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Jurisdiction, Terrorism and the Rule of International Law

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LECTURE

JURISDICTION, TERRORISM AND THE RULE OF INTERNATIONAL LAW

In October 2001, approximately one month after the September 11 terrorist attacks in the United States, Golden Gate University Law Professor Sompong Sucharitkul spoke to the students of Golden Gate University and others on the topic of jurisdiction, terrorism and the rule of international law.

The following is an excerpt from the speech given by Golden Gate University Law Professor Sompong Sucharitkul[*]

I come to this podium in trepidation in the presence of my learned colleagues on the faculty with whom I will also be able to share some of their thoughts. Before we proceed on this

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Professor Sucharitkul has served as Thailand's Ambassador to Japan, Italy, Greece, Israel, France, Portugal, and the Benelux countries, as well as the European Union and UNESCO; He has been Thailand's representative in the U.N. General Assembly for nearly 30 years; Professor Sucharitkul is currently a member of the Commercial Arbitration Centre at Cairo and the Regional Centre for Arbitration at Kuala Lumpur, Malaysia; Sucharitkul is a member of the Panels of Arbitrators and of Conciliators of the International Centre for the Settlement of Investment Disputes, World Bank, Washington, D.C.; He is an elected member of the Institute of International Law (Geneva) ; Sucharitkul is Vice President of the International Academy of Human Rights (Paris); Sucharitkul serves on the U.N. Compensation Commission, formed to process claims against Iraq for actions during the 1990 invasion of Kuwait; Also, Sucharitkul directs Golden Gate University's Center for Advanced International Legal Studies and the summer program in Bangkok.

topic of jurisdiction, terrorism, and the rule of international law, I would like to call your attention to the publication by the American Society of International Law on the back of this [information] you have, also the membership and new publication called "Careers in International Law" in case you maybe interested in pursuing further. I am not trying to sell anything, but I hope you will be able to make up your mind as to what will be your future career.

Now, we have divided our analysis of the problem that has been mentioned into three areas, each one of which, I think, is rather difficult. Jurisdiction of course does exist in national and even international law. Even when we study international law we have to examine the question of national jurisdiction - the extent, scope and limit of national jurisdiction. Then, in your class you have learned that, even in national jurisdiction, the United States Restatement has classified according to the separation of powers of the U.S. Constitution, the three powers: the jurisdiction to proscribe, which is the legislature; the jurisdiction to adjudicate, which is the judiciary; and the jurisdiction to enforce, which is the executive.

Now international law doesn't quite fall according to the separation of powers because international law has to attribute many additional powers to the states. The question of jurisdiction is one created by the states. International jurisdiction is based the consent of states. There is no prescriptive jurisdiction to speak of, the international organizations, world organizations, the U.N., whether it be the Security Council or the General Assembly. None of the principal organs of the U.N. have been designed to be legislative, but as time proceeded, I think you will find out that practice has made them perfect in some way.

The working orders of the Security Council, which for a long time had been idling, subject to some kind of paralysis, because of the use of veto; so that any important questions cannot get through without the approval of the five permanent members. But that has stopped on a number of occasions. It didn't work when we had the Korean crisis. Then the primary responsibility of the Security Council, the maintenance of peace and security has passed on to the General Assembly. That is why we have the Uniting for Peace Resolution.

But we have seen some sanctions imposed by the UN successfully - economic sanctions. That we did not see until the

Gulf War in 1990, when Iraq proceeded to invade and annex Kuwait. Then you suddenly noticed that the Security Council started off Resolutions 661, 662, 663, 664 until 678, when the magic formula is used, "all means necessary," if Iraq did not comply with the preceding resolutions of the Security Council. That is not all, but that is the kind of prelude I would like to present to the question of jurisdiction. Who has the international jurisdiction for the maintenance of peace and security? Undoubtedly, the Security Council.

If you look up in Chapter 7 of the Charter, Articles 39, 40 and 41, you will see that, failing the primary responsibility, it will fall back on the General Assembly to adopt some resolution, which may not carry the same type of binding effect as that of the Security Council, and therefore, the International Law Commission undertook the Study of State Responsibility. And now we are dealing with the draft articles of state responsibility. We were discussing whether the Security Council is vested with any law making power. That is the method on which we have not reached a final conclusion, but certainly some legal consequences flow from the adoption of the decision on Saturday. The Security Council can indeed create some obligations, not only on the part of member states, but also on the part of all states. I will try to bring to your attention by what I mean all states.

Now, jurisdiction here refers to the power to be exercised by the international organizations, through the principal organs primarily responsible for the maintenance of peace and security and whenever there is a likelihood of the breach of international peace then you can invoke and petition the Security Council, and ask that it act upon your request, and then try to draft a resolution and try to have it adopted. Of course, this takes a lot of discussion, a lot of debate. I will not at this point discuss with you the procedures of the Security Council because the Security Council is bilingual. By that, I mean you can speak in any language, but then the language will be translated into English and French and, subsequently, successive and not simultaneous, so that it takes a bit of time for the other party to reply because you can speak in any of the original, official languages of the U.N. That is what you can expect because the time that the Security Council puts aside for the discussion of the topic depends on the emergency. Sometimes, it can go on all night if there is a crisis.

When it comes to the question of jurisdiction, we say, "Well, who has jurisdiction in terms of national jurisdiction?" In terms of national jurisdiction, of course we are talking about terrorism because there are several types of terrorism. We have seen in our lifetime, we have witnessed terrorism on a national scale - not to speak of the Mafia, the Rosso Brigatto, the Red Brigade in Italy, and similar organized gangs in Japan such as the Yakusa. Also there is the Red Army. There are many types of Mafia groups around the world, but they are not international in the sense of international law. They committed terrorism, which is a crime under national law, but with the purpose of intimidating, putting the public into fear and in the case of national private terrorism it is with a private gain.

In the case of international terrorism in the long line of history, not just today, the techniques and the implementation or performance, perpetrations have taken different forms of terrorism. In my article, I sometimes refer as far back as Ivan the Terrible; sometimes they refer to it during the French Revolution. Other times, you have in the inter-war period. A large number of instances like the assassination of the French foreign minister and the assassination of the King of Yugoslavia; there, the French and Swiss governments immediately tried to organize an international meeting to adopt the Convention on the Suppression of International Terrorism, and there we have, for the first time, an objective international definition of terrorism.

I want to refer to this because I have cited this in Article I, paragraphs one and two. Paragraph one states, "The principle of international law, by virtue of which it is the duty of any state to refrain from any act designed to encourage terrorist activity directed against another state and to prevent the acts in which such activities take shape."

Paragraph 2 defines, this is the convention of 1937, defines terrorism in this way, "The express act of terrorism means criminal acts directed against a state and intended or calculated to create a state of terror in the minds of particular persons or group of persons or the general public." So there are two elements, criminal intent and criminal acts.

The criminal acts are directed against the state, so what you have seen in the incidents of September 11th is certainly a criminal act, certainly directed against the United States. The

United States has become the victim state under this definition. And that is not the end, "...is intended and calculated to create a state of terror in the minds of particular persons or group of persons or the general public." It did create a state of terror. The idea was to intimidate, not necessarily to successfully coax into submission or into surrender, but at least to create the state of fear, terror. It was terrible.

It is not only to be so defined, but you will see that the resolution 1368 of 12 September unequivocally condemns in the strongest terms "the horrifying terrorist attacks which took place on 11th September 2001 in New York, Washington, D.C., and Pennsylvania, and regards such acts like any act of international terrorism as a threat to international peace and security." Look at it carefully. I think this was a very carefully and considerably well drafted by the United States because it clearly puts the matter on the correct basis. It clearly defines and identifies an act as an act of terrorism and clearly states it is a threat to international peace and security. Hence, you invoke the whole gambit, the whole power in the hands of the Security Council.

Now the Security Council has come to be alive. It is not dead anymore. It is not paralyzed anymore. The veto does not apply because the U.S. has been able to talk and convince its friends into understanding, and there is no one from the members of the Security Council that would raise its voice against the identification of the act, as an act of terrorism. Before I go on with the resolutions, I would like to analyze in brief the crime of terrorism under international law. You have the victim of the crime, but what about another state? A crime has to be committed in another state, not an act of domestic terrorism. A domestic terrorism is committed by an American committing a crime in the United States, or by the Mafia in Italy, or by whatever is in the same national grouping, but this not that type of domestic violence or domestic terrorism.

This is clearly international terrorism, but you have to define who were the states responsible. Now, use your imagination because where can an act of planning, initiation, conspiracy preparation acquisition of equipment of the armaments and so on. How are these being coordinated? In whose territory? You will find in one of my articles that was published in the Israel Yearbook of Human Rights, this was 1989 following a meeting of experts on terrorism in Tel Aviv. I

happened to be invited to attend that meeting and a colleague of ours from the U.S., Oscar Schachter, he was flying on Pan America. That flight, on the return flight was the one that had the tragic ending in Lockerbie. He was a little bit shaken. Although he was not on the return flight, right before the meeting he learned that the flight had an accident, exploded. That is the kind of terrorism that we have to try to prevent, and we have not always succeeded.

We discussed about the conspiracy, complicity because the crimes of international terrorism, acts of terrorism are not generally committed by one group or two groups or one state or two states. It may take multiple venues, it could take place in various territories. Therefore, who is responsible? The states sponsoring the attacks? The state harboring or allowing terrorist activities to take place? We did discuss the question of Lebanon, whether Lebanon is really acquiescing. What could a country do in order to push out the terrorist from outside? Can that type of country be held responsible for allowing or for not getting rid of the terrorist activities that were brewing under their noses?

There were countries like Libya, where, at one time, it was clear they were sponsoring some type of terrorism. We have seen as a matter of jurisdiction, again the United States and the United Kingdom, from the Lockerbie case, that Oscar Schachter might have been on. But again, he was luckily attending the meeting in Tel Aviv to discuss questions of anti-terrorism and the legal aspects of how to prevent precisely the measures we will be discussing today.

We had other questions we discussed, but on this one the question of jurisdiction is so significant. That is why my approach is international jurisdiction. Now, that is why the United States and the United Kingdom approached the Security Council and obtained a resolution that would compel Libya to deliver two of their officials, two Libyan officials, for trial as the alleged offenders. The U.K. and the U.S., and we had before the International Court of Justice also proceedings instituted by Libya against the U.S. and U.K. for violating the Montreal Convention of 1971 because, under the Montreal Convention, the U.S. and the U.K. would be under the obligation to request extradition from Libya, rather than going outside of Libya and going through the international jurisdiction. But the Security Council found this was a

disturbance of international peace and security and adopted the resolution.

The ICJ came to the conclusion that it rejected the Libyan request, asking the court to suspend the application of the Security Council decision. Because we each have our own sphere of actions, the court is not going to interfere, there is no judicial review in international law because it is minding its own business through whatever disputes are submitted to the ICJ by the parties. Or it may give advisory opinions to the relative organs of the United Nations, but it is not going to pronounce on something that is not justiciable. It is really beyond the jurisdiction of the court.

So this is important even in the separation of jurisdiction of the international organization. Professor Okeke would agree with me. He is teaching International Organizations. I think Professor Jones also who sometimes co-taught with me, we have seen this. And then Professor Small also. In any event, that incident ended up in the Scottish court, Scottish judges, and Scottish criminal law being applicable because the venue of the crime, Lockerbie was in Scotland. But, it has to be somewhat internationalized so the Scottish court would be sitting at Kamp van Zeist in the Netherlands, which is a little town between Utrecht and Amsterdam. Now we have one conviction and one acquittal. The conviction is being appealed, and we will see what happens next. So you see, even in the field of international terrorism there is the possibility of justice being done even by a national court sitting internationally as a compromise. But we can always have other jurisdictions, not necessarily adjudicative, but more responsive than we have seen in Iraq in the operation Desert Shield at first, and then the Operation Desert Storm.

Now, you may want to examine what we can do in the circumstances. It depends how you want to look at the crime. Is it a criminal act? It is a criminal intent. But you have to look a little beyond the act; you have to look into the future, into the planning, because it is not the last act. It is not like the invasion of Kuwait by Iraq. That was a "fait accompli", it was finished. But here, it is not finished. I think they struck and destroyed the buildings and did a lot of damage, but that was not the end because they did not say it was finished or over. On the contrary, they said they were going to do it again. This is only the beginning. These acts were designated and

designed to create fear in the minds of the public. Not only the minds of Americans because the citizens in these buildings were not only American, there were many other citizens or nationalities there.

Let me not detain you with the details of nationality because that is far less important than the disturbance of the peace and security of mankind because of the indiscriminate nature of the criminal act. Primarily, the U.S. was the victim, but ultimately it is mankind because of the indiscriminate character of the attacks. It is an attack on whoever is a passenger on an airline. It is like the crime of piracy. For more than 200 years, pirates have been characterized as the enemies of mankind. It becomes universal jurisdiction, which means that any state, coming back to jurisdiction, any state can arrest any pirate on the high seas and prosecute and punish.

Now here, we are not so much concerned with the arrest, or the punishment or the adjudication. I want to guide you into something different. It is not so much counter measures. It is more self-defense. It is the defense of peace, the defense of mankind. Let us look into what we discussed in Tel Aviv. My Hebrew, Israel, Jewish and other colleagues discussed the bombing of Baghdad because they think there was a nuclear plot. They were afraid this might be used for a non-peaceful purpose, as the furthest argument that could be used was an anticipatory strike. And this strike was very difficult.

In 1988, we were trying to scratch our heads and see what kind of evidence you need to prove and, although the evidence was not to our satisfaction in Desert Storm, the evidence came to light because the SCUD missiles were used against Israel, and we did not know what was put in them. So, sometimes, when at the time of the occurrence of the incident, one may lack hindsight. But, later on, when the distance started to unfold itself, then you can see more clearly that what you have instinctively reacted to in self defense was correct. But sometimes it can be mistaken.

The U.S., in the case of USS Vincenes in the Gulf also, mistakenly believed it was being attacked by an Iranian civilian aircraft, which in fact was carrying passengers of Islamic faith to Saudi Arabia for their yearly pilgrimage. That had nothing to do with defense. But the US mistakenly believed that it was self defense, so there was no intention, so

there was no criminal act. That did not mean the US was absolved of the civil liability. The loss had resulted from a miscalculation, even though honest, it did not exonerate the liability to make reparations to the passengers.

So the law was clear. The international law of the air, civil aviation, has undergone a lot of changes since the fall of Soviet communism. We have had the international Civil Aviation Council proposing a resolution, which I think differs from the amendment to the protocol in article three which says in no circumstances will force be used to bring down a civilian aircraft, to endanger the lives of civilian passengers. That was not accepted by the United States in 1988. But it was accepted by the U.S. after the Cuban incident when a few U.S. aircraft were shot down by Cuba over Cuba. Then the US changed its position and accepted it.

But now we have new circumstances. We have seen President Bush say, I think correctly, he had the courage to say he had ordered the U.S. Air Force to shoot down American aircraft that may have been hijacked and aiming at destroying the building. This is self-defense. This has nothing to do with the destruction of the hijacked aircraft. This has to do with the defense on the ground. You are defending, you are protecting, preempting. This is preemptive self-defense. When we discuss the anticipatory self-defense, we have some difficulty in trying to measure the standard of evidence. What kind of evidence do you need to justify the taking of anticipatory self-defense?

The rescue party is different. That is no justification. That is countermeasure, not anticipatory self-defense, or preemptive strike, or, if you like, preemptive self-defense in this case. When the U.S. decided to seek the authority of the Security Council and tried to get coalition from as widely and broad-based as possible, not so much to pursue, I wouldn't put it that they are trying to arrest. There is no jurisdiction to pursue, but there is under Chapter 7 of the Security Council. But they would have been stronger with the purpose of collective self-defense. Defense of what? Defense of humanity. Defense of future victims of terrorism, and terrorism would not discriminate any targets. Maybe the U.S. would continue to be the victims, but it doesn't have to be the United States. Other countries could be victims. I think in Italy it's been so many times. And also France, and a number of other countries.

It is not only purely domestic, sometimes European, sometimes national terrorism and even the Olympic Games. There have been so many incidents or acts of international terrorism that I think now it's time for an international committee, and that is why we have here, even from the first resolution, "Calls on all states to work together to bring to justice perpetrators, organizers and sponsors of these terrorist acts, and stress that those responsible for aiding and supporting or enabling the perpetrators, organizers and sponsors of those acts will be held accountable." Here, accountable is a very flexible term. It's a very non-committal term. It can mean amenable. It can mean liable. It can mean also criminally responsible.

So it is further reinforced by Resolution 1373 of 20th September. And here it is citing a lot of other rules of international law. The principles of international law under Resolution 2625 of Friendly Relations and Cooperation Among States, laying down the basic principles of international law in the field of friendly relations and non-use of force. And here, we see that states have been acting under Chapter 7, yes Chapter 7, so it can be punishment. It can be elimination. It can be prevention because it has the authority of the Security Council. But, for coalition forces, acting pursuant to Security Council resolution is quite safe. Remember the bombing by Israel of Baghdad? There was no Security Council resolution to support to begin with. But here we have this clear and unambiguous resolution.

One thing is clear, "all states," and you see the expression "all states" here. It means that the Security Council has authority to bind not only member states, but the expression "all states" means also non-member states, even those who are not members of the U.N., they are bound. "...to prevent and suppress financing of terrorist acts." Here, we have already a convention of 1999 about the obligations that the states agree not to finance international terrorism.

> ...Refrain from providing any formal support to any persons and entities within that territory from making and funds or financial assets, freeze funds, without delay, funds or other financial assets. Taking this as a step to prevent the commission of terrorist acts, including provisions for early warning. Deny safe haven. Prevent those who finance, plan, commit or facilitate terrorist acts from using that respective

> territory. Ensure that any person who participates in financing, planning, or perpetration of terrorist acts or support terrorist acts be brought to justice. Support one another.

Of course, one measure of the international system is to prevent the movement of terrorist groups by effective border control and control of issues of identity.

> Calls upon all states to find ways to intensify and accelerate exchange of operational information, exchange of information to operate, to prevent and suppress terrorist acts and take action against perpetrators of such acts.

So this can be defensive. It can be preemptive. It can also be suppressive. "...Become parties as soon as possible." They are asking states to ratify convention on suppression of the financing of terrorism of 1999. States are called upon to:

> ...Increase cooperation and fully implement as many of these national conventions as possible relating to terrorism. Take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in commission of terrorist acts, and; ensure, in conformity with international law, that refugee status is not abused. Notes with concern, the close connection between international terrorism and transnational organized crime, illicit drugs, money laundering, illegal drug trafficking, illegal movement of nuclear, chemical, biological or other potentially deadly materials. Thus emphasizing the need for coordination of effort.

The Security Council also:

> Declares that acts, method and practice of terrorism are contrary to the purpose and principles of the U.N., and that knowingly financing, planning and inciting terrorism acts are also contrary to the purpose and principles of the U.N.; and decides to establish committee of the Security Council to monitor international businesses. Calls upon all states to report to the committee no later than 90 days from the day of adopting this resolution or thereafter, according to timetable on steps that they have taken to implement the resolution.

So, I think the U.N. really means business. But, how far will we see within 30 days? How far can the U.N. go? How far the coalition forces could proceed, not independently, but pursuant to the U.N. Security Council resolution.

You have seen that last weekend, last Saturday I think, the international headlines that, at a meeting of the A.P.E.C., Asian Pacific Economic Cooperation, President Bush, with President Putin, and also the Chinese president, Chinese and Russians appear to be supporting fully, the Chinese came out clearly that they supported this resolution, and this resolution supports clearly what has taken place. Though it doesn't mean we need to send troops. That is something different. I think the British, the French, Australians, Canadians, and others also supported.

You see, this is on the right road. We're on the right road. Not so much concerned with the question of prosecution and judgment because that will come. I am more concerned with the other stuff. It is a combat. To combat cancer, we have tried to preempt the onset of cancer. We have tried to preempt and eliminate the chance of the possibility of repetition or recurrence of these incidents that are harmful. They are not only demoralizing; they are aggravating and degrading. They inflict a great deal of losses not only in the United States, but in international trading and mankind in general.

It is beyond the dreams of millions. They must have dreamt it in a nightmare. But, we have to stop, and that requires intensive, concerted international preparations, actions, coordinations. I think this resolution at least constitutes the initial stage that the Security Council has been prepared to undertake, and I think here, the U.S. is headed in the right direction. You are fully reinforced internationally, legally in international rule of law.

I think in the words of Bush, the father, when the former president, in Operation Desert Shield and then Desert Storm, explained the rule of law. He has a different, instinctive sense. He said from now on, from 1991, that when coalition forces began to enter and start bombing Iraq and Kuwait, he said from now on the international rule of law doesn't mean just a rule of law. It means also the realization that you must have an advantage and responsibility to use force, when necessary, in order to implement the rule of law. That is what Bush, the father, said.

Today, I think the U.S. has only taken the first step, but hopefully, if the world is without international terrorism, it can be a pleasant place to live. This is where the Darwinian theory of evolution comes into play in order to invoke a sense of serenity and security of mankind. The surviving instinct that if we allow international terrorism to continue to operate, it is very difficult to stop or cure or to remedy. We need to make this a surgical operation in order to remove the cancer, or to remove whatever threat to the international peace and security.

We cannot afford to allow this hesitancy or deliberation to continue without taking action in time because we are already behind in time. We are already behind the advancement that international terrorism has made, and I am happy to see the progressive evolution of international law has not lagged far behind because we're catching up. That is why we see the change here. Even the resolve of President Bush in deciding to shoot down the American plane as a sacrifice because it is preventive. It is a preemptive strike to prevent the perpetration, the commission of further acts of terrorism.