

UNIVERSAL JURISDICTION: INDONESIA AND THE ASEAN REGION

SUBMISSIONS TO INDONESIA'S CONSTITUTIONAL COURT Case Number 89/PUU-XX/2022

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INTRODUCTION

1. Indonesia is authorized by customary international law to exercise universal jurisdiction over core international crimes like genocide, crimes against humanity, and torture. Sovereignty and international relations concerns do not prevent Indonesia from exercising such jurisdiction. In fact, Indonesia's exercise of universal jurisdiction over core international crimes is in line with international and regional legal developments as well as Indonesia's aim of being a human rights leader on the global stage.

A. UNIVERSAL JURISDICTION IS A FIRMLY ESTABLISHED GROUND OF JURISDICTION IN CUSTOMARY INTERNATIONAL LAW

2. The principle of universal jurisdiction, as recognized by customary international law, permits states to exercise criminal jurisdiction over an accused person for certain crimes, regardless of where the crimes were committed, the crimes' effect on the state, or the nationality of perpetrators or victims.¹
3. There is clear international consensus over the fact that universal jurisdiction may serve as a ground for criminal jurisdiction in customary international law. This conviction is shared by Member States of the Association of Southeast

¹ Under international law, states may exercise jurisdiction based on several established principles: the territoriality, nationality, passive personality, the protective principle and universal jurisdiction. Universal jurisdiction allows the exercise of jurisdiction when no other "connection" with the state concerns is established. Kriangsak Kittichaisaree, *International Human Rights Law and Diplomacy*, Edward Elgar Publishing, Northampton, 2020, p. 244.

Asian Nations ('ASEAN').² There is also increased international recognition of the importance of universal jurisdiction. In 2009, the U.N. General Assembly included the item entitled 'The scope and application of the principle of universal jurisdiction' in its agenda, and discussions have continued in the Sixth Committee since then.³ In 2017, the General Assembly decided to establish a working group of the Sixth Committee to facilitate comprehensive discussions of the topic.⁴ The U.N. International Law Commission decided, in 2018, to add the topic of universal criminal jurisdiction to its long-term programme of work.⁵ Several ASEAN states, including Indonesia, have affirmed the legitimacy and value of universal jurisdiction in discussions before the Sixth Committee.

B. ASEAN STATES ACCEPT THE VALIDITY AND IMPORTANCE OF UNIVERSAL JURISDICTION

4. ASEAN state representatives have acknowledged that universal jurisdiction is a "generally accepted principle of international law".⁶ The "existence and utility" of universal jurisdiction has been described as "undeniable".⁷ In its 2022 statement in the U.N. Sixth Committee, Indonesia's state representative stated that the principle of universal jurisdiction is "a crucial tool for putting an end to impunity for grave breaches of International Humanitarian Law and other international crimes".⁸
5. Universal jurisdiction has been represented by ASEAN state representatives as "an important instrument to combat international crimes and fight against impunity".⁹ This principle of jurisdiction has been described as a "valuable means to end impunity" when perpetrators are able to "slip through fragmented national jurisdictions".¹⁰ By giving an "opportunity to all states to possess jurisdiction" over "serious crimes of international concern", universal

² ASEAN comprises of Brunei, Cambodia, Indonesia, the Lao People's Democratic Republic, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam (see "Member States" on ASEAN's web site).

³ The scope and application of the principle of universal jurisdiction, UN Doc. A/RES/64/117, 15 January 2010 (<https://www.legal-tools.org/doc/d563cc/>).

⁴ The scope and application of the principle of universal jurisdiction, UN Doc. A/RES/72/120, 18 December 2017 (<https://www.legal-tools.org/doc/0ef888/>).

⁵ Report of the International Law Commission, seventieth session, UN Doc. A/73/10, 10 August 2018, p. 8 (<https://www.legal-tools.org/doc/jwtgoz/>).

⁶ Statement of the Republic of the Philippines, "The scope and application of the principle of universal jurisdiction", Sixth Committee, 74th session of the UN General Assembly, 17 October 2019.

⁷ Statement of Singapore, "The scope and application of the principle of universal jurisdiction", Sixth Committee, 69th session of the UN General Assembly, 15 October 2014.

⁸ Statement of the Republic of Indonesia, "The scope and application of the principle of universal jurisdiction", Sixth Committee, 77th session of the UN General Assembly, 13 October 2022.

⁹ Statement of Viet Nam, "The scope and application of the principle of universal jurisdiction", Sixth Committee, 69th session of the UN General Assembly, 15 October 2014.

¹⁰ Statement of Thailand, "The scope and application of the principle of universal jurisdiction", Sixth Committee, 69th session of the UN General Assembly, 15 October 2014.

jurisdiction ensures that “at least some perpetrators” are prosecuted, thus furthering the “deterrence”, “retribution”, and “condemnation” of such crimes.¹¹

6. Apart from securing accountability, universal jurisdiction protects other important purposes and values. As recognized by Indonesia’s state representative, the principle of universal jurisdiction serves to “protect the rights of victims” and “uphold justice”.¹² Universal jurisdiction’s goal of ensuring that no one is beyond the reach of the law furthers the rule of law. It reflects a “commitment” that perpetrators of serious crimes “must not go unpunished” and contributes to “the promotion of the rule of law at national and international levels”.¹³ The commitment of ASEAN states to the rule of law is clearly stated in the ASEAN Charter.¹⁴

C. SOVEREIGNTY CONCERNS DO NOT PREVENT THE EXERCISE OF UNIVERSAL JURISDICTION

7. There is general agreement among states and other international actors that universal jurisdiction applies to a narrow category of very serious crimes. Indonesia’s state representative has stated in the Sixth Committee that universal jurisdiction should “only be applied to the most serious crimes affecting the international community as a whole”.¹⁵ ASEAN state representatives concur that universal jurisdiction only attaches to crimes that are very serious in nature. The representative of the Philippines has argued that crimes attracting universal jurisdiction should be limited to “*jus cogens* crimes” as these crimes would be considered as “committed against all members of the international community and thus granting every State jurisdiction over the crime”.¹⁶ The serious nature of core international crimes such as genocide, torture, and mass extermination is generally accepted. These crimes undermine fundamental values shared across societies. Exercising universal jurisdiction over such crimes will not be controversial.
8. International law regulates the exercise of universal jurisdiction, prevents its abuse, and ensures that such jurisdiction is exercised consistent with state sovereignty. Indonesia’s state representative has stressed in its submissions to the U.N. Sixth Committee that universal jurisdiction “cannot be considered separately and applied independently from other relevant principles of

¹¹ Statement of Malaysia, “The scope and application of the principle of universal jurisdiction”, Sixth Committee, 68th Session of the UN General Assembly, 17 October 2013.

¹² Statement of Indonesia, “The scope and application of the principle of universal jurisdiction”, Sixth Committee, 72nd Session of the UN General Assembly, 11 October 2017.

¹³ Statement of Viet Nam, “The scope and application of the principle of universal jurisdiction”, Sixth Committee, 70th session of the UN General Assembly, 20 October 2015.

¹⁴ ASEAN Charter, preamble, Article 1.7, and Article 2.2.(h).

¹⁵ Statement of the Republic of Indonesia, “The scope and application of the principle of universal jurisdiction”, Sixth Committee, 77th session of the UN General Assembly, 13 October 2022.

¹⁶ Statement of the Republic of the Philippines, “The scope and application of the principle of universal jurisdiction”, Sixth Committee, 75th Session of the UN General Assembly, 3 November 2020.

international law, such as immunity of state officials from foreign criminal jurisdiction, state sovereignty, and territorial integrity”.¹⁷

9. Specifically, the exercise of universal jurisdiction should comply with the international law on immunity of state officials from foreign criminal jurisdiction.¹⁸ Recent international legal developments have clarified the relationship between universal jurisdiction and the functional immunity of state officials. In 2017, the International Law Commission adopted Draft Article 7, in the context of its work on the immunity of state officials from foreign criminal jurisdiction, which confirms that functional immunity does not apply with respect to genocide, crimes against humanity, war crimes, the crime of apartheid, torture, and enforced disappearance.¹⁹ In an important 2021 decision, the German Federal Court of Justice decided that functional immunity at least does not prevent the criminal prosecution of foreign lower-ranking state officials for war crimes.²⁰ Courts in ASEAN countries like Indonesia should not hesitate to similarly contribute to state practice when seized of questions of universal jurisdiction.

D. INDONESIA SHOULD PARTICIPATE IN THE DEVELOPMENT OF
CUSTOMARY INTERNATIONAL LAW ON UNIVERSAL JURISDICTION

10. Universal jurisdiction is a firmly established ground of jurisdiction in customary international law. ASEAN states like Indonesia should contribute to the further development of customary international law on universal jurisdiction through state practice, which includes court judgments as well as laws and policies on universal jurisdiction. ASEAN state actors should not let the scope and content of universal jurisdiction in customary international law be determined by the state practice and *opinio juris* of other countries. There is a particularly important role to be played by courts, like the Indonesian Constitutional Court, in cases involving questions of universal jurisdiction because the relevant crimes are usually perpetrated against politically disenfranchised and vulnerable individuals or groups. Vigilance and action by domestic courts in universal jurisdiction cases contribute to the protection of marginalized victims of core international crimes, regardless of where these crimes are committed.
11. Several ASEAN countries, including Indonesia, have made submissions in the U.N. Sixth Committee recognizing the legitimacy and importance of universal jurisdiction. Universal jurisdiction efforts in the ASEAN region can build on the

¹⁷ Statement of the Republic of Indonesia, “The scope and application of the principle of universal jurisdiction”, Sixth Committee, 77th session of the UN General Assembly, 13 October 2022.

¹⁸ Statement of Indonesia, 11 October 2017, see above note 12.

¹⁹ Draft articles on immunity from foreign criminal jurisdiction of State officials provisionally adopted by the Commission, UN Doc. A/CN.4/722, 12 June 2018, Article 7 (<https://www.legal-tools.org/doc/aoyg9l/>).

²⁰ Aziz Epik, “No Functional Immunity for Crimes under International Law before Foreign Domestic Courts: An Unequivocal Message from the German Federal Court of Justice”, in *Journal of International Criminal Justice*, 2021, vol. 19, no. 5, p. 1274.

region's efforts in cross-border co-operation in criminal matters, such as the ASEAN Treaty on Mutual Legal Assistance.²¹

12. It is in the interest of Indonesia and other ASEAN states to use universal jurisdiction to pursue accountability and peace in the region. The ongoing situation in Myanmar has attracted international media attention for more than a year and proves that the ASEAN region is not exempt from conduct that has preoccupied international criminal justice.
13. At the domestic level, individual ASEAN states like Indonesia should revisit their country's laws and policies to assess if they comply with the customary international law on universal jurisdiction. Civil society petitions like the one before this court are an opportunity for judicial actors to reassess domestic laws on extraterritorial jurisdiction with a view to implementing universal jurisdiction. ASEAN states like Indonesia should confidently take the lead in addressing questions of international criminal justice.

E. INDONESIA HAS POSITIONED ITSELF AS A HUMAN RIGHTS LEADER AND SHOULD EXERCISE UNIVERSAL JURISDICTION OVER CORE INTERNATIONAL CRIMES

14. Indonesia's political leaders have declared the country's commitment to human rights and accountability for serious human rights abuses. The country's human rights record and achievements are depicted as a source of national pride.
15. Indonesia aspires to be an active human rights leader at the regional and global level. From 2020 to 2022, Indonesia was a member of the UN Human Rights Council. Indonesia has announced its candidacy for the UN Human Rights Council for the period of 2024 to 2026.²² At the regional level, Indonesia takes a proactive role in the work of the ASEAN Intergovernmental Commission on Human Rights (AICHR). Indonesia assumes the ASEAN Chair in 2023 and has committed to putting forward "the promotion of human rights".²³ Indonesia's Ministry of Foreign Affairs believes that Indonesia's human rights leadership and diplomacy is "fully dedicated to Indonesia's national interests" and consolidates "Indonesia's reputation as a democratic country".²⁴ Such leadership goes to "Indonesia's global efforts to promote and protect human rights".²⁵

²¹ Treaty on Mutual Legal Assistance in Criminal Matters, 29 November 2004 (<https://www.legal-tools.org/doc/a3msav/>).

²² National report submitted pursuant to Human Rights Council resolutions 5/1 and 16/21: Indonesia, Human Rights Council, A/HRC/WG.6/41/IDN/1, 1 September 2022, para 9.

²³ National report submitted pursuant to Human Rights Council resolutions 5/1 and 16/21: Indonesia, Human Rights Council, A/HRC/WG.6/41/IDN/1, 1 September 2022, para 159.

²⁴ Ministry of Foreign Affairs of the Republic of Indonesia, "Indonesia and Human Rights Protection", 7 April 2019, available at https://kemlu.go.id/portal/en/read/97/halaman_list_lainnya/indonesia-and-human-rights-protection.

²⁵ Ministry of Foreign Affairs of the Republic of Indonesia, "Indonesia and Human Rights Protection", 7 April 2019, available at https://kemlu.go.id/portal/en/read/97/halaman_list_lainnya/indonesia-and-human-rights-protection.

16. When championing human rights within the region, Indonesia's leaders have underscored the importance of protecting and not just promoting human rights. In August 2022, Indonesia's Minister of Foreign Affairs emphasized in an ASEAN meeting that the "protection of human rights" is "as important" as the "promotion of human rights" in the region.²⁶ At international law, the state's human rights obligations involve the duty to respect rights, or not violate them, as well as the duty to take positive steps to protect individuals and groups from rights violations by third parties.²⁷ One such protective measure is the pursuit of criminal accountability through the exercise of universal jurisdiction.
17. The international community has repeatedly affirmed the legitimacy and importance of universal jurisdiction as a ground of jurisdiction recognized by customary international law. ASEAN states agree on the significance and value of universal jurisdiction. Indonesia's exercise of universal jurisdiction over core international crimes is consistent with customary international law and is not prevented by sovereignty or international relations concerns. By undertaking universal jurisdiction, Indonesia will contribute to the development of customary international law on universal jurisdiction. This will achieve Indonesia's goal of being a human rights leader on the regional and international stage.



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9 December 2022

²⁶ Ministry of Foreign Affairs of the Republic of Indonesia, "AIHCR Must Improve Human Rights Protection", 2 August 2022, available at <https://kemlu.go.id/portal/en/read/3868/berita/aihcr-must-improve-human-rights-protection>.

²⁷ Dinah Shelton and Ariel Gould, "Positive and Negative Obligations" in *The Oxford Handbook of International Human Rights Law*, p 563.