

# International Criminal Justice and Southeast Asia: Approaches To Ending Impunity for Mass Atrocities

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# AsiaPacific

## I S S U E S

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**SUMMARY** Nearly 15 years after entry into force, the UN Rome Statute of the International Criminal Court has 124 state parties, meaning that nearly two-thirds of states have joined this initiative to end impunity for the worst atrocities. Despite this global diffusion and normalization of international criminal justice, only 3 of 11 states in Southeast Asia have ratified the Statute. In response to the region's underrepresentation among ICC state parties, various governmental and nongovernmental actors have undertaken efforts to raise awareness of the Rome Statute and promote ratification in the region. However, beyond expanding the reach of the Statute, there is scope to draw upon regional experiences and potential to build a stronger foundation for an emerging regional consensus around ending impunity for mass atrocities.

Almost 70 years after the atrocities of World War II and the creation of the United Nations, violent conflicts and mass atrocity crimes remain a pressing challenge to the United Nations' objective of saving "succeeding generations from the scourge of war." After repeated failures to prevent these crimes, the second half of the twentieth century saw a rise in efforts to end impunity for international crimes such as genocide, war crimes, and crimes against humanity. From the Nuremberg trials to the establishment of the International Criminal Court (ICC), individuals are increasingly held accountable for committing such crimes. Nearly 15 years after its entry into force, the Rome Statute of the ICC has 124 state parties.<sup>2</sup> Despite the normalization of international criminal justice, only 3 of 11 states in the sub-region of Southeast Asia have ratified the Statute. States in Africa and Latin America have been much more likely to ratify, although powerful countries including the United States, China, and Russia still abstain from joining the ICC.

Although it is difficult for scholars from outside Southeast Asia to ascertain why regional states have not ratified the Rome Statute—regional actors take diverse positions—several concerns have been suggested. These include: worries about the possibility of politically motivated prosecutions; opposition from the United States, at least in the ICC's early years; capacity constraints and the need to amend inconsistent domestic legislation before accepting the ICC's jurisdiction—including constitutional provisions for the immunity of monarchical heads of state; prioritization of other development or reform initiatives; or a simple lack of political will, heightened by opposition from powerful domestic interest groups, especially among the security forces.<sup>3</sup>

Importantly, in light of historic colonial experiences, many states in the region have emphasized their support for the principles of sovereignty and noninterference in the internal affairs of other states. They are wary of any potential for the ICC to act without the affected state's consent. This was evident during the negotiations that led to establishment

of the ICC, during which Southeast Asian states generally supported the creation of the Court, but expressed their concern to protect national sovereignty. For instance, the Philippines' representative argued "national judicial systems should have primacy in trying crimes and punishing the guilty"<sup>4</sup> and Indonesia stressed that "the Conference must uphold the principle of respect for national sovereignty."<sup>5</sup> Thus, Southeast Asian states hold various concerns and competing priorities that must be considered when promoting the Rome Statute's norms throughout the region. A look beyond the region to Asia more generally, or even to the United States, indicates that such lack of enthusiasm toward the ICC is not unique to Southeast Asia.

However, ratification levels alone may not fully represent regional support for the underlying principles of international criminal justice. Indeed, Cambodia and Timor-Leste were founding members of the ICC. Thailand has signed but hesitates to ratify the Rome Statute. Ratification by the Philippines of the ICC Statute in 2011 and election of a Philippine judge provided an opportunity for Southeast Asia to gain greater visibility and engagement with the ICC in The Hague. Around the same time, policymakers and legislators in Indonesia and Malaysia also appeared interested in joining the ICC. For example, the Malaysian government affirmed its commitment to endorsing the instrument of accession to the Statute in 2011, and the parliament was considering adopting implementation legislation.<sup>6</sup> The election of President Joko "Jokowi" Widodo in Indonesia renewed hopes of Indonesia joining the ICC and encouraging other states in Southeast Asia to accept the Statute's norms. However, although the Indonesian government has shown some willingness to discuss past atrocities in Indonesia, including anti-Communist purges in 1965, this has not coincided with greater support for the ICC.<sup>7</sup>

Overall, Southeast Asia has presented a challenging context for those promoting formal adherence to the Rome Statute system through ratification. Various governmental and nongovernmental actors

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have tried to raise awareness of the Rome Statute and promote ratification across Southeast Asia. Considering regional states' longstanding emphasis on sovereignty and noninterference, however, focusing on ratifying the Rome Statute may not be the most effective approach to developing international criminal justice in Southeast Asia. A complementary, perhaps more strategic, approach would draw upon regional experiences to promote the Statute's underlying norms and principles. Indeed, many actors within Southeast Asia have undertaken a variety of alternative initiatives to pursue accountability for international crimes, often drawing on local contexts and experiences. There may be ways to learn from and leverage these existing initiatives to create a regional environment amenable to the Rome Statute's underlying norms and principles. This approach is relevant to policy actors seeking to promote international criminal justice and potentially other related frameworks, such as human security or the responsibility to protect, in Southeast Asia.

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### **Recognizing Regional Experiences**

Several states in Southeast Asia have already developed laws and institutions for prosecuting international crimes. Experiences thus far demonstrate cautious support of international accountability norms among some states, but also highlight the difficulty of pursuing prosecutions in challenging socio-political contexts. The Serious Crimes Process in Timor-Leste and the Extraordinary Chambers in the Courts of Cambodia (ECCC) each faced problems related to funding, human resources and technical capacity, political interference, and concerns about procedural fairness.<sup>8</sup> The challenges of these trials may have contributed to regional perceptions, already reflected in Rome Statute negotiations, that international criminal justice can be politically selective and involve international interference. Still, these processes set important precedents as attempts to hold individuals accountable for international crimes in Southeast Asia and provided state and non-state

actors with experience engaging with international crimes processes.

Some states have amended domestic laws to allow national-level prosecutions of international crimes. For instance, Indonesia adopted Law No. 26 of 2000 of the Human Rights Court (Law 26/2000) before the ICC was operational. In doing so, Indonesia declared that it was willing to investigate and prosecute those accused of crimes against humanity and genocide within special judicial chambers, including crimes committed by security forces in Timor-Leste. However, the proceedings of Indonesia's ad hoc human rights courts failed to provide an example for accountability—following protracted proceedings all of the accused were ultimately acquitted.<sup>9</sup> The Philippine Act on Crimes Against International Humanitarian Law, Genocide and Other Crimes Against Humanity (RA 9851), enacted in December 2009, is an example of legislation that incorporated Rome Statute provisions into national law before the Philippines ratified the Rome Statute. Vietnam also has some legislative capacity to prosecute international crimes<sup>10</sup> and Singapore's Penal Code includes a crime of genocide.<sup>11</sup>

Hence, while some states in the region have adopted legislation and pursued accountability for international crimes, prosecution remains difficult and is often influenced by structural judicial issues and national and international political considerations. However, these experiences also indicate that states have engaged with underlying international justice norms within the region—and continue to do so. Thus, there is scope for sharing lessons on prosecuting international crimes in Southeast Asia.

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### **Leveraging Regional Expertise and Opportunities**

The history of prosecuting international crimes in Southeast Asia suggests that state and non-state actors already hold a wealth of expertise about pursuing international criminal justice, including in challenging circumstances. International groups such as

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the Coalition for the International Criminal Court (CICC) and Parliamentarians for Global Action (PGA) have acted as conduits for sharing lessons and approaches to international criminal justice between Southeast Asian states. National networks such as the Philippines Coalition for the International Criminal Court (PCICC) and the Indonesian Civil Society Coalition for the International Criminal Court (ICSCICC), as well as local nongovernmental organizations (NGOs) and academics, have provided information about how national contexts and populations might suggest localized and contextualized approaches. For example, PCICC encouraged the Philippines to ratify the Rome Statute “precisely because of a continuing history of unresolved internal conflicts and turmoil in our land as well as many parts of the world where millions of Filipinos are based as overseas workers and deployed as peacekeepers.”<sup>12</sup> In Cambodia, NGOs have spread awareness of the ECCC through legacy and outreach programs and developed reconciliation initiatives in partnership with communities.

Actors in the region undertake a range of strategies that encourage, directly and indirectly, prosecution of international crimes. While these activities are diverse and dynamic, they can be loosely categorized. First, there are important opportunities for regional experience sharing and international engagement. Second, there is significant activity within domestic jurisdictions that broadly relates to promoting international criminal justice, including documenting human rights violations, providing input to domestic legislation drafting processes, and further developing necessary capacities. Finally, some groups undertake broader community mobilization and preventative projects that indirectly contribute to the goals of international criminal justice.

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**Intraregional and International Dialogue**

Cambodia, Timor-Leste, and the Philippines have all ratified the Rome Statute, adopted implementing legislation, and participated in the ICC Assembly

of State Parties, which provides important possibilities for intra-regional dialogue between Rome Statute parties and non-parties. Further, past experiences of prosecuting international crimes facilitate regional exchanges to discuss the specific and diverse historical, political, and development contexts in Southeast Asia.

Various regional seminars have provided opportunities for civil society and government representatives to better understand actors’ different priorities and understandings of international criminal justice. For example, in 2015, PGA held a seminar on “The International Rule of Law and the Protection of Civilians,” which included statements encouraging states to join the ICC. At a series of workshops on the responsibility to protect in Southeast Asia, CICC noted that this principle “helps elaborate international justice into something that goes beyond the strict focus of the ICC.”<sup>13</sup> Rather than only emphasizing the Rome Statute, such intra-regional exchanges raise awareness of common regional concerns, help to correct widespread misunderstanding about the ICC’s jurisdiction, and mandate and deflect arguments that it represents ideas and values foreign to the region.

The Association of Southeast Asian Nations (ASEAN) has also provided some, if limited, scope for regional discussions concerning international criminal justice. The ASEAN Political-Security Community Blueprint 2025 envisages a “rules-based . . . community of shared values and norms” and includes commitments to strengthen criminal justice systems and improve regional cooperation and information sharing to address transnational crime.<sup>14</sup> The 2009 creation of an ASEAN Intergovernmental Commission on Human Rights (AICHR) and the 2012 adoption of an ASEAN Human Rights Declaration (AHRD) both focused on promotion of human rights norms, and thus have not yet advanced the issue of accountability for breaches of international human rights and humanitarian law. However, these instruments may provide a foundation for future regional normative discourse

on the need to provide accountability for international crimes. For instance, AICHR is conducting a thematic study on the “right to peace,” as enshrined in the AHRD, and it will be interesting to see whether or how matters of accountability for international crimes will feature in its recommendations.

Without crowding out these spaces for intra-regional dialogue, the ICC could support such forums by building communicative relationships within Southeast Asia. The former president of the ICC, Judge Sang-Hyun Song from South Korea, was a frequent visitor to the region and similar consultations could be continued. However, other ICC outreach and judicial personnel could also gain familiarity with regional actors, contribute their expertise, or simply lend an ear to civil society concerns. This would greatly improve the ICC’s network for possible future investigation of crimes within Southeast Asia.

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#### **Documentation and Monitoring**

In the absence of formal accountability institutions, documentation initiatives hold great potential both to encourage establishment of such mechanisms—sometimes decades later—and to gather, store, and publicize evidence that would otherwise be lost. Likewise, ongoing monitoring of volatile situations holds important potential for prevention and early warning. Civil society actors across Southeast Asia have been at the forefront in documenting serious human rights violations and raising regional and international awareness of the potential commission of international crimes. For example, in Cambodia, the Documentation Centre of Cambodia (DC-Cam) gathered and organized evidence of Khmer Rouge crimes, which contributed to the impetus for establishing the ECCC. DC-Cam has also collaborated with the Network for Human Rights Documentation-Burma (ND-Burma) as it attempts to archive evidence of alleged human rights abuses. Similarly, civil society organizations in the Philippines, including Karapatan, publish data

regarding crimes such as torture and extrajudicial killings that might amount to international crimes.

Where national human rights institutions (NHRIs) exist in the region, they have often led the investigation and documentation of serious human rights violations and alleged international crimes. For instance, Indonesia’s Komnas HAM has investigated alleged cases of crimes against humanity and genocide and made recommendations for prosecution. However, despite these efforts, Indonesia’s Attorney General’s Office has been reluctant to pursue Komnas HAM’s findings, undermining implementation of the commission’s mandate.<sup>16</sup> As another example, the Myanmar National Human Rights Commission has investigated serious human rights violations and in 2015 even recommended that civilian courts prosecute military perpetrators,<sup>17</sup> but it also faces challenges. NHRIs—where they exist—will continue to play an important role in dealing with international crimes in the region, especially where they possess sufficient independence and relevant investigative powers.

All of these groups have publicized and disseminated their findings in traditional and social media, through engagement with officials, or by reporting to international treaty bodies and the Universal Periodic Review. These strategies have encouraged further debate and may contribute toward promoting norms of accountability and justice.

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#### **Domestic Legislation**

The ICC’s complementarity principle affirms that the ICC will only act where other jurisdictions are unable or unwilling to prosecute international crimes. Legislation is one important entry point for formalizing and regulating a state’s commitment to the underlying norms and principles of international criminal justice. Such legislation can also be enacted without formal accession to the Rome Statute system.

While “ordinary” offences such as murder or rape might be used to prosecute the underlying

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conduct of an international crime, Cambodia's Criminal Code and ECCC Law, Indonesia's Law 26/2000, and the Philippine RA 9851 are examples of national legislation for prosecuting international crimes. Similarly, a draft revised Indonesian Criminal Code would allow international crimes to be prosecuted within national courts.<sup>18</sup> Regional legislation has not always replicated the wording of the Rome Statute.<sup>19</sup> For example, Cambodia's legislation extends potential criminal responsibility to "legal entities," RA 9851 allows for the crime against humanity of persecution on grounds of sexual orientation, and Law 26/2000 excludes war crimes. However, they represent attempts to provide domestic avenues for prosecuting international crimes.

Thus, parliamentarians, academics, and NGO representatives are already engaged in developing national legislative capacity to prosecute international crimes. NGO actors and local lawyers have played an important role, by ensuring that accurate arguments and legal analysis are provided to drafting committees—and by counterbalancing other interest groups that may pressure for less comprehensive criminal jurisdiction.

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#### **Developing Human and Institutional Capacities**

Scholars have argued that "the era of international institution building for war crimes accountability is over; a new era of national capacity building has begun."<sup>20</sup> Police and judiciaries must be sufficiently independent and have the technical capacities to pursue prosecution, and the political will to overcome the barriers to prosecuting influential figures. Some state and non-state actors in the region have already identified these priorities. For instance, lawyers working at the ECCC also train Cambodian law students and judges, while the Supreme Court of the Philippines Judicial Academy is considering incorporating special courses on international criminal law into their curriculum

more regularly.<sup>21</sup> There is arguably room for further and cross-regional work in this area. For example, a 2014 study suggested that legal education in the ASEAN region could be harmonized by holding regional judicial training programs.<sup>22</sup> International criminal law could be integrated into such educational forums, as well as into broader legal capacity and rule of law training programs across the region.

There is also scope to develop regional police training initiatives that address international crimes investigations, drawing upon existing arrangements for combating transnational crime, as recognized by the 2025 Political-Security Blueprint. Technical assistance tools can be further developed through expanding web-based programs that provide access to legal information databases that support international crimes prosecutions.<sup>23</sup> Where appropriate in the absence of specific domestic international crimes legislation, this may include assistance with prosecuting atrocity crimes under existing criminal laws. Such initiatives may be crucial to ensure that serious violations of rights do not slip through any cracks: appearing "too difficult" for prosecution as international crimes, but inappropriate for prosecution under national legislation.

In many Southeast Asian countries the military has proven to be a staunch opponent to the Rome Statute, especially in countries with ongoing or recent armed conflicts, such as Burma (Myanmar), Indonesia, and Thailand. Potential openings exist, however. Some military-to-military exchanges have provided opportunities to share experiences of applying and enforcing international humanitarian and criminal law, although translation of such dialogue into improved practices may prove challenging. The region's role in global peacekeeping increases the relevance of international criminal law; personnel from Indonesia, Malaysia, and the Philippines have been heavily involved in UN peacekeeping operations. Such missions often respond to the commission of international crimes and regional peacekeeping forces have been

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deployed in situations now being considered by the ICC.<sup>24</sup> Indonesia and Malaysia are now leading efforts to establish a regional peacekeeping coordination capacity. These developments could assist Southeast Asian militaries in recognizing the value of promoting enforcement of international humanitarian law standards to protect peacekeepers. Civil society groups have already recognized this opportunity, for instance in the Philippines and Indonesia, where PCICC and ICSCICC have highlighted the Rome Statute's potential to protect armed forces deployed abroad.<sup>25</sup>

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**Accountability Beyond Prosecutions**

Where avenues for pursuing international crimes trials are lacking, many activists engage at the community level, leveraging domestic political debates through the media, using non-legal public hearings (including Peoples' Tribunals) to stimulate public discourse about international crimes policy, helping victims and survivors speak out for themselves, pursuing related priorities such as land and tax reform, and deploying social media campaigns that target younger generations. Some initiatives combine these goals, such as the 2013 "Year of Truth" campaign in Indonesia, which included public testimony from victims and survivors of violence and a report promoting justice alongside broader economic and social rights.

Thus, a variety of actors, especially local NGOs, have created space for debates about how to respond to international crimes. This has

encouraged development of innovative civil society projects that move beyond encouraging states to ratify the Rome Statute, by urging policymakers to take a wide range of domestic actions in response to international crimes.

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**Looking Forward**

While the entry points outlined above are not exhaustive, they demonstrate that a variety of approaches for promoting accountability for international crimes are already available; these look beyond a narrow focus on ratification of the Rome Statute and could be further developed. Context-specific policy strategies that recognize these approaches and the local insights that such activities represent are likely to be more relevant and useful for regional actors who are already doing this work. Legislators, judiciary and security force members, NHRIs, and civil society networks can all be engaged to suggest creative and locally appropriate approaches to gradually advancing accountability for international crimes—without necessarily waiting for prior ratification of formal instruments. However, these stakeholders may also benefit from targeted assistance programs that ensure space for open discussion, as well as provide resources, expertise, and other assistance. Contributions from international groups to such activities are likely to be most helpful where they are offered in a consultative manner and with a longer-term strategic outlook.

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**Endnotes**

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<sup>2</sup> As of the end of June 2016.

<sup>3</sup> See e.g. Mark Findlay, "Sign Up or Sign Off—Asia's Reluctant Engagement with the International Criminal Court," *Cambodia Law and Policy Journal* 1 (2014): 49–62; Steven Freeland, "International Criminal Justice in the Asia-Pacific Region: The Role of the International Criminal Court Treaty Regime," *Journal of International Criminal Justice* 11 (2013): 1,029–1,057; Valeriane Toon, "International Criminal Court: Reservations of Non-State Parties in Southeast Asia," *Contemporary Southeast Asia* 26 (2004): 218–232.

<sup>4</sup> Summary records of the plenary meetings and the meetings of the Committee of the Whole (Volume II), United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (United Nations, 15 June–17 July 1998). <http://legal.un.org/icc/rome/proceedings/contents.htm> (accessed 26 May 2016), 82.

<sup>5</sup> Note 4 above, 73, see also 338 and 106–107 (Thailand), 109 (Malaysia), 111 (Vietnam).

<sup>6</sup> 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-ASP/10/25 of 23 November 2011, para. 14.

<sup>7</sup> As demonstrated when Sudan's President Omar Al-Bashir, who is the subject of ICC arrest warrants, was invited to and attended the Organisation of Islamic Cooperation Summit in Indonesia in 2016.

<sup>8</sup> See e.g. David Cohen, "Justice on the Cheap' Revisited: The Failure of the Serious Crimes Trials in East Timor," *AsiaPacific Issues* 8 (2006); Christoph Sperfeldt, "From the Margins of Internationalised Criminal Justice: Lessons Learned at the Extraordinary Chambers in the Courts of Cambodia," *Journal of International Criminal Justice* 11 (2013): 1,111–1,137.

<sup>9</sup> David Cohen, *Intended to Fail: The Trials Before the Ad Hoc Human Rights Court in Jakarta*, Occasional Paper Series, International Center for Transitional Justice, New York, August 2003.

<sup>10</sup> See Art. 341–343, Socialist Republic of Viet Nam, Penal Code, No. 15/1999/QH10.

<sup>11</sup> Chapter VIB, Penal Code, Singapore, Chapter 224, 16 September 1872, revised 30 November 2008.

<sup>12</sup> See Philippine Coalition for the International Criminal Court (PCICC), *For Hope & Human Dignity: A Primer on the International Criminal Court for the Security Sector*, 2008, <https://drive.google.com/file/d/0ByN9IYiGLaz6NjRhNDIzNzAtMTQwYy00OGM5LThlNDktN2YyMTBiNjYxNDNBh/view?ddrp=1&chl=en#>; PCICC, *Senate Concurrence on Rome Statute is a Vote for Justice*, 23 August 2011.

<sup>13</sup> International Coalition for the Responsibility to Protect and Asia Pacific Centre for the Responsibility to Protect, *Advancing Atrocities Prevention in Southeast Asia*, 2016, 10.

<sup>14</sup> See *ASEAN 2025: Forging Ahead Together*, Jakarta: ASEAN Secretariat, November 2015, para. 5.1.

<sup>15</sup> Six of eleven states in the region have established NHRIs. See Andrew Byrnes, Andrea Durbach, and Catherine Renshaw, "Joining the Club: The Asia Pacific Forum of National Human Rights Institutions, the Paris Principles, and the Advancement of Human Rights Protection in the Region," *Australian Journal of Human Rights* 14 (2008): 63–98.

<sup>16</sup> Komnas HAM, *Comments of the Indonesian National Human Rights Commission on Indonesia's Compliance with the International Covenant on Civil and Political Rights*, 14 June 2013.

<sup>17</sup> See *Statement of the Myanmar National Human Rights Commission with regard to the case involving the death of Ko Aung Naing (a) Ko Aung Kyaw Naing (a) Ko Par Gyi*, Statement No (16 /2015).

<sup>18</sup> For a discussion, see Supriyadi W. Eddyono, Wahyudi Djafar, and B. R. Fritz Sumigar, *Envisioning Indonesian Penal Code Reform: Challenges in Reforming Criminal System and Protecting Civil Liberties*, November 2015.

<sup>19</sup> See Simon Meisenberg, "Complying with Complementarity? The Cambodian Implementation of the Rome Statute of the International Criminal Court," *Asian Journal of International Law* 5 (2014): 123–142.

<sup>20</sup> Morten Bergsmo, "Complementarity and the Challenges of Equality and Empowerment," *FICHL Policy Brief Series* 8 (2011): 1–4.

<sup>21</sup> A Special Course on International Criminal Law and Security was organized in January 2016 with involvement of AIJI Director, Prof. David Cohen. See more at <http://philja.judiciary.gov.ph/assets/files/pdf/icl.pdf> (accessed 24 July 2016).

<sup>22</sup> See Human Rights Resource Centre, *Judicial Training in ASEAN: A Comparative Overview of Systems and Programs*, Singapore: Konrad-Adenauer Foundation, 2014, [http://www.kas.de/wf/doc/kas\\_37729-1522-2-30.pdf?140514083039](http://www.kas.de/wf/doc/kas_37729-1522-2-30.pdf?140514083039) (accessed 26 April 2016).

<sup>23</sup> See regarding the Case Matrix Network, <http://www.casematrixnetwork.org> (accessed 26 April 2016).

<sup>24</sup> See Carlyle Thayer, "ASEAN and UN Peacekeeping," *The Diplomat*, 25 April 2014.

<sup>25</sup> HRRC, ELSAM, Indonesian CICC, *Progress Report: Indonesia Efforts to Ratify the 1998 Rome Statute of the International Criminal Court*, November 2012, 10; PCICC, *For Hope & Human Dignity*.

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