cases seeking Constitutional writs of *amparo*, the Supreme Court has employed the principle of superior responsibility to establish the respondents' accountability for an individual's disappearance, though not their criminal responsibility.[266] However, following the passage of the IHL Act, it was 'now clear' that enforced disappearances should be understood with reference to that Act. This has meant that 'the petitioner in an *amparo* case has the

[260] Human Rights Watch (n 258).
[261] Interview P5, referring to *Saturnino C Ocampo v Ephrem S Abando et al, GR No. 176830, Randall B Ecanis v Thelma Bunyi-Medina et al, GR No. 185587, Rafael G Baylosis, GR No. 185636, Vicente P Ladlad v Thelma Buni-Medina et al, GR No. 190005,* Republic of the Philippines, Supreme Court, 11 February 2014. Several individuals including a high profile politician, Saturnino Ocampo (who as involved in the *Bayan Muna* case, n 70) unsuccessfully sought the annulment of their indictment and arrest for murder. Leonen J referred to the IHL Act in a separate concurring opinion, arguing that '[s]hould it be shown that there are acts committed in violation of [the IHL Act]… these acts could not be absorbed in the crime of rebellion'.
[262] *Bayan Muna* (n 70).
[263] Section 17 allows Philippine authorities to surrender or extradite suspects to another state or 'the appropriate international court' that is investigating or prosecuting the suspect, IHL Act (n 83).
[264] *Bayan Muna* (n 70), emphasis in original. Carpio J dissented, finding that '[u]nder no circumstance can a mere executive agreement prevail over a prior or subsequent' inconsistent law.
[265] *Vinuya* (n 4).
[266] See with reference to the Rome Statute, *Lourdes D Rubrico et al v Gloria Macapagal-Arroyo et al,* GR No. 183871, Republic of the Philippines, Supreme Court, 18 February 2010 and with reference to the IHL Act, separate opinions of Brion J and Carop Morales JJ (*Rubrico*); *Cadapan*; *In the matter of the Petition for the Writ of Amparo and Habeas data in Favor of Noriel H Rodriguez v Gloria Macapagalarroyo et. al.*, GR No. 191805, 193160, Republic of the Philippines, Supreme Court, 15 November 2011.

[additional] burden of proving by substantial evidence the indispensable element of government participation'.[267]

The Mamasapano incident of 2015 occurred subsequent to the adoption of the IHL Act and Rome Statute ratification. Civil society suggested that the case be referred to the ICC.[268] An 'international monitoring team' advised that combatants should be prosecuted, including under the IHL Act,[269] with explicit reference to section 4(c)(7) – attacking undefended localities.[270] However, Department of Justice investigators considered that the international crimes provisions would not apply, as there was no 'armed conflict' as defined by the Act.[271] Instead, 90 members of the MILF and other separatist groups were reportedly charged with 'direct assault with murder' in August 2016.[272] It seems that while the IHL Act is yet to result in convictions or even trials specifically for international crimes, it has had some impact on Philippine jurisprudence and public discourse about responding to serious incidents, albeit not necessarily in a progressive manner.

In summary, the IHL Act largely replicates the provisions of the Rome Statute, although it extends the reach of some crimes. These differences were drawn from international law,

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[267] *Navia et al. v. Pardico et al.*, GR No. 184467, Republic of the Philippines, Supreme Court, 19 June 2012, with reference to the separate opinion of Brion J in *Rubrico*, ibid. The IHL Act supported findings that situations did not amount to enforced disappearances in *Siegfred B Mison v Paulino Q Gallegos and Ja Hoon Ku*, GR No. 210759, 211403, *Siegfred B Mison v Ja Hoon Ku*, GR No. 211590, Republic of the Philippines, Supreme Court, 21 June 2015; *Julian Yusa Y Caram v Marijoy D Segui et al*, GR No. 93652, Republic of the Philippines, Supreme Court, 5 August 2014; *Spouses Rozelle Raymod Martin and Claudine Margaret Santiago v Tulfo et al*, GR No. 205039, Republic of the Philippines Supreme Court, 21 October 2015; and from prior to the Act's passage, with reference the Rome Statute, see *Avelino I Razon et al v Mary Jean B Tagitis*, GR No. 182498, Republic of the Philippines, Supreme Court, 3 December 2009. This definition was confirmed by section 3(b) of the Enforced Disappearances Act (n 212).

[268] B Aquino Letter (n 91).

[269] International Monitoring Team (n 111), 16.

[270] Ibid, 14, see also Loretta Ann P Rosales, 'Statement of the Commission on Human Rights Chair on the Senate Mamasapano Report' (21 March 2015) <http://www.gov.ph/2015/03/22/statement-chr-chair-senate-report-on-mamasapano/> with reference to the Senate Report, see The Philippine Star, 'Full Text: Senate panel's report on Mamasapano clash', *The Philippine Star* (18 March 2015) <http://www.philstar.com/headlines/2015/03/18/1434963/document-senate-panels-report-mamasapano-clash>.

[271] NBI-NPS SIT, 'Report of the Joint National Bureau of Investigation - National Prosecution Service Special Investigation Team (NBI-NPS SIT) on the January 25, 2015 Mamasapano Incident' (March 2015) <http://www.doj.gov.ph/files/news/Mamasapano_NBI-NPS_SIT_Report_REDACTED.pdf>. see also Board of Inquiry, 'The Board of Inquiry Mamasapano Report, March 2015' (13 March 2015) <http://www.gov.ph/2015/03/13/boi-mamasapano-report-march-2015/>, which recommended investigating the incident 'to determine criminal and/or administrative liabilities or relevant government officials, the MILF, and other individuals', at 91.

[272] Edu Punay, 'DOJ indicts 88 MILF, BIFF men over SAF deaths', *The Philippine Star* (16 August 2016) <http://www.philstar.com:8080/headlines/2016/08/16/1613959/doj-indicts-88-milf-biff-men-over-saf-deaths>.

but also reflect local context and civil society engagement. However, proposed amendments may shift Philippine law further toward the Rome Statute, while in practice the domestic legislation is yet to be enforced. The next section considers the extent to which these mechanisms reflect the acceptance, rejection, or adaptation of the norm of international criminal justice.

5. Analysis: Localising International Criminal Justice in the Philippines

Sections 2 and 3 of this chapter identified a history of human rights movements, engaging with international organisations and civil society, and tensions between peace, development, and justice in the Philippines. Section 4 considered the relevant Philippines laws and institutions concerning international criminal justice. This section analyses whether these mechanisms represent the outcomes of a process of 'localisation'.

5.1. Prelocalisation Resistance

The localisation approach argues that 'local actors may offer resistance to new external norms because of doubts about the norms' utility and applicability and fears that the norms might undermine existing beliefs and practices'.[273] As section 2 described, the Philippines has a history of contributing to the development of international criminal law. Further, people's movements have been justified with reference to human rights. Social and economic issues have also contributed to conflict, while internal instability led to an ongoing tension between peace and justice. These 'aspects of the existing normative order'[274] in the Philippines do not all conflict with the 'normalised' understanding of international criminal justice (which, as discussed in chapter 1, involves ending impunity via fair international crimes trials, potentially with international involvement). However, there has also not been a consistent progression toward internalising the international criminal justice norm over time.

5.2. Local Initiative and Adaptation

In the Philippines, rather than international actors persuading states to accept international norms, 'credible local actors' have worked to reconstruct notions of

[273] Amitav Acharya, 'How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism' (2004) 58(2) *International Organization* 239-275, 251.
[274] Ibid, 251.

international criminal justice so as to 'supplement' but not 'supplant' the 'existing norm hierarchy'.[275] When early attempts at persuading the government to ratify the Rome Statute failed, civil society actors drafted domestic legislation initially based on pre-existing legal obligations.[276] The IHL Act contributed to constructing a version of 'international criminal justice' that would complement but not replace existing legal institutions. During the Rome Statute ratification campaign, Philippine and international NGOs and individuals acted as 'norm entrepreneurs' using discourse aimed at 'contextualizing, redefining, and localizing transnational ideas' of international criminal justice.[277] In particular, actors reframed ratification as an avenue for securing the Philippine's position as a human rights leader,[278] protecting Filipinos,[279] and providing an independent mechanism capable of pursuing non-state actors.[280]

However, beyond reframing, some civil society actors have attempted to adapt approaches to international crimes.[281] For example, PCICC's "Laying Justice on the Ground" project incorporates the principle of 'justice', but also complements local priorities of peace and development.[282] Initiatives involving community-level mobilisation and 'bottom-up' dialogues do not reject international criminal justice – PCICC in particular remains committed to the ICC. However, some individuals and communities prioritise other issues such as land reform, social justice and community-based dialogue (including in *barangay*-level forums). Alternatively, including where training security personnel and monitoring human rights violations are yet to result in prosecution, international criminal justice initiatives have been adapted to supplement human rights, rule of law, or conflict transformation activities.

5.3. Amplification

The 'localisation' framework suggests that local actors use their initiative to reframe and reconstruct norms, rather than only rejecting or accepting them. Where such '[b]orrowing

[275] Ibid, 251.
[276] Section 3.3.1.
[277] Amitav Acharya, 'Local and Transnational Civil Society as Agents of Norm Diffusion' (1-3 June 2012) <http://amitavacharya.com/sites/default/files/Local%20and%20Transnational%20Civil%20Society%20as%20Agents%20of%20Norm%20Diffusion.pdf>, 1.
[278] Section 3.3.2.
[279] Section 3.3.3.
[280] Section 3.3.4.
[281] Section 3.4.
[282] Section 3.4.2.

and modification … offer[s] scope for some elements of an existing norm hierarchy to receive wider external recognition through its association with the foreign norm', that is, for these local elements to be 'amplified', this may lead to 'new instruments and practices … in which local influences remain highly visible'.[283] The creation of new monitoring bodies, often with the participation of civil society, since the late 2000s can be understood as having 'developed from the syncretic normative framework'[284] contributed to by local civil society, state activities such as the Melo Commission, and international attention including from the Alston report.

The IHL Act is consistent with the process of localisation. It was modelled on the Rome Statute with some progressive additions that could be linked to local engagement and the Philippine's support for international treaties and human rights. Terms relating to conscription of children, persecution based on sexual orientation, belligerency, the retention of immunities and amnesties, and the combination of international and non-international war crimes related to the Philippine's policies and the internal unrest, even if some wording was derived from international law[285] and interviews suggest this domestic context shaped the final provisions.[286] Similarly, ratifying the Rome Statute could help provide an independent arbiter for state and non-state crimes, provide opportunities for the Philippines to participate in an influential international body, build legitimacy with civil society, and protect Philippine citizens.[287] Draft implementation and cooperation legislation more closely adopts the Rome Statute terms, which might suggest greater acceptance of the international criminal justice norm. However, this legislation (if passed) could be *less* progressive than the existing IHL Act, thus detracting from the norm in some respects.

The Philippines' laws and institutions do not represent the acceptance or rejection of the norm of international criminal justice over time. The government's engagement with the ICC and UPR, as well as with civil society, does not suggest that international criminal justice has been entirely rejected – even if Duterte has threatened to withdraw the Philippines from the ICC.[288] The Philippines' initial preference for domestic international crimes legislation and rejection of ICC jurisdiction might suggest that state actors were

[283] Acharya (n 273), 251.
[284] Ibid, 251.
[285] See section 4.2.
[286] Interviews P2, P3, P5.
[287] Section 3.3.
[288] Black (n 101).

aiming to 'preserve their autonomy from dominance, neglect, violation, or abuse by more powerful central actors'.[289] However, government statements do not suggest such motivations were paramount. Instead, the Philippines has used ASP statements to highlight the importance of complementarity, peace, and development needs when considering approaches to international criminal justice. Indeed, governments have, at times, demonstrated a willingness to adopt international crimes laws and monitoring mechanisms. Further, government and civil society statements in the Philippines have supported the goal of 'fighting impunity'.[290]

However, it is now more than a decade since the Melo Commission and more than five years since the IHL Act was enacted and the Rome Statute ratified, yet widespread extrajudicial killings and disappearances continue to be reported.[291] The impediments to enforcing international criminal laws in the Philippines are multifaceted and derive from community, military, police and judicial barriers, including legacies from the Marcos era.[292] Yet one actor remarked, 'I think you will meet a lot of persons who will say, "Not much is happening", but I come from a generation where martial law was a reality, so I think a lot is happening for me'.[293] Thus, temporal developments may be a matter of perspective. Still, the Philippines' engagement with international criminal law has not progressed from rejection toward the acceptance of the international criminal justice norm. Rather, the situation is complex and involves a range of actors.

5.4. Limitations of the Localisation Framework

Several limitations arise from analysing the Philippines' engagement with international criminal justice using the localisation approach.[294] First, at least in the long-term, localisation is a progressive process.[295] However, in the Philippines, responses to international crimes continue to be reconstructed as problems and incidents occur (as in Mamasapano or the 2016 drug-related killings), laws or mechanisms are adopted (the IHL Act and Rome Statute), and in attempts to monitor enforcement. This demonstrates that debates about norms reoccur and shift between acceptance, rejection, and other forms of

[289] Amitav Acharya, 'Norm Subsidiarity and Regional Orders: Sovereignty, Regionalism, and Rule-Making in the Third World' (2011) 55(1) *International Studies Quarterly* 95-123, 97.
[290] E.g., 13th Assembly Statement (n 119).
[291] Sections 2.5, 4.4.
[292] Angeles (n 30), 109.
[293] Interview P5.
[294] See also chapter 7.
[295] Acharya (n 273), 253.

adaptation over *time*, as new legal solutions are proposed, implemented, and enforced through localisation.[296]

Second, realist and rationalist approaches might also explain the mechanisms for prosecuting international crimes in the Philippines. It is very likely that US pressure alongside the Non-Surrender Agreement contributed to the delay in ratifying the Rome Statute,[297] whereas trade or aid concerns may have affected the EU initiatives favouring accountability. While the localisation framework takes such influences into account, it emphasises normative concerns rather than geopolitical and material issues and draws attention to the impact of local actors. However, although many Philippines NGOs would have received foreign donor funding, state and non-state actors promoted the adoption of the IHL Act and Rome Statute ratification in a period where (for example) the US is unlikely to have encouraged such developments and the laws were not clearly in the Philippine's material interests.

Third, the diverging positions of the US, EU and international actors such as Alston demonstrate another issue concerning the localisation framework: its generalised approach to norms and grouping actors by geography. This thesis concentrates on local engagement with a single international concept (international criminal justice), whereas different states and actors interpret the content and importance of this idea, and its overlap with other norms, differently. Such principles are not easily divided into *spatial* categories labelled 'international' or 'local'. For example, 'human rights' hold historic importance in the Philippines, despite their global nature. This suggests that it is somewhat artificial to conceive of norms as either international or local. Instead, ideas are dynamic and shifting.

Fourth, the Philippine approach to international criminal justice lends itself to mainstream constructivist analysis. Norm entrepreneurs have encouraged the socialisation of international norms through dissemination and other advocacy activities. Allegations that international aid was directed toward opposition forces have detracted from NGO's credibility in the past,[298] but 'local' civil society organisations have still attracted international attention toward domestic issues – adopting a 'boomerang' or 'spiral'

[296] See Lisbeth Zimmermann, 'Same Same or Different? Norm Diffusion Between Resistance, Compliance, and Localization in Post-conflict States' (2014) *International Studies Perspectives* 1-19.
[297] See Conde (n 71).
[298] Angeles (n 30), 50; section 2.3.

strategy.[299] Yet this role has extended well beyond obtaining the support of international actors to pressure the state. Indeed, local actors have been instrumental in shaping international criminal justice in the Philippines, including by drafting the IHL Act and via ongoing advocacy. This chapter shows that the norm of international criminal justice is not only transmitted in one *direction*: by external actors to receptive locals, but is adapted and applied in divergent ways, including through varied community-derived projects. Further, it seems that attracting the focus of international organisations (for example, Alston's report) has been useful *because* of the Philippines' history of deploying human rights to challenge non-compliant leaders. The localisation framework helps to draw out this insight, as it anticipates that the relatively strong influence of human rights arguments should correspond to the specific Philippine context (rather than international pressure alone).

This analysis suggests that tensions between a variety of actors and ideas influence international criminal justice in the Philippines. It unsettles assumptions about the evolution of norms over time (teleology), the location of influential actors and ideas (space), and how norms are transmitted (direction).

6. Conclusion

The localisation framework has helped to demonstrate that the Philippines has neither entirely accepted nor rejected international criminal justice. Nor have events progressed in a chronological sequence from rejection toward ratification, implementation and internalisation. International ideas and organisations have been important. However, rather than only external actors persuading the state, various actors influence the Philippines' approach to international criminal justice using locally adapted strategies that shift as contexts change. Civil society, in particular, drove the Philippines' adoption of the IHL Act and ratification of the Rome Statute using adapted arguments, albeit with international support. Local actors have also developed related initiatives drawn from state, non-state and community collaboration, rather than only top-down persuasion.

These efforts contributed to the Philippines' relatively strong support for international criminal justice compared to other states in Southeast Asia (until recently) – through engagement with the ICC and domestic legal developments, although there have been no

[299] See Jetschke (n 2); section 2, chapter 2.

international crimes mechanisms similar to the ECCC. However, both Cambodia and the Philippines are Rome Statute parties. The next chapter considers how a state might engage with international criminal justice from outside the Rome Statute framework, by analysing the approach of one non-party state that has nevertheless adopted international crimes legislation and even prosecuted international crimes: Indonesia.

Chapter 6 – Engaging with International Criminal Law as a Non-State Party: Indonesia

Timeline 3 – Indonesia

17th Century-1800 Dutch East India Company administration
1702-1975 Portugal administers East Timor
1800 Dutch East Indies under Dutch government administration
1942 Japanese invasion
1945 Indonesia declares its independence
1945-1949 Independence War / National Revolution against the Dutch
1949 The Netherlands recognises Indonesia's independence
Cold War Maluku, Aceh, Papua, East Timor separatist conflicts
1962 West Papua under UN administration
1962-1966 "Konfrontasi" between Indonesia and Malaysia
1965 Attempted "coup", General Suharto takes control
1967 Suharto becomes President
1969 West Papua incorporated into Indonesia
1975 Portugal recognises East Timor's independence
1975 Indonesia occupies East Timor
1991 "Santa Cruz massacre" in Dili, East Timor
1991 National Commission of Inquiry into the 12 November 1991 Incident in Dili (KPN)
1993 Komnas HAM (National Commission for Human Rights) established by Presidential Decree No. 50
1997 Asian economic crisis
1998 'Reformasi' protests
1998 B. J Habibie becomes President
1998 Joint Fact-Finding Team on the Events of 13-15 May 1998
1998 National Commission on Violence Against Women (Komnas Perempuan) established
1999 trial of 11 Special Command (Kopassus) members for disappearances in 1997-1998
1999 Independent Commission for the Investigation of Violence in Aceh (KPTKA)
1999 East Timor popular consultation and surrounding violence
1999 Law 35/1999 provides for military prosecutions within civilian courts
1999 Abdurrahman Wahid becomes President
1999 Law 39/1999 strengthens the independence of Komnas HAM
1999 United Nations Transitional Administration in East Timor (UNTAET) established
2000 Report of the UN Commission of Inquiry on East Timor
2000 KPP-HAM Report on the Investigation of Human Rights Violations in East Timor
2000 UNTAET Regulations 11 and 15 establish Special Panels in Dili
2000 Soldiers tried by joint military-civilian (koneksitas) proceedings for murder in Beutong Ateuh, Aceh ('Bantaqiah')
2000 Law 26/2000: ad hoc and human rights courts
2001 Megawati Sukarnoputri becomes President
2001 Law 21/2001 on Special Autonomy for Papua provides for a Truth and Reconciliation Commission
2002 National Investigation Team regarding Maluku announces results
2002 Timor-Leste becomes independent
2002 Bali bombings kill 202
2002 AGO rejects Komnas HAM recommendations to prosecute crimes in Trisakti and Semanggi ("I and II")
2002-2003 East Timor trials of 18 accused by ad hoc court under Law 26/2000 (all 6 convicted acquitted on appeal)
2003 Three sentenced to death for role in Bali bombings
2004 Komnas HAM concludes gross violations of human rights occured in Wamena and Wasior, Papua
2003-2004 Tanjung Priok trials of 14 accused (under Law 26/2000) all 12 convicted, acquitted on appeal
2004 Munir Said Thalib, human rights activist and founder of KontraS, assassinated
2004 Law 27/2004 requires the government to establish a Truth and Reconciliation Commission (TRC Law)
2004 Law 34/2004 on the TNI (Indonesian Armed Forces)
2004 Susilo Bambang Yudhoyono becomes President (in first direct presidential elections)
2004 Tsunami
2005 Establishment of Commission of Truth and Friendship (CTF) with Timor-Leste
2005 Memorandum of Understanding signed between GAM and the government in Helsinki
2005 Makassar permanent human rights court (under Law 26/2000) acquits 2 for alleged crimes in Abepura, Papua
2006 Fact-Finding Team on Poso, Central Sulawesi
2006 Law 11/2006 on Governing Aceh provides for TRC and Human Rights Court
2006 Law 13/2006 Concerning the Protection of the Witnesses and Victims (regarding LPSK)
2006 Constitutional Court annuls 2004 TRC Law due to its allowance for amnesties
2007 Komnas Perempuan report on 1965 sexual violence
2008 4th Inquiry into killings in Talangsari
2008 CTF issues final report
2009 President Yudhoyono wins second term
2010 Public hearing by victim's group held in Lhokseumawe Aceh (Simpang KKA)
2012 Komnas HAM submits report on 1965 violence and 1982-1985 "mysterious kllings" to Attorney-General
2013 Komnas HAM reports on gross human rights violations in Aceh conflict
2014 Jokowi becomes President, "Nawacita" plan includes resolution of past human rights abuses
2015 International Peoples' Tribunal 1965 held in The Hague
2016 Government arranges National Symposium: "Examining the 1965 Tragedy: A Historical Approach"
2016 Government discusses forming new non-judicial "Task Force" to review 1965 violence

1. Introduction

Indonesia provides a distinct, if challenging, setting to explore the development of mechanisms for prosecuting international crimes compared to Cambodia and the Philippines. Its national law is pluralistic, being 'made up of several legal systems interwoven with each other and operating simultaneously', including living customary law (*adat*), Islamic (*syariah*) and a modifications of the Dutch colonial civil law model.[1] Further, Indonesia's decentralised governance system means that the actions of the national government cannot be equated with those of regional and local governmental authorities. International crimes are alleged to have occurred in separatist conflicts (including in relation to Timor-Leste's independence), in 1965 and during Suharto's presidency, and in other situations involving the military. Indonesia has ratified relatively fewer international human rights and humanitarian law treaties than many states in Southeast Asia and, unlike the Philippines, Cambodia and Timor-Leste, has not ratified the Rome Statute.[2] However, it was one of the first states in the region to carry out trials under genocide and crimes against humanity legislation, although all convictions were overturned on appeal.

Given this complexity, this chapter focuses on Indonesia's *national* laws and institutions for prosecuting international crimes committed in Indonesia (as well as in East Timor prior to its independence as Timor-Leste in 2002), although it mentions the internationalised tribunal, the Special Panels in the District Court in Dili (Special Panels), which operated in Timor-Leste. Section 2 reflects on the history of international criminal law trials in Indonesia and identifies how principles of sovereignty, national unity, military prominence, human rights and development featured in these experiences. Section 3 then reviews statements made by representatives of foreign states and international organisations, the Indonesian government, and civil society to analyse how, within that historic context, variously located actors have employed local initiative to resist, reframe, and adapt approaches to international criminal justice. Section 4 considers how this engagement has resulted in the adoption of laws that reflect some aspects of the norm of international criminal justice, but also amplify other principles. These laws remain the object of debate. Finally, section 5 examines the implications of this case study for the localisation framework.

[1] Tim Lindsey and Mas Achmad Santosa, 'The Trajectory of Law Reform in Indonesia: A short overview of legal systems and change in Indonesia' in Tim Lindsey (ed), *Indonesia: Law and Society* (The Federation Press, 2008) 2-22, 3.
[2] See Tables 3 and 4, chapter 3.

2. Historic Engagement with International Criminal Law

This section analyses Indonesia's historic investigations and prosecutions of international crimes following WWII and until 30 November 2016 and seeks to identify key 'prelocalisation' themes that have accompanied these developments. This chapter does not analyse Indonesia's complex history of internal and external conflicts in depth, but focuses on national responses to crimes against humanity, genocide, and war crimes, consistent the focus of this thesis identified in chapter 1 (see also Timeline 3). It considers whether the norm of international criminal justice has been rejected, or accepted, over time in Indonesia.

2.1. Non-interference and Selectivity: Dutch Occupation and WWII

During the centuries of Vereenigde Oost-Indische Compagnie (United [Dutch] East India Company, VOC) and Dutch authority, which gradually spread across the thousands of islands that today make up the Republic of Indonesia, administrators engaged in conduct that could today be characterised as international crimes.[3] For example, during a thirty-year conflict in Aceh, '[f]orced labour, torture and sadism were commonplace Dutch tactics.'[4]

Japanese troops committed further crimes in the Dutch East Indies during WWII. In the Indonesian independence movement (Revolution) against the Dutch from 1945 to 1949, one estimate is that '[c]ivilian casualties overall exceeded 25,000, and could have been as high as 100,000. Over 7 million people were displaced on Java and Sumatra. Tens of thousands of Chinese and Eurasians were killed…'[5] However, with Indonesia having declared its independence in 1945, at first the 'post-war [Dutch] authorities in the Indies were more concerned with pursuing [Indonesian] collaborators than with arraigning Japanese'.[6]

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[3] See Larissa van den Herik, 'Addressing 'Colonial Crimes' through Reparations? Adjudicating Dutch Atrocities Committed in Indonesia' (2012) 10(3) *Journal of International Criminal Justice* 693-705; Adrian Vickers, *A History of Modern Indonesia* (Cambridge University Press, 2013); Anthony Reid, 'Colonial Transformation: A Bitter Legacy' in Anthony Reid (ed), *Verandah of Violence: The Background to the Aceh Problem* (Singapore University Press, 2006) 96-108.
[4] Vickers, ibid, 11.
[5] Ibid, 105.
[6] Robert Cribb, 'Avoiding Clemency: The Trial and Transfer of Japanese War Criminals in Indonesia, 1946–1949' (2011) 31(2) *Japanese Studies* 151-170, 153; Lisette Schouten, 'Colonial Justice in the

The Dutch-managed WWII trials in Indonesia applied flexible procedural rules[7] and in at least one case the defendants were convicted as one group.[8] Of 1038 individuals tried, just 7 per cent were found not guilty; a conviction rate markedly higher than those of the Australian, Chinese and British trials of mid- and low-level perpetrators.[9] Further, the proceedings were selective. Trials within Batavia (now Jakarta) focused on cases involving European victims,[10] though some crimes committed against Indonesians and other Asian nationals were considered elsewhere.[11] Double standards were also evident. Only recently have there been limited attempts by the Dutch government to respond to colonial-era atrocities.[12] The history of international crimes trials in Indonesia in the first half of the twentieth century is therefore imbued with legacies of selectivity, politicisation and external interference.

2.2. Unity and the Military: Pancasila, 1965, and Santa Cruz

Indonesia's independence was only recognised by the Netherlands in 1949, after a period of armed conflict that embedded the significance of national unity in the context of continuing religious, ethnic and linguistic heterogeneity.[13] The 1945 Constitution was 'a brief document hastily drafted as Indonesia declared its independence'[14] that had facilitated the state's control over the populace.[15] The post-independence laws were influenced by 'an old and continuing debate about the "Indonesian-ness" of law',[16] yet retained much of the earlier pluralistic legal system, in which Colonial laws had recognised both *adat* and Islamic laws. Following independence, *adat* and Islamic legal systems

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Netherlands Indies war crimes trials', in Kirsten Sellars (ed), *Trials for International Crimes in Asia* (Cambridge University Press, 2015) 75-99.

[7] Philip R Piccigallo, *The Japanese on Trial: Allied War Crimes Operations in the East, 1945-1951* (University of Texas Press, 1979), 176; Schouten (n 6).

[8] Piccigallo, ibid, 183; Cribb (n 6), 160.

[9] Piccigallo, ibid, 174; see section 2.2, Table 2, chapter 3.

[10] This included the prosecution of 13 defendants (and conviction of 11) for forcing Dutch women and girls into prostitution as 'comfort women' in Semarang, relying partly on testimony from Indonesian women, though the legacy of these trials for 'comfort women' system survivors is unclear: Stephanie Wolfe, *The Politics of Reparations and Apologies* (Springer, 2014), 243.

[11] Cribb (n 6), 162 .

[12] Van den Herik (n 3).

[13] Edward Aspinall, 'Violence and Identity Formation in Aceh under Indonesian Rule' in Anthony Reid (ed), *Verandah of Violence: The Background to the Aceh Problem* (Singapore University Press, 2006) 149-176, 169.

[14] Tim Lindsey, 'Constitutional Reform in Indonesia: Muddling Towards Democracy' in Tim Lindsey (ed), *Indonesia: Law and Society* (The Federation Press, 2008) 23-47, 23.

[15] Lindsey, ibid, 28-29.

[16] Lindsey and Santosa (n 1), 9.

endured.[17] In this context, President Sukarno developed an indigenous philosophy that helped 'generate a profound identity' to guide the new country.[18]

The five moral principles of Pancasila, the national philosophy, include 'belief in the one and only God',[19] 'just and civilized humanity',[20] 'the unity of Indonesia',[21] 'democracy led by deliberations among representatives',[22] and 'social justice for all Indonesians'.[23] Law No. 8 of 1985 required mass organisations, later extended to cover NGOs, to accept Pancasila as their ideology – though this is no longer required.[24] Pancasila is sometimes considered crucial for Indonesia's stability; as one interviewee explained, 'without state ideology Pancasila we are going to the process of Balkanisation, just like in Jerusalem'.[25]

Today, references to Pancasila can be found in Indonesia's human rights reports.[26] Yet at times Pancasila has been used as part of an 'anti-Western-oriented type of nationalist discourse protecting [the 'ruling elites'] against Islamic political forces who challenged the secular foundations of the state'.[27] Thus, Pancasila 'served as a major source of legitimization for Sukarno and later Suharto'.[28] Public enthusiasm for Pancasila has waned at times – notably in the early post-Suharto years – though it appears to be regaining

[17] Lindsey and Santosa (n 1).
[18] Jean Gelman Taylor, *Indonesia: Peoples and Histories* (Yale University Press, 2004), 2.
[19] *Ketuhanan yang Maha Esa.*
[20] *Kemanusiaan yang adil dan beradab*. This second "sila" has been described as 'as a commitment either to internationalism or more literally to a just and civilized humanitarianism' (see Michael Morfit, 'The Indonesian State Ideology According to the New Order Government' (1981) 21(8) *Asian Survey* 838-851, 840) and 'the key reference to the country's commitment to human dignity and human rights': Irene Istiningsih Hadiprayitno, 'Defensive Enforcement: Human Rights in Indonesia' (2010) 11(3) *Human Rights Review* 373-399, 377.
[21] *Persatuan Indonesia.*
[22] *Kerakyatan yang dipimpin oleh hikmat kebijaksanaan dalam permusyawaratan/perwakilan*
[23] *Keadilan sosial bagi seluruh rakyat Indonesia*
[24] Article 2, *Law No. 8 of 1985, Law on Social Organisations*, 17 June 1985; Bob S Hadiwinata, *The Politics of NGOs in Indonesia: Developing Democracy and Managing a Movement* (Routledge, 2002), 94.
[25] Interview I11.
[26] E.g., 'Indonesian Constitution and ideology, Pancasila, guarantees the right to freedom of religion and belief as one of the basic and non-derograble human rights': Indonesia, 'National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21', UN Doc. A/HRC/WG.6/13/IDN/1, 7 March 2012 (National Report 2012), para. 58 and Indonesia, 'Consideration of reports submitted by States parties under article 40 of the Covenant, Initial reports of States parties: Indonesia' UN Doc. CCPR/C/IDN/1, 19 January 2012, para. 247.
[27] Anja Jetschke, 'Linking the Unlinkable? International Norms and Nationalism in Indonesia and the Philippines' in Steve C. Ropp, Kathryn Sikkink and Thomas Risse-Kappen (eds), *The power of human rights: international norms and domestic change* (Cambridge University Press, 1999) 134-171, 137.
[28] Ibid, 137.

prominence.[29] Thus Pancasila provides an important set of contested norms that have been linked to Indonesian policy through tumultuous political times, including during Suharto's New Order government.

Although the exact facts are debated, General Suharto seized power following a short-lived coup on 30 September 1965, which was officially linked to a group of Communist Party of Indonesia (PKI) members.[30] Suharto established a 'Special Military Court' (*Mahmillub*) to try the surviving prisoners accused of being responsible for the alleged PKI plot.[31] With the apparent tacit support of the United States,[32] perhaps a million alleged communists or sympathisers were killed, transported or imprisoned by Indonesian authorities or military-supported militias. Many were discriminated against in the decades that followed, including on the basis of family connection.[33] By 1967, Sukarno had resigned.

The 1965 events provided an important justification for Suharto's New Order regime and reemphasised the pre-eminence of Indonesia's military in protecting the nation's unity and stability. In this narrative, annually reinforced on the anniversary of 30 September, the military had not only helped win independence from the Dutch, but also – ostensibly – prevented a communist insurgency, as well as having contained the potential for radical Islamic and separatist movements.[34] Further, under Suharto's *dwifungsi* doctrine, the military held an expansive role across Indonesia's governance system.

The New Order regime restricted or co-opted the activities of Indonesian civil society[35] and perpetrated widespread serious human rights violations and arguably international

[29] Google Trends analysis for "Pancasila", 2004 to 30 November 2016, <https://www.google.com.au/trends/explore?date=all&q=pancasila>.
[30] See Bernd Schaefer and Baskara T Wardaya (eds), *1965: Indonesia and the World, Indonesia Dan Dunia* (Goethe-Institut and Kompas Gramedia, 2013).
[31] Harold Crouch, *The Army and Politics in Indonesia* (Equinox Publishing, 2007), 161.
[32] Bradley R Simpson, *Economists with guns: authoritarian development and U.S.-Indonesian relations, 1960-1968* (Stanford University Press, 2008).
[33] See Schaefer and Wardaya (n 30); Robert Cribb, 'The Indonesian Massacres' in Samuel Totten and William S Parsons (eds), *Century of Genocide* (Routledge, 2009) 193-217; Komnas-HAM, 'Statement by Komnas-HAM (National Commission for Human Rights) on the Results of Its Investigations into Grave Violation of Human Rights During the Events of 1965-1966 (Unofficial Translation)' <http://www.etan.org/action/SaySorry/Komnas%20HAM%201965%20TAPOL%20translation.pdf>; Marlies Glasius, *Foreign Policy on Human Rights: Its Influence on Indonesia under Soeharto* (Intersentia, 1999), 33.
[34] See Anja Jetschke, *Human Rights and State Security: Indonesia and the Philippines* (University of Pennsylvania Press, 2011), 157-158.
[35] Hadiwinata (n 24).

crimes.[36] However, the Cold War geopolitical environment initially attracted little concern from Western powers about atrocities while Indonesian forces were apparently fighting communism and Islamic extremists, as well as suppressing separatist movements, such as in East Timor.[37] Yet the Indonesian government was not immune to international influence. By the 1970s and 1980s international human rights organisations, and eventually states,[38] devoted greater attention toward events within Indonesia, including the violent 1975 occupation of East Timor.[39] Campaigns were directed toward the release of political prisoners,[40] labour rights issues, and human rights and military violations in East Timor, Irian Jaya,[41] Aceh, and other regions.[42] In the context of Indonesia's deteriorating economic situation and internal power disputes,[43] these civil society campaigns met with some, albeit limited, success in the early 1990s, particularly when linked to restrictions, or credible threats of restrictions, to foreign aid.[44] This included the establishment of a National Commission of Inquiry (KPN) into the November 1991 'Santa Cruz massacre' in which a number of protestors were shot in Dili, East Timor (then still occupied by Indonesia).[45]

The investigations 'did not conform to the appeals of the western states to identify the perpetrators' and victims.[46] However, after the KPN investigation, nine low-level soldiers were sentenced to up to 18 months' imprisonment on administrative charges.[47] The commission also provided a model for establishing a national human rights institution, *Komisi Nasional Hak Asasi Manusia Republik Indonesia* (Komnas-HAM), in 1993 and for its subsequent reports concerning extrajudicial killings in Liquiçá, East Timor in 1995 and related to the Freeport mine in Irian Jaya and Nipah dam in East Java. These investigations

[36] Komnas-HAM (n 33); Schaefer and Wardaya (n 30); Vickers (n 3).
[37] Jetschke (n 34), 81-82. On the 1975 invasion of East Timor, see Geoffrey Robinson, *"If you leave us here, we will die" How Genocide Was Stopped in East Timor* (Princeton University Press, 2010), 64; Elizabeth Drexler, 'Fatal Knowledges: The Social and Political Legacies of Collaboration and Betrayal in Timor-Leste' (2013) 7(1) *International Journal of Transitional Justice* 74-94; Ben Kiernan, *Genocide and Resistance in Southeast Asia: Justice in Cambodia & East Timor* (Transaction Publishers, 2008), 106-110.
[38] See generally ibid.
[39] E.g., TAPOL, 'East Timor: Indonesian Takeover Means Bloodshed and Terror' *Tapol Bulletin* (October 1975) <http://vuir.vu.edu.au/26422/1/TAPOL12_compressed.pdf>; Robinson, ibid, 64.
[40] E.g., Amnesty International, 'The Amnesty International Annual Report 1975-1976' (1976) <https://www.amnesty.org/download/Documents/POL1000011976ENGLISH.PDF>, 132.
[41] As Timor-Leste and Papua were known then.
[42] See Jetschke (n 34); Glasius (n 33).
[43] Glasius (n 33), 315.
[44] See ibid; Jiwon Suh, *The Politics of Transitional Justice in Post-Suharto Indonesia* (PhD Thesis, Ohio State University, 2012), 71-73.
[45] Suh, ibid, 74-75.
[46] Glasius (n 33), 260.
[47] E.g. disobeying orders, firing on protesters etc, Suh (n 44), 77.

were also followed by military tribunal proceedings that pronounced light sentences for low-level perpetrators.[48] Thus, the New Order period involved the contestation of ideas about national unity, the role of the military, and a growing debate about accountability for violent incidents.

2.3. Human Rights, Democracy and Development: *Reformasi*

With interest rates exceeding 75 per cent and a massive devaluation of Indonesia's currency, growing popular outrage about the economy during the Asian Crisis of the late 1990s[49] contributed to Suharto's resignation and replacement by his deputy, Bacharuddin Jusuf Habibie. However, actors linked to legal aid, education and human rights advocacy movements had also played a crucial role in the transition, since: '[i]n the years leading up to Suharto's resignation in 1998, it had been these human rights NGOs who had insisted that the truth of the 1965 mass violence be addressed and that the state be accountable to its citizens'.[50] As a result, 'human rights' – economic, social and cultural, as well as civil and political – formed an important language deployed by civil society and political elites during the '*Reformasi*' period.

The legacy of human rights violations involving thousands of individuals and embedded anti-communist narratives provided a complex situation for responding to past atrocities. Given the public dissatisfaction with the former regime, some military actors began to support the process of democratic reform.[51] This necessitated changes that 'would not scare away international investors and aid agencies' and would also avoid further public violence.[52] This led to an emphasis on 'reform' (*Reformasi*), rather than 'revolution'[53] – to support the principles of progress, national development and stability.

Given this desire for change, *Reformasi* involved a discourse that contested to some extent the principles of sovereignty, national unity, and protecting the military. Instead, Habibie focused on economic reforms, adopted the first National Action Plan for Human Rights for 1998-2003, separated the police from the military, and revoked the law requiring political

[48] Suh (n 44), 82-85.
[49] Lindsey and Santosa (n 1), 12; Hadiprayitno (n 20), 386.
[50] Sri Lestari Wahyuningroem, 'Seducing for Truth and Justice: Civil Society Initiatives for the 1965 Mass Violence in Indonesia' (2013) 32(3) *Journal of Current Southeast Asian Affairs* 115-142, 122.
[51] Harold Crouch, *Political Reform in Indonesia after Soeharto* (Institute of Southeast Asian Studies, 2010), 130.
[52] Vickers (n 3), 223.
[53] Ibid, 223.

parties to adhere to Pancasila. In May 1999 Habibie's government allowed a "popular consultation" on East Timor's independence[54] – a move that the military then sought to undermine.[55] This reform strategy mustered only mixed support. Abdurrahman Wahid (known as Gus Dur) succeeded Habibie as President in October 1999 in the midst of escalating conflict in East Timor.

2.4. International Critique and Responses to Violence in Timor-Leste

Alarming violence accompanied the popular consultation of August 1999 in which 78.5 per cent of East Timor's population voted against remaining part of Indonesia.[56] Debate escalated about the appropriate way to respond to alleged international crimes. Following a United Nations (UN) Security Council Resolution demanding that 'those responsible' for this violence be 'brought to justice',[57] UN investigations[58] and Indonesia's own Commission on the Human Rights Violations in East Timor (KPP-HAM) acknowledged the commission of international crimes and KPP-HAM identified 33 possible perpetrators.[59] The 2000 UN Inquiry recommended establishing an 'international human rights tribunal', preferably with the participation of East Timorese and Indonesian members.[60] This proposal did not receive an enthusiastic international response, partly because Security Council members lacked the political will to pursue an expensive international court, especially given China's possible veto of any resolution and Indonesia's opposition.[61] In

[54] Dewi Fortuna Anwar, 'The Habibie Presidency: Catapulting Towards Reform' in Edward Aspinall and Greg Fealy (eds), *Soeharto's New Order and its Legacy: Essays in honour of Harold Crouch* (ANU E Press) 99-118.
[55] Crouch (n 51), 32.
[56] Commission for Reception Truth and Reconciliation, 'Chega! The Report of the Commission for Reception, Truth and Reconciliation in Timor Leste' (2006) <https://www.etan.org/news/2006/cavr.htm>, Part 1, 3; Part 3, 134.
[57] Resolution 1264 (1999).
[58] International Commission of Inquiry on East Timor, 'Report of the International Commission of Inquiry on East Timor to the Secretary General', UN Doc. A/54/726, S/2000/59, 31 January 2000, (2000 UN Inquiry); see also United Nations, 'Situation of human rights in East Timor, Report on the joint mission to East Timor undertaken by the Special Rapporteur of the Commission on Human Rights on extrajudicial, summary or arbitrary executions, the Special Rapporteur of the Commission on the question of torture and the Special Rapporteur of the Commission on violence against women, its causes and consequences, in accordance with Commission resolution 1999/S-4/1 of 27 September 1999', UN Doc. A/54/660, 10 December 1999.
[59] Commission to Investigate Human Rights Violations in East Timor, 'KPP-HAM Executive Summary Report on the investigation of human rights violations in East Timor' (31 January 2000) <https://www.unsw.adfa.edu.au/school-of-humanities-and-social-sciences/sites/default/files/documents/KPP-HAM.pdf>.
[60] 2000 UN Inquiry (n 58), para. 153.
[61] See Caitlin Reiger and Marieke Wierda, 'The Serious Crimes Process in Timor-Leste: In Restrospect' (ICTJ, March 2006) <http://www.ictj.org/sites/default/files/ICTJ-TimorLeste-Criminal-Process-2006-English.pdf>, 10.

line with the norms of sovereignty and non-interference, Indonesia's leaders argued that the best response would be to hold domestic trials, despite UN scepticism about this being an effective option.[62] Ultimately both an internationalised structure within Timor-Leste, the Special Panels,[63] and a domestic court established in Indonesia by Law 26/2000 to prosecute 'gross violations of human rights' – defined as crimes against humanity and genocide – were employed, as well as various non-criminal responses.[64]

A 2005 UN Commission of Experts found that despite KPP-HAM's 'comprehensive, credible and objective' investigation, [65] the Law 26/2000 trials were 'manifestly inadequate.'[66] They recommended Indonesia be given six months to initiate appropriate prosecutions, or face the establishment of an international tribunal,[67] although neither event occurred. The Special Panel's performance was also disappointing against the normalised standards of international criminal justice given inadequate funding, serious problems with handling sexual violence charges, dissimilar outcomes for different accused without adequate justification, the inability to bring justice to high-level indictees partly because of Indonesia's lack of cooperation in handing over perpetrators, and generally a failure to adequately protect defence rights.[68] Later in 2005, Indonesia and Timor-Leste established the much-criticised Commission of Truth and Friendship (see Timeline).

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[62] 2000 UN Inquiry (n 58), para. 113.
[63] See United Nations Transitional Administration for East Timor (UNTAET), *Regulation No. 15 of 2000 On The Establishment of Panels with Exclusive Jurisdiction Over Serious Criminal Offences*, 6 June 2000.
[64] On the various transitional justice mechanisms relating to East Timor, see e.g. Mark Cammack, 'Crimes against humanity in East Timor: the Indonesian ad hoc Human Rights Court hearings' in Kirsten Sellars (ed), *Trials for International Crimes in Asia* (Cambridge University Press, 2015) 191-225; David Cohen, 'Intended to Fail: The Trials Before the Ad Hoc Human Rights Court in Jakarta' (ICTJ, 8 January 2003) <https://www.ictj.org/publication/intended-fail-trials-ad-hoc-human-rights-court-jakarta>; Drexler (n 37); Lia Kent, 'Beyond 'Pragmatism versus 'Principle'': Ongoing Justice Debates in East Timor' in Renée Jeffery and Hun Joon Kim (eds), *Transitional Justice in the Asia-Pacific* (Cambridge University Press, 2014) 157-194; Susan Harris-Rimmer, *Gender and Transitional Justice: The Women of East Timor* (Routledge, 2010); Suzannah Linton, 'East Timor and Accountability for Serious Crimes' in M Cherif Bassiouni (ed), *International Criminal Law* (Koninklijke Brill, 2008) 257-282; Reiger and Wierda (n 61).
[65] United Nations Secretary-General, 'Report to the Secretary-General of the Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste (then East Timor) in 1999', UN Doc. S/2005/458, 15 July 2005, Summary, para. 15.
[66] Ibid, Summary, para. 17.
[67] Ibid, Summary, para. 28.
[68] See generally (n 64).

All of these mechanisms featured a lack of in-depth consultation with affected populations,[69] were influenced by political priorities (including Timor-Leste's leaders' wish to re-establish relations with Indonesia) and failed to hold higher-level perpetrators criminally accountable.[70] For transitional justice scholar Susan Harris-Rimmer: 'The substantial problem is that the international political process has led to a mixed approach consisting of entrusting the justice process to two national jurisdictions [ie, Indonesia and, after its independence, Timor-Leste], neither of which had the slightest chance of carrying out their mandate for a myriad of reasons, of which most were foreseeable'.[71] Thus, in contrast to Cambodia or the Philippines, more than one country's laws and institutions were engaged in prosecuting crimes that occurred in a particular time period within one contested 'space': East Timor.

Debates about whether or how to apply international norms when responding to historic and contemporary alleged international crimes in Indonesia were echoed during the presidencies of Megawati Soekarnoputri and Susilo Bambang Yudhoyono. In this period, Komnas-HAM investigations into violence both during and after Suharto's presidency – including in relation to separatist movements or violations by the armed forces in Aceh, Maluku, Central Sulawesi, Tanjung Priok, and Abepura – led to some prosecutions, including for crimes under Law 26/2000 (see Timeline).[72] However, most of Komnas-HAM's *pro-justicia* reports (special investigations undertaken under Law 26/2000) still languish at the Attorney General's office.[73] Moreover, insufficient resources and training, victim and witness protection issues, interference with the judiciary, prosecutorial ineffectiveness, harassment of court personnel, difficulties securing evidence, and a lack of government cooperation beset the cases that did proceed.[74] Of the minority of cases that led to convictions, all were overturned on appeal.[75] In 2012, President Yudhoyono (whose father-in-law allegedly committed crimes during the 1965 violence) appeared ready to apologise for the violence in 1965 and to ratify the Rome Statute, but neither action

[69] Suzannah Linton, 'Putting Things Into Perspective: The Realities of Accountability in East Timor, Indonesia and Cambodia' (2005) 3(182) *Maryland Series in Contemporary Asian Studies Series* 1-88, 10.
[70] Drexler (n 37), 79.
[71] Harris-Rimmer (n 64), 74.
[72] International Center for Transitional Justice and KontraS, 'Derailed: Transitional Justice in Indonesia Since the Fall of Soeharto' (March 2011) <http://ictj.org/sites/default/files/ICTJ-Kontras-Indonesia-Derailed-Report-2011-English_0.pdf> (Derailed Report).
[73] Ibid.
[74] See ibid; Cohen (n 64); Suzannah Linton, 'Unravelling the First Three Trials at Indonesia's Ad Hoc Court for Human Rights Violations in East Timor' (2004) 17(2) *Leiden Journal of International Law* 303-361.
[75] Derailed Report (n 72), 41.

eventuated.[76] Thus, while this period involved increased attention toward prosecuting international criminal conduct, little progress was made.

As for domestic developments since these trials, early hopes that President Jokowi was serious about 'settling' (*penyelesaian*) the cases of past human rights violations (*pelanggaran HAM yang masa lalu*) have been brought into doubt amid debates about the meanings of justice, reconciliation, development and national unity.[77] Jokowi has appointed controversial members of the military to key roles, including former Special Panels indictee General Wiranto as Security Minister,[78] and does not seem willing to pursue the prosecution of past violations.[79] In 2016, President Al-Bashir of Sudan, who is the subject of ICC arrest warrants, was able to visit Indonesia without threat of arrest.[80] Indonesia also continues to experience violence involving security officials, especially in Papua, meaning that the commission of future international crimes remains a possibility, while concerns about a lack of judicial independence remain.[81]

2.5. Summary: History

Indonesia has experienced a complex range of alleged international crimes, including those committed in relation to separatist and independence-related conflicts (such as in

[76] Rabby Pramudatama, 'SBY to apologize for rights abuses', *The Jakarta Post* (26 April 2012) <http://www.thejakartapost.com/news/2012/04/26/sby-apologize-rights-abuses.html>; National Report 2012 (n 26), para. 20.
[77] See section 3.
[78] Amnesty International, 'Indonesia: Gen. Wiranto's appointment shows contempt for human rights' (27 July 2016) <https://www.amnesty.org/en/latest/news/2016/07/gen-wiranto-is-a-threat-to-human-rights/>, though see Marguerite Afra Sapiie, 'Wiranto vows to settle historic human rights abuses', *The Jakarta Post* (15 September 2016) <http://www.thejakartapost.com/news/2016/09/15/wiranto-vows-to-settle-historic-human-rights-abuses.html>.
[79] See also regarding the appointment of Ryamizard Ryacudo as Defense Minister, Jakarta Globe, 'Human Rights Let-Downs Damp Jokowi's Pledges', *Jakarta Globe* (10 December 2014) <http://jakartaglobe.id/news/human-rights-let-downs-damp-jokowis-pledges/>. See Vannessa Hearman, 'No 'magic bullet'' (2016) 123 *Inside Indonesia* <http://www.insideindonesia.org/no-magic-bullet>.
[80] Lembaga Studi dan Advokasi Masyarakat (ELSAM), 'Receptivity Of Omar Al-Bashir: The Indonesian Government Continuing Impunity' (7 March 2016) <http://elsam.or.id/2016/03/receptivity-of-omar-al-bashir-the-indonesian-government-continuing-impunity/>.
[81] Human Rights Watch, 'World Report: Indonesia Country Summary' (January 2016) <https://www.hrw.org/world-report/2016/country-chapters/indonesia>; KontraS, '*Penyiksaan Merusak Hukum - Praktik Penyiksaan dan Perbuatan Tidak Manusiawi Lainnya di Indonesia 2015 - 2016* [Destructive Torture Law: The Pracitce of Torture and Other Inhumane Acts in Indonesia 2015-2016]' (25 June 2016) <http://kontras.org/data/20160625_Ringkasan_Laporan_penyiksaan_merusak_hukum_2016_97hf28bg2.pdf>.

East Timor, Aceh and Papua), in 1965 and under Suharto's regime, as well as violent incidents involving the armed forces occurring after *Reformasi*. Since WWII, responses to all of these categories of possible international crimes in Indonesia have featured recurring themes of sovereignty, selectivity – including minimal accountability for military perpetrators – and distaste for internationally managed proceedings. There have also been efforts to advance human rights, development, and the restraint of military impunity. There has been no linear progression from ratification of international treaties, to implementation in national law and enforcement or acceptance of the norm of international criminal justice. Rather, perspectives on international criminal justice have been – and remain – plural and dynamic. The next section turns to these varied understandings.

3. Local Initiatives and Adaptation

This section considers the second question analysed in this thesis: how state and other actors have influenced conceptions of how to respond to international crimes. It draws on public statements and interviews to analyse the *local initiative* that foreign states and international organisations (3.1), Indonesian authorities (3.2), and civil society actors (3.3) have employed to reframe and *adapt* (3.4) perceptions of international criminal justice. It proceeds according to groups and themes rather than chronology.

3.1. International States and Organisations

International concepts, international organisations and other states have played a crucial, if at times unwelcome, role in Indonesia's development of international criminal mechanisms. Indonesia's Regulation (*Perpu*) 1 of 1999 provided for the prosecution of human rights atrocities under Indonesia's Criminal Code. However, the UN opposed this *Perpu*,[82] which was also rejected by the DPR (Indonesian parliament). Reportedly, a 'strong consideration was fear that the lack of a retroactive clause might fail to satisfy the international community's demand that those responsible for gross violations in East Timor be tried'.[83] Scholars have suggested that the UN investigations of the violence in

[82] 2000 UN Inquiry (n 58), para. 112.
[83] International Crisis Group, 'Indonesia: Impunity Versus Accountability for Gross Human Rights Violations' (2 February 2001) <https://www.crisisgroup.org/asia/south-east-asia/indonesia/indonesia-impunity-versus-accountability>, 14; Ross Clarke, 'The Bali Bombing, East Timor trials and the Aceh Human Rights Court – retrospectivity, impunity and

East Timor and the establishment of the Special Panels influenced Indonesia to pursue avenues for domestic prosecutions.[84] Law 26/2000 underwent several rounds of revisions and evolved from having a 'human rights' focus to become modelled quite closely on the Rome Statute, which had been negotiated in 1998 but had not yet entered into force.[85]

Yet there was and is no single international perspective among states or the UN on prosecuting international crimes committed in Indonesia. Despite civil society criticism of Indonesia's occupation after Portugal's withdrawal from East Timor in 1975, states including the US and Australia disregarded, or even facilitated, Indonesia's actions.[86] In relation to the independence violence in East Timor in 1999, the UN Commission of Inquiry recommended establishing an international tribunal (with UN appointed judges but including members from both East Timor and Indonesia).[87] However, states including the US did not clearly support this approach,[88] while the Security Council welcomed the institution in Indonesia of a domestic (rather than international) response, if it could be 'swift, comprehensive, effective and transparent legal process, in conformity with international standards of justice and due process of law'.[89]

States and the UN have generally been less willing to demand that Indonesia prosecute international crimes outside East Timor. For example, despite well-documented atrocities in the early 2000s in Aceh and international involvement in the peace process, there were no Security Council resolutions on the issue.[90] Though the Aceh peace agreement ultimately allowed for trials, the Finnish mediator Martti Ahtisaari did not prioritise accountability issues during the negotiations, as securing stability was the focus[91] and past human rights abuses 'received relatively little attention from any of the principal actors,

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constitutionalism' in Tim Lindsey (ed), *Indonesia: Law and Society* (The Federation Press, 2008) 430-454, 442.
[84] See section 2.4; e.g. Linton (2005) (n 69), 20.
[85] Suh (n 44), 140.
[86] See section 2.2 and generally (n 37).
[87] 2000 UN Inquiry (n 58), para. 153.
[88] International Crisis Group (n 83), 25.
[89] United Nations Security Council, 'Letter Dated 18 February 2000 From the President of the Security Council to the Secretary-General', UN Doc. S/2000/137, 21 February 2000.
[90] E.g., Damien Kingsbury and Lesley McCulloch, 'Military Business in Aceh' in Anthony Reid (ed), *Verandah of Violence: The Background to the Aceh Problem* (Singapore University Press, 2006) 199-224.
[91] Hamid Awaludin, *Peace in Aceh: Notes on the Peace Process Between the Republic of Indonesia and the Aceh Freedom Movement (GAM) in Helsinki* (Tim Scott trans, CSIS, 2009), 111; see Edward Aspinall, 'Peace without justice? The Helsinki peace process in Aceh' (Centre for Humanitarian Dialogue, 2008) <https://www.hdcentre.org/wp-content/uploads/2016/08/56JusticeAcehfinalrevJUNE08-May-2008.pdf>, 12-15.

including the international community' in subsequent years.[92] However, several states called upon Indonesia to prosecute human rights violations in the Working Group reports for Indonesia's 2008 and 2012 UPR cycles.[93] Some states have engaged in military-to-military exchanges that included international humanitarian law training or discussed Rome Statute ratification with the government.[94] Countries like Sweden and Norway have engaged in capacity-building initiatives and exchanges on human rights issues.[95] These efforts have tended to draw on international norms and mechanisms as a way of monitoring Indonesia's approach to international crimes and human rights violations.

Glasius has found that threats of reduced foreign aid may have influenced Indonesia's domestic human rights policies in the past, including the establishment of KPP-HAM and Law 26/2000.[96] However, Indonesia seems to have rejected an offer for aid in return for signing a Bilateral Immunity Agreement with the US and, while a large trade agreement may have influenced Indonesia's preference for opposing the ICC's prosecution of Sudan's President Al-Bashir,[97] this position was also consistent with Indonesia's support for state sovereignty. In recent years, as business investment has increased, Indonesia's net receipts of aid have fallen dramatically.[98] Remaining foreign aid 'human rights' projects are increasingly focused on institutional transparency and governance issues, rather than accountability for serious violence.[99] This suggests that foreign *aid* is likely to be of

[92] Aspinall, ibid, 5.
[93] UN Human Rights Council, 'Report of the Working Group on the Universal Periodic Review: Indonesia', UN Doc. A/HRC/8/23, 14 May 2008, e.g. Germany, Brazil in relation to Timor-Leste, Sweden regarding torture; UN Human Rights Council, 'Human Rights Council, Report of the Working Group on the Universal Periodic Review: Indonesia', UN Doc. A/HRC/21/7, 5 July 2012, e.g. Slovenia, Australia, Canada.
[94] E.g. Ministry of Foreign Affairs, 'Joint Press Release: 5th Indonesia – European Union Human Rights Dialogue' (18 November 2014) <http://www.kemlu.go.id/en/berita/siaran-pers/Pages/Joint-Press-Release-5th-Indonesia-European-Union-Human-Rights-Dialogue.aspx>.
[95] E.g., Ministry of Foreign Affairs, 'Remarks at the First Bilateral Dialogue On Human Rights between Indonesia and Sweden, Jakarta' (23 April 2008) <http://www.kemlu.go.id/id/pidato/menlu/Pages/Remarks-at-the-First-Bilateral-Dialogue-On-Human-Rights-between-Indonesia-and-Sweden-Jakarta-23-Apri.aspx>; Ministry of Foreign Affairs, 'Indonesian Foreign Minister Meets with Norway's PM and Foreign Minister' (18 June 2015) < http://www.kemlu.go.id/en/berita/Pages/Indonesian-Foreign-Minister-Meets-with-Norway-s-PM-and-Foreign-Minister.aspx>.
[96] Glasius (n 33) – see also Linton (n 74) , 308 regarding US military aid.
[97] See Salla Huikuri, 'Empty promises: Indonesia's non-ratification of the Rome Statute of the International Criminal Court' (2016) 30(1) *The Pacific Review* 74-92, 85-86.
[98] World Bank, 'Net official development assistance and official aid received (current US$)' (2015) <http://data.worldbank.org/indicator/DT.ODA.ALLD.CD>.
[99] E.g., the EU has focused on environment, climate change, good governance, economic cooperation and education initiatives, see European Union, 'Blue Book 2015: EU-Indonesian Development Cooperation in 2014' (2015) <http://eeas.europa.eu/delegations/indonesia/documents/eu_indonesia/blue_book/bb2015_en.p

declining concern to Indonesia's leaders in relation to prosecuting international crimes, although business investment may still be a relevant factor, with a corresponding focus upon corruption and governance.

Given the timing, it is unsurprising that the drafting process for Law 26/2000 involved reference to the Rome Statute. Some international actors influenced the development of international criminal law in Indonesia, in part by creating a credible threat of international prosecutions, though states have taken various positions. The next section explores the Indonesian government's engagement with these issues.

3.2. Indonesian Authorities

As with the varied international perspectives, Indonesia's political leaders have been divided regarding the prosecution of international crimes. However, focusing upon the Yudhoyono (2004-2014) and Jokowi administration (2014-present) approaches toward the ICC in particular, as well as to past crimes, some general themes can be discerned from government statements and media reports.

3.2.1.Changing Support for International Criminal Justice

The Habibie administration appeared to support the ICC to some degree, but Megawati considered that Indonesia's domestic law should be amended prior to ratifying the Rome Statute.[100] During Yudhoyono's Presidency, two consecutive National Plans of Action on Human Rights incorporated intentions to join the ICC and in 2013 Indonesia's delegation to the UN reiterated the country's 'support to the global efforts to end any form of impunity for crimes against humanity, war crimes and the crime of aggression'. [101] However, the level of stated support for international criminal justice has varied within the government and over time.

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df>; 'In the meantime [there] is only little support [from donors] for the human rights issues for example, for Indonesia', Interview I1.

[100] Huikuri (n 97), 80.

[101] Permanent Mission of the Republic of Indonesia to the United Nations, 'Statement, H.E. Ambassador Desra Percaya, Permanent Representative, Republic of Indonesia to the United Nations at the United Nations General Assembly Thematic Debate: "Role of the International Criminal Justice in Reconciliation' (10 April 2013) <http://www.indonesiamission-ny.org/zymurgy/custom/statement.php?id=317#.U9HrW1ZNE_s> (Percaya Statement).

The military held significant authority during the Suharto regime and military leaders have typically opposed the prosecution of international crimes. For example, it seems that in 2013, following an encouraging visit by Indonesian officials to The Hague, Yudhoyono shifted toward opposing accession to the Rome Statute after meeting with former military generals.[102] A Minister of Defence spokesperson argued that Indonesia was 'already complying with the principles enshrined in' the Rome Statute and pointed out that 'big countries' had also not ratified.[103] The army (*Tentara Nasional Indonesia*, TNI) remains influential under Jokowi's presidency (see below).[104]

While some parliamentarians favour acceding to the Rome Statute, there has also been political opposition.[105] The Ministry of Foreign Affairs supported the ICC, though the former Minister also recalled that it 'is no panacea to abolish impunity'.[106] The most recent National Plan under Jokowi neglects to mention the former priority of accession,[107] although in 2014 the government called for 'appropriate measures to hold those responsible accountable' in relation to the downing of Malaysia Airlines flight MH17, although not necessarily via the Rome Statute framework.[108] Thus, Indonesia's officials continue to debate international criminal justice. Still, officials rarely oppose the ICC or its norms as such, but accord prominence to national laws and procedures – that is, the protection of Indonesia's sovereignty.

3.2.2.Sovereignty and Political Independence

[102] Huikuri (n 97), 81.
[103] Markus Junianto Sihaloho, 'Defense Minister Dodges Question on Blocking ICC Treaty's Ratification', *Jakarta Globe* (21 May 2013) <http://jakartaglobe.beritasatu.com/news/defense-minister-dodges-question-on-blocking-icc-treatys-ratification/>.
[104] E.g., Nani Afrida, 'Jokowi warned against inviting military into politics', *The Jakarta Post* (5 February 2016) <http://www.thejakartapost.com/news/2016/02/03/jokowi-warned-against-inviting-military-politics.html>.
[105] E.g, Margareth S Aritonang, 'Politics Stall Ratification', *The Jakarta Post* (16 May 2013) <http://www.thejakartapost.com/news/2013/05/16/politics-stalls-ratification.html>.
[106] Ary Hermawan, 'ICC ratification no panacea to end impunity: Marty', *The Jakarta Post* (12 June 2009) <http://www.thejakartapost.com/news/2009/06/12/icc-ratification-no-panacea-end-impunity-marty.html>.
[107] Ministry of Law and Human Rights, '*Rencana Aksi Nasional Hak Asasi Manusia, Tahun 2015-2019* [The National Action Plan on Human Rights, 2015-2019], <http://jabar.kemenkumham.go.id/attachments/article/1493/PERPRES_NO_75_2015_Lampiran.PDF>. Note, translations in footnotes are the author's and may not be accurate.
[108] United Nations, 'Security Council Fails to Adopt Resolution on Tribunal for Malaysia Airlines Crash in Ukraine, Amid Calls for Accountability, Justice for Victims' (30 July 2015) <http://un.org.au/2015/07/30/security-council-fails-to-adopt-resolution-on-tribunal-for-malaysia-airlines-crash-in-ukraine-amid-calls-for-accountability-justice-for-victims/>.

Indonesia's officials have expressed concerns about the potential for the ICC to politically interfere in domestic affairs, emphasising sovereignty, stability and national prosecutions. During the Rome Statute negotiations as a key member of the Non-Aligned Movement, Indonesia's representatives emphasised that 'first and foremost… the Conference … must uphold the principle of respecting national sovereignty'.[109] An argument against a 'preference to ICC intervention' was also expressed during the 2010 Kampala ICC Review Conference.[110] Officials have suggested that the Rome Statute 'could be misused to encourage the ICC to step in for certain political interests. Therefore, we don't need to rush to ratify it now'.[111]

In 2013, during a General Assembly debate on 'The Role of International Criminal Justice in Reconciliation', Indonesia's permanent representative to the UN reiterated that 'the development and improvement of legal institutions and perspective must of course be in conformity to each nation's history, culture, and way of life.'[112] Thus, one response to the international criminal justice norm has been to accept its validity, albeit without enthusiasm for the ICC, but to propose an approach based on the principles of sovereignty and subsidiarity.

3.2.3.Progress in Supporting Human Rights

Indonesia's official statements about international criminal justice have referred to Indonesia's democratic credentials and its progress in responding to 'past violence', including by discussing international criminal law issues alongside human rights achievements.[113] Thus, Indonesia's 2012 national UPR report confirmed that 'Indonesia remains committed to work progressively on' acceding to the Rome Statute.[114] In terms of

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[109] 'Statement by H.E. Mr Muladi, Minister for Justice, Head of Delegation of the Republic of Indonesia, before the Plenipotentiaries Conference of the Establishment of the International Criminal Court, 16 June 1998', in S H Muladi, *Statuta Roma Tahun 1998 Tentang Mahkamah Pidana Internasional: Dalam Kerangka Hukum Pidana Internasional dan Implikasinya Terhadap Hukum Pidana Nasional* [1998 Rome Statute of the International Criminal Court On: On the framework of International Criminal Law and Its Implications for National Criminal Law] (Alumni Universitas Trisakti, 2011), 17; see section 3.2.2, chapter 3.
[110] Republic of Indonesia, 'Statement by Mr. Mulya Wirana, Head of Indonesian Delegation to the Review Conference of the Rome Statute, Kampala, 31 Mei - 11 June 2010', <https://asp.icc-cpi.int/iccdocs/asp_docs/RC2010/Statements/ICC-RC-gendeba-Indonesia-ENG.pdf>.
[111] E.g., the Chair of House Commission I, quoted in Margareth S Aritonang, 'Govt officially rejects Rome Statute', *The Jakarta Post* (21 May 2013) <http://www.thejakartapost.com/news/2013/05/21/govt-officially-rejects-rome-statute.html>.
[112] Percaya Statement (n 101).
[113] See Hadiprayitno (n 20).
[114] National Report 2012 (n 26), para. 20.

'combating impunity' more generally, the UPR report observed that military courts had tried more than 1500 cases perpetrated by military officers, 'including human rights violations', and that the government 'continues to promote institutional reforms which will enhance the effectiveness and capacity of security sector institutions in dealing with alleged human rights violations'.[115]

However, turning to Indonesia's domestic international crimes mechanisms, discussions about the 'gross human rights violations' that fall under Law 26/2000 (crimes against humanity or genocide) and other breaches of international human rights law reveal some overlap and confusion. For example, in 2013 the Minister of Defence argued that when a group of Indonesian Special Forces (*Kopassus*) personnel raided Cebongan prison and killed four murder suspects, the 'Human Rights Law' (Law 26/2000) did not apply since 'there was no systemic order' and 'not enough people were killed'. He argued this was therefore 'not a human rights violation'.[116] Jokowi's election platform included a commitment to the 'equitable settlement of the cases of human rights violations in the past', though not to join the ICC or prosecute contemporary crimes.[117] The promise appears to have been directed at the incidents identified by Komnas-HAM as 'gross violations of human rights' – in other words, as defined in Law 26/2000 – and particularly the violence of 1965. This terminology may contribute to perceived inconsistencies between 'human rights law', about which Law 26/2000 is ostensibly concerned though it actually addresses international crimes, and domestic criminal law, the focus of the Attorney General's office, which is responsible for prosecuting international crimes. One commentator who proposes synchronising the two bodies of law has asked, 'How can

[115] Ibid, paras 28-29.

[116] The Minister reportedly suggested that this was not a breach of human rights because it is not covered by the Law on Human Rights (i.e., *Law No. 26 of 2000 Concerning Human Rights Courts*, Law 26/2000) ('*Ini bukan pelanggaran HAM* karena ada saran dikenakan Undang-Undang HAM*. Kami ambil sikap tidak sependapat'*, emphasis added): Sabrina Asril, *'Priyo: Penyerangan LP Cebongan Kriminal Bukan Pelanggaran HAM* [Priyo: Cebongan Prison Assault Criminal Not a Human Rights Violation]', *Kompas* (12 April 2013) <http://nasional.kompas.com/read/2013/04/12/15002171/Priyo.Penyerangan.LP.Cebongan.Kriminal..Bukan.Pelanggaran.HAM>, George Roberts, 'Indonesia denies prison raid a violation of rights', *ABC News* (13 April 2013) <http://www.abc.net.au/news/2013-04-13/indonesian-prison-raid-violation-of-human-rights/4627222>.

[117] '*penghormatan HAM dan penyelesaian secara berkeadilan terhadap kasus-kasus pelanggaran HAM pada masa lalu'*, see Joko Widodo and Jusuf Kalla, '*Jalan Perubahan untuk Indonesia yang Berdaulat, Mandiri dan Berkepribadian: Visi Misi, dan Program Aksi* [The Roadmap for an Indonesia that is Sovereign, Independent, and has Personality/Individuality: Vision, Mission, and Programme of Action]' (May 2014) <http://kpu.go.id/koleksigambar/VISI_MISI_Jokowi-JK.pdf>, 9. This distanced Jokowi from Prabowo Subianto, his main opponent, who had been accused of committing serious violations; Ken Setiawan, 'The politics of compromise' (2016) 123 *Inside Indonesia* <http://www.insideindonesia.org/the-politics-of-compromise>.

human rights issues be handled with criminal law?'[118]

3.2.4.National Unity: Reconciliation and Symposiums

On Human Rights Day in 2015, President Jokowi proposed that '[w]e all must have the courage to embark on reconciliation … through judicial channels, as well as non-judicial [measures]'.[119] By late 2016 prosecutions, or even a state apology, for past violence seemed unlikely. Further, the meaning of 'reconciliation' is contested[120] and the experiences of TRC's in Indonesia have been problematic. The government has not established the commission mentioned in Article 45 of Law No. 21 of 2000*, On Special Autonomy for the Papua Province*. The Constitutional Court annulled Law No. 27 of 2004, the first attempt to establish a national TRC (*Komisi Kebenaran dan Rekonsiliasi*), on the basis that its amnesties provision was inconsistent with Constitutional rights.[121] A regional bylaw to establish a TRC regarding Aceh was not passed until 2013, partly because of the lack of a national TRC, and its establishment proceeds slowly.[122]

There is also a tension between understandings of reconciliation as involving 'settling' past cases, consistent with the promotion of national unity, and those proposing justice mechanisms. In 2015 the Jokowi government announced the creation of a 'Reconciliation Committee' to respond to past human rights violations.[123] In 2016 a national symposium was held in which survivors and civil society shared testimony about the 1965 violence, alongside statements from (then) Coordinating Minister for Politics, Law and Human

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[118] Marguerite Afra Sapiie, 'Settlement of rights cases hampered by commission, AGO's differing interpretation', The Jakarta Post (26 October 2016) <http://www.thejakartapost.com/news/2016/10/26/settlement-of-rights-cases-hampered-by-commission-agos-differing-interpretation.html>.
[119] Ina Parlina, 'Jokowi vows to promote rights', *The Jakarta Post* (12 December 2015) <http://www.thejakartapost.com/news/2015/12/12/jokowi-vows-promote-rights.html>.
[120] See Birgit Bräuchler (ed), *Reconciling Indonesia: Grassroots agency for peace* (Routledge, 2009).
[121] *Lembaga Studi dan Advokasi Masyarakat (ELSAM), Komisi untuk Orang Hilang dan Korban Kekerasan (Kontras), Solidaritas Nusa Bangsa (SNB), Inisiatif Masyarakat Partisipatif untuk Transisi Berkeadilan (Imparsial), Lembaga Penelitian Korban Peristiwa 65 (LPKP 65), Raharja Waluya Jati, H. Tjasman Setyo Prawiro*, Case No. 006/PUU-IV/2006, Constitutional Court, Republic of Indonesia, English translation available at <http://www.kontras.org/data/kkr/kesimpulan%20ENG.pdf>.
[122] Amnesty International, 'Indonesia: Appointment of Aceh Truth Commission Selection Team a Step Closer to Truth and Reparation for Victims' (30 November 2015) <https://www.amnesty.org/en/documents/asa21/2976/2015/en>; The TRC mandate is limited to 'local actors', see Asian Legal Resource Centre, 'Indonesia: Truth, justice, reparation & guarantees of non-repetition remain elusive' (1 September 2016) <http://alrc.asia/indonesia-truth-justice-reparation-guarantees-of-non-repetition-remain-elusive/>.
[123] Setiawan (n 117).

Rights, Luhut Binsar Panjaitan (Luhut) and the military, denying the violence.[124] Luhut indicated that the symposium aimed to counter increasing international attention toward the 1965 events.[125] Members of the military then organised (with the Defence Minister's support)[126] a separate symposium on 'Protecting Pancasila from Threats of the Indonesian Communist Party [PKI] and Other Ideologies', at which participants argued that the reconciliation process 'could open old wounds, disrupt the nation's unity, or even encourage prolonged horizontal conflicts'.[127] As one commentator put it, 'the [national] symposium can only be considered the starting point of a long process towards the nation confronting its past', though 'there is also a real risk that it could be the final chapter'.[128] For now, debates about 'reconciliation' continue.

In summary, Indonesia's government has drawn on the concepts of sovereignty, human rights, and reconciliation in its statements concerning international criminal law. Prosecuting historic alleged international crimes remains a live and controversial political topic, as does the improvement of accountability for contemporary incidents of violence. These official attempts to shape perceptions of international criminal justice correspond to the historic debates considered in section 2 and are reflected in civil society arguments.

3.3. Civil Society

The nature of 'civil society' in Indonesia, as elsewhere, is complex, and some generalisation is involved in discussing civil society strategies.[129] However, Indonesian and internationally-based NGOs, legal advocates, academics and other community leaders and associations have played a significant role in shaping debates about international criminal justice in Indonesia.[130] This section focuses on the various approaches taken by

[124] Ayu Wahyuningroem, 'Justice denied?' (2016) 125 *Inside Indonesia* <http://www.insideindonesia.org/justice-denied>.
[125] Ibid.
[126] Nabilla Tashandra, *'Didukung Ryamizard, Purnawirawan TNI Akan Bentuk Simposium Lawan PKI* [Defence minister backs move by retired TNI officers to hold anti-PKI symposium]', *Kompas* (13 May 2016) <http://nasional.kompas.com/read/2016/05/13/15530051/Didukung.Ryamizard.Purnawirawan.TNI.Akan.Bentuk.Simposium.Lawan.PKI>.
[127] The Jakarta Post, 'Attempts at formal reconciliation "will reopen old wounds"', *The Jakarta Post* (3 June 2016) <http://www.thejakartapost.com/news/2016/06/03/attempts-at-formal-reconciliation-will-reopen-old-wounds.html>.
[128] Wahyuningroem (n 124).
[129] See Glossary; Verena Beittinger-Lee, *(Un) Civil Society and Political Change in Indonesia: A Contested Arena* (Routledge, 2009).
[130] Ibid; Hilmar Farid and Rikardo Simarmatra, 'The Struggle for Truth and Justice: a Survey of Transitional Justice Initiatives Throughout Indonesia' (ICTJ, January 2004)

NGOs toward advocating for international criminal justice, including documenting crimes, drawing on local contexts, and engaging with international actors and state authorities.

3.3.1.Documentation and Monitoring

Though many civil society actors refer to domestic laws in their advocacy, they are willing to draw on international influence where productive. The President cancelled a visit to the Netherlands in 2010 after a Maluku separatist group asked a court in The Hague to order his arrest.[131] Other groups have asked foreign governments to prioritise Rome Statute ratification in their meetings with Indonesia[132] and made submissions to human rights processes such as the UPR. However, local activities have not become less important after international attention is enlisted.[133] Instead, civil society advocacy involves a range of methods, of which recourse to international pressure is just one.

In the years following *Reformasi*, local activists had 'differences of opinion' about how to respond to past crimes, including 'the tension between the model of the truth commission vis-à-vis the model of … prosecution through the courts'.[134] Victims' needs are diverse and may even conflict. An NGO representative explained:

> in general we can say that [victims] want justice. But, you know, they have their own interpretation of what justice means… For the victim[s] of '65 for example, they say that justice for them is … general rehabilitation… But … then for the victim[s] of disappearances in '97 and '98, they say justice means "If I found my disappeared loved one". That's justice. And not necessarily a human rights court. But for the other[s] … they said, justice for us means, "The perpetrators should be brought to court, to ad hoc human right court" for example...[135]

In the early 2000s, NGOs like the Commission for Disappearances and Victims of Violence (KontraS) and Indonesian Association of Families of the Disappeared (IKOHI) pressured

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<http://ictj.org/sites/default/files/ICTJ-Indonesia-Survey-Initiative-2004-English.pdf>; Jeff Herbert, 'The legal framework of human rights in Indonesia' in Tim Lindsey (ed), *Indonesia: Law and Society* (The Federation Press, 2008) 456-482, 479; from at least the 1920's, according to Hadiprayitno (n 20), 393.

[131] BBC, 'Indonesia cancels Netherlands visit over arrest threat', *BBC* (5 October 2010) <http://www.bbc.com/news/world-asia-pacific-11475558>.

[132] Indonesian Civil Society Coalition for the International Criminal Court (ICSCICC), 'Intervention' (16 November 2012) <http://lama.elsam.or.id/article.php?act=content&id=2174&cid=15&lang=en#.WEUNhqJ96b8>.

[133] Consistent with Suh's findings, (n 44), 106.

[134] Interview I14.

[135] Interview I2.

Komnas-HAM to investigate violence under Suharto, in East Timor, and elsewhere in Indonesia, under Law 26/2000. Meanwhile, the Institute for Policy Research and Advocacy (ELSAM) drafted a bill for a TRC and others helped victims lodge complaints with police, the Ombudsman or Komnas-HAM. Both those favouring a TRC and those seeking prosecutions therefore worked to document and gather evidence of international crimes. However, most Komnas-HAM reports remained 'in the desk of the Attorney General Office',[136] subject to a disagreement as to what types of evidence are required to pursue prosecutions and who is responsible for gathering that evidence.[137] One interviewee explained how local NGOs realised that the Attorney General's sluggishness was 'not because [of] the legal reason' but was because 'the issue is really [a] political issue.'[138]

3.3.2.Reframing for Domestic Political Concerns

The realisation that there were political rather than legal barriers to seeking justice for international crimes in Indonesia led some NGOs to adapt their arguments and strategies. For example, when discussing the main benefits of ratifying the Rome Statute with the government, NGOs decided that: 'because Yudhoyono is very cautio[us] with [his] image, we talk about the good image'.[139] From 2007, victims groups held weekly Thursday protests in front of the President's Palace. This strategy was adapted from a practice of the Mothers of the Plaza de Mayo,[140] but was thought to have potential because of the President's concern about his reputation.[141] This also led actors to generate converging vocabularies, drawing on international and national concepts and legal principles.

Particularly during the Yudhoyono administration, some NGOs promoted ICC accession by emphasising Indonesia's role as a 'champion and beacon of democracy, good governance and human rights in the region'.[142] One interviewee explained 'it's a matter of national pride' – since as 'the biggest democratic country in the world … we are responsible to the

[136] Interview I2, see also Derailed Report (n 72), 3.
[137] Including as to whether Komnas-HAM must identify suspects in order for the Attorney General to proceed with investigations, see Herbert (n 130), 468 and 471.
[138] Interview I9.
[139] Interview I2.
[140] An Argentinian association formed by mothers of individuals who disappeared under the authoritarian regime of the late 1970s and early 1980s.
[141] Suh (n 44), 125.
[142] ICSCICC (n 132). This language is notably similar to that used by the Philippines government at its first Assembly of States Parties session as a state party a year earlier: Department of Foreign Affairs, 'Philippines deposits instrument of ratification for Rome Statute of the International Criminal Court' (31 August 2011) <http://www.gov.ph/2011/08/31/philippines-deposits-instrument-of-ratification-for-rome-statute/>.

international community, not only [the] Indonesian people'.[143] In 2012, the regional coordinator for the Coalition for the International Criminal Court (CICC) argued that 'Indonesia's membership to the ICC is consistent with its declaration of strong commitment to human rights and the rule of law'.[144]

The Rome Statute campaign also responded to concerns about sovereignty and political interference by emphasising the principles of complementarity and non-retroactivity. In 2014, CICC argued that: 'The [ICC] is centered on the notion of complementarity — the ICC will not and cannot be involved in cases that Indonesian courts are willing and able to take up'.[145] One interviewee emphasised that 'sovereignty' means 'not only privilege and control in our territory but also responsibility… internally to the population of the state' – as well as to the 'international community'.[146] In a 2012 seminar, 'credible local actor' Justice Akil Mochtar, as Deputy Chairman of the Constitutional Court, stressed that ratification would 'complement the national judicial system'.[147] Indeed, one reason for pressing for ratification is that it could provide an 'entry point' ('*pintu masuk*')[148] to develop Indonesia's international crimes laws. These priorities include accelerating the reform of Indonesia's Law 26/2000, Military Code, Criminal Code and Criminal Procedure Code to help to 'fill the gaps' in this legislation.[149] This potential is particularly important since civil society advocates are aware that ratifying the Rome Statute will not provide retrospective jurisdiction over past crimes.[150]

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[143] Interview I11.
[144] Coalition for the International Criminal Court (CICC), 'Global Coalition Calls on Indonesia to Join the International Criminal Court' (9 July 2012) <http://archive.iccnow.org/documents/PR_for_Indonesia_July_2012_Final.pdf>, 2.
[145] CICC, 'Jokowi: Act on Promises to Join ICC' (3 December 2014) <http://archive.iccnow.org/documents/CICCPR_CGJ_Indonesia_Dec2014_ENG.pdf>.
[146] Interview I11.
[147] ICSCICC, 'Progress Report: Indonesia Efforts to Ratify the 1998 Rome Statute of the International Criminal Court' (November 2012) <http://advokasi.elsam.or.id/assets/2015/09/201211_Progress-Report_Indonesia-effort-to-ratify-1998-Rome-Statute.pdf> (Progress Report), 7.
[148] Interview I10: '*paling penting dengan ratifikasi ICC kami punya pintu masuk untuk reformasi system*' [the most important aspect of ratifying the ICC is that we will have an entry point to reform the system].
[149] '*mengisi kekurangan itu*', Hukum Online *'Pemerintah Masih Takut Meratifikasi Statuta Roma* [Government Still Scared to Ratify the Rome Statute]', *Hukum Online* (17 July 2013) <http://www.hukumonline.com/berita/baca/lt51e6c2ca4777c/pemerintah-masih-takut-meratifikasi-statuta-roma>; see Koalisi Masyarakat Sipil untuk Mahkamah Pidana Internasional (i.e., ICSCICC), *'Draft Naskah Akademis dan Rancangan Undang-Undang tentang Pengesahan* [Draft Academic Manuscript and Draft Law on the Ratification of the] Rome Statute of the International Criminal Court 1998' (2008) <http://advokasi.elsam.or.id/assets/2015/09/2008_Naskah-Akademik_RUU-ratifikasi-statuta-roma_ICC.pdf> (Naskah Akademis).
[150] There is interest in an argument that enforced disappearances might be considered a continuing crime that still attracts ICC jurisdiction post-ratification – Interview I2, see Huikuri (n 97), 81.

NGOs have also invoked the historically important norm of protecting the military. For example, civil society suggested that the Rome Statute might support the army's peacekeeping activities abroad.[151] Complying with international criminal law, and supporting its enforcement, could 'protect the nation because there is a big consequence if you are not implementing the law' – including potentially barriers to purchasing military equipment.[152] Beyond the ICC debate, one international humanitarian and criminal law trainer has explained to the army that since Law No. 34 of 2004, *Concerning the National Army of Indonesia* specifies 'obeying the law' as a measure of professionalism,[153] he is 'just helping [them] to be professional. And they understand it is not my idea, or idea from *bule* [foreigners]. This is from Indonesian law, from the TNI law'.[154]

Finally, drawing on a strategy executed by Komnas Perempuan, Indonesia's National Commission on Violence Against Women,[155] ELSAM and an NGO network, Coalition for Justice and Truth Seeking (KKPK), have attempted to reframe the debate about past 'human rights' violations as a discussion about existing domestic legal obligations and the social contract of the Indonesian Constitution.[156] Thus, in July 2015 a group of Indonesian civil society actors issued a joint declaration drawing on the Constitution, Laws No. 39 of 1999 (on human rights) and 26/2000, as well as community (including victims') experiences, to argue that the government's reconciliation initiatives for 'past human rights abuses' was 'not in line with the responsibility to actualize the justice for the … victims'.[157] An individual formerly associated with the government stressed that Pancasila's five key principles support the idea of state responsibility and respect for the law.[158] Others reference *Reformasi*-era People's Consultative Assembly (MPR) resolutions

[151] Progress Report (n 147), 9.
[152] Interview I5.
[153] Ibid. Paragraph D of the preamble refers to the principles of human rights provisions in national law and Indonesia's obligations under international law treaties ('*hak asasi manusia ketentuan hukum nasional, dan ketentuan hukum internasional yang sudah diratifikasi*').
[154] Interview I5.
[155] The director of KKPK is a former Komnas Perempuan commissioner.
[156] E.g., Progress Report (n 147), 8; Lintang Setianti, '*Konstitusionalisme Penyelesaian Pelanggaran HAM Masa Lalu: Jalan Indonesia Tidak Tunggal* [The Constitutionalism of Resolving Past Human Rights Violations: There is Not a Single Way]' (21 August 2015) <http://elsam.or.id/2015/08/konstitusionalisme-penyelesaian-pelanggaran-ham-masa-lalu-jalan-indonesia-tidak-tunggal/?utm_source=ELSAM+NETWORK&utm_campaign=c6429ee7ae-ELSAM_News_Agustus_20159_1_2015&utm_medium=email&utm_term=0_8452388d01-c6429ee7ae-107561477>.
[157] H S Dillon et al, 'Civil Society Declaration: Demand The Real Justice For Victims of Human Rights Violations in Indonesia' (9 July 2015) <http://www.kontras.org/eng/index.php?hal=siaran_pers&id=279>.
[158] Interview I11.

that, for instance, recommended the establishment of a national truth and reconciliation commission.[159]

Thus some actors use language so as to 'always try to adapt to the situation in Indonesia. So we mention sometimes the "gross violations of human rights" as mentioned in the law number 26 of 2000 as well as in the law of human rights of [39 of] 1999, … [we are] flexible according to the situation.'[160] For example, if the political environment is such that amending Law 26/2000 might actually erode Komnas-HAM's authority, it might be 'better … to insist [on] Rome Statute ratification', since 'the risk is that they're going to say no' compared to possibly negotiating a domestic instrument that is 'even worse'.[161]

3.3.3.Critical Engagement

Some NGOs have adjusted their advocacy methods to build 'local credibility'[162] by collaborating with authorities. A strategy of discourse has included helping to translate the Rome Statute into Bahasa Indonesia,[163] drafting a Rome Statute accession bill and implementation study,[164] responding to misperceptions about the ICC (especially regarding complementarity and its non-retroactivity), capacity building seminars and discussions with parliamentarians.[165] One organisation decided to continue public advocacy and protests about historic crimes, but also foster dialogue through 'critical engagement' with the government and police. This recognised that 'we cannot just … make the press release or just protest … we have to meet them'. [166]

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[159] See Indria Fernida, *Calling for truth about mass killings of 1965/6: Civil Society Initiatives in revealing the truth of mass killings of 1965/6 under the transitional justice framework in Indonesia* (University of Oslo, 2014) <http://www.jus.uio.no/smr/english/about/programmes/indonesia/docs/thesis-indria-fernida.pdf>, 22; Dillon (n 157), regarding TAP/MPR/V/2000.
[160] Interview I7.
[161] Interview I6.
[162] See Amitav Acharya, 'How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism' (2004) 58(2) *International Organization* 239-275, 251.
[163] Interview I10.
[164] Naskah Akademis (n 149).
[165] E.g., CICC, 'Seminar advances ICC prospects for Malaysia, Indonesia' (3 September 2015) <https://ciccglobaljustice.wordpress.com/2015/09/03/seminar-advances-icc-prospects-for-malaysia-indonesia/>; see CICC, '2013 Status of the Rome Statute Around the World' (2013) <http://archive.iccnow.org/documents/RomeStatuteUpdate_2013_web.pdf>, 50.
[166] Interview I9, see also Interview I10.

However, local NGOs who engage government institutions have sometimes felt these closer ties adversely affected their legitimacy with other NGOs.[167] Further, when NGOs discuss international criminal justice with survivor groups and the authorities, their messages can conflict. As one NGO representative recounted, he could be asked by security forces '"What about the case that happened in the past? Will we be tried?" And then when we talk with them we say "No, no, no…" But when we talk to victims [we say]: "Yes! They can be prosecuted because disappearances is [a] continuing crime"'.[168] Thus, NGO credibility is not always fostered through increased collaboration. Although they are creative and derive from local initiative, the strategies discussed in this section all seek to reframe the concept of international criminal justice in light of local priorities, without radically reconstructing or *adapting* these norms or the targets of their advocacy.

3.4. Local Adaptation

Despite these civil society initiatives, not even an official apology for past violence has been forthcoming.[169] One interviewee explained that while President Yudhoyono

> did a few things, established mechanisms and made promises … When we had to see or assess what real progress has been made, there was none. So in that context … we agreed that … we cannot wait anymore for the government to do something … we should take leadership as citizens, as civil society.[170]

At the same time, local NGOs have found it challenging to secure international funding for international criminal justice work.[171] An NGO representative explained that this 'is influencing how [NGOs] … develop the[ir] strategy[ies] to settle the human rights abuses'.[172]

3.4.1.Community-Developed Projects and Other Priorities

Activists have identified a need to engage with other stakeholders beside state or security actors. It seems that Munir Said Thalib (Munir) – who was later murdered[173] – established

[167] Interview I9, 'it's very challenging because on the other way, some people who don't really understand what we were thinking they're "oh" like, … "police and [this NGO] want to [be] working together with the police" and [so] they [are] thinking that we will reduce our criticism'.
[168] Interview I2.
[169] Antara News, 'State not to offer apology to former communist party: President', *Antara News* (28 June 2016) <http://www.antaranews.com/en/news/105432/state-not-to-offer-apology-to-former-communist-party-president>.
[170] Interview I14; see also Hadiprayitno (n 20), 374.
[171] Fernida (n 159), 63.
[172] Interview I9.

the NGO KontraS partly with the model of Argentina's Mothers of the Plaza de Mayo in mind. He and others recognised the symbolic power and stamina of the 'victim' as a political actor.[174] But beyond victims' groups, NGOs have worked to increase the knowledge and interest of the public in responding to violence. One NGO representative explained: 'There has to be a demand! If there is no demand it's just the fifty, or … even less … [activists] … who continue to say the same thing over and over again because there's nothing more to be said'. She and others advocating for justice realised:

> we couldn't be so focused … on a very legalistic … articulation of the problem that this is a crime because of this and it violates, you know, Article this of covenant or convention that… That kind of approach … was still important and necessary but … what we need to do is to … build a new constituency within the general public.[175]

This shift in target audience, especially toward the 'young generation',[176] required new language.[177] However, this could not just be a 'vernacularisation' aimed at lawmakers internalising the idea of prosecuting international crimes. That norm itself needed to be reimagined.

One organisation held focus groups and organised events where 'we tr[ied] to invite people who were not the usual suspects'. This helped them to realise 'how huge the gaps are' between existing advocacy strategies based around legal arguments and public interest and understanding.[178] They recognised that in the years following *Reformasi*, 'human rights is so stigmatized in mainstream Indonesia … as being a Western concept', or even 'a Western conspiracy against the sovereignty' of Indonesia and 'against our culture. So … because of that, we needed to find … some other language…'[179] It also seemed that 'justice' could be achieved through 'a combination of … measures. Not just legal but also social and … economic and cultural'. These issues, including the stigma faced by survivors, would not necessarily be resolved 'even if we did have a court'.[180] Moreover, 'creating demand' meant 'meet[ing the public] half way … particularly for Indonesia where … one of probably the most powerful modalit[ies] of public discourse is through the arts'. Traditional media including diplomatic briefings, press releases and opinion pieces have

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[173] See section 4.2.3.
[174] Interview I2.
[175] Interview I14, emphasis added.
[176] Interview I14.
[177] An NGO representative explained that civil society organisations 'are quite good at translating' [international law terminology] into the language that [is] really understandable for the common people', Interview I1.
[178] Interview I14.
[179] Interview I14.
[180] Interview I14; and on economic and social demands, Interviews I2, I8.

remained an important tool, but 'film, social media, an alternative way to reach out to the young[st]ers' are also being deployed,[181] in particular following the success of Joshua Oppenheimer's films *The Act of Killing* (2012) and *The Look of Silence* (2014).[182]

National NGOs have also deepened their engagement at the provincial and community level. This has included controversial attempts to adapt religious or other traditional reconciliation practices, including Islamic '*islah'* and '*diyat'* processes and '*peusijuek'* in Aceh.[183] *Adat* laws have formed the foundation for reconciliation ceremonies in the absence of prosecutions for violence in Kei, Maluku, in 1999,[184] while a traditional practice of *nahe biti bo'ot* (spreading the large mat) and *lisan* procedures were reconstructed in Timor-Leste to respond to pre-independence violence.[185] Several local NGOs have worked toward resolving the 1965 violence 'from below',[186] recognising that 'reconciliations at the … grassroots levels are really happening',[187] especially for the 1965 violence. Some provide social assistance for victims,[188] while others provide legal aid to respond to broader human rights violations. In Palu, NGO workers utilised community connections to engage with the municipal government and local religious authorities, organising commemorations and even an apology by the mayor,[189] which Komnas-HAM hoped might provide an 'example' for the national government.[190] These initiatives are diverse and often contentious, but recognise or adapt approaches to international crimes from a variety of sources.

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[181] Ibid; e.g. regarding 1965, Riezky Ramadani, 'Public Discussion: 1965 History in the media' *Arkipel* (27 September 2015) <http://arkipel.org/public-discussion-1965-history-in-the-media/>.
[182] Wahyuningroem (n 124).
[183] Kimura Ehito, 'The Struggle for Justice and Reconciliation in Post-Suharto Indonesia' (2015) 4(1) *Southeast Asian Studies* 73-93.
[184] Craig Thorburn, 'Adat, Conflict and Reconciliation: The Kei Islands, Southeast Maluku', in Tim Lindsey (ed), *Indonesia: Law and Society* (The Federation Press, 2008) 115-143, 140.
[185] Luiz Vieira, 'The CAVR and the 2006 Displacement Crisis in Timor-Leste: Reflections on Truth-Telling, Dialogue, and Durable Solutions' (ICTJ, Brookings-LSE, July 2012) <https://www.ictj.org/sites/default/files/ICTJ-Brookings-Displacement-Truth-Telling-Timor-Leste-CaseStudy-2012-English.pdf>, 8, see also Elizabeth Drexler, 'The Failure of International Justice in East Timor and Indonesia' in Alexander Laban Hinton (ed), *Transitional Justice: Global Mechanisms and Local Realities after Genocide and Mass Violence* (Rutgers University Press, 2010) 49-66.
[186] For e.g. see Fernida (n 159); Wahyuningroem (n 50).
[187] Interview I1.
[188] E.g., KontraS assists with securing drivers' licenses.
[189] Jeremy Kutner, 'A City Turns to Face Indonesia's Murderous Past', *The New York Times* (12 July 2015) <http://www.nytimes.com/2015/07/13/world/asia/a-city-turns-to-face-indonesias-murderous-past.html?hp&action=click&pgtype=Homepage&module=photo-spot-region&region=top-news&WT.nav=top-news&_r=2>; Wahyuningroem (n 50).
[190] The Jakarta Post, 'Jokowi urged to follow regional example in addressing issues related to 1965', *The Jakarta Post* (30 June 2016) <http://www.thejakartapost.com/news/2016/06/30/jokowi-urged-follow-regional-example-addressing-issues-related-1965.html>.

3.4.2.Alternative Spaces for Public Dialogue

These attempts to move beyond translating international norms for local contexts are not entirely 'bottom-up', but draw on multiple influences. Many civil society and government actors have been able to study abroad, or engage with diaspora groups and large international NGOs, as well as sub-national provincial communities. For example, the National University of Singapore has developed an online forum for individuals who experienced harms during Suharto's New Order regime to share their stories.[191] In 2012 and 2013, partly inspired by International Centre for Transitional Justice initiatives, KKPK organised a 'Year of Truth',[192] which included public survivor testimony in Palu, Solo, Kupang, Takengon and Jayapura, with additional thematic hearings in Jakarta.[193] Like Cambodia's Women's Hearings,[194] these aimed to provide 'a space for victim survivors to tell their story'.[195] The International People's Tribunal for 1965 (IPT) held in The Hague in 2015 drew on the 'positive response from the Indonesian society and media' of the Tokyo Women's Tribunal.[196]

Yet these strategies were not applied 'top-down', either. KKPK's report from the Year of Truth was called *Menemukan Kembali Indonesia* (Rediscover Indonesia).[197] As one interviewee pointed out, 'impunity' remains a key point, but 'the main message is about … the search for Indonesia'.[198] The hearings were supported by social media campaigns[199] and the report uses the language of 'violence' rather than technical legal language and while its recommendations include familiar affirmations of the importance of justice, they also include suggestions associated with economic, social and cultural rights. The IPT was held in The Hague with international judges,[200] but the prosecutors were predominantly

[191] See 'Learning 65' (2016) <http://www.learning65.com/>.
[192] *Tahun Kebenaran*.
[193] See Annie Pohlman, 'A Year of Truth and the Possibilities for Reconciliation in Indonesia' (2016) 10(1) *Genocide Studies and Prevention: An International Journal* 60-78, 74; Wahyuningroem (n 50).
[194] Section 3.4.2, chapter 4.
[195] Interview I14.
[196] Interview I1; see chapter 3.
[197] KKPK, 'Menemukan Kembali Indonesia' (2014) <http://elsam.or.id/2015/01/buku-i-menemukan-kembali-indonesia/>.
[198] Interview I14.
[199] Pohlman (n 193).
[200] Apparently Indonesian judges were sought but none agreed to participate given the sensitive political nature of the Tribunal.

Indonesian and it was organised and attended by diaspora, students and activists of varied nationalities.[201] These initiatives were largely targeted toward an Indonesian audience.[202]

Legal reform and prosecutions have always remained important goals. As one interviewee put it, 'the responsibility is still [with] the government of Indonesia'.[203] These strategies simply recognise the prevailing political realities, including that legal mechanisms are either unlikely to be developed or have already proven disappointing. They may even, as Wahyuningroem argues, aim to 'seduce' the government into taking steps that ultimately lead to justice, since for many '[w]hile these "alternatives" are useful, they are not good enough if they do not lead to the state acknowledging the truth and taking responsibility'.[204] In a sense, these adapted initiatives may, like ratifying the Rome Statute, represent attempts to create a 'pintu masuk' toward justice. For example, organisers of the IPT hoped it would 'open up space for public debate'.[205] Indeed, it may have influenced Indonesian officials to present a government proposal for an Indonesian symposium as being 'part of the Indonesian way of balancing this human rights discourse'.[206] However, since the symposium, officials and former members of the military have contributed to an increasingly public anti-communist rhetoric and Jokowi has indicated that an apology for the 1965 events will not be forthcoming.[207] Thus, the process of adapting the mechanisms for responding to international crimes continues.

3.5. Summary: Local Initiative and Adaptation

The norm of international criminal justice has not been accepted in Indonesia in any linear sense, while perspectives surrounding it are plural, dynamic and not easily located geographically as 'local' or 'international'. Through various mediums including protests, public truth-telling proceedings, media, film and collaborating with authorities, Indonesian and international actors have deployed diverse arguments to support their

[201] Author's personal observations, November 2015.
[202] Pohlman (n 193), 73-74.
[203] Interview I9.
[204] Wahyuningroem (n 124).
[205] Nursyahbani Katjasungkana, *1965 Tribunal Hearings: Welcome statement by Nursyahbani Katjasungkana, general coordinator Foundation IPT 1965* (17 November 2015) IPT 1965 <http://1965tribunal.org/1965-tribunal-hearings-welcome-statement-by-nursyahbani-katjasungkana-general-coordinator-foundation-ipt-1965/>.
[206] Wahyuningroem (n 124); Ayomi Amindoni, 'Indonesia rejects IPT 1965 recommendations', *The Jakarta Post* (20 July 2016) <http://www.thejakartapost.com/news/2016/07/20/indonesia-rejects-ipt-1965-recommendations.html>.
[207] Wahyuningroem (n 124).

different and changing views about prosecuting international crimes. One approach has been to reframe international norms of human rights and international criminal justice for local use with reference to complementarity, domestic legislation, national unity, and reconciliation, while also attempting to gain local credibility through building relationships with authorities. Others have sought to reconstruct ideas about international criminal justice, including through community forums. History suggests that government representatives, international actors and Indonesia's vibrant civil society, wherever located, will continue to adapt to dynamic contexts.

4. Mechanisms for Prosecuting International Crimes in Indonesia

This section addresses the third question of this thesis by examining the options for prosecuting international crimes in Indonesia. It considers how these laws and institutions may represent *amplifications* of reconstructed norms, so that 'local influences remain highly visible'.[208]

4.1. International Mechanisms

Indonesia has not yet ratified the Rome Statute, though it could become subject to the ICC's jurisdiction via a declaration or Security Council referral. Individuals might also be prosecuted by internationalised tribunals or under the universal jurisdiction legislation of other states. The potential for such international trials is unknown.[209] However, Indonesia has also prosecuted international crimes under domestic legislation and there is legal scope for future prosecutions.

4.2. Domestic Legislation

There are several potential avenues for prosecuting international crimes in Indonesia. First are the provisions in international treaties or conventions that Indonesia has ratified.[210] However, Indonesia has relied on national legislation to implement its treaty

[208]Acharya (n 162), 251.
[209] And is not addressed here, see section 4, chapter 1.
[210] Article 7(2) of *Law No. 39 of 1999 Concerning Human Rights* suggests it may incorporate 'international law concerning human rights'; and see Law 34/2004, section 2(d), though note Simon Butt, 'The Position of International Law Within the Indonesian Legal System' (2014) 28(1) *Emory International Law Review* 1-28 regarding the uncertainty over whether Indonesia is truly a monist or a dualist system.

obligations[211] and has ratified relatively few treaties relating to international crimes. Second, Law 26/2000 provides for special tribunals to prosecute crimes against humanity and genocide (see 4.2.1-4.2.2). Third, the civilian Criminal Code, *Kitab Undang-Undang Hukum Pidana* (KUHP, Code) includes 'ordinary' crimes that might be used to prosecute similar conduct and may be updated to include international crimes (4.2.3). Fourth, Indonesia has a Military Disciplinary Code (KUHDT)[212] and Military Criminal Code (KUHPM, Military Code).[213] Law No. 31 of 1997 provides that the general courts should prosecute offences included in both the civilian and military Codes, unless the Chair of the Supreme Court decides otherwise.[214] Military tribunals have tried soldiers for conduct potentially involving international crimes, though there have been concerns about low sentences and a failure to consider high-level perpetrators, and prosecutions are typically for administrative crimes such as incorrectly obeying orders.[215] Attempts to amend these laws have stalled. This section focuses on Law 26/2000 and the Criminal Code. These are the only potential avenues for prosecuting international crimes as such within Indonesia's domestic legal system.

4.2.1.Law No. 26 of 2000

Law 26/2000 provides human rights courts with jurisdiction over crimes against humanity and genocide committed in Indonesia or by Indonesian citizens, including abroad (Article 5). Concerns about international views, and civil society work on the draft law, led to the final form of Law 26/2000 being closely modelled on the Rome Statute.[216] As discussed in chapter 1, the Rome Statute represents the primary instrument promoted by the international criminal justice norm, so that this similarity may appear to represent Indonesia's acceptance of this norm. However, there are differences.

First, the draft text for what became Law 26/2000 did not initially include an avenue for retrospective punishment. However, partly as a result of concerns about international

[211] E.g., *Law No. 5 of 1992 concerning Cultural Objects*; *Law No. 9 of 2008 on the use of Chemical Materials and the Prohibition of Chemical Materials as Chemical Weapons*.
[212] *Kitab Undang-Undang Hukum Disiplin Tentara.*
[213] *Kitab Undang-Undang Hukum Pidana Militer*
[214] *Law No. 31 of 1997 Concerning the Trial of the Military*.
[215] Amnesty International, 'Indonesia: Military tribunals being used to shield human rights violators' (19 June 2013) <https://www.amnesty.org/en/latest/news/2013/06/indonesia-kopassus-trial/>.
[216] See Suh (n 44), 126-139.

(particularly UN) perceptions,[217] the Law was altered to provide for two potential international crimes mechanisms. The first was the establishment of 'Human Rights Courts' in Central Jakarta, Surabaya, Medan and Makassar,[218] each of which would be a 'special court within the context of a Court of General Jurisdiction'[219] with prospective jurisdiction.

Article 43(1) then provides for 'ad hoc Human Rights Courts' concerning '[g]ross violations of human rights occurring prior to the coming into the force of this Act'.[220] However, Article 28I(1) of Indonesia's Constitution upholds 'the right not to be tried under a law with retrospective effect' as right that 'cannot be limited under any circumstances', and such fair trial principles are arguably promoted by the norm of international criminal justice.[221] Article 43(1) was a 'compromise'[222] that was inserted to allow crimes committed during the East Timor violence and prior to and during the *Reformasi* period to be prosecuted.[223]

The crimes in Law 26/2000 are termed 'gross violations of human rights', rather than 'international crimes'.[224] Even though Indonesia had ratified the Geneva Conventions (but not its Additional Protocols),[225] war crimes were excluded from the human rights courts' criminal jurisdiction.[226] Moreover, Article 9 concerning crimes against humanity does not

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[217] Section 3.1.
[218] Article 45, Law 26/2000. Only the Makassar Human Rights Court on the Abepura Case was formed.
[219] Articles 2-3, ibid.
[220] Article 43, ibid, makes no reference to Article 15(1) regarding restrospective laws in the International Covenant on Civil and Political Rights, which was not ratified by Indonesia until 2006.
[221] See e.g., Article 21(3) Rome Statute; although the principle of 'legality' in international criminal law has particular requirements of notice, foreseeability and accessibility that may allow the prosecution of crimes not addressed by domestic legislation at the relevant time, as found in *Prosecutor v Albio Jose Osorio Soares,* Case No. 01/PID.HAM/AD.Hoc/2002/ph.JKT.PST, Ad Hoc Tribunal for East Timor, 7 August 2002 (*Soares*); e.g., *Prosecutor v Kaing Guek Eav (Duch)*, Case No. 001/18-07-2007-ECCC/SC, Appeal Judgement, 3 February 2012, paras 89-91; see also Clarke (n 83).
[222] Herbert (n 130), 467.
[223] However, the Constitutional Court found that *Law No. 15 of 2003, the Anti Terrorism Law*, could not be applied retroactively to Kadir, the defendant in the 'Bali Bombing' case, see ibid, 459; Clarke (n 83) and section 4.2.3.
[224] Article 7, Law 26/2000.
[225] See *Law No. 59 of 1958 Concerning the Ratification by the Republic of Indonesia of all the Geneva Conventions of 12 August 1949* (approving ratification). On the implementation of Indonesia's obligations under the Geneva Conventions, see GPH Haryomataram, 'Internal Disturbances and Tensions: Forgotten Conflicts' in Timothy LH McCormack, Michael Tilbury and Gillian D Triggs (eds), *A Century of War and Peace: Asia-Pacific Perspectives on the Centenary of the 1899 Hague Peace Conference* (Kluwer Law International, 2001) 155-168.
[226] See section 5.3; Suzannah Linton, 'Accounting for Atrocities in Indonesia' (2006) 11 *Singapore Year Book of International Law* 199-241, 211.

include 'other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health', which has been an important provision for extending the reach of international criminal law at the ICTY and ICTR.[227] A separate crime of torture was also not included. These omissions were 'no accident'[228] since the 'missing' crimes are among the most commonly alleged in Indonesia and war crimes may have been applied to military perpetrators of violence in East Timor.[229]

The chapeau of Article 9 on crimes against humanity[230] could be understood in Indonesian as requiring an attack to be 'directly targeted against the civilian population'. This might suggest the accused must personally participate in the particular attack (which could restrict the operation of the provision to relatively lower-level perpetrators), or require a 'direct attack' against the civilian population such as would arise in armed conflict.[231] Otherwise, Law 26/2000 closely replicates the Rome Statute's definitions of crimes against humanity and genocide, although questions have been raised about the interpretation of 'religious group' in Indonesia (*kelompok agama*), since national law provides that there are only five religions.[232] Still, an explanation attached to the legislation confirms that these crimes are in accordance with the Rome Statute.[233]

The inclusion of the death penalty in Articles 36 and 37 of Law 26/2000 represented a controversial divergence from the Rome Statute,[234] though lower penalties are provided for some crimes.[235] Article 34 affords victims and witnesses limited protection from

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[227] It is unclear that 'any' civilian population could be targeted, however. Linton points out that '*penganiayaan'* in Article 9(h) was interpreted as meaning 'assault' in the East Timor cases, requiring physical violence, as used in the Criminal Code; Linton, ibid, 215. In *Adam R Damiri*, Case No. 09/PID.HAM/AD.HOC/2002/PH.JKT/PST, Ad Hoc Tribunal for East Timor, Judgment, 5 August 2003, the Panels noted: 'Considering that the meaning of abuse in the Law No. 26 of the year 2000, is the translation of the word persecution according to Statuta Rome'.

[228] Linton, ibid, 211.

[229] The Ad Hoc Human Rights Court for East Timor found that an internal armed conflict had occurred in East Timor, albeit in determining that widespread, systematic attacks had occurred, see *Soares* (n 221); *Prosecutor v Tono Suratman*, Case No. 10/Pid. HAM/Ad. Hoc/ 2002/PN. Jkt. Pst, Ad Hoc Tribunal for East Timor, Judgment, 13 May 2003.

[230] '*serangan yang meluas atau sistematik yang diketahuinya bahwa serangan tersebut ditujukan secara langsung terhadap penduduk sipil*'.

[231] Linton (n 226), 213.

[232] Interview I13.

[233] 'Article by Article' explanation for Article 7, Law 26/2000.

[234] Amnesty International, 'Amnesty International's Comments on the Law on Human Rights Courts (Law No. 26/2000)' (9 February 2001) <https://www.amnesty.org/en/documents/asa21/005/2001/en/>.

[235] E.g., Article 9(c) enslavement; (f) torture; (g) rape and other forms of sexual violence; (h) sterilisation and other forms of sexual assault; and (i) persecution (Articles 38-40).

threats and harassment.[236] Article 35 also specifies that victims are eligible for compensation, restitution and rehabilitation if there is a conviction.[237] The wording differs significantly from Article 75 of the Rome Statute (which addresses reparations) and, consistent with the usual practice in Indonesia's court system, the Law does not provide for victims to participate in proceedings (other than as witnesses) as at the ICC.[238] This suggests that the victims provision was not simply adopted from the international norm. Indeed, because no convictions have been upheld, the attempt to secure reparations for the Tanjung Priok case, for example, resulted only in a controversial '*islah*' (private Islamic) procedure that served to divide victims.[239]

The Law is obscure as to modes of liability, although Article 41 confirms that for attempting, plotting, or assisting with the perpetration of the two relevant crimes, the same sentences will apply as for direct perpetration.[240] Under Article 42 superiors are accountable for their subordinates' actions, although it is unclear whether this extends to crimes that the subordinates 'were committing or *about to commit*', as in the Rome Statute, or just crimes being committed or recently committed.[241] Moreover, the use of '*Komandan militer*' might be interpreted as only extending to lower level commanders – at the field command level or several levels higher – rather than covering Generals or higher level policy makers.[242]

Thus, Indonesia does have a basic legal framework for prosecuting crimes against humanity and genocide via Law 26/2000, although the law is implemented drawing on the narrower rules of evidence included in Indonesia's Criminal Procedure Code (KUHAP).[243] In reality, despite the potential to develop important international criminal law jurisprudence concerning command responsibility and the interaction of official armed

[236] See also *Government Regulation No. 2 of 2002*; Linton (n 226), 216; and limited protections, e.g. Article 153(3), in the *Law No. 8 of 1981, Code of Criminal Procedure* on victim and witness security and protection.
[237] See also *Government Regulation No. 3 of 2002*; Articles 98-100, *Code of Criminal Procedure.*
[238] For a discussion of the role of victims in Indonesia's general criminal courts, see Harkristuti Harkrisnowo, 'Victims: The Forgotten Stakeholders of the Indonesian Criminal Justice System' in Wing Cheong Chan (ed), *Support for victims of crime in Asia* (Routledge, 2008) 262-288.
[239] Kimura (n 183).
[240] Accused in the Law 26/2000 trials were typically indicted under Article 42, command responsibility, as well as the applicable Article 36-40, which includes the sentences for perpetrating each of the Law 26/2000 crimes, rather than with reference to the Criminal Code.
[241] Law 26/2000 uses '*sedang melakukan atau baru saja melakukan*' which suggests only crimes in the process of being committed or just recently committed (in the past) would be covered: Linton (n 226), 216.
[242] E.g. Hikmahanto Juwana, 'The Concept of Superior Responsibility under International Law as Applied in Indonesia' (2005) 1 *Asia-Pacific Yearbook of International Humanitarian Law* 179-195.
[243] See Article 10, Law 26/2000; *Damiri* (n 227).

forces and militias, the processes of the Law 26/2000 trials were criticised and none of the few convictions, with short sentences, were upheld on appeal.[244] Only two suspects were indicted by the only permanent regional court established, the Makassar Human Rights Court, in relation to the Abepura, Papua, case – and both were acquitted. The Law 26/2000 Courts generally made cursory use of international criminal jurisprudence,[245] mostly in relation to command responsibility, a novel mode of liability in Indonesia at the time.[246] The Rome Statute was referenced to justify the award of sentences *below* the minimum set by Law 26/2000.[247] International criminal law was also drawn upon to support the retroactive application of the Law.[248] As mentioned above, attempts to amend Law 26/2000 have not progressed, partly due to fears that this process might dilute Komnas-HAM's existing powers.[249]

4.2.2.Criminal Code and Amnesties

As in most countries, Indonesia's Criminal Code[250] includes crimes such as murder that could be used to prosecute the underlying conduct involved in committing international crimes.[251] The Code extends jurisdiction over crimes committed by civilians (including police) in Indonesia or on an Indonesian ship or plane (Articles 2-3) and in limited circumstances outside Indonesia, including for conduct by Indonesian nationals (Articles 4-5). However, the Criminal Code and the Criminal Procedures, which largely reflect

[244] Derailed Report (n 72).
[245] E.g., *Damiri* (n 227), the same wording was adopted in *Prosecutor v Eurico Guterres*, Case No. 04/PID.HAM/AD.HOC/2002/PH.JKT.PST, Ad Hoc Tribunal for East Timor, Judgment, 27 November 2002.
[246] E.g., *Prosecutor v Endar Priyanto*, Case No. 05/Pid.Ham/AD.Hoc/2002/PN.Jkt.Pst., Ad Hoc Tribunal for East Timor, Judgment, 29 November 2002; Though see, for e.g., *Prosecutor v Herman Sedyono et al*, Case No. 01/HAM/TIM-TIM/02/2002, Ad Hoc Tribunal for East Timor, Judgment, 15 August 2002, a reference to *Prosecutor v Akayesu*, Case No. ICTR-96, Chamber I, Judgement, 2 September 1998 in *Prosecutor v Timbul Silaen,* Case No. 02/PID.HAM/AD.Hoc/2002/PN.JKT.PST, Ad Hoc Tribunal for East Timor, Judgment, 15 August 2002.
[247] E.g. in *Sedyono*, ibid, where the Panel argued that 'even thought (sic) the Roman Statute itself had not been ratified by the government, it would be appropriate to ponder upon the … fact that the Roman statute does not set any minimum standard of sentencing' and that 'international judiciary practices that are accepted as the international common law do not recognize the existence of minimum standard of sentencing'.
[248] *Silaen* (n 246): the Panel argued that the *nullum crimen sine lege* 'principle applies to crimes committed after ICC took effect and not to crimes before ICC took effect. Referring to prior trials, from Nuremberg to ICTR and ICTY, deviation of [sic] the non-retroactive principle was taken for the sake of achieving justice for various crimes that were committed in the past'.
[249] Interview I6.
[250] *Kitab Undang-Undang Hukum Pidana [Penal Code of Indonesia]*, 19 May 1999.
[251] See annex 3; Herbert (n 130), 459.

colonial-era laws, are badly out of date and draft new Codes have been under consideration since the *Reformasi* period.

The most recent, 5 June 2015, version of the draft Criminal Code[252] clarifies and extends jurisdiction ('*Asas Universal*') outside the territory of Indonesia for crimes committed under international law or treaties that are included as crimes in Indonesian law (Article 6). This could be significant since the draft Code includes several international crimes, including a separate crime of torture in draft Article 669, reflecting Indonesia's obligations under the Convention Against Torture.[253] An international crimes section of the June 2015 draft is titled 'Serious Crimes Against Human Rights'.[254] This heading may be necessary to distinguish these international crimes from others in the remainder of the Code, in case including them in the same instrument might 'weaken the gravity' of these 'extraordinary' violations.[255] However, the reference to human rights 'could lead to the misperception that human rights violations consist only of genocide, crimes against humanity, war crimes and even command responsibility' (see below),[256] as has occurred with Law 26/2000.[257]

The Rome Statute's Article 7(2) definitions and Elements of Crimes are not included in the draft Code. This was also the case in Law 26/2000, but unlike that Law, the draft Code and its explanatory materials do not suggest that it be interpreted in accordance with the Rome Statute.[258] The draft Code includes the crimes of genocide (Article 400), crimes against humanity (401), 'crimes in wartime or armed conflict' (402),[259] and command responsibility (403), all punishable with sentences including the death penalty. The

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[252] As at 30 November 2016. Copies of the 2015 drafts are available at Aliansi Nasional Reformasi KUHP, 'R KUHP' (5 June 2015) <http://reformasikuhp.org/r-kuhp/>.
[253] See Supriyadi Widodo Eddyono, Wahyudi Djafar and Bernhard Ruben Fritz Sumigar, 'Indonesian Penal Code Reform: Challenges in Reforming Criminal System and Protecting Civil Liberties' (ICJR, November 2015) <http://icjr.or.id/data/wp-content/uploads/2016/03/Envisioning-Indonesian-Penal-Code-Reform.pdf>, 9-11. See also Article 668 prohibiting the use of coercion to obtain a confession.
[254] '*Tindak Pidana Terhadap Hak Asasi Manusia Yang Berat'.* Law 26 of 2000 refers to serious or gross violations of (rather than crimes against) human rights, '*pelanggaran hak asasi manusia yang berat'*. There were discussions about the section title during the drafting process, since some 'came with the opinion … that the violation of human rights is not only the violations mentioned in the Rome Statute'. Something similar to 'the violation of international law and international peace' was proposed at one stage, Interview I7.
[255] Eddyono, Djafar and Sumigar (n 253), 12.
[256] Fadillah Agus, 'Milestones, flaws in draft penal code', *The Jakarta Post* (27 March 2014) <http://www.thejakartapost.com/news/2014/03/27/milestones-flaws-draft-penal-code.html>.
[257] See section 3.2.3.
[258] See (n 233); Eddyono, Djafar and Sumigar (n 253), 13. E.g., Article 401(1)(h) still uses 'penganiayaan' for persecution, despite the possibility that this could be narrowly interpreted as requiring physical force, see (n 227).
[259] *Tindak Pidana dalam Masa Perang atau Konflik Bersenjata*.

wording of the draft provisions is slightly different to Law 26/2000, sometimes with the apparent intention of moving closer to the wording of the Rome Statute. For example, the crimes against humanity provision includes a subsection (k) concerning 'other inhumane acts'.[260]

Draft Article 402 indicates that, despite developing upon Law 26/2000 by incorporating war crimes, the draft Code is only intended to capture these crimes in an adapted manner. It applies to 'every person who during a war or armed conflict carries out gross violations against persons or property',[261] that is, apparently during an international or non-international armed conflict.[262] However, there is no provision covering the conduct included within Article 8(2)(b) of the Rome Statute, which includes a range of 'other serious violations of the laws and customs applicable in armed conflict'. Moreover, there is no mention of the other war crimes committed during a non-international armed conflict, including in Article 8(2)(c) and (e) of the Rome Statute, even though this is arguably the most relevant context for war crimes in Indonesia. This may not be surprising given that Indonesia has not ratified the Additional Protocols to the Geneva Conventions. Yet provisions covering Article 8(2)(b), (c) and (e) of the Rome Statute were included in a draft Code circulated until 2014,[263] though not in the 2015 draft.[264] Equivalent provisions may instead be included within the Military Code, thereby bringing these crimes within the jurisdiction of the military courts. However, it is unlikely that the Military Code will be amended to include these crimes in the near future.[265]

The limited scope of the superior responsibility provision of Law 26/2000 (Article 42) remains in Article 403 of the draft Code. Further, a chapeau has been introduced that

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[260] '*perbuatan lain tidak manusiawi yang mempunyai sifat sama dengan perbuatan untuk menimbulkan penderitaan mental maupun fisik yang berat*'.
[261] '*setiap orang yang pada masa perang atau konflik bersenjata melakukan pelanggaran berat terhadap orang atau harta kekayaan*'.
[262] Notwithstanding Article 405, which includes the exception for internal disturbances of Article 8(2)(d), (2)(f) and Article 1(2), Additional Protocol II, though this provision could provide the impression that the Code only applies to international armed conflicts, see Eddyono, Djafar and Sumigar (n 253), 15. Under the Rome Statute, the crimes in Article 8(2)(a) are only committed during an international armed conflict. On the debate as to whether violations in an internal armed conflict would be considered 'grave breaches', see Lindsay Moir, 'Grave Breaches and Internal Armed Conflicts' 7(4) (September 1, 2009) *Journal of International Criminal Justice* 763.
[263] Copy on file with author, Articles 397-399. The 2008 version may be viewed at Aliansi Nasional Reformasi KUHP, 'Reform' <https://kuhpreform.wordpress.com/resources/>.
[264] See (n 252).
[265] On the military law reform process, see Bhatara Ibnu Reza, 'Prevent new Military Discipline Law from leading to impunity', *The Jakarta Post* (6 October 2014) <http://www.thejakartapost.com/news/2014/10/06/prevent-new-military-discipline-law-leading-impunity.html>.

suggests that superior responsibility represents a separate *crime* 'punishable in the same way as Article 400' (on genocide),[266] rather than a mode of liability. The location of this section with the 'offences', rather than among the provisions on criminal liability, has attracted criticism.[267] It probably represents an attempt to delineate responsibility for international crimes from the remainder of the "ordinary" Code, but could create confusion.[268]

Both the existing and draft Codes include other relevant provisions for criminal responsibility[269] and a range of 'exclusion, mitigation and enhancement of punishment' provisions that cover similar ground to the Rome Statute.[270] The draft Code extends the defence of superior orders to those: under a legal obligation to obey orders; who believe in good faith that the command is legal/legitimate;[271] *or* (*atau*) – rather than 'and' as in Article 33 of the Rome Statute – where the order was not manifestly unlawful.[272] An individual involved in drafting discussions suggested this might have been a 'compromise'.[273] It is not clear whether this is accurate, or whether 'or' might here be interpreted inclusively, but the widening of the superior orders defence would be consistent with the views of those in favour of protecting security officials.

Article 406 of the draft ensures that the normal statutory limitation periods do not apply to the international crimes provisions, except for the section concerning command responsibility.[274] The potential for a Presidential amnesty under Article 14 of the Constitution, remains. This is consistent with the use of political amnesties in the past and continued discussion about awarding amnesties, including in relation to non-state fighters in the Aceh conflict.[275] Further, Article 20A(3) of the Constitution provides for

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[266] *'Dipidana yang sama sebagaimana dimaksud dalam Pasal 400'.*
[267] Agus (n 256).
[268] Eddyono, Djafar and Sumigar (n 253), 13.
[269] Articles 53-62, 160-161 (incitement to commit a punishable act), current Criminal Code. In the draft Code, see e.g. Articles 18-23. There is no provision addressing incitement in the draft, though such conduct might be covered by draft Article 22(d) and Articles 400(2) and 401(2) on making attempts (*percobaan*) and assisting with (*pembantuan*) the perpetration of genocide and crimes against humanity.
[270] E.g. Articles 44-51, current Criminal Code; Articles 32-47, draft Code.
[271] Article 404(1)(b) of the Draft Code: '*perintah itu diyakininya dengan itikad baik telah diberikan dengan sah*'. This is perhaps a slightly higher standard than Article 33(1)(b): 'person did not know that the order was unlawful'.
[272] '*perintah itu tidak secara jelas melawan hukum'*, Article 404.
[273] Interview I11.
[274] Though Indonesia has not ratified the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.
[275] Renée Jeffery, 'Amnesty and Accountability: The Price of Peace in Aceh, Indonesia' (2012) 6 *The International Journal of Transitional Justice* 60-82; Marguerite Afra Sapiie, 'House agrees to amnesty

parliamentary immunity, though Article 28J obliges 'every person' to 'respect the human rights of others'.[276] Thus there is some scope for senior leaders to avoid liability for international crimes under existing and draft legislation.

In relation to victims, unlike Law 26/2000,[277] Indonesia's Criminal Code does not directly refer to victim protection or participation, although compensation may be available via civil proceedings[278] and victims are addressed in Law No. 13 of 2006*, Concerning the Protection of the Witnesses and Victims* (administered by the Institute for the Protection of Witnesses and Victims, *Lembaga Perlindinguan Saksi dan Korban*, LPSK, under this 'LPSK law'). The LPSK law provides for various protections, rights to medical assistance including psycho-social rehabilitation, and (through a request to the Court by LPSK) compensation for victims of serious human rights violations. LPSK has been under-resourced,[279] but has provided assistance to victims in recent years.[280]

Finally, it is unclear how the proposed draft Code section on international crimes is intended to interact with the existing Law 26/2000. A former judge suggested that the amendments to KUHP would supersede Law 26/2000, because the aim was for 'codification' where 'there will be no other Code, outside the Code'.[281] Others have explained that the amendments aimed to remove colonial legacies and harmonise relevant national and international instruments.[282] The draft Code will not have retrospective effect, in contrast to the possibility for 'ad hoc' courts established under Law 26/2000. One official actor thought that the ability to establish such 'ad hoc' courts would be retained.[283] Should Indonesia ratify the Rome Statute and enact its provisions in domestic

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for surrendered Aceh rebels', *The Jakarta Post* (22 July 2016) <http://www.thejakartapost.com/news/2016/07/22/house-agrees-to-amnesty-for-surrendered-aceh-rebels.html>.

[276] See International Crisis Group (n 83), 16 as to the debate as to whether 28J might limit the prohibition on the retroactive application of law in Article 28I.

[277] Section 4.2.1.

[278] Including in combination with criminal proceedings, see Articles 98-100, *Code of Criminal Procedure*.

[279] Derailed Report (n 72), 65.

[280] See Lembaga Perlindungan Saksi dan Korban, '*LPSK Kerjasama Dengan Komnas-HAM Dalam Memenuhi Hak Korban Pelanggaran HAM Berat* [LPSK Collaboration With Komnas-HAM in Fulfilling the Rights of Victims of Serious Human Rights Violations] (11 August 2015) <http://www.lpsk.go.id/berita/berita_detail/2352#sthash.z8uqyjdU.dpuf>; Harkrisnowo (n 238).

[281] Interview I13.

[282] See Asian Human Rights Commission, 'Indonesia: New bill on the Indonesian Penal Code needs immediate review' (17 November 2015) <http://www.humanrights.asia/news/ahrc-news/AHRC-OLT-010-2015>; Eddyono, Djafar and Sumigar (n 253), 2-3, 12.

[283] Interview I6.

legislation,[284] there could be even greater obscurity as to how or when the different laws apply.[285]

In any case, enforcing an amended Code in the domestic legal system is likely to be challenging and will require resources and political will, as has been evident with Law 26/2000. Conduct that could otherwise have been prosecuted under 'normal' criminal provisions might in future be addressed through the international crimes provisions, which have additional elements to prove. As Linton has argued in relation to prosecuting torture under Law 26/2000, from the perspective of possible perpetrators, 'one can see how the higher threshold crimes are more attractive—the likelihood of conviction is low'.[286] Similar difficulties may arise for the draft Code provisions, should they be adopted. Consistent with the localisation framework, laws and institutions for prosecuting crimes in Indonesia typically complement, rather than replace, Indonesia's existing social and legal institutions.

4.3. Enforcement

The cases brought under Law 26/2000 were mentioned in section 4.2.1, but there have been other cases relating to conduct that might be considered an international crime prosecuted under other domestic legislation. These demonstrate Indonesia's broader engagement with international criminal justice issues beyond the national and international realm. The 'Bantaqiah case' in 2000 has been 'the one and only attempt at judicially accounting for state violence in Aceh'.[287] It involved an attack on a religious school that killed 57 attendees. While there was some support from officials for prosecutions under Law 26/2000, following a fact-finding commission naming several high ranking military officers as responsible, joint civil-military (*koneksitas*) proceedings were held. Despite witness security concerns, this highly publicised trial led to the conviction and sentencing of 24 lower-ranking soldiers and one civilian for murder.[288] Even this result, which arguably failed to reflect 'international criminal justice', was the

[284] See Butt (n 210).
[285] Aliansi Nasional Reformasi KUHP and Institute for Criminal Justice Reform, 'Monograf Focus Group Discussion: *Melihat Problem Kodifikasi R KUHP* [Observing the Codification Problems of the Draft Code]' (12 August 2015) <http://reformasikuhp.org/monograf-diskusi-model-pembahasan-r-kuhp-di-dpr/>.
[286] Linton (n 226), 212.
[287] Elizabeth Drexler, *Aceh, Indonesia: Securing the Insecure State,* (University of Pennsylvania Press, 2008), 125.
[288] Derailed Report (n 72), 52; Drexler, ibid, from 137.

exception, following conflict and severe deprivations of human rights experienced in Aceh over decades.[289] There have also been military cases that led to convictions, for example, in relation to violence in Poso, Central Sulawesi following a Komnas HAM investigation, as well as regarding an incident at Trisakti University, disappearances in 1997-1998, an attempted assassination of Papuan leader Theys Eluay, and other Papua related cases. However, in these situations and others only limited punishments have been imposed, while the outcomes are not always disclosed.[290]

Another case was the trial of Masykur Abdul Kadir and others for their role in the 2002 bombings in Bali. The accused were convicted under Emergency Law No. 12 of 1951, offences in the Code,[291] and Kadir was convicted under terrorism legislation passed after the bombings in 2003.[292] In Kadir's case, the Constitutional Court found that retrospective laws are prohibited except for gross violations of human rights – that is, crimes against humanity and genocide.[293] It held that the bombings did not constitute a crime against humanity or genocide, although the minority thought the crimes were so serious that an exception to the principle of non-retrospectivity should apply. The Court's decision – especially that of the minority – demonstrates that national courts may find it challenging to discern the exact parameters of 'international criminal justice' in situations where a plurality of criminal offences might be relevant and the Constitutional framework is invoked.

Civil liability has also been pursued outside[294] and within Indonesia.[295] For example, in 2005 Jakarta Legal Aid Foundation brought a civil suit on behalf of a group of 1965 victims, but it was rejected on technical grounds.[296] The poisoning of KontraS founder Munir on a flight to the Netherlands may not be considered a crime against humanity, but in 2007 Garuda Airlines was found negligent, while two individuals were also jailed as a

[289] For discussion, see Drexler, including at 166.
[290] See also Derailed Report (n 72), 53,
[291] *Masykur Abdul Kadir*, Case No. 013/PUU-I/2003, Constitutional Court, Republic of Indonesia; Simon Butt and David Hansell, 'The Masykur Abdul Kadir Case: Indonesian Constitutional Court Decision No 013/PUU-I/2003' (2004) 6 *Asian Law* 176-196, 180, 182; see also Clarke (n 83).
[292] Clarke, ibid, 445.
[293] Butt and Hansell (n 291), 180.
[294] E.g., *Todd v Panjaitan*, CIV.A. 92-12255-PBS, 1994 WL 827111, United States District Court of Massachusetts, 26 October 1994; *Doe VII v Exxon Mobil Corporation No. 09-7125*, US Court of Appeals, District of Columbia Circuit, 8 July 2011.
[295] See Tim Lindsey and Simon Butt, 'Civil Liability for Criminal Acts at Indonesian Law' < http://law.unimelb.edu.au/__data/assets/pdf_file/0009/1546299/CivilLiabilityforCriminalActsatIndonesianLaw2.pdf>.
[296] Derailed Report (n 72), 75.

result of the incident, though the man suspected of ordering the crime, Purwopranjono, was acquitted in 2009 and direct perpetrator Pollycarpus was released in early 2015.[297]

There are therefore various avenues for responding to international crimes within Indonesia's legal system, including under Law 26/2000 and potentially the Criminal Code, once eventually revised, and (with difficulty) via civil suits. However, convictions for international crimes have not been upheld.

5. Analysis: Localising International Criminal Justice in Indonesia

Section 2 identified themes of sovereignty, national unity, the importance of the military, human rights, and development as being associated with Indonesia's experience of prosecuting international crimes. However, section 3 also showed that these principles are contested by different actors, who have used a range of strategies to reframe and reconstruct understandings of international criminal justice in Indonesia. Section 4 considered Indonesia's legislation and international crimes cases in light of that context. This section argues that these laws and prosecutions do not represent the acceptance of the norm of international criminal justice, but neither do they demonstrate complete rejection. Instead, a process of localisation has taken place involving prelocalisation resistance (5.1), local initiative and adaptation (5.2) and amplification (5.3), although the Indonesian case highlights some challenges in applying this framework (5.4).

5.1. Prelocalisation Resistance

The colonial period has influenced contemporary discussions about international criminal justice in Indonesia. For instance, some Indonesian human rights advocates questioned the decision to locate the IPT in The Hague rather than (perhaps) Geneva or within Southeast Asia, even though it was partly organised by individuals resident in the Netherlands, was live streamed online, and the political environment presented barriers to holding it in Indonesia. One activist suggested that the Dutch location would allow Indonesian authorities to argue there was a double standard, saying 'Oh, what are you [the Netherlands] doing with these issues, while you also did unlawful things to Indonesian

[297] The Jakarta Post, 'National scene: Court upholds Pollycarpus release', *The Jakarta Post* (30 July 2015) <http://www.thejakartapost.com/news/2015/07/30/national-scene-court-upholds-pollycarpus-release.html>.

people'.[298] Indeed, official actors expressed concern about the 'internationalisation' of the 1965 case when establishing the national symposium.[299]

The Netherlands-operated WWII trials were selective and failed to establish strong norms in favour of internationally managed prosecutions. Instead, both Sukarno and Suharto elevated the role of the military within society and propounded the principles of Pancasila, while other states exhibited minimal concern about human rights violations during those presidencies. Indonesia also experienced periods of economic deterioration in that time. These events served to embed concerns about Indonesia's sovereignty, development and the role of the military in ensuring stability.

However, these principles were also contested by international civil society and by groups within Indonesia that began advocating for the protection of economic, social, cultural, civil and political rights alongside demands for truth and justice. Thus by the late 1990s a precursor for localisation – a situation in which the dominant normative order remained strong, but included aspects that were 'already discredited from within or found inadequate to meet with new and unforeseen challenges'[300] – was evident. Yet there has not been linear progress toward a normalised understanding of international criminal justice that seeks impartial, independent international crimes trials via ratification of treaties or the adoption of domestic laws. Rather, debates continue, both about prosecuting historic international crimes and amending legislation that would have prospective effect.

5.2. Local Initiative and Adaptation

Localisation is said to occur when resistance is met by attempts by 'credible local actors' to reframe and reconstruct the relevant international and local norms.[301] In Indonesia, international actors, the government, and civil society have deployed arguments that respond to prelocalisation concerns about protecting the military, ensuring national

[298] Interview I1: though she thought some NGOs and academics had made the argument that the Dutch had paid reparations for the Westerling slaughter in Karawang, so the Indonesian government could act similarly.
[299] Wahyuningroem (n 124); Amindoni (n 206).
[300] Acharya (n 162), 251.
[301] Ibid.

stability and unity and, by emphasising complementarity, the importance of sovereignty and avoiding political interference.[302]

There have been two predominant official responses to alleged serious human rights violations that may amount to international crimes. These are to either avoid the issue or to investigate and document the incidents, but proceed no further than securing a few low-level prosecutions. Most recently there have been attempts to revive a TRC mechanism and establish a committee to 'settle' or 'resolve' past human rights abuses that may have amounted to international crimes.[303] Yet the language of 'settling' itself suggests a reframing of the debate toward resolving the issue via amnesties or 'reconciliation', rather than seeking justice or aiming to respond to victims' (albeit diverse) demands – although these debates continue.

Civil society actors promoting international criminal justice have documented crimes,[304] presented international criminal justice as aligned with domestic priorities,[305] pursued Rome Statute ratification, and built closer relationships with authorities.[306] Yet where attempts to 'reframe' the norms of international criminal justice in light of the political context were unsuccessful, they have adapted their approaches. Some actors have attempted to derive new languages and pursue priorities other than prosecutions for responding to international crimes. This has involved moving away from considering state authorities as the primary targets of advocacy, towards engaging the general public and youth.[307] Some groups prioritise attempts to secure economic, social and cultural rights such as social services, or focus on grassroots initiatives or municipal apologies.[308] KKPK's *Menemukan Kembali Indonesia* report represents an attempt to reconstruct the norm of international criminal justice by creating a new language of national rediscovery aimed at the Indonesian public. The Year of Truth and other non-criminal proceedings such as the IPT have provided alternative spaces for discourse that address, but are not limited to, justice issues. Adaptations of traditional or religious reconciliation practices, perhaps

[302] Section 3.
[303] The Jakarta Post, 'Draft bill on reconciliation commission not enough, say victims', *The Jakarta Post* (11 May 2015) <http://www.thejakartapost.com/news/2015/05/11/draft-bill-reconciliation-commission-not-enough-say-victims.html#sthash.lJOioauw.dpuf>; Margareth S Aritonang and Moses Ompusunggu, 'Special body set up to tackle rights abuses', *The Jakarta Post* (6 October 2016) <http://www.thejakartapost.com/news/2016/10/06/special-body-set-up-to-tackle-rights-abuses.html>.
[304] Section 3.3.1.
[305] Section 3.3.2.
[306] Section 3.3.3.
[307] Section 3.4.2.
[308] Section 3.4.1.

drawing upon *adat* or *syariah* laws, may divide observers and participants, but also contribute unique options to this debate. In these ways, actors in diverse locations have adapted the norms surrounding international criminal justice in Indonesia, while also attempting to transform 'local practices and beliefs'.[309]

5.3. Amplification

The localisation approach suggests that the interaction of actors' resistance, local initiative, and adaption leads to *amplification* – where '[n]ew instruments and practices are developed from the syncretic normative framework in which local influences remain highly visible'.[310] Indonesia has typically supported the ICC to the extent that it is not perceived as interfering in domestic politics or peace processes. This approach can be understood as a way to bring wider recognition to the norms of sovereignty, national stability, and non-interference. Indonesia's national laws for prosecuting international crimes were also adapted from the international norm.

The passage of Law 26/2000 through the legislature with unanimous approval would not have been possible without DPR members, the Ministry of Justice, academics, civil society and lawyers drafting and supporting the Law.[311] During the drafting process, the text of Law 26/2000 increasingly reflected the Rome Statute's content.[312] However, it does differ from it in several respects, most notably in the exclusion of war crimes and 'other inhumane acts', and by allowing for retrospective prosecutions. These departures responded to local circumstances as well as international influences. The enforcement of these laws failed to reflect the international norm of impartial, independent justice or 'ending impunity'. Indeed, the Law 26/2000 prosecutions, and other domestic proceedings stimulated by Komnas HAM investigations, arguably allowed Indonesia to defend the norms of sovereignty, non-interference and protecting the military through a legal framework that benefited from its 'association with the foreign norms',[313] consistent with the concept of amplification. Thus, one former politician explained the development of Law 26/2000 as the convergence of international norms and Indonesia's global identity:

[309] Acharya (n 162), 251.
[310] Ibid, 251.
[311] Suh (n 44), 126-139.
[312] Ibid.
[313] Acharya (n 162), 251.

> we're going to uphold [the] international norm, but supported by the *quality of [the] Indonesian institution itself.* We are going to *demonstrate our accountability to international society*… Free and active not only to *protect Indonesian institutions* but also to disseminate … [the] international peace and security of mankind.[314]

Still, the Law provides Indonesia with a legal framework concerning international crimes that could in future be enforced or reformed in a progressive manner. Indeed, a draft Criminal Code is closer to the Rome Statute than Law 26/2000 and may address concerns about the need to synchronise Indonesia's 'human rights' and criminal laws.[315] Yet, it still fails to include the full spectrum of war crimes. This suggests that the process of localisation will not necessarily lead to the acceptance of international norms over time, although some developments have occurred.

By applying the localisation framework, this chapter has shown how Indonesia's mechanisms relating to international criminal justice have not just resulted from norm diffusion by external actors (outside-in), though nor have they solely represented the outcome of "local" norm entrepreneurs translating or rejecting external norms (inside-out). Instead, Indonesia's approach to international criminal law presents a continuing interaction of variously located actors.

5.4. Limitations of the Localisation Framework

Material concerns associated with realist or rationalist explanations do not appear to explain Indonesia's approach to prosecuting international crimes, especially as donor financing has become less relevant,[316] while local initiatives continue to evolve, albeit facing varied challenges. Further, as Indonesia has developed democratic governance structures, liberal frameworks that emphasise domestic politics would interpret Jokowi's inclusion of resolving past human rights violations in his election platform as an indicator of potential change. Yet this would not explain the failure to pursue prosecutions following Jokowi's election on this mandate. A constructivist framework focused on how the concept of international criminal justice has been intersubjectively understood by different actors may be more suitable for explaining Indonesia's international crimes laws. However, mainstream constructivist frameworks describe the spread of the international criminal

[314] Interview I11, emphasis added.
[315] Sapiie (n 118); section 3.2.
[316] Section 3.1.

justice norm as occurring through the ratification and internalisation of international instruments and norms.[317] Instead, this chapter emphasised the role of local actors in reconstructing understandings of international criminal justice. It suggests that this process is dynamic and involves multiple paths, rather than representing external influence flowing in the *direction* of locals.

This chapter also revealed some challenges in applying the localisation framework. In particular, localisation imposes *spatial* boundaries that were difficult to apply in practice. The scope of this chapter is limited to national laws, but as the examples of Palu and Aceh make clear, the national government's actions should not be equated with the potentially different actions taking place regionally. Further, laws and institutions in both Indonesia and Timor-Leste responded to crimes perpetrated in East Timor (with Timor-Leste's legislation first adopted under UN administration). Thus, Indonesia's national mechanisms also intersected with international approaches.

There is also no clear distinction between 'local' and 'international' actors. At times foreign civil society actors and states have promoted the prosecution of international crimes in Indonesia – particularly in the late 1990s and early 2000s. Yet many participants in the debate about Indonesian international criminal justice issues are 'locally' based in Indonesia, including lawmakers, political representatives, military leaders, and NGO activists. Some of these actors' views appear to align with government perspectives from time-to-time,[318] making it difficult to clearly delineate between 'state' and 'non-state' perspectives. Thus, 'local' actors can take opposing positions, including within and across government ministries. Further, many 'locals' are from time-to-time or normally based offshore in cities like New York, Geneva, Oslo, The Hague or Sydney – as political exiles, migrants, employees of international organisations, academics or students. The diversity afforded by multiple and overlapping ethnic (clan), religious, racial and other groups in Indonesia provides considerable scope for dynamic friction between different perspectives of international criminal justice, but these are not easily classified along local/international lines.

[317] See chapter 2.
[318] See e.g. Romli Atmasasmita, '*Ratifikasi International Criminal Court (ICC): Suatu Keniscayaan?* [Ratification of the International Criminal Court (ICC): A Necessity?]' <http://www.unisosdem.org/article_detail.php?aid=7589&coid=3&caid=21&gid=3> and of Hikmahanto Juwana, Juwana (n 242).

It is also difficult to distinguish between 'local' and 'international' *norms.* What it means to preserve Indonesia's 'sovereignty', 'human rights' and 'national unity' may be contested, but these norms are also not necessarily 'local'. Indeed, such norms might have plural impacts, rather than always conflicting.[319] Thus, civil society actors refer to Pancasila's emphasis on national unity as an argument *for* prosecutions, just as the government argues for reconciliation (to ensure unity) through *non*-prosecutions. As another example, the *domestic* Law 26/2000 and draft Code adapt the norm of international criminal justice by addressing 'human rights violations' of crimes against humanity and genocide (and war crimes, in the case of the draft Code), rather than using labels from domestic or international humanitarian or criminal law. Thus, spatial classifications of ideas can overlap.

Finally, Acharya's approach to localisation retains some teleology in the sense that resistance is theoretically followed by local innovation and adaptation and results in the 'amplification' of this convergence in the form of new institutions over *time*. In contrast, while Indonesia's experience is indeed dynamic, it is closer to Zimmerman's conception of norms being reinterpreted and adapted at various points,[320] so that different debates may coincide or run in parallel. Indeed in Indonesia, the government debates new laws with prospective operation (such as the draft Code) at the same time as it explores non-judicial responses to 'past' crimes. Simultaneously, civil society actors advocate for amending domestic laws or ratifying various treaties for future operation. They also ask Komnas-HAM and the Attorney General to enforce Law 26/2000 for either historic or prospective crimes, while seeking reparations and other non-judicial support for victims.

Despite these challenges, the localisation approach helped to demonstrate that in Indonesia, domestic international crimes laws and institutions have resulted from frictions between the deviating arguments of variously located actors. This process has not ceased following the adoption or use of national legislation. Instead, it is ongoing, both in relation to drafting new laws and through attempts to enforce existing laws.

[319] Compare Jetschke (n 34), 41.
[320] Zimmerman refers to 'steps', Lisbeth Zimmermann, 'Same Same or Different? Norm Diffusion Between Resistance, Compliance, and Localization in Post-conflict States' (2014) 17(1) *International Studies Perspectives* 98-115.

6. Conclusion

Section 2 demonstrated that Indonesian responses to international crimes have been linked to 'prelocalisation' concerns about sovereignty, national unity, the role of the military, development, human rights and democracy – though different actors have contested these principles. Section 3 took up this latter point and reviewed how various actors' arguments about international criminal justice in Indonesia involve 'local initiative' and 'adaptation'. Section 4 returned to the laws and institutions that have both resulted from (and shaped) the arguments surrounding international crimes in Indonesia. These mechanisms 'amplify' domestic law and legal institutions, as well as principles of sovereignty and protecting Indonesia's military. Section 5 argued that this picture appears more complex than either the mainstream constructivist or even the localisation frameworks suggest – and is made particularly complicated by the range of potential crimes and mechanisms still being debated in Indonesia. This dynamic process involves aspects of time, space and directionality, as various actors draw on adapted arguments to reconstruct the norm of international criminal justice.

Civil society actors are aware of Indonesia's deviation from the mainstream theoretical 'path'. One activist explained that 'we took a wrong turn you know in this journey as a country'.[321] Some are hopeful of redirection, where 'then we go back to the right track and then we can just continue our journey'.[322] Others see potential for productivity in this friction: 'We are learning by doing'.[323] How such lessons might be applied in Indonesia's future remains to be seen. However, this chapter suggests that debates by various actors about sovereignty, the military, human rights, and national unity will continue to adapt Indonesia's approaches toward prosecuting international crimes, rather than leading to acceptance (or rejection) of the norm of international criminal justice.

[321] Interview I6.
[322] Ibid.
[323] Interview I5.

Chapter 7 – Analysis: Localisation of International Criminal Justice in Southeast Asia

1. Introduction

The previous four chapters explored how states in Southeast Asia have engaged with international criminal justice and established laws and institutions to investigate and prosecute international crimes. This chapter analyses in more depth whether states in Southeast Asia have accepted, rejected, or adapted[1] ideas about international criminal justice and the benefits and limitations of localisation for exploring this process. It begins by reviewing the key principles of the theoretical approach taken by this thesis, which suggests that norms are 'localised' through processes of prelocalisation resistance, local initiative, adaptation, and the amplification of reconstructed norms through new institutions and practices (section 2.1). It then considers how activities relating to international criminal justice correspond to each of these aspects of localisation across Southeast Asia, with particular reference to the case studies (2.2-2.5). In light of these findings, Section 3 challenges how constructivist[2] and the related localisation approaches explain how international norms are adapted over time, across different spaces (local/global), and in certain directions (outside-in/inside-out). Section 4 then argues that this thesis demonstrates several important implications for such theories.

2. Localising International Criminal Justice in Southeast Asia

2.1. Review of the Localisation Framework

Chapter 2 considered how various theories, often drawn from the international relations field, have explained how and why states adopt and comply with international norms. These include realist and rationalist perspectives focused upon states' security and material interests, the liberal promotion of universalist values, and constructivist attention toward how social structures and identities construct meaning.[3] It also outlined how constructivist approaches often suggest a temporal aspect to the diffusion of norms, with states progressing from rejecting an external idea towards accepting it, usually by

[1] See section 2, chapter 2; Glossary; and below for further discussion of these terms.
[2] See section 2, chapter 2.
[3] Ibid.

ratifying an international treaty and internalising its principles over time.[4] They may also apply spatial divisions to help explain how differently located actors accept (or reject) 'local' or 'international' ideas.[5] Finally, because they analyse the spread of international or 'universal' ideas across the world – and ask why states might decide to comply with them – much constructivist research considers how ideas flow in a direction from international actors and organisations toward local recipients.[6]

In the field of international criminal justice, these aspects suggest that, with the possible influence of civil society norm entrepreneurs, outsider states will ideally advance toward being included within the international criminal justice 'project',[7] represented by ratification of international treaties such as the Rome Statute or (at least) the adoption of international crimes laws that closely replicate the Statute (acceptance). To some degree, alternative responses to serious and widespread crimes have been 'regarded with suspicion' by international criminal lawyers,[8] although, a 'local turn' has promoted the integration of community concerns into international criminal justice responses. However, such perspectives have also been critiqued for overly delimiting the global from the local and potentially romanticising the latter (see section 3.2).[9]

On the other hand, identifying the significance of the 'divide between 'inside' and 'outside'' 'provides a discursive space' to accommodate power dynamics and the tensions between these spaces[10] – and counters managerial or 'top down' approaches (see section 3.2).[11] Acharya's localisation framework (and broader 'norm circulation' approach)[12] draws attention to how credible local actors reframe and reconstruct ideas in light of local experience, so that both international and local norms are modified and converge – for example by contesting and invoking aspects of sovereignty and stability in relation to

[4] Section 3.1, chapter 2.
[5] Section 3.2, chapter 2.
[6] Section 3.3, chapter 2.
[7] See section 2, chapter 1; Frédéric Mégret, 'International Criminal Justice: A Critical Research Agenda' in Christine Schwöbel (ed), *Critical Approaches to International Criminal Law* (Routledge, 2014) 17-53, 17.
[8] Carsten Stahn, 'Justice civilisatrice? The ICC, post-colonial theory, and faces of 'the local'' in Christian De Vos, Sara Kendall and Carsten Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press, 2015) 46-84, 48.
[9] Annika Björkdahl et al, 'Introduction: Peacebuilding through the Lens of Friction' in Annika Björkdahl et al (eds), *Peacebuilding and Friction: Global and Local Encounters in Post Conflict-Societies* (Routledge, 2016) 1-16.
[10] Stahn (n 8), 47.
[11] Ibid, 48.
[12] Amitav Acharya, 'The R2P and Norm Diffusion: Towards A Framework of Norm Circulation' (2013) 5(4) *Global Responsibility to Protect* 466-479, observes that 'resistance is often seen as futile or illegitimate', 470.

international criminal justice. Thus, ideas might be 'localised', rather than either accepted in the 'normalised' form or completely rejected. In this manner, localisation seeks to challenge "external/global/good, internal/local/bad" equations,[13] as well as assumptions about the relative influence of local and international actors.

This thesis has drawn on the general structure of Acharya's localisation framework to consider how states and non-state actors have engaged with the principle of international criminal justice by developing laws and institutions for prosecuting international crimes in Southeast Asia. This approach allowed this thesis to incorporate non-state advocacy, local agency, historic experience, and both international and domestic influences into its analysis of international criminal laws and institutions in Southeast Asia. To apply this framework, this chapter addresses each of the four sections of chapters 3-6, referring especially to examples from the case study chapters, but also from elsewhere in Southeast Asia, to highlight the insights of the localisation approach.

First, chapter 3 and each case study attempted to identify key themes associated with regional states' historic engagement with international criminal law (addressing question A of this thesis).[14] In this chapter, section 2.2 considers whether such experiences might be characterised as forms of prelocalisation resistance. Second, the country case studies in particular analysed how different international, government, and civil society actors attempted to influence approaches to international criminal justice in each state (question B). They also addressed situations in which actors more extensively adapted their strategies to reconstruct ideas about international criminal justice. Sections 2.3 and 2.4 below consider the extent to which these approaches involved 'local initiative' and 'adaptation'. Third, chapter 3 and the case studies identified the laws and institutions for prosecuting international crimes committed in Southeast Asian states (question C). Section 2.5 considers whether these mechanisms suggest that states accepted or rejected the norms of international criminal justice, or involve 'amplification'. The final part of these chapters reviewed how the localisation approach contributed to understanding the laws and institutions for prosecuting international crimes in each state (question D).

[13] Amitav Acharya, *Rethinking Power, Institutions and Ideas in World Politics: Whose IR?* (Routledge, 2014), 185.
[14] See Research Questions: section 5, chapter 1.

2.2. Prelocalisation

This thesis first aimed to identify the key themes that have accompanied states' engagement with international criminal justice. Chapters 3-6 began with a historical analysis that aimed to chart the progress of these norms across the region and especially in each case study. Since scholars have drawn attention to the underrepresentation of Asian states as parties to the Rome Statute, it anticipated finding that states in the region had rejected the international criminal justice norm through what the localisation framework would label 'prelocalisation' resistance.[15]

This thesis has not outlined the progress of international criminal justice over time in Southeast Asia. However, while states in Southeast Asia have not fully accepted the norm of international criminal justice, they have not entirely rejected it, either. No international tribunals similar to the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY, ICTR) have been established in Southeast Asia. Yet some states, including non-parties to the Rome Statute, have established criminal institutions and other transitional justice procedures, adopted domestic legislation addressing international crimes, and/or investigated and even prosecuted international crimes within national legal systems.

These initiatives build on a history of international criminal legal engagement in Asia, beginning with the International Military Tribunal for the Far East (IMTFE) and other post-World War II (WWII) trials.[16] While states in Southeast Asia are diverse, many share recollections of the selective and politicised nature of international criminal justice, including selective and procedurally challenged WWII war crimes prosecutions (including of independence fighters) and (at least initially) a lack of international interest in prosecuting crimes perpetrated during the Cold War. Since that period, states in Southeast Asia have promoted the use of domestic, rather than external, mechanisms to prosecute international crimes, or for international prosecutions to take place with state consent, with reference to the principle of sovereignty.[17]

Other themes are also evident. Experiences of internal unrest and armed conflict have led stability and the relationship between prosecutions and maintaining peace to be concerns,

[15] Amitav Acharya, 'How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism' (2004) 58(2) *International Organization* 239-275, 251.
[16] Section 2.2, chapter 3.
[17] Sections 3.1, 3.2, chapter 3.

at least among the case study states. Histories of conflict mean that much of the region hosts powerful militaries, often with the capacity to wield significant political pressure. The Asian crisis, and, for example, Marcos' failed economic strategy and General Ne Win's disastrous isolation of Myanmar's economy, have led many regional states to rely upon foreign development assistance at times, though some states such as Singapore and many states in more recent years (such as Malaysia) have not relied upon such aid. Principles of human rights and the rule of law are prominent across the region, often included in states' Constitutions and encouraged by development programmes.

The experiences of other regions may have been similar, though this is a question for further, comparative research.[18] However, these themes also vary across Southeast Asia in at least two ways. First, as section 2.3 shows, the relative importance of these issues differs across each state. For example, at a high level, human rights had greater prominence in discussions about responding to international crimes in the Philippines, while in Indonesia notions of national unity and sovereignty were pronounced, and the rule of law and development issues, as well as Buddhist forgiveness, featured in Cambodia. These issues have been contested and drawn upon by various actors (see sections 2.3 and 2.4).

Second, state authorities have sometimes changed their approaches and may have adopted different positions in relation to crimes committed at different times (see section 2.3.2). For instance, Cambodia established the ECCC, was an early party to the Rome Statute and has been the focus of significant international rule of law development work and advocacy. On the other hand, there have been no convictions for international crimes based on Cambodia's Criminal Code and accountability for contemporary serious human rights violations alleged to amount to international crimes is limited.[19] The Philippines did not ratify the Rome Statute until after it had passed domestic international crimes legislation, while extrajudicial killings have recently increased.[20] Official positions can also change as domestic political contexts alter – compare the approaches of Benigno Aquino and Rodrigo Duterte in the Philippines[21] and during Jokowi's presidency in Indonesia.[22]

[18] See below; section 3.2, chapter 8.
[19] See section 5, chapter 4.
[20] Section 2.5, chapter 5.
[21] Ibid.
[22] Section 2.4, chapter 6.

States in Southeast Asia have not completely rejected the concept of prosecuting international crimes, though some – such as Brunei Darussalam, Singapore and Lao PDR[23] – have engaged with the concept less than others. Indeed, even in states such as Indonesia and Myanmar that have not ratified the Rome Statute, there may be scope for National Human Rights Institutions (NHRIs) or other groups to investigate and document alleged crimes perpetrated by the military, for civil society actors to propose alternative transitional justice mechanisms, and for perpetrators to potentially find accountability within the domestic legal system.[24] States and civil society actors may also respond (or not) to 'past' crimes – such as under Suharto in Indonesia, 'the Democratic Kampuchea regime' (DK) in Cambodia, or Marcos in the Philippines – while debating different approaches for prospective crimes.

None of these cases is easily plotted upon a spectrum from rejection toward the acceptance of the international criminal justice norm, or reveals forms of contestation belonging only an antecedent '*pre*localisation' phase. While states' approaches to international criminal law are embedded in historic experiences, their laws and institutions for prosecuting past and prospective international crimes fail to represent outcomes of 'the linear, progressive time that implicitly underwrites much of the constructivist norms scholarship'.[25] The implications of this observation are addressed in sections 3.1 and 4.

2.3. Local Initiative

The second aspect of Acharya's localisation theory considers how 'local actors borrow and frame external norms in ways that establishes (sic) their value to the local audience'.[26] This thesis was not confined to local actors and analysed how international organisations, other states, state authorities, and civil society have influenced ideas about international

[23] Section 5, chapter 3.
[24] E.g., Myanmar National Human Rights Commission (MNHRC), 'The inquiry report of the Myanmar National Human Rights Commission into the death of Ko Aung Naing (a) Ko Aung Kyaw Naing (a) Ko Par Gyi' (2 December 2014) <http://www.mnhrc.org.mm/en/2014/12/the-inquiry-report-of-the-myanmar-national-human-rights-commission-into-the-death-of-ko-aung-naing-a-ko-aung-kyaw-naing-a-ko-par-gyi/>.
[25] Charlotte Epstein, 'The postcolonial perspective: an introduction' (2014) 6(2) *International Theory* 294-311, 300; see also Acharya (n 12), 471. In relation to the regional human rights mechanisms in Southeast Asia, Interview R3 commented that 'our ways [are] rather like in a zig zag and [are a] long path'. Similarly, Interview M1 noted that 'ASEAN used to be zig zagging, but zig zagging in a forward manner', whereas now on 'many of these key issues it looks like it's moving backwards'.
[26] Acharya (n 15), 251.

criminal justice in Southeast Asia. This section returns to each of these stakeholders to identify prominent themes represented in these debates, especially among the case study states. It focuses predominantly on the past decade, but proceeds actor-by-actor, rather than chronologically.

2.3.1. International States and Organisations

This research found that international (or 'external')[27] actors do play an important role in influencing approaches toward prosecuting international crimes in Southeast Asia. Foreign states and international organisations have monitored and critiqued the commission of international crimes in some states in Southeast Asia and proposed the establishment of 'impartial' international criminal mechanisms. For example, a Group of Experts appointed by the United Nations (UN) drew attention to crimes committed during DK in Cambodia, and the UN and international NGOs advocated for international control over DK trials.[28] Similarly, the UN arranged the establishment of the Special Panels in the District Court in Dili (Special Panels) and it is unlikely that Indonesia would have adopted Law 26/2000 were it not for the international attention directed toward violence in East Timor.[29] International development assistance programs and organisations such as the International Committee of the Red Cross have also facilitated the drafting of national international crimes legislation.[30]

Though they may not directly or overtly seek international crimes prosecutions, projects funded by foreign states or international organisations have also targeted institutional governance, including judicial reform, often employing or training nationals of the countries they are working in. Such initiatives are sometimes termed 'capacity building' and may involve the socialisation of international justice norms, at least in a general sense.[31] The UN and some states also support community-driven reconciliation and justice

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[27] Ibid.
[28] Section 3.1, chapter 4.
[29] Section 2.4, chapter 6.
[30] Sections 2.4, chapter 4; 2.4, chapter 5; e.g. Coalition for the International Criminal Court, '2013 Status of the Rome Statute Around the World' (2013) <http://archive.iccnow.org/documents/RomeStatuteUpdate_2013_web.pdf>.
[31] This term has been critiqued, see Stahn (n 8), 50, with reference to Frédéric Mégret, 'Too Much of a Good Thing? ICC Implementation and the Uses of Complementarity' in Carsten Stahn and Mohamed El Zeidy (eds), *The International Criminal Court: From Theory to Practice* (Cambridge University Press, 2011) 361-390; Morten Bergsmo, Olympia Bekou and Annika Jones, 'Complementarity after Kampala: Capacity Building and the ICC's Legal Tools' (2010) 2(2) *Goettingen Journal of International Law* 791-811.

activities, including in Cambodia[32] and Myanmar.[33] This may reflect global trends toward 'hybrid' projects that combine local and international input, but which still promote particular international norms.[34]

International institutions have also shaped many Southeast Asian states' approaches to prosecuting international crimes. Most regional states' domestic international crimes legislation is modelled upon the Rome Statute (see section 2.5).The ICC has not yet pursued investigations in the region. However, the former President of the Court, Judge Song Sang-Hyun visited Southeast Asia to promote Rome Statute ratification[35] and the ICC Prosecutor has recently drawn attention to violence in the Philippines.[36]

However, states and organisations outside of Southeast Asia have not always promoted the prosecution of international crimes perpetrated within the region. The Cold War reticence of many states to condemn regional atrocities has been mentioned,[37] but until the early 2000s there was little international appetite for the Security Council to establish mechanisms similar to the ICTY or ICTR to consider crimes in Cambodia or East Timor.[38] The United States contributed to the establishment of the ECCC, but also asked Southeast

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[32] See Ross Grantham Westoby, *Influencing official and unofficial justice and reconciliation discourse in Cambodia: the role of local non-state actors and institutions* (PhD Thesis, University of Queensland, 2013), 46; e.g. Transcultural Psychosocial Organisation, 'Donors' (2015) <https://tpocambodia.org/donors/>; European Union, 'Building Foundations for Justice' (December 2014) <http://eeas.europa.eu/delegations/cambodia/projects/list_of_projects/276753_en.htm>.

[33] E.g. European Commission, 'Reconciliation in Myanmar: Bridging the Divides with Cultural Expression' (March 2014-February 2016) <https://ec.europa.eu/europeaid/projects/reconciliation-myanmar-bridging-divides-cultural-expression_en>; USAID, 'Office of Transition Initiatives (OTI): Burma' (February 2016) <https://www.usaid.gov/sites/default/files/documents/1866/2016%20Burma_OTI%20Fact%20Sheet.pdf>.

[34] For a discussions concerning hybridity in the peacebuilding space, see Björkdahl et al (n 9), 8; Oliver P Richmond, 'De-romanticising the local, de-mystifying the international: hybridity in Timor Leste and the Solomon Islands' (2011) 24(1) *The Pacific Review* 115-136. On the relationshp between the peacebuilding notion of hybridity and localisation, see Lisbeth Zimmerman, 'Same Same or Different? Norm Diffusion Between Resistance, Compliance, and Localization in Post-conflict States' (2014) 17(1) *International Studies Perspectives* 98-115, 104.

[35] Sang-Hyun Song, 'Keynote address Second Asia-Pacific Consultation on the Universality of the Rome Statute of the International Criminal Court Parliamentarians for Global Action & Parliament of Malaysia' (9 March 2011) <https://www.icc-cpi.int/NR/rdonlyres/0BD8BB10-C186-4EEE-8D0D-B8C3E53AD234/283100/110309ICCPresidentSongKeynoteatPGAAsiaPacificConsu.pdf>.

[36] ICC Office of the Prosecutor, 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda concerning the situation in the Republic of the Philippines' (13 October 2016) <https://www.icc-cpi.int/Pages/item.aspx?name=161013-otp-stat-php>.

[37] See section 2.3, chapter 3.

[38] Sections 3.1, chapter 3; 2.3, chapter 4.

Asian states to sign Bilateral Immunity Agreements (BIAs).[39] After the democratic transition accelerated in 2011, states did not repeat earlier calls for the ICC to prosecute international crimes committed in Myanmar.[40]

Thus, international actors take diverse and changing positions towards international criminal justice in Southeast Asia. Some have pursued impartial trials that respect the international criminal justice norm, while others have taken little interest, opposed such trials, or promoted initiatives that draw on local initiative.

2.3.2.Southeast Asian Authorities

Consistent with the localisation approach, despite the importance of international stimulus, actors based within the region have also influenced the laws and institutions that relate to international criminal justice in certain Southeast Asian states. This includes political leaders and other official actors who have presented varied arguments about prosecuting international crimes. However, states rarely present homogeneous positions. Senators in the Philippines strongly advocated for the passage of the IHL Act and ratification of the Rome Statute, despite the unwillingness of the executive government under Arroyo.[41] One representative of an international organisation has observed that, generally, in regional states:

> the military tends to know a lot more about what we're talking about … and have much more practical reasons for and against [ratifying or implementing treaties]…. the Attorney Generals chambers tend to be very good international lawyers… and they … come up with good legal arguments for and against. The Ministry of Foreign Affairs: …. It's trying to work out which other countries have done different things'.[42]

These differences may be exacerbated by rotation within (especially foreign) ministries,[43] a lack of clarity about relative ministerial responsibilities, and political changes – including at the conclusion of armed conflict.

[39] Interview R2: 'I think … [BIAs are] one of the reasons as well that would probably be an obstacle to contribute to accountability'; see Table 3, chapter 3.
[40] See section 3.1, chapter 3 (though international attention toward violence against the Rohingya minority escalated in 2016, e.g., Yanghee Lee, 'Report of the Special Rapporteur on the situation of human rights in Myanmar', UN Doc. A/HRC/31/71, 18 March 2016, paras 53, 60).
[41] Section 3.1, chapter 5.
[42] Interview R1.
[43] Interview R3.

Further, regional states' approaches toward international criminal justice are diverse. There has been some interaction among Southeast Asian states on the issue of international criminal justice, often facilitated by the Coalition for the ICC (CICC) or Parliamentarians for Global Action (PGA).[44] However, a regional consensus position on international criminal justice is yet to emerge. In contrast to the public comments made by the African Union (AU), often to oppose the ICC, ASEAN provides only limited scope for overtly discussing international criminal justice.[45] ASEAN statements regarding the ICC are relatively rare,[46] although in 2003 ASEAN acknowledged the establishment of the ICC as 'a positive development'.[47] This may be partly due to the ICC's lack of attention toward Southeast Asia, as well as ASEAN's preference for non-interference and for consultative decision-making within the institution. AICHR and other ASEAN avenues may provide forums for promoting international criminal justice in future (see below), but in general ASEAN has favoured a 'constructive engagement' approach to the commission of serious violations of human rights and international crimes across the region, rather than directly advocating for prosecutions.[48]

Thus, there is no unified position on the part of states in Southeast Asia toward the ICC or international criminal justice. Still, in statements about international criminal justice, many states in the region have referred to principles that echo the historic 'prelocalisation' experiences identified in section 2.2. The issues of sovereignty, peace and stability, and human rights and development are mentioned here.

As Cryer puts it: 'Generally, international criminal law scholars see sovereignty as the enemy.'[49] As discussed in chapter 3, Southeast Asian states emphasised the principles of sovereignty and non-interference during the Rome Statute negotiations. Similar concerns

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[44] E.g., a Philippines Member of Parliament presented to the Indonesian parliament on 'Gender Justice through the domestic implementation of Rome Statute Standards - The Philippine Experience' in May 2016: Francisco Ashley Acedillo, 'Seminar on Gender Justice and Working Session on the Challenges of the Ratification and Implementation of the Rome Statute by Indonesia: Gender Justice through the domestic implementation of Rome Statute Standards - The Philippine Experience' (PGA, 26 May 2016) <http://www.pgaction.org/pdf/Rep-Acedillo_remarks-indonesia.pdf>.

[45] See also section 3.2.1, chapter 3.

[46] For an older e.g., see Rodolfo Severino, 'Sovereignty, Intervention and the ASEAN Way' (3 July 2000) < http://asean.org/?static_post=sovereignty-intervention-and-the-asean-way-3-july-2000>.

[47] ASEAN, '14th EU-ASEAN Ministerial Meeting Brussels: Joint Co-Chairmen's Statement' (27-28 January 2003) <http://asean.org/?static_post=14th-eu-asean-ministerial-meeting-brussels-27-28-january-2003>.

[48] Section 2.4, chapter 3.

[49] Robert Cryer, 'International Criminal Law vs State Sovereignty: Another Round?' (2005) 16(5) *European Journal of International Law* 979-1000, 980.

were raised within other regions, including by African states, China and the US.[50] In some states in Southeast Asia these concerns have been manifested in a preference for domestic mechanisms and prosecutions, but have not provoked public opposition toward the ICC, at least while there have been no ICC investigations.[51]

When viewed in the context of the selective WWII trials and histories of colonial interference, a preference for national proceedings may not seem completely resistant toward broader conceptions of international criminal justice, including in relation to the ICC's complementarity principle. Cambodia secured significant influence over the ECCC, Indonesia enacted Law 26/2000 and prefers to develop an 'Indonesian way' to resolve past human rights abuses,[52] and states such as the Philippines adopted domestic international crimes legislation. Such national legislation does not conflict with every aspect of the norm of international criminal justice (including the notion of complementarity), even if it avoids international involvement in proceedings.

Enforcement of these laws has been difficult, but they could be used in future where the ICC might otherwise lack the jurisdiction or resources to prosecute international crimes. This is particularly important given that it is unlikely that states within the region would refer cases of alleged international crimes to the ICC, or that the Security Council would do so.[53] Official bodies have also sometimes been established in response to international pressure, such as following the Alston report in the Philippines,[54] or the KPN and KPP-HAM (East Timor) investigations in Indonesia.[55] Such initiatives are not criminal processes and may not secure convictions, but can contribute to gathering evidence and promoting discourse about responding to international crimes.

[50] United Nations, 'Summary records of the plenary meetings and of the meetings of the Committee of the Whole (Volume II), United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court', UN Doc. A/CONF.183/13 (Vol.11), 15 June - 17 July 1998, <http://legal.un.org/icc/rome/proceedings/contents.htm>, e.g., United States, 152, 361; Nigeria including regarding the African Union, 111; Mexico, 107; China, 75, 123-124; Pakistan, 78, 127, 173, and including regarding NAM states, 189; India, 86.
[51] See Euan Black, 'Duterte's threat to withdraw the Philippines from the International Criminal Court marks further shift East' *Southeast Asia Globe* (21 November 2016) <http://sea-globe.com/philippines-icc/>.
[52] Ayu Wahyuningroem, 'Justice denied?' (2016) 125 *Inside Indonesia* <http://www.insideindonesia.org/justice-denied>.
[53] Section 3, chapter 1.
[54] Section 2.4, chapter 5.
[55] Section 2.4, chapter 6.

States in Southeast Asia have experienced internal conflicts and in the Philippines, Thailand, Myanmar, and Indonesia these disputes are not completely resolved, while new incidents of violence continue to emerge across the region. Peace and stability have therefore also featured in statements about international criminal justice. For example, Prime Minister Hun Sen explained how Cambodia would balance the need for justice 'with the paramount need for continued national reconciliation and the safeguard of the hard gained peace'.[56] Similarly, officials in the Philippines were interested in how the ICC could contribute to peace by being able to prosecute non-state actors.[57]

Many states have historically been governed by military regimes and the armed forces retain significant influence, especially where conflict is ongoing. Although armies in the region may incorporate international humanitarian law into their practices, military actors often argue that investigating international crimes could contribute to internal unrest.[58] In this way, international criminal justice has been cast as a set of procedures that is appropriate only where it facilitates national stability, supports the prominence of the military and reinforces existing international and domestic legal commitments.

Some states refer to past efforts to respond to violence or emphasise their democratic credentials and human rights records in statements about international crimes. The Philippines has stressed how 'in the not so distant past, we stood up against impunity of colonial rule and of an oppressive dictatorship'[59] and Cambodia has referred to its transition from a violent history.[60] States that are not Rome Statute parties might also attempt to deflect stigmatisation by indicating that they are progressing toward accountability or already respect consistent norms – albeit through domestic mechanisms.

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[56] Hun Sen, 'Address of Samdech Hun Sen to the United Nations General Assembly's Millennium Summit, 8 September 2000' (2000) 32 (September) *Cambodia New Vision* 1-4 <http://cnv.org.kh/cnv_html_pdf/cnv_32.PDF>; see also Cheang Sokha and James O'Toole, 'Hun Sen to Ban Ki-moon: Case 002 last trial at ECCC', *The Phnom Penh Post* (27 October 2010) <http://www.phnompenhpost.com/national/hun-sen-ban-ki-moon-case-002-last-trial-eccc>: 'we have to think about peace'.

[57] Philippine Coalition for the International Criminal Court (PCICC), 'For Hope & Human Dignity: A Primer on the International Criminal Court for the Security Sector' (2008), 6.

[58] E.g. The Jakarta Post, 'Attempts at formal reconciliation 'will reopen old wounds'', *The Jakarta Post* (3 June 2016) <http://www.thejakartapost.com/news/2016/06/03/attempts-at-formal-reconciliation-will-reopen-old-wounds.html>.

[59] Republic of the Philippines, 'Statement by H E Libran N Cabactulan, Permanent Representative, Philippine Mission to the United Nations at the 10th Session of the Assembly of States Parties' (14 December 2011) <https://asp.icc-cpi.int/iccdocs/asp_docs/ASP10/Statements/ICC-ASP10-GenDeba-Philippines-ENG.pdf> .

[60] E.g., Hun Sen (n 56).

For example, Lao PDR has noted that it is researching the Rome Statute,[61] while Indonesia mentioned its 'efforts to eradicate the practices of impunity', including through training and preventative activities, during its 2012 UPR review.[62]

In summary, although the states in Southeast Asia are diverse, many have responded to the concept of international criminal justice with reference to the principles of sovereignty, stability, and human rights drawn from 'local' experiences. However, public statements and even the passage of new laws and establishment of criminal mechanisms have not necessarily resulted in international crimes investigations or prosecutions (or convictions). Further, within each state, different authorities and departments may hold diverse perspectives, but other domestic stakeholders also contribute to debates about international criminal justice. It is therefore necessary to examine how civil society actors have sought to influence approaches toward international criminal law in Southeast Asia.

2.3.3.Civil Society

Consistent with the localisation framework, diverse 'civil society'[63] actors have developed adaptive approaches to responding to international crimes in Southeast Asia – as demonstrated in the case study states. In fact, analysing states' approaches to international criminal justice in isolation would present an incomplete picture. For example, focusing only on officials' opposition to the Case 003 and 004 trials in Cambodia could suggest greater 'Cambodian' resistance toward international criminal justice than is evident from the significant contribution of NGO actors to the ECCC's victim participation process and outreach. Other non-state actors might also be considered – such as the NDF and MILF in the Philippines, which have declared their intention to abide by international humanitarian law principles.[64] One advantage of the localisation framework is that it draws attention to these diverse and 'local' perspectives as forming potentially important

[61] Lao People's Democratic Republic, 'Statement by Mrs Viengvone Kittavong, Deputy Director General, Department of Treaties and Law, Ministry of Foreign Affairs, Lao People's Democratic Republic, Assembly of States Parties to the Rome Statute of the International Criminal Court, 7th Session, General Debate' (15 November 2008) <https://asp.icc-cpi.int/iccdocs/asp_docs/library/asp/ICC-ASP-ASP7-GenDebe-Lao-ENG.pdf>.
[62] Indonesia, 'National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21', UN Doc. A/HRC/WG.6/13/IDN/1, 7 March 2012.
[63] See Glossary.
[64] Section 2.3, chapter 5.

components of the process of adapting norms (which may result in states amending or adopting new laws and institutions).[65]

Of course, civil society comprises heterogeneous actors with different motivations. In Southeast Asia, there are some Government Organised Non-Government Organisation (GONGOs) that represent government interests, but other NGO representatives may also be aligned with political parties or be influenced by international donor priorities. Some groups comprise current or former victims and survivors, such as IKOHI in Indonesia or SELDA in the Philippines, or more formally represent victims as in the case of Legal Aid of Cambodia, while others may have a broader human rights advocacy role. Academics and lawyers within the region argue in favour of international criminal justice,[66] but some also suggest reasons for exercising caution in relation to the ICC.[67]

The case studies in this thesis focused predominantly on how NGOs based in each of the states promote different responses to international crimes. The localisation framework anticipates 'credible local actors' to have potentially more influence than those who may be perceived as outside 'stooges'.[68] This suggests that the identities of different civil society actors may affect their influence. Further, engaging in debates about justice might also construct the identities of the proponents.[69] For example, NGO actors in Indonesia, Philippines, Malaysia, and Thailand have adopted critical engagement strategies.[70] Yet close collaboration can also raise the suspicions of other stakeholders. One regional advocate observed that the relationships she had established within a Southeast Asian state's foreign ministry had 'been quite valuable because I can criticise and my voice had been heard, but some people see this [as meaning that] I'm bought by the governments'.[71] It can also be difficult to balance conflicting messages. Officials may be encouraged to

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[65] Amitav Acharya, 'Local and Transnational Civil Society as Agents of Norm Diffusion' (1-3 June 2012) <http://amitavacharya.com/sites/default/files/Local%20and%20Transnational%20Civil%20Society%20as%20Agents%20of%20Norm%20Diffusion.pdf>.

[66] E.g., Koalisi Masyarakat Sipil untuk Mahkamah Pidana Internasional (i.e., ICSCICC), *'Draft Naskah Akademis dan Rancangan Undang-Undang tentang Pengesahan* [Draft Academic Manuscript and Draft Law on the Ratification of the] Rome Statute of the International Criminal Court 1998' (2008) <http://advokasi.elsam.or.id/assets/2015/09/2008_Naskah-Akademik_RUU-ratifikasi-statuta-roma_ICC.pdf>.

[67] E.g., Romli Atmasasmita, '*Ratifikasi International Criminal Court (ICC): Suatu Keniscayaan?* [Ratification of the International Criminal Court (ICC): A Necessity?]' <http://www.unisosdem.org/article_detail.php?aid=7589&coid=3&caid=21&gid=3>.

[68] Acharya (n 15), 251.

[69] Epstein (n 25), 299.

[70] Interviews I5; R2; section 3.3.3, chapter 6.

[71] Interview R3.

pursue international crimes legislation so as to avoid potential ICC prosecution, while victims are told that supporting such mechanisms would allow official crimes to be punished.[72]

Many NGOs rely on international donor funding and use seminars (sometimes with international sponsorship), regional advocacy networks such as FORUM-Asia, and UN bodies to draw attention to the commission of international crimes and promote accountability. This can resemble a 'boomerang' or 'spiral' approach,[73] whereby national NGOs work with transnational advocacy networks to direct international pressure toward officials in their state, as in relation to the 1999 violence in East Timor, during the Marcos regime, or via the UPR process.

However, while international awareness has been important, civil society actors have driven legislative and policy changes from within states, often working with NHRIs, international advisors, and political actors. Groups such as DC-Cam and ND-Burma have documented crimes, while across the region NHRIs and human rights NGOs monitor and report violations, not only via international processes, but also via public reports, commissions and social and traditional media. Philippines-based actors drafted and encouraged lawmakers to adopt domestic international crimes legislation in 2009 and ratify the Rome Statute.[74] Due to security challenges in openly advocating for international criminal justice, civil society actors in Myanmar have written complaints, documented violations and brought legal cases, while also working with international organisations and NGOs to publicise reports of international crimes.[75] Civil society actors have needed to be flexible in carrying out this work. They may face security risks, difficulties securing evidence, a lack of judicial independence, and resource constraints. Moreover, political conditions can change, sometimes necessitating a new approach – or opening opportunities, such the renewed focus on Rome Statute ratification when Benigno Aquino

[72] Section 3.3.3, chapter 6.
[73] See Anja Jetschke, 'Linking the Unlinkable? International Norms and Nationalism in Indonesia and the Philippines' in Steve C. Ropp, Kathryn Sikkink and Thomas Risse-Kappen (eds), *The power of human rights: international norms and domestic change* (Cambridge University Press, 1999) 134-171.
[74] See chapter 5.
[75] E.g. in relation to sexual violence: Kachin Women's Association Thailand (KWAT) and Legal Aid Network (LAN) 'Justice Delayed, Justice Denied: Seeking Truth about Sexual Violence and War Crime Case in Burma' (January 2016) <http://www.kachinwomen.com/kachinwomen/images/2016/Justice_Delayed_Report_Eng.pdf>; FORUM-Asia, 'HRC 31 Side Event – Time for Justice and Accountability: Rape, Sexual Violence and Burma/Myanmar's Ethnic Conflicts' (10 March 2016) <https://www.forum-asia.org/?p=20341>.

was elected in the Philippines. One regional advocate likened 'human rights advocacy in this region' to 'trying to keep balance on the greasy log while juggling'.[76]

Being responsive includes efforts to 'borrow and frame' to establish the 'value' of international criminal justice 'for local audiences', as anticipated by the localisation framework.[77] The Indonesian Civil Society Coalition for the ICC (ICSICC) argued that the Rome Statute protects Indonesian peacekeeping forces operating on the territory of states parties,[78] just as the Philippines Coalition (PCICC) mentioned that the Statute could benefit Philippine workers living abroad.[79] Similarly, the downing of Malaysia Airlines Flight MH17 over the Ukraine led advocates and politicians to 'seize the opportunity' to discuss the benefits of Malaysia ratifying the Rome Statute.[80] While officials are prompted to respect their international treaty obligations where relevant,[81] NGO representatives often prefer to refer to Constitutions and provisions under domestic criminal codes. Civil society actors have also stressed the potential for justice to facilitate peace and development (for instance, in Kachin Peace Network's slogan, 'Justice Guarantees Lasting Peace' in Myanmar).[82] These arguments respond to concerns such as sovereignty, politicisation, stability, and development that are often expressed by state and military representatives.

Civil society actors have therefore used local initiative to engage with officials, document crimes, provide legal assistance, and publicly advocate for international criminal justice

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[76] Interview M1.
[77] Acharya (n 15), 251.
[78] ICSCICC, 'Progress Report: Indonesia Efforts to Ratify the 1998 Rome Statute of the International Criminal Court' (November 2012) <http://advokasi.elsam.or.id/assets/2015/09/201211_Progress-Report_Indonesia-effort-to-ratify-1998-Rome-Statute.pdf>, 9.
[79] PCICC (n 57), 24.
[80] Interview R1; e.g., M Kulasegaran, 'Now the time than ever before for Malaysia to become a member of International Criminal Court (ICC) and make those who shot down MH17 to be accountable'*accountable* (1 August 2015) <http://ipohbaratvoice.blogspot.com.au/2015/08/now-time-than-ever-before-for-malaysia.html>.
[81] Interview R1.
[82] E.g. in Myanmar, activists suggest that the 'rising of nationalism' could 'damage the whole country' as in Bosnia, Interview M10, or argue that government repression may cause groups to 'take up arms' as in the Middle East', Interview M6. Instead, activists suggest that justice could 'prevent recurrence' and 'address the harms of the past', Interview M1. See also Aileen Thomson, 'Opening Up Remedies in Myanmar' (ICTJ, 12 September 2015) <https://www.ictj.org/publication/opening-remedies-myanmar?utm_source=International+Center+for+Transitional+Justice+Newsletter&utm_campaign=c372e4dca7-ICTJ_In_Focus_Issue_52_January_2015&utm_medium=email&utm_term=0_2d90950d4d-c372e4dca7-246000193>, 2; Patrick Pierce and Caitlin Reiger, 'Navigating Paths to Justice in Myanmar' (ICTJ, July 2014) <http://www.ictj.org/publication/navigating-paths-justice-myanmars-transition>, 1; section 3.3.4, chapter 5.

using a range of flexible arguments adjusted for domestic contexts. However, it can be challenging for international NGOs to persuade country-based actors to advocate strongly for prosecuting international crimes, or for Rome Statute ratification. As one approach, at a workshop on 'Advancing Atrocities Prevention in Southeast Asia' in 2015, CICC's Amielle de Rosario argued that 'a key entry point to strengthening a society's resilience to atrocity crimes in Southeast Asia could be to emphasize how accountability can be a preventative tool'.[83] Thus, it can be useful to reframe international criminal justice as being relevant for a variety of forums and audiences. However, actors across the region have also moved beyond reframing notions of international criminal justice toward adapting the concept more fundamentally.

2.4. Local Adaptation

The third component of the 'localisation' framework addresses how '[e]xternal norms may be reconstructed to fit with local beliefs and practices even as local beliefs and practices may be adjusted in accordance with the external norm'.[84] More than reframing, this approach emphasises how actors within states reconstruct norms in potentially unexpected or innovative ways.

In Southeast Asia there are many examples of actors transforming their approaches toward international crimes. This may respond to changing conditions, or to a realisation that legally oriented strategies have stalled. It may be insufficient for those promoting international criminal justice to identify persistent barriers – such as sovereignty – and argue against these principles. A regional human rights advocate has found that 'non-interference can be [a] stumble block, but you just have to go around it because non-interference is here to stay'.[85]

In practice, such approaches may not be promoted, or even perceived by their proponents, as international criminal justice projects, even though they may seek similar goals. They may actually derive from organisations across the region assisting victims of violence to

[83] Genocide Watch, 'Southeast Asia Report: Advancing Atrocities Prevention' (2015) <http://genocidewatch.net/2016/04/11/southeast-asia-report-advancing-atrocities-prevention/>, she has previously discussed a 'justice continuum' between the responsibility to protect and the ICC: International Coalition for the Responsibility to Protect, '#R2P Weekly: 16 – 20 November 2015' (20 November 2015) <https://icrtopblog.org/2015/11/20/r2p-weekly-16-20-november-2015/>.
[84] Acharya (n 15), 251.
[85] Interview R3.

articulate their own priorities. A human rights advocate explained that some 'Thai NGOs like to say, we need to educate [some] people – I don't like that because it is not the way we are doing things… because not only they can learn from us, we also can learn from them… you know they actually need to educate us how [to] understand their own problem'.[86] Another regional activist pointed out that for those affected by serious atrocities, although 'we've got to empower them with their knowledge that they are entitled to protection, … to justice…', 'they know best what they want'.[87]

Drawing on consultations with groups affected by violence, some originally international criminal justice-oriented NGOs, including DC-Cam, PCICC and Timor-Leste's Judicial System Monitoring Programme (JSMP), have broader scopes of advocacy. Communities have suggested that enforcing existing domestic laws, taxation reform,[88] land reform,[89] reparations[90] or pursuing other economic and social rights[91] are priorities. The varied nature of the projects suggested by communities reflects the diverse contexts in which violence has taken place.

However, even for resource constrained activists facing security risks, securing international criminal justice is not necessarily considered to be mutually exclusive with these other concerns. Some NGO networks have developed platforms for advocating for prosecutions that also allow victims to share their experiences, including via peoples' courts and public hearings, such as during KKPK's 'Year of Truth',[92] the Cambodian

[86] Interview R3.
[87] Interview M1.
[88] E.g., Network for Human Right Documentation-Burma (ND-Burma), 'The Hidden Impact of Burma's Arbitrary & Corrupt Taxation' (May 2010) <http://nd-burma.org/reports/the-hidden-impact-of-burmas-arbitrary-a-corrupt-taxation/>.
[89] E.g., Philippine Coalition for the International Criminal Court, 'Building Bridges for Peace' (2012) <https://pcicc.files.wordpress.com/2012/03/bpp2012_8_5x9_final_becky1.pdf>; ND-Burma, 'To Recognize and Repair: Unofficial Truth Projects and the Need for Justice in Burma' (8 June 2015) <http://nd-burma.org/reports/to-recognize-and-repair/>.
[90] E.g., Asia Justice and Rights (AJAR) et al, 'Opening the Box: Women's Experiences of War, Peace, and Impunity in Myanmar' (23 September 2015) <http://www.burmapartnership.org/2015/09/opening-the-box-womens-experiences-of-war-peace-and-impunity-in-myanmar-2/>; Karapatan and SELDA, 'Primer: Human Rights Victims Reparation and Recognition Act of 2013 (Republic Act 10368) and Anti-Enforced or Involuntary Disappearance Act of 2012 (Republic Act 10353)' (November 2013) <http://www.karapatan.org/files/Primers%20and%20Law.pdf>.
[91] E.g., KKPK, *'Menemukan Kembali Indonesia* [Rediscover Indonesia]' (2014) <http://elsam.or.id/2015/01/buku-i-menemukan-kembali-indonesia/>.
[92] Ibid; Sri Lestari Wahyuningroem, 'Seducing for Truth and Justice: Civil Society Initiatives for the 1965 Mass Violence in Indonesia' (2013) 32(3) *Journal of Current Southeast Asian Affairs* 115-142.

Defenders Project Women's Hearings,[93] Kuala Lumpur War Crimes Commission,[94] and the IPT 1965. These have not necessarily received government support, but represent attempts to adapt to state resistance toward prosecutions and generate new mechanisms for responding to international crimes. In Indonesia, the government also initiated a public symposium in which victims and members of the military recollected different versions of the events of 1965.[95]

Other actors support community-developed projects that do not overtly promote international criminal justice, but draw on broader reconciliation and transitional justice norms as well as community traditions, often working with international partners. These include Buddhist-inspired reconciliation projects in Cambodia, community-based dialogues in the Philippines, and inter-ethnic forums in Myanmar. Alongside the Special Panels, the Community Reconciliation Process (CRP) in Timor-Leste reconstructed the customary practice of *nahe biti bo'ot* (spreading the large mat) and *lisan* procedures 'anchored in a broad concept of reconciliation'.[96] None of these initiatives met all of their goals,[97] and they should not be romanticised,[98] but they demonstrate that various actors have drawn on varied contexts to adapt their responses to international crimes. Such activities move past seeking a convergence between 'local' and 'international' understandings of international criminal justice. Instead, they generate novel responses to international crimes or produce new spaces for advocacy that reach beyond prosecutions.

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[93] Beini Ye, 'Transitional Justice Through the Cambodian Women's Hearings' (2014) 5 *Cambodia Law and Policy Journal* 23-38.
[94] Though its hearings have not addressed crimes committed within Southeast Asia.
[95] Wahyuningroem (n 52).
[96] Luiz Vieira, 'The CAVR and the 2006 Displacement Crisis in Timor-Leste: Reflections on Truth-Telling, Dialogue, and Durable Solutions' (ICTJ, Brookings-LSE, July 2012) <https://www.ictj.org/sites/default/files/ICTJ-Brookings-Displacement-Truth-Telling-Timor-Leste-CaseStudy-2012-English.pdf>, 8, see also Elizabeth Drexler, 'The Failure of International Justice in East Timor and Indonesia' in Alexander Laban Hinton (ed), *Transitional Justice: Global Mechanisms and Local Realities after Genocide and Mass Violence* (Rutgers University Press, 2010) 49-66; Simon Robins, 'Challenging the Therapeutic Ethic: A Victim-Centred Evaluation of Transitional Justice Process in Timor-Leste' (2012) 6(1) *International Journal of Transitional Justice* 83-105; Lia Kent, 'Unfulfilled Expectations: Community Views on CAVR's Community Reconciliation Process ' (JSMP, August 2004) <http://www.cavr-timorleste.org/otherFiles/Lia%20Kent_Report.pdf>.
[97] See, generally, ibid.
[98] Customary approaches may be opposed by affected individuals and perpetuate inequalities, including by excluding marginalised groups including women, see Kamari Maxine Clarke, *Fictions of justice: the International criminal court and the challenges of legal pluralism in sub-Saharan Africa* (Cambridge University Press, 2009), 131; Drexler (n 96); Susan Harris-Rimmer, 'Women Cut in Half: Refugee Women and the Commission for Reception, Truth-Seeking and Reconciliation in Timor-Leste' (2010) 29(2) *Refugee Survey Quarterly* 85-103; Kent (n 96).

2.5. Amplification: Mechanisms for Prosecuting International Crimes

This thesis has also identified the laws and institutions for investigating and prosecuting international criminal conduct in Southeast Asian states. This relates to the fourth aspect of localisation: the 'amplification' of '[n]ew instruments and practices … developed from the syncretic normative framework in which local influences remain highly visible'.[99] There is only limited potential for the ICC to prosecute international crimes committed in Southeast Asia. This suggests that attempts to encourage states to *accept* the notion of international criminal justice as promoted by the ICC have met with only limited success. However, the Rome Statute encourages states to take national measures toward prosecuting international crimes and its complementarity principle confirms that the ICC will only act where other states with jurisdiction are unwilling or unable to.[100] Thus, developing domestic international crimes legislation is consistent with ICC principles.

Yet, there is still tension between the localisation emphasis upon domestic adaptation – with its suggestion of pluralism – and the ICC's promotion of the norm of international criminal justice. As Stahn argues, the 'ICC does not directly proscribe how (sic) domestic justice should look like, nor does it have the power to enforce such a vision through regulatory action. But it actively shapes such choices, through narratives, policies and procedures.'[101] In particular, the Rome Statute provides an important and influential model for states' international crimes legislation, even for non-parties. This section draws on earlier chapters (with a focus upon domestic legislation) to evaluate whether these laws and institutions for prosecuting international crimes in Southeast Asia represent the 'amplification' of localisation processes.

States in Southeast Asia have suggested that domestic mechanisms might be more appropriate for responding to international crimes than international tribunals, including during the Rome Conference.[102] National international crimes prosecutions could reduce international "interference" and allow states to manage their internal stability and development priorities, for example through jurisdictional limits. They are consistent with both existing treaty obligations to prosecute crimes (such as under the Convention Against Torture) and the ICC's complementarity principle, but may not reflect international norms concerning the conduct and fairness of trials. Domestic laws also provide an avenue for

[99] Acharya (n 15), 251.
[100] Section 2, chapter 1.
[101] Stahn (n 8), 57, and see 50.
[102] Sections 3.2.2, chapter 3; 3.2.2, chapter 5; 3.2.2, chapter 6.

promoting states' own judicial institutions and for 'amplifying' adapted conceptions of international criminal justice, in which local influences remain evident.[103]

Six of the eleven states in Southeast Asia have legislation criminalising more than one core international crime where committed on their territories or by their citizens. These include the Rome Statute parties, Cambodia, Timor-Leste, and the Philippines, but also Indonesia, Vietnam and Singapore.[104] Further, all states in Southeast Asia have domestic Criminal Codes that include crimes such as murder, rape, and slavery that could be used to prosecute much underlying conduct that might otherwise be considered an international crime. Thus, if the other judicial, political, and resource precursors are in place, Southeast Asian states could potentially prosecute perpetrators under national legislation to ensure that they do not enjoy complete impunity. However, 'ordinary' crimes may lack the symbolic force of war crimes, crimes against humanity and genocide trials (and must still be enforced).[105]

For the states parties to the Rome Statute, the Statute has served as the model for laws for prosecuting crimes as war crimes, crimes against humanity, and genocide. This suggests that, rather than representing a significant adaptation of the international norm, these states have accepted the legal framework for international criminal justice represented by the Rome Statute. The reliance upon the Statute could have narrowed the scope for developing alternative forms of legislation drawn from local context (see below).[106]

However, local influences remain visible. In all cases, international crimes legislation applies alongside other criminal offences and usually requires the application of general criminal modes of liability and existing criminal procedures. The Philippines legislation currently combines international and national war crimes, though it may be amended to reduce its differences with the Rome Statute.[107] The ECCC has Cambodian and international personnel and is described as 'hybrid', 'internationalised', or 'localised'. The ECCC also has relatively narrow temporal and personal jurisdiction, consistent with the

[103] Acharya (n 15), 251.
[104] See section 4.2, chapter 3.
[105] While the process of prosecuting international crimes may still be 'ordinary', see Mark A. Drumbl, *Atrocity, punishment, and international law* (Cambridge University Press, 2007), 6.
[106] See Christian De Vos, 'All roads lead to Rome: implementation and domestic politics in Kenya and Uganda' in Christian De Vos, Sara Kendall and Carsten Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press, 2015) 379-407.
[107] Section 5.3, chapter 5.

interests of the international and Cambodian government negotiators, including to support Cambodia's sovereignty and stability.[108]

Similarly, the Special Panels represented the world's first internationalised tribunal, but had narrow jurisdiction, faced procedural complexities, resource limitations, political barriers, and difficulties incorporating community views and preferences, which were contributed to by the UN.[109] Consistent with the significant involvement of international actors and willingness of the government to signal its acceptance of international norms (adaptation), however, the Penal Code in Timor-Leste includes definitions that expand upon the Rome Statute, for example, encompassing additional conduct that could constitute the crime of genocide.[110]

As for the non-parties, Indonesia's Law 26/2000 refers only to genocide and crimes against humanity, excluding war crimes and the crime against humanity of 'other inhumane acts'. Vietnam's international crimes legislation was adopted before the Rome Statute was negotiated and the provisions are more akin to those applied in Nuremberg and at the IMTFE.[111] In Singapore, alongside an existing grave breaches provision to implement the Geneva Conventions, in 2007 a crime of genocide was incorporated into the Penal Code to implement its obligations under the Genocide Convention.[112] Consistent with some international practice, but in tension with the norm of international criminal justice,[113] many states in Southeast Asia have also deployed amnesties as a measure to resolve conflicts and promote stability. Legislation, including in states parties to the Rome Statute, continues to provide avenues for future amnesties, pardons and immunities for international crimes, amplifying concerns about ensuring peace and stability. [114]

International criminal law norms propounded from Rome or The Hague therefore have had an important, but not exclusive, influence upon the development of international criminal law within Southeast Asia. Indeed, the prosecution of international crimes has been rare across Southeast Asia, with the ECCC's two judgments, the Special Panels' limited convictions, and some domestic proceedings for torture and other crimes under

[108] See section 5.3 in chapter 4.
[109] Section 4.3.1, chapter 3.
[110] Section 4.2.1.1, chapter 3.
[111] Section 4.2.1.3, chapter 3.
[112] Section 4.2.1.2, chapter 3.
[113] Section 3, chapter 1.
[114] E.g., sections 4.4, chapter 4; 4.3, chapter 5; 4.2.2, chapter 6.

civilian[115] or military criminal laws[116] providing the only examples of criminal accountability for violence that might have been charged as international crimes. Further, securing prosecutions (or convictions) under any legislation remains a significant challenge, as this thesis has shown, even though charges of direct assault with murder have been laid in the Philippines,[117] and terrorism in Indonesia, for example.[118]

Official investigators and NHRI's, where they exist, face challenges in investigating alleged criminal conduct and ensuring that prosecutions are carried out (either appropriately or at all). In Indonesia, the Attorney General has failed to act on the recommendations for prosecution made by Komnas-HAM and related investigative bodies.[119] Individuals have been charged as a result of submitting complaints about military violence to the MNHRC.[120] It has been difficult to translate investigations by the Commission on Human Rights and other groups such as the Melo Commission into convictions in the Philippines.[121] These organisations have, however, documented and publicised serious violations of human rights and alleged international crimes.

Where criminal proceedings are difficult to access, constitutional provisions may provide another avenue for responding to international crimes. This has been a particularly active area in the Philippines. However, petitioners for constitutional remedies still face challenges in securing a satisfactory result.[122] Similarly, activists in Myanmar have sought writs of *habeas corpus* and *mandamus* to respond to cases of arbitrary arrest, detention or disappearance, but generally without success.[123]

Finally, some states have developed non-criminal mechanisms for responding to international crimes that adapt notions of international criminal justice in light of

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[115] E.g., sections 4.5, chapter 4; 4.4, chapter 5; 4.2, chapter 6.
[116] E.g., Amnesty International, 'Indonesia: Military tribunals being used to shield human rights violators' (19 June 2013) <http://www.amnesty.org.au/news/comments/32102/>.
[117] Section 4.4, chapter 5.
[118] Section 4.3, chapter 6.
[119] Section 3.3.1, chapter 6.
[120] E.g., the conviction of Brang Shawng for making false accusations against the Myanmar Army; Ja Seng Ing Truth Finding Committee, 'Who Killed Ja Seng Ing?' (December 2014) <http://www.burmapartnership.org/wp-content/uploads/2014/12/REPORT_Who-Killed-JSI_6.Dec_.14.pdf>.
[121] Section 4.4, chapter 5.
[122] E.g., ibid.
[123] See Melissa Crouch, 'The Common Law and Constitutional Writs: Prospects for Accountability in Myanmar' in Melissa Crouch and Tim Lindsey (eds), *Law, Society and Transition in Myanmar* (Hart Publishing, 2014) 141-157.

domestic concerns, such as the Philippines' monitoring bodies[124] or the incorporation of customary dispute resolution practices by the CAVR CRP.[125] Drawing on a contested vocabulary of 'reconciliation', Indonesia organised a national symposium on the 1965 violence, more than ten years since the last international crimes prosecutions under Law 26/2000.[126]

All of the mechanisms established to prosecute international crimes in the region have faced allegations that their procedures were politicised, involved selective temporal and personal jurisdiction, procedural inadequacies, witness security issues, and due process concerns. These criticisms are frequently directed to international criminal justice; they were raised historically in relation to the IMTFE and continue to be addressed toward the ICC.[127] However, they also reflect political debates concerning states' sovereignty, stability, development and justice systems, and victims' demands. Thus, states across the region have implemented mechanisms relating to international crimes that reflect considerable domestic, as well as international, experiences.

This thesis has thus demonstrated the significance of international arguments and instruments, especially the Rome Statute, in shaping the form of international crimes legislation that exists in many states in Southeast Asia. However, local influences and the product of domestic debate and parliamentary processes are also evident in the laws and institutions to prosecute international crimes. These mechanisms do not represent the acceptance or rejection of the international criminal justice norm, but 'amplify' norms that have been reconstructed through a complex process of adaptation and engagement. This process is ongoing, may differ for different events, and involves a range of actors.

3. The Limitations of Localising International Criminal Justice in Southeast Asia

The final question addressed by this thesis asks what the localisation framework contributes to analysing how and why international criminal justice mechanisms have

[124] Section 2.5, chapter 5.
[125] For discussions of the strengths and limitations of this approach, see (n 96) and e.g. Elizabeth Drexler, 'Fatal Knowledges: The Social and Political Legacies of Collaboration and Betrayal in Timor-Leste' (2013) 7(1) *International Journal of Transitional Justice* 74-94; Lia Kent, 'Beyond 'Pragmatism versus 'Principle'' in Renée Jeffery and Hun Joon Kim (eds), *Transitional Justice in the Asia-Pacific* (Cambridge University Press, 2014) 157-194; Susan Harris-Rimmer, *Gender and Transitional Justice: The Women of East Timor* (Routledge, 2010).
[126] Wahyuningroem (n 52).
[127] Sections 2-3, chapter 1.

been adopted in states in Southeast Asia. As discussed in chapter 2, this approach, originally developed to analyse institutional (especially ASEAN) engagement with norms, was selected for several reasons. It has allowed this thesis to examine how state and civil society actors attempt to influence approaches toward prosecuting crimes within a historic context. 'Localisation' also places particular emphasis upon 'local' experiences and actors and the ways in which they *adapt*, rather than only reject or accept international norms.[128]

However, this thesis has also suggested that 'mainstream' constructivist approaches to analysing international legal norms, as well as the modified localisation approach employed in this thesis, can be nuanced in several ways. Some complications were identified in chapter 2 and relate to international relations frameworks in general. These include the tendency to focus at the international, regional, or state level of analysis and complexities in identifying how structures, agency, and identities interact and are mutually constituted.[129] This section will address three particular issues that arose in this thesis. That is, it will examine what this thesis did not find. In particular, it has challenged temporal, spatial, and directional accounts of how states engage with international criminal justice.

3.1. Time: Dynamic and non-linear engagement

The first finding is that states in Southeast Asia are *not* progressing from rejecting the international criminal justice norm toward ratification and eventual acceptance over time. States do not only stall or temporarily regress in their support for prosecuting international crimes, but may pursue multiple consecutive approaches that change – both over time and in relation to different incidents. States that have 'rejected' the Rome Statute do not necessarily oppose the ICC, but may hold various reasons for not ratifying. Officials from some non-party states, like Indonesia, have still engaged with principles of international criminal justice, such as by participating in the Rome negotiations, attending educational sessions about the Statute, or adopting national international crimes laws. Other states' officials, such as in Lao PDR or Singapore, have not significantly progressed their engagement with international criminal institutions in recent years, but have not express increasing opposition, either.[130]

[128] Section 2.4, chapter 2.
[129] Section 2, chapter 2.
[130] Section 5, chapter 3.

International crimes legislation may narrow, as well as broaden, the potential scope for convictions relative to crimes included in the Rome Statute. Such laws do not necessarily lead to fairer (or any) trials, the conviction of perpetrators, or reparations for victims. Limited jurisdiction and the principle of the non-retroactive application of criminal laws have also complicated the development of international criminal jurisprudence in the region. For instance, institutions such as the ECCC must apply non-retroactive laws, while retrospective prosecutions (for terrorism) have faced Constitutional challenge in Indonesia.[131]

Assuming that only previous regimes commit crimes might inhibit the development of legal structures that prevent future crimes or ensure broader accountability,[132] although prospective legislation exists in Cambodia, Timor-Leste and Indonesia alongside past-oriented mechanisms. Still, such legislation has not prevented the recurrence of human rights violations that might constitute international crimes.[133] Penal Code provisions and institutional reform projects may be forward-focused, but undermined by persisting power structures, judicial reform issues, and impunity for past violations. Incorporating principles of peace and stability into notions of international criminal justice may promote the use of amnesties, immunities and pardons for some perpetrators. These complexities prevent the identification of sequenced stages of reform toward one normalised ideal and suggest that approaches to international criminal law have multiple temporal dimensions.

Acharya posits that 'over the long term, localization may produce an incremental shift toward fundamental change or norm displacement' as resistance to 'new norms may weaken'.[134] However, although the process of localising international criminal justice in Southeast Asia may not yet be sufficiently 'long term', this thesis suggests that localisation is not necessarily positive – or entirely negative – from the perspective of those interested in 'ending impunity'. Rather than norm entrepreneurs socialising states into internalising international norms over time, both before and after international crimes laws are adopted, actors across Southeast Asia (and beyond) debate and reconstruct the concept of

[131] Section 4.3, chapter 6.
[132] Suzannah Linton, 'Putting Things Into Perspective: The Realities of Accountability in East Timor, Indonesia and Cambodia' (2005) 3(182) *Maryland Series in Contemporary Asian Studies Series* 1-88, 8.
[133] Though atrocities have declined, see Alex J Bellamy, 'Atrocity Prevention: From Promise to Practice in the Asia Pacific' (2016) 8(2-3) *Global Responsibility to Protect* 180-199.
[134] Acharya (n 15), 253.

international criminal justice in dynamic ways. In practice, different administrations take varied positions at different times toward prosecuting international crimes.

This lends support to Acharya's concept of norm 'circulation' as an ongoing process of feedback and contestation[135] and to Zimmerman's insight that debates and choices about international and local norms recur as new problems arise (including new incidents of violence), when laws are proposed, as legislation is passed, and again when efforts are made to enforce new instruments.[136] The practice in Southeast Asia, as demonstrated in chapter 3 and in more depth in the case study chapters, suggests that each of these decisions can be revisited, or run in parallel, as alternative responses to international crimes are pursued. For example, in 2016, debates about amending Law 26/2000 coincided with proposals to incorporate international crimes into Indonesia's revised Criminal Code (with prospective operation), advocacy for reforming the military Criminal Code, and a national symposium to review past human rights violations.

Moreover, civil society and victims' groups present evolving and sometimes competing demands, whether for truth and reconciliation commissions, reparation, or prosecutions. The harms and needs victims experience can also change over time[137] – including in the case of inter-generational and continuing trauma.[138] These debates might intersect, but also invite distinct legal responses that develop or reverse previous initiatives, and are built upon in turn.

This thesis has demonstrated several factors that influence states' approaches toward prosecuting international crimes in Southeast Asia. These include: historic experiences and priorities (including sovereignty, stability and development concerns); international influence; domestic political changes; and changing spaces for civil society advocacy. None of these is fixed, uncontested, or necessarily likely to encourage states to shift toward accepting international norms over time, especially when operating in combination. Instead, responding to international crimes is a dynamic and complex debate between various actors and ideas.

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[135] Acharya (n 12).
[136] Zimmermann (n 34); see also Alexander Betts and Phil Orchard, 'Introduction: The Normative Institutionalization-Implementation Gap' in Alexander Betts and Phil Orchard (eds), *Implementation and World Politics: How International Norms Change Practice* (Oxford University Press, 2014) 1-26.
[137] E.g., 'the next generation may not want land, they may want scholarships', Interview M1.
[138] As in Cambodia, see Patrick Hein, 'The Multiple Pathways to Trauma Recovery, Vindication, and National Reconciliation in Cambodia' (2015) 7(2) *Asian Politics & Policy* 191-211.

3.2. Space: tensions between different ideas and actors

International states and organisations, authorities, and civil society representatives, debate and reconstruct international criminal justice, often drawing upon principles considered relevant for the particular geographic area. The suggestion that such reframing and adaptation is important, especially when undertaken by 'local' actors, represents a significant contribution of the localisation framework that is supported by this thesis. It also recognises that proximity to events and locations, including crime sites or mass graves, can provide specific expertise or points of perspective.[139] However, this section will analyse how spatial boundaries between the 'local' and 'international' may be interlinked and indistinct.

First, the localisation framework casts the role of 'credible local actors' in opposition to the 'external' or 'international': Acharya refers to 'the *divide* between transnational actors who operate across continents and time zones and local actors those who are situated within single time zones and marginalized locations'.[140] Yet in reality, characterising a particular group or individual as 'local' or 'global/international' is *subjective*.[141] The focus of this thesis on the norm of international criminal justice derived from The Hague has led national NGO's to be presented as 'local' by comparison. However, these groups may be far removed from stakeholder communities, especially in remote areas. Similarly, NGO representatives might consider themselves 'local',[142] but be subject to 'international donor imperatives that delimit the power that their own vernacular knowledge forms can have in shaping solutions',[143] for example, when Cambodian NGOs lost funding to represent ECCC civil parties.[144]

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[139] Annie Pohlman, 'Telling Stories about Torture in Indonesia: Managing Risk in a Culture of Impunity' (2015) 33 *Oral History Forum* 1-17.
[140] Acharya (n 65), 1, emphasis added.
[141] See Leila Ullrich, 'Beyond the 'Global–Local Divide': Local Intermediaries, Victims and the Justice Contestations of the International Criminal Court' (2016) 14(3) *Journal of International Criminal Justice* 543-568; Annika Björkdahl, Kristine Höglund, Gearoid Millar, Jair van der Lijn and Willemijn Verkoren, *Peacebuilding and Friction: Global and Local Encounters in Post Conflict-Societies* (Routledge, 2016); Sally Engle Merry, *Human Rights & Gender Violence: Translating International Law Into Local Justice* (University of Chicago Press, 2006), 214; Susanne Buckley-Zistel, 'Frictional spaces: Transitional justice between the global and the local,' in Annika Björkdahl et al (eds), *Peacebuilding and Friction: Global and Local Encounters in Post Conflict-Societies* (Routledge, 2016) 17-31; Clarke (n 98).
[142] Ullrich ibid, 549.
[143] Clarke (n 98), 135.
[144] Alice Cuddy, 'Victim lawyers stung by cuts', *The Phnom Penh Post* (11 May 2015) <http://www.phnompenhpost.com/national/victim-lawyers-stung-cuts>.

Second, as a result of this subjectivity, defining a group or an idea as 'local' is *practically* difficult. There 'is no unified local. The "local" has many faces' and has many meanings – 'a country, a community, a group, a neighbour and so on'.[145] Equally, there is no unified 'Western', 'international society' or 'global' perspective on prosecuting international crimes in Southeast Asia. This thesis has shown that actors often fail to represent particular categories. European experts are seconded to 'local' NGOs to work alongside 'locals' and international expatriates in Cambodia,[146] while Cambodian actors, especially in the elite, may have been educated or worked overseas. Judge Raul Pangalangan, the Philippines' nominated ICC judge, has been a member of the government, NGOs, academia, media, and legal profession, sometimes at the same time. Survivors of international crimes form part of influential diaspora communities that contribute to discourse concerning international criminal justice through events such as the IPT 1965, or participate in the ECCC trials as civil parties. In this way, 'local and global are inherently related to each other rather than mutually exclusive'.[147]

Third, the above discussion demonstrates the complexity involved in determining which *ideas* are local, as opposed to global (or 'external'). One activist argued that 'there seems to be this assumption it's not part of our culture to want justice, but then this assumption seems to be more clearly articulated amongst diplomats from the West'.[148] Such a "Western"[149] perception casts 'local' conceptions of justice in opposition to the international norm.[150] Indeed, the array of legal and traditional rules of engagement and conflict resolution mechanisms in Southeast Asian states[151] might only be grouped together as 'local' when compared to the Rome Statute. Observers may apply the 'local' label to either reify or critique different approaches toward international criminal justice.

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[145] Stahn (n 8), 46.
[146] Section 3.3.2, chapter 4.
[147] Buckley-Zistel (n 141), 25.
[148] Interview M1.
[149] See Nicole Deitelhoff and Lisbeth Zimmermann, 'From the Heart of Darkness: Critical Reading and Genuine Listening in Constructivist Norm Research: A Reply to Stephan Engelkamp, Katharina Glaab, and Judith Renner' (2014) 10(1) *World Political Science Review* 17-31, regarding the problematic nature of this term.
[150] E.g., 'different sense of justice that we have in the West': indented quote in section 3.4.2, chapter 4, Interview C2.
[151] See contributions in Alexander Laban Hinton (ed), *Transitional Justice: Global Mechanisms and Local Realities after Genocide and Mass Violence* (Rutgers University Press, 2010); Rosalind Shaw, Lars Waldorf and Pierre Hazan, *Localizing Transitional Justice: Interventions and Priorities After Mass Violence* (Stanford University Press, 2010); Fadillah Agus, *Traditional laws of war in Indonesia: published for 50th anniversary of Geneva Conventions 1949* (Trisakti University, 1999).

In this way, local and global principles are defined with reference to the other; they are mutually constitutive.

For example, many Southeast Asian states have sought to protect their sovereignty from the exercise of ICC jurisdiction. This emphasis, drawn from historic colonial experience, may be perceived as conflicting with the norms of international criminal justice, but is not unique to Southeast Asia.[152] NGOs have responded to this lack of 'fit' through reframing, such as by presenting the principle of complementarity as consistent with state sovereignty.[153] Similarly, in the Philippines, NGOs suggested that a historic appreciation for protecting human rights would be enhanced by passing international crimes laws and ratifying the Rome Statute.[154] Neither human rights nor sovereignty are only 'local' (prelocalisation), or 'Western' norms.[155] Yet, the tendency of actors in Indonesia[156] or the Philippines to choose to draw upon these principles is derived from 'local' experience.

Fifth, this shows how power and material *contexts* intersect with geographic designations. Appreciating the places and times in which actors are situated provides a 'counterpoint to internationalism and globalisation in international affairs',[157] by acknowledging the potential for pluralism. For instance, colonial histories have generated particular experiences of violence and impunity within the boundaries of regional states that were defined during occupation.[158] A spatial awareness cautions that, in diverse situations, community perspectives of violence and its resolution may (and perhaps often do) differ from the prescriptions prescribed by the international criminal justice framework.

Further, while it is difficult to define some actors in Southeast Asia as 'local' or 'international', or even 'regional', this does not mean that everyone has access to each characterisation. This thesis does not suggest that globalisation creates equal platforms of

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[152] Valeriane Toon, 'International Criminal Court: Reservations of Non-State Parties in Southeast Asia' (2004) 26(2) *Contemporary Southeast Asia* 218-232, 226; see also Mark Findlay, 'Sign up or Sign off – Asia's reluctant engagement with the International Criminal Court' (2013) 13(44) *Sydney Law School Legal Studies Research Paper*, 4-5; Amrita Kapur, 'Asian Values v. The Paper Tiger: Dismantling the Threat to Asian Values Posed by the International Criminal Court' (2013) 11(5) *Journal of International Criminal Justice* 1059-1090.
[153] Kapur, ibid; e.g. section 3.3.2, chapter 6.
[154] Section 3.3.2, chapter 5.
[155] Amitav Acharya, 'Norm Subsidiarity and Regional Orders: Sovereignty, Regionalism, and Rule-Making in the Third World' (2011) 55(1) *International Studies Quarterly* 95-123; Deitelhoff and Zimmerman (n 175), 22.
[156] Section 3.2.3, chapter 6.
[157] Stahn (n 8), 46.
[158] Tayyab Mahmud, 'Geography and International Law: Towards a Postcolonial Mapping' (2007) 5(2) *Santa Clara Journal of International Law* 525-562, 545, 549.

power that deprive spatial categories of all meaning.[159] National laws are adopted by geographically defined states, within which different individuals have more or less connection to sites of violence and where actors' mobility across local, regional or international scales[160] is uneven. Some individuals move between provinces and across the world, as where Indonesian activists invite the Mothers of the Plaza de Mayo to Indonesia, certain Myanmar nationals travel to South Africa to discuss truth and reconciliation options, Cambodian NGO representatives attend the ICC Assembly of States Parties (ASP), and activists research and communicate online.[161] However, even if spatial divisions are social constructs, they can still constrain. In other words, access to global forums such as the ASP may be relatively restricted for many, even if new institutions such as National Human Rights Institutions, development projects, and online networks provide avenues to create 'new spaces that cut across old barriers'.[162]

Identifying these constraints as aspects of power and socially constructed spaces, rather than (only) consequences of actors being geographically located as either 'local' or 'international', challenges and builds upon the localisation approach[163] and is complex, but crucial for at least two reasons. First, it helps to reveal how barriers and opportunities can be compounded across geographic lines. That is, community actors may face challenges that arise from local, national, and international sources, even if these also present diverse settings for advocacy. Second, to return to an insight of the localisation framework, recognising that some may find it difficult to move beyond 'local' settings does not suggest that such actors lack agency – or that globalised power divisions are inevitable or necessary.[164] Yet it also serves as a reminder that local actors disagree, just as international organisations and states do. Softening localisation's spatial divisions allows scope to appreciate other similarities and differences between different actors and groups. This helps to avoid equating a failure to prosecute international crimes with 'local' unwillingness or lack of capacity to support international justice norms without further questioning.

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[159] See ibid.
[160] See Björkdahl et al (n 9), 4: 'It is helpful, therefore, to perceive of these dynamics between the global and local not as between two reified or bounded levels of social, economic, and political reality, but between socially constructed, continuously negotiated, and actively interacting scales'.
[161] Buckley-Zistel makes a similar point, (n 141), 28.
[162] Ibid, 28.
[163] Acharya suggests that the localisation, subsidiarity and norm circulation concepts are relevant for 'marginalised' and 'less powerful' actors, thus recognising the importance of power. However, Acharya retains a distinction between 'global' and 'local' norms, actors, and 'levels', wherein the 'less powerful' are often the local actors, even if they hold agency, see Acharya (n 12), 469.
[164] Mahmud (n 158), 554.

Instead, approaches to international crimes can and do arise from complex sources of authority. Tensions between ideas may therefore have unexpected and potentially productive consequences (see section 4). Thus, experiences of international criminal justice found within Southeast Asia demonstrate that categories such as global and local are better viewed as mutually constitutive and dynamic points of perspective, rather than as defined and fixed labels.[165]

3.3. Direction: power and agency

Localisation is a voluntary process that challenges the notion that international ideas and influence flow in one direction: from the 'international' toward receptive states.[166] However, it still considers the reception, or 'import', of external norms.[167] That is, we are still discussing 'norms' – specifically, the norm of international criminal justice[168] – though with an appreciation that different actors reinterpret this idea and may offer alternative approaches toward it. For example, this thesis' analysis of states' international crimes legislation was undertaken with reference to the Rome Statute[169] and focused upon laws adopted by states, although it also discussed non-state initiatives. As mentioned in chapters 2 and 3, this was because the Rome Statute represents part of the 'normalised' approach to prosecuting international crimes, and therefore offers a useful comparison point for considering states' engagement with the norm of international criminal justice.[170] This focus was consistent with this thesis' goal of analysing the *laws* and institutions for prosecuting international crimes in Southeast Asia in a legal thesis. However, it has consequences.

Notably, it may imply that the Rome Statute provides the most important measure against which approaches to international criminal justice are to be judged. This demonstrates how '[l]ocal dimensions are typically considered through a vertical lens, which places the 'international' at the centre and uses it as a benchmark against regional, domestic or local

[165] Buckley-Zistel (n 141).
[166] Section 2.4, chapter 2.
[167] E.g., to boost a domestic government's legitimacy, see Acharya (n 15), 247; section 3.2, chapter 4.
[168] On the constructivist investment in studying norms, see Martin Weber, 'Between "Isses" and "Oughts": IR Constructivism, Critical Theory, and the Challenge of Political Philosophy' (2013) 20(2) *European Journal of International Relations* 516-543.
[169] As discussed in chapter 1, the Statute's provisions do not all represent customary international law. However, it is a focal point for actors seeking to implement international criminal law, especially of course for Rome Statute parties.
[170] Sections 3.2, chapter 2; 4.2, chapter 3.

responses'.[171] Similarly, some have suggested that the low level of ratifications of the Rome Statute indicates that regional states reject the norm of international criminal justice.[172] In this way, the Statute can dominate debates about responding to international crimes and suggest a 'one-size-fits-all' response to heterogeneous contexts.[173]

This suggests that any analysis of how states, and civil societies, respond to international crimes should acknowledge the expansive influence of international normative orders. Indeed, the 'neglect of the role of power in shaping ideational international orders has been a long-standing critique levelled at conventional constructivism',[174] which some scholars have responded to.[175] In particular, the focus of international criminal justice research upon the Rome Statute reflects the observation that 'the promotion of the global 'fight against impunity' has taken on certain missionary features.'[176] These include the notion that states should implement laws that are consistent with the Rome Statute, even though regional states may have felt that their preferences were not secured during the Rome negotiations.[177]

That said, it is not necessarily the ICC's "fault" that the Rome Statute provides a focal point for discussions about international criminal law.[178] Civil society representatives, wherever based, have deliberately referred to the Statute when advocating for the prosecution of international crimes committed in Southeast Asia – and for broader purposes such as the prosecution of gender-based violence.[179] As one advocate explained, international instruments can provide a 'torch' by which they seek to guide regional states, including to

[171] Stahn (n 8), 49.
[172] Section 4, chapter 1.
[173] See regarding such approaches to 'general principles in criminal law', Linton (n 132), 34.
[174] Epstein (n 25), 301.
[175] See Deitelhoff and Zimmerman (n 175), 20.
[176] Stahn (n 8), 57.
[177] Clarke (n 98), 141-142, section 3.2.2, chapter 3.
[178] Stahn (n 8), 59.
[179] E.g. regarding gender issues: PCICC, 'Day of Justice 2012: Women & human rights advocates talk gender-just reparations for Lubanga victims' (20 July 2012) <http://pcicc.wordpress.com/2012/07/20/day-of-justice-2012-women-human-rights-advocates-talk-gender-just-reparations-for-lubanga-victims/>; Emily Waller, Emma Palmer and Louise Chappell, 'Strengthening gender justice in the Asia-Pacific through the Rome Statute' (2014) 68(3) *Australian Journal of International Affairs* 356-373.

try and prevent them adapting norms in undesirable ways.[180] Further, parliamentarians and others drafting legislation find in the Rome Statute a useful model for legislation.[181]

However, the emphasis on the legal framework promoted by the ICC has several other implications. First, establishing international crimes may require additional proof compared with proving 'ordinary' criminal offences; crimes against humanity must be widespread or systematic, genocide requires proving specific intent.[182] This may exacerbate existing witness security and evidentiary challenges in bringing charges within domestic legal systems. States in Southeast Asia have not typically adopted the ICC's Elements of Crimes into domestic legislation, or modified their domestic criminal procedures or modes of liability in order to address international crimes. Prosecuting international crimes may be even more difficult than pursuing other criminal charges, Constitutional remedies or non-criminal responses.

Second, an ICC focus could even limit the potential avenues for prosecuting perpetrators of serious or widespread violence more generally.[183] If the Rome Statute is considered the primary regime for responding to atrocities, official actors might argue that the ICC's lack of attention toward a particular incident suggests that international crimes were not committed.[184] Moreover, in some states in Southeast Asia international criminal justice has been promoted as a potential mechanism for resolving serious human rights violations – for instance by arguing that such violations amount to international crimes[185] – albeit potentially alongside UPR and other human rights oriented arguments.[186] Yet even though

[180] Interview R3, e.g. in relation to human rights: 'So we want everywhere [to] have the same treatment, the same understanding… so, when we mention about "fire", it means "fire, here, there it's "fire", so that's what we want when we talk about human rights, it means human rights [is] like this, not like that.'
[181] Interview P1.
[182] See Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge University Press, 2005), 175.
[183] Sarah Nouwen and Wouter Werner, 'Monopolizing Global Justice: International Criminal Law as Challenge to Human Diversity' (2014) 13(1) *Journal of International Criminal Justice* 157-176; Drumbl (n 105).
[184] See section 3.3.3, chapter 4 regarding the ICC providing a 'shelter' to criminals, Interview C6. See also discussion regarding the Cebongan attack, section 3.2.3, chapter 6.
[185] E.g. Global Diligence, 'Communication Under Article 15 of the Rome Statute of the International Criminal Court The Commission of Crimes Against Humanity in Cambodia July 2002 to Present', Executive Summary (7 October 2014) <https://www.fidh.org/IMG/pdf/executive_summary-2.pdf>; Jefferson Antiporda, 'Int'l court can look into drug killings — CHR', *The Manila Times* (23 August 2016) <http://www.manilatimes.net/intl-court-can-look-into-drug-killings-chr/281635/>.
[186] E.g., compare Global Diligence, ibid, to UN High Commissioner for Human Rights, 'Summary prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the

there have been relevant trials in the broader Asia-Pacific region,[187] rather than a 'justice cascade',[188] human rights repression is not consistently declining in Cambodia or the Philippines, for instance,[189] and violent incidents may even amount to international crimes in some areas.[190] If international crimes are not proven or convictions are overturned (as in the case of the Law 26/2000 trials), perpetrators escape justice, victims are left without remedy, and violence may continue.

Third, a focus on the Rome Statute may indirectly limit the exploration of alternative responses to international crimes and other violent incidents, including for state responsibility. Branch has argued that 'the Court restricts people's concepts of injustice and justice to those provided by the ICC and thus to put entire forms of domination, violence, and inequality beyond the scope of justice'.[191] This may occur even in non-party states through stifling creativity, for example, or because justice advocates focus their resources and attention on the ICC to the detriment of other projects. In fact, in states where the ICC is unlikely to have jurisdiction, it is arguably even more important to develop domestic criminal, or alternative, frameworks for responding to "injustice". However, this thesis has shown that some Southeast Asian states *have* established frameworks for potentially prosecuting international crimes beyond the Rome Statute, including mechanisms such as the ECCC and domestic legislative avenues, though still with a reliance upon international criminal law principles and texts (see next section).

Finally, while this thesis has demonstrated that non-legal and civil society forums and (for instance) security actor training initiatives play important roles in discourse about international crimes, the focus has been on laws and institutions established by states. By questioning assumptions about the direction of influences, there is scope to examine how

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annex to Council resolution 16/21', UN Doc. A/HRC/WG.6/18/KHM/3, 7 November 2013, regarding land disputes.

[187] Leigh A Payne and Kathryn Sikkink, 'Transitional Justice in the Asia-Pacific: Comparative and Theoretical Perspectives' in Renée Jeffery and Hun Joon Kim (eds), *Transitional Justice in the Asia-Pacific* (Cambridge University Press, 2014) 33-60.

[188] Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (W W Norton & Company, 2011).

[189] Sections 2.5, chapter 4; 2.5, chapter 5; though see Bellamy (n 133).

[190] See, generally, (n 185).

[191] Adam Branch, 'What the ICC Review Conference Can't Fix' *African Arguments* (11 March 2010) <http://africanarguments.org/2010/03/11/what-the-icc-review-conference-can't-fix/>, referred to in Stahn (n 8), 62.

various actors seek to *influence non-state* actors, including the general public, as well as non-state perpetrators of crimes, including corporations.[192]

The constructivist focus on the transfer of international norms toward receptive states represents expectations about the direction in which ideas flow. Taken as a whole, this thesis has shown that the Rome Statute and ICC are influential in many states in the region. However, it has also demonstrated that other actors and concepts must be considered in order to appreciate the diversity of laws and institutions for responding to international crimes in Southeast Asia. To focus only on external actors and instruments neglects the agency of political actors throughout Southeast Asia and the processes by which they interact. Instead of acceptance or rejection, there are processes of adaptation, friction between different actors and ideas, and mechanisms that draw on a variety of influences. The following section considers the consequences of this insight.

4. Adjusting for Time, Space and Direction: Implications

The analysis above has several implications for analysing how states respond to international crimes that challenge existing approaches. First, the norm of international criminal justice will not necessarily be accepted through ratification and socialisation over time. Debates about international criminal justice can generate new laws and institutions, but apparent progress may not persist. Yet, rather than rejecting the international criminal justice norm entirely, different actors also reconstruct responses to international crimes, though not in a linear manner. Thus, resistance is not permanent or comprehensive within states. The 'liberal arrow of progress, then, is at odds with these circular, messy, lived temporalities'.[193]

Second, actors operating within diverse and changing social structures may influence international criminal justice in ways that cut across local and international divisions. Resource constraints, power hierarchies, and the ability to access forums for influencing lawmakers might affect different stakeholders' approaches toward international criminal justice. These structural factors may arise from geographic locations that might be termed 'local' or 'international'. However, they are not confined to spatial categories and may have

[192] See Karisa Cloward, *When Norms Collide: Local Responses to Activism against Female Genital Mutilation and Early Marriage* (Oxford University Press, 2015), chapter 1; Interviews C1, M1 regarding the importance of engaging the business community.
[193] Epstein (n 25), 306.

differential impact. Recognising this complexity avoids characterising the region as an international laggard without appreciating the initiatives for pursuing justice that already exist, as well as barriers and opportunities that may extend across boundaries.[194]

Third, the mutability of temporal and spatial categorisations invites further consideration of how such classifications interact. Arguably 'to isolate the temporal from the spatial dimensions of human existence is problematic'.[195] Thus, this thesis also considered how norms might evolve or be contested in multiple directions (across time and space), by challenging assumptions of external-to-internal norm diffusion. It is beyond the scope of this thesis to further analyse possible space-time intersections within international criminal law, but two aspects can be raised. One is that, as social constructs, spatial labels such as 'local', 'international', national boundaries, and jurisdictional provisions may be a product of a particular time. That is, what is considered 'local' today is already contested, but may differ again in five or ten years time; a court's geographic jurisdiction may have been decided differently at another time and in a different location. Further, the spatial elements of jurisdictions, or decisions about the appropriate location and personnel for 'internationalised' mechanisms, might shape perceptions of time – and transition. It might be argued that international criminal law mechanisms, like penal codes, 'not only secure a spatially defined territory, but also act as a temporal hinge, one that performs the crucial role of connecting the past with the future, retribution with prevention'.[196]

A related point concerns how narratives of the 'evolution' of international criminal justice involve accounts of events occurring in particular spaces *and* at certain times.[197] For instance, the dominant norm of international criminal justice might be presented as arising from a (teleological) accumulation of events progressing from certain spaces and times – from, say, the Treaty of Versailles (or trial of von Hagenbach, or earlier), to Nuremberg and Tokyo from 1945-1948, the ICTY's establishment, and Rome in 1998.[198] Likewise, a chronological account told today of Cambodia's progression from ratifying the

[194] In relation to the ICC and Uganda, see Clarke (n 98), 120.
[195] Mariana Valverde, *Chronotopes of Law: Jurisdiction, Scale and Governance* (Routledge, 2015), 9.
[196] Ibid, 12.
[197] And told by different observers situated in various spaces at certain times.
[198] See Gerry Simpson, *Law, War & Crime: War Crimes, Trials and the Reinvention of International Law* (Polity, 2007), whereas the 'history of war crimes law can be comprehended as a series of undulations between recourse to the administration of local justice and grand gestures towards the international rule of law', 33; Buckley-Zistel (n 141), 24; Marieke De Hoon and Kjersti Lohne, 'Negotiating Justice at the ASP: From Crisis to Constructive Dialogue', *EJIL: Talk!* (29 November 2016,) <http://www.ejiltalk.org/negotiating-justice-at-the-asp-from-crisis-to-constructive-dialogue/>.

Rome Statute, to adopting domestic international crimes legislation, to prosecuting international crimes at the ECCC replicates a familiar, linear, socialisation plot promoted since (arguably) the 1998 Rome Conference. This thesis tells different stories, both in relation to Cambodia and elsewhere in Southeast Asia. For instance, international criminal law could be understood as being 'constituted, not by some inexorable surge towards 'global' justice but by th[e] opposition or movement between the domestic and the international'.[199] It therefore invites other 'genres', drawn from alternative perspectives of both spaces and times.[200]

Fourth, this attention to interaction suggests some promise for the normative project of international criminal justice – not because of its inherent progressiveness, but due to the resistance that it can inspire. Tensions between different actors and ideas might stimulate change, or have the potential to be productive, rather than only indicating the rejection of international norms. States and civil society actors have engaged with different ideas to produce diverse responses to international crimes in Southeast Asia, including the Rome Statute and non-criminal structures. In this regard, it is helpful to refer to Anna Tsing's conception of friction:

> A wheel turns because of its encounter with the surface of the road; spinning in the air it goes nowhere. Rubbing two sticks together produces heat and light; one stick alone is just a stick. As a metaphorical image, friction reminds us that heterogeneous and unequal encounters can lead to new arrangements of culture and power.[201]

Determining which consequences of such friction might be 'productive' is subjective, however. This hints at the importance of reflexivity. Stakeholders' own backgrounds and preconceptions inevitably shape their approaches toward analysing responses to violence.[202] For example, this author's international criminal law training as an Australia-based lawyer caused this thesis to focus upon 'international criminal justice', rather than

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[199] Simpson, ibid, 34.
[200] See Valverde (n 195) – recognising that none of us can 'occupy some God-like place from which to measure or to theorize temporality or spatialization', but that we my appreciate 'the different ways in which the processes and relations that make up the world are temporalized and spatialized', 32.
[201] Anna Lowenhaupt Tsing, *Friction: An Ethnography of Global Connection* (Princeton University Press, 2005), 5.
[202] See section 3.2, chapter 2; Inanna Hamati-Ataya, 'Reflectivity, reflexivity, reflexivism: IR's 'reflexive turn' – and beyond' (2012) 19(4) *European Journal of International Relations* 669-694; Sarah M H Nouwen, ''As You Set out for Ithaka': Practical, Epistemological, Ethical, and Existential Questions about Socio-Legal Empirical Research in Conflict' (2014) 27(1) *Leiden Journal of International Law* 227-260; Deitelhoff and Zimmerman (n 175), 28; Michelle Burgis-Kasthala, 'Scholarship as Dialogue? TWAIL and the Politics of Methodology' (2016) 14(4) *Journal of International Criminal Justice* 921-937, 925.

human rights, transitional justice, or community frames for understanding ideas about prosecuting international crimes. By acknowledging their individual normative priorities, politicians, researchers, advocates and international organisation representatives might become more aware of the possibilities for alternative perspectives, terminologies, and ideas.

The fifth implication concerns the direction of influence. The Rome Statute and notions of international criminal justice have affected the way in which some states in Southeast Asia have responded to international crimes. Looking forward, as Stahn has argued, if 'states strengthen domestic systems primarily for the sake of adjudicating specific cases domestically [rather than at the ICC], reform efforts are geared towards ICC priorities rather than long-term domestic interests'.[203] Historic experiences and power structures that encourage the adoption of 'international' mechanisms might restrict the avenues for communities to promote alternative legal and non-legal responses to international crimes.

On the other hand, Southeast Asia might be said to be experiencing the opposite of the ICC's alleged 'Africa bias',[204] in that the Court has dedicated very little attention to the region, other than the recent statement concerning the Philippines.[205] This distance could actually have provided scope for different actors to adapt and develop innovative and context-driven responses to international crimes beyond the Rome Statute. It might also have conveyed the impression that the ICC will make a limited contribution to civil society goals, while promoting international criminal justice requires resources that could be deployed elsewhere. If such a situation continues, it would not be surprising if civil society groups continued to pursue alternative projects (including those focused upon institutional reform and critical engagement with authorities and the general public).

Structural influences, and perceptions of them, can also change. While economic disadvantage arising out of conflict or resource depletion may encourage states to seek international aid associated with particular justice paradigms, donor priorities can alter just as states' reliance upon assistance can. Communities, parliamentarians and other 'local' actors, including the military, have promoted a variety of responses to international crimes drawing on arguments related to stability and sovereignty, alongside international

[203] Stahn (n 8), 74.
[204] ICC Office of the Prosecutor, 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda: 'The ICC is an independent court that must be supported'' (24 November 2015) <http://www.haguejusticeportal.net/index.php?id=13403>.
[205] ICC Office of the Prosecutor, (n 36).

states and organisations. The power to shape discourse about international criminal justice arises from multiple shifting sources. Further, 'the local and the global engage with each other, rather than one being dominated and imprinted upon the other'.[206] This provides scope to produce a variety of legislative (or non-criminal) models for responding to international crimes.

Thus, the potential influence of a range of actors located in diverse and dynamic positions must be taken into account when analysing international criminal justice. This thesis proposes a point of embarkation: rather than analysing the transfer of the international criminal justice norm toward receptive states, how does one imagine international criminal law as an atemporal (dynamic), non-located (yet cognisant of spatial structures) and multi-directional (plural) phenomenon? Or, removing the focus upon 'international criminal justice', how are ideas about how to respond to serious violence formed through the interaction of various actors across different times and spaces? This involves moving away from a 'local' *or* 'international' perspective toward one of shifting viewpoints that anticipates a multiplicity of understandings. None of these perceptions may be spatially bound or stable, but all still arise within social and material structures, while at the same time redefining them.

This suggests that the outcomes of frictional encounters are multifaceted and may be unpredictable.[207] Yet, appreciating this complexity does not suggest that there is no meaningful way of analysing how states (in Southeast Asia) engage with international criminal justice. Across the region and most clearly demonstrated in the case study states, experiences of colonial occupation, instability, political interference, and development priorities, have shaped approaches toward international criminal justice. Each of these issues has been contested and drawn upon to both reject and promote international criminal justice. Thus, this thesis has shown that historic experience, social structures and the way in which actors engage all influence the laws and institutions established to prosecute international crimes.

In fact, this thesis has demonstrated that it is possible to identify some of the key factors that construct adaptive or localised mechanisms, at least in hindsight, in Southeast Asia. As has been observed in relation to the broader democratic reform project in Cambodia, 'the planned outcome of liberal democracy was predictably unfulfilled, while the unpredicted

[206] Buckley-Zistel (n 141), 26.
[207] See Björkdahl et al (n 9).

hybridity was entirely natural'.[208] In other words, it may be impossible to determine what laws will result from frictional engagement, especially as these processes are dynamic, but there is room to consider who is likely to influence them, what arguments they may draw upon, and to identify some of the key dynamics that will affect their operation. Some practical implications of this insight are elaborated upon in the final chapter.

[208] Joakim Öjendal and Sivhuoch Ou, 'The 'awkward' success of peacebuilding in Cambodia – creative and incomplete, unsustainable yet resilient, progressing but stalling' in Annika Björkdahl et al (eds), *Peacebuilding and Friction: Global and Local Encounters in Post Conflict-Societies* (Routledge, 2016) 138-154, 145.

Chapter 8 – Conclusion

1. Introduction

This thesis aimed to identify the laws and institutions for prosecuting international crimes across Southeast Asia and to evaluate whether these represent the acceptance, adaptation, or rejection of the norm of international criminal justice. It considered: what experiences have accompanied the development of international criminal justice mechanisms in Southeast Asia (question A);[1] how different actors have influenced ideas about prosecuting international crimes (B);[2] and what options exist to prosecute international crimes committed in the region (C).[3] Finally, it explored the contribution of an approach concerned with the localisation of norms to analysing international criminal law in Southeast Asia (D).[4] It has argued that the laws and institutions for prosecuting international crimes in Southeast Asia reflect the adaptation of the norm of international criminal justice by diverse state and non-state actors in various locations. Its attention toward the development of international criminal law especially within the case study states, including beyond the Rome Statute framework, is timely given recent developments indicating that international criminal justice remains a live and politically important issue across Southeast Asia.[5]

Section 2 of this chapter identifies the contribution of this thesis to existing literature exploring international criminal justice in Southeast Asia. It suggests several implications of this analysis (2.1) and identifies areas for comparison with other regions and areas of law (2.2). It summarises the insights offered by this thesis for the localisation approach toward examining international norms (2.3) and by its methodology (2.4). Finally, it

[1] See questions in section 5, chapter 1; section 2, chapters 3-6.
[2] Section 3, chapters 3-6.
[3] Section 4, chapters 4-6.
[4] Section 5, chapters 4-6.
[5] E.g., see ICC Office of the Prosecutor, 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda concerning the situation in the Republic of the Philippines' (13 October 2016) <https://www.icc-cpi.int/Pages/item.aspx?name=161013-otp-stat-php>; Marguerite Afra Sapiie, 'Wiranto vows to settle historic human rights abuses', *The Jakarta Post* (15 September 2016) <http://www.thejakartapost.com/news/2016/09/15/wiranto-vows-to-settle-historic-human-rights-abuses.html>; Yanghee Lee, 'End of mission statement by the Special Rapporteur on the situation of human rights in Myanmar', 1 July 2016, <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20224&LangID=E#sthash.sJlBP0Hc.dpuf>.

advocates for a multi-dimensional approach to exploring states' engagement with international criminal justice.

2. Contribution to International Criminal Justice Literature

2.1. Regional Scholarship

Chapter 1 outlined the development of international criminal law and noted that a relatively smaller body of literature addresses Southeast Asian states' engagement with international criminal justice compared to other regions. However, it was noted that there has been important research addressing the use of transitional justice mechanisms across the broader Asian region,[6] as well as examining the International Military Tribunal for the Far East, Extraordinary Chambers in the Courts of Cambodia (ECCC), and responses to crimes in Timor-Leste, including the Special Panels in the District Court in Dili (Special Panels) and trials under Law 26/2000 in Indonesia.[7] This thesis has complemented this literature by elaborating upon engagement with international criminal law in Southeast Asia, rather than the broader Asia-Pacific region or with a focus on one country. This section outlines several implications of this contribution, which challenge existing literature in several ways.

Although this thesis did not only focus upon the Rome Statute, its findings support Findlay, Freeland, and Toon's analyses of why many states in Southeast Asia are not members of the ICC.[8] Principles of sovereignty, related fears of international interference or selective prosecutions, a preference for domestic proceedings, the influence of other states such as the US, and the existence of other priorities – including development and threats to stability arising from armed conflict – are all features of the debate about international criminal justice in Southeast Asia, although they are also relevant beyond the region (see

[6] Especially Renée Jeffery and Hun Joon Kim (eds), *Transitional justice in the Asia-Pacific* (Cambridge University Press, 2014) and Suzannah Linton, e.g. 'Post Conflict Justice in Asia' in M Cherif Bassiouni (ed), *The Pursuit of International Criminal Justice: A World Study on Conflicts, Victimisation and Post-Conflict Justice* (Intersentia, 2010) vol 2, 515-753, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2036245>.
[7] Section 5.2, chapter 1.
[8] Mark Findlay, 'The Challenge for Asian Jurisdictions in the Development of International Criminal Justice' (2010) 32(2) *Sydney Law Review* 215; Mark Findlay, 'Sign Up or Sign Off — Asia's Reluctant Engagement with the International Criminal Court' (2014) 1(1) *Cambodia Law and Policy Journal* 49-62; Valeriane Toon, 'International Criminal Court: Reservations of Non-State Parties in Southeast Asia' (2004) 26(2) *Contemporary Southeast Asia* 218-232; Steven Freeland, 'International Criminal Justice in the Asia-Pacific Region: The Role of the International Criminal Court Treaty Regime' (2013) 11(5) *Journal of International Criminal Justice* 1029-1057.

below). For all of these reasons, while some states that have progressed domestic initiatives to join the ICC (such as Malaysia or Indonesia)[9] may accede to the Statute in the medium-term, it is likely that most states in Southeast Asia will remain outside the ICC framework for some time.

Yet this thesis has also demonstrated (especially in the case study chapters) that a variety of actors contest and respond to these issues in changing ways. For instance, civil society actors reframe measures such as joining the ICC so as to appear consistent with stability, sovereignty, or development issues. Further, many actors have presented reconstructed versions of 'international criminal justice' that accommodate other priorities, such as for reparations, community engagement, or institutional reform.

Beyond the Rome Statute, regional states are subject to obligations to prosecute international crimes arising from the Geneva Conventions, Convention Against Torture, and Genocide Convention. States have established domestic prosecutorial and investigative institutions, adopted international crimes legislation, supported international criminal tribunals outside the region, and contributed to debates about prosecuting contemporary mass violence. Draft legislation in the Philippines and Indonesia would further amend domestic legal approaches to international criminal prosecutions. While the Rome Statute and ICC have been important influences upon the development of international crimes legislation in some states in Southeast Asia, this has not prevented states from adapting various principles and facilitating (or tolerating) some domestic investigations and non-criminal forums for documenting and publicising international crimes.

This has several implications for those advocating for international criminal justice in the region.[10] First, context and experiences matter, noting the differences across regional States, including the capacity within domestic judicial systems to investigate and prosecute international crimes. Both the Rome Statute's complementarity principle and

[9] See chapter 6 regarding Indonesia. In 2011 Malaysia completed the domestic prerequisites to join the ICC by obtaining the approval of the Malaysian Cabinet, ICC 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', ICC Doc. ICC-ASP/10/25, 23 November 2011, para. 14.
[10] Some of the suggestions described in this section are mentioned in Emma Palmer and Christoph Sperfeldt, 'International Criminal Justice and Southeast Asia: Approaches To Ending Impunity for Mass Atrocities' (2016) 126 *AsiaPacific Issues*, <http://www.eastwestcenter.org/publications/international-criminal-justice-and-southeast-asia-approaches-ending-impunity-mass> and I thank and acknowledge Sperfeldt's contribution to some of these ideas.

the improbability of ICC prosecutions across Southeast Asia (see below) suggest that future prosecutions of international criminal conduct are more likely to occur within domestic jurisdictions, whether under specific 'international crimes' legislation or ordinary criminal codes. In order for such crimes to be investigated, let alone for fair trials to be carried out, investigators and judiciaries must be sufficiently independent and have the technical capacities to pursue such prosecutions. This includes ensuring the security of witnesses and overcoming both political barriers to prosecuting influential figures and domestic legal restrictions (such as possible immunities and amnesties). The problems faced by the ECCC, Special Panels and the Law 26/2000 trials demonstrate these challenges. In some jurisdictions, such as Myanmar, and Cambodia and Timor-Leste in the past, recent conflict and resource constraints may exacerbate capacity issues. Thus, one entry point for those promoting the prosecution of international crimes is to focus on institutional reform, including through projects aimed at developing judicial and prosecutorial independence and transparency across the legal system.

Another avenue involves 'educating' various stakeholders about international criminal law investigations and prosecutions. For instance, ECCC lawyers train Cambodian law students and judges, while the Supreme Court of the Philippines Judicial Academy is considering integrating special international criminal law courses into their standard curriculum.[11] Such initiatives are essential to secure convictions given the additional elements, evidence, and novel modes of liability required to prove the commission of international crimes. International, NGO, or cross-regional assistance in this area could help to prevent a situation where serious violence appears too grave, complicated, or sensitive to be prosecuted under ordinary criminal offences, but the higher threshold of the international crimes provisions seems impossible to meet. Building domestic capacity could involve engaging the ICC's potential for 'positive complementarity', which anticipates the Court taking a broader role in encouraging domestic international crimes prosecutions, but may be frustrated by the Court's limited resources (see also below).[12]

[11] See e.g., Supreme Court of the Philippines Philippine Judicial Academy, 'Special Course on International Criminal Law and Security' (January 2016) <http://philja.judiciary.gov.ph/assets/files/pdf/icl.pdf>.
[12] William W Burke-White, 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice' (2008) 49(1) *Harvard International Law Journal* 53-108; Naomi Roht-Arriaza, 'Just a 'Bubble'? Perspectives on the Enforcement of International Criminal Law by National Courts' (2013) 11(3) *Journal of International Criminal Justice* 537-543, 537.

Indeed, technical assistance is unlikely to shift state positions toward prosecuting international crimes in isolation. In fact, such initiatives have been pursued across the region for many years, with varied success (compare the impact of Rome Statute capacity-building in Lao PDR and Timor-Leste). To be sure, a degree of misperception about prosecuting international crimes and the ICC likely persists in some quarters. A variety of government departments with rotating staff are involved in lawmaking processes, while the official institutions most interested in seminars (such as National Human Rights Institutions (NHRIs), Ministries of Foreign Affairs, Justice, or Attorney General's departments) may already be relatively amenable to prosecuting international crimes, whereas opponents, including in the military, can be comparatively harder to access. However, the lengthy engagement of regional states with the issue suggests that a failure to understand the notion of international criminal justice – or for instance the principle of complementarity – is not the primary factor restraining states from accepting these norms. Indeed, approaches focused only upon education represent assumptions about the dominance of external influence and domestic incapacity that may patronise and deny local agency. They may also fail to disrupt persisting political barriers. Those advocating for international crimes prosecutions could also learn from and progress existing initiatives that engage with diverse experiences and contexts.

Second, this thesis has demonstrated that there is already relevant legislation and a range of actors debating international criminal justice across Southeast Asia. NGOs and networks draw upon "local" contexts to encourage prosecutions, but often also aim to promote the Rome Statute's underlying aims in broader ways that may not rely upon international criminal law. Existing approaches include monitoring serious human rights violations and related trials, supporting and complaining to NHRIs, and publicising violent incidents via local, national, regional, and international networks including the Universal Periodic Review. Lawyers have brought cases under domestic legislation and contributed to debates about amending relevant laws. Parliamentarians, academics, lawyers, and NGO representatives have ensured that legal analysis is provided to drafting committees and countered arguments from other interest groups seeking less comprehensive criminal jurisdiction. There is therefore potential to use and develop domestic legislation, respond to victims' particular demands, or pursue alternative responses to different past, current, or prospective crimes. The examples offered in this thesis are not exhaustive, but

demonstrate that a variety of approaches for promoting international crimes prosecutions already exist in Southeast Asia that look beyond the Rome Statute.[13]

Third, this expertise provides opportunities for cross-regional NGO, parliamentary, judicial, and investigative experience sharing. This may relate to the prosecutions that have occurred, including before the Special Panels, ECCC, and under Law 26/2000, as well as the processes adopted for drafting and enforcing *domestic* legislation, such as the Philippine's IHL Act, or of how advocacy can draw on local contexts, including traditional and religious processes. International groups such as the Asia-Pacific division of the Coalition for the International Criminal Court (CICC) and Parliamentarians for Global Action, and national networks such as the Philippines and Indonesian Civil Society Coalitions for the ICC have already pursued such regional discussions.[14]

Again, these might not be overtly targeted toward international criminal justice, but allow participants to learn more about other actors' different priorities concerning responding to serious violence.[15] The ASEAN Intergovernmental Commission on Human Rights (AICHR) might eventually represent another useful institution for highlighting the importance of prosecuting international crimes, although its mandate is limited.[16] Further, militaries across Southeast Asia have often opposed ratifying the Rome Statute or the prosecution of (especially military perpetrators of) alleged international crimes. However, they have also been significant contributors to UN peacekeeping operations and may continue to engage in military-to-military discussions that carefully address accountability issues.[17] NGO networks have already recognised that these experiences may encourage militaries to support the enforcement of international humanitarian law principles, including through international crimes mechanisms and notions of command responsibility.

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[13] See also Palmer and Sperfeldt (n 10).
[14] See also Suzannah Linton, 'Putting Things Into Perspective: The Realities of Accountability in East Timor, Indonesia and Cambodia' (2005) 3(182) *Maryland Series in Contemporary Asian Studies Series* 1-88, 6, regarding experience sharing that occurred between personnel at the Special Panels and ECCC.
[15] E.g., International Coalition for the Responsibility to Protect and Asia Pacific Centre for the Responsibility to Protect, 'Advancing Atrocities Prevention in Southeast Asia' (2016) <https://r2pasiapacific.org/filething/get/2114/SE%20Asia%20Report%20Web%20Version.pdf>; Palmer and Sperfeldt (n 10).
[16] Section 4.1, chapter 3.
[17] See Jewel Topsfield, 'Indonesia, Australia military co-operation on hold for 'technical reasons'', *The Sydney Morning Herald* (4 January 2017) <http://www.smh.com.au/world/indonesia-australia-military-cooperation-on-hold-for-technical-reasons-20170104-gtltai.html>.

Fourth, while these strategies are often implemented by domestically based or regional NGOs and civil society, this thesis suggested that international actors also play an important role in advocating for prosecuting international crimes in the region (beyond technical assistance or capacity building activities). It is arguable that none of the laws and institutions for prosecuting international crimes in Southeast Asia would have been adopted in the absence of any international pressure or support. Yet, for international states and organisations that continue to promote international criminal justice in the region, context-specific responses that recognise and support the existing initiatives in the region are likely to be more useful.[18]

The prospects for the ICC investigating or prosecuting crimes in Southeast Asia are discussed in the next section. However, in relation to its role in advocating for international crimes prosecutions, the ICC could further develop regional consultations with NGOs and official actors to learn about relevant domestic priorities, activities and concerns. This would greatly improve the ICC's network and knowledge as it decides whether to investigate alleged international crimes within Southeast Asia in future[19] – for example, in the Philippines or Cambodia. It would also help to build trust within regional civil society that the ICC will incorporate their experiences in ways that are valuable and appropriate to support (amplify) their own domestic and regional mandates. The ICC faces its own resource and political constraints, but will need input from civil society if it does commence investigations in the region or promote domestic complementarity proceedings, especially as regional official actors are likely to oppose international 'interference' (see below). This might also involve revisiting the role of CICC in the region, as it provides a potential gateway between the ICC and relevant NGOs in Southeast Asia.

Yet, this thesis indicates that civil society support for the ICC is likely to be heterogeneous in Southeast Asia, given the emphasis of many actors upon domestic and community responses to violence. The ICC has much to learn from Southeast Asian civil society about how to navigate challenging regional political environments. Indeed, legislators, judiciary and security force members, NHRIs, civil society networks and individual community members can all suggest adaptive approaches toward responding to international crimes – beyond only ratifying the Rome Statute. These stakeholders might request resources, expertise, and other assistance in doing so, but international contributions are likely to be most helpful where they are offered in a consultative manner and with a sustainable

[18] Palmer and Sperfeldt (n 10).
[19] See ibid.

trajectory. It should not be presumed that projects – or specific prosecutorial initiatives – lack or have the support of communities without actively integrative (rather than notional or symbolic) dialogue.

Fifth, this thesis demonstrates that international criminal justice can be developed and reconstructed by civil society actors, including community members. Even when confronted by security and political challenges, NGOs have used local initiative to directly or indirectly contribute to the goals of international criminal justice. These include developing non-criminal public hearings that stimulate public discourse and allow victims to vocalise their experiences and needs, pursuing media campaigns targeting younger generations, and addressing related priorities such as legal aid, social welfare, and land and tax reform. Yet a certain amount of political 'space' is required in order for such events and projects to be developed in safety. Legislation or policing that limits the scope of NGO activities, such as recent laws passed in Cambodia restricting NGO registrations,[20] or media controls, also inhibit the opportunities for debating – and reconstructing – notions of international criminal justice.

Finally, local adaptation is not necessarily a progressive or positive process from the perspective of those supporting the norm of international criminal justice. Critical engagement strategies may or may not be more effective for securing convictions, but in practice are pursued in countries like Indonesia and the Philippines in the absence of other realistic expectations of securing justice. Alternative approaches such as seeking reparations, non-criminal forums, or institutional reform projects might indirectly contribute to future prosecutions, but do not ensure that perpetrators of 'the most serious crimes of concern to the international community as a whole'[21] are punished. Domestic investigations and prosecutions are often not pursued, or may not be considered fair or to have sufficiently contributed to post-conflict reconciliation. National legislation may expand upon, or limit, the scope of the Rome Statute's crimes, but if not enforced, will not contribute to 'ending impunity'.[22]

Yet, this thesis highlights how tensions between different actors may affect the development of laws, institutions, and projects – including in ways that potentially contribute to some goals associated with international criminal justice, such as the

[20] Human Rights Watch, 'World Report: Cambodia' (2016) <https://www.hrw.org/world-report/2016/country-chapters/cambodia>.
[21] Preamble, Rome Statute.
[22] See section 2, chapter 1.

documentation of crimes, monitoring government accountability, or community reconciliation. Thus, it calls for a more nuanced appreciation for the multiple and dynamic ways that actors, including within civil society, engage with each other and international criminal law. Approaches toward international criminal justice will continue to evolve in Southeast Asian states. However, both linear progression and stagnant resistance toward the ICC and the norms it promotes are unlikely scenarios. Instead, debates about sovereignty, development, human rights and the rule of law, politicisation and selectivity, and the promotion of peace and stability, are likely to be contested with respect to international criminal justice by actors located within and beyond the region. States may respond to significant events such as the future commission of crimes, new civil society strategies, or ICC action in the region, in ways that are not predictable. However, they will probably do so with reference to the themes presented in this thesis and be influenced by actors based within the region.

2.2. Comparing Regions and Regimes

The debates about sovereignty, potential ICC interference, the existence of competing development priorities, and stability concerns that have featured in regional debates about the ICC are not restricted to Southeast Asia. In fact, these concerns have been raised by a number of states, for instance when the ICC issued arrest warrants for Sudan's President Al-Bashir.[23] The US, China and Russia are not states parties and while most African states have ratified the Rome Statute, the African Union (AU) has been openly hostile toward the Court.[24]

This resistance has been accompanied by an evolving critical international criminal law scholarship that challenges the assumptions and normative goals of the international criminal justice 'project'.[25] Other scholars have considered the scope for 'plural' approaches to international criminal law.[26] This thesis has contributed to such scholarship

[23] E.g., African Union, 'Decision on the Progress Report on the Commission on the Implementation of Decision Assembly/AU/Dec.270(XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court', AU Doc. Assembly/AU/10(XV), 27 July 2010.
[24] Agence France-Presse, 'African Union members back Kenyan plan to leave ICC', *The Guardian* 2 February 2016 <https://www.theguardian.com/world/2016/feb/01/african-union-kenyan-plan-leave-international-criminal-court>.
[25] See section 2, chapter 1; Frédéric Mégret, 'International Criminal Justice: A Critical Research Agenda', 18, and other contributions in Christine Schwöbel (ed), *Critical Approaches to International Criminal Law: An Introduction* (Routledge, 2014).
[26] Section 2, chapter 1; e.g., see Elies van Sliedregt and Sergey Vasiliev (eds), *Pluralism in International Criminal Law* (Oxford University Press, 2015).

by demonstrating how state and other actors have both resisted and adapted the norm of international criminal justice across Southeast Asia, including by adopting domestic laws and establishing related institutions. These mechanisms have integrated some aspects of the normalised approach to prosecuting international crimes (such as by adopting similar laws to the Rome Statute), while also having regard to diverse and competing concerns. This has led to the establishment of adaptive structures such as the ECCC, Special Panels and Law 26/2000, or the pursuit of other priorities. That is, rather than only 'transplanting organs into an existing body', there are indications that alternative conceptions of international criminal justice are being formed.[27]

These findings offer scope for comparative regional research exploring the relative influence of the norm of international criminal justice in different contexts. For instance, De Vos has observed that Kenya and Uganda (both ICC state parties) replicated the Rome Statute in national law with little accommodation 'to reflect more localised concerns and desires', such as incorporating corporate liability.[28] This thesis has contributed to the literature concerning the ICC's complementarity principle, as it has analysed how ICC members in Southeast Asia have similarly relied upon the Rome Statute model for implementation, though arguably with relatively greater adaption both to narrow and broaden the scope of national laws.[29] The reasons for these (still minor) departures are country specific, hinting that while some Southeast Asian states may have adopted such legislation in part to '"perform" complementarity for predominantly international audiences', as in Kenya and Uganda,[30] there were also additional internal political factors. Further, draft amendment legislation in the Philippines ostensibly to comply with the complementarity principle might narrow the scope of its existing international crimes legislation. It would therefore be instructive to examine the operation of the complementarity regime both between Southeast Asian states and compared to other

[27] Cassandra Steer, 'Legal Transplants or Legal Patchworking? The Creation of International Criminal Law as a Pluralistic Body of Law' in Elies van Sliedregt and Sergey Vasiliev (eds), *Pluralism in International Criminal Law* (Oxford University Press, 2015) 39-67, 54.
[28] Christian De Vos, 'All roads lead to Rome: implementation and domestic politics in Kenya and Uganda' in Christian De Vos, Sara Kendall and Carsten Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press, 2015) 379-407, 403.
[29] For instance, the Cambodian legislation allows for corporate liability, Indonesia's Law 26/2000 excludes war crimes.
[30] De Vos (n 28), 406.

regions, including where relatively more states have ratified the Rome Statute, such as in Latin America,[31] or within the closer South and East Asia regions.

Clarke has argued that the ICC's 'failure to treat Ugandans and other Africans as political agents creates, again, the conditions for seeing Africans as in need of salvation by a benevolent "West"'.[32] This observation has less immediate relevance for Southeast Asia, as there has been relatively little ICC engagement to date. Yet, as argued in chapter 7, mainstream approaches to norm diffusion can represent similar assumptions about the progressive nature of international criminal justice and the superiority of international instruments over domestic approaches. Further, there have been suggestions that prosecuting crimes in Asia, and particularly Cambodia, could relieve the ICC from accusations of an African bias,[33] although the ICC's focus upon land and environment crimes may still attract accusations that it is targeting developing countries.[34] Should the ICC take a similar approach to any future Southeast Asia investigations as it has in Africa, the question arises as to whether it might face similar cooperation issues. Only limited speculation can be provided here.

It remains the case that a Security Council or state referral of a situation in Southeast Asia to the ICC Prosecutor is unlikely.[35] In late 2016 international concerns about violence involving the Rohingya minority group in Myanmar escalated, including from within Southeast Asia.[36] China and other states have previously blocked a Security Council resolution concerning military attacks in Myanmar[37] and as at 30 November 2016 there was no indication that the Security Council would refer the situation to the ICC. A

[31] See Naomi Roht-Arriaza, 'Just a 'Bubble'? Perspectives on the Enforcement of International Criminal Law by National Courts' (2013) 11(3) *Journal of International Criminal Justice* 537-543.
[32] Kamari Maxine Clarke, *Fictions of justice: the International criminal court and the challenges of legal pluralism in sub-Saharan Africa* (Cambridge University Press, 2009), 119.
[33] E.g., Thierry Cruvellier, 'The ICC, Out of Africa', *The New York Times* (6 November 2016) <http://www.nytimes.com/2016/11/07/opinion/the-icc-out-of-africa.html?_r=0>.
[34] Christine Schwöbel-Patel, 'The Re-branding of the International Criminal Court (and Why African States Are Not Falling For It)' *Opinio Juris* (28 October 2016) <http://opiniojuris.org/2016/10/28/the-re-branding-of-the-international-criminal-court-and-why-african-states-are-not-falling-for-it/>.
[35] Section 3, chapter 1.
[36] Agencies, 'Malaysia: Myanmar pursues ethnic cleansing of Rohingya', *Al Jazeera* 3 December 2016 <http://www.aljazeera.com/news/2016/12/myanmar-ethnic-cleansing-rohingya-161203104609449.html>.
[37] United Nations, 'Security Council Fails to Adopt Draft Resolution on Myanmar, Owing to Negative Votes by China, Russian Federation, Press Release SC/8939' (12 January 2007) <http://www.un.org/press/en/2007/sc8939.doc.htm>.

preference for investigative and domestic (or possibly regional)[38] responses was also indicated when the Myanmar government supported the formation of an Advisory Commission on Rakhine State led by former UN Secretary-General Kofi Annan.

The Philippine preference for adopting domestic legislation when ratification remained unpopular, Cambodia's insistence on an internationalised model for the ECCC, and Indonesia's willingness to adopt Law 26/2000 and prosecute perpetrators (even if convictions were overturned) all indicated desires to avoid international political interference, while sustaining international relationships and internal stability. Similar concerns may well persist, even if they are contested by civil society. Any ICC investigations in the region may be greeted with wariness and even resistance by ASEAN, though (as in Africa) different states are likely to take different approaches. Thus, prosecutions in Southeast Asia are unlikely to provide an easy method of geographic diversification for the ICC. Still, speaking generally, this thesis finds that resistance to the ICC is likely to occur through emphasising domestic legislation, sovereignty, and adaptation – rather than an overt rejection of the principles of international criminal justice. There is scope for further research to investigate the possibilities for ICC cooperation and its domestic consequences in the event of future regional investigations. This could include doctrinal analysis of the possible laws – for example, relating to extradition – that might apply in such an event, as well as qualitative investigation.

This thesis has also revealed opportunities to analyse approaches toward international criminal justice and the ICC in relatively unexplored areas, for example: non-party states with no international crimes mechanisms such as Myanmar. In general discussions during fieldwork for this thesis in 2014, regional activists were deeply concerned by 'land-grabbing' issues across Southeast Asia and viewed these as just as serious as, and possibly amounting to, international crimes.[39] These reports were followed by the ICC Prosecutor's

[38] Malaysia claimed that the ethnic cleansing was leading to a flow of refugees that 'makes this matter no longer an internal matter, but an international matter', see Agencies (n 36).
[39] See GRAIN, 'Asia's agrarian reform in reverse: laws taking land out of small farmers' hands' (30 April 2015) <https://www.grain.org/article/entries/5195-asia-s-agrarian-reform-in-reverse-laws-taking-land-out-of-small-farmers-hands>; Global Diligence, 'Communication Under Article 15 of the Rome Statute of the International Criminal Court The Commission of Crimes Against Humanity in Cambodia July 2002 to Present' (7 October 2014) <https://www.fidh.org/International-Federation-for-Human-Rights/asia/cambodia/16176-cambodia-icc-preliminary-examination-requested-into-crimes-stemming-from>; Human Rights Foundation of Monland, Burma Link, Burma Partnership, 'Invisible Lives: The Untold Story of Displacement Cycle in Burma' (August 2016) <http://www.burmapartnership.org/wp-content/uploads/2016/09/FINAL-Eng-IDP-Report-1.pdf>.

2016 announcement that she would prioritise land crimes.[40] These developments favour the expansion of scholarly attention toward the legal issues associated with diverse forms of violence and widespread human rights violations, including those related to land disputes and within different legal frameworks. There is also significant non-legal and domestic activity relating to international criminal justice that might be further examined. Opportunities include comparing this and similar qualitative research with findings drawn from larger quantitative studies and databases,[41] or deeper empirical research exploring how rural and remote community activists shape responses to international crimes.

Finally, this thesis complements the scholarship concerning the diffusion of other normative regimes within the region, including human rights norms. It has been pointed out that Asian states' failure to join the ICC framework is reminiscent of their relative reluctance to ratify international human rights law treaties.[42] Jetschke has shown how justifications and excuses about human rights violations in the Philippines and Indonesia shaped responses to various incidents.[43] Others have discussed the role of ASEAN and AICHR in debates about human rights,[44] or the responsibility to protect.[45] This thesis builds upon this research by examining similar debates in relation to international criminal justice. It demonstrates that terminology is often contested, including as to whether particular situations are constructed as 'human rights violations' as opposed to international or other crimes, or whether generic terms such as 'violence' or projects about preventing atrocities via reforms are more appropriate.[46]

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[40] ICC Office of the Prosecutor, 'Policy Paper on Case Selection and Prioritisation' (15 September 2016) <https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf>.
[41] Such as the ICC's Legal Tools Database, Transitional Justice Database Project and ICRC's Customary International Humanitarian Law Database; see Hun Joon Kim and Renee Jeffery, 'Conclusion' in Renee Jeffery and Hun Joon Kim (eds), *Transitional Justice in the Asia Pacific* (Cambridge University Press, 2014) 259-280, 273.
[42] Simon Chesterman, "International Criminal Law with Asian Characteristics" (2014) *NUS Law Working Paper Series* 2014/002.
[43] Anja Jetschke, *Human Rights and State Security: Indonesia and the Philippines* (University of Pennsylvania Press, 2011).
[44] Alex J Bellamy, 'Atrocity Prevention: From Promise to Practice in the Asia Pacific' (2016) 8(2-3) *Global Responsibility to Protect* 180-199; Matthew Davies, 'ASEAN and human rights norms: constructivism, rational choice, and the action-identity gap' (2013) 13(2) *International Relations of the Asia-Pacific* 207-231.
[45] Alex J Bellamy and Mark Beeson, 'The Responsibility to Protect in Southeast Asia: Can ASEAN Reconcile Humanitarianism and Sovereignty?' (2010) 6(3) *Asian Security* 262-279; Genocide Watch, 'Southeast Asia Report: Advancing Atrocities Prevention' (2015) <http://genocidewatch.net/2016/04/11/southeast-asia-report-advancing-atrocities-prevention/>.
[46] Section 5.2, chapter 6.

These findings reveal how future research could compare the application of different legal language across the region to identify if and when certain regimes have greater use or impact. Scholars might track and investigate (for example, using discourse analysis techniques) how dialogue evolves in response to a given incident, to locate how and when international criminal justice language might feature as opposed to human rights or more vernacularised terminology. It was beyond the scope of this thesis to engage in a significant examination of ASEAN or AICHR's potential to contribute to international criminal justice given their relative lack of engagement with this field to date.[47] Nor did it compare regional engagement with international criminal law to other areas of public or private international law. These could all be fruitful areas for further analysis.

In summary, this thesis examined debates about international criminal justice in Southeast Asia. It supplemented and challenged existing literature concerning Rome Statute ratifications and transitional justice in the region with empirical research that highlighted particular strategies and themes in Cambodia, the Philippines and Indonesia. Rather than asking why states should ratify the Rome Statute, or seeking to explain why they have not, it placed this debate in historical context and analysed the arguments deployed by various actors to influence approaches toward prosecuting international crimes beyond the ICC. This thesis has devoted particular attention to the role of civil society, especially NGO, actors and the general public in shaping debates about the resulting laws and institutions, as well as how some actors have resisted and adapted the international criminal justice norm. This raised issues of relevance to other regions, including as to complementarity and cooperation with the ICC, and to other international law fields, such as international human rights law, that warrant further investigation. A further contribution to all of this literature was the application of a localisation framework to analyse engagement with international criminal justice.

2.3. Contribution to Theoretical Framework

This thesis represents the first extensive attempt to apply the localisation framework to analyse international criminal justice.[48] Doing so has presented several important

[47] See section 4.1, chapter 3.
[48] Though see Emma Palmer, 'Localizing international criminal accountability in Cambodia' (2015) 16(1) *International Relations of the Asia-Pacific* 97-135 for a preliminary attempt in relation to Cambodia; and Lisbeth Zimmermann, 'Same Same or Different? Norm Diffusion Between Resistance, Compliance, and Localization in Post-conflict States' (2014) *International Studies*

implications. First, consistent with constructivist claims,[49] identities, actors' agency and discourse, historic experiences, and social structures shape perceptions of international criminal justice and the manner in which it is implemented. Further, as the localisation framework emphasises, states and international organisations are not the only or primary actors to influence legal change. Rather, the ways in which actors including diplomats, legislators, community and other civil society actors perceive and attempt to influence laws must be taken into account in order to provide an accurate account of engagement with international norms.

Second, rather than anticipating that international norms will be internalised over time through processes of socialisation, a productive (and realistic) starting point could consider how ideas change through processes of interaction in various settings. Removing an expectation of temporal progression considerably opens the scope for productive analysis. For instance, it suggests that states can take varied approaches in relation to different violent incidents and that neither favourable nor resistant positions are fixed and unassailable.

Third, grouping actors as 'local' or 'international' can help to reveal divergent understandings of international norms and highlight the importance of different contexts. However, these spatial placeholders must not mask heterogeneity, the potential for movement across these categorisations, or other axes for tension between different actors (including via power structures and intersectional differences of sex, ethnicity, race, education, etcetera). It may be more useful to understand stakeholders' potential influence over international crimes laws by considering their interests, arguments and access to various forums of debate and influence, while also recognising that these elements can change.

Finally, the localisation framework might be further developed in future research in several ways. In particular, greater attention could be devoted toward integrating Acharya's concepts of localisation, subsidiarity and norm circulation.[50] For instance,

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Perspectives 98-115, including 104-105 for references regarding peacebuilding and human rights in post-conflict countries.

[49] See section 2, chapter 2.

[50] Amitav Acharya, 'How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism' (2004) 58(2) *International Organization* 239-275; Amitav Acharya, 'Norm Subsidiarity and Regional Orders: Sovereignty, Regionalism, and Rule-Making in the Third World' (2011) 55(1) *International Studies Quarterly* 95-123; Amitav Acharya 'The R2P and Norm Diffusion: Towards A Framework of Norm Circulation' (2013) 5(4) *Global Responsibility to Protect*

'subsidiarity' acknowledges a role for power dynamics by explaining how local actors (especially from post-colonial states) export norms (such as sovereignty) self-protectively to challenge prevailing normative orders in favour of local autonomy. This thesis has uncovered similar behaviour in regional states' preferences for domestic legislative responses to international crimes and promotion of sovereignty and non-interference norms. Yet, at least in some states, these forms of contestation also involve attempts to reconstruct ideas about international criminal justice through adapting international crimes laws. That is, processes of localisation and subsidiarity intersect.

Further, localisation draws attention to novel approaches to translating or adapting existing international and local norms. However, there is scope to consider how friction between different ideas and actors might generate entirely new practices and norms.[51] To an extent, Acharya's broader work on norm 'circulation' responds to this insight by considering how norms evolve through feedback loops.[52] This thesis also suggests that resistance to particular norms such as international criminal justice might have wider implications, such as by encouraging resources to be dedicated toward developing non-judicial mechanisms or human rights offices with mandates that extend beyond investigating international crimes. Examining this issue further would involve not only analysing those approaches toward international crimes that are not derived from the Rome Statute, but also those that do not target prosecutions at all.

The four dimensions of the localisation framework could also be further interrogated. The 'prelocalisation' concept usefully invites researchers to identify 'aspects of the existing normative order'[53] that might be in friction with a different set of norms. This invites a historic and contextual analysis, which in this thesis highlighted particular experiences and themes relating to international criminal justice across Southeast Asia. However, this research suggests that, rather than representing contestation with preexisting 'cognitive priors', 'prelocalisation' resistance toward norms: may continue post the 'amplification' of such debates in new laws; is unlikely to be uniform within states; and involves various

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466. Similar approaches might also be further engaged with, see e..g. 'syncretic institutionalism', Dennis Charles Galvan and Rudra Sil (eds), *Reconfiguring institutions across time and space: syncretic responses to challenges of political and economic transformations* (Palgrave Macmillan, 2007); Annika Björkdahl, Kristine Höglund, Gearoid Millar, Jair van der Lijn and Willemijn Verkoren, *Peacebuilding and Friction: Global and Local Encounters in Post Conflict-Societies* (Routledge, 2016).

[51] See Björkdahl et al, ibid.

[52] Acharya (2013) (n 50).

[53] Acharya (2004) (n 50), 251.

changing behaviours. Future research might similarly begin with a historic awareness, but investigate the ongoing and contested nature of events and experiences (that is, across both time and space), instead of viewing them only as precursors to normative adaptation, or as representing supposedly '"authentic" local values'.[54] Rather than labelling this as '*pre*localisation', it may be helpful to identify this task as one of locating normative debates within dynamic contexts (perhaps, 'contextualisation').

This thesis adopted Acharya's heading of 'local initiative' for the relevant chapter sections addressing different groups' approaches toward international criminal justice. This was arguably inappropriate, since each section also considered *international* influence, which was necessary to accurately capture the character of international criminal justice debates. However, the title remained, since these sections also identified how actors in various locations attempt to frame the international criminal justice norm to establish 'their value to the local audience'.[55] That is, some international NGO groups and states have used 'local initiative', albeit in a slightly different sense to that proposed by Acharya as these are not his 'credible local actors'. Further, despite the difficulties associated with the term "local", discussed in chapter 7, focusing on what 'local initiative' might mean in a given context drew the research toward considering community-derived projects and the general public, rather than only the transnational networks that typically feature in constructivist scholarship. It would therefore be useful to include a similar section in future analyses, but to ensure it considers how diverse actors draw on and change arguments – or are excluded from debates.

In Acharya's 'adaptation' process, local actors borrow from and reconstruct international norms. 'Amplification' involves the development of new instruments and practices 'from the syncretic normative framework in which local influences remain highly visible', in order to expand the recognition of existing norm hierarchies through 'association with the foreign norm'.[56] This thesis found that laws and institutions can be established while aspects of the relevant norms continue to be contested (such as Indonesia's failure to accede to the Rome Statute, despite adopting Law 26/2000), rather than at the end of a localisation process. Such mechanisms may also form the subject of future local initiatives, for instance where NGOs advocate for legislative amendments or greater enforcement,

[54] Nicole Deitelhoff and Lisbeth Zimmermann, 'From the Heart of Darkness: Critical Reading and Genuine Listening in Constructivist Norm Research: A Reply to Stephan Engelkamp, Katharina Glaab, and Judith Renner' (2014) 10(1) *World Political Science Review* 17-31, 23.
[55] Ibid, 251.
[56] Ibid, 251.

alongside other adaptive projects. It was therefore practically and theoretically difficult to separate adaptation from 'local initiative' or 'amplification' and admittedly the scope of each section was porous.

However, including an 'adaptation' section prompted an analysis of how actors move beyond reframing international criminal justice to pursue related ends, often in novel ways. Its loose boundaries allowed this thesis to consider how international criminal justice-focused organisations undertake apparently distinct initiatives, such as addressing land reform and conflict prevention. Further research could clarify the conceptual scope of 'adaptation' and 'amplification' with reference to a wider array of practical examples concerning international criminal justice, perhaps drawn from other regions or relative to different norms. This might also help to explain the impact of power structures upon norm reconstruction in varied contexts; that is, to explore how international norms are adapted within different constraints and opportunity sets. In this context, there is also scope to elaborate upon this research using (or developing) alternative theoretical frameworks derived from Southeast Asia, or drawn from post-colonial studies and Third-World Approaches to International Law.[57]

This thesis supports the position that, unlike some constructivist perspectives that propose that 'local practices are made consistent with an external idea', in Southeast Asian states 'external ideas are simultaneously adapted to meet local practices' through localisation.[58] Yet while this thesis confirms that localisation is not static,[59] it is not necessarily progressive (see chapter 7). Laws can lie dormant (noting the lack of prosecutions under the Philippines IHL Act, Cambodia's Criminal Code provisions, or Law 26/2000 in more than a decade) and violations of rights and incidents of violence often continue to lack remedy. Apparently 'localised' mechanisms such as the ECCC continue to face challenges, potentially from both domestic and international avenues. Thus, this thesis does not suggest that internationalised tribunals or domestic prosecutions, or other

[57] Ching-Chang Chen, 'The absence of non-western IR theory in Asia reconsidered' (2010) 11(1) *International Relations of the Asia-Pacific* 1-23; Amitav Acharya and Barry Buzan, 'Why is there no non-Western international relations theory? An introduction' (2007) 7(3) *International Relations of the Asia-Pacific* 287-312; Anchalee Rüland, 'Constraining Structures: Why Local International Relations Theory in Southeast Asia Is Having a Hard Time' in Ingo Peters and Wiebke Wemheuer-Vogelaar (eds), *Globalizing International Relations: Scholarship Amidst Divides and Diversity* (Palgrave Macmillan, 2016) 107-129.
[58] Ibid, 251.
[59] Acharya (2013) (n 50).

localised mechanisms, will necessarily bring perpetrators of atrocity crimes to justice, break so-called cycles of impunity, or strengthen global justice norms.

On the other hand, concentrating advocacy attention only upon Rome Statute ratification also arguably has limited scope to secure convictions, or ensure future accountability. While localisation processes do not inevitably end impunity, they can contribute to other ends such as developing new legal institutions, encouraging discourse about past events, empowering victims, and promoting political accountability. This may or may not lead to future prosecutions, but involves contestation and engagement within domestic legal systems, even in situations where the ICC is unlikely to act. The point is that recognising and exploring the options for investigating and prosecuting international crimes beyond the Rome Statute is not the same as rejecting the norm of international criminal justice and promoting impunity. Instead, it simply recognises prevailing realities and the potential represented by resistance and friction. In summary, localisation provides a useful device for exploring approaches to different norms, but it might be usefully adjusted by relaxing assumptions of temporal progression (including as suggested by the notion of '*pre*localisation') and local/global divides, and further theorising how discursive tensions contribute to innovative legal outcomes.

2.4. Methodological Limitations and Contributions

Chapter 2 explained that this thesis did not take a strict comparative law approach but, consistent with its emphasis upon international norms and their relationship to law, adopted qualitative empirical research methods.[60] This is a relatively novel approach to international criminal law scholarship, which tends toward doctrinal methodologies,[61] and involved a number of limitations (see section 3 of chapter 2). In particular, the data collection process was restricted by timeframe, access, selectivity, reliability, and bias issues. These were largely unavoidable given the time and resource limits of this research, although future research might analyse developments that take place after this thesis, drawing on more extensive fieldwork.

[60] Section 3.2, chapter 2.
[61] Sarah M H Nouwen, ''As You Set out for Ithaka': Practical, Epistemological, Ethical, and Existential Questions about Socio-Legal Empirical Research in Conflict' (2014) 27(1) *Leiden Journal of International Law* 227-260. Such methods are common within the transitional justice field, but less so in international criminal law, as observed by Michelle Burgis-Kasthala, 'Scholarship as Dialogue? TWAIL and the Politics of Methodology' (2016) 14(4) *Journal of International Criminal Justice* 921-937, 926.

Case studies are not comprehensive and are best used to illustrate ideas, rather than claiming to represent accurate accounts of events.[62] The studies explored in this thesis demonstrated different arguments and processes for prosecuting international crimes, which necessarily excluded some historic events. Each study was time bound and only updated for developments occurring before 30 November 2016. However, engagement with international criminal justice is an ongoing process in Southeast Asia, as evidenced by debates in 2016 about responding to historic crimes in Indonesia,[63] violence in Myanmar,[64] and President Duterte's threats withdraw the Philippines from the ICC.[65] The combination of interdisciplinary techniques provided a more nuanced account of the laws and institutions for prosecuting international crimes in Southeast Asia than could have been provided by doctrinal analysis alone.

3. Conclusion

To review, this thesis has addressed the questions A-D set out in chapter 1. In doing so, it has challenged existing literature concerning international criminal law in Southeast Asia by applying a localisation framework using qualitative methods. This has allowed this thesis to show how historic experiences and the arguments deployed by a range of actors have shaped the laws and institutions for prosecuting international crimes. By examining approaches across Southeast Asia, this thesis has demonstrated how different experiences and arguments have been associated with diverse approaches toward international criminal justice throughout the region.

This thesis makes a number of original and significant contributions to scholarly knowledge about international criminal law in Southeast Asia. These include: identifying themes associated with Southeast Asian states' experiences of international crimes trials since WWII, including during the Rome Statute negotiations; providing updated analysis of the laws and institutions for prosecuting international crimes across Southeast Asia (including of draft legislation in the Philippines and Indonesia); in doing so, proving the existence of international crimes laws and institutions beyond the dominant Rome Statute framework, including within domestic jurisdictions; evaluating the arguments and

[62] Section 3.3, chapter 2.
[63] Sapiie (n 5).
[64] Lee (n 5).
[65] Euan Black, 'Duterte's threat to withdraw the Philippines from the International Criminal Court marks further shift East' *Southeast Asia Globe* (21 November 2016) <http://sea-globe.com/philippines-icc/>.

strategies employed by various actors, including within civil society, to influence such mechanisms; challenging the relationship between relevant debates and international crimes laws using a 'localisation' framework and qualitative research methods – and doing so across several case study states – for the first time; contesting temporal, spatial and directional accounts of the diffusion of the norm of international criminal justice to reconceptualise the localisation approach; and proposing new legal and theoretical research ideas warranting further investigation.

This thesis argues that the laws and institutions for prosecuting international crimes within Southeast Asia reflect the adaptation of the international criminal justice norm by state and non-state actors in various locations. It therefore proposes a nuanced approach to examining actors' engagement with international criminal justice. It invites researchers to consider how diverse actors draw on adapted arguments to influence legal responses to violence within and across different times and spaces. Its shift in focus beyond the Rome Statute will be crucial as actors throughout, and beyond, Southeast Asia – including the ICC Prosecutor – continue to debate responses to alleged international crimes in the region. As it is, extrajudicial killings continue in the Philippines, military violence continues to target the Rohingya minority in Myanmar, and individuals across the region are forcibly removed from their homes to make way for agricultural and other business interests. There is significant scope to further adapt 'international criminal justice' to develop a wider range of responses toward investigating prosecuting international crimes.

Annex 1 - Bibliography

Laws and Cases

List of Treaties, Agreements and Declarations

Year Adopted	*Treaties and Declarations*
1946	Charter of the International Military Tribunal for the Far East, 19 January 1946
1949	Geneva Convention (I) on Wounded and Sick in Armed Forces in the Field; Geneva Convention (II) on Wounded, Sick and Shipwrecked of Armed Forces at Sea; Geneva Convention (III) on Prisoners of War; Geneva Convention (IV) on Civilians, adopted 12 August 1949, entered into force 21 October 1950
1951	Convention on the Prevention and Punishment of the Crime of Genocide, adopted 9 December 1948, entered into force 12 January 1951
1967	The ASEAN Declaration (Bangkok Declaration), 8 August 1967
1968	Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity, adopted 26 November 1968, entered into force 11 November 1970
1977	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II), adopted 8 June 1977, 7 December 1978
1984	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 December 1984, entered into force 26 June 1987
1998	Rome Statute of the International Criminal Court, adopted 17 July 1998, entered into force 1 July 2002
2000	Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, adopted 25 May 2000, entered into force 12 February 2002
2003	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, 6 June 2003
2005	Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), adopted 8 December 2005, entered into force 14 January 2007

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[1] Includes cases occurring under external (colonial or UN) administration.
[2] For further legislation, see Attorney General's Chambers, 'Text of Acts' <http://www.agc.gov.bn/AGC%20Site%20Pages/Text%20of%20Acts.aspx>; 'Text of Orders' <http://www.agc.gov.bn/AGC%20Site%20Pages/Text%20of%20Orders.aspx>.

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Annex 2 – Interview Table, Sample Protocol and Preparation

Table of Formal Interviews

Code[1]	Type	Date and Location
C1	Cambodia civil society	19 November 2014, Phnom Penh
C2	Cambodia international legal (international)	25 November 2014, Phnom Penh
C4	Cambodia civil society	29 November 2014, Phnom Penh
C5	Cambodia civil society	5 December 2014, Phnom Penh
C6	Cambodia civil society	23 November 2015, The Hague
I1	International civil society (Indonesia)	8 October 2014, Jakarta
I2	Indonesia civil society	9 October 2014, Jakarta
I5	Indonesia international legal	13 October 2014, Jakarta
I6	Indonesia official	14 October 2014, Jakarta
I7	International civil society (Indonesia) (joint interview)	16 October 2014, Jakarta
I8	Indonesia official / civil society	17 October 2014, Jakarta
I9	Indonesia civil society	22 October 2014, Jakarta
I10	Indonesia civil society	23 October 2014, Jakarta
I11	Indonesia official / academic	23 October 2014, Jakarta
I13	Indonesia international legal / academic	24 October 2014, Jakarta
I14	Indonesia civil society	25 October 2014, Jakarta
M1	Myanmar civil society	27 October 2014, Bangkok
M2	International civil society (Myanmar)	3 November 2014, Yangon
M4	Myanmar civil society	4 November 2014, Yangon

[1] Interview codes were also used for some more formal but "off-the-record" discussions, which are not included in this code. Thus, the codes do not proceed in precise chronological order. In total, 32 formal recorded interviews were held (included in the table), of 41 formal meetings and countless informal discussions over coffee or at conferences across the region, in Australia, and in The Hague.

M5	Myanmar civil society	4 November 2014, Yangon
M6	Myanmar international legal / civil society	4 November 2014, Yangon
M8	Myanmar civil society	6 November 2014, Yangon
M9	Myanmar civil society	6 November 2014, Yangon
M10	Myanmar civil society	7 November 2014, Yangon
P2	Philippines international legal	12 November 2014, Manila
P3	International civil society (Philippines)	14 November 2014, Manila
P4	Philippines civil society	14 November 2014, Manila
P5	Philippines civil society	14 November 2014, Manila
P6	Philippines civil society	14 November 2014, Manila
R1	International civil society (regional)	10 October 2014, Skype
R2	International civil society (regional)	27 October 2014, Bangkok
R3	Regional civil society	30 October 2014, Bangkok

Name	Date	Title/Role
Location	Consent Form Notes/Follow-up	Organisation

Interview Protocol Sample

Introduction:

- {Interpreter protocols if necessary: confirm consent to interpreter, introduce, confirm interpreter has signed confidentiality agreement, allow interpreter to explain their role, then commence introductions:}
- Thank for time. I understand you know a lot about [international criminal law/accountability/criminal law] and am honoured to have the opportunity to learn from you.
- Introduce self – PhD UNSW Faculty of Law, supervisors, background researching international criminal law and before that worked as a solicitor.

Consent:

- Confirm they have read consent form and go through it – check they understand the document.
- Clarify any confidentiality / anonymity concerns:
    - Unless you say in writing that you are ok with being named in my research, if I refer to anything you say in my research, I will not use your name, but may identify the material as belonging to a [nonstate actor/international/legal organisation/department] in [State] {= as relevant}. It may still be possible to identify you because of what you say and your role. Would that be ok?
    - [Did they request a copy of the transcript / approval of attributed material? {Note carefully.}]
    - Confirm: are you ok with doing this interview in English?
- Make sure have signed copy of consent.

Recording:

- Using iPad to record the interview to make sure I don't miss anything. It's also so that I don't need to make notes and can listen more closely.
- I might also take some hand written notes.
- Are you happy for the interview to be recorded?
- If you want any part of the interview to be "off the record", just let me know and we can stop the recorder and I won't take notes.
- [Clarify any questions. The file name will not have your name on it.]
- **Turn recorder on.** Check working. Check time.

Overview of interview:

- My research is about prosecuting war crimes, crimes against humanity and genocide when they are committed within Southeast Asia. I'm hoping to learn more about local approaches to pursuing accountability for international crimes in the region.
- I really want to understand [your organisation's/the department/ government's] views about the different questions I ask. So it is helpful if you think about what [your organisation]'s position is for each question.
- I will be asking a lot of questions, so if anything I ask is unclear or you want to clarify anything please let me know.
- If you would prefer not to answer any of the questions, that is fine, please just let me know that you would rather move on to the next question.
- The interview should take about an hour (from now).

- If at any time you want to stop the interview or stop to have a break, we can stop or take a break, just let me know.
- **Do you have any questions?**
- Remember you can ask me to clarify anything as we go too.

Check time: 5 mins.

Part 1: Background – Role in Organisation
*[Modify as appropriate for interviewee]

Topic Statement: I'm interested in learning about [your organisation]'s ideas about accountability for international crimes. So firstly, I'd like to learn a bit more about your role at [organisation/department].

1. **Could you tell me what your main responsibilities are in [organisation/department]?**
2. **Can you explain which part of your work relates to accountability for serious crimes?**

- [Target: establish person's credibility and ability to answer these questions. 2nd, 3rd question may uncover *processes* for influencing mechanisms.
- Research questions: A(b),(c).]

Part 2: Background – Defining Terms

Topic Statement: Next I'd like ask some questions about how [your organisation] thinks about terms like "international crimes". I'd also like to learn what [organisation] generally think is the best way to respond to international crimes.

3. **What would [your organisation] say are the most important "international crimes"?**
    a. [Target: *laws:* establish understanding of term.
    b. Research questions: A (general) – understanding of terms.
    c. Checklist (possible responses):
        i. CAH, WC, genocide, aggression?
        ii. Or other crimes?]
    d. [Clarify that from now on when I say "international crimes" I will mean the kind of conduct that could be considered CAH, WC, genocide, aggression.]
4. **What does [your organisation/government] see as the 3 most important issues to consider when responding to "international crimes"?**

a. [Target: *ideas/norms/events*. (Keep general and see what comes up).

b. Checklist: effectiveness, material factors, local issues, peace and stability vs justice, historic experiences/events, truth-telling, victims, restorative factors, reconciliation, impunity, need for criminal trials.

c. Goes to: What does "justice" and "accountability" mean for your organisation?

Research question: A(a)]

Part 3: <u>Communication</u>/Translation
*[Modify/remove depending on interviewee – this part most relevant for civil society]

Topic statement: <u>I'd like to understand how your organisation communicates about accountability issues to different local and international groups, and what you've found is the best way to get your messages across.</u>

5. <u>*Nonstate:*</u> **When [your organisation] is talking about accountability for international crimes with [State government], what are the 3 main ideas or points you try to get across?**

<u>OR:</u> <u>*Government:*</u> **When [the government] is talking about accountability for international crimes with international organisations or other states, what are the 3 main ideas or points you try to get across?**

a. [Target: *norms/processes*

b. Checklist: non-interference, complementarity, inclusion/global citizen, ratification, local mechanisms, international approaches, new laws, judicial reform, police reform, credible localness (not foreign influenced).

c. Goes to: What does "justice" and "accountability" mean?

d. Research question A(c)]

6. **Does your [organisation] change which points you emphasise, depending on who are talking to?** (Or do you consistently try to make the same points to everyone?)

a. [Target: *translation*/discourse, grafting/pruning/adapting.

b. Checklist: changing strategies, 'menu selection', modify for different audiences, address the audience's concerns, material factors, focus on complementarity, talk about normative benefits, join democratic states?]

c. <u>If not raised,</u> **clarify**:

7. *Sub-question:* **Do you think [your organisation] has changed the way it discusses accountability over time?**

a. [Target: translation, grafting/pruning/adapting, prior norms.

b. Checklist: changing strategies, modify for more success – eg stressing different points, using local actors, emphasising local or global prior norms (non-interference etc). **Example?**]

Check time: 25 mins in.

Part 4: What mechanisms exist in [State]:

Topic statement: Now I'd like to turn to the laws and institutions that do exist in [State] for responding to international crimes.

8. **What criminal laws or mechanisms are there in [State] for *prosecuting* international crimes?**

    a. [Target: *laws:* other legislation/institutions.

    b. Research questions: B (a)(b)]

9. **Which of these does [your organisation] believe is the most important to address accountability for international crimes?**

    a. [Target: *laws/mechanisms, effectiveness*.

    b. Research question: B(c)(i)]

    c. **Example?**

10. *Sub-question:* **What non-legal responses does [your organisation] consider are important in [State], such as investigation commissions, or local customary or traditional procedures?**

    a. [Target: *processes, institutions.*

    b. Research questions: B (a)(b)]

Check time: 35 mins in.
Part 5: Why these mechanisms? Adaptations.

Topic statement: I'd like to understand why you think these laws and institutions you've mentioned have been used in [State]. (Rather than other options [give example if necessary, eg, an international tribunal].) I'm going to start with quite a general question that you can answer in whatever way makes sense to you.

11. **What do you think have been the 3 most important factors influencing how [State] has responded to international crimes?**

    a. [Target: *actors*, material influences, *material* factors, experiences, ideational factors, and *norms*.

    b. Checklist, categories: other states, domestic material factors, domestic civil society, international civil society, military, international organisations.

c. Norms: non-interference, sovereignty, historical experiences, local culture/attitudes, social hierarchies, peace vs justice issues, stability, colonial control.

d. > Research questions: A(a) (b), (c)]

If don't address these above, ask specific questions, 12-17:

12. *Sub-question:* **Can you give an example of how [(one of)these factors] influenced a certain law or mechanism?**

    a. [Target: *processes, events, amplification.* Keep general to allow for influences on decision making as well as legal content, elaborate as relevant:]

    b. *Elaborate:*

        i. **How did this influence change the content of the law?** OR

        ii. **How did it change way the mechanism was structured?** OR

        iii. **How did this influence affect the choice to pursue one option over another?** AND **What was discarded?**

    c. Research questions: A(b) and (c), B(c)(ii), C.

13. *Sub-question:* **Which local groups do you think have most influenced [State government] decisions about accountability?**

    a. [Target: *actors*: civil society, police, government members, departments, judicial organs/individuals.

    b. Research questions: A (c)]

14. *Sub-question:* **How do you think they have been effective at getting their message across?**

    a. [Target: *discourse*, pressure, adaptiveness, involving other influential parties/organisations.

    b. Research questions: A(b), (c)]

    c. **Example?**

15. *Sub-question:* **Are there historic experiences in [State] that might influence [State's] responses to international crimes?**

    a. [Target: *events:* previous trials, colonialism, domestic pressures.

    b. Research questions: A(a)]

    c. **Example?**

16. *Sub-question:* **Are there regional experiences or influences that might influence [State's] responses to international crimes?**

    a. [Target: *events:* previous trials elsewhere, ASEAN, relevance of different forums for discussion.

    b. Research questions: A(a)]

    c. **Example?**

17. *Sub-question:* **Are there local cultural, religious or traditional ideas that may have influenced the development of accountability mechanisms?**

    a. [Target: *norms*, customary practices, social hierarchies.

    b. Research questions: A(a), possibly B(c)(ii), C]

    c. **Example?**

18. Given all those different factors and influences, **What other options does your [organisation] argue *could* work to respond to international crimes committed in [State]?**

    a. [Target: *laws*, institutions, processes.

    b. Research questions: C(b)

    c. Checklist: institutional (judicial/police) reform, new laws, ratification/ICC, locally relevant, local cultural practices, legal or non-legal, reconciliatory, funding/capacity measures?]

Check time: 50 mins in.

[If time] Part 6: Export of Norms
Topic Statement: Just before we finish up and I ask if you have any questions, I'm interested to know whether you think what's happening in [State] is influencing the rest of Southeast Asia or the world, for instance:

19. *Legal personnel:* **How do you think trials in [State] might have contributed to substantive international criminal *law* globally?**

    a. [Target: *export of legal/accountability norms*.]

OR: **How do you think [State's] choices have influenced attitudes about international criminal accountability in other countries?**

    b. [Target: *export of other norms*.

    c. > Research questions: C]

Part 7: Any other questions, Close:

20. **Is there anything we haven't talked about that you think is important in understanding international criminal accountability in [State]?**

Thank you.

Checklist: (I'm just going to check that we've covered everything)

☐ Consent form signed

☐ Perceptions and understandings of international criminal accountability.

☐ Actors influencing choice of mechanisms.

☐ Normative factors influencing choice of mechanisms.

☐ Communication/translation strategies used by this organisation.

☐ Local adaptions in laws.

☐ Check contact details.

Are there any other people who you think I should talk to?

Discuss any follow-up if necessary.

TURN RECORDER OFF AND SAVE.

Interview Preparation and Evaluation

Name:

Organisation: **Email:**

Preparation:

Gather background information about the individual and organisation:
[Insert]

[Review your research questions.
Review background material.]

Consider: What is the main purpose of this interview: what do I want to find out from this person? Ie, What can they tell me about my research questions?

Why can they help me with this? Ie, What of this person's personal experience is specifically relevant to my research questions?

Consider: what information do I already have about these issues? What is missing/needed? What of this could this person help me with?

General outstanding issues in State:

Review interview questionnaire – highlight the 5 + 2/3 most important questions to ask this person.

Adjust the preambles in light of experience.

Consider the other questions and adjust for relevance.

Have I sent the Interview Consent Form? Do I need to bring a copy/ies?

Do I know where I am going and at what time? Double check the address/time!

What happens if I get lost?

Have I saved this sheet securely?

Evaluation:

Have I saved the recording securely?

Any immediate nonverbal notes?

Voice/tone

Body language

How responsive/helpful was the interviewee?

What did the interviewee *really* seem to be saying?

How do I feel about how it went generally?

Was my main aim as set out in my planning above met? How/why?

Has new information/ideas been provided? What?

Was their information consistent with others? How so/not?

What information is still missing? What didn't I understand or was unclear that I might need to revisit?

How could I find it?

What did I do well?

What could I have done differently?

How can I gain the skills to do this?

What assumptions did I make that could be avoided?

Did I stick to my plan? Was that ok?

Do I need to adjust my interview protocol?

Annex 3 – Rome Statute Implementation

Table 6: Southeast Asia Rome Statute / International Crimes - Possible Relevant Domestic Provisions for Criminal Conduct

	Brunei Darussalam	Cambodia	Indonesia	Lao People's Democratic Republic	Malaysia	Myanmar	The Philippines	Singapore	Thailand	Timor-Leste	Viet Nam
Genocide		s 183-187 PC; Art 4 ECCC Law	s 8, 26/2000				s 5 RA 9851	s 130D PC		s 123 PC	s 342 PC (crimes against mankind)
Crimes against humanity		s 188-192 PC; Art 5 ECCC Law	s 9, 26/2000				s 6 RA 9851			s 124 PC	s 342 PC (crimes against mankind)
War Crimes	s 3 GCA	s 193-198 PC; Art 6 ECCC Law			s 3 GCA		s 4 RA9851	s 3 GCA		s 125 PC	s 343 PC
Aggression	s 121 PC	See ss 443-444		see ss 59, 70 PC	ss 121, 125 PC	ss 121, 125 PC	ss 118-121 PC	ss 121, 125 PC	ss 119-120 PC	s 134 (incitement to war)	s 341 PC
Territorial	ss 2, 5 (re soldiers) PC	ss 12-17 PC; Art 1 ECCC Law (temporal limits)	ss 2-3 PC	s 3(new) PC	ss 2, 5 (re soldiers) PC	ss 2, 5 (re soldiers) PC; s 3 GCA	s 17 RA 9851, s 2 PC	ss 2, 5 (re soldiers) PC	ss 4-6 PC	s 7 PC	s 5 PC
Extra-territorial	s 3 PC; s3(2) GCA	ss 19-22 PC	ss 4-5, 7 (official destruction of property) PC; s 5, 26/2000	s 4 PC	ss 3-4 PC; s 3(2) GCA	ss 3-4 PC	s 2 PC	ss 3-4 PC; s 3(2) GCA	ss 7-9 PC	ss 8-9 PC	s 6 PC
Killing/ Murder	ss 299-301 PC; via s3 GCA	ss 183(1), 188(1), 193(1), 199-205 PC; Arts 3-6 ECCC Law	ss 8(1), 9(1) 26/2000; s 340 PC	s 88 PC	ss 299-301 PC; via s 3 GCA	ss 299-301 PC	ss 4(a)(1), 4(b)(1), 5(a)(1), 6(a) RA9851; ss 248-249 PC	ss 130D(a), 299-301 PC; via s 3 GCA	ss 288-291 PC	ss 123(1)(a), 124(1)(a), 125(1)(a), 138-139 PC	ss 83, 93-99

	Brunei Darussalam	Cambodia	Indonesia	Lao People's Democratic Republic	Malaysia	Myanmar	The Philippines	Singapore	Thailand	Timor-Leste	Viet Nam
Serious bodily or mental harm	ss 321-329, 350-351 PC; via s3 GCA	ss 183(2), 188(11), 193(3), 217 PC; Arts 4-6 ECCC Law	s 8(2) 26/2000; ss 90, 170, 351 PC	s 90 PC	ss 321-329, 350-351 PC; via s3 GCA	ss 321-329, 350-351 PC	ss 4(a)(3), 5(a)(2), 6(k) RA9851; s 263 PC	ss 130D(b), 321-329, 350-351 PC; via s 3 GCA	ss 295-297 PC	ss 123(1)(a), 124(1)(a), (k), 125(1)(c), 145-146 PC	ss 104-110, 121 (humiliating) PC
Inflicting conditions of life to destroy / Exterm'n		ss 183(3), 188(2) PC; Arts 4-5 ECCC Law	ss 8(3), 9(2) 26/2000				ss 5(a)(3), 6(b) RA9851	s 130D(c) PC		ss 123(1)(f), (i), (j), 124(1)(b) PC	ss 104, 107 PC (injury / harm only)
Measures to prevent births	ss 312-316 PC	s 183(4) PC; Art 4 ECCC Law	ss 8(4), 9(8) 26/2000		ss 312-316 PC	ss 312-316 PC	ss 5(a)(4), 6(g) RA9851; s 256 PC	ss 130D(d), 312-316 PC	s 303 PC	ss 123(1)(b), 124(1)(g), 141 PC	
Forcibly transferring children to another group	s 361 PC	ss 183(5), 327 PC; Art 4 ECCC Law	s 8(5) 26/2000; s 297 PC	ss 100, 134(new) PC (trafficking)	s 361 PC	s 361 PC	s 5(a)(5) RA9851; s 347 PC	ss 130D(e), 361 PC	s 317 PC	s 123(1)(d) (separating members of the group)	s 120 PC
Enslavement	ss 367, 370-374 PC	ss 188(3), 274-277 PC; Art 5 ECCC Law	s 9(3) 26/2000; ss 297, 324, 328 PC	s 100 PC	ss 367, 370-374 PC	ss 367, 370-374 PC	ss 6(c) RA9851; ss 272-274 PC	ss 367, 370-374 PC	s 312	ss 124(c), 155(c), 162-163, 166 PC	ss 119 (trafficking women), 120 (trade children) PC
Deportation/ Forced transfer	ss 360 PC, via s3 GCA	ss 188(4), 193(7) PC; Arts 5-6 ECCC Law	s 9(4) 26/2000	ss 75, 134(new) PC	s 360 PC; via s3 GCA	s 360 PC	ss 4(a)(6), 4(16)-(17), 6(d) RA9851	s 360 PC; via s3 GCA		ss 123(1)(d), (e), 124(d), 125(1)(g) PC	
Imprison't/ severe deprivation physical liberty	ss 339-340, 346-348, 362, 365 PC	ss 188(5), 193(7), 253 PC; Arts 5-6 ECCC Law	s 9(5) 26/2000; ss 328, 333, 334 PC	s 99 PC	ss 339-340, 346-348, 362, 365 PC	ss 339-340, 346-348, 362, 365 PC	s 6(e) RA9851; ss 267-269 PC	ss 339-340, 346-348, 362, 365 PC	ss 309-312 PC	s 124(e), 125(g), (f), 160 PC	ss 123, 134 PC

	Brunei Darussalam	Cambodia	Indonesia	Lao People's Democratic Republic	Malaysia	Myanmar	The Philippines	Singapore	Thailand	Timor-Leste	Viet Nam
Torture or inhuman treatment	ss 330-331 PC, via s3 GCA	ss 188(6), 193(2),193 (3), 205 PC (with murder); Arts 3-6 ECCC Law	s 9(4) 26/2000; ss 351, 422 PC	ss 171, 154 PC	ss 330-331 PC, via s3 GCA	ss 330-331 PC	ss 4(a)(2), 4(b)(1), 4(c)(18), 6(f) 9851; RA9745	ss 330-331 PC, via s3 GCA	s 28 Const	ss 124(1)(f), 125(1)(b), 167 PC	Art 7 Const; s 6 Criminal Procedure Code
Rape	s 375 PC	ss 188(7), 239, 243, 251 PC; Art 5 ECCC Law	s 9(7) 26/2000; ss 285-288 PC	s 128-129 PC	s 375 PC	s 375 PC	ss 4(c)(19), 6(g) RA9851; s 335 PC	ss 375-376A PC	ss 276-277 PC	ss 123(1)(c), 124(1)(g), 172 PC	ss 111-114 PC
Sexual slavery / enforced prostitution	ss 366-367, 372-373A PC	ss 188(7), 284 PC	ss 9(7), 9(8) 26/2000; ss 297, 332 PC	ss 132, 133(new), 134(new) PC	ss 366-367, 372 PC	ss 366-367, 372-373 PC	ss 4(c)(19), 6(g) 9851; RA9208, amended by RA10364; s 341 PC	ss 372-373A PC	ss 282-283 PC	ss 123(1)(c), 124(1)(g), 171, 174 PC	ss 119, 255 PC
Forced pregnancy		s 188(7) PC	s 9(7) 26/2000				ss 4(c)(19), 6(g) 9851			ss 123(1)(c), 124(1)(g) PC	ss 111(g), 113(e) PC
Sexual violence other		ss 188(7), 246-252 PC	ss 9(7), 9(8) 26/2000; s 289 (obscene acts) PC	s 137 (outrage to decency) PC			ss 4(c)(19), 6(g) 9851; ss 262, 336 PC; RA9208, amended by RA10364 (trafficking)	ss 376-377D PC	ss 278-285 PC	ss 123(1)(c), 124(1)(g) 171, Sections II-IV PC	ss 111-121 PC
Persecution	ss 298, 505(c) PC	ss 188(8), 513 PC; Art 3, 5 ECCC Law	s 9(9) 26/2000; s 156 PC	ss 176(new), 177(new)	ss 298, 298A, 505(c) PC	ss 298, 505(c) PC	s 6((h) 9851	ss 298, 505(c) PC	ss 206-207 PC	ss ss 124(1)(h), 135 PC	
Enforced disappear'ce	ss 340, 346, 365 PC	ss 188(9) PC	s 9(10) 26/2000; ss 328, 427 PC	s 99 PC (unlawful arrest/detention)	ss 340, 346, 365 PC	ss 340, 346, 365 PC	s 6(i) RA9851; RA 10353	ss 340, 346, 365 PC	s 28 Const	s 124(1)(i) PC	
Apartheid		s 188(10) PC	s 9(11) 26/2000				s 6(j) RA9851			s 124(1)(j) PC	

	Brunei Darussalam	Cambodia	Indonesia	Lao People's Democratic Republic	Malaysia	Myanmar	The Philippines	Singapore	Thailand	Timor-Leste	Viet Nam
Other in humane acts (eg incl forced marriage)	s 366 PC	ss 188(11), 193(2), 193(3) PC; Art 5 ECCC Law	s 90 PC (serious bodily harm), eg as in s 333 PC		s 366 PC	s 366 PC	s 6(k) RA9851; RA9208, amended by RA10364 (trafficking etc)	s 366 PC		s 124(1)(k) PC	ss 121, 146 (forcible marriage) PC
Biological/medical experiments	via s 3 GCA	s 193(2) PC			via s3 GCA		ss 4(a)(2), 4(c)(11) RA9851	via s 3 GCA		ss 125(1)(b), (m) PC	s 242 (breaching regs on medical examination/treatment) PC
Extensive destruction/ appropriat'n of property	ss 403, 409, 425 PC; via s 3 GCA	ss 193(4), 410 PC; Art 6 ECCC Law	s 170; Chapter XXVII PC	ss 61, 111 PC	ss 403, 409, 425 PC; via s 3 GCA	ss 403, 409, 425 PC	ss 4(a)(4), 4(c)(14) RA9851; ss 320-331 PC	ss 403, 409, 425 PC; via s 3 GCA	ss 147, 352, 358 PC	ss 123(1)(g), 125(1)(h), 126, 129 PC	ss 135-137, 143, 280, 343 PC
Compelling POW to serve in forces	via s3 GCA	s 193(5) PC; Art 6 ECCC Law			via s3 GCA		s 4(a)(8) RA9851	via s 3 GCA		s 125(3)(b) PC	ss 340, 343 PC
Deprive POW fair trial	via s3 GCA	s 193(6) PC; Art 6 ECCC Law			via s3 GCA		ss 4(a)(5), 4(b)(4) RA9851	via s 3 GCA		s 125(1)(i) PC	ss 340, 343 PC
Taking hostages	via s3 GCA	s 193(8) PC; Art 6 ECCC Law	s 328 PC (kidnapping)	s 101(new) PC	via s3 GCA		ss 4(a)(7), 4(b)(3) RA9851; s 267 PC	via s 3 GCA; Hostage Taking Act 2010	See ss 135/1-135/4 PC (terrorization)	s 125(1)(d) PC	ss 134, 343 PC
Attacks against population / civilian/cultural/religious objects	ss 277, 290, 295, 296 GCA	ss 193(4), 194 PC; Art 7 ECCC Law	E.g., ss 179, 191, 193, 196, 201-203 PC	ss 67, 111-112 PC	ss 277-278, 295, 296 PC	ss 277-278, 295, 296	s 4(c)(1)-(2), (5)-(7), (10) RA9851; ss 320-331 PC	ss 277-278, 295, 296	See ss 135/1-135/4 (terrorization), 206, 218 PC	ss 126, 129 PC	ss 85, 183, 343 PC
Attacks humanitar'n assistance		s 194(3) PC					s 4(c)(3)-(4) RA9851			s 128 PC	ss 343

	Brunei Darussalam	Cambodia	Indonesia	Lao People's Democratic Republic	Malaysia	Myanmar	The Philippines	Singapore	Thailand	Timor-Leste	Viet Nam
Killing combatant who surrendered							s 4(c)(8) RA9851			ss 125(1)(k), 126(h) PC	ss 343 PC
Poison/chem /biolog. weapons	s 278, 328 PC, Biological Weapons Act	ss 194(1), 201 PC	Law 9/2008: Chemical Weapons	s 80(new) PC	ss 278, 328 PC	ss 278, 328 PC	s 4(c)(25) RA9851; ss 14(12) (aggravates), 248(3), 328 PC	ss 278, 328 PC		s 127 PC	ss 182-194, 343 PC
Conscripting children < 15	Eligibility: ss 12, 13 Royal Brunei Armed Forces Act (17.5)	Eligibility: Cambodia Conscription Law (18)	Eligibility: s 12, Law 34/2004 (18)	Eligibility: Law on Obligations of National Defense Service (18)	s 18 Armed Forces Act 1972 (17.5)	Eligibility: 18	s 4(c)(24) RA9851, Eligibility: 18	s 2 Enlistment Act 1970 (16.5)	Ministerial regulation No 2, 2554 of April 2011 and announced legislation	s 125(1)(e) PC, Eligibility: 18	Eligibility: Law on Militia and Self-Defence Force 43/2009 (18)
War crimes etc/Other*	E.g., s297A (interference with graves/ remains) PC	ss 194, eg 194(4), (5), (7) PC	E.g. s 180 PC (removing corprses); see Anti-Terrorism Law (15/2003)	E.g. s 96 (denigration of corpses) PC	See Armed Forces Act (eg re looting)		See s 4 RA9851	See Armed Forces Act (eg re looting)		ss 130 (war crimes against other rights), 131 PC (terrorism)	ss 84 (terrorism), 246, 343 PC

NB: PC = National Penal Code, CPC = Criminal Procedures Code, GCA = Geneva Conventions Act/Legislation, Const = National Constitution, 26/2000 = Indonesia's Law No. 26 of 2000, RA 9851 = Republic Act No. 9851 in the Philippines

Table 7: Southeast Asia Rome Statute / International Criminal Law - Possible Relevant Domestic Provisions for Liability

	Brunei Darussalam	Cambodia	Indonesia	Lao People's Democratic Republic	Malaysia	Myanmar	The Philippines	Singapore	Thailand	Timor-Leste	Viet Nam
Ne bis in idem (double jeopardy)	s 269 CPC	s 23 PC, s 12 CPC	s 76 PC		Art 7(2) Const	s 374 Const	ss 2(f), 17 RA9851; Art 21 Const	s 11(2) Const	ss 10-11 PC	s 9 PC; 31(4) Const	
Nullum crimen sine lege (Legality) and non-retroactivity		ss 3, 9 PC	s 1 PC; Art 28I Const	s 5 PC	Art 7(1) Const	s 373 Const	s 2(f) RA9851; s 22 PC	s 11(1) Const	ss 2-3 PC	ss 1-3 PC; 31(2)-(3), (5) Const	ss 2, 7 PC
Commits (individual/jointly)	ss 34-35, 37, 120A, 121A (conspiracy) PC	ss 24-26 PC	s 5; 86, 88 (conspiracy) 5 PC	ss 7, 9-10, 16-17(new) PC.	ss 34, 35, 37, 120A-120B (conspiracy) PC	ss 34, 35, 37, 120A-120B (conspiracy) PC	s 8 RA9851; ss 16-19, 4, 8 (conspiracy) PC	ss 34, 35, 37, 120A-120B (conspiracy) PC	ss 1, 59, 83, 210, 213 PC	ss 29-34 PC	ss 9-10, 20 (complicity) PC
Acts/omissions distinction	ss 33, 36 PC		Incl in definitions, eg s 427 PC (omit to give notice of deprivation of liberty)	See s 16 PC	ss 33, 36 PC	ss 33, 36 PC	s 8(a)(1) RA9851; s 4 PC	ss 33, 36 PC	See s 157 PC	s 11 PC	
Orders, solicits, induces crime or attempt	ss 107, 505 PC	s 28 PC	s 55 (provoking acts) PC	s 17 PC	ss 107, 298A, 505 PC	ss 107, 505 PC	s 8(a)(2) RA9851, s 17 PC	ss 107, 298A, 505 PC	ss 84-85 PC	ss 31, 157-159 (coercion) PC	s 20 PC
Aids, abets, otherwise assists commission or attempt	ss 107-120 PC	s 29 PC	s 56 PC	s 17 PC	ss 107-120 PC	ss 107-120 PC	s 8(b) RA9851; ss 18-19 PC	ss 107-120 PC	ss 86, 88, 184 PC	ss 32 (complicity) PC	ss 20-22 PC

	Brunei Darussalam	Cambodia	Indonesia	Lao People's Democratic Republic	Malaysia	Myanmar	The Philippines	Singapore	Thailand	Timor-Leste	Viet Nam
In any other way contributes intentionally to further criminal activity/purpose (preparation)	s 120 PC; preparation in some definitions, eg 'being prepared to wage war', s 122 PC.	ss 185, 190, 196 PC	ss 56 PC, and offences eg s 359 negligent cause of death PC	ss 13, 17 PC	s 120 PC; preparation in some definitions, eg 'being prepared to wage war', s 122 PC.	s 120 PC; preparation in some definitions, eg s 121 PC	s 8(a_(3) RA9851; ss 18-19 PC	s 120 PC; preparation in some definitions, eg 'being prepared to wage war', s 122 PC.	s 86 PC	s 16 (negligence), contra s 22 PC	ss 17 PC
Incites (e.g. genocide)	ss 153A, 298, 505 PC	ss 28, 494-497 PC	s 156 PC	s 17 PC	ss 298-298A, 505 PC	ss 153A, 298, 505 PC	s 5(b) RA9851	ss 298-298A, 505 PC	s 85 PC (incitement)	s 123(2) PC	s 20 PC
Attempts	s 511 PC; in some definitions eg 119-121 PC	s 27 PC	ss 53, 87 PC	ss 14-15 PC	511 PC; in some definitions eg ss 119-121 PC	511 PC; in some definitions eg ss 119-121 PC	s 8(c) RA9851; s 6 PC	511 PC; in some definitions eg ss 119-121 PC	ss 80-82, 88 PC	ss 23-26 PC	ss 18-19 PC
Command/superior responsibility							s 10 RA9851		s 157 PC	s 136 PC	
Child under 18	ss 82-83 PC	s 38 PC	s 45 PC; s 6, 26/2000	ss 7(new), see 44, 53(new) PC	ss 82-83 PC	ss 82-83 PC	s 12(2)-(3) PC	ss 82-83 PC	ss 73-76 PC	s 20 PC	ss 12, 68
Official capacity	Contra Art 84B Const, Also: s 25, Constitutional Matters II	s 8 PC, contra Arts 7, 80, 104 new Const	Contra Art 20A Const	see Chapter 8 re civil servants			s 9 RA9851				Art 52 Const
Statute of limitations (not to apply)		s 143 PC	Contra s 78 PC	Contra s 51 PC			s 11 RA9851		s 95 PC	s 117 PC	s 24 PC
Mental element (intent + knowledge)	ss 35, 39, 80, 87-89 (good faith, 92) PC	s 4 PC	Incl in offence definitions	ss 7(new), 9 PC.	ss 39, 80, 87-89 (good faith, 92) PC	ss 39, 80, 87-89 (good faith, 92) PC	ss 4, 12(4) PC	ss 39, 80, 87-89 (good faith, 92) PC	s 59 PC	ss 12-16 PC	s 9-11 PC

	Brunei Darussalam	Cambodia	Indonesia	Lao People's Democratic Republic	Malaysia	Myanmar	The Philippines	Singapore	Thailand	Timor-Leste	Viet Nam
Mental disease/defect	s 84 PC	s 31 PC	s 44 PC	s 7(new), see s 54 PC	s 84 PC	s 84 PC	s 12(1) PC	s 84 PC	s 65 PC	s 21 PC	s 13 PC
Not intoxication unless voluntary	ss 85, 86 PC	s 31 PC		See s 55 PC	ss 85, 86 PC	ss 85, 86 PC	See s 15 PC	ss 85, 86 PC	s 66 PC	s 212 PC	s 14 PC
Reasonably defend self/other/property essential for survival	ss 81, 96-106 PC	ss 33-35 PC	s 49(1) PC	s 20 PC	ss 81, 96-106 PC	ss 81, 96-106 PC	s 11 PC	ss 81, 96-106 PC	s 68 PC	ss 43-45, 48-49 PC	s 15 PC
Duress (threat death/serious bodily harm), acts nec/reas to avoid threat	s 94 PC	ss 36, 35 (necessity) PC	ss 48, 49(1) PC	ss 19, 21 (necessity) PC	s 94 PC	s 94 PC	s 12(5)-(7) PC	s 94 PC	s 67 PC	ss 43-45	s 16 PC
Mistake of fact (or law)	ss 76, 79 PC				ss 76, 79 PC	ss 76, 79 PC		ss 76, 79 PC	ss 61-64 PC	ss 17-18 PC	
Superior orders (legal obligation, did not know unlawful, not manifestly unlawful)	Contra ss 76, 188 PC	s 32 PC	Contra s 51 PC	Contra ss 22(new)-23(new) PC	Contra ss 76, 188 PC	Contra ss 76, 188 PC	s 12 RA9851	Contra ss 76, 188 PC	s 70 PC	ss 46, 50 PC	Contra ss 316-318 PC
Amnesty	Art 9 Const; s 268 CPC	s 139 PC, Arts 27, 90 Const	Art 14 Const	Arts 53(new), 67(new) Const	ss 38, 42(1) Const	s 204 Const	Art XVII s 19, Art XI ss1-2 Const	Art 22P(1) Const		ss 118, 120-121 PC; 95(3) Const	Arts 84(10), 103(5) Const; ss 25(3), 57(2) PC
Pardon	Art 9 Const; s 268 CPC	Art 27 Const	Art 14 Const	s 50 PC	ss 38, 42(1) Const	s 204 Const	Art VII s 19 Const	Art 22P(1) Const	s 179 Const	ss 118, 122 PC; 85 Const	Art 103(12) Const; s 57 PC

NB: PC = National Penal Code, CPC = Criminal Procedures Code, GCA = Geneva Conventions Act/Legislation, Const = National Constitution, 26/2000 = Indonesia's Law No. 26 of 2000, RA 9851 = Republic Act No. 9851 in the Philippines
*E.g., starvation, looting, mutilation of corpses, terrorism etc.