4-4-1987

Outline Of A Talk On the Problem of Jurisdiction In the Context of International Terrorism

Sompong Sucharitkul
Golden Gate University School of Law, ssucharitkul@ggu.edu

SYRACUSE UNIVERSITY COLLEGE OF LAW INTERNATIONAL LAW SOCIETY
presents

INTERNATIONAL TERRORISM

on
Saturday, April 4, 1987

College of Law Grant Auditorium

9:00-10:35 AM

Profile of a Terrorist:
Speaker- Moorhead Kennedy, Executive Director of the Council for International Understanding;
Panelists- Professor Myron, Department of Psychology, S.U.; Major Thomas Adams

10:50-12:25 PM

The Problem of Jurisdiction:
Speaker- Dr. Sompong Sucharitkul, Member and Special Rapporteur of the International Law Commission;
Panelists- L. F. E. Goldie, Professor of Law and Director of International Legal Studies Program at Syracuse College of Law; Waldemar A. Solf, Senior Fellow/Adjunct Professor at Washington College of Law;

1:30-3:05 PM

Media and Terrorism:
Speaker- Dwight Jensen, Professor, Newhouse
Panelists- John Mitchell, Assistant Professor, Newhouse; Robert Friedlander, Professor, Ohio Northern University;

3:20-4:55 PM

Responses to Terrorist Acts:
Speaker- Justus R. Weiner, Director of the Division of American Law and External Ralations, State of Israel;
Panelists- David Rosenbloom, Professor, Maxwell; Shaw Dallal, Adjunct Professor S.U.

Co-Sponsors: American Society of International Law; Communications Law Society; Jewish Law Society; Center for Interdisciplinary Legal Studies; and the Association of Student International Law Societies.

OUTLINE OF A TALK ON THE PROBLEM OF JURISDICTION IN THE CONTEXT OF INTERNATIONAL TERRORISM

Dr. Sompong SUCHARITKUL

I. INTRODUCTION

Problems of multi-dimensional character converge in any serious treatment of international terrorism.

Definitional problems relate first and foremost to the notion of "terrorism" further confounded by thin line of watershed between "national" and "international" terrorism. (European Convention on the Suppression of Terrorism, 1976).

Another conceptual problem is one surrounding the expression "jurisdiction". The term "jurisdiction has been used in several legal contexts, not necessarily inter-connected. In its etymological sense, "jurisdiction" is a combination of "jus" - juris + dictio, literally the statement of the law or the right or what the law is or the determination of the right. Thus, in international law, even from the classics of the law of nations, "jurisdictio" is equated with "imperium", as in the axiom "par in parem non habet imperium, non habet jurisdictionem". Jurisdiction is but an aspect of "sovereignty", or governmental authority of the State. "Jurisdiction" in private international law conveys another connotation, while in comprative law, the expression jurisdiction is replaceable with the term "legal system" or a territory or "patria" in which an independent or antonomous legal system operates. The different uses of the same term in various branches or disciplines of the law have created some confusion. Further complications have been added as the result of different usages of that terminology in the same context, in the same discipline, in public international law.

2/...

II. Different meanings of "jurisdiction" in international law :

The meanings of jurisdiction vary also with the types of jurisdictional authority exercised by the different State organs. In principle, it would be misleading and inaccurate not to recognize and identify types of jurisdiction involved or invoked. There are at least three aspects, types or phases of jurisdiction in the context of international terrorism.

A. Prescriptive jurisdiction, or the authority to prescribe the rules of conduct for individuals and officials within or without the State.

B. Adjudicative jurisdiction, or the power of judicial determination of a legal conflict or dispute.

C. Enforcement jurisdiction, or the administrative or executive authority of the State to prevent, repress and suppress the commission of offences against the law of nations or other crimes.

III. Bases for jurisdiction in connection with "international terrorism" :

For the different types or aspects of jurisdiction, the legal bases for the assumption or exercise of jurisdiction by a State are not necessarily the same. In this particular domain, several legal theories, criteria or bases may be discussed which could be regarded as having provided legitimate foundation for the assumption and exercise of jurisdiction by the State, whether it be prescriptive, adjudicative or enforcement jurisdiction.

1. Territory or the principle of territoriality, locus delicti commissi is a clear and firm basis for all the three phases of jurisdiction, legislative or prescriptive,

judicial or adjudicative, and preventive or punitive. However, the territorial connections need not be confined to one single State. An offence may well be committed across the boundary as in transfrontier crimes, or for other reasons deemed to be committed also within the territory of the forum State. The extended notion of territorial principle includes also :-

a. The objective territorial principle, because the object or victim of the crime happens to be in the forum State. (The S.S. Lotus 1927 PCIJ).

b. The subjective territorial principle, because the subject or author of the crime emanate from the forum State.

c. The fiction of territoriality, because the offense is committed on board a vessel flying the flag of the forum State, or an aircraft registered in the forum State.

d. The colonial regime of extra-territoriality, because the offense is deemed to have been committed in the forum State although in reality in another State in which the accused enjoyed extra-territoriality.

2. Nationality or the principle of nationality, provides a sound basis for jurisdiction in various domains. In criminal justice, the nationality of the accused is clear evidence of sound basis, the nationality of the injured party or the victim of the crime is also pertinent. Nationality is often attributable not only to natural persons but also to properties such as vessels, aircraft, spacecraft or through ownership by a national, including multinational corporation.

3. Protective principle has been recognized as a necessary basis for the defence of security and economic

interests of the forum State, such as the offence of treason, offences against the official secrets Act, coinage offences, counterfeits, etc.

4. Universality or universal principle is based on the nature of the offence which is regarded as a crime against the law of nations, such as piracy jure gentim, apartheid, genocide, acts of terrorism, offences against peace or humanity.

The above principles afford reasonable justification for the exercise of adjudicative or judicial jurisdiction, once the accused person is physically present and placed in the custody of the authority of the forum State. Prescriptive jurisdiction may be grounded on the above principles although the limitations might be less rigid if no enforcement actions or measures are contemplated. Repressive or enforcement jurisdiciton is based more realistically on the physical presence or actual physical control or arrest of the accused within the territorial confines of the forum State or on the high seas or in the airspace thereabove beyond national jurisdiction.

IV. Multiplicity of legal bases for jurisdiction inevitably leads to conflict of jurisdiction because of concurrence of jurisdiction by several States.

Examples : 1) a pirate jure gentium is a hostis generis humani and could be arrested, tried and punished by any State;

2) an international terrorist, or high-jacker of aircraft could be arrested, tried and punished by more than one States, e.g., the State of the nationality of the aircraft, the State where the aircraft has landed, or the State where the accused is arrested. (See relevant Conventions, Hague, Tokyo, Montreal).

V. Resolution of jurisdictional problem may be provided by agreement between the States involved, by negotiation on an ad hoc basis, or prior agreement in the form of bilateral or multilateral treaties. Extradition may afford one solution, refusal to extradite is generally followed by an obligation to arrest and try the accused person.

VI. Problems connected with extradition

1. Extradition is generally at the discretion of the requested State, the request for extradition itself is discretionary on the part of the executive branch of the government in the absence of clear legal provisions.

2. Extradition is therefore based on law or statutes and on the existence of treaty provisions applicable to the situation in question.

3. Treaty practice of States is far from uniform, nor is national legislation identical in regard to questions of extraditable offences, non-extraditability of nationals or of political offenders.

4. Tendency in favour of removing limitations on extradition of terrorists on grounds of political crimes or punishment or persecution.

VII. Problems of arrest and detention of terrorists

VIII. Problems of proceedings against terrorists

IX. Problems relating to exchange of detainees and convicts (hostages and prisoners)

X. The practice of States in seeking solution to the jurisdictional problems through negotiation and cooperation. Reference will be made to the latest trends

in the U.S. practice, e.g., the Supplementary Treaty between U.S.A. and U.K., 1986, 99th Congress, 2nd Session, Lugar's Report, 99-17, Terrorism, Hearings before Sub-Committee on Civil and Constitutional Rights, 99th Congress, Serial No. 91; and anti-Terrorism Act of 1986, Hearing before the Sub-Committee on Crime, H.R. 4294, Serial No. 100.