

The Question of the Scope and Application of Universal Jurisdiction in Carrying Out Anti-Terrorist Operations

The United Nations Legal Council

Background

Universal jurisdiction is the jurisdiction established over a crime without reference to the place of perpetration, the nationality of the suspect or the victim, or any other connection between the crime and the prosecuting State. Its purpose is associated with the idea that international crimes affect the international order as a whole. Since such offences affect the citizens of every country, and since some countries do not respond justly or effectively to allegations of international crimes, international law grants all States the right to prosecute international crimes; this is the universal principle which justifies the use of universal jurisdiction. Other justifications include the passive personality principle, which allows states to defend their overseas nationals by prosecuting those who victimize them, the active personality principle, which allows states to prosecute their nationals for crimes committed abroad, and the protective principle, which extends jurisdiction based on perceived threats to national security coming from abroad.

Terrorism constitutes a criminal offence, and in a majority of states terrorists are persecuted under criminal law. However, litigation is not the only method of dealing with terrorists. In fact, anti-terrorist operations span a wide range of activities including: surveillance, intelligence gathering, active combat, targeted missile attacks on suspected terrorist hideouts, prolonged imprisonment of suspected terrorists, and financial or economic sanctions. Most of these undertakings are controversial at best; indeed, serious questions of legality of jurisdiction have surfaced in recent years, as anti-terrorist operations have become increasingly important and thus more prominent in international relations.

Legal Context

Several documents provide guidelines for dealing with terrorism internationally. Two of the most significant are the *European Union's Framework Decision on Combating Terrorism* and the 2001 *Security Council Resolution 1373*, which imposed extensive obligations on States in relation to the suppression of terrorist acts and the financing of terrorism. These require every country to freeze the financial assets of terrorists and their supporters, deny them travel or safe haven, prevent terrorist recruitment and weapons supply, and engage in cooperation with other countries in information sharing and criminal prosecution. Although they do not specifically deal with universal jurisdiction, these documents focus on the peaceful elimination of terrorist organizations, and they do not condone the use of force or operations against states (rather than terrorist entities).

Despite the emphasis placed on international human rights law by the UN General Assembly and the Security Council during counter-terrorism operations, several countries, including the United States and Israel, have insisted on using force against states which may be harbouring terrorists. Indeed, after September 11, 2001 the United States Congress passed *S. J. Resolution 23* which read that "the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." However, the legality of this and

similar resolutions made by other Western states is not clear, as, in general, a state cannot unilaterally declare itself entitled to act in a way that would infringe on the territorial sovereignty of another nation – at least not without declaring war first. Under international law the government of one state cannot conduct activities in the territory of another country unless acting with the consent of that country. Article 2(4) of the *United Nations Charter* states that “all members shall refrain in their international relations from the threat or use of force against the territorial integrity or the political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” It is also not legal to use force as a reprisal, for the purposes of punishment rather than prevention. However, a justification for the extra-territorial use of force comes from Article 51 of the Charter: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.” While an imminent threat of terrorist attack may be enough to dictate a fast defensive response under Article 51, ongoing anti-terrorist operations of an offensive nature cannot be equally justified.

Past Solutions

Although states harbouring terrorists are in clear violation of international law, unless the terrorists are acting under specific instructions of that state’s government, anti-terrorist operations cannot be targeted at the state harbouring, but must be directed at the terrorist organization. One way of obtaining jurisdiction for such operations without infringing on territorial sovereignty is for the state seeking jurisdiction to explicitly ask for permission from the other state to operate within its borders. Of course, when a state does provide safe haven to terrorist entities it is unlikely to agree to such operations.

Another solution, perhaps the most controversial and legally questionable, has been to declare a “war on terrorism,” virtually allowing the country all the jurisdictional rights of a state at war. This method of dealing with jurisdictional impediments on the use of force, however, is equally unsupportable, as under international law, armed conflict is defined as a relationship between states. In addition, just war theory restricts the means by which war is conducted and gives humanitarian protection to civilians and combatants within the theatre of war. In the “war on terrorism” the participating countries have employed missile attacks at civilian targets and often imprisoned civilians for extended periods under suspicion of terrorism, neither of which are permitted during regular warfare.

Conclusions

Extending the rights of universal jurisdiction would be looked favourably upon by countries already engaged in extensive anti-terrorist operations, and those most under threat from terrorist attack. At the same time, they could be used to justify subversive or war-like operations against minority groups or to dominate weak states which are of interest to powerful countries. For example, states seeking greater self-determination such as Kosovo, Georgia, Chechnya, Iraq, Afghanistan, or Libya could become legally powerless if attacked for supposedly harbouring terrorists or extremists. It is crucial to develop international legal standards which would allow states to effectively deal with terrorism while preserving the territorial integrity and sovereignty of emerging nations.

Key Questions

- What constitutes anti-terrorist operations?
- For which anti-terrorist operations should universal jurisdiction be allowed?
- To what extent can universal jurisdiction be applied without infringing on state sovereignty?
- How can we ensure the security of states seeking self-determination?
- What types of universal jurisdiction should be permitted?

Helpful Links

- UN Action to Counter Terrorism (has all 14 conventions on terrorism, which explicitly state what kind of counter-terrorism measures are permitted in each situation): <http://www.un.org/terrorism/instruments.shtml>
- US National Counterterrorism Centre: <http://www.nctc.gov/>
- Legal article on the necessity of universal jurisdiction in terrorism: <http://digitalarchive.gsu.edu/cgi/viewcontent.cgi?article=1016&context=gsulr>
- European Union's Framework Decision on Combating Terrorism: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:164:0003:0007:EN:PDF>
- Security Council Resolution 1373: <http://www.un.org/News/Press/docs/2001/sc7158.doc.htm>
- <http://www.bbc.co.uk/> for searching for news articles relating to recent anti-terrorist operations etc.

Helpful Books

- "Counter-Terrorism Law and Practice" by Arvinder Sambei, Anton du Plessis, and Martin Polaine.
- "Accountability for Atrocities: National and International Responses" edited by Jane E. Stromseth
- "Intervention, Terrorism, and Torture" edited by Steven P. Lee
- Any recent (2006 or newer) international law or international criminal law textbook or handbook.