



HA 32/2022

The Permanent Mission of Malaysia to the United Nations presents its compliments to the Office of Legal Affairs and has the honour to refer to the note LA/COD/59/1 of 10 January 2022.

The Permanent Mission of Malaysia to the United Nations has further the honour to present its response to the request for information and observations on the scope and application of universal jurisdiction, as enclosed.

The Permanent Mission of Malaysia to the United Nations avails itself of this opportunity to renew to the Office of Legal Affairs the assurances of its highest consideration.

New York 29 April 2022

**INPUT FOR THE UN SECRETARY-GENERAL’S REPORT ON
“THE SCOPE AND APPLICATION OF
THE PRINCIPLE OF UNIVERSAL JURISDICTION”**

A. INTRODUCTION

1. The United Nations General Assembly (UNGA) on 9 December 2021 adopted resolution 76/118 entitled “the Scope and Application of the Principle of Universal Jurisdiction”. As such, the United Nations Office of Legal Affairs is inviting Member States to submit “information and observations on the scope, and application of universal jurisdiction, including, where appropriate, information on the relevant applicable international treaties and on their national legal rules and judicial practice”.

B. EARLIER REPORTS RELATING TO MALAYSIA

2. In 2010 and 2020, Malaysia had submitted its specific information regarding the scope and application of universal jurisdiction on the basis of relevant national legal rules, applicable international treaties and judicial practice, as reflected in the Reports of the Secretary-General on the Scope and Application of the Principle of Universal Jurisdiction [A/65/181](#) and [A/75/151](#).

C. MALAYSIA’S POSITION

Piracy

3. It is observed that the Courts of Judicature Act 1964 [Act 91] specifically provides that High Court has the jurisdiction to try the offence of piracy. In this regard, paragraph 22(a)(iv) of Act 91 provides as follows:

*“22. (1) The High Court shall have jurisdiction to try—
(a) all offences committed—
(i) ...
(ii) ...
(iii) ...
(iv) by any person on the high seas where the offence is piracy by the law of nations; and”.*

4. Be that as it may, 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 need to specifically criminalizing piracy, as

defined under Article 101 of UNCLOS, to give effect to its treaty obligations. Malaysia is further drafting its Maritime Security Bill which, among others, purports to strengthen its regime against maritime offences, including piracy. In the proposed law, the basis of jurisdiction will include universal jurisdiction. In other words, although the jurisdiction of the High Court to try the offence of piracy has been provided for by Act 91, the offence of piracy has yet to be prescribed.

5. In the absence of clear prescription, it is unclear whether the basis of jurisdiction to try the offence of piracy is universality principle or other principles of criminal jurisdiction.

6. In addition to the above, Malaysia is not a Contracting Party to the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP). ReCAAP is the first regional government-to-government agreement to promote and enhance cooperation against piracy and armed robbery against ships in Asia. ReCAAP was launched in November 2006 with 14 Asian Contracting Parties including North, Southeast, and South Asian countries. It has 21 Contracting Parties today, including Europe (Norway, the Netherlands, Denmark, the United Kingdom and Germany), Australia, and the United States¹.

7. Be that as it may, ReCAAP Information Sharing Centre (ReCAAP ISC) continued to maintain good cooperation at operational level with Malaysian Maritime Enforcement Agency (MMEA) on information exchange and verification of incidents².

War Crimes

8. Malaysia has enacted Geneva Conventions Act 1962 [Act 512] **to give effect to the obligations under the 1949 Geneva Conventions**, namely the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, the Geneva Convention Relative to the Treatment of Prisoners of War and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War.

9. Subsections 3(1) and (2) of Act 512 provides that:

¹**About ReCAAP Information Sharing Centre |combating maritime robbery, sea piracy** see: https://www.recaap.org/about_ReCAAP-ISC

² https://www.recaap.org/resources/ck/files/reports/ED%20Report/ED's_Report_2020_FINAL.pdf

“3. (1) Any person, whatever his citizenship or nationality, who, whether in or outside Malaysia, commits, or aids, abets or procures the commission by any other person of any such grave breach of any of the scheduled conventions as is referred to in the following articles respectively of those conventions:

- (a) article 50 of the convention set out in the First Schedule³;*
- (b) article 51 of the convention set out in the Second Schedule⁴;*
- (c) article 130 of the convention set out in the Third Schedule⁵; or*
- (d) article 147 of the convention set out in the Fourth Schedule⁶,*

shall be guilty of an offence and shall, on conviction,

- (i) in the case of such a grave breach as aforesaid involving the wilful killing of a person protected by the convention in question, be sentenced to imprisonment for life;*
- (ii) in the case of any other such grave of breach as aforesaid, be liable to imprisonment for a term not exceeding fourteen years.*

(2) In the case of an offence under this section committed outside Malaysia, a person may be proceeded against charged, tried and punished therefor in any place in Malaysia as if the offence had been committed in that place, and the offence shall, for all purposes incidental to or consequential on the trial or punishment thereof, be deemed to have been committed in that place.”

Other offences with extra-territorial jurisdiction

10. It is observed that Malaysia has enacted various legislations which provide for extra-territorial jurisdiction as follows:

- (a) section 2 of the Extra-Territorial Offences Act 1976 [Act 163] provides for the extra-territorial effect of offences committed outside Malaysia as specified in the Schedule. To date, only two Acts has been specified namely the Official Secrets Act 1972 [Act 88] and Sedition Act 1948 [Act 15]. Act 163 further provides for extra-territorial effect of offences committed outside Malaysia the commission of which is certified by the Attorney General to affect the security of the Federation;

³ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field.

⁴ Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea.

⁵ Geneva Convention Relative to the Treatment of Prisoners of War

⁶ Geneva Convention Relative to the Protection of Civilian Persons in Time of War

- (b) Chapters VI, VIA and VIB of the Penal Code [Act 574] provides for **offences against the State, offences relating to terrorism and organized crime** respectively. Section 4 of Act 574 specifically provides the extra-territorial application of those offences;
- (c) section 127A of the Criminal Procedure Code [Act 593] provides that the offences committed out of Malaysia under Chapters VI, VIA and VIB of the Act 574 and pursuant to Act 163 may be dealt with as if it had been committed within Malaysia;
- (d) paragraph 22(1)(b) of the Courts of Judicature Act 1964 [Act 91] provides that the courts have jurisdiction to try offences committed out of Malaysia under Chapters VI and VIA of the Act 574 and as specified in or certified pursuant to Act 163;
- (e) subsection 2 of the Subordinate Courts Act 1948 [Act 92] provides that in the case of offences committed outside Malaysia under Chapters VI and VIA of Act 574 and specified in or certified pursuant to Act 163, any reference in that Act to the local limits of jurisdiction of the courts shall be deemed to include a place where the accused is found; and
- (f) section 4 of the Anti-Trafficking In Persons and Anti-Smuggling of Migrants Act 2007 [Act 670], section 9 of the Computer Crimes Act 1997 [Act 563], sections 3, 7, 8 and 9 of the Aviation Offences Act 1984 [Act 307], section 82 of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 [Act 613], section 4 of the Communications and Multimedia Act 1998 [Act 588] and section 4 of the Strategic Trade Act [Act 708] provide for the extra-territorial application of the offences under the respective Acts.

11. It is observed that the above offences although committed outside Malaysia, maintain some **“link” or “nexus” with Malaysia**, for example the nationality of the person committing the offence or the nationality of the injured person is Malaysian. As such, it is possible that the basis of the extra-territorial application of those offences are other general principles of criminal jurisdiction namely the nationality principle, protective principle and passive personality principle **rather than** the universality principle which is **not dependent** on such links.

12. Further under international law, whether these crimes can be categorized as crimes of universal jurisdiction **remains unclear because it is not within the “traditional” scope of offences accepted as subjected to universal jurisdiction.**

International assistance and cooperation

13. Malaysia’s international assistance and cooperation laws such as the Extradition Act 1992 [Act 479] and the Mutual Assistance in Criminal Matters Act 2002 [Act 621] which involves state to state extradition and mutual legal assistance are applicable to serious offences.

14. 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.

15. 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].

16. Thus in the event of Malaysia receiving a request for extradition which is based on the principle of universal jurisdiction, section 6 of Act 479 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.

17. In the case of mutual assistance, Act 621 requires that the Requesting State to have jurisdiction over the offence to which the request relates and where extra-territorial criminal jurisdiction is claimed, Act 621 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.

18. Be that as it may, it is to be highlighted that subsection 20(1)(i) of Act 621 provides the discretion of the Attorney General to refuse assistance if he considers such provision of assistance would affect the sovereignty, security, public order or other essential public interest in Malaysia.

19. 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.**

Current position

20. As mentioned above, it is noted that the paragraph 4 of Resolution 76/118 invites Member States and observers regarding the scope and application of universal jurisdiction, including where appropriate information on the relevant applicable international treaties and their national legal rules and judicial practice.

21. In this regard, it is highlighted that Malaysia had provided its views on foundation and scope of the principle of universal jurisdiction, the need to achieve common consensus and understanding by Member States and the need for an in-depth legal analysis of universal jurisdiction.

22. Taking into consideration that the Report of the Secretary-General has yet to provide substantive analysis of the subject matter and that Malaysia has already reiterated its comments at the previous Sixth Committee sessions (2016, 2017 and 2020), it would be more apt for Malaysia to provide comments once the Secretary-General has completed the consultation with Member States and has formulated further analysis of the scope and application of the principle of universal jurisdiction.

23. Further, Malaysia observes that there has been minimal response from Member States in providing information on the scope and application of universal jurisdiction, the relevant applicable international treaties as well as their national legal rules and judicial practice in relation to the principle.

24. For this purpose, Malaysia views that it is timely for the Committee to analyse the underlying cause of the unforthcoming response from Member States and recommends the Committee to consider Malaysia's views as a way forward so to ensure the topic is progressing.

25. Malaysia also notes that based on paragraph 3 of the Resolution (76/118), the working group of the Sixth Committee, to be established at its seventy-seventh session, to consider and comment on the question "what should be the role and purpose of universal jurisdiction".