

MALAYSIA'S COMMENTS
ON THE SCOPE AND APPLICATION OF THE
PRINCIPLE OF UNIVERSAL JURISDICTION

PURSUANT TO GA RESOLUTION 64/117
OF 16 DECEMBER 2009

Malaysia notes that a State's recognition of the exact scope and application or implementation of the principle of universal jurisdiction, in particular its legal basis and validity, remain a matter of intense debate. This understanding is premised on the decided cases of international tribunals and various domestic courts as well as from academic literature. In this regard, Malaysia prefers to adopt a cautious approach of the subject while participating in the debate in the evolution of the said principle.

Malaysia's preliminary views are as follows:

(a) Foundation of Principle of Universal Jurisdiction

1. Malaysia notes that the traditional foundation for the principle of universal jurisdiction is the extraordinary heinousness of the alleged conduct and at least in the case of piracy by the law of nations, was premised on the fact that acts of piracy on the high seas were beyond the territorial jurisdiction of any particular state and pirate vessels were not under the lawful flag of any nation.
2. On this premise the principle of universal jurisdiction is said to have been extended to by state practice to apply to the serious crimes of international concern namely, war crimes, crimes against humanity and genocide. Further there from, the modern principle of universal jurisdiction is agreed to be extended further to include heinous human rights offences namely, slavery, torture and apartheid. In this regard, Malaysia notes in particular the Princeton Principles of Universal Jurisdiction which attempt to crystallize the principle and outline its parameters. However, actual recognition and application of this extension by States remains uncertain.
3. Malaysia notes that with the exception of the surge in the 1990s, instances of the principle of universal jurisdiction on the basis of customary international law being invoked as the basis of criminal jurisdiction by national courts has and continues to be rare. This rarity arises not from any lack of regard for the seriousness of international crimes concerned but from the ability and preference of prosecutors and national courts to found criminal jurisdiction on the more well-established principles of extra-territorial jurisdiction, namely the territorial principle, nationality principle, and protective principle as well as on the terms established by their domestic law.
4. Malaysia also notes that in most instances where extra-territorial criminal jurisdiction has been relied by States in the absence of any nationality, territoriality or protective nexus, the legal basis to establish such claim has been that State's own domestic law which in turn has generally been enacted to give effect to a treaty obligation and less often to give direct effect to a customary international law obligation. An example of the former would be legislation to implement obligations under the Geneva Conventions of 1949 and its Additional Protocol which codify the international humanitarian law offences under customary international law. An example of the latter would be

legislation which statutorily provides national courts with criminal jurisdiction over piracy as defined by the law of nations.

5. Malaysia is also of the view that it is misleading to assert that universal jurisdiction is established by treaty in all instances, in particular for offences such as terrorism and drug trafficking. A closer examination of those treaties reveals that as a treaty obligation, State Parties to those treaties are under a mandatory duty to establish criminal jurisdiction on the basis of nationality and territoriality. Even where State Parties are given a discretion to establish extra-territorial criminal jurisdiction on the other grounds, it is noted that those other grounds are still based on those basic principles for example where the victim is a national of that State (passive personality principle), the offence is against a state/government facilities abroad (protective principle) or the offences is committed by a stateless person who has habitual residence in the State.
6. Nor should the principle of universal jurisdiction be confused with the principle of aut dedere aut judicare, which under the relevant international criminal treaties (and hence operates as a treaty obligation for State Parties) requires a State Party where an offender is found to prosecute or extradite him. This in turn flows from the earlier obligation in the said treaty for the State Party to criminalize the treaty offences and establish jurisdiction over it on the specified grounds. In Malaysia's view, the principle of aut dedere aut judicare does not on itself establish universal jurisdiction for that particular treaty-based offence.
7. Further on this point, Malaysia also notes that where treaties have required State Parties to establish criminal jurisdiction where there is no nexus between the State and its nationals to serious crime, for example the Geneva Conventions of 1949, the Convention against Torture and the Genocide Convention, this is based on the agreement of the State Parties that as among themselves (as the treaty only guides State Parties) they will take jurisdiction over those treaty offences absent of any nexus. Any attempt to exercise such criminal jurisdiction against a non-State Party would be without legal basis and sure to be met with strong objections.
8. In summary, in the modern world where much of international law is codified in treaties, especially that of the serious crime of international concern, and where the exercise of extra-territorial criminal jurisdiction is founded on treaty obligations and implementing domestic legislation, it is difficult to accept the extension of universal jurisdiction on the basis of customary international law beyond that which has been traditionally accepted i.e. for piracy by the law of nations.
9. For Malaysia, recognition of the principle of universal jurisdiction over piracy by the law of nations is as provided under section 22 of the Courts of Judicature Act 1964 (Revised - 1972) [Act 91] which provides that:
 - (a) all offences committed —
 - (i) within its local jurisdiction; (local jurisdiction includes 'territorial waters')
 - (ii) on the high seas on board any ship or on any aircraft registered in Malaysia;
 - (iii) by any citizen or any permanent resident on the high seas on board any ship or on any aircraft;
 - (iv) by any person on the high seas where the offence is piracy by the law of nations;

On this regard it is noted that to date, there has been no statutory criminalization of the act of piracy under Malaysian laws. However, as a State Party to the United Nation Convention on the Law of the Sea (UNCLOS), Malaysia will be specifically criminalizing piracy as defined under Article 101 of UNCLOS to give effect to its treaty obligations.

(b) Scope of Principle of Universal Jurisdiction

10. Under customary international law, it appears that the application of the principle is only relatively unchallenged in relation to piracy by the law of nations.
11. Although the principle is said to extend (under international criminal laws) to the serious crimes of international concern i.e. war crimes, crime against humanity and genocide, it is found that the exercise of jurisdiction has been treaty or statutory based with treaty or statute-based defining of those crimes since the Nuremberg Tribunal to the International Criminal Court. It is also generally argued that the exercise of criminal jurisdiction of those international tribunals has been on the basis of the delegated authority of the States involved, victor or loser alike.
12. Nevertheless it is recognized that certain States enacted domestic law to claim extra-territorial jurisdiction over such crimes and premised the legality of such legislation on the basis of the principle of universal jurisdiction.
13. Malaysia however would only claim such jurisdiction on the basis of treaty obligations. Therefore the existence of such obligation to apply universal jurisdiction over those offences would need to first be established by a treaty to which Malaysia has become a party.
14. Further thereto, Malaysia is of the view that it is not likely for the principle of universal jurisdiction to apply to any of the other offences such as terrorism or drug-trafficking unless the obligation to take jurisdiction absent nexus is established by the relevant treaties.

(c) Application of Principle of Universal Jurisdiction

15. For Malaysia, any exercise of extra-territorial criminal jurisdiction must be based on enabling domestic law. For example –
 - in relation to terrorism offences, section 4 of the Penal Code of Malaysia established the extra-territorial application of the offences while section 22 (a)(v) of the Court of Judicature Act 1964 empowers the courts to take jurisdiction over those offences.
 - in relation to other offences such as trafficking in person, computer crimes, money laundering which also gives extra-territorial application, the courts jurisdiction is provided therefore under the respective laws.
16. Further thereto, Malaysia's international cooperation laws such as the Extradition Act 1992 and the Mutual Assistance in Criminal Matters Act 2001 which involves state to state extradition and mutual legal assistance would also be applicable to these serious offences.
17. However, in all instances the offender is granted fundamental guarantees and due process. This means that all trials require the presence of the accused under the Criminal Procedure Code [Act 593], a request for extradition is founded on the requirement of an offence punishable with imprisonment of not less than one year or with death under both country and be able to satisfy the

extra-territorial criminal jurisdiction. A request for mutual assistance is founded on the fact that the offences to which the request relates is a serious offence. Hence no request for extradition and mutual assistance would be made unless the requirement of the offence is satisfied.

18. Thus in the event of Malaysia receiving a request for extradition which is based on the principle of universal jurisdiction, section 6 of the Extradition Act 1992 would require as a basic condition of satisfying the requirement of extradition offence punishable under both country and be able to satisfy the extra-territorial criminal jurisdiction. Hence no warrant of arrest would be issued unless the requirement of the offence is satisfied.
19. In the case of mutual assistance, the Mutual Assistance in Criminal Matters Act 2002 requires that the Requesting State have jurisdiction over the offence to which the request relates and where extra-territorial criminal jurisdiction is claimed, the Mutual Assistance in Criminal Matters Act 2002 and the relevant mutual assistance treaties require Malaysia to be able to recognize and take jurisdiction if the offence took place in similar circumstances outside Malaysia.
20. Therefore, under existing law it would be quite difficult for Malaysia to request or accede to a request for extradition or mutual assistance in criminal matters where jurisdiction is claimed solely on the basis of the principle of universal jurisdiction.

Government of Malaysia
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