Localising International Criminal Justice in Southeast Asia

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.

...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.

...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.

...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.

1.1 International Criminal Justice in Southeast Asia

Legal responses to atrocity crimes do not only result from international norms being transmitted to receptive ‘locals’. Instead, they are initiated and modified by a range of actors who adapt arguments and persist with...
advocacy efforts over time, across different spaces, and within changing circumstances. This has been the case in some states in Southeast Asia,\textsuperscript{6} where serious violations of human rights that are alleged to amount to international crimes continue to be perpetrated, often with impunity, but also alongside the development of laws and mechanisms for prosecuting such violence.

From 2016, President Rodrigo Duterte’s government was implicated in the deaths of thousands of alleged drug users and dealers within the Philippines, which forms the subject of a preliminary examination by the International Criminal Court (ICC) (ICC Office of the Prosecutor, 2018). Since 2000, hundreds of thousands have been forcibly evicted from their lands in Cambodia (Global Diligence, 2014) and elsewhere in the region (GRAIN, 2015). Between August 2017 and 2018, reports indicated that over 725,000 Rohingya men, women, and children, fled violence in Myanmar (Independent International Fact-Finding Mission on Myanmar, 2018: 751). In Indonesia, the government continues to fail to live up to promises to respond to serious human rights abuses, including the killings of possibly a million individuals in 1965 (Cribb, 2009; Komnas-HAM, 2012).

How can perpetrators of such shocking violence be brought to justice? International criminal justice is concerned with prosecuting international crimes, including genocide, crimes against humanity, and war crimes, usually based on laws replicating the Rome Statute of the International Criminal Court\textsuperscript{7} and generally with some international involvement. One possibility is therefore to pursue prosecutions for such crimes before the ICC, which is located in The Hague in the Netherlands. However, among other jurisdictional and admissibility barriers, just two of the eleven states in Southeast Asia – Cambodia and Timor-Leste – are parties to the Rome Statute of the ICC, which would provide one source for ICC jurisdiction over such crimes. This is despite the Rome Statute’s wide acceptance by 123 state parties worldwide at the end of 2019. The Philippines was a party from 2011, but withdrew from the Rome Statute in 2018, effective from March 2019, while Malaysia acceded in the same month, but then withdrew its accession.

\textsuperscript{6} While ‘Southeast Asia’ can be considered a constructed concept, for the purposes of this book it includes 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).

\textsuperscript{7} Adopted 17 July 1998, entered into force 1 July 2002.
1.1 INTERNATIONAL CRIMINAL JUSTICE

Scholars have identified some reasons why states in the region have not joined the ICC. These include a fear of ‘harassment suits’ from opponents, international (United States) pressure, insufficient domestic infrastructure or legislative support (Toon, 2004), the presence of ongoing conflicts, and a preference for addressing human rights abuses within domestic jurisdictions (Freeland, 2013). This under-representation of the region within the ICC system led to concerns that Asia was ‘seriously lagging behind in international criminal law’ (Song, 2011: 2).

International criminal law scholars have recognised that a version of ‘international criminal justice’, involving the use of ‘international’ or ‘internationalised’ institutions to prosecute individuals for international crimes might be considered ‘normalised’ (Mégret, 2005; Epstein, 2014). The Rome Statute and ICC represent an important legal institutional component of this idea. In particular, ratifying the Rome Statute is a significant measure for states to give effect to the ‘norms’ – or intersubjective beliefs about what is ‘appropriate’ behaviour (Finne-more & Sikkink, 1998) – promoted by international criminal law. As a result, some have argued that the ‘nations of Asia must ratify the Rome Statute and become full members in the international pursuit of justice against war criminals’ (Goldstone, 2011: 19). Others argue that ‘[e]xpanding the role of Asian countries [in the ICC] is highly important to building a truly international system of criminal justice’ (Kim, 2017: 271).

From that perspective, by not joining the ICC, the states in Southeast Asia appear to have rejected a ‘norm of international criminal justice’ that – while contested – promotes securing individual criminal accountability via prosecuting international crimes, perhaps with international involvement, including through ratifying the Rome Statute and incorporating its provisions into domestic law (Clarke, 2009; Sikkink & Kim, 2013; Mégret, 2014; Kim, 2017). While international criminal justice arguably comprises a collection of norms, ‘norm’ is used here to capture this relatively narrow, but contested, definition and focus for international criminal justice. Although international law recognises individual criminal responsibility for other serious crimes, such as terrorism or significant drug or environmental offences (Ratner et al., 2009: 10), the Rome Statute provides the ICC with jurisdiction over crimes against humanity, war crimes, genocide, and the crime of aggression. The developing norm favouring individual prosecutions before international tribunals has focused upon the first of these three crimes in particular.
This book considers the mechanisms involved in prosecuting these ‘international crimes’ in four states in Southeast Asia: Cambodia, Indonesia, the Philippines, and Myanmar. It is important to note that the reference to Southeast Asia in the title of the book is not meant to indicate that these countries somehow are representative of that region. Rather, they have been selected to demonstrate varied approaches to international criminal justice within Southeast Asia (see Section 1.4).

The book draws on a range of theoretical approaches that supplement what has been (arguably problematically) termed a ‘mainstream’ (Weber, 2014; see d’Aspremont, 2016: 627–8) or ‘first wave’ (Acharya, 2014: 185) constructivist suggestion: states might internalise international norms through interaction between spatially differentiated (international and local) actors and ideas (see Riles, 1995; Hughes, 2008; Buckley-Zistel, 2016) over time (Craven et al., 2007; Koskenniemi, 2012; Simpson, 2014; Zimmermann, 2016), which should encourage the ‘external’ idea (once it has emerged) to flow in the direction of receiving ‘locals’ (Acharya, 2004) – who ideally implement it in law and practice. That sort of understanding implies a linear path where, with the socialising influence of ‘civil society’ and other states, governments might progress towards accepting a norm of international criminal justice, including by ratification and implementation of the Rome Statute or (at least) the adoption of domestic laws and practices that closely replicate the international model. The withdrawal of the Philippines and in/out approach of Malaysia in 2019 already confound that story, but there is more to tell.

States in Southeast Asia have had significant engagement with the concept of international criminal law. Most Southeast Asian countries

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8 The ICC has jurisdiction over aggression only after 17 July 2018, though ‘crimes against peace’ were prosecuted in the region following World War II. This book therefore focuses on crimes against humanity, genocide, and war crimes, though there is domestic legislation that might apply to aggression, such as ‘crimes against peace’ in Article 421 of Vietnam’s Criminal Code, No. 100/2015/QH13, 27 November 2015, amended and supplemented by Law No. 12/2017/QH14 or via other criminal code provisions concerning aggression against the state. Southeast Asian states strongly supported including the crime of aggression during the negotiations concerning the Rome Statute.

9 ‘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 organizations’ (Roht-Arriaza, 2002: 98). It does not typically refer to political groups, though there may be close relationships between political organisations, the government, religious groups, and various civil society actors, all of whom may work closely with particular media platforms (Jeffery, Kent, & Wallis, 2017).
that have experienced conflict in recent decades have held related trials (Payne & Sikkink, 2014). There have also been historic international crime trials, particularly after World War II (Sellars, 2015). All eleven Southeast Asian states are parties to the Geneva Conventions, although only seven have ratified the Genocide Convention, six Additional Protocol I, and five Additional Protocol II (see Appendix A). As of June 2019, just two states remained Rome Statute parties (Cambodia and Timor-Leste), but six had legislation criminalising two or more of the crimes of genocide, crimes against humanity, and war crimes. With two exceptions, all Southeast Asian states sent delegations to the 1998 Diplomatic Conference that finalised the ICC’s Rome Statute. The participating states supported an independent court that respected the primacy of national jurisdictions, but mostly argued that the Court should have jurisdiction over aggression or other crimes beyond those eventually included. Singapore, in particular, played a significant role in the negotiations (Struett, 2008: 128), Brunei Darussalam, Indonesia, The People’s Democratic Republic of Laos (Lao PDR), the Philippines, and Thailand then all contributed 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. There was therefore some regional engagement with the process of establishing the ICC, although states did not necessarily have their core concerns reflected in the final version of the Statute.

Since the Rome negotiations, the region has experienced a spectrum of approaches to international criminal justice, including the establishment of international(ised) criminal institutions such as the Extraordinary

13 Cambodia, the Philippines, Timor-Leste (all have been Rome Statute parties), as well as Vietnam, Indonesia, and Singapore.
14 Cambodia, which faced resource constraints, and Myanmar, which was relatively isolated at the time (see Chapter 5).
16 Ibid.: 124 (Singapore regarding chemical weapons), 165 (Indonesia), 176, 291 (Thailand), 178, 287 (Vietnam), 292, 340 (The Philippines).
Chambers in the Courts of Cambodia (ECCC) and Special Panels in the District Court in Dili (Special Panels); Rome Statute ratifications; and the adoption of domestic legislation addressing international crimes – as well as other transitional justice procedures. This suggests that regional approaches to international criminal justice may be more complex than the low (and fluctuating) level the Rome Statute ratification suggests. It also presents a different question than has been the focus of literature addressing international criminal law in Southeast Asia to date. Rather than analysing specific legal mechanisms (such as the ECCC), or asking why states have not ratified with the Rome Statute, this book asks: how have actors in Southeast Asia engaged with ‘international criminal justice’ by adopting laws and establishing institutions to prosecute international crimes, including beyond the Rome Statute framework? This specific issue is yet to be addressed, despite its importance for those interested in how to respond to atrocities in the region.

This book has several objectives. It analyses how four states in Southeast Asia have developed laws and institutions for prosecuting international crimes. It seeks to shift discussions about international criminal justice beyond debates about the ICC, by emphasising the complex ways in which actors adapt conceptions of international criminal justice. It therefore assesses how actors in states, international organisations, and civil society have interacted and adapted ideas about international criminal justice. Using the case studies of Cambodia, the Philippines, Indonesia, and Myanmar, it demonstrates how the mechanisms for prosecuting international crimes across these states challenge assumptions about how norms are diffused over time, spatial designations between ‘local’ and ‘international’ ideas and actors, and the direction in which ideas and influences evolve across the world. The potential influence of a range of actors located in diverse and shifting spaces must be taken into account when analysing international criminal justice. This argument presents several practical implications for those interested in responding to international crimes in Southeast Asia and beyond.

1.2 The Norm of International Criminal Justice

The idea that individuals should be prosecuted for committing international crimes before international criminal tribunals has gained

17 For an overview of transitional justice approaches in certain states across the wider Asia-Pacific region, see (Jeffery and Kim, 2014; Linton, 2010).
increasing popularity in recent decades (Struett, 2008). Still, the idea of placing limits upon violent conduct, even in war, has ancient and diverse roots, including from within Asia. From an ancient law against cannibalism in the Shun Period, to the Methods of the Sima and the Wei Liaozi military commentary of the fourth century BCE, and the writings of Sun Tzu, Chinese thinkers placed constraints upon waging war (Daqun, 2012: 351). The Laws of Manu in India also ‘laid down some of the earliest foundations of humanitarian rules for armed conflict’ (Song, 2013: 211).

Following World War II, trials in Nuremberg, Tokyo, and elsewhere in the world (including in the Asia-Pacific region) developed important principles of international criminal law. International criminal law shifted the historic emphasis of international law on state responsibility towards a focus upon holding individuals accountable for their crimes, often with international involvement and in post-conflict settings. The approach of prosecuting crimes before tribunals that were in some way separated from domestic courts gathered momentum alongside the establishment of International Criminal Tribunals for the former Yugoslavia and Rwanda, and tribunals to address crimes in Sierra Leone and Lebanon, among other places. This trend, or ‘norm cascade’, has been described as now being ‘embodied’ in the establishment of the ICC, its principle of complementarity, and the ratification of the Rome Statute by states across the world (Schiff, 2008: 3, 257; Struett, 2008: 24). It is also said to have contributed to a ‘justice cascade’ leading to further domestic prosecutions for human rights violations (Sikkink, 2011b).

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 defined as the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes’ (Teitel, 2003: 69). Transitional justice may be offered as a ‘toolkit’ for responding to mass atrocities – one tool being international criminal law prosecutions (Harris-Rimmer, 2010a: 19; Shaw & Waldorf, 2010: 3). Arguably, the ‘ICC is seen as the key enforcement mechanism’ for transitional justice (Campbell, 2014: 55). 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 (Jeffery & Kim, 2014: 1). Therefore, international criminal law forms one aspect of a broader set of transitional justice approaches.
By contrast, 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 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 (Boas, 2012). This version of international criminal justice, or ‘the norm of international criminal justice’, promotes the investigation and prosecution of (and potential convictions for) international crimes with reference to international institutions and laws.

One way that states can demonstrate that they embrace international criminal justice is by ratifying the Rome Statute (Simmons & Danner, 2010; Goodliffe et al., 2012). However, international criminal law extends beyond the Rome Statute and has overlapping and shifting boundaries drawing on domestic and various areas of international law (Ratner et al., 2009: 10). Indeed, its intersections with different legal fields arguably ‘constitute a rather uncomfortable combination of inherently different types of law’ (van Sliedergt, 2012: 8).

The content of any international criminal justice ‘norm’ has also been contested.18 Third World Approaches to International Law (TWAIL) scholars have drawn attention to the importance of colonial and post-colonial experiences, including those of individuals throughout the broader ‘Third World’ (rather than just states), in understanding and evaluating international law (Anghie & Chimni, 2003; Burgis-Kasthala, 2016). 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’ (Schwöbel, 2014: 11).

Others have argued that the norm of international criminal justice has particular content, for example, the requirement of prosecutions (or at least genuine investigations that might lead to them) and an emphasis upon the Rome Statute text, which might constrain the possibility of developing alternative approaches to international crimes beyond the ICC framework (de Vos, 2015; Steer, 2014). Indeed, there has been a growing focus on the relationship between international criminal law and domestic legal systems (Roht-Arriaza, 2013; Woolaver, 2019), including through the lens of ‘pluralism’ (Stahn & van den Herik, 2012; van

18 Contestation is used in a general way in this book to suggest the action of disputing, opposing, or arguing.
Sliedregt & Vasiliev, 2014). A pluralist 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’ (Steer, 2014: 56). This same period has also seen the proliferation of theoretical ‘approaches’ to international criminal law including (despite early divisions between the two ‘fields’: Koh, 1997: 2615–16; Bederman, 2000), with reference to constructivist international relations scholarship (Slaughter et al., 1998; Bederman, 2000).

1.3 The Socialisation and Localisation of the International Criminal Justice Norm

A constructivist approach is concerned with identities and the role of social norms – such as the importance of ending impunity for international crimes – including legal norms such as substantive case law and treaties, in transforming state behaviour (Ruggie, 1998; Wendt, 1999; Finnemore, 2000; Kratochwil, 2001). A facet of the broad array of constructivist perspectives identifies relationships between widely held intersubjective ideas (norms), international law, and legal compliance. One prominent branch includes socialisation and process-oriented frameworks for explaining why states might ‘obey’ laws and change their practices. Generally speaking, socialisation approaches aim to explain how states might be persuaded to adopt and internalise particular norms through communication and engagement, including through negotiating, ratifying, and implementing treaties. Such frameworks, for instance those proffered by Koh (1997) and Goodman and Jinks (2013), may focus upon or promote the adoption of particular norms, such as encouraging states to comply with international human rights laws. As a result, some constructivist approaches are oriented towards ‘moral goals’ and specific policy recommendations, for example, that states implement certain norms promoted by treaties and international law-making practices in domestic law or policies (see Price, 2008).

Other scholars also draw on constructivist approaches, but emphasise power relationships and may take a Marxist, feminist, or ‘Third World’ perspective, or distance themselves from ‘constructivist’ terminology

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19 ‘Approach’, ‘framework’, ‘perspective’, and ‘theory’ are used interchangeably in this book to describe different theoretical structures and methods for understanding phenomena, including the diffusion and reconstruction of norms.
altogether (Price & Reus-Smit, 1998; Anghie & Chimni, 2003; Epstein, 2014). For example, post-colonial scholars critique such ‘mainstream’ or ‘first wave’ constructivist literature by pointing to the ‘norm diffusion’ embodied by colonialism, which ‘bore all the trappings of “appropriateness”’ (Finnemore & Sikkink, 1998; Epstein, 2014: 301), as well as the ways that both liberalism and constructivism favour universalisms (Epstein, 2014: 298). Some have emphasised the ‘value-laden quality of criminal law’ and the significance of power relationships in exercising justice (Abbott, 1999: 375).

In the human rights realm, constructivist transnational advocacy scholars have developed multilayered theoretical frameworks for understanding legal obligation. Margaret E. Keck and Kathryn Sikkink (1998) used a ‘boomerang’ model to explain how transnational advocacy networks of NGOs, states, and intergovernmental organisations work to encourage states to protect human rights. Thomas Risse and Sikkink (1999) proffered a 'spiral' framework to explain how such networks influence the integration of human rights norms through stages of adaptation, moral discourse, and institutionalisation. These sophisticated frameworks have been further contributed to by an array of literature suggesting that norms can be ‘vernacularized’ (Levitt & Merry, 2009), contested (Wiener, 2014), translated (Zimmermann, 2017), 'localized' (Acharya, 2004, 2014), and developed through processes such as ‘circulation’ (Acharya, 2013: 469). Rather than focusing upon how norms might be accepted by particular ‘local’ actors through socialisation, the localisation framework (explained further shortly) considers how ideas might themselves be restructured by ‘local’ actors (Acharya, 2004: 251): ‘In constructivist perspectives on socialization, norm diffusion is viewed as the result of adaptive behavior in which local practices are made consistent with an external idea. Localization, by contrast, describes a process in which external ideas are simultaneously adapted to meet local practices.’

Thus, ‘constructivism’ is diverse and difficult to define. However, in general, constructivism ‘rejects a simple law/power dichotomy, arguing instead that legal rules and norms operate by changing interests and thus reshaping the purposes for which power is exercised’ (Slaughter et al., 1998: 381). While ‘the field of international criminal justice has been largely insulated from constructivist analysis of justice processes’ (Ullrich, 2016: 567), socialisation approaches would tend to suggest that states can be encouraged to internalise particular understandings of norms such as ‘international criminal justice’ through communication