



ASIA JUSTICE COALITION UNIVERSAL JURISDICTION CONVENING SERIES

AVENUES TO ACCOUNTABILITY: UNIVERSAL JURISDICTION AND ASIA

CONVENING NOTE

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Overview

From 26-28 April 2022, the Asia Justice Coalition (AJC) secretariat held its third in a series of convenings on universal jurisdiction. This closed-door workshop brought together a diverse group of experts to focus on the barriers and opportunities for universal criminal jurisdiction (hereafter universal jurisdiction) in Asia.

The convening included context-specific case studies including practise in Malaysia, Bangladesh, Cambodia, Australia, and South Korea, as well as deliberations on cooperation within ASEAN, the on-going universal jurisdiction matter regarding crimes against the Rohingya in Argentina, and lessons learned from ASEAN norm diffusion regarding human trafficking.

'Asia' is used here inclusively to incorporate South Asia, Central Asia, Southeast Asia, East Asia, and the Pacific. The focus on Asia relates to the secretariat's consideration of the various avenues for justice and accountability for international crimes in our region.¹

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.

Barriers to Justice? Prioritization, Political Will, Sovereignty, and Non-Interference

In general, participants agreed that justice for atrocity crimes² is not high amongst State priorities in Asia.³ This was underscored by the fact that Asia has the fewest States Parties per region to the Rome Statute of the International Criminal Court.⁴ Likewise, there is no Asian-wide court or regional accountability mechanism for atrocity crimes. Domestic prosecution for atrocity crimes under universal jurisdiction is also not a high priority.

The convening case studies indicated that few States within Asia have domesticated international human rights and humanitarian obligations; in States that have relevant domestic law, the law may not be effectively applied or practitioners may not see the value of applying it to a particular case. Where the domestic law does not exist, practitioners are left to argue on the basis of broad international human rights principles.

¹ Further information regarding the secretariat's initial thinking on universal jurisdiction can be found in its [Universal Jurisdiction Scoping Paper](#). The convening notes from the [first](#) and [second](#) convenings can also be found on the Coalition's [website](#).

² 'Atrocity crimes' include war crimes, crimes against humanity, and genocide. The choice of the term 'atrocity crimes' over 'international crimes' is intended to separate war crimes, crimes against humanity, and genocide from crimes that have an international element including transnational human and drug trafficking or piracy.

³ It was noted that the pandemic may further deprioritize justice for atrocity crimes.

⁴ Here, the Rome Statute is one measure of State recognition and incorporation of international crimes owing to the Statute's principle of complementarity.

Participants raised that, in general, prioritising justice for international crimes—and pursuing prosecution under universal jurisdiction specifically—is a politically-motivated determination. Thus, low prioritisation could be described as little ‘political will’ to pursue justice for atrocity crimes. The term ‘political will’ was used to describe the choices made by relevant stakeholders—politicians, public prosecuting bodies, and law enforcement—at several points in relation to domestic prosecution under universal jurisdiction for atrocity crimes. These choices could include:

- Whether a State has signed on to international human rights and humanitarian law treaties;
- Whether and how a State has incorporated international crimes into its domestic law;
- Whether a State government dedicates specific resources⁵ to addressing atrocity crimes, including the establishment of a specialised investigative unit;
- Whether a law enforcement agency or prosecution authority devotes its own resources to investigating or filing a case under universal jurisdiction;
- Whether a prosecuting authority charges the accused with atrocity crimes—accounting for more specific harm to victims—or with terrorism or immigration fraud which may gain more public traction or require few resources to prosecute; or
- Where consent to prosecute atrocity crimes is required under domestic law, whether a State official consents to prosecution under universal jurisdiction to permit a prosecution action to proceed.

In some cases, a lack of political will does not indicate an *opposition* to justice; rather, other pressing State concerns including humanitarian crises and the global pandemic may take precedence over resource-intensive trials under universal jurisdiction. In other cases, a lack of political will indicates a failure to see the utility of prosecuting non-nationals for conduct that took place outside of the State’s territorial jurisdictions. For stakeholders to see the utility of universal jurisdiction, they must see the utility of pursuing justice for atrocity crimes more broadly.

The principles of sovereignty and non-interference were central to this discussion. Specifically within the Association of Southeast Asian Nations (ASEAN), sovereignty and non-interference act as practical and rhetorical hurdles to bringing universal jurisdiction cases within the bloc.⁶ This particularly arises when sitting or former leaders are named in charges—prosecution of such leaders in a State other than the Territorial State challenges the Territorial State’s right to conduct its affairs without outside interference. In contrast, the principle *underlying* universal jurisdiction is that the severity of the conduct is so great—and thus contrary to the international legal order—that it should be permissible to be prosecuted in *any* State. However, while the *rationale* for universal jurisdiction may be accepted, there remains a lack of international consensus on its *scope*. At present, this makes it difficult to argue within Asia that universal jurisdiction, sovereignty, and non-intervention are compatible.

Regarding international justice more broadly, participants raised that international criminal justice mechanisms developed (and continue to operate) far away from the region. This geographic distance lends itself to States making stronger rhetorical arguments regarding violations of sovereignty and non-interference where the mechanisms were created not ‘by the region, for the region’.⁷ Participants highlighted the necessity for the process for pursuing international justice must be translated into domestic contexts and that domestic understandings must be translated back to the international sphere.

Participants noted that the principles of sovereignty and non-interference are malleable enough to support pursuance of international justice. Likewise, low prioritisation and little political will are not indefinite.

Promoting Values, Protecting Interests: Re-Framing Universal Jurisdiction

⁵ Where States failed to prioritise resources for investigation and prosecution, the burden shifts to civil society organisations who communicate with affected communities, investigate to the best of their ability, and advocate for justice elsewhere.

⁶ Both States within Asia and outside Asia raise concerns about sovereignty and non-interference in discussions at the United Nations General Assembly Sixth (Legal) Committee regarding the scope of universal jurisdiction.

⁷ This was stated with particular reference to International Criminal Court investigations related to Myanmar and the Philippines. To this, it was raised that if there were earnest and competent regional or domestic mechanisms for international justice, the Rome Statute’s principle of complementarity would likely preference locating justice in Asia rather than in The Hague.

To this, participants recommended considering States' values and interests to address prioritisation and political will.⁸ The two concepts intersect: 'values' may relate to a State's identity⁹ and appeals to State preferences including 'consultation and cooperation' and 'adherence to the rule of law'; 'interests' may relate to a State's external diplomacy and appeals to State preferences including stability and trade opportunities. Re-framing the promotion of international justice as a value and/or an interest may provide greater opportunities to embed mechanisms for pursuing justice such as the exercise of universal jurisdiction.

Related to values, participants noted that within ASEAN, phrasing efforts as 'preventing atrocities', and 'improving institutional capacity' had been more persuasive than discussions regarding 'the Responsibility to Protect' and institutionalizing 'accountability mechanisms'. This permits States to see efforts to address human rights and humanitarian law violations as a 'humanitarian' response to be addressed within a State's territorial jurisdiction rather than as a judgment on other States' failings or an infringement on their sovereignty. Regional efforts on the protection of women and children provide an example of significant progress using this framing.

The notion that a State should not be a 'safe haven' for human rights and humanitarian law violators also relates to a values framing, especially in reference to universal jurisdiction. It was noted that domestic public pressure in Australia to not be a 'safe haven' for World War II 'war criminals'—compelled the Australian government to establish a special investigation unit that operated between the late 1980s and early 1990s.¹⁰ This is in contrast to how States permitting the exercise of universal jurisdiction are sometimes framed alternatively as 'global enforcers'—attempting to meddle in other States' affairs and thus sit in direct conflict with principles of sovereignty and non-interference.

Related to interests, the case studies discussed indicated that international-related economic crimes and terrorism were more readily incorporated in domestic legislation than atrocity crimes. On this, it was raised that the region has a tendency to avoid developing legally-binding instruments for non-economic issues. Instead, framing international justice as promoting domestic or regional security—both physical and economic—may prove fruitful. One example of this was human trafficking; it was noted that greater regional cooperation occurred in part when 'trafficking', once considered a 'feminist' or 'humanitarian' issue, was reframed as a security issue.

Further and with specific reference to ASEAN, participants raised that ASEAN members' interests are currently affected by impunity in the region. For example, neighbouring States are bearing the cost of crimes within Myanmar, with refugee flows and greater conflict at their borders. Where protecting non-interference may ordinarily be in a State's interest for diplomacy and trade, these effects may change the 'non-interference calculus'. This is because *not* acting to address impunity is itself 'interfering' with a State's own domestic priorities.¹¹

It was noted that the strongest argument for the exercise of universal jurisdiction, and pursuing international justice more broadly, would likely incorporate both a State's values and interests.

'Pivots' and 'Springboards': Models in Current Practice

Participants agreed that progress towards international justice must come from Asia-led initiatives, rather than transplantation of 'Western' or 'external' models. It was noted that 'reforms do not always walk in the front door', and thus it is useful to think creatively about ways to press for greater prioritisation.

⁸ It was noted that the 'values' and 'interests' framing could also be seen in how ASEAN members responded to the 2021 coup in Myanmar. As the coup was seen to be contrary to the ASEAN Charter, the principle of 'non-interference' did not prevent States from voicing condemnation.

⁹ It was noted that some States have human rights protections and recognition of international justice embedded in their constitutions. Where this is the case, a strong argument can be made for pursuing international justice as a *part of* the State's identity.

¹⁰ Importantly, public pressure can work for and against international justice. At the time of the Korean Navy's capture of Somali men accused of piracy, accountability for piracy was a significant 'hot button' international issue. Thus, trials for the accused men were politically supported. However, as the trial was expensive, lengthy, and attracted criticism for issues related to the accused's fair trial rights, public and politician support for the trial waned. There have been no further piracy trials in Korea since.

¹¹ On the complexity of domestic 'interests', it was noted that migrant worker-sending States including Sri Lanka, the Philippines, and Nepal have put pressure on worker-receiving States to mitigate or rectify harm experienced by their nationals. Although not broaching the principle of non-interference, this provides an example of how an economic interest—ensuring remittances—can also be seen through a human rights lens—providing worker protections—and may engender the necessary political will for reform.

To this end, it was noted that there are existing mechanisms that could be used to ‘pivot’ towards—or adapt to—the exercise of universal jurisdiction and existing issue areas from which to ‘springboard’—or gain momentum—for greater cooperation on international justice.

Considering ‘pivots’, participants discussed the use of the mechanisms such as the International Crimes Tribunal (Bangladesh) (ICT). The ICT was developed as a domestic mechanism to address crimes committed *within* Bangladesh, but its statute is broad enough to bring prosecution under universal jurisdiction. The existence of the ICT provides one example in the region of how a domestically-oriented and contextually-specific entity may be adaptable for international justice efforts more generally.

Considering ‘springboards’, participants discussed current regional cooperation on corruption and anti-human trafficking. It was noted that both issues likely engender the political will for cooperation because they relate to States’ economic and security interests. On corruption, the mutual legal assistance treaty between Indonesia, Malaysia, Singapore, and Thailand provides one model for resource- and information-sharing on criminal matters that is potentially analogous to resource-sharing needs of universal jurisdiction cases. On human trafficking, the creation and implementation of the ASEAN Convention against Trafficking in Persons, Especially Women and Children provides a model process through which States framed their disparate interests¹² in a constructive manner.¹³ Recent cooperation in the ASEAN Human Rights Dialogue, based on voluntary participation, likewise permits States to discuss and contextualise international human rights obligations in a model that may be useful for further socialising international justice efforts.

Accepting Imperfection? Considering International Justice Strategically

Specifically addressing universal jurisdiction, it was agreed that universal jurisdiction can: raise awareness of particular atrocities; identify and determine previously untested facts; provide the opportunity for survivors to have a sense of agency and to participate in processes to address the harm experienced; and lead to the prohibition or hampering of an accused’s travel.

However, the value of bringing a case under universal jurisdiction—and prosecution in general—can be overemphasised and may not actually support survivors’ needs. Any effort towards international justice is exceedingly complex and asks responsible actors to address multiple visions of, or demands for, justice by the many different stakeholders involved. To this, participants reiterated that survivors’ preferences should lead the pursuit of any case related to international justice.

Several considerations arise regardless of the avenue or mechanism pursued. There is an ever-present risk that pursuing a particular case at the ‘wrong’ time will bring political backlash. Adequate resourcing is a challenge. Even internationally-supported mechanisms with a mandate involving victim and Civil Party participation, like the Extraordinary Chambers in the Courts Cambodia, lean on civil society organisations’ assistance to the thousands of victims, including providing legal representation. This is a heavy burden, especially when such organisations often rely on ad hoc donor contributions. Participants noted issues related to ensuring a fair trial including the availability of effective representation for the accused, the availability of appropriate interpreters, and whether a jurisdiction permits trials *in absentia*.¹⁴ Regarding universal jurisdiction within Asia, several jurisdictions maintain the death penalty, raising the question of whether a particular Forum State should or should not be pursued based on domestic sentencing legislation.

This prompted the question of whether waiting for a ‘right’ time or ‘perfect’ way to press for international justice contributes in its own way to impunity. On this, participants noted the importance of collaboration, resource and best practice sharing amongst advocates, and the importance of being guided by survivors’ priorities. In this way, advocates and civil society can provide a ‘toolbox of options’ for justice to survivors.

¹² It was noted that almost every country in Asia is affected either as a source or a destination country for human trafficking.

¹³ However, the comparison suffers when recognized that—in contrast to defining the scope of universal jurisdiction—there is significant international agreement on trafficking efforts. Approximately 175 States, including all ASEAN members, have signed on to the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (or Palermo Protocol).

¹⁴ It was noted that *in absentia* trials, permitted in several civil law countries, can have symbolic value for survivors. However, the inability of the accused to participate in the trial may affect its perceived legitimacy.

Next Steps

Participants raised the following potential ‘next steps’ towards situating international justice—of which universal jurisdiction is one tool—within Asia:

- Consider the development of a Model Law on universal jurisdiction, looking to the example of the African Union, to familiarise the concept and provide a foundation on which State and regional discussions can be held.
- Share experiences in strategy and strategic litigation between advocates in the region. This may include the development of a legislation or case database.
- Develop or advocate for constructive dialogue within and between state law enforcement, investigators, and prosecutors. This may be domestically—identifying key actors within the relevant jurisdiction to engage—or this may be regionally or internationally—such as holding trainings by experienced actors. Likewise, advocate for strengthening structural foundations by establishing special investigative and prosecutorial services.
- Examine and promote other accountability avenues including sanctions or universal civil jurisdiction.
- Further examine practise related to cross-border or international crimes in the region (trafficking, terrorism, corruption) for other more specific ‘pivots’ or ‘springboards’.
- Consider and address State concerns raised at the Sixth (Legal) Committee.
- Where there appears to be an absence of political will, consider pushing for basic statements of principle regarding justice and accountability which may later be built upon.
- Engage in public education, addressing why efforts for international justice are valuable and, where bringing a specific case, how the process will proceed and why.

About the AJC Universal Jurisdiction Convening Series

This convening was the third 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 third 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.