



ASIA JUSTICE COALITION UNIVERSAL JURISDICTION CONVENING SERIES

BARRIERS AND OPPORTUNITIES: CIVIL SOCIETY AND UNIVERSAL JURISDICTION

CONVENING NOTE

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Overview

From 26-28 October 2021, the Asia Justice Coalition (AJC) secretariat held its first in a series of convenings on universal jurisdiction. This closed-door workshop brought together a diverse group of experts who discussed the experience of civil society actors that have promoted or pursued universal jurisdiction matters. The convening included context case studies from South Africa, Syria, and Nepal and discipline case studies including open source investigation and litigating torture.

The focus on civil society and universal jurisdiction arose from the Secretariat’s consideration¹ of the various avenues towards justice and accountability for international crimes. Participants acknowledged that universal jurisdiction is only one tool to address international crimes—comprehensive justice and accountability requires recourse to many different mechanisms.² Nevertheless, civil society organizations (CSOs) play an important role in making universal jurisdiction available by amongst other things: collecting and maintaining information that may be used as evidence; assisting victims to access and understand proceedings; providing context and highlighting particular harms to be addressed by prosecuting authorities; pushing for necessary domestic legislative reform to permit universal jurisdiction for international crimes; and advocating for funding for international criminal investigation by domestic and international bodies.

¹ Further information regarding the Secretariat’s thinking on universal jurisdiction can be found in its [Universal Jurisdiction Scoping Paper](#).

² These could include, where applicable: the International Criminal Court; the International Court of Justice; human rights bodies; domestic legal systems; and truth-telling exercises, amongst others.

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It should not be taken to reflect the views or positions of all members.



This convening note is organized around the prominent themes that emerged during the discussions. The convening adhered to the Chatham House rule and the participants' responses were non-attributable.

CSOs Bear A Significant Burden In Pursuing Universal Jurisdiction Cases

In relation to barriers for CSO engagement with universal jurisdiction cases, participants raised the significant expectations placed on CSOs that support or assist in universal jurisdiction cases.

Participants noted that many such CSOs do not set out to be involved in legal cases. Prior to the international legal violations leading to a legal case, CSOs—and particularly local CSOs—may be focused on issues other than violations, but pivot to address these as they arise. In pivoting, they are learning 'on the job' about both the relevant legal framework and the practical documentation of such violations. This is also true for CSOs that form in response to violations.

It was noted that some CSOs begin documenting violations to raise needed domestic or international attention; this documentation may be given to a court for consideration once a jurisdiction is available. Because this documentation would originally be collected for advocacy, it may not have been collected with the rigour necessary to meet criminal trial evidentiary standards. Likewise, for information to be used in a court proceeding, CSOs providing information are expected to have maintained confidentiality of witnesses, chain of custody records, and proper storage. Storage itself raises an issue particularly where digital information is collected, and the amount of information may far outpace the CSO's database capabilities or funding for an appropriate database may not be sustainable. Depending on the relationship with the prosecuting authority, this all may cause information provided by CSOs to be questioned or disregarded. This is the case even where the court or investigating authority has less access than the CSO to the territory in which the crime was committed.

Participants raised that CSOs can be left to fill administrative gaps even in the better-resourced Forum State jurisdictions. For example, in two case studies of Global South organizations, CSOs were left to pay for medical assessments as well as provide travel and accommodation for victims and witnesses to participate in the cases in the Global North. In one case study, a CSO was told by police in the Forum State that they had little ability to provide security for witnesses participating, for which the CSO devised its own security protocol. In each case study CSOs took on the role of communicating between the affected communities and the court processes; in two, CSOs developed ways to make court proceedings accessible.

It was noted that Forum State processes for universal jurisdiction themselves often do not have resources to meet the needs identified and filled by CSOs. This was also the case in relation to the international investigative mechanisms mandated to collect information on international criminal violations. Further, jurisdictions and mechanisms often have little or no resources to provide CSOs assisting in matters. This indicates the gap between how international criminal proceedings in domestic courts run and how they *could* run in a more effective manner if greater resources were allotted.

In enumerating these burdens, it was recognized that 'civil society' is not a monolith and different CSOs will have different capacities and different goals. This will lead some CSOs to seek greater technical legal capacity to focus on pursuing universal jurisdiction cases while others will focus on, for example, seeking legal reform or engaging human rights instruments. However, it was noted that civil society itself is fundamentally different from judicial systems and is not responsible for the administrative and technical legal processes that take place in a universal criminal jurisdiction trial. Rather, civil society's various strengths—advocacy, knowledge of the affected community or coming from the affected communities, knowledge of context and language, flexibility, diversity—can complement court processes.

Communication And Coordination Are Needed—Both In International Justice and Out

Participants highlighted that no one mechanism has a monopoly on collecting relevant information or receiving funding in relation to international criminal justice and that there is no entity mandated with harmonizing the actors pursuing international justice and accountability. This indicates that communication between actors is vital and that coordination between actors with similar goals should be pursued. CSOs particularly should identify their

strengths and weaknesses and seek to identify other organizations that complement their work. For example, when one CSO is supporting victims in a universal jurisdiction case, a broader advocacy group could assist in doing court reporting and media appearances when the first CSO must be careful of speaking publicly. This is especially the case when the first CSO is bound by law to maintain silence.

Cooperation between CSOs also includes skill-sharing and load-sharing. It was noted that larger international non-governmental organizations provide necessary training to smaller CSOs. (Notably, it was stated that this training will not be ‘one size fits all’ and will need to adapt to the context.) Further, in one case study cooperation between two groups of CSOs made it possible to collect information from victims and witnesses to give to the Forum State prosecuting authorities, where neither government authorities had acted.

Participants raised the importance of communication and coordination with Forum State prosecuting authorities. Relationships differed between case studies. In some, CSOs’ positive relationships with prosecuting authorities eased the way for pursuing cases under universal jurisdiction; in others, a failure to investigate or initiate prosecution had to be challenged in Court. It was noted that CSO relationships with prosecuting authorities differ according to the goal of the CSO. If a CSO wants to give and receive information on an on-going basis, a non-confrontational approach is likely preferred. It was agreed that, in general, prosecuting authorities would benefit from greater awareness of local context and local languages. It was also noted that prosecuting authorities may benefit from CSOs’ specialized knowledge of international crimes—for example, crimes against children or sexual violence—and may need assistance in understanding the complexity of such harms. It can assist in building trust between a CSO and a prosecuting authority if this specialized knowledge is highlighted at the beginning of such a relationship. It was emphasized that building the prosecuting authorities’ trust and confidence in the work of a CSO was key to ensuring an on-going working relationship.

It was also noted that CSO communication and coordination with organizations *outside* the international criminal justice field should also be pursued. This is because, for example, groups that focus on corruption and transnational organized crime may have strategies that can assist other CSOs to track perpetrators’ assets, and such tracking could be useful as evidence or in any potential reparations order in universal jurisdiction cases. Likewise, groups that bring large environmental class actions may be able to share strategies with other CSOs for contacting, tracking, and informing large numbers of victims and witnesses.

Strategy and the ‘International Criminal Justice Ecosystem’

Participants highlighted the role each CSO, legal jurisdiction, and international mechanisms plays in the larger ‘international criminal justice ecosystem’—each actor has its own ways and means to advance justice.

It was agreed that there was no ‘one’ strategy for approaching international justice—rather, it is necessary to look at the range of puzzle pieces that might best be assembled to address the full illegality of a particular circumstance. Universal jurisdiction remains only one of these puzzle pieces.

Because of this, participants noted that the use and impact of universal jurisdiction is limited. Universal jurisdiction cases are lengthy, costly, difficult for victims to follow or attend, only considered for a few accused, and cannot guarantee a conviction or reparations. Participants also cautioned there are significant risks. There may be immediate security risks to the individuals and organizations involved. Pushback from the CSO’s home jurisdiction may result in restrictions on the CSO’s operation. Cases raised without adequate evidence or to predominantly to attract attention to a situation may risk a CSO’s credibility and reputation. There also remains the risk of creating an unfavourable precedent—particularly damaging for future cases in jurisdictions that have heard few universal jurisdiction matters.

These limitations and risks must be made clear to affected communities so as to properly manage expectations.

Nevertheless, it was recognized that even where a conviction is not secured, pursuing universal jurisdiction cases still can have several positive impacts. Pursuing such a case can ‘lift the veil of impunity’—challenging the power of the accused / perpetrator. It can cause the accused to limit international travel and raise scrutiny of others implicated in the crimes investigated. It can ease political will for related prosecutions, open the door for greater pressure on legal reform in the accused’s home jurisdictions and, in some instances, it can raise morale of victims.

Practice Points for CSOs Engaging In Universal Jurisdiction

Not all civil society that works for international justice wishes to engage in universal jurisdiction cases. Moreover, of CSOs that wish to engage, some CSOs will prefer to be approached by prosecuting authorities for assistance rather than proactively pursue a case on their own. Participants noted the validity of civil society choosing the approach that best suited their purposes.

However, if a CSO does decide to proactively pursue a case under universal jurisdiction, participants noted several practice points. These included:

Consider the most relevant forums/jurisdictions.

- Identify Forum States with which there is a 'close and strong link' to the relevant circumstances. This can include the presence (or likelihood of presence) of the accused or the presence of victims within the Forum State's territory. A stronger link may increase chances of investigation and prosecution.
- Global or local political pressure can also encourage authorities in a Forum State to open investigations or begin prosecutions.
- Geographical proximity between the jurisdiction in which the harm took place and the Forum State may ease some logistical challenges for interviewing witnesses. It may also mean that suspected perpetrators may travel to the Forum State, which may increase the likelihood the prosecuting authorities in the Forum State will act.
- Understand that each jurisdiction criminalizes international crimes and codifies universal jurisdictional differently. Participants noted the importance of considering the law and legal processes in the Forum State and, if possible, seeking legal advice from relevant law firms.
- Investigation in a Forum State is more likely if the presence of the accused can be secured. This includes if the accused is transiting through the Forum State. Depending on the crime alleged, the Forum State may have obligations to 'extradite or prosecute' which can be called upon if authorities fail to investigate. However, it was noted that even if the presence of an accused is secured, they may enjoy functional or Head of State immunity.
- Mutual Legal Assistance treaties assist to facilitate cooperation between jurisdictions. It may be useful to investigate if any agreements exist between the Forum State and any other relevant jurisdiction to the matter.

Consider all obligations to victims in initiating or supporting a universal jurisdiction case.

- Even if there is no formal requirement of the victims' presence in the jurisdiction, securing their presence for witness testimony and evidence review is crucial. Participants noted that while it may be easier to locate victims through the diaspora community, it is important to factor in who gets to speak for whom.
- Participants raised that CSOs must not only consider security threats to victims, but that providing information to authorities may also raise issues for victims' immigration status, if outside their country of origin.
- Where possible, CSOs working with victims should keep victims updated and attempt to provide information in local languages. This brings victims closer to the justice dispensation architecture and does away with the perception of 'distant justice' of universal jurisdiction. However, it was noted that regular communication and translation may be exceedingly burdensome, particularly on smaller CSOs. Participants recommended that communication can take place: through social media (Facebook, Twitter, Instagram); by preparing community-specific handbooks simplifying international justice initiatives and mechanisms; or by setting up a regular podcast/radio/video program.

If collecting information, prepare for chain-of-custody questions and issues related to disclosure.

- Regarding chain-of-custody, it was suggested to prepare affidavits each time potential evidence is transferred listing where, when, and to whom the potential evidence moved.
- Regarding disclosure, it was suggested to prepare all CSO staff or volunteers who work in relation to the case for potentially their internal communications to be disclosed in prosecution. This can also be addressed by limiting the number of people who are regularly or tangentially involved in case assistance.

Have a clear data/information-sharing policy.

Information provided to external actors (government investigative authorities or international investigative bodies or regional bodies) cannot be taken back. It was recommended to establish a clear organization-wide data/information-sharing policy early in a CSOs operation. This policy should include who can receive data, why, how, and how to address any security concerns. This can also form the basis of explicit information-sharing agreements with external actors.

Adopt a rigorous, transparent methodology for collection, management, and storage of information.

Participants raised that the credibility of a case can be strengthened where a CSO can produce its methodology. This methodology describes the CSOs standards and process of collecting, managing and storing information. It was suggested this can be included as a 'chapter' in any docket handed to authorities.

Be able to act quickly.

Where a perpetrator is traveling to a potential Forum State, CSOs that wish to bring a case against that perpetrator are forced to act quickly. This means bringing together the documentation, local legal knowledge, and any advocacy or campaigning at the same time to address the perpetrator's visit. This is where communication and coordination in a network of like-minded organizations and practitioners can be crucial.

Conduct thorough due diligence and conflict of interest checks if seeking to engage a private investigator or other professional service.

Participants raised that CSOs and prosecuting authorities have used and may use the services of private investigators to locate an accused, conduct parts of an investigation, and verify information. It was noted that the role of such professionals and their methodology in conducting tasks like recording metadata, translating local languages into court accepted language, and studying visual and voice recognition technology must be thoroughly vetted. Private investigators must act in good faith and respect the principle of consent.

Understand prosecutorial discretion.

- Charging of the accused person is dependent on prosecutorial discretion, the charging policy of the prosecuting unit/State, and any relevant rules, procedures, and priorities. CSOs may have limited influence in the laying of charges but can develop lines of communication with prosecuting authorities. Participants raised that, in previous years, individuals investigated for international crimes have been charged for terrorism rather than, for example, crimes against humanity. Terrorism charges are unlikely to address the complex criminality that has occurred in instances of international criminal violations. It was noted that this trend appears to be reversing as prosecutors have begun charging cumulatively (terrorism and international crimes together).
- Participants raised that the burden can be so great on CSOs pursuing universal jurisdiction that they almost have to take on role of 'prosecutor' in preparing and arguing for a case to be heard. Participants suggested 'thinking like a prosecutor'—or indeed the defence or the judge—can be assisted by having a special team that has not seen all the information collected by the CSO until it has finished its investigation. The special team then 'pokes holes' in the evidentiary and legal strategy to assist the CSO to see where gaps exist.

Consider synergies with other avenues for accountability.

Participants suggested all actors involved in international justice and accountability should consider how others' work may assist theirs. For example, opinions of human rights tribunals can support arguments in universal jurisdiction cases. Likewise, participants noted other avenues to address international criminal



harms including bringing tort cases under relevant jurisdictions and the relevance of broader corporate accountability.

Remember there are different visions of universal jurisdiction success.

It was noted that victims often do not care whether the accused person is a 'big fish' or a 'small fish'—rather, they want to be heard through the tools available in international law. Therefore, some CSOs may see even symbolic representation and acknowledgment of their suffering as 'success'. However, symbolic representation may not be the goal for other CSOs pushing for appropriate legal characterization and adequate domestic legal precedent for international crimes. There, conviction or clarity on the law may be considered 'success'. Regardless, it was recognized that both visions of success work towards establishing a form of justice. Participants encouraged CSOs to carefully consider their objectives and ask: 'Is this really meeting the needs of the people we seek to serve?'

About the AJC Universal Jurisdiction Convening Series

This convening was the first in a series of closed-door workshops on universal jurisdiction. In total, the series covers universal jurisdiction and civil society, universal jurisdiction and the Global-South, universal jurisdiction and Asia, and universal civil jurisdiction and corporate accountability. It constitutes a collaborative effort to problem-solve and make available more avenues for justice and accountability in our region.

The AJC Secretariat is grateful for the time and contributions of its first convening participants.

About the Asia Justice Coalition

Founded in 2018, the Asia Justice Coalition's purpose is to improve the legal landscape in Asia to ensure justice and accountability for gross violations of international human rights law and serious violations of international humanitarian law. The Coalition operates through collaboration, resource-sharing, and coordinating efforts between local and international civil society organizations working in the region. Its work is accomplished by undertaking joint activities relating to justice and accountability and engaging in collective advocacy.