

UNIVERSAL JURISDICTION: INDONESIA AND THE ASEAN REGION

**ORAL SUBMISSIONS
Case Number 89/PUU-XX/2022
Indonesia Constitutional Court**

Dr. Cheah W.L.
Associate Professor
Faculty of Law, National University of Singapore

INTRODUCTION

1. Your excellencies, good morning and thank you for letting me present my opinion here today.
2. My legal analysis concludes that based on international law and regional ASEAN developments, Indonesia may and should exercise universal jurisdiction over core international crimes like genocide, crimes against humanity, and torture. I will present the following points in support of my legal analysis:
 - a. Universal jurisdiction is a firmly established ground of jurisdiction in customary international law. ASEAN States accept the validity and importance of universal jurisdiction.
 - b. Sovereignty and international relations concerns do not prevent Indonesia from exercising such jurisdiction.
 - c. Indonesia should participate in the development of customary international law on universal jurisdiction. Indonesia is also an active human rights leader at the regional and global level.
 - d. Indonesia's new penal code provides for universal jurisdiction for crimes under international law.

A. UNIVERSAL JURISDICTION IS A FIRMLY ESTABLISHED GROUND OF JURISDICTION IN CUSTOMARY INTERNATIONAL LAW AND ASEAN STATES RECOGNISE THIS.

3. 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

4. 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 Asian Nations ('ASEAN').² In 2017, the General Assembly decided to establish a working group of the Sixth Committee for discussions on universal jurisdiction.³ Several ASEAN states, including Indonesia, have affirmed the legitimacy and value of universal jurisdiction in discussions before the Sixth Committee.
5. ASEAN state representatives have recognized that universal jurisdiction is a "generally accepted principle of international law".⁴ In its 2022 statement in the U.N. Sixth Committee, Indonesia 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".⁵
6. Indonesia is not alone in recognizing the importance and legitimacy of universal jurisdiction in the ASEAN region. Vietnam has recognized "universal jurisdiction as "an important instrument to combat international crimes and fight against impunity". Thailand has described this principle of jurisdiction as a "valuable means to end impunity" when perpetrators are able to "slip through fragmented national jurisdictions".⁶ Malaysia has explained that by giving an "opportunity to all states to possess jurisdiction" over "serious crimes of international concern", universal jurisdiction ensures that "at least some perpetrators" are prosecuted.⁷
7. Apart from securing accountability, universal jurisdiction protects other important purposes and values of ASEAN. As recognized by Indonesia's state representative, the principle of universal jurisdiction serves to "protect the rights

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.

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/72/120, 18 December 2017 (<https://www.legal-tools.org/doc/0ef888/>).

⁴ 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.

⁵ 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.

⁶ 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.

⁷ 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.

of victims” and “uphold justice”.⁸ It guarantees that no one is beyond the reach of the law furthers the rule of law.⁹ This universal and regional commitment to the rule of law is clearly stated in the ASEAN Charter.¹⁰

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

8. The exercise of universal jurisdiction does not threaten sovereignty or international relations. If it did, states would have stopped this practice. Trends show that the practice of universal jurisdiction is increasing rather than decreasing. Universal jurisdiction does not pose a threat to international relations and sovereignty in the ASEAN region for the following reasons. First, the international community and ASEAN agrees that universal jurisdiction under customary international law applies to a narrow category of very serious crimes. Indonesia has stated should “only be applied to the most serious crimes affecting the international community as a whole”.¹¹ Other ASEAN states agree. For example, the Philippines has stated universal jurisdiction should be limited to “*jus cogens* crimes” that are “committed against all members of the international community”.¹² 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 core international crimes will not be controversial.

9. Second, universal jurisdiction does not threaten stability because international law regulates the exercise of universal jurisdiction and prevents its abuse. ASEAN states recognize and support this. International law ensures that such jurisdiction is exercised consistent with state sovereignty. Indonesia has stressed in its submissions to the U.N. Sixth Committee that universal jurisdiction must be exercised in line with “principles of international law, such as immunity of state officials from foreign criminal jurisdiction, state sovereignty, and territorial integrity”.¹³ Similarly, Singapore has recognized that universal jurisdiction “cannot be exercised in isolation from, or to the exclusion of, other principles of international law, including the principle of immunity of State officials from foreign criminal jurisdiction, State sovereignty, and territorial integrity”. Vietnam has emphasized that the exercise of universal jurisdiction should “fully respect other rules and principles of international law, including

⁸ 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.

⁹ 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.

¹⁰ ASEAN Charter, preamble, Article 1.7, and Article 2.2.(h).

¹¹ 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.

¹² 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.

¹³ 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.

with regard to the immunity of state officials from foreign criminal jurisdiction”.

10. If universal jurisdiction is exercised consistent with international law, there is little risk of abuse or threat to political relations. Specifically, the exercise of universal jurisdiction should comply with the international law on immunity of state officials from foreign criminal jurisdiction.¹⁴ The international community has clarified the relationship between universal jurisdiction and the functional immunity of state officials. In 2017, the International Law Commission adopted Draft Article 7 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.¹⁵ 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.¹⁶ Courts in ASEAN countries like Indonesia should not hesitate to similarly contribute to state practice when seized of questions of universal jurisdiction.
11. State practice shows that states generally exercise universal jurisdiction in a measured manner. ASEAN states are aware of the need to proceed carefully and coordinate action when exercising universal jurisdiction. State representatives from Indonesia, Vietnam, and Singapore have recognized that universal jurisdiction should be exercised as a “last resort” and subsidiary to the jurisdiction of the territorial or nationality state.¹⁷ This measured approach is reflected in the domestic laws of ASEAN states providing for universal jurisdiction over certain crimes. These laws set out certain conditions regulating the exercise of universal jurisdiction, such as requiring trials to be held before certain courts, mandating the minister’s involvement over certain issues, and with due consideration of other proceedings by other countries and international actors.¹⁸ ASEAN states are aware that cases based on universal jurisdiction will require coordination between states in light of ASEAN’s diverse legal systems and the crimes’ cross-border nature.¹⁹ Such cooperation can build on existing regional agreements, such as the ASEAN Mutual Legal Assistance Treaty, and

¹⁴ Statement of Indonesia, 11 October 2017, see above note 8.

¹⁵ 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/>).

¹⁶ 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.

¹⁷ Statement of Indonesia, “The scope and application of the principle of universal jurisdiction”, Sixth Committee, 75th Session of the UN General Assembly, 3 November 2020; Statement of Singapore, “The scope and application of the principle of universal jurisdiction”, Sixth Committee, 75th Session of the UN General Assembly, 3 November 2020; Statement of Viet Nam, “The scope and application of the principle of universal jurisdiction”, Sixth Committee, 75th Session of the UN General Assembly, 3 November 2020.

¹⁸ See for example, Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity, Timor Leste Penal Code, Singapore Geneva Conventions Act, Malaysia Geneva Conventions Act.

¹⁹ See, for example, Statement of Indonesia, “The scope and application of the principle of universal jurisdiction”, Sixth Committee, 73rd session of the UN General Assembly, 11 October 2018.

international frameworks, such as the UN Myanmar Mechanism and INTERPOL.

D. INDONESIA SHOULD PARTICIPATE IN THE DEVELOPMENT OF CUSTOMARY INTERNATIONAL LAW ON UNIVERSAL JURISDICTION AS A HUMAN RIGHTS LEADER IN THE REGION AND GLOBALLY.

12. The international law on universal jurisdiction is created and changed through the practice and opinion of states. ASEAN states like Indonesia should contribute to the further development of 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 international law on universal jurisdiction be determined by the practice and opinion of other countries.
13. There is a particularly important role to be played by courts, like the Indonesian Constitutional Court, in cases involving questions of universal jurisdiction. This is because such 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. 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.
14. Indonesia's political leaders have declared the country's commitment to human rights and accountability for serious human rights abuses. 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 2026.²⁰ At the regional level, Indonesia takes a proactive role in the work of the ASEAN Intergovernmental Commission on Human Rights (AICHR). Indonesia assumed the ASEAN Chair in 2023 and has committed to putting forward "the promotion of human rights".²¹ 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

²⁰ 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.

²¹ 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.

“Indonesia’s reputation as a democratic country”.²² Such leadership goes to “Indonesia’s global efforts to promote and protect human rights”.²³

15. 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.²⁴ 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.²⁵ One such protective measure is the pursuit of criminal accountability through the exercise of universal jurisdiction.

F. INDONESIA’S NEW PENAL CODE PROVIDES FOR UNIVERSAL JURISDICTION FOR CRIMES UNDER INTERNATIONAL LAW

16. On 6 December 2022, the Indonesian House of Representatives (Dewan Perwakilan Rakyat) unanimously passed a bill creating a new penal code. As explained in the elucidation accompanying this code, the reformation of Indonesia’s criminal law achieves, among others, the “adaptation and harmonization” given “developments in the field of criminal law as well as the development of values, standards, and norms which are acknowledged by nations internationally (emphasis added).”
17. Several provisions in the new penal code reflect the Indonesian legislature’s intention that Indonesia exercise universal jurisdiction over certain crimes, including core international crimes. Specifically, Article 6 of the new Indonesian penal code states:

“Criminal provisions in the Law shall be applicable to Any Person who is located outside of the territory of the Unitary State of the Republic of Indonesia who committed a Crime pursuant to international laws that has been stipulated as a Crime in the Law.”²⁶

The code provides for other forms of jurisdiction.²⁷ The new code also criminalizes several core international crimes. Articles 529 and 530 criminalize

²² 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.

²³ 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.

²⁴ 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>.

²⁵ Dinah Shelton and Ariel Gould, “Positive and Negative Obligations” in *The Oxford Handbook of International Human Rights Law*, p 563.

²⁶ Article 6, Law No 1 of 2023.

²⁷ Article 4 sets out the territorial principle. Article 5 sets out the protective principle and passive nationality principle as well as the types of crimes attracting such jurisdiction. Article 8 sets out the active nationality principle. Cases linked to Indonesia by territory, nationality, or protective interests fall under

torture. Article 598 criminalizes genocide and Article 599 criminalizes crimes against humanity.²⁸ The new Indonesian penal code affirms Indonesia's identity as an engaged and responsible member of international society by expressly recognizing its power to exercise universal jurisdiction over certain crimes.

18. By adopting Article 6, Indonesia's legislature clearly affirms Indonesia's ability and responsibility under international law to exercise universal jurisdiction over certain crimes, including core international crimes.²⁹ It should be noted that Indonesia has ratified the Geneva Conventions I-IV and the Torture Convention. Under these conventions, Indonesia is in fact required to exercise universal jurisdiction over war crimes and torture. The exercise of universal jurisdiction, as the elucidation to the code notes, "protects the legal interests of Indonesia and/or the legal interests of other countries".³⁰ A finding by this court that Indonesian authorities have the power to exercise universal jurisdiction over core international crimes would be in line with the new penal code and legislative intention.

CONCLUSION

19. 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.

Dr. Cheah W.L.
Associate Professor
Faculty of Law
National University of Singapore
<https://law.nus.edu.sg/people/cheah-w-l/>

8 February 2023

these articles. Article 6's universality principle deals with cases without any such links, involving crimes under international law. Law No 1 of 2023 affirms that Indonesia can and should exercise universal jurisdiction for core international crimes.

²⁸ Articles 529 and 530 on Torture. Article 598 on genocide. Article 599 on crimes against humanity. Article 6, Law No 1 of 2023.

²⁹ According to Article 624, the new Indonesian Penal Code comes into force three years from its date of promulgation. Its unanimous passage nevertheless indicates Indonesia's legislature's strong support for the penal code.

³⁰ Elucidation, Law No 1 of 2023.