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**Universal jurisdiction and the prosecution of the war on terror: international and domestic law intersect.**

Others speaking in this session will consider the question of pre-emption and its possible jurisprudential foundations. They focus upon the key issues of anticipatory self defence and UN Charter authorizations. In this paper I seek to explore the boundaries of a related but relatively poorly understood topic, being the doctrine of universal jurisdiction. In particular I ask whether universal jurisdiction has any application to the exercise of jurisdiction over terrorist suspects located in states unwilling or unable to prosecute.

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**Universal jurisdiction defined**

The definition of universal jurisdiction is a troubled issue. When asked, a text writer is likely to describe universal jurisdiction in terms of the principle that every state has an equal interest in bringing to justice the perpetrators of international crimes such as genocide, crimes against humanity, or war crimes no matter where the acts were committed and regardless of the nationality of the perpetrators or their victims.

There are a number of difficulties with such a response. The first is that it fails adequately to distinguish between types of international jurisdiction – jurisdiction to prescribe, jurisdiction to adjudicate and jurisdiction to enforce. The second is that it is, in a circular fashion, defined in terms of specific acts or categories of acts, the definition of which is largely unclear.

The inadequacy of current definitions of universal jurisdiction was noted by Judge Van den Wyngaert in the *Arrest Warrant* case between the Democratic Republic of Congo and Belgium. There, the Judge stated that “[t]here is no generally accepted definition of universal jurisdiction in conventional or customary international law”.

That truth underlies the inadequacy of the concept of universal jurisdiction and the difficulty in placing overt reliance upon it as a justification for acts done as a response to terrorism.

Indeed, in the *Arrest Warrant* case, individual judges used phrases including:

‘universal jurisdiction’, ‘pure universal jurisdiction’, ‘subsidiary universal jurisdiction’, ‘universal jurisdiction “properly so called”’, ‘universal jurisdiction “in absentia”’, ‘territorial jurisdiction over crimes committed elsewhere’ and ‘extraterritorial jurisdiction’. Such conjuring with terminology cannot hide the lack of a common understanding of the basic concepts.

One must seek to identify more precisely the components of universal jurisdiction.

As Roger O’Keefe has recently described, jurisdiction to prescribe or prescriptive jurisdiction refers, in the criminal context, to a state’s authority under international law to assert the applicability of its criminal law to given conduct, whether by primary or subordinate legislation, executive decree or, in certain circumstances, judicial ruling.

Jurisdiction to enforce, sometimes called “executive” jurisdiction, refers to a state’s authority under international law actually to apply its criminal law, through police and other executive action.

Universal jurisdiction undoubtedly encompasses the first and second types of authority, being the authority to prescribe and the authority to adjudicate. To that extent, universal jurisdiction in the sense of a function of international crimes is a relatively simple

concept. When international law defines international crimes, universal jurisdiction exists for those crimes.

Of course that definition simply begs the question “what are international crimes” in international law.

It also leaves open the question of the extent and limits of universal jurisdiction to enforce, and the application of the doctrine in relation to individuals located in states unwilling or unable to shoulder their own responsibilities.

### **Territorial Limitations on the Enforcement of Universal Jurisdiction**

The territorial limits of the enforcement of universal jurisdiction are a function of the history of the doctrine. Universal jurisdiction has a long history, defined by its application to particular categories of crime. Originally, those crimes were piracy, genocide, slave trading.

Even in those categories, universal jurisdiction was shrouded in ambiguity. For example piracy, considered by many to be the foundation upon which universal jurisdiction rests, has itself had a lengthy history of definitional problems.

Particularly difficult was the distinction to be drawn between private individuals and those who operated as privateers under the auspices of states. The definition of piracy in UNCLOS now seems to settle that issue by referring to piracy being private acts for private ends.

But the point remains that even in its earliest history, universal jurisdiction was limited by a concern not to engage with states themselves, but to focus on the individual.

The distinction between private and stated sponsored acts traditionally lay at the heart of universal jurisdiction because the exercise of universal jurisdiction, in the sense of

jurisdiction to enforce, against a state or state sponsored crimes has clear potential to escalate into inter state conflict.

Post world war two, such a distinction began to be eroded. The crimes against humanity trials at Nuremburg are the most well known, but there were also many trials conducted at a national level, based on combinations of jurisdictional bases including protective, passive personality and universal jurisdiction. At least some of those trials expressly referred to universal jurisdiction to try war criminals as one of their jurisdictional foundations. In those trials lie the seeds of the suggestion that universal jurisdiction to enforce against terrorists may permit extraterritorial actions in cases of delinquent states.

It is notable that in the often quoted decision of the Israeli Supreme Court in *Eichman* (itself notable for the abduction that prompted the decision), the Court said the following:

“But while general agreement exists as to this offence, the question of the scope of its application is in dispute. Thus one school of thought holds that it cannot be applied to any offence other than the one mentioned above (piracy) lest it involve excessive interference with the competence of the State in which the offence was committed.”

The Court thus recognized that universal jurisdiction on its face involves an interference with the presumed jurisdictional competence of the State in which the offence was committed (or the State in which the offender is located).

What does this situation mean for customary international law? The environment in which it operates is constantly changing. Customary international law is inherently possessed of the characteristics of flexibility, capable of responding to developing circumstances. It must also operate within the boundaries of state consent.

These considerations become significant when states are dealing with terrorist activities, non-state actors and delinquent states.

## Universal Jurisdiction and Terrorism

Is terrorism a crime that permits the exercise of a universal jurisdiction to prescribe and enforce? Put another way, is terrorism an international crime, and if so, are there territorial limitations upon the ability of states to locate, prosecute and punish individual terrorists?

There have been many attempts to define terrorism. Definitions include: a "...strategy of violence designed to instil terror in a segment of society in order to achieve a power-outcome, propagandise a cause or inflict harm for vengeful political purposes.", or 1) the perpetration of violence by whatever means; 2) the targeting of innocent civilians; 3) with the intent to cause or with wanton disregard for its consequences; 4) for the purpose of causing fear, coercing or intimidating an enemy; 5) in order to achieve some political, military, ethnic, ideological or religious goal.

In considering the extent to which such actions are international crimes, the starting point must be the terrorism treaties of the 1970's (although the first major step in the modern era in outlawing terrorism under international law was made through the *Convention for the Prevention and Punishment of Terrorism*, developed by the League of Nations in the 1930s. However, the Convention never came into force):

- the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal Convention);
- the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons Including Diplomatic Agents (Internationally Protected Persons Convention); and
- the 1971 OAS Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance, the Hague Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention).

Article 4 of the Hague Convention provides:

"1. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over the offence and any other act of violence against passengers or crew committed by the alleged offender in connection with the offence, in the following cases:

- (a) when the offence is committed on board an aircraft registered in that State;
- (b) when the aircraft on board which the offence is committed lands in its territory with the alleged hijacker still on board;
- (c) when the offence is committed on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in that State.

2. Each Contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offence in the case where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph 1 of this Article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law."

Article 7 of the Hague Convention provides:

"The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State."

Each of those treaties extends the concept of universal jurisdiction to prescribe, and that of universal jurisdiction to adjudicate, to the specified terror offences.

In the absence of these treaty provisions I think the better view is that there was no pre-existing customary international law entitlement to exercise universal jurisdiction in relation to the offence of terrorism. However that is not the position today.

There is even some support today for the view that there is an affirmative rule under customary law specifically requiring states to extradite suspects or to exercise universal jurisdiction over such conduct which involves attacks on civilians or civilian objects and satisfies the popular concept of "terrorism".

For example, at the international level, the UN General Assembly has recently adopted a number of conventions providing for universal jurisdiction, such as the 1997 International Convention for the Suppression of Terrorist Bombings and the 1999 Convention for the Suppression of the Financing of Terrorism.

There are at least three treaties expressly using the word "terrorism" which provide for universal jurisdiction based on the prosecute or extradite principle:

- the 1977 European Convention on the Suppression of Terrorism (European Terrorism Convention),
- the 1997 International Convention for the Suppression of Terrorist Bombings (Terrorist Bombings Convention); and
- the 1999 International Convention for the Suppression of the Financing of Terrorism (Terrorist Financing Convention).

The 1997 Terrorist Bombings Convention imposes an obligation to prosecute or extradite upon states parties with respect to persons who unlawfully and intentionally use explosives and other lethal devices in certain public places with intent to kill or cause serious bodily injury or to cause extensive destruction of the public place.

The Convention requires states parties in Article 8 (1) to prosecute or extradite.

"The State Party in the territory of which the alleged offender is present shall, in cases to which article 6 applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the

case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State."

Article 1 of the 1977 European Terrorism Convention identifies unlawful acts covered by the Convention, by providing that they are not political offences or connected to political offences, including seizures of aircraft under the 1970 Hague Convention, attacks on aircraft covered by the 1971 Montreal Convention, attacks on internationally protected persons, kidnapping or hostage-taking, use of explosives or firearms which endangers persons and attempts to commit these offences or to act as an accomplice of one who commits or attempts to commit one of these offences. Article 8 imposes a duty to provide mutual legal assistance.

Article 6 spells out measures to be taken by states parties to establish jurisdiction. It provides:

- “1. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over an offence mentioned in Article 1 in the case where the suspected offender is present in its territory and it does not extradite him after receiving a request for extradition from a Contracting State whose jurisdiction is based on a rule of jurisdiction existing equally in the law of the requested State.
2. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.”

There remains the vexed question of extending universal jurisdiction to enforce over individuals located in third states that do not consent to the exercise of that jurisdiction. It is unlikely that a government that is responsible for terrorist crimes would actively seek to prosecute them. Other States may unofficially harbour support for terrorist objectives and provide a safe haven. Universal jurisdiction, including a potential universal jurisdiction to enforce, provides a possible mechanism to bring terrorist suspects to justice.

UN Security Council Resolutions, including Resolution 1373, establishing the counter terrorism committee, and Resolution 1566, which is relevantly as follows:

“Acting under Chapter VII of the Charter of the United Nations,

1. Condemns in the strongest terms all acts of terrorism irrespective of their motivation, whenever and by whomsoever committed, as one of the most serious threats to peace and security;

2. Calls upon States to cooperate fully in the fight against terrorism, especially with those States where or against whose citizens terrorist acts are committed, in accordance with their obligations under international law, in order to find, deny safe haven and bring to justice, on the basis of the principle to extradite or prosecute, any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or commission of terrorist acts or provides safe havens;

*3. Recalls that criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, and all other acts which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and calls upon all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature;*

4. Calls upon all States to become party, as a matter of urgency, to the relevant international conventions and protocols whether or not they are a party to regional conventions on the matter;

6. Calls upon relevant international, regional and subregional organizations to strengthen international cooperation in the fight against terrorism and to intensify their interaction with the United Nations and, in particular, the CTC with a view to facilitating full and timely implementation of resolution 1373 (2001);”

In addition to the treaty provisions that I have discussed, there is a growing body of customary international law that appears to support the proposition that terrorism may be countered by an exercise of both universal jurisdiction to prescribe and an extraterritorial universal jurisdiction to enforce in cases of failed, or more problematically, delinquent

states. Indeed, it is difficult to reconcile at least some of the extractions from Afghanistan, Iraq and other places on any other basis.

For example, it has been reported that the U.S. Central Intelligence Agency (CIA) has transferred about a dozen non-Iraqi prisoners out of Iraq. Without making any comment on the veracity of those reports, let us assume for the moment that they are true. The transfers would, on their face, probably be contrary to Article 49 of the Fourth Geneva Convention which says, "Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive."

However to the extent that the US was in effective occupation and control of Iraq at the time, the transfers may be permissible as an exercise of enforcement if they were for the purpose of exercising universal jurisdiction over terrorists who would not otherwise face prosecution. An exercise of universal jurisdiction at a time when the United States was in effective occupation of the territory would not seem to offend the territorial limitations upon the enforcement of universal jurisdiction.

Customary international law is not static. It may be modified over time by new assertions of rights, if other states acquiesce in those assertions. There is, in my view, a clear extension of universal jurisdiction to encompass terrorism as an international crime.

That does not however necessarily extend to an ability to enforce universal jurisdiction on an extraterritorial basis. The legality of extraterritorial enforcement is directly at issue in the ICJ proceedings brought by the Congo against France, in which the legality of the French warrant addressed to the President of the Congolese government in proceedings brought in France against the Congolese Minister of the Interior, Mr. Pierre Oba.

Such a jurisdiction to enforce raises the difficult problems of extraterritorial enforcement and the issues that so concerned the early days of universal jurisdiction. Even if the state in which the perpetrator is located is unwilling or unable to prosecute or investigate,

opening the barriers of territory to permit third states to physically enter and enforce a universal jurisdiction remains problematic. Notwithstanding the limited state practice relating to abductions (for example in *Eichmann*), there is in my view little or no support for the proposition that universal jurisdiction extends to an extraterritorial jurisdiction to enforce.

In fact, even if delinquent states are under a positive legal obligation to prosecute or extradite terror suspects, multilateral enforcement by virtue of Chapter VII resolutions would in my view remain the appropriate vehicle for enforcement actions.

### **Conclusion**

There seems to be a clear development in customary international law permitting the exercise of universal jurisdiction in cases of terrorists. That is a substantial and relatively recent development. Even in the absence of an extraterritorial enforcement jurisdiction, it represents a powerful new tool in the prosecution of the war on terrorists.