



## **LEGAL OPINION ON UNIVERSAL JURISDICTION**

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### **1. SUMMARY**

- 1.1 Universal jurisdiction forms part of a state's contribution to the enforcement of international law. It is not simply a state's right but in some cases is a duty owed by states under international law, either under international treaties or as a manifestation of its duty to provide individuals with access to justice.
- 1.2 Universal jurisdiction is an agreement by the inter-state community to universalize the right of access to justice for victim communities in relation to crimes of concern to the international community. States offer their court structures as a form of burden-sharing among states and to fulfil their obligations to victims and victim communities to provide access to justice.
- 1.3 Universal jurisdiction is a decentralized adjunct of the developing framework of international criminal law. There is no formal hierarchy in terms of choice of forum for the prosecution of international crimes. However, where the territorial state or state of nationality is unwilling or unable to prosecute, exercise of universal jurisdiction by regional actors is preferable to avoid the need for intervention by international criminal tribunals.
- 1.4 Universal jurisdiction is not an absolute right or duty but should be balanced against the international obligations and other legitimate aims of prosecuting states.

### **2. SOURCE AND STRUCTURE OF UNIVERSAL JURISDICTION PROSECUTIONS**

- 2.1 Plenary jurisdiction is not an aspect of sovereignty. The jurisdiction of a state's domestic courts is derived from a 'legal right and not from an assertion of unlimited will' and 'is subject ultimately to regulation within the legal framework of the international community'.<sup>1</sup>
- 2.2 International law therefore sets the parameters of jurisdiction that can be claimed by states. According to contemporary doctrine, international law recognizes a number of permissive principles enabling states to claim domestic criminal jurisdiction where there is a 'genuine connection between the subject matter of jurisdiction and the

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<sup>1</sup> Oppenheim, *International Law* (9<sup>th</sup> ed, 1992), vol I, 12.

territorial base or reasonable interests of the state in question'.<sup>2</sup> Recognized permissive principles include principles of territoriality (where the alleged crime is committed within the prosecuting state's territory), nationality (where the alleged crime is committed by the prosecuting state's national), passive personality (where the alleged crime impacts victims of the prosecuting state's nationality) and protective jurisdiction (where the alleged crime threatens fundamental interests of the prosecuting state).

- 2.3 These forms of 'sovereign-based' exercises of jurisdiction, exercisable where there is a nexus between the state and the crime charged, are distinct from an exercise of universal jurisdiction. By definition, universal jurisdiction exists where there is no nexus between the prosecuting state and the crime charged. According to the definition in the Princeton Principles on Universal Jurisdiction, 'universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction'.<sup>3</sup>
- 2.4 Universal jurisdiction serves a different community or set of communities than the sovereign's domestic political community. Universal jurisdiction can be regarded as a licence provided by the inter-state community to universalize the right of access to justice for victim communities so that third states may prosecute certain heinous crimes of concern to the international community.
- 2.5 The prosecuting state exercising universal jurisdiction does so as part of its role in the broader international community. The interest of the prosecuting state is to serve the international legal framework. Universal jurisdiction can be seen as a state's contribution to the enforcement of international law.

### **3. UNIVERSAL JURISDICTION AS A CONTRIBUTION TO INTERNATIONAL LAW'S ENFORCEMENT**

#### **a. Universal jurisdiction as a form of burden-sharing in international law's enforcement**

- 3.1 International law has weak enforcement mechanisms. In certain discrete areas of international law, states have developed courts and tribunals that have jurisdiction to determine violations of international law and to indicate remedies. Under the developing area of international criminal law, states have elected to recognize individual criminal responsibility for certain violations of international law and to develop a framework for the prosecution of international crimes. Universal jurisdiction is a decentralized adjunct of international criminal law, recognizing the capacity of domestic courts to act as agents of the international community and prosecute international crimes.
- 3.2 There is no formal hierarchy in terms of choice of forum for the prosecution of international crimes. However, according to Article 17 of the Rome Statute of the International Criminal Court, the ICC will only gain jurisdiction where domestic states

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<sup>2</sup> Crawford, *Brownlie's Principles of International Law* (8<sup>th</sup> ed, 2012), 456.

<sup>3</sup> Princeton Principles on Universal Jurisdiction (2001), available at [https://lapa.princeton.edu/hosteddocs/unive\\_jur.pdf](https://lapa.princeton.edu/hosteddocs/unive_jur.pdf).

with jurisdiction are unwilling or unable to prosecute ('doctrine of complementarity'). Though Indonesia has not ratified the Rome Statute, it has expressed its support for the ICC, while highlighting that the Court is intended to supplement and not supplant national judicial mechanisms consistently with the doctrine of complementarity. Where the territorial state or state of nationality is unwilling or unable to prosecute, the exercise of universal jurisdiction – in particular by regional actors – is an available mechanism for the prosecution of international crimes.

- 3.3 In the sections below, we recognize that this is not just a right of states, but in some cases extends to a duty upon states to do so.

**b. Universal jurisdiction as a state's fulfilment of treaty obligations**

- 3.4 Under certain treaties, Indonesia has an obligation to 'try or extradite' individuals present on their territory (including non-Indonesian citizens) where they are alleged to have committed certain crimes.
- 3.5 According to this obligation, Indonesia has a duty to prosecute individuals who enter their territory where they do not extradite them to a third country willing and able to prosecute them.
- 3.6 Treaties acceded to or ratified by Indonesia include those imposing an obligation to prosecute or extradite individuals in relation to the following crimes: counterfeiting;<sup>4</sup> war crimes;<sup>5</sup> unlawful acts against civil aviation;<sup>6</sup> torture;<sup>7</sup> terrorist bombings;<sup>8</sup> financing terrorism;<sup>9</sup> and others.
- 3.7 In 2019, the UN International Law Commission adopted a set of draft Articles on the prevention and punishment of crimes against humanity, which includes an obligation under Article 6 and 7 to criminalize and establish jurisdiction over the offence of crimes against humanity 'where the alleged offender is present in any territory under its jurisdiction and does not extradite or surrender the person'. In Indonesia's 2019 statement to the Sixth Committee of the General Assembly, Indonesia wished to 'highlight the utmost importance of the provisions contained within the draft articles,

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<sup>4</sup> International Convention for the Suppression of Counterfeiting Currency (20 April 1929), acceded to by Indonesia on 3 August 1982, available at

<https://treaties.un.org/pages/LONViewDetails.aspx?src=LON&id=560&chapter=30&clang=en>.

<sup>5</sup> Geneva Conventions (12 August 1949), acceded to by Indonesia on 30 September 1958, available at <https://ihl-databases.icrc.org/en/ihl-treaties/geneva-conventions-1949additional-protocols-and-their-commentaries>.

<sup>6</sup> Convention for the Suppression of Unlawful Seizure of Aircraft (16 December 1970), ratified by Indonesia on 27 August 1976, available at <https://treaties.un.org/doc/db/terrorism/conv2-english.pdf>.

<sup>7</sup> Convention Against Torture (10 December 1984), ratified by Indonesia on 28 October 1998, available at [https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtmsg\\_no=IV-9&chapter=4&clang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtmsg_no=IV-9&chapter=4&clang=en).

<sup>8</sup> Convention for the Suppression of Terrorist Bombings (15 December 1997), acceded to by Indonesia on 29 June 2006, available at [https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtmsg\\_no=XVIII-9&chapter=18&clang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtmsg_no=XVIII-9&chapter=18&clang=en).

<sup>9</sup> International Convention for the Suppression of the Financing of Terrorism (9 December 1999), ratified by Indonesia on 29 June 2006, available at [https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtmsg\\_no=XVIII-11&chapter=18&clang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtmsg_no=XVIII-11&chapter=18&clang=en).

particularly Articles 6 and 7 on criminalization and establishment of national jurisdiction respectively'.<sup>10</sup>

- 3.8 The duty to prosecute under international treaties is an enforceable legal obligation. In 2012, the International Court of Justice found that Senegal had violated its international obligations under Article 7 of the Convention Against Torture by failing to prosecute Mr Hisséne Habré, the former President of Chad, who had been resident in Senegal since 1990 for crimes he was alleged to have committed during his presidency, including acts of torture and crimes against humanity.<sup>11</sup>

**c. Universal jurisdiction as a state's fulfilment of human rights obligations**

- 3.9 Jurisdiction is not exclusively a right of states but is to some extent a matter of individual right, that is, an obligation owed to individuals.
- 3.10 Victims of international crimes have a right of access to justice, which extends to a duty on the part of states to prosecute individuals entering their territory who may have committed international crimes. Indonesia has recognized this fundamental right in a number of international instruments.
- 3.11 Indonesia acceded to the International Covenant on Civil and Political Rights (ICCPR) in 2006. The ICCPR recognizes the right of victims of egregious human rights violations to access to justice. Under Article 2(2) of the ICCPR, each state party undertakes 'to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the...Covenant'. Under Article 2(3) of the ICCPR, each state party agrees '[t]o ensure that any person whose rights or freedoms have been violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity' and 'that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities'.
- 3.12 On 16 December 2005, Indonesia voted in favour of General Assembly resolution 60/147 on the 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law'. According to this resolution, 'States have the duty to investigate, and if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for [gross violations of international human rights law]' (para 4) and 'where so provided in an applicable treaty or under other international law obligations, States shall incorporate or otherwise implement within their domestic law appropriate provisions for universal jurisdiction' (para 5).
- 3.13 The prosecuting state is not the driving force behind universal jurisdictions and does not infringe upon the sovereignty of another state by prosecuting the perpetrators of international crimes. Universal jurisdiction is most appropriately triggered by victims

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<sup>10</sup> 'Statement by Delegation of Indonesia to Sixth Committee on Agenda Item 79' (October 2019), available at [https://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/indonesia\\_1.pdf](https://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/indonesia_1.pdf).

<sup>11</sup> Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal), Judgment of 20 July 2012, available at <https://www.icj-cij.org/public/files/case-related/144/144-20120720-JUD-01-00-EN.pdf>.

and victim organizations.<sup>12</sup> Prosecuting states offer their courts as neutral agents of the international community to provide victims with their right of access to justice. Indonesia has recognized this fundamental right in a number of international instruments.

#### **4. LEGAL LIMITATIONS ON UNIVERSAL JURISDICTION PROSECUTIONS**

4.1 Universal jurisdiction is not an absolute right of victims nor does it impose an absolute duty on states. In certain cases, a state will be prohibited from exercising jurisdiction. In others, a state may determine that the exercise of universal jurisdiction conflicts with other legitimate aims of that state. This enables states to balance other fundamental obligations and interests, though this balance must accord with applicable legal criteria.

##### **a. Serving Heads of State, Heads of Government and Ministers of Foreign Affairs will be immune from an exercise of universal jurisdiction**

4.2 In certain cases, the exercise of universal jurisdiction over a particular individual will conflict with other duties upon a state, notably, obligations to grant immunity.<sup>13</sup>

4.3 In international law, it is firmly established that certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister of Foreign Affairs, enjoy immunities from jurisdiction in other states, both civil and criminal. There is no exception to personal immunity in relation to international crimes.<sup>14</sup>

4.4 Individuals will lose personal immunity once they cease holding office or if their state of nationality waives immunity.

4.5 Conversely, functional immunity does not apply in relation to international crimes and does not prevent the exercise of universal jurisdiction.<sup>15</sup>

##### **b. Prosecuting states may elect not to exercise universal jurisdiction where it will not provide effective access to justice or disproportionately interferes with other legitimate aims**

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<sup>12</sup> In most, if not all, universal jurisdiction trials, the motivation for prosecution does not derive chiefly from the prosecuting state but from victims and victim organizations: Leslie Johns, Máximo Langer and Margaret E. Peters, 'Migration and the Demand for Transnational Justice' (2022) 116 *American Political Science Review* 1184; Devika Hovell, 'The Authority of Universal Jurisdiction' (2018) 29(2) *European Journal of International Law* 427; Frédéric Mégret, 'The Elephant in the Room' in *Debates about Universal Jurisdiction: Diasporas, Duties of Hospitality, and the Constitution of the Political* (2015) 6 *Transnational Criminal Law* 89; Luc Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (2004), 221.

<sup>13</sup> In *Al-Adsani v. UK*, (2002) 34 EHRR 273 (ECHR 2001), the European Court of Human Rights held that 'measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction' (para 56).

<sup>14</sup> *Case Concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v Belgium), Judgment of 14 February 2002, paras 58-61.

<sup>15</sup> 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.

- 4.6 In determining whether to exercise universal jurisdiction, States need not exercise universal jurisdiction where it would not provide effective access to justice for victims or disproportionately impacts other legitimate interests.
- 4.7 States have shown the capacity to develop criteria by which to assess the balance between this right and competing legitimate aims. For example, the UK has identified relevant factors to be weighed in the balance in determining whether to assume extraterritorial jurisdiction, including (i) seriousness of the offence; (ii) availability of witnesses and evidence; (iii) vulnerability of the victim; (iv) danger that offences would not otherwise be prosecuted; (v) international consensus as to the reprehensible nature of the crime and (vi) impact on standing and reputation of the UK.<sup>16</sup>

## **5. CONCLUSION: THE EXERCISE OF UNIVERSAL JURISDICTION REPRESENTS INDONESIA'S CONTRIBUTION TO THE ENFORCEMENT OF INTERNATIONAL LAW**

- 5.1 Indonesia's exercise of universal jurisdiction to prosecute core international crimes would show regional leadership and represents Indonesia's contribution to the enforcement of international law.
- 5.2 The exercise of universal jurisdiction does not interfere with a state's sovereignty. On the contrary, it is important that Indonesia and other ASEAN states engage in burden-sharing to pursue accountability where international crimes are committed within the region. The aims of international criminal justice are better fulfilled where crimes are prosecuted in the regional context rather than relying on international courts or states in other regions.



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<sup>16</sup> UK Home Office, Review of Extra-territorial Jurisdiction: Steering Committee Report (1996).