

# Asia's Reticence Towards Universal Jurisdiction

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## Keywords

UNIVERSAL JURISDICTION, UNIVERSALITY, INTERNATIONAL CRIMINAL LAW, ASIA, CRITICAL LEGAL STUDIES

## Abstract

Universal jurisdiction is often heralded as an essential tool in the global fight against impunity. For a principle that contains the word “universal” in its name, it is striking though, perhaps unsurprising to discover that only two Asian states have ever exercised it. This paper goes on to provide some context for the Asian experience, positing a few indigenous explanations for Asia's ambivalence towards this fundamental principle of international criminal law. It will be shown that unlike other areas of international law, Asia cannot hide behind the usual excuse of “refusing to play by Western rules”. The paper concludes by arguing that Asia should take up the unique opportunity it has to shape the future of international criminal law.

## I. Introduction

On 13 August 2015, the Indonesian navy announced the seizure of the Silver Sea 2, a large cargo ship which has gained recent infamy for its involvement in the slave-driven Thailand fishing trade. The navy had spent a week trying to capture the vessel and the ship was close to leaving Indonesian waters by the time it was finally seized. Fisheries Minister Susi Pudjiastuti could not contain her elation. “I'm so overwhelmed with happiness. It was almost impossible, but we did it.”<sup>1</sup> Pudjiastuti added that authorities were looking into human trafficking allegations.

On 26 September, it was announced that the captain of the ship was arrested for illegal fishing while 16 members of his crew would be deported.<sup>2</sup> The trafficking investigations were said to be continuing, but a conviction is unlikely due to jurisdictional issues. Indonesia is the forum of apprehension. Satellite imagery only links the ship to slave fishing activities in Papua New Guinea.<sup>3</sup> The captain is Thai, as are the owners of the ship. None of the victims is from Indonesia. The instinct of Western human rights advocates might be to call for the exercise of universal jurisdiction. After all, slave trafficking must be considered a crime so heinous as to amount to a crime against the

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<sup>1</sup> Bangkok Post, AP, *Indonesia navy nabs Thai cargo ship*, 14 August 2015, at [bangkokpost.com/print/655948](http://bangkokpost.com/print/655948) (accessed 22 May 2016).

<sup>2</sup> Today, AP, *Thai man arrested on boat believed to be carrying slave fish*, 26 September 2015, at [todayonline.com/print/1538001](http://todayonline.com/print/1538001) (accessed 22 May 2016).

<sup>3</sup> The Telegraph, AP, *Slave boats tracked by satellite to Papua New Guinea fishing grounds*, 27 July 2015, at [telegraph.co.uk/news/worldnews/australiaandthepacific/papuanewguinea/11765597/Slave-boats-tracked-by-satellite-to-Papua-New-Guinea-fishing-grounds.html](http://telegraph.co.uk/news/worldnews/australiaandthepacific/papuanewguinea/11765597/Slave-boats-tracked-by-satellite-to-Papua-New-Guinea-fishing-grounds.html) (accessed 22 May 2016).

international community as a whole. Unfortunately, Indonesian law does not provide for universal jurisdiction for crimes outside a very narrow list.<sup>4</sup> The list does not even include core international crimes such as war crimes or genocide.

It will be shown that Indonesia's ambivalence towards universal jurisdiction is common among Asian states. Part A presents the state practice and *opinio juris* in Asia, or more specifically the lack thereof. Part B puts forth some localised explanations for Asia's reticence towards this fundamental principle of international criminal law. Part C argues that Asia has a unique opportunity to shape the future of universal jurisdiction and international criminal law generally. Asia should grasp this opportunity for its own sake as much as for the sake of the international community. For the purpose of this paper, Asia shall be taken to refer to East, South and Southeast Asia.

## II. Universal Jurisdiction and the Asian Experience

Universal jurisdiction refers to extraterritorial "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>5</sup> Leading publicists agree that, on a customary level, universal jurisdiction can be exercised over at least piracy, slavery and the core international crimes of war crimes, genocide and crimes against humanity.<sup>6</sup> The reasoning goes that certain crimes are so heinous that they constitute crimes against the interests of the international community as a whole, according every state the right to prosecute on behalf of the international community.<sup>7</sup> The Sixth Committee of the UN General Assembly has been considering the scope and application of universal jurisdiction since 2009. While contentions remain as to the content of the principle, the General Assembly has repeatedly acknowledged that the principle is valid "beyond doubt".<sup>8</sup> On the other hand, a preliminary review of literature, national jurisprudence and official documents shows that Asian states have not exactly embraced the principle.<sup>9</sup>

<sup>4</sup> Article 4, Kitab Undang-Undang Hukum Pidana (Indonesian Criminal Code), Indonesia (1995).

<sup>5</sup> Program in Law and Public Affairs, *The Princeton Principles on Universal Jurisdiction* (Princeton University New Jersey, 2001), Principle 1.

<sup>6</sup> *Id*, *Princeton Principles on Universal Jurisdiction*, Principle 2; Cassese, A, "Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction", 1(3) *Journal of International Criminal Justice* (2003) 589, 591-592; A/63/237, Annex. Some jurists are more critical about the existence of a consensus: see Reydams, L, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford University Press, Oxford, 2003), 6; International Court of Justice (ICJ), *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Separate opinion of President Guillaume, ICJ Reports 2002, 35, 14 February 2002, 42; Yee, S, "Universal Jurisdiction: Concept, Logic, and Reality", 10(3) *Chinese Journal of International Law* (2011) 503, 511-512.

<sup>7</sup> Israel Supreme Court, *Attorney General of Israel v Eichmann* (1962) 36 Int'l L. Rep. 277.

<sup>8</sup> UN General Assembly - Sixth Committee, *Sixty-sixth session: Summary of work*, 2011, at <[un.org/en/ga/sixth/66/ScopeAppUniJuri.shtml](http://un.org/en/ga/sixth/66/ScopeAppUniJuri.shtml)> (accessed 23 May 2016); UN General Assembly - Sixth Committee, *Sixty-seventh session: Summary of work*, 2012, at <[un.org/en/ga/sixth/67/ScopeAppUniJuri.shtml](http://un.org/en/ga/sixth/67/ScopeAppUniJuri.shtml)> (accessed 23 May 2016).

<sup>9</sup> The author has briefly reviewed relevant academic literature, digitised law reports of China, Hong Kong, India, Sri Lanka, Malaysia and Singapore, studies by international organisations, as well as transcripts of discussions at and written responses to the General Assembly.

## II.1. National Laws Providing for Universal Jurisdiction

Universal jurisdiction has its roots in customary international law, originating from the necessity to prosecute pirates who operate with impunity on the high seas, before being expanded to other serious crimes of international concern.<sup>10</sup> Treaties, most notably the 1949 Geneva Conventions, also provide for a limited form of universal jurisdiction between state parties over specific crimes by way of *aut dedere aut judicare* clauses. Asian states have signed the key conventions on international crimes in proportions similar to other regions of the world. On the other hand, in terms of implementation into national law, a 2011 study by Amnesty International found that Asia (and the Middle-East) lagged behind other regions.<sup>11</sup> Piracy is the only customary universal jurisdiction crime that is regularly found in the statute books of Asian states. Other crimes covered by universal jurisdiction are usually only implemented as a result of treaty obligations. Even then, many treaty-based international crimes have yet to be implemented into the domestic laws of Asian states.<sup>12</sup>

## II.2. Judicial Practice

Among Asian states, it appears that only China and Japan have ever exercised universal jurisdiction. The two cases both involve piracy. In February 2003, the Shantou Municipal Intermediate People's Court convicted ten Indonesians of hijacking a Thai oil tanker off the coast of Malaysia. They were apprehended while trying to dispose of the stolen goods in Chinese territorial waters.<sup>13</sup> In April 2011, the Tokyo District Court convicted four Somalis for the hijacking of a Bahamas-registered tanker off the coast of Oman, under a prosecution arrangement with the capturing US authorities.<sup>14</sup> Additionally, South Korea has sought to characterise a hijacking case from 1983 as an exercise of universal jurisdiction.<sup>15</sup> In that case, the hijacked plane was diverted to South Korea, thereby arguably giving South Korea territorial jurisdiction. Similarly, contrary to

<sup>10</sup> Cryer, R, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, Cambridge, 2007), 44.

<sup>11</sup> See Amnesty International, *Universal Jurisdiction: A Preliminary Survey of Legislation Around the World Annex I* (Amnesty International Publications, London, 2011). See also, Amnesty International, *Universal Jurisdiction: Strengthening this Essential Tool of International Justice* (Amnesty International Publications, London, 2012). The ICRC maintains a more up-to-date record at <[icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule157](http://icrc.org/customary-ihl/eng/docs/v2_rul_rule157)>.

<sup>12</sup> *Id*; Chengyuan, M, "The application of universal jurisdiction in China's criminal law," 31(3) *Tribune of Political Science and Law* (2013) 88, 98-99.

<sup>13</sup> Government of the People's Republic of China, *Information from and observations by China on the scope and application of the principle of universal jurisdiction* (2010), at <[un.org/en/ga/sixth/65/ScopeAppUniJuri\\_StatesComments/China\\_E.pdf](http://un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/China_E.pdf)> (accessed 23 May 2016).

<sup>14</sup> International Crimes Database, *Japanese Piracy Trial*, at <[internationalcrimesdatabase.org/Case/1208/Japanese-Piracy-Trial/](http://internationalcrimesdatabase.org/Case/1208/Japanese-Piracy-Trial/)> (accessed 23 May 2016) Huang, Y, "Universal Jurisdiction Over Piracy and East Asian Practice", 11(4) *Chinese Journal of International Law* (2012) 623.

<sup>15</sup> Government of Korea, *Universal Jurisdiction in the Republic of Korea*, (2010), at <[un.org/en/ga/sixth/65/ScopeAppUniJuri\\_StatesComments/RepublicofKorea.pdf](http://un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/RepublicofKorea.pdf)> (accessed 23 May 2016).

the ICRC,<sup>16</sup> the post-WWII prosecution of *Kuroda* was not an exercise of universal jurisdiction since the war crimes were “committed against [the Philippines] people and [their] government”.<sup>17</sup> Private efforts such as the Kuala Lumpur War Crimes Commission set up by former Malaysia Prime Minister Mahathir Mohamad cannot be considered true exercises of universal jurisdiction.

In contrast, there has been plenty of practice by non-Asian states. The 1990s-2000s in particular saw a peak in the exercise of universal jurisdiction by European states. In 2014, proceedings based on universal jurisdiction were ongoing in Africa, Europe and South America.<sup>18</sup>

### II.3. Expressions of *Opinio Juris*

Asian states have been relatively silent on the topic of universal jurisdiction. Only China, Malaysia, the Philippines, South Korea and Vietnam have responded to the General Assembly's call for information and observations over the past five years.<sup>19</sup> Nine Asian states contributed during the General Assembly discussions (a notable minority) and those that spoke, mostly urged restraint in the exercise of universal jurisdiction outside the context of piracy.<sup>20</sup> This can be contrasted with the AU and EU's active engagement through expert meetings and the AU's decision to refer the topic for discussion to the General Assembly.

<sup>16</sup> ICRC, *Practice Relating to Rule 157. Jurisdiction over War Crimes*, at <icrc.org/customary-ihl/eng/docs/v2\_rul\_rule157> (accessed 23 May 2016).

<sup>17</sup> Supreme Court of the Philippines, *Shigenori Kuroda v. MG Rafael Jalandoni* (1949) G.R. No. L-2662.

<sup>18</sup> Universal Jurisdiction Annual Review, *Make Way for Justice*, (2015), at <fidh.org/IMG/pdf/trial-ecchr-fidh\_uj\_annual\_review\_2014-2.pdf> (accessed 23 May 2016).

<sup>19</sup> Available at:

Government of the People's Republic of China, “Information from and observations by China on the scope and application of the principle of universal jurisdiction”, 2010, at <un.org/en/ga/sixth/65/ScopeAppUniJuri\_StatesComments/China\_E.pdf> (accessed 23 May 2016); Government of Malaysia, *Malaysia's comments on the scope and application of the principle of universal jurisdiction*, 2010, at <un.org/en/ga/sixth/65/ScopeAppUniJuri\_StatesComments/Malaysia.pdf> (accessed 23 May 2016); Government of Korea, *Universal Jurisdiction in the Republic of Korea*, 2010, at <un.org/en/ga/sixth/65/ScopeAppUniJuri\_StatesComments/RepublicofKorea.pdf> (accessed 23 May 2016); Government of the Philippines, “Information and Observation on the scope of the Principle of Universal Jurisdiction”, 2010, at <un.org/en/ga/sixth/66/ScopeAppUniJuri\_StatesComments/Philippines.pdf> (accessed 23 May 2016).

<sup>20</sup> See summaries of work at UN General Assembly - Sixth Committee, *Sixty-fifth session: Summary of work*, 2011, at <un.org/en/ga/sixth/65/ScopeAppUniJuri.shtml> (accessed 23 May 2016); UN General Assembly - Sixth Committee, *Sixty-sixth session: Summary of work*, 2011, at <un.org/en/ga/sixth/66/ScopeAppUniJuri.shtml> (accessed 23 May 2016); UN General Assembly - Sixth Committee, *Sixty-seventh session: Summary of work*, 2012, at <un.org/en/ga/sixth/67/ScopeAppUniJuri.shtml> (accessed 23 May 2016); UN General Assembly - Sixth Committee, *Sixty-eighth session: Summary of work*, 2012, at <un.org/en/ga/sixth/68/UnivJur.shtml> (accessed 23 May 2016); UN General Assembly - Sixth Committee, *Sixty-ninth session: Summary of work*, 2012, at <un.org/en/ga/sixth/69/universal\_jurisdiction.shtml> (accessed 23 May 2016).

### III. Reasons for Asia's Reticence towards Universal Jurisdiction

Judge Xue Hanqin notes that Asian countries have for a long time maintained deep scepticism towards international law due to its European origins.<sup>21</sup> Rightly or wrongly, universal jurisdiction too has been characterised as a form of neo-imperialism by European powers.<sup>22</sup> This part does not seek to defend Asia's lack of universal jurisdiction practice, nor will it reiterate notions of Asian exceptionalism or third world approaches to international law. Instead, it hopes to provide some rational explanations for Asia's reticence towards universal jurisdiction, approaching the issue from three broad categories of government, society, and residual interests. It is only with a proper understanding of Asia that we can formulate ways to engage Asia in making universal jurisdiction a truly global doctrine.

#### III.1. Government

As observed by many scholars, Asian states tend to jealously guard their sovereignty, preferring a strict reinterpretation of the Westphalian notion of non-intervention.<sup>23</sup> The principle of non-intervention, to the extent of *non-interference*, is a central theme of key Asian instruments such as the Bandung Declaration, the Five Principles of Peaceful Coexistence and the ASEAN Treaty of Amity and Cooperation (which applies to all members of the ASEAN Regional Forum). The principle of non-intervention is also integral to the foreign policy doctrines of most Asian states. This presents a huge impediment to the exercise of universal jurisdiction. Core international crimes such as genocide and crimes against humanity are often linked to political purposes or committed in politically charged circumstances. The exercise of universal jurisdiction by a third state thus represents a serious incursion into the politics of the territorial state. It has been colourfully described by Henry Kissinger as "judicial tyranny".<sup>24</sup> The insistence of Asian states on the principle of non-intervention parallels their cautious approach to universal jurisdiction. Only treaty-based universal jurisdiction, which by definition carries some form of state consent, has been regularly implemented in domestic laws. Further, the two

<sup>21</sup> Xue, H, "Meaningful Dialogue through a Common Discourse", 1(1) *Asian Journal of International Law* (2011) 13, 15.

<sup>22</sup> See e.g. examples provided in Chengyuan, M, "The Connotation of Universal Jurisdiction and its Application in the Criminal Law of China", in Bergsmo, M and Ling, Y, eds, *State Sovereignty and International Criminal Law* (Torkel Opsahl Academic EPublisher, Beijing, 2012), 180 It is respectfully submitted that nationalistic resistance may have been overstated. Despite some concerns over the unidirectional application of universal jurisdiction, African states generally support the doctrine on principle. See e.g. Memorandum annexed to AU's request for universal jurisdiction to be added agenda of sixty-third session of UNGA: A/63/237, Annex.

<sup>23</sup> Ginsburg, T, "Eastphalia as the Perfection of Westphalia", 17 *Indiana Journal of Global Legal Studies* (2010) 27, 28; Hitoshi, N, "Revisiting the Principle of Non-Intervention: A Structural Principle of International Law or a Political Obstacle to Regional Security in Asia?", 3(1) *Asian Journal of International Law* (2013) 25, 26.

<sup>24</sup> Foreign Affairs, Kissinger, H, *The Pitfalls of Universal Jurisdiction: Risking Judicial Tyranny*, *Foreign Affairs*, July 2001, at <foreignaffairs.com/articles/2001-07-01/pitfalls-universal-jurisdiction> (accessed 23 May 2016); In addition to being a renowned diplomat, Dr Kissinger is often criticised for his interference in the politics of Cambodia and Bangladesh (then East-Pakistan).

isolated instances of judicial practice both involved piracy, a crime committed on the high seas without any territorial state to contend with. In the context of core international crimes, the principle of non-intervention was taken to an extreme during the Cambodian genocide of the 1970s. Then, Asian states were quite content to stand still while the Khmer Rouge regime went on a murderous spree in their backyard.<sup>25</sup> China and ASEAN even publicly criticised Vietnam's subsequent intervention in Cambodia, though due consideration must be given to the Cold War context.<sup>26</sup> More than two decades went by before Pol Pot and his collaborators were brought before the Extraordinary Chambers in the Courts of Cambodia, a tribunal established mainly through the efforts of the present Cambodian government and the Western world.<sup>27</sup>

Another characteristic of Asian governments is their general aversion to confrontational methods. They have historically demonstrated a preference to settle problems through informal and collaborative processes.<sup>28</sup> Miles Kahler observes that Asian institutions are informal by design and explicitly reject legalisation.<sup>29</sup> Asian leaders have also repeatedly championed the informal nature of ASEAN (with its associated forums) and APEC as an advantage instead of inadequacy.<sup>30</sup> The conduct forming the basis for universal jurisdiction prosecutions will often be official acts. Accordingly, the exercise of universal jurisdiction is a potential source of interstate conflict.<sup>31</sup> This is not the 'Asian way'. If a third state is outraged that an intolerable international crime has been committed, the preferred Asian approach will be to quietly exert diplomatic pressure through "constructive engagement". Whether this approach is effective is quite another matter altogether.<sup>32</sup> The point to be made is that universal jurisdiction is counter to the intuitions of many Asian governments.

<sup>25</sup> See generally Ratner, S, and Abrams, JS, "The Khmer Rouge Rule Over Cambodia: A Historical Overview", in *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (Oxford University Press, Oxford, 1997).

<sup>26</sup> It must be noted that the EU and US also supported the deposed Khmer Rouge regime in the immediate aftermath.

<sup>27</sup> Of the \$191 million pledged to the tribunal since 2006, Thailand is the only ASEAN country to contribute more than \$24,000; The Cambodia Daily, Peter, Zand Crothers, L, *KR Tribunal Goes After Donations From Asean Member States*, 19 August 2013, at <camodiadaily.com/archives/kr-tribunal-goes-after-donations-from-asean-member-states-39991/> (accessed 23 May 2016).

<sup>28</sup> Koh, T, "International Law and the Peaceful Resolution of Disputes: Asian Perspectives, Contributions, and Challenges", 1 *Asian Journal of International Law* (2011) 57; The Guardian, Chesterman, S and Kishore, M, *The Asian way of handling the world*, 4 March 2010, at <theguardian.com/commentisfree/2010/mar/04/global-problem-solving-asian-way> (accessed 23 May 2016).

<sup>29</sup> Kahler, M, "Legalization as Strategy: The Asia-Pacific Case", 53(3) *International Organization* (2003) 549, 565.

<sup>30</sup> Carlos Romulo (former Foreign Secretary of the Philippines) once said, "We often find that private talks over breakfast prove more important than formal meetings": Acharya, A, *Ideas, Identity and Institution-building: From the 'ASEAN way' to the 'Asia-Pacific way'?* in *Regionalism in Asia* (Taylor & Francis Ltd, London, 2009), 152.

<sup>31</sup> Morris, M, "Universal Jurisdiction in a Divided World: Conference Remarks", 35 *New England Law Review* (2001) 337, 356.

<sup>32</sup> Tay, S, "Interdependence, states and community: ethical concerns and foreign policy in ASEAN" in MacDonald, DB, et al, eds, *The Ethics of Foreign Policy* (Ashgate Publishing, New York, 2007) 141; Meanwhile, Mya Maung opines that constructive engagement "can only lead to a prolongation of the

A caveat must be drawn that China's foreign policy is taking a more assertive form under Xi Jinping. It remains to be seen if this will lead to a radical departure from Deng Xiaoping's conservative philosophy of *tao guang yang hui* ("to bide one's time"). In 2007, ASEAN took the unprecedented step of expressing "revulsion" over Myanmar's bloody crackdown on dissident monks.<sup>33</sup> The regional rhetoric on human rights is increasing, though Tan Hsien Li cautions that there has so far been "more smoke than fire".<sup>34</sup> It could well be that changes in regional geopolitics will bring about a diminishment of the principle of non-intervention, though a seismic shift will be needed before we start to see universal jurisdiction exercised on a frequency comparable to Europe.

## III.2. Society

The *bona fide* exercise of universal jurisdiction comes at a high cost to the prosecuting state without a corresponding level of direct benefits.<sup>35</sup> Foreign relations could be seriously jeopardised as a result. In turn, trade will be affected. Even in cases of a less diplomatically-sensitive nature, international crimes prosecution can be a costly affair.<sup>36</sup> Strong popular support is thus needed before any government will embark on such a thankless venture. In this regard, despite an emerging civil society, those living in Asia have hardly taken to the streets demanding justice for crimes that they have no real nexus to. It will be shown that social realities are currently uncondusive to the application of universal jurisdiction in Asia.

### III.2.1. Traditional communitarian beliefs

The "Asian values" debate of the 1990s was couched in developmental terms, pitting the autocratic governments of Asia against the liberal democracies of the West.<sup>37</sup> This paper is unconcerned with the merits or flaws of "Asian values" as a development model. For our purpose, the important idea to take away from the debate is the confirmation that Asian societies continued to accept communitarian values and strict hierarchies. Studies conducted during the period confirmed that a strong majority of Asians emphasised social order and harmony, in sharp contrast to Western respondents.<sup>38</sup> Michael Barr points out that even the opponents of "Asian values", including Aung San Suu Kyi and Lee Teng Hui, argued from the premise of social conservatism.<sup>39</sup> The respect for communitarian norms and hierarchies is instructive. It provides a rational explanation for

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Burmese military's stranglehold on power": Maung, M, "The Burma Road to the Past", 39(2) *Asian Survey* (1999) 265, 285.

<sup>33</sup> Statement by ASEAN Chair, Singapore's Minister for Foreign Affairs George Yeo in New York, September 27 2007, at <mfa.gov.sg/content/mfa/overseasmission/washington/newsroom/press\_statements/2007/200709/press\_200709\_03.html> (accessed 23 May 2016).

<sup>34</sup> Tan, H, *The ASEAN Intergovernmental Commission on Human Rights: Institutionalizing Human Rights in Southeast Asia* (Cambridge University Press, Cambridge, 2011), 140-141.

<sup>35</sup> Morris, *supra* nt 31, 359.

<sup>36</sup> See, Skilbeck, R, "Funding Justice: The Price of War Crimes Trials", 15(3) *Human Rights Brief* (2008) 6.

<sup>37</sup> See, Langlois, AJ, *The Politics of Justice and Human Rights: Southeast Asia and Universalist Theory* (Cambridge University Press, Cambridge, 2001), 12-43.

<sup>38</sup> *Id.*, 43; Ghai, Y, "Human Rights and Governance: The Asia Debate", 15 *Australian Year Book of International Law* (1994) 1, 12-13; Milner, A, *What's Happened to Asian Values?*, 1999 at <digitalcollections.anu.edu.au/bitstream/1885/41912/2/values.html> (accessed 23 May 2016).

<sup>39</sup> Barr, M, *Cultural Politics and Asian Values: The Tepid War* (Taylor & Francis, London 2002), 18-19.

the relative nonchalance of those living in Asia towards the supposed “crimes of universal concern” taking place in other countries. The Japanese proverb, *deru kugi wa utareru* (“the nail that sticks out gets hammered down”), comes to mind. A society that places a premium on social order is unlikely to have too much sympathy for the cause of “renegades” elsewhere. On certain levels, a conservative mind could even rationalise that those who were harshly persecuted for going against the social order had it coming.

Nevertheless, the argument of cultural relativism must not be overstated. Simon Tay points out that culture is shaped by the politics as much as it in turn shapes politics.<sup>40</sup> The conservatism of the 1990s-2000s may be a product of realist developmental concerns more than any supposed deep-rooted subservience. The era of strongmen in Asia is arguably over; newer generations of Asians are growing up in increasingly rights-centric societies. The prevailing social norm will move progressively away from strict communitarian autocracy. The keyword however is “progressive”.

### III.2.2. *Lack of common Asian identity*

Another uncontroverted conclusion from the “Asian values” debate is that Asia is a diverse region in cultural and historical terms. One of the main proponents of “Asian values”, the late Lee Kuan Yew, conceded as much in an interview with *Asiaweek* in 1999.<sup>41</sup> The idea of “community” has thus far been restricted to intergovernmental interaction; there has been no real effort to extend the concept to the social and ethical spheres.<sup>42</sup> On the contrary, relations between certain Asian societies (e.g. Japan/Korea, China/Vietnam) are highly volatile. The absence of a common Asian identity is significant. Luc Reydamas observes that nearly all universal jurisdiction cases that have gone to trial, involved defendants with strong links to the forum state.<sup>43</sup> This is only to be expected since few societies will proactively demand the prosecution of crimes committed by or against those they have absolutely no affinity to.

Southeast Asia provides a good case study. With the exception of Thailand, all of the Southeast Asian states were colonised for more than a century. The Dutch colonised Indonesia, the British took Malaya and Myanmar, Portugal controlled East Timor, France controlled Vietnam, the Philippines was under the administration of first Spain and subsequently the US. There are hence at least five different colonial experiences. This historical fact remains visible today in the form of different administrative languages and systems of government. On the most basic level, many Filipinos still carry Spanish names instead of anything that sounds stereotypically Asian. Economic integration in Southeast Asia is also lacking, with much room for improvement in intra-Southeast Asia trade. This absence of a social nexus explains the lacklustre reaction of Southeast Asian societies to the recent Rohingya crisis, in sharp contrast to how European societies saw the refugee crisis as a pan-European problem. Going further back, the muted response of ASEAN states to the Cambodia genocide and decades of military oppression in Myanmar show that the notion of Southeast Asian brotherhood is more honoured in its breach than its observance.

<sup>40</sup> Tay, S, “Human Rights, Culture and the Singapore Example”, 41(4) *McGill Law Journal* (1996) 743, 778.

<sup>41</sup> Barr, *supra* nt 39, 3.

<sup>42</sup> Tay, “Interdependence, states and community”, *supra* nt 32, 145-146.

<sup>43</sup> Reydamas, *supra* nt 6, 222.



### III.2.3. *Absence of Active NGO Culture*

Well-funded NGOs such as Amnesty International (headquartered in London), Human Rights Watch (headquartered in New York), the International Committee of the Red Cross (headquartered in Geneva) and the International Federation for Human Rights (headquartered in Paris) have played a leading role in pushing the development of universal jurisdiction around the world, particularly in Europe. In states that allow for civil petitions and private prosecutions, NGOs have even initiated and ran universal jurisdiction prosecutions against foreign perpetrators of core international crimes.<sup>44</sup> The civil movement in Asia is still in the embryonic stages. Asia-based NGOs do not command similar levels of state support,<sup>45</sup> nor are their views always congruent to that of those whose interest they claim to defend.<sup>46</sup>

### III.3. **Residual Interests**

Asia has been going through a rather peaceful phase of rapid economic development. The veneer of peace may sometimes mask the uncomfortable fact that there has been a fair number of atrocities in living memory, most of them unaccounted for. These include *inter alia* the post-war displacements in Vietnam, atrocities committed by Indonesian troops in East Timor, Myanmar's string of human rights violations and China's heavy-handed crackdowns on separatist movements. Many of those allegedly responsible for international crimes remain in positions of critical influence today. They have a strong interest in self-preservation and are a formidable force against their respective states' exercise of universal jurisdiction over any international atrocity. It is worth mentioning that their worries are not unwarranted. The Spanish High Court and Argentina Federal Court have issued arrest warrants against former Chinese President Jiang Zemin for alleged genocide and crimes against humanity.<sup>47</sup> Any effort to increase universal jurisdiction practice in Asia must overcome the roadblocks set up by these forces.

## IV. **Asia at a Crossroads**

Should Asia bother with universal jurisdiction or can it brush the principle off as yet another imposition of Western human rights ideals? Conversely, should the global

<sup>44</sup> See Lawyers Committee for Human Rights, *Universal Jurisdiction: Meeting the Challenge through NGO Cooperation* (2002), 17-24, available at <humanrightsfirst.org/wp-content/uploads/pdf/meeting\_challenge310502.pdf>.

<sup>45</sup> It has been estimated that the EU funds NGOs to the tune of €7.5 billion per year: Association of Accredited Public Policy Advocates to the European Union, *NGO Funding by the EU*, available at <aalep.eu/ngo-funding-eu>; Asian governments on the other hand tend to see human rights NGOs as unwelcome cultural imperialists: see e.g. *The Singapore Government's Response To Amnesty International's Report "Singapore – The Death Penalty: A Hidden Toll Of Executions"*, available at <nas.gov.sg/archivesonline/speeches/view-html?filename=2004013005.htm>.

<sup>46</sup> Langlois, *supra* nt 37, 42.

<sup>47</sup> Reuters, Ortiz, F, *Spain orders arrest of former Chinese president, others over Tibet*, 14 February 2014, available at <reuters.com/article/2014/02/10/us-china-spain-idUSBREA1911W20140210>; Henao, LA, *Argentine judge asks China arrests over Falun Gong*, see *Id*, 22 December 2009, available at <reuters.com/article/2009/12/23/us-argentina-china-falungong-idUSTRE5BM02B20091223#tIruKJtF Yo4L04Iu.97>.

community engage Asia in the development of universal jurisdiction? This part will briefly reiterate the importance of universal jurisdiction as an essential tool to combating international crimes. It will go on to argue that Asia's attitude towards universal jurisdiction has serious implications for the future of universal jurisdiction and in turn international criminal law. It is in the interest of Asia as much as it is in the interest of the global community that international crimes are properly addressed. Asian states should progressively ramp up its involvement in the development of universal jurisdiction even if they are not currently predisposed to its exercise on the individual level.

#### IV.1. Universal Jurisdiction and the Fight Against Impunity

In its final report on the obligation to prosecute or extradite (*aut dedere aut judicare*), the International Law Commission noted that “[u]niversal jurisdiction is a crucial component for prosecuting alleged perpetrators of crimes of international concern, particularly when the alleged perpetrator is not prosecuted in the territory where the crime was committed.”<sup>48</sup> This truism has been asserted by so many of the most distinguished jurists that one would find it difficult to add anything new. Three points bear emphasis: (1) Universal jurisdiction applies only to the most abhorrent crimes in international law - crimes that no state can justifiably deny to be deserving of punishment; (2) The exercise of universal jurisdiction at the national level complements international criminal justice at the International Criminal Court and other international tribunals; (3) Impunity is a real problem for international criminal law and universal jurisdiction plugs the gap for perpetrators that seek refuge outside of the directly affected states.

#### IV.2. Asia's Opportunity to Shape the Future of International Criminal Law

Contrary to the zealous proclamations of human rights NGOs, the customary status of universal jurisdiction remains unsettled in international law. General Assembly discussions have reached a stalemate.<sup>49</sup> For all its indifference to the debate so far, Asia ironically finds itself in the position to play a decisive role in shaping the future of universal jurisdiction and consequently the development of international criminal law.

##### IV.2.1. The Continuing Relevance of Universal Jurisdiction

First, it is questionable whether any principle can legitimately claim to be customary international law when there has been practically no judicial practice or *opinio juris* from Asia. This objection is rooted in the “traditional approach” to customary international

<sup>48</sup> Final report of the International Law Commission on the Obligation To Extradite or Prosecute (*Aut Dedere Aut Judicare*) (2014), para 18.

<sup>49</sup> At its sixty-ninth session in 2014, the General Assembly decided that a working group of the Sixth Committee would be set up to continue a thorough discussion of the scope and application of universal jurisdiction. Many representatives also urged the International Law Commission to consider the topic. It is foreseeable that debate on this topic will go on for some time yet. UN General Assembly - Sixth Committee, *Sixty-ninth session: Summary of work* (2014), available at <[un.org/en/ga/sixth/69/universal\\_jurisdiction.shtml](http://un.org/en/ga/sixth/69/universal_jurisdiction.shtml)>.

law, which demands evidence of actual state practice and demonstrable *opinio juris*.<sup>50</sup> In this regard, a vocal and unlikely ally in the form of the US had previously asserted strong objections to universal jurisdiction over war crimes.<sup>51</sup> According to the US, there has not been enough “operational” practice and “definitive” *opinio juris* around the world to support a finding of customary universal jurisdiction over war crimes.<sup>52</sup> Even taking the more liberal “modern approach” which “relies principally on loosely defined *opinio juris* and/or inference from the widespread ratification of treaties or support for resolutions and other ‘soft law’ instruments”,<sup>53</sup> it is uncertain if universal jurisdiction clears the bar when it is largely ignored by a continent that contains more than half of the world’s population. On the point of widespread ratification of treaties, the conventions on international crimes do not purport to create universal jurisdiction generally but only as between state parties by way of *aut dedere aut judicare* clauses. Furthermore, many states have not incorporated treaty-based international crimes into their national laws.

Secondly, as pointed out by Yee Sienho, there has been a noticeable decline in the fortunes of universal jurisdiction after the equivocal judgement of the International Court of Justice (ICJ) in the *Arrest Warrant* case.<sup>54</sup> The international court in its main judgement declined to decide on the existence of a customary right to universal jurisdiction over core international crimes, choosing instead to dispose of the case by only addressing the secondary issue of immunity.<sup>55</sup> Judges Higgins, Kooijmans, and Buergenthal issued a joint separate opinion in support of universal jurisdiction over the core international crimes, while President Guillaume in his separate opinion limited his recognition of universal jurisdiction to only piracy.<sup>56</sup> The ICJ was careful not to pronounce on universal jurisdiction but the damage was done. In Alain Pellet’s words, “the ... *Arrest Warrant Case* shows that the Court can ... slow down and maybe go as far as durably jeopardizing highly desirable evolutions in the law”.<sup>57</sup> Yee Sienho points out that many states that were previously the stalwarts of universal jurisdiction have since retreated to more conservative positions.<sup>58</sup> Asia, being the last major region that is hitherto uncommitted, has the capacity to revitalise the doctrine or sound its death knell.

<sup>50</sup> Erakat, N, “The US v. The Red Cross: Customary International Humanitarian Law & Universal Jurisdiction”, 41 *Denver Journal of International Law and Policy* (2013) 225, 230.

<sup>51</sup> Bellinger, J, Bhand Haynes, WJ, “A US government response to the International Committee of the Red Cross study Customary International Humanitarian Law”, 89 *International Review of the Red Cross* (2007) 443, 466-467.

<sup>52</sup> *Id.*, 469-471.

<sup>53</sup> Meron, T, “Revival of Customary Humanitarian Law”, 99(4) *American Journal of International Law* (2005) 817, 817.

<sup>54</sup> See generally Yee, *supra* nt 6.

<sup>55</sup> ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ Reports 2002, 3, 14 Feb 2002, 19.

<sup>56</sup> ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, ICJ Reports 2002, 63, 14 Feb 2002, 79 and 81; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Separate opinion of President Guillaume, ICJ Reports 2002, 35, 14 Feb 2002, 42.

<sup>57</sup> Pellet, A, “Shaping the Future of International Law: The Role of the World Court in Lawmaking”, in Arsanjani, MH, ed, *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Martinus Nijhoff Publishers, Leiden, 2011), 1080.

<sup>58</sup> Yee, *supra* nt 6, 520-522.

#### IV.2.2. Universal Jurisdiction and the Complementarity Principle

The relationship between universal jurisdiction and the complementarity principle of the International Criminal Court is an interesting one. The complementarity principle is a unique creation of international law. It provides for the primacy of national investigations and prosecutions.<sup>59</sup> Scholars have referred to the “catalytic effect” of the complementarity principle, which encourages states to carry out domestic investigations and prosecutions in order to avoid the involvement of the ICC.<sup>60</sup> Even though the ICC is not itself vested with universal jurisdiction, the scope of its jurisdiction is naturally larger than that of any individual state.<sup>61</sup> As such, some states have decided to provide their national courts with universal jurisdiction over international crimes in order to ensure that the courts can be effective complements to the ICC.<sup>62</sup>

The complementarity regime means that the decisions of national courts will be crucial to the future development of international criminal law. Together with the ICC, they will form the building blocks of jurisprudence in this (relatively) young area of international law. More than ever, the decisions on *Eichmann* and *Pinochet* will be as influential as *Tadic*. Asian states should be alert to this development. Presently, a significant number of national prosecutions are based on universal jurisdiction. Simon Chesterman describes the wariness of Asian states towards the ICC due to scepticism over Western rules.<sup>63</sup> By abstaining from international criminal justice beyond the occasional specialised tribunal, Asia risks becoming further alienated from the rules of international criminal law. Protests of Western hegemony are unlikely to find sympathy if Asia consciously chooses to sit out of the process altogether. Already, current literature on international criminal law is overwhelmingly centred on Africa, Europe and the Americas. A future Jiang Zemin will be subject to Spanish or Argentinian interpretations of international criminal law once those interpretations become entrenched at the international level.

Correspondingly, by missing out on input from Asia, international criminal law risks being deprived of its legitimacy and intellectual integrity as an international body of law. The contribution of Asian jurists such as the late ICTY judge Li Haopei should not be underestimated. By giving disproportionate airtime to states that are willing to exercise universal jurisdiction, the complementarity regime may dilute the voice of scholars from other legal systems. The international community should actively engage Asia in developing the latter's capacity for international criminal justice.

<sup>59</sup> Article 17, United Nations, *Rome Statute of the International Criminal Court* (1998) 2187 UNTS 90 (*Rome Statute*).

<sup>60</sup> See generally Kleffner, JK, “Complementarity as a Catalyst for Compliance”, in Kleffner, J and Kor, G, eds, *Complementary Views on Complementarity: Proceedings of the International Roundtable on the Complementary Nature of the International Criminal Court Amsterdam* (T.M.C. Asser Press, The Hague, 2006).

<sup>61</sup> E.g. an alleged perpetrator who is a national of a state party to the ICC, having committed genocide in his home state but currently residing in another state which is party to the ICC.

<sup>62</sup> Butler, H, “The Growing Support for Universal Jurisdiction in National Legislation”, in Machado, S, ed, *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (University of Pennsylvania Press, Philadelphia, 2006), 67.

<sup>63</sup> Chesterman, S, “International Criminal Law with Asian Characteristics?” *NUS Law Working Paper Series 2014/002*, April 2014, available at <law.nus.edu.sg/wps/pdfs/002\_2014\_Simon\_Chesterman.pdf>, 32-35.

### IV.3. Progressive Engagement

Given the foregoing discussion, one might wonder if Asia should reject the principle of universal jurisdiction altogether. Such a move would be unwise. When confined to its proper limits, the principle is a “desirable evolution” for both Asia and the world. By ramping up its engagement in the development of universal jurisdiction, Asia is doing itself a favour as much as it is contributing to global peace and justice.

It is uncontroversial that crimes such as genocide, war crimes and crimes against humanity are abhorrent and worthy of universal condemnation. The established categories of international crimes have long been agreed to, evident by the widespread ratification of the relevant international conventions even among Asian states. These are not some radical or ethnocentric human rights standards. Simon Chesterman opines that “[Asia] arguably has the longest history of restraining the conduct of hostilities”.<sup>64</sup> Zou Keyuan observes that, on the related subject of humanitarian intervention, “[China] now considers intervention acceptable ‘under exceptional circumstances, such as when a national government practices racist policies, kills its people en masse, or collapses only to leave slaughtered people in its wake’”.<sup>65</sup> Unless any government plans on committing genocide anytime soon, it is not too onerous a duty to incorporate universal jurisdiction over core international crimes into domestic law. These states will merely be fulfilling their existing treaty obligations. Considering the utility of universal jurisdiction in facilitating justice, Asia should rise to its responsibility of helping to rid the world of impunity. On a regional level, the widespread implementation of international crimes and universal jurisdiction into national laws can have a normalising influence in curbing government or military excesses. This will contribute to regional peace and stability, providing ideal conditions for trade and economic cooperation.

In Asia, there remains the larger problem of actually applying such laws. Given the aforementioned lack of social and political impetus, it would be naive to expect a proliferation of universal jurisdiction practice overnight. This is where the notion of progressive engagement comes in. For a start, universal jurisdiction presents a good solution to tackling transnational crimes such as human trafficking and slavery described at the beginning of this paper. Victims of multiple nationalities are involved and the perpetrators may be shielded from criminal justice in their home state due to their links to the powerful. Regional cooperation in this area is growing and universal jurisdiction can add another weapon to the arsenal. There is also the point famously made by Lord Denning that “[w]hen a change is made, someone some time has to make the first move. One country alone may start the process. Others may follow. At first a trickle, then a stream, last a flood.”<sup>66</sup> Tan Hsien Li points out that not all Asian states are equal in their attitudes towards human rights. In Southeast Asia, the ASEAN Intergovernmental Commission on Human Rights “would likely take more incisive action when chaired by Indonesia, the Philippines, and Thailand, but be more subdued when other members chair.”<sup>67</sup> The implementation of universal jurisdiction over core

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<sup>64</sup> *Id.*, 5.

<sup>65</sup> Zou, K, *China-ASEAN Relations and International Law*, Chandos Publishing, 2009, 29-30; Zou further claims that this position is shared by India and ASEAN.

<sup>66</sup> High Court of Justice of England and Wales, *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529, 556. Luc Reydamas quotes Lord Denning in a similar context in *Universal Jurisdiction*, *supra* nt 6, 83.

<sup>67</sup> Tan, *supra* nt 34, 160.

international crimes is a process and certain states can send a strong message by becoming early adopters.

Finally, to address realist concerns, the acceptance of an interventionist principle like universal jurisdiction may ironically shield Asian states from foreign interference in other areas of greater sensitivity. It bears repeating that universal jurisdiction only attaches to the most heinous of crimes. By actively embracing the core of international criminal law, Asian states have greater legitimacy when holding out on peripheral areas of human rights. Through their jurisprudence, Asian states could even push back against contrary values and the expansionist agenda of international NGOs, ensuring that universal jurisdiction is kept within “acceptable” bounds.

## V. Conclusion

Universal jurisdiction is a relatively young concept that appears counterintuitive to Asian governments and societies. It may very well not be in the nature of Asians to worry about what is going on in other countries. However, this does not mean that Asia should continue to ignore the principle altogether. Universal jurisdiction is here to stay, just like how international criminal law is already entrenched in the international legal order. Asia can and should play an important role in helping to write the rules of universal jurisdiction and international criminal law. This is the responsible way for the sake of itself and for the purpose of establishing a truly universal legal order free of impunity and atrocities.

Returning to the issue of slave boats, the European Union is exploring a ban on seafood imports from Thailand.<sup>68</sup> The ban may cost the Thai fishing industry some 575-730 million Euros in revenues each year.<sup>69</sup> There will be knock-on effects for the whole region. Putting aside all the talk about Western hegemony, should Asian states not also be doing something about problems going on in their own backyard?

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<sup>68</sup> AP, *EU probes illegal fishing, slave labor PIFSLBefore Thai Ruling*, 1 October 2015, available at <[news.yahoo.com/eu-threatens-taiwan-comoros-ban-over-illegal-fishing-115305116.html](http://news.yahoo.com/eu-threatens-taiwan-comoros-ban-over-illegal-fishing-115305116.html)>.

<sup>69</sup> *Ibid.*