SECTION IV - Universal Jurisdiction

DRAFT RESOLUTION

CHALLENGE REPORT

Prof. Dr. Gert Vermeulen

Preamble

The participants in the Preparatory Colloquium of the IVth Section of the XVIIIth International Congress of the International Association of Penal Law, held in Xi’an (China) (12-15 October 2007);

Considering that universal jurisdiction could be one of the most effective instruments to prevent and punish the most serious crimes recognized by International customary law, and particularly those reflected in the Statute of the ICC, by increasing the likelihood of prosecution and punishment of its perpetrators;

Reason: In many cases, notably in most cases where the suspect is not present in the territory of the state exercising universal jurisdiction and almost always in cases where the suspect is to be found in his/her state of nationality, especially when he/she exercise(s)/has exercised a government, diplomatic or otherwise official function there, extradition will not be granted. Consequently, no punishment will incur, nor will a conviction be pronounced. Exercising universal jurisdiction in such cases may even decrease or erode the general preventative potential of establishing universal jurisdiction for the crimes concerned.

Therefore, universal jurisdiction can definitely not be considered ‘one of the most effective instruments’ to prevent and punish the most serious crimes [...]. It may prove valuable, however, be it in the majority of cases only where it can be reasonably expected that the presence of the suspect at the hearing of proceedings in the state exercising universal jurisdiction can be ensured (it is suggested to insert the latter condition below, in the actual text of the draft resolution, under the newly suggested heading II.A).

Further, the notion of ‘the most serious crimes recognized by international customary law, and particularly those reflected in the Statute of the ICC’, seems problematic for a series of reasons (infra, under I.2).

Keeping in mind that exercise of universal jurisdiction by States will remain necessary in order to prevent impunity for

1 All comments to the original draft resolutions have been inserted in bold and italic. Actual text amendments, insertions or additions have also been underlined.

2 Professor of Criminal Law, Head of Department Criminal Law and Criminology, Director of the Institute for International Research on Criminal Policy (IRCP), Ghent University, Belgium. President of the Belgo-Luxembourg Section of the IAPL (Union Belgo-Luxembourgeoise de Droit Pénal).
international crimes as mentioned above, even after the establishment of the International Criminal Court;

Reason: The preventative potential of universal jurisdiction does not necessarily require that States actually exercise such jurisdiction; it may be sufficient for them to have established jurisdiction (‘to prescribe’). Further, it is very arguable that universal jurisdiction, given its controversial nature (as outlined in the next recital) and bearing in mind that, even when speaking about the crimes within the jurisdiction of the ICC, the state exercise of jurisdiction is ‘necessary’, for is many cases (supra) nor punishment, nor conviction will be prompted and even the general preventative effect of the principle may be at risk. This does not imply, however, that the principle will be useless in all situations. Hence, it seems fair to ‘recognize’ the potential value of the principle, even after the establishment of the ICC.

Mindful that universal jurisdiction has become one of the most controversial topics of criminal law related academic and non-academic debates;

Remark: The controversial character of universal jurisdiction did not emerge from the above recitals, nor does it from the draft resolution below, which seems to rather one-sidedly promote state universal jurisdiction for the most serious crimes, failing to truly address the complexity of the issue in a sufficiently critical fashion or with the necessary sense of realism.

Recalling the previous AIDP resolutions on this topic, in particular, those adopted by

Suggestion: Delete these references altogether (reasoning given below)

- the Third International Congress of Penal Law (Palermo, 3–8 April 1933), dealing with the subject “For what offences is it proper to admit universal competency?”. The resolution stated that “there are offences which are harmful to the interests common to all states”, and discerned a tendency towards a universal repression of certain of serious offences, which endanger the common interests of the states in their international relations; [the resolution is quite neutral in phrasing, not promoting nor recommending universal jurisdiction, but merely observing a tendency, which we do not really discern today, so that recalling this resolution does not add to the current congress’ debate]
- the XIIIth International Congress of Penal Law (Cairo, 1 – 7 October 1984), inviting States to adopt the principle of universality in their national law for the most serious offences in order to ensure that such offences do not go unpunished; [the quoted phrase from the resolution is very unsophisticated, not reflecting in any way the complexity of the debate]

Propose to the XVIIIth International Congress of the International Association of Penal Law the adoption of the following Resolution:

I. Legitimacy of the principle under International law

Remark: In this chapter, unlike what its title seems to suggest, the issue of legitimacy of the universal jurisdiction principle under international law is simply not addressed. As it is definitely worth addressing in the resolution, it is suggested to add new substance to the chapter’s current content (see in fine).
1. Universal jurisdiction is a complementary criterion of jurisdiction over those [‘those’ to be deleted; see French text: ‘des crimes’] crimes committed abroad and [replace ‘and’ by ‘that are’, this in order to avoid any misunderstanding in the sense that the following part of the sentence would refer to ‘universal jurisdiction’ instead of to ‘crimes’] not covered by any other jurisdictional principle that this State may have.

2. With the aim of assuring the protection of those fundamental interests recognized by the international community as a whole and preventing impunity, universal jurisdiction should be applied to investigate, prosecute and punish at least the most serious crimes recognized by International customary law, and particularly those reflected in the Statute of the ICC.

Remark: Not only is universal jurisdiction promoted in an uncritical, normative/ideological fashion (leaving apart major problems with its application in many cases, even for ICC mandated crimes, as outlined above), the choice and delineation of offences for which the resolution recommends state universal jurisdiction seems to have been given insufficient thought (at least from the perspective of legitimacy under international law), for they seem:

- vague (‘the most serious crimes recognized by international customary law’, whereas there is no absolute consensus about which crimes are recognized in international customary law);
- misleading (piracy and slavery essentially being the sole crimes for which international customary law accepts ius cogens state universal jurisdiction, whereas international law for the majority of other international crimes, irrespective of whether they are footed in customary and/or convention law, does not call for state universal jurisdiction over them. The ‘mainstream’ – but erroneous – conviction that international law legitimizes or even requires states to establish and exercise universal jurisdiction for ‘international crimes’ seems to underlay the drafting of the resolution).
- technically at least incorrect or doubtful on one point (the ‘crime of aggression’, as an ICC mandated crime, is not ‘as such’ reflected in ‘international customary law’ (it remains uncertain to what extent it is interlinked with the notion ‘war of aggression’ as comprised in the international customary law notion ‘crimes against peace’, especially since an official ICC definition is still lacking), so that the use of ‘and particularly those’, presupposing that all ICC crimes are known crimes under international customary law, is incorrect; moreover, awaiting the 2010 Review Conference of the Rome Statute, which will consider the inclusion of a provision defining the crime of aggression, it seems rather pointless to call upon states to establish universal jurisdiction for it), and
- at least very arguable, if not already contra legem, where it comes to the crime of genocide (the latter being an ICC mandated crime, covered at the same time by the 1948 Genocide Convention, which in Article VI only provides for territorial state jurisdiction or jurisdiction by an international penal tribunal, so that not even the possibility to establish extraterritorial jurisdiction for genocide may be derived from international law. In relation to the latter point, it is worth mentioning that for the other ICC mandated crimes reflected in international customary law, i.e. ‘crimes against humanity’ and ‘war crimes’ (the latter being covered also by the Geneva Conventions and the Protocols thereto, from which a right for states to establish and exercise universal jurisdiction may indeed be implicitly derived when it comes to grave breaches of them), there is consensus that universal
jurisdiction over them may be established by states. The resolution turning this into a recommendation to do so, has no ground in international law, and remains disputable therefore even where ‘crimes against humanity’ and ‘war crimes’ are concerned.

In sum, the resolution cannot be considered to build upon international (customary) law in recommending state universal jurisdiction for the international crimes envisaged, which, moreover, seem to have been improperly defined or with insufficient legal precision.

Suggestion: Delete the resolution (alternative suggested below).

3. In an effort to avoid the abuse of universality, universal jurisdiction should not be applied to crimes other than those serious crimes referred in subsection 2.

Remark: The warning against the abuse of universal jurisdiction in itself is to be welcomed. From an international law viewpoint, though, the radical position taken finds no legitimation in international law – on the contrary: infringes upon it. Quite some conventions explicitly stipulate that state jurisdiction for the offences they cover (and which do not necessarily constitute offences under international customary law also) is not excluded where exercised in accordance with national law, meaning that states establishing universal jurisdiction over the offences concerned, will not act against the terms of international convention law in doing so.

This is not a plea for the resolution to stick to absolute discretion for states to establish universal jurisdiction for any offence they wish or in an unconditioned fashion. On the contrary, confirming the traditional Lotus doctrine (PCIJ 1927), according to which states are free to establish jurisdiction as they wish so long as they do not contravene an explicit prohibition in international law, would be walking a thin line. Not only has the Nuclear Weapons Advisory Opinion (ICJ 1986) generically softened (some may even argue: altered) the traditional Lotus doctrine (the Court having held that something may be contrary to the rules of international law even in the absence of a comprehensive and universal prohibition thereof in either customary or conventional international law), the discretion of states to establish universal jurisdiction has also been convincingly challenged in the Congo v. Belgium case (ICJ 2002), in which – unfortunately – the Court has not ruled about the issue.

Suggestion: Delete the resolution (alternative suggested below).

4. Future conventions on international crimes should always confirm the applicability of universal jurisdiction.

Remark: Even if it remains unclear what the drafters exactly mean using the notion ‘international crimes’, the resolution clearly contradicts the previous one, as there is no doubt that crimes covered by international convention law do not necessarily constitute crimes recognized by international customary law.

Suggestion: Delete the resolution (alternative suggested below).

Suggested insertion of the following resolution:

States wishing to establish universal jurisdiction in order to prevent impunity for serious crimes recognized in either international customary or convention law, including those reflected in the
Statute of the ICC, are requested to carefully consider such decision, as international law generically does not contain any obligation to do so.

II. General requirements of the exercise of universal jurisdiction

Suggestion: Replace title by new title and respective subtitles: General principles (A) in establishing universal jurisdiction (jurisdiction to prescribe) and (B) exercising universal jurisdiction (jurisdiction to enforce)

Reason (and further comments relating to the overall structure of the draft resolutions): As the draft resolutions below all relate to the exercise of universal jurisdiction (i.e. to jurisdiction to enforce, erroneously used as the title for the resolutions under IV, which relate to various issues that are all a-specific for the issue of universal jurisdiction), as opposed to the establishment of universal jurisdiction (i.e. jurisdiction to prescribe), it is suggested to clearly distinguish between both in the congress’ resolutions, logically starting with setting out general principles relating to the latter (i.e. in addition to the legitimacy issue covered under I, which – strictly spoken – is also a matter of jurisdiction to prescribe only). Further, it is suggested to integrate resolutions having to do with conflicts of jurisdiction in the set of resolutions setting out general principles relating to jurisdiction to enforce (other than have been inserted under that heading in the initial draft resolutions under IV, well-understood).

II. General principles

II.A. in establishing jurisdiction (jurisdiction to prescribe)

New resolution suggested:

States considering to establish universal jurisdiction, are recommended to make such jurisdiction dependent on the conditions that the suspect can be found in their territory (recourse to extradition being ruled out) and that the facts concerned constitute punishable offences also under the law of the state where they have been committed.

II.B. in exercising jurisdiction (jurisdiction to enforce)

1. In the application of universal jurisdiction [suggestion to replace by: Where, unlike recommended above, states have chosen to establish universal jurisdiction even in cases where the suspect cannot be found in their territory, and where they wish to actually exercise such jurisdiction], a distinction should be made between investigation and trial.

2. Investigation [suggested insertion: on the basis of universal jurisdiction] is admissible in absentia; States can [suggested replacement of ‘; states can’ by ‘, states being allowed in this case to’] initiate criminal proceedings, conduct an investigation, preserve evidence, issue an indictment, [suggested insertion: issue an international arrest warrant] or request extradition. [suggested addition: However, states are recommended not to investigate in absentia unless it can be reasonably expected that the presence of the suspect at the hearing of proceedings can be ensured].

3. The presence of the defendant should be always required for the main proceedings. Therefore trials in absentia should be generally refused in cases of universal jurisdiction.
Suggested additional resolution:

Where, unlike recommended above, states have chosen to establish universal jurisdiction even in cases where the facts concerned do not constitute punishable offences also under the law of the state where they have been committed, they are recommended to refrain from actually exercising such jurisdiction unless it is plausible that sufficient evidence can be gathered without having recourse to coercive investigative measures (such as e.g. (house) search, seizure, interception of telecommunications, dna sample taking) in the state where the facts have been committed in case the taking of these would be hindered there by absence of dual criminality.

III. Universal jurisdiction and conflicts of jurisdiction

Suggestion: Delete title and include relevant resolution(s) relating to conflicts of jurisdiction under the previous (newly created) heading II.B.

Preliminary remark relating to the initial draft resolutions 1, 4 and 5 below: in terms of substance matter dealt with, they can be considered plainly α-specific for the issue of universal jurisdiction, and are therefore suggested to be deleted altogether (infra).

1. International community should establish mechanisms in order to assure the way to determine the best and most effective jurisdiction in cases of conflict of multiple jurisdictions.

Suggestion: Delete the resolution (supra)

2. As a complementary principle universal jurisdiction should not be dependent to the other principles of jurisdiction. The ranking of concurrent jurisdictions proposed by the Resolutions of the XVIIth International Congress of Penal Law should be taken into account.

Remark: The meaning of the first sentence is unclear, even if dependent to’ is read as ‘dependent on’ or ‘dependent of’. The reference to the resolutions of the XVIIth Congress in the second sentence seems incorrect and therefore irrelevant. The resolutions referred to do not contain a ‘ranking’ of concurrent jurisdictions, but merely set out a non-hierarchical list of 5 criteria that should be taken into account in finding a solution that will best serve the proper administration of justice in terms of fair and efficient proceedings. Only the last 2 of them (‘the state in which the perpetrator was apprehended’ and ‘the state where evidence is most readily available’, which both appear in the next proposed resolution) have a potential linkage with universal jurisdiction.

Suggestion: Delete the resolution and insert a reference to the XVIIth Congress resolutions in the next resolution, rephrasing it altogether.

3. In cases of conflict of jurisdiction only between States claiming universal jurisdiction [suggested replacement of ‘only between states claiming universal jurisdiction’ by: ‘between states among which at least one having established universal jurisdiction, preference should in no case be given to the latter state unless the suspect can/has been found (and/or apprehended) in its territory or evidence is most readily available there’] [suggestion to delete the remaining part of the resolution] the most appropriate State should be determined with a preference to either the custodial State or the State where most of the evidence can be found, taking into account criteria such as the ability of
each State to ensure a fair trial and to guarantee the maximum respect for human rights and the potential (un)willingness or (in)ability of such States to conduct the proceedings.

4. Concerning the ne bis in idem principle, a State wishing to exercise universal jurisdiction should respect the final decision rendered by the domestic court of another State (or international court) regarding the same act. An exception must be made provided for in cases where proceedings before the court having exercised universal jurisdiction and rendered the final decision were conducted with the aim of shielding the perpetrators from criminal responsibility. Furthermore, a retrial based on universal jurisdiction should also be allowed if the first trial was not conducted independently or impartially, in accordance with the norms of due process recognized by international law, or if it was conducted in a manner inconsistent with rendering international justice.

*Suggestion: Delete the resolution (supra)*

5. Amnesties, pardons, processes of national reconciliation and statute of limitations should be always treated according to their respective (international) regulation; exceptions to the full recognition in a foreign State should be made if they were established solely with the aim of shielding the perpetrators from true criminal responsibility.

*Suggestion: Delete the resolution (supra)*

6. Procedural immunities as recognized in international law should be respected by State authorities. However the case should be referred to the competent international judicial organ, that may allow prosecution. Such decision should be taken within a reasonable time.

*Remark: The first sentence of the draft resolution is merely stating the obvious, as it was moreover confirmed by the ICJ in its 2002 ruling in the Congo v. Belgium case. The second sentence seems also redundant, as for many ‘international crimes’ states may have established universal jurisdiction for, there may be no ‘competent international judicial organ’ available to which the case may be referred. That procedural immunities are irrelevant before such organs, simply follows from international customary law (Nuremberg Charter etc), so that pointing out that these may allow prosecution, is again no more than stating the obvious. Moreover, the contents of the resolution are also obviously valid when it comes to offences for which states have other than universal jurisdiction, so that it is a-specific for the issue at stake.*

*Suggestion: Delete the resolution*
Suggestion: Delete the resolution, because a-specific for the issue of universal jurisdiction.

2. With regard to procedural questions, national criminal trials conducted on the basis of universal jurisdiction should be equitable and expeditious and guarantee fair, impartial and independent proceedings, as well as the respect for fundamental human rights.

Remark: As should be all criminal trials.

Suggestion: Delete the resolution, because a-specific for the issue of universal jurisdiction.

3. Conditions to be filled by the international arrest warrant are determined by the national law of the prosecuting State, such as an elevated degree of suspicion against the suspect, ground for arrest, proportionality or absolute necessity for the public security, prima face evidence. The issuance of an international arrest warrant under universal jurisdiction should not be interpreted in a manner prejudicial to the presumption of innocence.

Remark: The resolution is a-specific for the issue of universal jurisdiction. The conditions stated should apply in issuing an arrest warrant altogether, even in a merely national setting. Equally, Issuing an arrest warrant, even in a mere national setting, should never be prejudicial to the presumption of innocence. This is all stating the obvious, moreover..

Suggestion: Delete the of resolution, because a-specific for the issue of universal jurisdiction.

4. The principle of aut dedere aut judicare should apply to the State, on whose territory the suspect or accused is found, in accordance to the criteria set out in part III of the present resolution.

Remark: The draft resolution is contrary to the respective recommendations (the insertion whereof has been suggested above) that states would only establish universal jurisdiction on the condition that the suspect can be found in their territory and that, where they have chosen to do so anyway, they would not investigate in absentia unless it can be reasonably expected that the presence of the suspect at the hearing of proceedings can be ensured. Recommending an aut dedere aut iudicare obligation upon the state where the suspect can be found (in casu i.e. another state than the one exercising universal jurisdiction), would actually promote states to establish and exercise universal jurisdiction in cases where the suspect cannot be found on their territory or where the presence of the latter at the hearing of proceedings cannot be ensured. Moreover, given that – as outlined earlier, in most cases where the suspect is not present in the territory of the state exercising universal jurisdiction and almost always in cases where the suspect is to be found in his/her state of nationality, especially when he/she exercise(s)/has exercised a government, diplomatic or otherwise official function there, extradition will not be granted, the proposed resolution is quite unrealistic, and would be unacceptable to almost any state.

Suggestion: Delete the resolution

V. Universal Jurisdiction and International Cooperation in Criminal Matters

States are called upon to enhance international cooperation in cases of universal jurisdiction. Such cooperation must however not infringe upon fundamental procedural guarantees and human rights.

Remark: First sentence seems like a hollow phrase only. Second sentence states the obvious.
Suggestion: Delete the resolution

New resolutions suggested:

In order to prevent that the absence of dual criminality would frustrate the possibilities of international cooperation in criminal matters for serious crimes recognized in international
convention law, states are recommended to criminalize these even where they do not (wish to)
adhere to the conventions concerned, without this meaning that they should establish also
jurisdiction over them.

In this respect, it is to be recalled that establishing universal jurisdiction over such offences may
even create specific hindrances to routine international cooperation in criminal matters, for a series
of exceptions and grounds for refusal may/can only be invoked where the requesting member
state’s jurisdiction is extra-territorial in nature and based on a jurisdiction principle unknown to the
requesting state for the offence concerned, or, alternatively, where the requested member state
itself has also jurisdiction over the offences.

Proposed consolidated text version: see next pages
Proposed consolidated text version

Preamble

The participants in the Preparatory Colloquium of the IVth Section of the XVIIIth International Congress of the International Association of Penal Law, held in Xi’an (China) (12-15 October 2007);

Considering that universal jurisdiction may prove valuable to prevent and punish serious crimes recognized in either international customary or convention law, including those reflected in the Statute of the ICC, by increasing the likelihood of prosecution and punishment of their perpetrators;

Recognizing that the establishment and exercise of universal jurisdiction by States may remain useful in order to prevent impunity for international crimes as mentioned above, even after the establishment of the International Criminal Court;

Mindful that universal jurisdiction has become one of the most controversial topics of criminal law related academic and non-academic debates;

Propose to the XVIIIth International Congress of the International Association of Penal Law the adoption of the following Resolution:

I. Legitimacy of the principle under international law

1. Universal jurisdiction is a complementary criterion of jurisdiction over crimes committed abroad that are not covered by any other jurisdictional principle that this State may have.

2. States wishing to establish universal jurisdiction in order to prevent impunity for serious crimes recognized in either international customary or convention law, including those reflected in the Statute of the ICC, are requested to carefully consider such decision, as international law generically does not contain any obligation to do so.

II. General principles

A. in establishing jurisdiction (jurisdiction to prescribe)

3. States considering to establish universal jurisdiction, are recommended to make such jurisdiction dependent on the conditions that the suspect can be found in their territory (recourse to extradition being ruled out) and that the facts concerned constitute punishable offences also under the law of the state where they have been committed.

II.B. in exercising jurisdiction (jurisdiction to enforce)

4. Where, unlike recommended above, states have chosen to establish universal jurisdiction even in cases where the suspect cannot be found in their territory, and where they wish to actually exercise such jurisdiction, a distinction should be made between investigation and trial.

5. Investigation on the basis of universal jurisdiction is admissible in absentia, states being allowed in this case to initiate criminal proceedings, conduct an investigation, preserve evidence, issue an indictment, issue an international arrest warrant or request extradition. However, states are
recommended not to investigate in absentia unless it can be reasonably expected that the presence of the suspect at the hearing of proceedings can be ensured.

6. The presence of the defendant should be always required for the main proceedings. Therefore trials in absentia should be generally refused in cases of universal jurisdiction.

7. Where, unlike recommended above, states have chosen to establish universal jurisdiction even in cases where the facts concerned do not constitute punishable offences also under the law of the state where they have been committed, they are recommended to refrain from actually exercising such jurisdiction unless it is plausible that sufficient evidence can be gathered without having recourse to coercive investigative measures (such as e.g. house search, seizure, interception of telecommunications, dna sample taking) in the state where the facts have been committed in case the taking of these would be hindered there by absence of dual criminality.

8. In cases of conflict of jurisdiction between states among which at least one having established universal jurisdiction, preference should in no case be given to the latter state unless the suspect can/has been found (and/or apprehended) in its territory or evidence is most readily available there.

III. Universal Jurisdiction and International Cooperation in Criminal Matters

9. In order to prevent that the absence of dual criminality would frustrate the possibilities of international cooperation in criminal matters for serious crimes recognized in international convention law, states are recommended to criminalize these even where they do not (wish to) adhere to the conventions concerned, without this meaning that they should establish also jurisdiction over them.

10. In this respect, it is to be recalled that establishing universal jurisdiction over such offences may even create specific hindrances to routine international cooperation in criminal matters, for a series of exceptions and grounds for refusal may/can only be invoked where the requesting member state’s jurisdiction is extra-territorial in nature and based on a jurisdiction principle unknown to the requesting state for the offence concerned, or, alternatively, where the requested member state itself has also jurisdiction over the offences.