ASSESSMENT OF THE DOCTORAL DISSERTATION SUBMITTED BY MGR. PETRA BAUMRUK, LL.M., ON *THE STILL EVOLVING PRINCIPLE OF UNIVERSAL JURISDICTION*

1. Relevance of the Topic

The doctoral dissertation focuses on an interesting topic which is of high relevance for current international law and international relations. The topic, under the title of *The scope and application of the principle of universal jurisdiction*, has been at the agenda of the UN General Assembly, and its Sixth Committee, since 2009. It has, for several years already, featured among the most controversial issues in the debates between the European Union and the African Union. It is also the object of several judgments rendered either at the international scene (for instance the ICJ Arrest Warrant Case) or in domestic courts (United Kingdom, Belgium, Malaysia, etc.). The principle of universal jurisdiction gives rise to burning legal and political questions which, though discussed at numerous instances in scholarly literature, have not been settled yet and are therefore worth revisiting.

2. Formal Aspects of the Dissertation

The dissertation is in English, which is not the author´s mother tongue (and neither is it the mother tongue of the commentator). The text is, in general, well written and easy to understand. Despite that, it shows certain terminological and linguistic errors. For instance: it would be more appropriate to speak about the *use* or *application*, and not the *usage* of the principle of universal jurisdiction (p. 27); the tribunals *were*, rather than *where* established (p. 58), the implementation should be *non-selective*, rather than *none-selective* (p. 170), International criminal law continues to *evolve*, rather than to *formulate* (p. 171), etc. Some expressions lack clarity – for instance, what does the author has in mind when claiming that *"further study on the topic cannot be disregarded"* (p. 2)? Does she mean that there is a specific study that has to be taken into account? O that further study is needed? Some sentences are also rather clumsy, e.g. *"this study seeks to locate the assertion of universal jurisdiction within the legal system of jurisdiction and avoid it being in violation of national sovereignty but playing a complementary role"* (p. 9). I could give other examples of such inaccuracies. Yet, most of them are rather minor and they do not prevent readers from understanding the text.

The situation is worse with respect to the Resumé in the Czech language. The summary is full of mistakes in grammar and syntax and it lacks uniformity in the terminology (universal jurisdiction is sometimes wrongly translated as "univerzální princip" – p. 174). Some sentences moreover simply do not make any sense. This is the case, for instance, with the sentence: *"Jsou to například obavy, které vznikají v souvislosti s politickým zneužíváním nebo jinak nerozvážného rozhodnutí univerzální jurisdikce, jako například obavy týkající se mezinárodních vztahů, zásady rovnosti mezi suverénními státy a nebo spravedlnost trestního řízení"* (p. 176). At the same time, it is important to acknowledge that Czech is a difficult language and to assess positively that the author, while studying a PhD programme in English, has sought to learn this language.

3. Methodology and Sources

The Summary submitted together with the Dissertation contains an independent section on the scope of and methods used in the text. It is interesting to note that the Dissertation itself does not have such a section, as this would be appropriate. In the Summary, the author indicates that she deals with the topic both from the *de lege lata* and from *de lege ferenda* perspective (p. 6). This is indeed true as she seeks not only to describe the legal regulation of the principle of

universal jurisdiction applicable under current international law, but also to formulate certain recommendations for the future development of this law. Neither the Dissertation nor, despite the section on the Scope and Methods, the Summary elaborates on the methodology. The Summary suggests that the author has adopted the historical and theoretical approaches. Yet, it does not specify what these approaches are – especially in the latter case, this is not clear.

The Dissertation draws on a considerable number of primary sources and secondary literature. It is strange that in the bibliography, primary sources are labelled as internet sources, as the latter term is usually reserved for texts written specifically for the online use. I guess, some of the articles were consulted in their online (not hard copy) version as well and still, they are not qualified as internet sources in the bibliography. The list of books, book chapters and articles includes most of the important titles on the principle of universal jurisdiction and related topics that have been published in English over the past decades. The author however relies somewhat too extensively on secondary sources, at the expense of primary ones (treaties, case-law, resolutions, national legal acts etc.). From that perspective, her thesis is more a rehearsal of views held by other scholars than an original and innovative piece of research.

4. Substantive Aspects of the Dissertation

The dissertation, of a standard length (200 pages), consists of three parts encompassing altogether seven chapters and concluding remarks. The structure is logical and corresponds to the objective of the dissertation, described in the Introduction, *"to identify and explore how far the law of universal jurisdiction has actually evolved, and how far we should expect it to evolve in the near future considering its constrains and challenges"* (p. 7). The division between the general and the specific part is however not completely clear as the relationship between the two parts is not that of generality/specificity.

In the Introduction, the author explains the relevance of the topic and defines the scope of her research. It is somewhat confusing that universal jurisdiction is sometimes described as a principle, at other times as a concept and yet in other instances as a doctrine. It is not clear how the author conceptualizes these notions and whether she considers them as synonymous or not. In section 1.2.1, the author introduces three branches of international law, which should be allegedly relevant for her analysis – international criminal law, human rights and international humanitarian law. Provided that the concept of jurisdiction has mostly been discussed under general international law, it would be appropriate to include other, more traditional branches of international law as well. When introducing the three branches, the author claims that *"the strict prohibition of serious human rights violations binds state and individuals as well"* (p. 7). This claim is highly controversial and could only be true under certain conditions and while adopting a specific understanding of human rights.

The "general" part of the Dissertation focuses on the concept of jurisdiction, the historical evolution of universal jurisdiction and the content of this jurisdiction. The discussion of the concept of jurisdiction is comprehensive and well-informed. The author shows the difference between universal jurisdiction and other classical jurisdictional titles (territoriality, nationality, passive personality, protective jurisdiction) consisting in that under the former, no territorial, national or other link between the act and the state exercising jurisdiction is required. At several instances, the author deplores the lack of an *"accepted definition of universal jurisdiction"* (p. 64). How does she understand the notion of definition? And if no definition exists, can the principle of universal jurisdiction make part of international law?

In chapter 3, the author seeks to trace the historical evolution of the principle of universal jurisdiction, distinguishing three different periods – that prior to the WWII, when the principle was first used with respect to piracy; that of the post-WWII, when its scope was extended to encompass genocide, crimes against humanity, war crimes and possibly other crimes under international law; and the modern period, when the principle has been invoked and/or discussed

by several national and international institutions (including the International Court of Justice and the UN General Assembly, on the agenda of which the item was included in 2009, at the instigation of Tanzania and not Rwanda, as wrongly stated on p. 62). The conclusions of the analysis are not completely clear. The author seems to suggest that the principle of universal jurisdiction is now established under international law, that it is mostly a right and not an obligation, and that it is conditional on the presence of the relevant person on the territory of the states exercising universal jurisdiction.

I find these claims plausible but insufficiently evidenced. First of all, the author does not specify which of the two fundamental approaches described on p. 34 she opts for, i.e. whether she looks for a permissive or a prohibitive rule. Secondly, although she includes a section entitled Conventional and Customary International Law (section 3.4.2), she does not discuss the source of the principle of universal jurisdiction at any length. Thirdly, in section 4.3.1 pondering the scope of crimes giving rise to universal jurisdiction, the author discusses the inductive and deductive approach. Is this distinction only pertinent for the scope of crimes? Would the use of the two approaches, when applied to establishing the existence of the principle of universal jurisdiction, lead to the same conclusions? Finally, the author seems to opt for the inductive approach, thus relying on treaties, case-law and national practice. Yet, the overall number of cases she discusses is very limited. Particularly problematic is the lack of any detailed analyses of the national legislation going beyond mere references to the reports issued by the Amnesty International (p. 85).

The "specific" part of the dissertation concentrates on the scope of crimes giving rise to universal jurisdiction and the concept of subsidiarity. The chapter on the core crimes is highly confused and confusing. The author claims that whether a crime is subject to the principle of universal jurisdiction is determined by its gravity. Yet, she admits that there is no uniform understanding of what gravity means and that, moreover, the concept might be more political than legal. She goes on listing the set of crimes under international law included into the Rome Statute (minus aggression, plus torture) and suggesting that these are the grave crimes. After that, she suddenly stresses that the gravity might not be the only relevant factor and that the scope of crimes could be defined inductively, based on the national practice. She immediately discards this option claiming that the state practice is *"either scarce or inconsistent"* (p. 114) – this without giving any overview of such practice. Such an overview would however be highly interesting provided that a certain number of states, including the Czech Republic, apply, or might apply under their criminal codes, universal jurisdiction to a rather extensive set of crimes going largely beyond the classical crimes under international law. It might also be worth considering, whether the whole debate about the scope of crimes makes sense, if the author opts for the prohibitive approach to universal jurisdiction (p. 34).

The chapter on subsidiarity is the most comprehensive and referenced one, though again references are made more to secondary literature than to primary sources. Yet, this time, the author cites at least some national practice (p. 130). The practice seems to indicate in the same direction, so the author´s claim that its instances *"share the same fundamental assumption that the territorial states are to be given primacy*" (p. 131) might be well true. The same applies to the overall conclusion of the chapter which, though clumsily expressed, reflects the evidence presented in the text. This conclusion is that *"if one pretends that international law submits the exercise of universal jurisdiction to the notion of subsidiarity then it is to conclude that general international law provides for a hierarchy within the different jurisdictional bases accepted in modern international law"* (p. 150).

The third part of the dissertation presents certain challenges that the principle of universal jurisdiction faces. One of them is the institution of immunities of high ranking officials. The relationship between universal jurisdiction and immunities is an interesting topic that would be worth further research. At several instances (for instance p. 163), the author

mentions political opposition to the principle of universal jurisdiction – she however never elaborates on this point and does not even pay and attention to the recent debate between the EU and the African Union. In section 6.4, the author seeks to propose a new approach to universal jurisdiction. Most suggestions however remain rather vague. For instance, the author stresses *"the need to take into account the perspective of victims and allowing them to participate"* (pp. 164-165). How exactly should victims get involved in the exercise of universal jurisdiction? What form would their participation take on?

The overall conclusion of the dissertation is somewhat vague and toothless. This reflects the admission by the author that *"even though one thinks that after having analyzed the principle of universal jurisdiction and searched for some sort of such clarification on the topic it might become clearer, but it is usually so when dealing with universal jurisdiction that it raises more questions than it answers"* (pp. 166-167). The author nonetheless seeks to give certain answers. First, she claims that *"universal jurisdiction may only be exercised and applied over the most serious international crimes"* (p. 167). This claim has no sound ground in the dissertation, so it is presumed rather than evidenced. The two subsequent answers relate to the principle of subsidiarity and, though stated somewhat too categorically, have at least been discussed at length previously. The last answer has it that *"universal jurisdiction should never be considered in isolation from other principles of international law but always in accordance with accepted international standards"* (p. 167). This claim, though certainly not unwarranted, is too general to constitute any meaningful contribution to the debate.

5. Conclusions and Recommendations

The dissertation does not make any groundbreaking contribution to the research of the principle of universal jurisdiction. It mostly rehearses the arguments raised by other scholars, with the only original part being that on the principle of subsidiarity. The theoretical and methodological position that the author takes is not clear. It is regrettable that so little attention is paid to the actual national (and also international) practice, beyond some of its classical and ever-cited instances (Eichmann, Pinochet etc.). The conclusions of the dissertation are also rather vague and general, leaving the reader in a state of uncertainty and confusion. Despite this, I fully acknowledge that the topic is not an easy one and that it might be too ambitious to expect that all its aspects could be clarified, or even outlined, in a single piece of research. The author has sought to engage with the topic, tracing the historical evolution of the principle of universal jurisdiction and discussing some of the recent challenges it faces. She has tried to formulate her own position with respect to some of these challenges.

In view of the foresaid, I ***recommend the dissertation*** for the oral viva in the course of which the author should address the comments raised in this assessment. More specifically, she should answer the following questions:

1) Does she opt for the permissive or prohibitive approach to the principle of universal jurisdiction (as defined on p. 34)? Does the choice of the approach has a bearing on the way in which the existence of the principle and its scope will be established?
2) What are the main legal issues at stake in the recent debate on universal jurisdiction between the EU and the African states?
3) Do the immunities of high ranking officials, under current international law, constitute an obstacle to the exercise of universal jurisdiction? Should they do so?

Done in Prague on 25 August 2015

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