

Universal Jurisdiction through the Eyes of ASEAN States: Rule of Law Concerns and the Need for Inclusive and Engaged Discussions

By CHEAH Wui Ling

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1. ASEAN States and Universal Jurisdiction

The principle of universal jurisdiction 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 There is clear international consensus about the established nature of universal jurisdiction as well as its important role in the pursuit of accountability and preservation of humanity's fundamental values. This conviction is shared by Member States of the Association of Southeast Asian Nations ('ASEAN') even as state representatives highlight the need for more efforts to clarify the scope and implementation of universal jurisdiction.² This policy brief argues for ASEAN state actors to take domestic, regional and international action that will contribute to state practice and *opinio juris* on universal jurisdiction, thus contributing to its development. The need for such engagement is pressing. While discussions about universal jurisdiction gather pace before various United Nation ('UN') bodies, ASEAN state actors have also had to address questions about its exercise at home. In July 2022, the Singapore Attorney General received a petition from civil society actors against former Sri Lanka president Gotabaya Rajapaksa who was then in Singapore, having fled Sri Lanka in the wake of mass anti-government protests.³ This petition, which was widely covered by local and international media, called on the Singapore authorities to initiate criminal proceedings against Mr. Rajapaksa based on universal jurisdiction for alleged grave breaches of the Geneva Conventions during Sri Lanka's civil war in 2009. Universal jurisdiction claims have thus arrived at the doorstep of ASEAN states.⁴

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 "Rights group seeks arrest of former Sri Lanka president Gotabaya Rajapaksa in Singapore", *The Straits Times*, 24 July 2022.

⁴ Indonesia's constitutional court is currently considering amendments to Indonesia's Law on the Human Rights Court, 23 No-

In 2009, the UN 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.⁵ In 2017, the General Assembly decided to establish a working group of the Sixth Committee to facilitate comprehensive discussions of the topic.⁶ The UN International Law Commission has also decided, in 2018, to add the topic of universal criminal jurisdiction to its long-term programme of work.⁷ Several ASEAN states have participated in discussions in the Sixth Committee, generating a body of submissions that amount to expressions of *opinio juris*. There is, however, a need for more country-specific and comparative research on the approach taken by ASEAN states to universal jurisdiction.⁸ Some ASEAN states adopt a more positive attitude to universal jurisdiction and justice for core international crimes, while others are less enthusiastic. The level of societal awareness and civil society support for such initiatives also differs from state to state in the ASEAN region.

Representatives of ASEAN states have voiced concerns about the uncertain scope and implementation of universal jurisdiction. They have also stressed that the exercise of universal jurisdiction may undermine state sovereignty. It would be easy to assess, and perhaps dismiss, the apprehension of ASEAN countries over universal jurisdiction based on the region's prioritisation of state sovereignty,⁹ but such an analysis would be incomplete and over-

ember 2000 (<https://www.legal-tools.org/doc/8d6ceb/>) to allow for universal jurisdiction in cases involving grave human rights abuses, see Salai Za Uk Ling, Antonia Mulvey and Chris Guinness, "All eyes on Indonesia's Constitutional Court which could be on verge of making history", *The Jakarta Post*, 12 October 2022.

⁵ 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/>).

⁶ 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/>).

⁷ 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/>).

⁸ For an example, see Xing Yun, "Asia's Reticence Towards Universal Jurisdiction" in *Groningen Journal of International Law*, 2016, vol. 4, no. 1.

⁹ Such sovereignty concerns are real, have been observed by many commentators, and should not be dismissed. See, for example,

simplistic. Many of the concerns raised by ASEAN states over universal jurisdiction are shared by other states. More importantly, a holistic analysis of ASEAN country-positions shows that these sovereignty-related concerns are in fact rooted in uncertainties over the scope and implementation of universal jurisdiction, issues that are completely valid from a rule of law perspective and which can be addressed through elaboration efforts. If progress is to be made, there is a need for states supportive of universal jurisdiction to avoid the principle's over-enthusiastic extension, and for international discussions on the topic to proceed in a legally-grounded and inclusive manner. Genuine international consensus on the scope and exercise of universal jurisdiction is necessary to facilitate the cross-border co-operation warranted by such cases. There is also a pressing need for ASEAN states to fully participate in discussions about universal jurisdiction at the domestic, regional and international level.

2. ASEAN States' General Acceptance of Universal Jurisdiction and Rule of Law Concerns

ASEAN state representatives have recognised that universal jurisdiction is a "generally accepted principle of international law".¹⁰ Universal jurisdiction is viewed as "an important instrument to combat international crimes and fight against impunity".¹¹ It has been described as a "valuable means to end impunity" when perpetrators are able to "slip through fragmented national jurisdictions".¹² 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, thus furthering the "deterrence", "retribution" and "condemnation" of such crimes.¹³ It serves to "protect the rights of victims" and "uphold justice".¹⁴ Indeed, the "existence and utility" of universal jurisdiction has been stated as "undeniable".¹⁵

Nevertheless, ASEAN state representatives have insisted on a cautious approach to universal jurisdiction. The exercise of universal jurisdiction may be politicised, resulting in the compromising of state sovereignty and non-interference.¹⁶ These sovereignty-related concerns have also been raised by non-ASEAN states. More importantly, a holistic analysis of these sovereignty

arguments reveals rule-of-law concerns. As Tamanaha explains, the basic rule-of-law conception requires, among others, that laws comply with formal legality requirements and be "set forth in advance", are "general", "be publicly stated", are "applied to everyone according to their terms", and "cannot demand the impossible".¹⁷ Laws that are uncertain and vague do not comply with these formal legality requirements. On the one hand, universal jurisdiction's goal of ensuring that no one is beyond the reach of the law contributes to the rule of law. It reflects a "commitment" that perpetrators of these crimes "must not go unpunished" and contributes to "the promotion of the rule of law at national and international levels".¹⁸ On the other hand, uncertainties over the scope and implementation of universal jurisdiction could lead to its arbitrary, unfair or uneven application, in effect undermining the rule of law. In other words, while universal jurisdiction contributes to the rule of law, uncertainty over its exercise compromises the rule of law.

3. A Rule of Law Analysis: Uncertainties over the Scope and Exercise of Universal Jurisdiction

ASEAN state representatives have focused on two areas of uncertainty when discussing universal jurisdiction. First, they have emphasised that more clarity is needed on what crimes give rise to universal jurisdiction under customary international law. In 2016, the chairperson of the Sixth Committee's working group on universal jurisdiction prepared an informal working paper for discussion which set out a "preliminary list" of crimes that "may" attract universal jurisdiction: apartheid, corruption, crimes against humanity, crimes against peace/crime of aggression, enforced disappearances, genocide, piracy, slavery, terrorism, torture, transnational organized crime, and war crimes.¹⁹ In contrast, Thailand's state representative has argued that "apart from piracy" there is yet to be international agreement on the crimes giving rise to universal jurisdiction.²⁰ In similar vein, the Indonesian representative has observed that state practice shows "differences in the definition, scope and list of crimes" subject to universal jurisdiction and the principle is "not uniformly applied".²¹ Most agree that universal jurisdiction should only attach to crimes that are very serious or 'egregious' 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".²² It will not be an easy task to move beyond such generalities and identify the specific crimes giving rise to universal jurisdiction. In undertaking this exercise, one should bear in mind the serious nature of core international crimes such as genocide, torture and mass extermination. Such crimes undermine fundamental values shared across societies and go far back in time. The law prohibiting such crimes should not be equated with international human rights law, which is broader and argu-

¹⁰ 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.

¹¹ 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.

¹² 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.

¹³ 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.

¹⁴ 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.

¹⁵ 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.

¹⁶ 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.

¹⁷ Brian Z. Tamanaha, "The History and Elements of the Rule of Law", in *Singapore Journal of Legal Studies*, 2012, p. 240.

¹⁸ Statement of Viet Nam, 20 October 2015, see above note 16.

¹⁹ Informal Working Paper prepared by the Chairperson for discussion in the Working Group, 4 November 2016.

²⁰ Statement of Thailand, 15 October 2014, see above note 12.

²¹ Statement of Indonesia, "The scope and application of the principle of universal jurisdiction", Sixth Committee, 74th session of the UN General Assembly, October 2019.

²² 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.

ably more contested. Regardless, inclusive discussions over the exact type of crimes attracting universal jurisdiction should be pursued.²³ Such discussions need to take place not only at the international level but also at the domestic level, and be undertaken by not only political actors but also judicial actors whose decisions contribute to customary international law.

Another area of uncertainty flagged by ASEAN states relates to the exercise of universal jurisdiction in conformity with existing international legal norms. As emphasised by Singapore's representative, universal jurisdiction "cannot be applied in isolation" and should be applied "together with other applicable principles of international law".²⁴ ASEAN state representatives have specifically referred to the importance of ensuring that any exercise of universal jurisdiction complies with the international law on immunity of state officials from foreign criminal jurisdiction.²⁵ They are not alone in drawing attention to this area of uncertainty. While the relationship between universal jurisdiction and immunities continues to attract debate, recent developments have reduced this uncertainty at least in relation to one type of immunity, namely, 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.²⁶ 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.²⁷ Courts in ASEAN countries should not hesitate to similarly reflect and contribute to state practice when seized of questions of universal jurisdiction.

Such legal uncertainties are not insurmountable and can be addressed to further rule-of-law values. The rule of law is widely accepted and prominently recognised in the ASEAN Charter. Explaining and addressing uncertainty issues through a rule-of-law framework could focus the discussion over universal jurisdiction. Officials representing Indonesia and Vietnam have made general references to the "rule of law" when discussing universal jurisdiction, but have not expressly articulated uncertainty concerns using a rule-of-law framework.²⁸ Clear and certain laws ensure the equal and fair application of rules to all, regardless of politics and power dynamics. Uncertain laws, on the other hand, give rise to fears over the law's selective and arbitrary application. Uncertainties clearly exist with respect to the scope and implementation of universal jurisdiction. Beyond rule-of-law concerns, legal certainty over the boundaries of universal jurisdiction will facilitate the cross-border co-operation needed in universal jurisdiction

²³ Singapore's representative has underscored that universal jurisdiction should only attach to crimes which "the international community has generally agreed are crimes" attracting such jurisdiction.

²⁴ Statement of Singapore, 15 October 2014, see above note 15.

²⁵ *Ibid.*; Statement of Indonesia, 11 October 2017, see above note 14.

²⁶ 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/>).

²⁷ 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.

²⁸ Statement of Indonesia, 11 October 2017, see above note 14; Statement of Viet Nam, 15 October 2014, see above note 11.

cases. To implement fair and effective trials, states conducting universal jurisdiction trials will usually need the co-operation of territorial and nationality states to obtain evidence, witness testimonies as well as secure the presence of the accused. As recognised by Indonesia's representative, a "strong cooperation regime" is "crucial" in universal jurisdiction cases, but "this will only be possible if there is an agreement on the scope and application of the principle of jurisdiction among states".²⁹ ASEAN actors – courts, legislatures, government officials and civil society – should contribute to the clarification of universal jurisdiction and position themselves as makers of international law.

4. The Need to Clarify Universal Jurisdiction through Inclusive and Engaged Discussions

As the UN and other international actors persist in attempts to clarify the reach of universal jurisdiction, discussions and efforts should proceed in an inclusive and engaged manner. Supporters of universal jurisdiction should avoid the principle's over-extension when putting forward proposals. Proposals should be based on circumspect, as opposed to creative, legal analysis. For example, ASEAN state representatives have underscored the need to distinguish between treaty-based universal jurisdiction obligations and universal jurisdiction under customary international law. Indonesia's representative has highlighted that the exercise of universal jurisdiction is different from treaty obligations to prosecute or extradite which have "a more specific scope" as agreed "in various agreements between states".³⁰ This concern has also been raised by other Asian countries like India which argued that such "[t]reaty obligations to extradite or prosecute should not be conceptualized as, or used to infer the existence of, universal jurisdiction".³¹

On their part, it is in the interest of ASEAN state actors to fully participate in discussions on international criminal justice. 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 for over a quarter of a century. Indonesia, Malaysia, Singapore, Thailand and Vietnam have made several submissions on universal jurisdiction in the Sixth Committee. ASEAN should consider making submissions as a regional grouping.³² To do so, ASEAN can build on its existing work relating to cross-border co-operation in criminal matters, such as the ASEAN Treaty on Mutual Legal Assistance.³³ When debating and put-

²⁹ 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.

³⁰ 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. Singapore has also explained that universal jurisdiction is distinct from the exercise of jurisdiction set out in "treaties" or by "international tribunals constituted under specific treaty regimes". See 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.

³¹ Statement of India, "The scope and application of the principle of universal jurisdiction", Sixth Committee, 76th Session of the UN General Assembly, 21 October 2021.

³² ASEAN states have also aligned themselves with the position taken by the Non-Aligned Movement, but it would make more sense for the regional grouping to put forward their own position that takes into account region-specific interests and needs.

³³ Treaty on Mutual Legal Assistance in Criminal Matters, 29 No-

ting forward proposals on universal jurisdiction, ASEAN and individual ASEAN states should formulate and detail the issues, interests and values at stake. For example, while there are real sovereignty concerns, a more detailed analysis and elaboration of the uncertainties associated with universal jurisdiction demonstrates rule-of-law shortcomings. This will enable ASEAN to pinpoint what is at stake and clearly communicate it to the international community. When engaging in such discussions, ASEAN and ASEAN states should not hesitate to give concrete suggestions that go beyond general principles. For example, several ASEAN countries have argued in their statements in the Sixth Committee that universal jurisdiction should only be exercised as a ‘last resort’, based on the subsidiarity idea which favours a state exercising more traditional forms of jurisdiction, such as territoriality or nationality, over universal jurisdiction. Strictly speaking, international law does not recognise any hierarchy or priority among the different forms of jurisdiction, though some states have implemented subsidiarity as a matter of policy.³⁴ Vietnam has put forward some guidelines regarding the exercise of universal jurisdictions “complementary” to other states with a “stronger link” to the crime, such as the territorial state.³⁵ First, Vietnam’s representative argued that universal jurisdiction may only be exercised if the accused is in the territory of the state wishing to exercise such jurisdiction. Second, the state wishing to exercise universal jurisdiction should consult with the territorial state and the nationality state about the possibility of extraditing the accused to these latter states to face justice. Such detailed suggestions move discussions forward.

vember 2004 (<https://www.legal-tools.org/doc/a3msav/>).

³⁴ Similarly, Indonesia explains that universal jurisdiction is to be exercised as a “last resort” and “therefore confined only to circumstances where a state that has jurisdiction is unable or unwilling to prosecute” (Statement of Indonesia, 3 November 2020, see above note 30). Singapore also stated that in its view, universal jurisdiction should only be exercised when “no State is able or willing to exercise the other established bases of jurisdiction, including on the principles of territoriality or nationality” (Statement of Singapore, 3 November 2020, see above note 30). This idea of subsidiarity is reflected and developed also in the statements of other Asian countries. For example, Sri Lanka has argued that universal jurisdiction should not be exercised “while the judicial mechanisms of the country where the alleged infractions occurred are in process” and that “domestic legal remedies be given priority” (Statement of Sri Lanka, “The scope and application of the principle of universal jurisdiction”, Sixth Committee, 69th session of the UN General Assembly, 15 October 2014). As a matter of policy, states could decide to take a ‘complementarity’ approach to deciding whether to exercise universal jurisdiction, but it will require more study to determine whether such a ‘last resort’ approach should be codified or adopted when fleshing out the scope and content of universal jurisdiction.

³⁵ 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.

At the domestic level, individual ASEAN states should revisit their country’s laws and policies to assess if they comply with the customary international law on universal jurisdiction. Domestic discussions could be furthered through legislative debate and the active consultation of civil society actors, legal practitioners and academics. It is important to bear in mind the diversity of states within the ASEAN regional grouping. Individual ASEAN states have different constitutional and legal orders, socio-political interests and priorities. Individual ASEAN states should consider their stance on universal jurisdiction given their country’s circumstances. Some ASEAN states may be more able and willing to give effect to the principle of universal jurisdiction in their domestic laws and implement policies that facilitate universal jurisdiction cases. For example, the Philippines has incorporated universal jurisdiction into its domestic law for certain core international crimes by enacting Republic Act No. 9851 of 2009, the Philippine Act on Crimes Against International Humanitarian Law, Genocide and Other Crimes Against Humanity.³⁶ Civil society petitions may provide the impetus or opportunity for judicial and political actors to reassess domestic laws on extraterritorial jurisdiction with a view to implementing universal jurisdiction. Indonesia’s Constitutional Court is currently considering whether Indonesia’s Law on the Human Rights Court should be amended to allow for universal jurisdiction over grave human rights abuses, in a case brought by civil society actors with a view to bringing Myanmar’s military to justice.³⁷ The experience of these individual ASEAN states may eventually serve as a model for other states in the ASEAN region. ASEAN states should confidently take the lead as well as look to each other for lessons and shared experiences in addressing questions of international criminal justice.

CHEAH WUI LING is Associate Professor, Faculty of Law, National University of Singapore. She holds academic qualifications from Harvard Law School (LL.M.), European University Institute, and Oxford University (D.Phil.). She is a qualified lawyer (called to the New York Bar) and has served as a Legal Officer at INTERPOL’s Office of Legal Affairs (Lyon, France). In 2011, she was a Visiting Professional at the International Criminal Court. For their helpful comments, she wishes to thank Morten Bergsmo, Cheah Choo Kheng, Tan Hsien-Li and Tara Davenport. She also thanks TOAEP Editor Antonio Angotti and CILRAP Fellow Devasheesh Bais.

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³⁶ Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity, 11 December 2009 (<https://www.legal-tools.org/doc/8c74cc/>).

³⁷ Ling, Mulvey and Gunness, 12 October 2022, see above note 4.

