

The Limits of Universal Jurisdiction in Indonesia: Constitutional Identity and Pancasila-Based Filtering

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Abstract

Amid ASEAN's institutional deadlock and the region's failure to address grave human rights violations such as the crisis in Myanmar, this study examines Indonesia's constitutional stance on universal jurisdiction. This research addresses a fundamental paradox: how a state fundamentally built upon the principle of humanity (Pancasila) can constitutionally justify restrictions on jurisdictional instruments designed to adjudicate crimes against humanity. Using a normative legal methodology with a comparative lens (Germany and Argentina), this research evaluates the legal reasoning behind Constitutional Court Decision No. 89/PUU-XX/2022. Rather than merely assessing the legal status of international customary law, the findings highlight how the Court utilised the doctrine of 'open legal policy' to reject the mandate of international jurisdiction in the interests of national stability and constitutional identity. Ultimately, this article offers a new conceptual framework for the Global South (developing countries), demonstrating how developing countries can exercise legitimate constitutional resistance to the extraterritorial reach of international criminal law whilst firmly upholding their domestic humanitarian commitments.

Keywords: constitutional sovereignty; international crimes; Global South; Pancasila; Indonesia; universal jurisdiction.

Abstrak

Di tengah kebuntuan institusional ASEAN dan kegagalan kawasan dalam menangani pelanggaran hak asasi manusia berat seperti krisis Myanmar, studi ini mencermati sikap konstitusional Indonesia terhadap yurisdiksi universal. Penelitian ini membahas sebuah paradoks mendasar: bagaimana sebuah negara yang secara fundamental dibangun di atas prinsip kemanusiaan (Pancasila) dapat secara konstitusional membenarkan pembatasan instrumen yurisdiksi yang dirancang untuk mengadili kejahatan terhadap kemanusiaan. Menggunakan metode yuridis normatif dengan lensa perbandingan (Jerman dan Argentina), riset ini mengevaluasi pertimbangan hukum di balik Putusan Mahkamah Konstitusi Nomor 89/PUU-XX/2022. Alih-alih sekadar menilai status hukum kebiasaan internasional, temuan penelitian ini menyoroti bagaimana Mahkamah menggunakan doktrin open legal policy sebagai instrumen untuk menolak mandat peradilan internasional demi stabilitas nasional dan identitas konstitusional. Pada akhirnya, artikel ini menawarkan kerangka konseptual baru bagi *Global South* (negara berkembang), yang menunjukkan bagaimana negara berkembang dapat menerapkan resistensi konstitusional yang sah terhadap jangkauan ekstrateritorial hukum pidana internasional dengan tetap mempertahankan komitmen kemanusiaan domestik mereka secara kokoh.

Kata Kunci: Global South; Indonesia; kedaulatan konstitusional; kejahatan internasional; Pancasila; yurisdiksi universal.

Introduction

The contemporary international legal order is confronted with a profound tension between global impunity for heinous international crimes and the territorial jurisdictional limits of sovereign states. Enforcement mechanisms frequently fall into paralysis when extraterritorial atrocities are perpetrated absent any traditional nexus or connecting factors. Within the Southeast Asian context, regional institutional deficiencies in mitigating gross human rights violations are epitomised by the multidimensional crisis in Myanmar. Indonesia is the foremost political and economic power in the region, and leadership within ASEAN is a critical test of international legal obligations amid growing scrutiny of human rights commitments in the developing discourse on universal jurisdiction.

The protracted conflict in Myanmar represents the most critical challenge confronting ASEAN in maintaining regional stability. Since the military coup on February 1, 2021, which ousted the civilian-led government of Aung San Suu Kyi, Myanmar has degenerated into a de facto civil war, inflicting widespread suffering upon the civilian population. According to reports issued by the Institute for Strategy and Policy-Myanmar, armed violence across various regions, including Sagaing, Magway, Bago, Chin, and Kayah, has displaced more than 1.6 million individuals.¹ Before these events, the Myanmar military regime was documented committing genocide against the Rohingya ethnic group in 2017. This event led to over 9,000 casualties and triggered a mass exodus of approximately one million refugees to neighbouring states, predominantly Bangladesh.²

The implications of this crisis extend far beyond the domestic sphere, directly impacting neighbouring states and the broader Southeast Asian region. The influx of refugees, systemic human rights violations, and the potential escalation of cross-border armed conflict have raised profound concerns regarding regional stability. ASEAN's diplomatic efforts under the Five-Point Consensus agreed upon in April 2021 were ineffective and produced no concrete results because of institutional deadlock.³ The military junta continues to defy international pressure, persisting in its brutal repression of both political opposition and civil society. In the midst of this impasse, there has been a

¹ Institute for Strategy and Policy Myanmar, "At Least 1,650,661 People Displaced by Conflict in the Sagaing, Magway, Bago, Chin and Kayah Regions," in Annisa Febrianti Putri Indrasari, Taufik Muhammad Ramadhan, and Prilla Marsingga, "Sumber Konflik Perang Sipil Myanmar Pasca Kudeta Militer Tahun 2021," *Journal of Integrative International Relations* 8, no. 2 (November 23, 2023): 98–114, <https://doi.org/10.15642/jiir.2023.8.2.98-114>.

² Md. Khalid Rahman and Md. Khaled Amin, "Rohingya Persecution in Myanmar and Thoughts on Repatriation: Evidence From Rohingya Refugee Camps in Bangladesh," *Indonesian Journal of International Law* 21, no. 4 (2024), art. 5, <https://doi.org/10.17304/ijil.vol21.4.1778>.

³ Jürgen Haacke, "Reassessing ASEAN's Five-Point Consensus: On Shifting Boundaries of Legitimate Involvement and a Contested Consensus," *Asian Politics & Policy* (2025), <https://doi.org/10.1111/aspp.70050>. see Nguyen Tri Dung and Ponka Tatiana Ivanovna, "ASEAN's Non-Interference Principle and the Rohingya Crisis: Implications for the Organization's Institutional Role in the Region," *Conflict Studies / Nota Bene* 2 (2025): 141–154, <https://doi.org/10.7256/2454-0617.2025.2.74862>.

resounding demand for international accountability regarding the crimes against humanity perpetrated by the Myanmar military junta. However, efforts to bring the perpetrators before the International Criminal Court (ICC) face severe impediments, given that Myanmar is not a state party to the Rome Statute.

The ICC's jurisdictional mechanism can only be triggered through a referral from the United Nations Security Council, a path that is practically unviable due to the perpetual threat of a veto from permanent members, such as China or Russia.⁴ This lack of an effective legal framework to prosecute extraterritorial perpetrators of gross human rights violations raises profound questions concerning the efficacy of the international legal order in eradicating impunity. The intricate conundrum regarding the efficacy and jurisdictional barriers of international tribunals is not confined to the regional level, but concurrently overshadows the resolution of various other large-scale global disputes.⁵ Ria Wulandari, this impasse in international law enforcement has catalysed a discourse on repositioning the very concept of jurisdiction. The term jurisdiction derives from the Latin *jurisdictio*, which comprises two words: *juris* and *dicto*. These words mean “*belonging to the law*” or “*lawful right*” and “*the act of speaking*” or “*declaration*”, respectively. Terminologically, jurisdiction is defined as power prescribed by law, or a form of legal authority that delineates a state's right and power to prescribe norms, enforce laws, and adjudicate sanctions. In international law, traditional jurisdiction is a direct corollary of the principle of state sovereignty, which grants exclusive rights within territorial boundaries.⁶

International law has engendered a radical extraterritorial expansion in the form of universal jurisdiction to terminate impunity for crimes against humanity, such as those perpetrated in Myanmar. This doctrine empowers any sovereign state to prosecute perpetrators of serious international crimes, irrespective of the *locus delicti*, the nationality of the offender or the victim, or any direct nexus.⁷ The extraordinary atrocities are deemed to violate the principle of *jus cogens*, the peremptory norms recognised by the international community as codified in Article 53 of the 1969 Vienna Convention on the Law of Treaties. *Jus cogens* is a non-derogable norm and the guardian of the international community's fundamental moral values.⁸

According to Kai Ambos, universal jurisdiction is the only form of state jurisdiction without a jurisdictional link between the prosecuting state and the

⁴ Ben Saul, “The ICC Pre-Trial Chamber Decision on Jurisdiction over the Situation in Myanmar,” *Australian Journal of International Affairs* 73, no. 1 (2019), <https://doi.org/10.1080/10357718.2018.1538316>.

⁵ Ria Wulandari, “Jurisdiction Issues of the International Court and the Effectiveness of ICJ’s Decision in the Russia-Ukraine Dispute Resolution,” *Nurani: Jurnal Kajian Syari’ah Dan Masyarakat* 22, no. 2 (2022): 343–50, <https://doi.org/10.19109/nurani.v22i2.13890>.

⁶ Malcolm N Shaw, *International Law*, 9th ed. (Cambridge: Cambridge University Press, 2021), 582–85.

⁷ Kai Ambos, *Treatise on International Criminal Law: Volume III: International Criminal Procedure* (Oxford: Oxford University Press, 2016), 112–115.

⁸ United Nations, “Vienna Convention on the Law of Treaties,” 1969.

crime in question.⁹ Under this doctrine, the prosecuting state acts as a collective representative organ of all mankind to enforce the principle of *aut dedere aut judicare* (*extradite or prosecute*), as enshrined in the 1949 Geneva Conventions, the 1948 Genocide Convention, and the 1984 Convention Against Torture. However, this limitless expansion has drawn sharp criticism for encroaching upon the post-Westphalian principle of non-intervention. Antonio Cassese cautioned that, without stringent limits, universal jurisdiction was highly susceptible to becoming an instrument for the politicisation of justice, thereby undermining the stability of international relations.¹⁰ J.G. Starke considered universal jurisdiction a doctrine subject to strict limitation rather than a basis for prosecuting international crimes.¹¹ This concept was historically confined to piracy, the oldest documented security threat, recorded since 1350 BCE off the coast of North Africa, because it occurred on the high seas, a realm beyond any nation's exclusive sovereignty.

The theoretical tension between the demands for universal justice and the protection of state sovereignty triggers a fundamental legal paradox in Indonesia. Although the state actively promotes regional humanitarian solutions, its domestic judicial institutions remain insulated from the doctrine of universality. This paradox crystallised when several civil society groups petitioned the Constitutional Court to review Law Number 26 of 2000 on Human Rights Courts in Case Number 89/PUU-XX/2022. The petitioners sought to expand the jurisdiction of Indonesian human rights courts to prosecute foreign nationals (*warga negara asing*) under the principle of universal jurisdiction. However, the Constitutional Court rejected the petition entirely, holding that the expansion lacks a valid constitutional basis in Indonesia. For Indonesia, this debate becomes increasingly intricate when evaluated against the state's ideological framework. Pancasila, particularly the Second Principle (Just and Civilised Humanity), functions as Indonesia's Constitutional Identity or National Grundnorm.¹² This National Grundnorm is consistent with the protection of universal humanity. As a mixed legal system, Indonesia must selectively integrate international norms to avoid infringing national sovereignty and the rigid principle of legality (*nullum crimen, nulla poena sine lege*) inherent in domestic criminal law. Indonesia has not ratified the 1998 Rome Statute, and applying universal jurisdiction without an explicit statutory basis creates diplomatic friction and jurisdictional overlap.

The boundaries of universal jurisdiction have been examined in several previous studies. Claus Kreß showed that universal jurisdiction must be

⁹ Kai Ambos, "The Jurisdictional Connectivity of Universal Jurisdiction," *International Criminal Law Review* 23, no. 4 (2023): 511–518. <https://doi.org/10.1163/15718123-bja10145>.

¹⁰ Antonio Cassese, *Cassese's International Criminal Law*, edisi ke-3, direvisi oleh Gaeta et al. (Oxford: Oxford University Press, 2013), 271–274.

¹¹ J.G. Starke, *Introduction to International Law*, edisi ke-10 (London: Butterworths, 1989), 241.

¹² Susi Dwi Harijanti et al., "Constitutional Identity and Judicial Review in Indonesia: Navigating National Values and Global Norms," *Constitutional Review* 10, no. 1 (2024): 75–82. <https://doi.org/10.31078/consrev1013>

conceptualised as a subsidiary mechanism rather than a substitute for international criminal tribunals.¹³ In the field of maritime crimes, Septi Dyah Tirtawati and Joko Setiyono examined the application of universal jurisdiction limited to piracy on the high seas.¹⁴ Meanwhile, Munif Ashri showed a legislative vacuum (*lacuna iuris*) in this extraterritorial codification, both at the international level and in Indonesian domestic law.¹⁵

This study's fundamental novelty distinguishes it from existing scholarship. Previous studies were often dominated by Eurocentric Western perspectives or merely mapped regulatory lacunae mechanically. No study has interconnected universal jurisdiction with the discourse on Pancasila-based Constitutional Identity, alongside a critical analysis of the Constitutional Court's legal reasoning in Decision Number 89/PUU-XX/2022. This study filled that scholarly void by offering a Global South perspective on how Indonesia deployed Constitutional Identity as a legitimate shield to circumscribe the extraterritorial reach of international law in the name of national interest, without dismantling domestic humanitarian commitments. Positioned at the intersection of international humanitarian obligations and constitutional sovereignty, this study argued that while a wholesale adoption of universal jurisdiction was untenable due to strict constitutional constraints, an absolute rejection would equally undermine Indonesia's commitment to global justice. Therefore, this study posited a "middle-ground" framework: the conditional and proportional application of universal jurisdiction, strictly filtered through Indonesia's constitutional identity. Based on this conceptual stance, the following questions were formulated to guide the study: (1) What is the normative status and contestation of the principle of universal jurisdiction under contemporary international law? (2) How does the Constitutional Court Decision Number 89/PUU-XX/2022 define the constitutional boundaries for prosecuting extraterritorial international crimes within the Indonesian criminal justice system? (3) How can Indonesia construct a proportional, conditional model for universal jurisdiction within Law Number 26 of 2000 that balances international accountability with national interests?

Consistent with the questions, this study aimed to analyse the doctrinal recognition of universal jurisdiction, evaluate the constitutional limits under the Constitutional Court's open legal policy doctrine, and formulate a structured legislative framework for its conditional adoption. This study contributes to existing literature by providing a conceptual offering to the Global South legal

¹³ Claus Kieß, "Universal Jurisdiction over International Crimes and the Institut de Droit International," *Journal of International Criminal Justice* 4, no. 3 (2006): 561–585. <https://doi.org/10.1093/jicj/mql032>

¹⁴ Septi Dyah Tirtawati dan Joko Setiyono, "Menilik Penerapan Yurisdiksi Universal Negara Terhadap Kejahatan Perompakan di Laut Lepas," *Jurnal Al-Daulah* 10, no. 2 (2021): 145–150. <https://doi.org/10.24252/ad.v10i2.25410>

¹⁵ Munif Ashri, "Kekosongan Hukum Pengaturan Yurisdiksi Universal Atas Kejahatan Serius Internasional" (Tesis, Universitas Gadjah Mada, 2022).

discourse, showing how a state can navigate the pressure of global accountability without sacrificing its constitutional sovereignty.

For structure and clarity, this study is organised according to the following roadmap. Section 2 explores the normative status and contestations surrounding the principle of universal jurisdiction in international law. Section 3 critically dissects the legal reasoning and implications of the Constitutional Court Decision Number 89/PUU-XX/2022. Section 4 discusses the reconciliation between the enforcement of international humanitarian law and Pancasila as Indonesia's Constitutional Identity. Section 5 synthesises the conclusions and offers prospective legal policy recommendations.

Methods

A normative-doctrinal legal study design was adopted with an analytical-prescriptive method to examine the resistance and systemic boundaries of implementing universal jurisdiction in Indonesia.¹⁶ This method was used to scrutinize the connection and coherence between extraterritorial international legal norms and the substance of domestic constitutional law in Indonesia. To comprehensively address the questions, this study synthesised four distinct legal methods,

Firstly, the Statute Method was used to systematically examine domestic regulations, primarily Law Number 26 of 2000 on Human Rights Courts, alongside relevant international legal instruments, including the 1948 Genocide Convention, the 1969 Vienna Convention, and the 1998 Rome Statute. *Secondly*, the Conceptual Method was used to dissect substantive legal doctrines, namely *jus cogens*, *aut dedere aut judicare*, the Westphalian concept of sovereignty, and the theory of Constitutional Identity. *Thirdly*, the Case Method was undertaken through an in-depth analysis of the ratio decidendi or the core legal reasoning of the judges, in the Constitutional Court Decision Number 89/PUU-XX/2022. *Fourthly*, the *Comparative Method*. Applied restrictively to examine implementation models of universal jurisdiction in selected modern judicial systems, specifically Germany and Argentina, as benchmarks for normative evaluation and synchronisation for Indonesia. The evaluation was systematic, based on specific analytical parameters rather than superficial juxtaposition. The comparison variables specifically included: (a) Substantive Scope: the precise types of international crimes codified under the domestic universal jurisdiction frameworks. (b) Procedural Triggers: the strict requirement of the perpetrator's physical presence (*forum deprehensionis*) versus the admissibility of in absentia investigations. (c) Prosecutorial Discretion: the role of judicial and prosecutorial authorities along with oversight mechanisms implemented to prevent the political abuse of universal jurisdiction. (d) Subsidiarity Frameworks: how these states navigated the principle of subsidiarity to respect and protect foreign state sovereignty.

¹⁶ Peter Mahmud Marzuki, *Penelitian Hukum*: Edisi Revisi (Jakarta: Kencana, 2021), 35–40

The comparative analysis was grounded in distinct analytical parameters rather than a purely descriptive narrative, and the evaluation was structured around clear criteria to formulate a balanced model for Indonesia. This study used both primary and secondary legal materials. Primary legal sources included judicial decisions and international conventions, while secondary sources included reputable international and national scientific journals, legal textbooks, and official institutional reports. These legal materials were gathered through documentary studies and analysed qualitatively using systematic and teleological interpretation methods.¹⁷ The legal reasoning process was constructed deductively, drawing conclusions from general principles of international law and applying general principles to factual scenarios and specific constitutional limitations in Indonesia, thereby generating a prescriptive and contextual legal construction.

Results and Discussion

The Status and Recognition of the Principle of Universal Jurisdiction in International Law: Navigating Normative and Doctrinal Fragmentation

The principle of universal jurisdiction resides at the epicentre of the most fundamental theoretical discourse within the sphere of international criminal law. Universal jurisdiction was the structural antithesis of classical jurisdictional doctrines predicated on territoriality and nationality, allowing domestic judiciaries to adjudicate the most egregious international crimes without a concrete jurisdictional connection. However, rather than converging into a coherent normative framework, contemporary global dynamics manifested an acute legal fragmentation, characterised by a persistent tension between the expansion of universal moral imperatives and state sovereignty-based retrenchment. This fragmentation was rooted in the structural tension between positive international legal instruments and the peremptory nature of *jus cogens* norms. For instance, when the international community drafted the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), a sharp clash developed, one that remains crystallised to this day. The prohibition of genocide was universally recognised as a peremptory norm (*jus cogens*), generating *erga omnes* obligations to prosecute perpetrators.¹⁸ However, Article VI of the Genocide Convention explicitly restricted jurisdiction to: "...a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction..."¹⁹

¹⁷ Johnny Ibrahim, *Teori dan Metodologi Penelitian Hukum Normatif* (Malang: Bayumedia Publishing, 2018), 210.

¹⁸ M. Cherif Bassiouni, "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice," *Virginia Journal of International Law* 42, no. 1 (2021): 81–85. <https://doi.org/10.2139/ssrn.284412>

¹⁹ Konvensi tentang Pencegahan dan Penghukuman Kejahatan Genosida, 9 Desember 1948, United Nations Treaty Series, vol. 78, hlm. 277, Pasal VI.

The inherent contradiction, where the nature of the crime was universal, but the enforcement mechanism was territorially restricted by treaty, served as evidence that international law operated in a state of ambiguity since its inception. This uncertainty helped explain why state practice fractured into two extreme poles, as shown by the juxtaposition of *Attorney-General of Israel v. Adolf Eichmann* and the *Arrest Warrant of 11 April 2000 (DRC v. Belgium)* case. In the *Eichmann* case, the domestic court unilaterally expanded its jurisdiction, arguing that the authority to prosecute genocide derived directly from customary international law, which held hierarchical primacy over the formal treaty text.²⁰ In the *Arrest Warrant* case, the International Court of Justice (ICJ) adopted a restrictive method, prioritising the classical principle of international law, namely *the immunity ratione personae* of high-ranking state officials, over assertions of universal accountability.²¹ This cautious stance confirmed that the international community did not issue a 'blank check' for the exercise of universal jurisdiction, which could undermine the stability of global diplomatic relations.

The dynamics of enforcing universal jurisdiction at the national level did not advance linearly; instead, they experienced a phenomenon of jurisdictional retrenchment. Global North states, such as Germany, France, and Sweden, successfully prosecuted war criminals from the Syrian and Rwandan conflicts, primarily because the suspects were physically present within their territories.²² However, this success was highly selective and significantly contingent upon the foreign policy calculations of individual states. The empirical experiences of Spain and Belgium offered a cautionary tale. In this case, both nations were compelled to amend and narrow universal jurisdiction statutes following immense political pressure from major powers.²³ This political reality supports Maximo Langer's thesis that universal jurisdiction in international practice was driven not by an automated positive legal obligation, but by asymmetrical diplomatic calculations.²⁴ Consequently, the Indonesian Constitutional Court's cautious and restrictive approach in Decision Number 89/PUU-XX/2022 should not be seen as domestic legal backwardness. Indonesia's prudence had a solid theoretical foundation in international law because the global order was fragmented and lacked consensus on expanding universal jurisdiction beyond traditional crimes

²⁰ *Attorney-General of the Government of Israel v. Adolf Eichmann*, Supreme Court of Israel, Judgment of 29 May 1962, International Law Reports 36 (1968): 277–280.

²¹ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, hlm. 3, para. 58–61.

²² Julia Geneuss, "Fostering Global Accountability: The German Approach to Universal Jurisdiction over Syrian War Crimes," *Journal of International Criminal Justice* 22, no. 2 (2024): 315–320. <https://doi.org/10.1093/jicj/mqae011>

²³ Naomi Roht-Arriaza, "The Legislative Retrenchment of Universal Jurisdiction in Spain and Its Implications for Global Justice," *Leiden Journal of International Law* 35, no. 1 (2022): 142–148. <https://doi.org/10.1017/S0922156521000624>.

²⁴ Maximo Langer, "The Diplomacy of Universal Jurisdiction: The Political Economy of Extraterritorial Prosecutions," *American Journal of International Law* 115, no. 4 (2021): 611–615. <https://doi.org/10.1017/ajil.2021.49>.

such as piracy (*hostis humani generis*) on the high seas, a doctrine recognised for centuries.

Constitutional Analysis of the Constitutional Court Decision Number 89/PUU-XX/2022: Reinterpreting the Pancasila Paradox and Justifying a Conditional Adoption Model

The ideological and normative contestation surrounding universal jurisdiction in Indonesia found the constitutional battleground in the Constitutional Court (*Mahkamah Konstitusi*) Decision Number 89/PUU-XX/2022. To chart a coherent legislative path forward, this study explicitly established the analytical position by offering a restrictive but dynamic reinterpretation of the Court's ruling. Rather than viewing the judgment as an absolute, eternal constitutional prohibition against universal jurisdiction, this study argued that the Court's reliance on the open legal policy doctrine served as a constitutional handoff to the legislature. To bridge the apparent friction between the Court's cautious stance and the recommendation to amend Law Number 26 of 2000, it was imperative to first untangle the philosophical paradox within Indonesia's *Grundnorm-Pancasila*, which significantly influenced the Court's ratio decidendi.

The constitutional gridlock over universal jurisdiction emanated from a fundamental paradox rooted within the Second Principle of Pancasila, which states "Just and Civilised Humanity" (*Kemanusiaan yang Adil dan Beradab*). Civil society groups advocating for an expansive interpretation invoke the mandate of "Just Humanity" (*Adil*). According to proponents, the principle was a cosmopolitan moral imperative for Indonesia to eradicate impunity for gross human rights violations regardless of geographical boundaries, and to act as an active global humanitarian actor. Conversely, a restrictive interpretation, which resonated with the Constitutional Court, showed the mandate of "Civilised Humanity" (*Beradab*). Within the framework of international relations, civility was construed as an absolute respect for state sovereignty, territorial integrity, and the principle of non-intervention. Under this restrictive view, the unilateral exercise of universal jurisdiction absent a clear international treaty connection was rejected as a form of "judicial imperialism", an uncivilised overreach of domestic judicial power over foreign sovereign acts. This philosophical tension manifested in three systematic points of contention between the Constitutional Court's strict legal reasoning and developments in contemporary international law, which this study addressed to justify its proposed legislative amendment.

First, on State Sovereignty and Non-Intervention, the Constitutional Court reasoned that expanding the jurisdiction of Law Number 26 of 2000 to cover crimes committed abroad by non-citizens would violate other nations' sovereignty and breach the principle of good neighbourliness. This study acknowledged the risk but argued that the Court evaluated an absolute model of universal jurisdiction. However, developments in modern state practice showed that sovereignty was not compromised when a state adopted a subsidiarity

framework. This implied that Indonesian courts would only intervene as a last resort when the territorial state or international tribunals were proven unable or unwilling (*genuine inability or unwillingness*) to prosecute.

Second, on the Principle of Legality (*Asas Legalitas*), the Court raised concerns about the ambiguity of prosecuting extraterritorial crimes without clear statutory definitions, which could violate Article 28I (1) of the 1945 Constitution. This study counter-argued that the precise constitutional barrier justified the urgency of a legislative amendment. Incorporating the principle directly into Law Number 26 of 2000 through explicit statutory codification, rather than depending on abstract customary international law, satisfied the requirement of *lex scripta* and *lex certa*, thereby neutralising any conflict with the domestic principle of legality.

Third, regarding Judicial Competence and Institutional Readiness, the Court showed the pragmatic limitations of the Indonesian criminal justice system, including challenges in evidence collection, witness protection, and foreign-language barriers in international crimes. Despite the structural validity, these institutional limitations should not be weaponised as permanent normative barriers to block judicial evolution. Therefore, this study posited that the proposed amendment to Law Number 26 of 2000 remained highly relevant and constitutionally justifiable because it did not champion the absolute universal jurisdiction rejected by the Court. Conditional Universal Jurisdiction (*Yurisdiksi Universal Bersyarat*) was proposed as an alternative model. This model followed the Court's caution by implementing narrow procedural safeguards. It required the perpetrator's physical presence on Indonesian soil (*forum deprehensionis*), mandated strict adherence to the principle of subsidiarity, and required executive-level prosecutorial screening to safeguard national diplomatic interests. The proposed legislative reform aligned with the Court's declaration that jurisdiction remained an open legal policy, and the conditional model fit within Indonesia's prevailing constitutional framework.

A rigorous exploration of the ratio decidendi and the philosophy of the open legal policy

In the core legal reasoning (*ratio decidendi*) of Decision Number 89/PUU-XX/2022, the Constitutional Court declined to engage in judicial activism to expand Article 5 of Law Number 26 of 2000, thereby strictly adhering to the active personality principle (*extending only to Indonesian citizens abroad*).²⁵ Philosophically, the Court positioned the open legal policy doctrine as a constitutional defence mechanism.

The Court argued that defining extraterritorial criminal jurisdiction entailed highly intricate calculations of national interest that cross-cut the domains of law, diplomacy, security, and state budgetary capacity. The Constitution did not

²⁵ Indonesia, Undang-Undang Nomor 26 Tahun 2000 tentang Pengadilan Hak Asasi Manusia, Lembaran Negara Republik Indonesia Tahun 2000 Nomor 208, Pasal 5.

impose a rigid mandate either to adopt or prohibit universal jurisdiction. Consequently, the choice to maintain a restrictive method, depending on nationality, was constitutionally valid and constituted the exclusive prerogative of the legislature (*the House of Representatives and the President*), rather than falling within the purview of the Court's adjudicative authority.²⁶

Institutional readiness in the developing nation (Global South)

Within a broader discourse, the localised narrative regarding the technical limitations of the Indonesian judiciary is representative of institutional readiness challenges among developing nations (*the Global South*). The enforcement of universal jurisdiction demanded highly costly and complex institutional pre-requisites, ranging from the capability to conduct cross-border investigations and provide international witness protection to mastery of international evidence law and the availability of certified foreign language interpreters.

A hasty implementation of universal jurisdiction, absent mature institutional readiness, inevitably engendered asymmetric judicial overreach. The domestic judiciary is highly vulnerable to exploitation by dominant international actors for political expedience, rather than serving as an instrument for enforcing global justice. Consequently, this disruption had the potential to threaten security and stability and jeopardise Indonesia's national economic interests amid regional dynamics fraught with geopolitical friction. The Constitutional Court's stance aligned with the jurisprudential characteristics of Global South states, which tend to prioritise constitutional sovereignty as a shield against disproportionate external intervention.²⁷

Comparative Review: the constitutional anatomy of Germany, Argentina, and Indonesia

A comparative analysis of each country's constitutional architecture, judicial interpretive methods, and institutional readiness is required to understand why the Indonesian legal system rejected universal jurisdiction while other nations embraced it. The fundamental differences among Germany, Argentina, and Indonesia showed that the successful implementation of universal jurisdiction depended heavily on how a state designs the relationship between international law and its domestic legal order.

Germany represented a model of international monism that was highly receptive to expanding extraterritorial jurisdiction. The German legal framework rested upon the stipulation of Article 25 of the *Grundgesetz* (German Basic Law) that general rules of international law formed an integral part of federal law and

²⁶ Mahkamah Konstitusi Republik Indonesia, Putusan Nomor 89/PUU-XX/2022, 23 April 2023, hlm. 112–115.

²⁷ Antony Anghie, "The Global South and International Law: Contemporary Challenges in Sovereignty and Human Rights," *Third World Quarterly* 46, no. 2 (2025): 412–415. <https://doi.org/10.1080/01436597.2024.2319082>.

took precedence over domestic statutes.²⁸ This constitutional foundation enabled Germany to comprehensively incorporate the *Völkerstrafgesetzbuch* (VStGB) or the Code of Crimes Against International Law. In practice, German courts used an internationalist-monistic interpretive method that connected national law directly to developments in the Rome Statute. To prevent judicial overload, Germany implemented stringent procedural filters through Section 153f of the StPO (German Code of Criminal Procedure). This clause granted absolute discretion to the Federal Prosecutor General (*Generalbundesanwalt*) to terminate proceedings when the suspect was not physically present within German territory, and no logical physical nexus existed. This flexibility was strongly supported by institutional readiness in the form of a specialised investigative unit for serious international crimes (*Zentralstelle für Völkerstrafrecht*).

In contrast, Argentina adopted universal jurisdiction through a more aggressive constitutional method shaped by its domestic history. Article 118 of the Constitución de la Nación Argentina explicitly mandated national courts to adjudicate crimes committed outside the state's territorial boundaries when the act violated international law (*delitos contra el derecho de gentes*).²⁹ Argentina's judicial interpretive method was extraterritorial and aggressive, born in response to, and as an instrument of, transitional justice following the collapse of the domestic military dictatorship.

Operationally, Argentina's case-filtering mechanism was initially highly permissive before the doctrine of subsidiarity strictly circumscribed it. Under this limitation, Argentine courts were positioned as a mechanism of last resort, activated only when the judicial system of the locus state was proven non-functional. Structurally, this doctrine was implemented by investigating magistrates who took a proactive role in tracking violators of international law, as reflected in the extraterritorial investigation into the Rohingya humanitarian crisis in Myanmar. In contrast to the German and Argentine models, Indonesia's legal position was founded on a different constitutional foundation. Governed by Article 1 paragraph (3) and Article 11 of the 1945 Constitution, the domestic legal order operated within a mixed-dualism framework. In the context of universal jurisdiction, this framework was operationalised as a rigid constitutional gatekeeper. Indonesia ideologically embraced global humanitarian principles in the constitutional preamble. The mixed-dualism framework made clear that international norms were non-self-executing and required formal legislative transformation into positive law before domestic courts could apply or adjudicate them directly. This created a severe systemic barrier for universal jurisdiction, which predominantly thrives on customary international law and jus cogens norms. Under this framework, absent an explicit domestic statute, international criminal law remains legally inert and unenforceable within the Indonesian criminal justice system.

²⁸ Jerman, *Grundgesetz für die Bundesrepublik Deutschland* [Hukum Dasar Federasi Jerman], Pasal 25.

²⁹ Argentina, *Constitución de la Nación Argentina* [Konstitusi Nasional Argentina], Pasal 118.

This study observed a profound systemic conflict between the structural framework and the Constitutional Court's judicial practice. In Indonesian constitutional practice, the Court systematically weaponised the mixed-dualism framework as a normative shield. In Decision Number 89/PUU-XX/2022, the Court used dualistic hurdles not just as a neutral rule of recognition, but as a constitutional alibi to justify the state's or government's ongoing delays and failures to fulfil its international human rights obligations. By prioritising state-sovereignty-based retrenchment and hiding behind the open legal policy doctrine, the Court's legal reasoning essentially allowed the state to evade its *erga omnes* obligations to combat impunity for extraordinary crimes, converting a procedural dualist doctrine into a substantive shield against international accountability.³⁰

Germany and Argentina adopted elastic procedural filtering instruments within procedural laws, including Germany's Section 153f StPO and Argentina's operationalisation of the subsidiarity doctrine, while Indonesia enforced absolute and closed procedural limitations. The absence of any codification of universal jurisdiction within Law Number 26 of 2000 on Human Rights Courts functions as a legislative barrier that automatically blocks any extraterritorial prosecution of foreign subjects. This normative hurdle was further compounded by institutional realities, as Indonesia currently lacked a specialised prosecutorial unit or dedicated judicial infrastructure with the expertise and competence to apply international evidentiary standards in extraterritorial criminal matters. Institutional deficiencies were not a permanent justification for inaction; an urgent legislative mandate was the construction of a procedural framework to implement a conditional model of universal jurisdiction. Through this comparative narrative, Indonesia's reluctance to adopt universal jurisdiction did not strictly reflect an abdication of human rights, but rather the logical consequence of the Constitution's structural characteristics, which demanded formal positive harmonisation before external norms could be internalised. Considering the asymmetries of international law and the premature state of domestic institutional readiness, this study concluded that relying on the restrictive method selected by the Indonesian Constitutional Court as a permanent stance was insufficient. A proportional stance requires shifting from absolute dualism to a conditional adoption model that insulates national jurisdictional sovereignty from external intervention without isolating Indonesia from its global humanitarian commitments.

A Prescriptive Model for the Adoption of Universal Jurisdiction within Law Number 26 of 2000: A Global South Legal Reconciliation

The formulation of legal policy (*rechtspolitiek*) on the urgency of adopting universal jurisdiction into Law Number 26 of 2000 on Human Rights Courts must not be trapped in a binary dichotomy of absolute rejection or naive

³⁰ I Dewa Gede Palguna and Agung Wardana, "Pragmatic Monism: The Practice of the Indonesian Constitutional Court in Engaging with International Law," *Asian Journal of International Law* 14, no. 2 (2024): 404–424, <https://doi.org/10.1017/S2044251323000723>.

acceptance. As a developing nation (Global South) currently consolidating its legal system, Indonesia requires a transitional model. This model must respond to the demands of global humanitarian accountability without sacrificing domestic stability and its Constitutional Identity.

Exploiting the philosophical ambiguity of Pancasila: between cosmopolitanism and sovereignty

The theoretical novelty of Indonesia's legal articulation resides within the inherent ambivalence of the Second Principle of Pancasila: "Just and Civilised Humanity." Universal jurisdiction created profound conceptual tension within the constitutional philosophy. *The Dimension of "Just Humanity"* Hermeneutically imposed a universal moral obligation upon Indonesia to act as an agent of global justice. From this vantage point, justice must not be circumscribed by geopolitical boundaries. Consequently, when large-scale humanitarian tragedies, such as the genocide within Myanmar's multidimensional crisis, occur, an ethical summons gains urgency for Indonesia to exercise responsible sovereignty. This foundational sovereignty must not be permitted to transform into a safe haven that shields perpetrators of international crimes from the reach of global law. *The Dimension of "Civilised Humanity"*. This dimension functioned as an instrument of sovereign restraint. In contemporary international law, civilisation was measured by a state's compliance with the principle of *par in parem non habet imperium* (*an equal has no power over an equal*). Therefore, unilateral expansion of domestic jurisdiction over foreign nationals for extraterritorial offences, absent a robust legal nexus, was deemed to violate the dignity of being "civilised". This action no longer reflects just law enforcement; instead, it infringes the principles of non-intervention and global sovereign equality. To reconcile this Pancasila paradox, Indonesia could not adopt an absolute model of universal jurisdiction. The most rational alternative was to formulate a Prescriptive Model of Conditional Universal Jurisdiction as an exceptional policy tool.

Reframing structural challenges: from local constraints toward institutional readiness

The shortage of judges and the acute case backlog in Indonesia cannot be viewed as trivial internal technical issues. In international legal scholarship, these problems served as empirical evidence of deficient Institutional Readiness and the heightened risk of the Over-extension Problem, both common in developing nations. Consequently, data from the Supreme Court suggesting a deficit of thousands of judges across the three primary judicial branches was not just an administrative oversight, but a serious structural indicator.³¹ Compelling Indonesian courts, despite continued hyper-formality and high caseloads, to adjudicate extraterritorial international crimes was counterproductive. Procedural incapacity

³¹ Mahkamah Agung Republik Indonesia, "Laporan Tahunan Mahkamah Agung Tahun 2024" (Jakarta: Mahkamah Agung, 2025), 142–145.

in untangling the complexities of international cases, compounded by the intricacies of cross-border evidence gathering and the total absence of a specialised investigative unit equivalent to the European Union's Genocide Network, will degrade the legitimacy and credibility of domestic judicial authorities before the international community. Before Indonesia activates extraterritorial jurisdiction, it must prioritise reinforcing the judiciary's internal capacity through mutual legal assistance (MLA) mechanisms and extradition as the primary layer of legal enforcement.³²

The legal architecture of a conditional universal jurisdiction model for Indonesia

The legislature needs to insert a narrowly tailored exception clause to reform Law Number 26 of 2000 without dismantling the rigid principle of legality (*nullum crimen, nulla poena sine lege*). This prescriptive model must mandate four strict cumulative requirements before an Indonesian court can assert jurisdiction over a foreign national, namely: *The Principle of Actual Presence (Forum Deprehensionis/ Presence of the Suspect)*. The Indonesian Human Rights Court shall have jurisdiction only when the suspect is physically present within the territorial boundaries of the Republic of Indonesia. This requirement is adapted from the Dutch International Crimes Act 2003 to prevent speculative and politically motivated in absentia prosecutions.³³ *Absolute Subsidiarity and Complementarity*. This jurisdiction can only be activated as a mechanism of last resort, specifically when the state where the crime occurred (*locus delicti*) or the state of the perpetrator's nationality (active personality) is proven to be demonstrably unwilling or unable to prosecute, and the mechanisms of the International Criminal Court (ICC) have reached a deadlock due to global geopolitical impediments.³⁴ *Specification of Core Crimes Only*. The scope of absolute competence must be strictly restricted to the most serious crimes under general international law, namely genocide, crimes against humanity, and war crimes, the enforcement of which derives directly from *jus cogens* norms.³⁵ *The Filter of Prosecutorial Discretion (Prosecutorial Filters)*. Adapting the successful filtering system in the German *Völkerstrafgesetzbuch* (VStGB), Indonesia's Attorney General needs robust prosecutorial discretion. This authority functions as a judicial safety valve to reject or terminate extraterritorial cases deemed misaligned with domestic public interest or posing a risk to the stability of Indonesia's foreign policy, which is anchored in the "independent and active" principle.

³² Nacem AllahRakha, "Transnational Legal Cooperation and the Challenges of Extraterritorial Jurisdiction," *International Criminal Law Review* 22, no. 5 (2022): 890–95, <https://doi.org/10.1163/15718123-bja10114>.

³³ Belanda, *International Crimes Act 2003* (Wet internationale misdrijven), Staatsblad 2003, 270, Pasal 2(1)(a).

³⁴ Carsten Stahn, *A Critical Introduction to International Criminal Law*, edisi ke-2 (Cambridge: Cambridge University Press, 2024), 118–122.

³⁵ M. Cherif Bassiouni, *The Shifting Paradigms of International Criminal Law* (Oxford: Oxford University Press, 2018), 245–249

Mitigating asymmetric lawfare through international transparency

Implementing the conditional model safeguards against the perils of asymmetric lawfare, in which dominant global actors use international legal processes as instruments of political pressure to delegitimise other states' sovereignty.³⁶ Belgium's 2003 experience, when its judicial system suffered temporary paralysis from an influx of politically motivated complaints against world leaders, serves as a cautionary tale for Indonesia.³⁷ Furthermore, extraterritorial law enforcement inherently involves significant procedural complexity. As Naeem AllahRakha reminds us, asserting jurisdiction over cross-border crimes continually confronts the dilemma of fair procedural enforcement and protecting the defendant's rights (*due process challenges*). These challenges include intricate regulatory synchronisation, cross-jurisdictional evidence gathering, and the fulfilment of transparent justice standards that frequently collide with the boundaries of another state's legal sovereignty.³⁸

Indonesia's prescriptive model must integrate impartial trial standards as mandated by Article 14 of the International Covenant on Civil and Political Rights (ICCPR).³⁹ Any exercise of universal jurisdiction must depend on legitimate and transparent international cooperation, achieved by synchronising MLA treaty networks with INTERPOL and Eurojust.⁴⁰ Under this legal architecture, reforming Law Number 26 of 2000 will not alter the fundamental characteristics of the domestic legal order that respects Westphalian sovereignty. Indonesia's legal policy (*rechtspolitiek*) reflects legal maturation, with Pancasila serving as a filter for global intervention and ensuring Indonesia's civil contribution to enforcing universal humanitarian justice.

Conclusion

This study shows that Indonesia's refusal to expansively adopt universal jurisdiction does not constitute an abdication of global justice. It is a strategic act of "*constitutional balancing*", safeguarding national sovereignty while concurrently upholding the humanitarian values enshrined within the Second Principle of Pancasila. Anchored in the paradigm of *Third World Approaches to International Law* (TWAIL) and post-colonial constitutionalism, this study offers a novel

³⁶ Chantal Meloni, "Lawfare or Global Justice? The Strategic Use of Universal Jurisdiction in Contemporary Conflicts," *Journal of International Criminal Justice* 21, no. 1 (2023): 55–62, <https://doi.org/10.1093/jicj/mqad004>.

³⁷ Luc Reydam, "The Rise and Fall of Universal Jurisdiction in Belgium," *Leiden Journal of International Law* 18, no. 1 (2005): 67–71, <https://doi.org/10.1017/S092215650400242X>.

³⁸ Naeem AllahRakha, "Cross-Border E-Crimes: Jurisdiction and Due Process Challenges," *ADLIYA: Jurnal Hukum dan Kemanusiaan* 18, no. 2 (2024): 160–162, <https://journal.uinsgd.ac.id/index.php/adliya/article/view/38633/pdf>.

³⁹ International Covenant on Civil and Political Rights (ICCPR), adopted Dec. 16, 1966, United Nations Treaty Series, vol. 999, p. 171, Art. 14.

⁴⁰ Beth Van Schaack, "National Courts and the Enforcement of Jus Cogens Norms: A Procedural Assessment," *Harvard International Law Journal* 64, no. 2 (2023): 310–315, <https://doi.org/10.2139/ssrn.4391204>.

contribution to international legal theory by showing how a Global South nation uses the domestic *Grundnorm* to resist hegemonic pressures.

The constitutional shield manifests subaltern legal agency rather than isolationism, and internalisation of international humanitarian norms does not depend on crude adoption or aggressive judicial activism. However, these universal values must be selectively filtered through the lens of a Pancasila-based Constitutional Identity to counter the structural asymmetries of international criminal law, which has historically been weaponised as a tool of judicial imperialism against developing states. This study's novelty lies in reaffirming that a state's Constitutional Identity provides a legitimate foundation for decolonising international legal discourses and asserting a pluriversal jurisdictional stance on the global stage.

Within the regional context, Indonesia's choice to use a restrictive method pursuant to the Constitutional Court Decision Number 89/PUU-XX/2022 does not imply an abdication of humanitarian responsibility regarding the multidimensional crisis in Myanmar. Indonesia's proposed resolution is not a unilateral jurisdictional action by domestic courts, which are highly susceptible to politicisation and lawfare, but rather a reinforcement of the complementarity principle and legitimate international cooperation mechanisms. The country channelled its humanitarian responsibility through multilateral avenues and measured law enforcement diplomacy. The implications for the ASEAN region are clear: regional human rights enforcement rests on treaty-based cooperation rather than extraterritorial judicial activism, which undermines Westphalian sovereignty and the principle of non-intervention enshrined in the ASEAN Charter.

Recommendations

To translate the Constitutional Court's decision and global demands into a harmonious positive legal order, this study offers three sharp and concrete policy recommendations. *Limited Amendment to Law Number 26 of 2000 on Human Rights Courts*. The legislature (*the House of Representatives and the President*) should insert a conditional universal jurisdiction clause. This amendment must mandate the suspect's physical presence (*presence of the suspect/forum deprehensionis*) within the territorial boundaries of the Republic of Indonesia as an absolute prerequisite before an investigative process can commence. This requirement safeguards constitutional boundaries while anticipating the realities of extra-territorial criminal law enforcement limitations.

Synchronisation of the Open Legal Policy Doctrine with the Aut Dedere Aut Judicare Principle. The Government of Indonesia must explicitly connect the legislature's open legal policy doctrine with ratified international treaty obligations, such as the 1948 Genocide Convention and the 1984 Convention Against Torture. The open legal policy doctrine must not create a legal vacuum (*lacuna iuris*). This synchronisation ensures Indonesia avoids indiscriminate prosecution while

preventing it from becoming a safe haven for international criminals due to the absence of an extradition legal basis.

Reinforcing Judicial Institutional Readiness. The Supreme Court and the Attorney General's Office should incrementally establish a specialised unit or chamber dedicated to international crimes. Adapting Germany's Genocide Network model to Indonesia's resource constraints, the unit's mandate would be to build judges' and prosecutors' competency in international humanitarian law and facilitate cross-border coordination with INTERPOL. These measures ensure preparedness once the cumulative requirements of conditional universal jurisdiction are satisfied.

Limitations and Directions for Future Studies. This study focuses exclusively on the normative constitutional law perspective in Indonesia and the doctrinal analysis of the Constitutional Court's core legal reasoning (*ratio decidendi*). Several limitations remain because the analysis did not examine the dynamics of legal politics (*rechtspolitiek*) within parliament that influenced the formulation of human rights judicial policy. The analysis also did not include an empirical assessment of constitutional justices' judicial behaviour. As a roadmap for future scholarly inquiries, subsequent studies are advised to: (1) Examine the aspects of political legislation and international political economy that influence the legislature's reluctance to adopt extraterritorial jurisdictional expansions. (2) Explore the substantive feasibility of the MLA framework at the ASEAN regional level as an effective alternative avenue for accountability, aimed at overcoming the constitutional impediments identified in this article.

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