Jakarta’s Bashir dilemma

We should not undermine the Indonesian legal system, which is still finding its tentative way, writes Tim Lindsey.

BU Bakar Bashir’s jailing in Jakarta last Thursday, for only 30 months for “the crime of evil conspiracy” that led to the Bali bombings, has resulted in a barrage of criticism.

The result is disappointing for those who, like Foreign Minister Alexander Downer, claim there is “no doubt” about Bashir’s role in the atrocity that led to the deaths of 202 people — and especially for the families of those murdered, whether Indonesian or Australian. The US State Department echoed these sentiments when it professed itself “disturbed by the message sent by the relatively brief sentence”.

But what really is the message sent by the conviction? The State Department seems to have misunderstood what happened: the real message is not that the Indonesian judges are going soft on Bashir, but exactly the opposite.

Opposition Leader Kim Beazley may have captured the mood in Australia when he said Bashir should “spend the rest of his miserable life in jail” but it was obvious from early in the trial that this would never happen. In fact, given the weak case against him, that Bashir was convicted at all indicates how desperate the Indonesian authorities were to nail him.

I share the view that Bashir has responsibility for Jemaah Islamiah attacks, but rule of law requires that personal opinions are irrelevant: it is the evidence that counts. As Sidney Jones of the International Crisis Group said in Singapore last week: “In the post-Soeharto era, people demand evidence. You can’t simply arrest people on suspicion or on hearsay.”

Compare Bashir’s trial to that of Schapelle Corby, the Australian woman being tried in Bali for importing cannabis. Many Australians are outraged at what they see as the railroading of her case by Indonesian authorities, who seem convinced of her guilt and to be giving scant weight to evidence that her supporters claim proves her innocence. Yet, many of the same people would see Bashir’s light sentence as a travesty because “he is obviously guilty”. The point is that in a rule-of-law system there cannot be different standards for different defendants. The only standard that can be applied is a fair assessment of the weight of the evidence and in Bashir’s case — whatever his guilt — the evidence was extraordinarily flimsy.

The prosecution relied on a string of witnesses who refused to testify. Those who did were not able to tie Bashir to the Bali, Marriott or embassy bombings. Natsir Abbas, one witness who did link him to terrorism, gave evidence that Bashir had been involved in JI training — but in the southern Philippines. The evidence left little doubt that Bashir was the titular head of JI, but that was not much help: JI is, unfortunately, still a legal organisation in Indonesia (something Jakarta should have fixed long ago).

In the end, the court seems to have convicted largely on the basis of police reports, which allege that Bashir told Amrozi and Mubarak (neither of whom testified) that the “event” in Bali was “up to you, because you know the situation in the field” — hardly a smoking gun.

As one of Bashir’s lawyers said in Jakarta last week, he could not be convicted on this untested evidence in a criminal trial in Australia or the US.

This debacle reflects a key weakness in the Indonesian legal system: judges have improved enormously since Soeharto but the prosecution service — which for decades simply
ran sham trials — remains under-skilled and inexperienced in handling contested criminal cases. The prosecution’s problems are only compounded by the US withholding key witnesses. It has refused court requests for testimony from Hambali, the key link to al-Qaeda, and has given only limited access to Omar al-Faruq and Bali bomber Riduan Isamuddin.

The US may have security reasons keeping them all in the ether but they are not good rule-of-law reasons and they did huge damage to the prosecution. That Bashir was jailed at all is in itself a demonstration of how much the Indonesian authorities fear him — and not that they want to go easy on him.

The result is now that when the Bashir case reaches the Indonesian Supreme Court, there is a real possibility that the flimsy conviction will be thrown out or, at the very least, his sentence reduced sufficiently for him to be released. If that happens, and he walks away from his second major trial, Bashir’s prestige will be immeasurably enhanced. How will that serve the US war on terrorism?

The problem is that the US strategy on terrorism in Indonesia seems to counter its stated objectives of supporting democracy and rule of law. This has become a major controversy as a result of allegations by Fred Burks, a former State Department translator, that he was present when White House official Karen Brooks tried to pressure former president Megawati Soekarnoputri, to “render” (disappear) Bashir to the US or a third country, which uses torture. Brooks has denied this but Burks claims Megawati “rendered” two other suspects, Kuwaiti Faruq and Pakistani Iqbal Madni. As Bashir’s lawyers point out with heavy irony, in Indonesia at least Indonesians get an open trial and people know where they are.

One of the basic aims of all terrorists is to reveal the flaws and weaknesses in the state systems they oppose by placing them under extreme stress. Responding to the lawlessness of terrorism by sideling emergent rule of law in a country only six years out from three decades of dictatorship is to play straight into their hands.

Instead, the West needs to support the continuing — albeit painful and slow — reform of judicial and legal institutions in Indonesia. And the US, in particular, needs to rethink how it can better support critical terrorist prosecutions.

Associate Professor Tim Lindsey is director of the Asian Law Centre, and deputy director of the centre for the study of contemporary Islam at the University of Melbourne.