

His Excellency Ban Ki Moon,  
The United Nations Secretary General,  
UN Headquarters  
New York, NY 1007

**RE: The Government of Rwanda's report on information and observations on the scope and application of the principle of universal jurisdiction**

**Your Excellency,**

Reference is made to the UN General Assembly resolution 64/117 of 16 December 2009 which, in its operative paragraph 1, requests the Secretary General to invite Member States to submit information and observations on the scope and application of the principle of universal jurisdiction, including information on the relevant applicable international treaties, their domestic legal rules and judicial practice, and to prepare and submit to the General Assembly, at its sixty-fifth session, a report based on such information and observations; we hereby submit to you the mentioned report.

**GENERAL INFORMATION AND OBSERVATIONS ON THE SCOPE AND APPLICATION OF THE PRINCIPLE OF UNIVERSAL JURISDICTION**

States generally exercise jurisdiction when the crime occurs in their territory. However, there is also a legal basis for extraterritorial jurisdiction provided that there is a connection between the alleged crime and the forum state. This connection or link can be based either on the Passive personality principle (e.g. when the victim is of the nationality of the prosecuting state) or the Active personality principle (e.g. when the defendant is of the nationality of a forum state).

In regard to universal jurisdiction, the first question that arises is whether it can be an effective tool for fighting against the impunity of perpetrators of serious crimes. If the answer is affirmative, then the next question is whether there is any legal basis to support this radical departure from the traditional principle of territorial criminal jurisdiction and what is the precise scope of its application?

Despite the recent and increasing use of universal jurisdiction to hold perpetrators of gross violations of human rights criminally accountable, the scope of application and even validity of universal jurisdiction remain topics of hot debate among scholars, NGO groups and politicians. In this regard, the Government of Rwanda recognises that there are good and negative aspects in terms of scope and application of universal jurisdiction.

**Positive developments of universal jurisdiction**

Rwanda recognises some universal jurisdiction positive developments. The examples are the following:

- Rwandan and Yugoslav mass murderers have been prosecuted in various jurisdictions such as Germany, Switzerland, Belgium, The Netherlands and in Canada (to mention but a few) easing the international community's resources burden and sending the message that these countries will not provide safe haven for atrocity perpetrators;
- Eradication of any form of impunity for serious crimes;
- Universal Jurisdiction assists the ICTR and ICTY in implementing their respective completion strategies by transferring cases to other competent jurisdictions;
- Rwanda itself has universal jurisdiction over any crime falling within the category of international or cross-border crimes such as genocide, war crimes, crimes against humanity, torture, money laundering, piracy, drug trafficking, etc.
- It is worth mentioning that in the exercise of its universal jurisdiction, the President of the Supreme Court of Rwanda may, in the interest of justice and with a view to harmonize universal jurisprudence, seek cooperation from the United Nations, international organizations or a member state in which the crime was committed, to provide foreign judges to sit with their Rwandan counter parts to hear such cases. He may also request letters of rogatory from foreign courts to conduct some investigations on behalf of Rwandan Courts.

However, there are also very troubling developments in the application of universal jurisdiction.

### **Negative Developments of Universal Jurisdiction**

#### **1. Political motivation in the application of universal jurisdiction**

The first one is that this principle has been used to settle political scores. Particularly, Rwanda has been a victim of the abuse of this principle. It is worth mentioning in this report the case of this kind of abuse by French and Spain judges against Rwanda.

In 2006, a French judge issued arrest warrants for nine Rwandan officials, including President Paul Kagame, linking them to the killing of Rwanda's former president, whose plane crashed down in 1994. This was an odd indictment by any legal standard let alone international standards. The judge did not consider alternative theories, did not visit Rwanda, did not conduct any investigation of his own, concocted evidence later denied by his own witnesses, used evidence of genocide fugitives, etc; very clear abuses of the Principle of Universal Jurisdiction. Yet it served the political goal of painting Rwanda Government in very negative terms.

In the meantime, France was harboring a large number of very famous génocidaires. Instead of using Universal Jurisdiction to try these genocide fugitives, all of whom were subject of international Arrest Warrants, the judge chooses to indict the leadership of Rwanda.

This, along with the failure to prosecute notorious génocidaires, represents universal jurisdiction being abused by the French judge France to gain political leverage in its high-stakes diplomatic battle between France and Rwanda at that time. This is not only the view of Government of Rwanda; the African Union called for a moratorium on the indictments against Rwandan officials which it condemned as politically motivated. This has also left many States embarrassed on how to execute arrest warrants that were clearly intended to serve political rather than judicial end.

## **2. Expensive, time-consuming, and inefficient**

The application of universal jurisdiction is always expensive, time-consuming, and inefficient. None of the cases in that category has taken less than five years to conclude and yet they have all cost millions of moneys. Some are still on going and some appear like they will never end. Something on that issue definitely needs to be done.

## **3. Lack of universally accepted and clear definition of universal jurisdiction**

Another gap and practical problem in the effective exercise of universal jurisdiction is the lack of universally accepted and clear definition of universal jurisdiction. The definitions proposed by different scholars seem to suggest that there is consensus among the scholastic opinion as to overall depiction of universal jurisdiction, but that there exists a continuing debate over issues such as 1) whether the presence of the accused in the state exercising universality is required, 2) whether some "connecting link" with the sate seeking to utilize such jurisdiction is mandated, and 3) to which international crimes universal jurisdiction may be applied.

Referring to the first issue addressed above, it remains unclear whether or not the prosecution of the accused in absentia is allowed. The experience of international tribunals and domestic courts would be helpful to clarify this issue. The general rule is that in criminal proceedings the presence of the accused is mandatory. However, this is not absolute. The rationale for this rule is to secure the fair trial requirement stipulated to, not only in international instruments, but also probably in the criminal statutes of almost every state. Particularly, Article 14 of International Covenant on Civil and political Rights, Article 6 of the European Convention on Human Rights and the relevant statutory articles of the International Criminal Tribunal for Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC), all encapsulate this norm.

States are reluctant to exercise universal jurisdiction in absentia. Such a strict requirement may preclude the effective exercise of universal jurisdiction. The position of Rwanda on this issue is that there should be a fair balance and "the meaning of this right to fair trial is not to be interpreted too literally." In this regard, we support the position of ICTR in Barayagwiza case, where the ICTR Chamber concluded that neither the refusal of the accused to attend his trial nor the absence of his council might preclude the proceedings against him provided that they were "duly informed of his on-going trial." Thus, whenever a state seeking to utilize universal jurisdiction duly informs the accused, or a state that is anticipated to provide 'secure

heaven' to the perpetrator of the crime falling under the domain of universal jurisdiction, may warrant criminal proceedings without violating the above-mentioned right to fair trial.

Another issue that attracts attention is whether some "connecting link" between the alleged perpetrator and the state seeking to utilize such jurisdiction is required. Such a link is used to justify the territorial principle of criminal jurisdiction: a state seeking to prosecute the accused can do so only if there is a connection to the state. The link can be found either in the form of passive or active personality principle. The former implies that the victim of the alleged crime be of the nationality of the state wishing to exercise jurisdiction while the latter connotes that perpetrator of the crime should be a national of the prosecuting state. Thus, such a link is required for the exercise of jurisdiction based on the territorial principle. Another version of jurisdiction is based on the protective principle, meaning jurisdiction for acts committed abroad that could affect the security of the state. Once again, a state-perpetrator nexus is alleged. But, universal jurisdiction, as the term itself suggests, is rather different from these three types of jurisdiction.

It should be noted that exercising extraterritorial jurisdiction based on passive and active personality principles must not be confused with universal jurisdiction. By its very nature the universal jurisdiction is different from criminal territorial jurisdiction; and as such it does not require any link to justify the exercise of this jurisdiction. The Princeton Principles on universal jurisdiction, being "a progressive restatement of international law on the subject of universal jurisdiction," in the subsection 3 of principle 1 stipulates that a state may seek the extradition of the accused of the crime under international law without further requirement of any connection to the state. This subsection, supported by the general principle of law *aut dedere aut judicare*, supports the proposition that link for the exercise of universal jurisdiction is not required.

It is also worthwhile to ask in the context of definition to what crimes may universal jurisdiction apply. Again there is no universal agreement among scholars and national laws regarding the crimes that universal jurisdiction might cover.

Thus, in order to avoid any misuse and misunderstanding, and to reach the goal of effective exercise of universal jurisdiction, there should be, at the UN GA sixty-fifth session, an attempt to define universal jurisdiction in terms of crimes falling under its application. This should be done by defining the crimes with a clear set of penalties in accordance with procedure to be followed by domestic law. Indeed, this will ease the job of domestic courts in a practical sense providing apparent legal basis for the exercise of universal jurisdiction.

From all the developments above, the Government of Rwanda wishes to formulate some recommendations that may be taken into consideration in the coming UN GA sixty-fifth session, in order to address the theoretical gaps and abuse in relation to the scope and application of the principle of universal jurisdiction.

## **RECOMMENDATIONS**

### **1. Avoid political motivated prosecutions**

Forum states should only take cases where justice, as opposed to political leverage, is determined to be the sole reason for the process.

There should be special scrutiny of claims perceived to be “taking sides” in connection with an ongoing conflict, primarily of a political nature.

Although no precise guideline is possible, some consideration should be given to the cost of trials to public order outweighing their benefits to combating impunity.

## **2. Incorporate “The Princeton Principles on Universal Jurisdiction” (2001)**

Crimes subject to universal jurisdiction include: (1) piracy; (2) slavery; (3) war crimes; (4) crimes against peace; (5) crimes against humanity; (6) genocide; and (7) torture; (Principle 2)

The application of universal jurisdiction to the crimes listed above is without prejudice to the application of universal jurisdiction to other crimes under international law; (Principle 2)

Once out of office, government officials, including heads of state, should not be immune from prosecution based on the defense that they were acting in an official capacity; (Principle 5)

There should be no statute of limitations on the prosecution of these crimes; (Principle 6)

Blanket amnesties generally are inconsistent with a nation's obligation to hold individuals accountable for these crimes; (Principle 7)

## **3. Incorporate protective aspects of the Princeton Principles:**

A state shall exercise universal jurisdiction in good faith and in accordance with its rights and obligations under international law; (Principle 1)

In exercising universal jurisdiction, a state and its judicial organs shall observe international due process norms including but not limited to those involving the rights of the accused and victims, the fairness of the proceedings, and the independence and impartiality of the judiciary. (Principle 1)

In the exercise of universal jurisdiction, a state or its judicial organs shall ensure that a person who is subject to criminal proceedings shall not be exposed to multiple prosecutions or punishment for the same criminal conduct. (Principle 9)

A state shall refuse to entertain a request for extradition based on universal jurisdiction if the person sought is likely to face a death penalty sentence or to be subjected to torture or any other cruel, degrading, or inhuman punishment or treatment, or if it is likely that the person sought will be subjected to sham proceedings in which international due process norms will be violated. (Principle 10)

## **CONCLUSION**

As a conclusion, the Government of Rwanda is convinced that, for the effective exercise of universal jurisdiction, the states need not only implementing legislation providing clear legal basis in terms of definition, penalties to be imposed on the convictions and procedure but also willingness to exercise such extraterritorial jurisdiction beyond political motivations.

Finally, the position of Rwanda is that:

- We must strike the right balance to end the culture of impunity while establishing safeguards against the potential abuse of universal jurisdiction;
  
- There must be a system of review whereby an aggrieved person can appeal to another judge or another tribunal to review the decision of a judge issuing an international arrest warrant;
  
- The review process can be before a court of national, regional or international jurisdiction. But certainly there must be a system of review such that no individual judge anywhere in the world should have unlimited power to hold an independent and sovereign State at ransom for political or any other gain hiding behind Universal or other perceived or assumed jurisdictional competence;
  
- While this review process is going on, individuals and States should be permitted to conduct their businesses normally until the review process is completed. Short of this, large and powerful States or political judges from those States may gag, stifle or swallow small nations or its entire leadership or both. This has high potential for instability and negative effect on international law and order.
  
- In all circumstances, the opinion of international police (Interpol) should be sought on whether international arrest warrant should be issued on the basis of evidence available and where INTERPOL itself has not issued or advised that international arrest warrant should be issued, no State anywhere in the world should feel obliged to respect arrest warrant issued by individual judges in individual member States of the UN.

Thank you for the attention you will accord these observations.

Ministry of Justice

The Republic of Rwanda