WIN-CHIAT LEE

TERRORISM AND UNIVERSAL JURISDICTION

1. INTRODUCTION

Under international law, a nation may typically claim jurisdiction over a criminal case on the basis of two principles, namely, the principle of territoriality and the principle of nationality. The principle of territoriality is the principle by which a nation may claim jurisdiction over an alleged crime if it is committed within its territory. The principle of nationality, by contrast, allows a nation to extend its criminal jurisdiction beyond its borders. However, the extraterritorial jurisdiction allowed by the principle of nationality is rather limited; as it stands, this kind of extraterritorial jurisdiction is limited by the connection of a nation to a crime through either the nationality of the alleged perpetrator of the crime (active nationality) or that of the victim (passive nationality). The principle of nationality, active or passive, is the principal uncontroversial means by which a nation may assert extraterritorial jurisdiction.

In recent years, however, a highly controversial principle of criminal jurisdiction under international law has gained prominence, as well as significance, due to a number of high-profile cases. Though the use of this principle by nations to assert criminal jurisdiction is still rare, the frequency of its use has increased significantly in recent years. I am referring to the principle of universal jurisdiction. By this principle, a nation may claim jurisdiction over a criminal case without regard to where it is supposed to have taken place or the nationality of either the alleged perpetrator or the victim of the crime. Perhaps the proper way to state the principle of universal jurisdiction is that in its pure form, it allows a nation's claim of jurisdiction over an alleged crime to be “based solely on the nature of the crime.”

Clearly, the principle of universal jurisdiction expands the scope of a nation's extraterritorial criminal jurisdiction in a significant way. But this expansion is still rather limited. Even its most enthusiastic defenders would want to restrict the use of universal jurisdiction to a special class of serious crimes under international law, often known as “international crimes” – crimes such as torture, genocide, and crimes against humanity.

However, as a matter of international law, it is only fair to say that the list of crimes subject to universal jurisdiction is still evolving. Regardless, even with the clear restriction of its applicability to a very small number of serious crimes, universal jurisdiction is rightly considered problematic and controversial.

Universal jurisdiction has been used in a number of high-profile cases such as Israel’s prosecution of Eichmann in 1961 and, more recently, beginning in 1995, Belgium’s trial and eventual conviction of a number of Rwandans for war crimes committed against other Rwandans in Rwanda. In 1996, universal jurisdiction was also invoked when Spain considered the prosecution of the former Chilean dictator, General Augusto Pinochet, for crimes committed against Chilean citizens under his rule. Later Spain even sought the extradition of General Pinochet from Britain when he was in Britain on a private visit.

While much has been said concerning the appeal, as well as the pitfalls, of the principle of universal jurisdiction in relation to genocide, torture, crimes against humanity, and other serious violations of human rights, the discussion of the use of universal jurisdiction in relation to terrorism is relatively rare. The use of universal jurisdiction in relation to terrorism may not be without precedents. A crime that has a long history of association with the principle of universal jurisdiction is piracy. One can perhaps quite readily extend the justification for the use of universal jurisdiction in piracy cases to cases involving the hijacking of airplanes and ships. But it is important, especially in the current environment, to consider the use of universal jurisdiction to deal with terrorist crimes in general and not only in relation to those that are committed on the high seas, in international airspace, or with multiple claims of territorial jurisdiction.

The purpose of this chapter is to argue that terrorism in general should be included as such, and not merely incidentally, among the crimes subject to universal jurisdiction. There is much that is similar between terrorism and other crimes that are considered to be subject to universal jurisdiction. Like the perpetrators of genocide, torture, and crimes against humanity, terrorists typically inflict violent harms and/or death on innocent people, violate their fundamental human rights, and cause widespread fear and sense of insecurity within certain groups of people, often with the purpose of serving political ends. More importantly, as in most of these other crimes, the violence committed in terrorist acts involves the depersonalization of the victims. However, I do not wish to make a case for subjecting terrorism to universal jurisdiction solely on the basis of the family resemblances between terrorism and some of the other crimes considered to be subject to universal jurisdiction. After all, it is not clear