

SOUTH AFRICAN OBSERVATIONS ON ON THE APPLICATION OF UNIVERSAL JURISDICTION

1 SUBJECT

The South African government has been requested to make observation to the Secretary-General of the United Nations on the scope and application of the principle of universal jurisdiction.

2. BACKGROUND:

The Secretary-General of the United Nations in his letter dated 8 January 2010 to member States drew the attention of States to General Assembly Resolution 64/117 of 16 December 2009 entitled "The scope of application of the principle of universal jurisdiction". In that report the Secretary-General is tasked 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 practices, and to prepare and submit to the General Assembly, at its sixty-fifth session, a report based on such information and observation. Based upon this report the Secretary General made a request to States with which we are pleased to herein comply.

3. DISCUSSION

3.1 Jurisdiction

3.1.1 We shall aim to first contextualise the matter and define jurisdiction, before proceeding to the different manifestations of jurisdiction of an extraterritorial nature and the application thereof in South African law. Within the context of this response, "jurisdiction" refers to criminal jurisdiction.

3.1.2 The concept of jurisdiction is closely linked to the international law principles of sovereignty and territory. The sovereignty of States implies that within a State's own territory, it can exercise legislative, judicial and executive authority to the exclusion of other States, and this competence is referred to as jurisdiction. As a general rule, the exercise of these functions is limited to the territory of the State.

3.1.3 However, this rule is of a general nature, and already in the *Lotus* case the Permanent Court of International Justice held that the territoriality of criminal law is not an absolute principle of international law: international law does not prohibit a State from exercising jurisdiction in its own territory in respect of any case that relates to act which have taken place abroad. States have a "wide measure of discretion" to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, unless specific rules prohibiting such extension exists.

3.1.4 Jurists have asserted that the general rule of the *Lotus* case still applies, but that in practice States limited extraterritorial jurisdiction to "cases in which there is a direct and substantial connection between the State exercising jurisdiction, and the matter in question", with the result that the exercise of jurisdiction is generally restricted to acts committed within their territories, acts having an effect within their territories, matters affecting their nationals or acts threatening their security.

3.1.5 It is also a recognised principle that a State may exercise jurisdiction in a case where a crime is commenced in its territory and completed in another State (subjective territoriality) and where a crime is commenced in another State and completed within its territory (objective territoriality, also referred to as the "effects" doctrine, which allows a State where the effect of a crime is felt, to exercise jurisdiction).

3.2 MANIFESTATIONS OF EXTRATERRITORIAL JURISDICTION IN SOUTH AFRICAN LAW

3.2.1 The Nationality Principle:

South Africa in general accepts the principle that it will not exercise jurisdiction over acts committed by its nationals abroad, with certain exceptions, like treason, while Parliament can also extend jurisdiction over South African nationals and permanent residents abroad by means of legislation, as in the *Implementation of the Rome Statute of the International Criminal Court* (Act 27 of 2002) with regard to genocide, crimes against humanity and war crimes and in the case of the *Regulation of Foreign Military Assistance Act* (Act 15 of 1998) with regard to the crimes of mercenaries and the unauthorised rendering of foreign military assistance.

3.2.2 The Protective Principle:

A State may exercise jurisdiction over non-nationals who have committed acts abroad that are considered prejudicial to its safety and security. The application of this principle in South African law requires a connection (jurisdictional link) between the non-national and South Africa, like residence or physical presence in South Africa after the commission of the crime.

3.2.3 The Passive Personality Principle:

This principle holds that a State may exercise jurisdiction over a person who commits an offence abroad which harms one of its own citizens. The *Implementation of the Rome Statute of the International Criminal Court Act* (Act 27 of 2002) applies this principle in Section 4(3) (d) where it incorporates jurisdiction for genocide, war crimes and crimes against humanity committed outside the territory of South Africa if the crime was committed against a South African national or resident.

3.3 UNIVERSAL JURISDICTION

3.3.1 All the above principles presuppose a jurisdictional link between the crime in question and the exercise of jurisdiction on the State's territory. The universality principle holds that in the case of certain crimes, the so-called "international crimes" (or "crimes in international law") all States will have jurisdiction, regardless of when and where the crime was committed and the nationality of the victims or perpetrators, in other words, in the absence of any jurisdictional link. Such crimes are a violation of international law and directly punishable under international law itself by means of international tribunals, or by domestic courts. The basis is that these crimes are considered particularly offensive to the international community as a whole in that it is viewed as a crime against mankind (a crime *contra omnes*). The heinousness of the crime is the trigger for universal jurisdiction. The original international crime is piracy. Universal jurisdiction over piracy has been recognised in international law for many centuries. All States may apprehend and arrest pirates on the high seas and punish them, irrespective of the nationality of the pirates or where their acts of piracy were committed.

3.3.2 As regards other crimes, most authorities assert that as a core, state practice has identified that the crimes of genocide, war crimes and crimes against humanity can be considered as crimes attracting universal jurisdiction. (Slave-trading and torture are also sometimes included in the list).

3.3.3 It should be noted that international law permits States to exercise jurisdiction over these crimes, but does not oblige them to do so in the absence of a treaty obligation to this effect.

3.3.4 The doctrine of universal jurisdiction is controversial, and most States will not try a person for an international crime unless such crime has been incorporated into its domestic law.

3.4 UNIVERSAL JURISDICTION IN SOUTH AFRICAN LAW

3.4.1 In practice, South Africa will not try a person for an international crime unless it has been criminalised under its domestic law, as is the case with the crimes provided for in the Rome Statute that was incorporated by means of the *Implementation of the Rome Statute of the International Criminal Court Act* (Act 27 of 2002). The basis for jurisdiction over genocide, crimes against humanity and war crimes are therefore the Act incorporating these crimes into South African domestic law, and not the principle of universal jurisdiction. This Act requires a jurisdictional link between the crime and South African jurisdiction, namely nationality of South Africa or residence on its territory, the presence of the perpetrator, irrespective of nationality, on South African territory or on the basis of the passive personality principle (Section 4(3)).

3.4.2 The *Constitution of the Republic of South Africa, 1996* provides in Section 231(4) that an international agreement becomes law in the Republic when it is incorporated into national legislation. The Rome Statute has been so incorporated and can therefore be applied as South African law, as is the case with other international treaty.

3.4.3 The *Constitution* further provides in Section 232 that customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. This raises the possibility that in a case where universal jurisdiction for an international crime becomes accepted in customary international law and such a crime is not a treaty crime incorporated into South African domestic law, jurisdiction may exist in South African domestic law by virtue of the provisions of Section 232 without a jurisdictional link existing between South Africa and the crime. However, until the Courts pronounce in this respect, this remains mere speculation.

3.5 INTERNATIONAL TREATIES

3.5.1 A number of international crimes have been created by treaty, which obliges States party thereto to prosecute or extradite offenders. These treaties generally do not proceed from the basis of universal jurisdiction, but require one of the traditional links to establish jurisdiction in the domestic law of the State in question. South Africa is party to a number of such treaties, namely the Genocide Convention of 1948, the Torture Convention (crimes provided for in the Rome Statute and therefore incorporated by means of the *Implementation of the Rome Statute of the International Criminal Court Act* (Act 27 of 2002), the three conventions dealing with hijacking (Convention on Offences and Certain Other Acts Committed on Board Aircraft (1963), the Convention for the Suppression of Unlawful Seizure of Aircraft (1970) and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971)), incorporated into domestic law by the *Civil Aviation Offences Act, 1972* and the *International Convention for the Suppression of Acts of Nuclear Terrorism*, incorporated by the *Nuclear Energy Act, 1999*.

3.5.2 The *Protection of Constitutional Democracy Against Terrorist and Related Activities Act, 2004* aims to give effect to South Africa's obligations in respect of the suppression of terrorism in terms of United Nations conventions, Security Council resolutions and the OAU *Convention on the Prevention and Combating of Terrorism*. It incorporates the following conventions into South African domestic law:

- *International Convention on the Suppression of the Financing of Terrorism;*
- *International Convention on the Suppression of Terrorist Bombings;*
- *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms on the Continental Shelf;*
- *International Convention against the Taking of Hostages;*
- *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents;*
- *Convention on Offences and Certain other Acts committed on Board Aircraft;*
- *Convention for the Suppression of Unlawful Seizure of Aircraft;*

- *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation;*
- *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation.*

3.5.3 Jurisdiction over offences provided for in the conventions are conferred on South African courts by Section 15(1) on the grounds of territoriality, active personality, passive personality, protection of the state and "any other basis recognized by law" (15), while a person may also be prosecuted in South Africa for an offence in terms of the conventions when such person is present on South African territory if a South African court has jurisdiction or any court in a foreign state has jurisdiction.

3.5.4 Wide jurisdictional powers are therefore conferred on the South African courts by the Act, but it is submitted that all the grounds for jurisdiction require a jurisdictional link with South Africa in order for a prosecution to take place in a South African court.

3.5.5 However where South Africa does not prosecute it has a duty to extradite person charged with the treaty crimes mentioned above. South Africa is a member of the Europe Convention on Extradition of which all of European Countries and other Countries outside of Europe like South Africa are members and is thus obligated to process request for extradition from other member States of the European Convention.

4. CONCLUSION

Trusting that the above information is of assistance to the Secretary-General of the United Nations.