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Effectiveness of Bases of Jurisdiction in Tokyo, Hague and Montreal Conventions on Aviation Security Having Regard to Customary International Law

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Abstract

The international treaties relating to aviation security set forth several bases of extraterritorial jurisdiction and necessitate state parties to implement them in their national laws. The extraterritorial application of national laws is required for their suppression since the offenses acknowledged by these treaties cut across international boundaries. Whereas some of these bases incorporate consensual principles of customary international law, the others represent ambitious claims embracing controversial doctrines. State cooperation requires uniformity in the laws of the requesting and requested states because it is a reciprocal process, including uniformity in the extraterritorial reach of national laws. The validity of a state of jurisdiction can be assessed on its proximity or remoteness to a customary rules of jurisdiction, in particular the consensual one. Applying this test to the bases supplied by the aviation treaties, it can be suggested that only a few bases embody consensual rules of customary international law. Hence, states may face difficulties in procuring law enforcement cooperation from their treaty partners owing to reciprocal nature of these proceedings. Therefore, it is unlikely that states will use these treaties as the foundation for cooperation; instead, they will continue to rely on bilateral treaties to seek interstate cooperation in extradition and proceedings involving mutual legal assistance. This will frustrate the objective of aviation treaties to facilitate multilateral, rather than bilateral cooperation among states.

Keywords: *Aviation Security, Extraterritoriality, Customary rules of Jurisdiction, Quasi Universality, Passive Personality and Effects Doctrine.*

Introduction

The bases of jurisdiction as indicated in various international treaties relating to civil aviation have contributed to extraterritorial application of domestic laws. Indeed, some of these bases have been in use even before the adoption of civil aviation conventions; it stands to reason that the conventions have brought forth consistency and regularity in their application (Krisch, 2022).

With the unprecedented rise in cross border criminality in the 21st century, need for extraterritorial application of national laws surged, and the international treaties on civil aviation provided multiple bases of jurisdiction to facilitate the realization of this objective (Boister, 2009). Therefore, an in-depth study of these treaties is crucial to understand how far national laws can reach extraterritorially and what restrictions, if any, can be placed on their expansion beyond national borders.

This article aims to analyse the extent to which bases of jurisdiction as listed in civil aviation treaties reflect customary rules of jurisdiction Dickinson. (1935). Furthermore, it investigates if any of these bases represent previously unknown concepts of jurisdiction. The study underscores the point that jurisdictional rules in multilateral treaties must be definitive, otherwise states will be free to interpret them the way they want, keeping in view the entrenched principles of their national justice systems. To highlight discrepancies in state practise, those bases of jurisdiction will be focused which are pre-disposed to more than one interpretation. However, it must be noted that the paper concerns with legislative jurisdiction only whereas jurisdiction to enforce will be out-with its purview. Finally, conclusions will be made along the lines of the *Lotus case* that currently there are no restrictions on the application of national laws abroad although the enforcement of laws is strictly confined to state territory (*SS Lotus (Fr v Turk)*, 1927) .Therefore, it does not matter if the rules of jurisdiction set forth by the aviation treaties accord with customary rules or not. Having said this, projection of national law aboard on imaginative bases of jurisdiction altogether disconnected from customary rules may cause serious problems in state cooperation in law enforcement, i.e., extradition and mutual legal assistance. For this reason, rules laid down by the treaties should not be too far-fetched, or else state will continue to rely on bilateral treaties as basis of cooperation in place of multilateral ones. Naturally, this consequence will prejudice the international regime sought to be established by aviation security treaties to apprehend the offenders drawn in borderless crimes.

For the purposes of present study, three multilateral treaties pertaining to aviation security have been selected, namely " Tokyo Convention 1963, Hague Convention 1970 and Montreal Convention 1971''.The validity of jurisdictional bases supplied these treaties will be evaluated keeping in view each basis's distance from indisputable rules, like nationality etc. With a view to assess reasonableness, a spectrum of jurisdictional bases has been introduced. At one end of the spectrum will be bases predicated on universally agreed linking factors between the crime and the state willing to prosecute, such as territory and nationality and at the other, bases having far-fetched or controversial nexus, such as effects doctrine and passive personality.

In keeping with these objectives, the paper has been alienated into four parts. Part I will discuss jurisdictional provisions of the Tokyo Convention 1963, Part II will consider provisions of the Hague Convention 1970, part III will examine the Montreal convention 1971. Conclusions and recommendations will be made towards the end.

Assessing Proprietary of a Jurisdictional Claim

There are two theories for determining proprietary of an extraterritorial jurisdictional claim. The first is called classical international law theory and the second, principle of balance of interest or reasonableness principle (Meessen, 1996, p. 83).

Classical Theory

The classical theory evaluates proprietary keeping in view the proximity or distance of a jurisdictional claim from principle of territoriality. Under this theory, states are free to regulate the conduct or event happening inside their territory unless in doing so they violate a rule of international law. States must, however, demonstrate that the application of their laws is supported by some permissive rule of international law in order to control behaviour or events outside of their territory. A permissive rule is the one which establishes a genuine and effective link among the regulating state and the event to be regulated.

A link will be considered genuine if it is based on one of the six conventional principles of jurisdiction, namely territorial, nationality, protective, universality, passive personality and effects doctrine. As per the classical theory, the more a state departs from the territorial principle, less genuine will be considered its claim for jurisdiction. (Maier, 1983)

One of the major weaknesses of classical theory is that although it gives recognition to concurrent claims of jurisdiction over the same event, it provides no mechanism to resolve conflicts of jurisdiction. Meessen (1996, pp. 84 n 5). In other words, where more than one state is equally competent to regulate the same event, the classical theory establishes no system of priority. Even though claims under territorial and nationality principles are generally deemed superior, the theory itself does not provide any hierarchy of claims.

Principle of balance of interest

Balance of interest represents the second theory for assessing righteousness of a jurisdictional claim. (Roth, 1992) According to this theory, states must consider the interests of other states with concurrent jurisdiction over the event when weighing their interest in regulating a particular event'. In case, interest of the other states is stronger, state with weaker interest should voluntarily abstain from exercising jurisdiction. (Roth, 1992)

This principle was enshrined in Restatement Third of American foreign policy. Sec 403, Restatement (Third) of Foreign Relations of the United States, though the Restatement regulates American national law only, it codifies principles of comity and customary international law. Therefore, it can be used to discern the rules of general application at international level.

The constraint that one state may not act in an unfair manner toward another would limit the exercise of jurisdiction, according to Restatement Third's Section 403, even though a state may be competent to establish jurisdiction on any of the grounds recognized by international law. (Miron & Palchetti, 2021).

Section 403(2) contains a catalogue of factors with the help of which rationality of a jurisdictional claim can be determined. It comprises effects of an event, restraint or burden caused by it, and whether or not the significance of one state is stronger than the other (s). Meessen (1996, pp. 8 n 5).

A major weakness of the approach is discretion vested with states to determine relative strength of their jurisdictional claim. (Miron & Palchetti, 2021) . Obviously, a state is unlikely to concede weakness of its interest in proportion to interests of the other states in regulating an event susceptible to multiple claims of jurisdiction. Apart from this, factors listed in Restatement Third to determine comparative strength of a jurisdictional claim are imprecise and equivocal. Hence, rather than relying on these factors, reasonableness of a claim should be gauged keeping in view practice of states in the specific area of activity to which the claim relates. Meessen (1996, pp. 90-91 n 5)

Considering the foregoing, it can be argued that neither of the two approaches *per se* are good enough to determine proprietary of an extraterritorial claim of jurisdiction. Meessen (1996, pp. 88). Therefore, in the pages that follow, jurisdictional provisions of three treaties relating to aviation security will be analysed giving due regard to the rules set out by both, classical theory of jurisdiction and principle of reasonableness. However, as opposed to determining reasonableness in the light of Restatement Third' nature of the activity to be regulated and state practice will be taken into consideration, with a view to provide rationale for labelling a jurisdictional claim as expansive or restrictive.

Since the assumption of this paper is that treaty law gives birth to domestic extraterritorial laws, by pointing out lack of reasonableness in various bases supplied by the treaties, an effort will be made to clarify these ambiguities in domestic laws.

Customary bases of jurisdiction: A standard to examine legality of the bases under Civil Aviation treaties

Jurisdiction

The term jurisdiction refers to ability of states to bring conduct and events subject to their national law. (Mann, 1964, pp. 1 at 9) Although a state is free to implement jurisdiction within its territory, it needs to prove subsistence of a permissive rule to establish jurisdiction outside its territory.

There are three types of state jurisdictions, namely prescriptive jurisdiction, enforcement jurisdiction and adjudicatory jurisdiction. Prescriptive jurisdiction refers to authority of states to make laws regulating events and conduct affecting their interests. Enforcement jurisdiction connotes authority to enforce laws. (Bassiouni, 1974) Although enforcement jurisdiction is confined to state territory, prescriptive jurisdiction may extend beyond borders. (Bassiouni, 1974). For example, if a national of state A commits a crime in state B and escapes to state C, now state A or B cannot punish him in the territory of state C, they will have to wait for his voluntary surrender or extradition by state C.

The adjudicatory jurisdiction alludes to competence of a state to adjudicate dispute. According to some scholars, adjudicatory jurisdiction represents a prototype of enforcement jurisdiction and there is no need to create an independent category of jurisdiction under this head. (O'Keefe, 2004). Therefore, for the purposes of this paper, jurisdiction to adjudicate disputes shall be discussed as a subcategory of the enforcement jurisdiction.

Given below is an overview of the bases of jurisdiction under customary international law and their recognition in state practise.

Territorial Principle

According to this principle, states may apply their laws extraterritorially when the event taking place outside their territory either commenced or culminated within their territory. In other words, the event must have a link with state purporting to establish jurisdiction, whether in the context of originating in its territory or ending therein. The former is called 'subjective territorial principle' and the latter 'objective territorial principle.' (Evans, 2006, pp. 343–344) However, there is difference of opinion in regard to scope of the objective territoriality principle. Corresponding to the European approach, it is imperative for a state to establish jurisdiction under this principal that a part of the event must have taken place inside state territory, whereas in American view, mere effects or impact of the event is enough to claim jurisdiction. Meessen (1996, pp.6 n 5)

Effects Doctrine

The above disagreement gave birth to the controversial effects doctrine. In virtue of it, states are entitled to implement their laws to events occurring outside their territory when the event at issue leaves some effects within their territory. This principle was constructed by American courts pursuant to the relevance of "American Anti-Trust laws'' to the events happening outside state territory. (Evans, 2006 , pp. 343– n 23)
The principle was imitative from a judgment of the "Permanent Court of International Justice" (PCIJ) in the *Lotus case.* According to this judgement, the application of Turkish law on French ship Lotus was held to be valid on the ground that the French ship collided with Turkish vessel Boz-Kourt on the high seas, causing serious damage to the latter and killing all the passengers on board. *(SS Lotus (Fr v Turk)*, 1927)
The opposing view is that *Lotus* case was decided on objective territorial principle instead of effects doctrine. Pursuant to this argument, the offence not only completed within Turkish vessel but also commenced therein. (Roth, 1992)

Notwithstanding the above disagreement, this much is clear that exercise of jurisdiction over conduct occurring out--with state territory can only be justified if a constituent part of the event takes place inside state territory. (Roth, 1992)

Protective Principle

In accordance with this principle, states are entitled to apply their laws to an event happening outside their territory where the event in question poses a threat to their security, integrity and political independence. Alternatively stated, where an act or event outside the territory of a state undermines its vital national interests, such state is entitled to apply its laws rather than the place of incidence of the event or nationality of the victims or perpetrators. This again is a controversial principle since the term national security is open to multiple interpretations. (Bassiouni, 1974).

Nationality principle

Nationality principle allows a state to pertain its laws to conduct or event occurring outside its territory if the act or event at issue was carried out by one of its nationals. According to this principle, states are competent to govern the conduct of their nationals wherever they are. Therefore, regardless of where the crime was committed or the nationality of the victim, a state will have the authority to control the act or occurrence if it was committed by one of its citizens. Much like territoriality, nationality is a non-controversial principle recognized by almost all states. Dickinson. (1935).

Passive nationality principle

Based on this code, a state is permitted to apply its laws to a crime occurrence place outside its territory where the victim of the crime is one or more of its nationals. It has been argued that the principle sets out a controversial basis of jurisdiction as victim's nationality is thought to be a weak ground to apply one state's law in the territory of another. (Zagaris & Rosenthal, 2021)

Universality principle

Pursuant to this rule, a state is competent to apply its laws extraterritorially, where the act or event in question constitutes a universal wrong, such as Genocide, Torture or Crimes against humanity. The rationale is that there are some offences which violate the most highly regarded values of humanity, therefore, no connection is required to establish jurisdiction over these crimes. Resultantly, a state requires no territorial or nationality link with the crime, apart from its universally condemnable nature to establish jurisdiction over it. (J. Hafen, 1992).

The following section examines bases of jurisdiction set forth in multilateral treaties relating to safety of civil aviation, and extent to which their legitimacy is affirmed by the customary bases of jurisdiction.

Examining legality of bases of jurisdiction under aviation security treaties on the touch stone of customary bases of jurisdiction

The Tokyo Convention 1963

The agreement's jurisdictional mechanisms are outlined in Article 3 of the convention. The state of registration of the aircraft is competent to exercise jurisdiction over offenses and acts committed on board an aircraft, according to Article 3(1). According to Article 3(2), each astringent state must take all necessary procedures to establish its jurisdiction as the state of registration over crimes committed on board aircraft registered in that state. The treaty "does not exclude any criminal jurisdiction exercised in accordance with the national law," according to article 3(3). (Convention on Offences and Certain other

Acts Committed on Board Aircraft) .An analysis of article 3 indicates that state of registration has primary competence to implement its laws to the conduct occurring on-board aircraft, however, no scheme of priority exists under the convention in terms of competing jurisdictional claims. (Arvinder Sambei et al., 2009, p. 134) For example, although state of registration is essentially required to establish jurisdiction, it does not have sole or exclusive power to do so.

Legitimacy of the claim of state of registration on the touchstone of customary bases

Under the customary law, aircrafts and ships are considered to have nationality of the state whose flags they are carrying. Therefore, basis of jurisdiction incorporating right of the state of registration to apply its laws to the aircraft under Article 3(1) of the Tokyo Convention represents a variation of the principle of nationality. (Horlick, 1971)

That being said, it is significant to point out that traditionally states while projecting their laws abroad on the basis of nationality withhold the enforcement of those laws till the return of their nationals to home countries. Hence, it is a contribution of the Tokyo Convention to encourage states to apply their laws to a crime committed on-board an aircraft regardless of the place where the aircraft was at the time of the commission of offence, the only requirement being occurrence of the crime in the aircraft registered in such state. (Dawson, 1987) The provision ensures that the crimes committed on board aircrafts are subject to laws of at least one state no matter where, by whom and against whom such crimes are committed. By virtue of this provision, even the crimes committed while aircraft is flying over high seas or territories subject to no jurisdiction can be brought under state jurisdiction. (Mendelsohn, 1967).

As regards location of this basis on spectrum of customary rules of jurisdiction, it can be placed closer to the nationality principle. The basis has been criticized by some as requiring passengers to make a conscious choice of airline so that they might know which country's laws they will be following. However, the ground seems reasonable keeping in view its emphasis on direct link between state of registration and the aircraft in which the crime is committed, leaving no room for whimsical interpretations. (Horlick, 1971)

All state parties to establish jurisdiction over aircrafts bearing their nationality as states of registration:

Article 3(2) requires all state parties to establish jurisdiction as states of registration over aircrafts bearing their nationality. This provision indicates that one of the key concerns of the Tokyo conference was to encourage as many states as possible to implement their laws to crimes committed on-board aircraft so that no gaps are left for the offender to avoid punishment. In the words of Abeyaratne, the provision is meant for the purposes of demonstrating that aerial terrorism is a serious offence, and its suppression requires a concerted effort on the part of all states. (Abeyratne, 1996) Therefore, by giving all contracting states jurisdiction equal to state of registration maximum level of commitment has been sought to be achieved. At the same time, protection of laws has been extended to maximum number of aircrafts.

Preservation of existing jurisdictional bases

According to Article 3(3), the Convention does not eliminate the use of any ground for jurisdiction that has already been established in conformity with national law. This provision reiterates that the convention does not override national laws setting forth such principles of jurisdiction not provided for by the convention. . (Horlick, 1971).

Therefore, a contracting state applying its laws to offences committed on-board aircraft on bases, such as passive personality, protection and universality would not be precluded by the convention. As suggested by Mendelsohn, this provision serves three purposes. First, to affirm that the bases of jurisdiction not expressly provided for by the convention are preserved. Second, to encourage state parties to provide for

new bases of jurisdiction in their domestic laws and finally, to demand the state of listing to apply at least some of its laws to the offences committed on-board aircraft. (Mendelsohn, 1967). That said, it has been argued that this provision has permitted innovative bases of jurisdiction by allowing states to apply their laws to crimes committed on-board aircraft on any basis recognized by their national laws. . (Krisch, 2022)

Arguably, such an open-ended provision can be used to justify the most unreasonable expansions of national laws abroad. To some extent, such excessively broad application of national laws is already taking place. For instance, in case titled *US v Watchmakers of Switzerland Information Center Inc* 133 F Supp 40 (S.D.N.Y 1955) it was held that if the activity on-board aircraft has consequences within the US that are contrary to its municipal laws, the US courts will be empowered to make orders. (*United States v. Watchmakers of Switzerland Inf. C.*, 1995) Apart from this, the provision can be quoted for allowing those bases of jurisdiction which have no connection with the traditional linking factors. To illustrate, it has been suggested in the Counter-Terrorism Implementation Kits for the International Counter-Terrorism Conventions that 'We shall show that in some situations where none of the conventional connecting criteria exist, governments are required under the agreements that aim to establish a consistent response to terrorist offenses to establish their jurisdiction. *(Implementation Kits for the International Counter-Terrorism Conventions Criminal Law Section Legal and Constitutional Affairs Division Commonwealth Secretariat Marlborough House Pall Mall London SW1Y 5HX United Kingdom*, n.d.).

However, the provision should be understood to mean that the convention does not preclude state of registration of the aircraft to apply their laws on multiple bases of jurisdiction as provided for in its national laws. (Fitzgerald, 1988)

Overview of article 4

The following criteria must be met in order for a contracting state that is not the state of registration to interfere with an aircraft while it is in flight: (a) the offense has a bearing on its territory; (b) it was committed by or against its national or permanent resident; (c) it is against the state's security; (d) it involves a violation of any rule or regulation relating to aircraft safety that is in effect in that state; and (e) the exercise of its sovereign rights. (Art.4, Tokyo Convention, 1963).

Right of the subjacent states to interfere with an aircraft

Article 4(a) allows a subjacent state to intercept a flight and apply its laws to the crimes committed on-board an aircraft if the crime has an effect on their territory. (Mendelsohn, 1967). This provision gives recognition to the controversial effects doctrine. While the doctrine has some support in state practice, it rarely finds expression in multilateral treaties. Moreover, the convention gives no definition of the term 'effects' to circumscribe its scope. As a result, jurisdiction can be established even if the crime has an indirect and remote effect on the territory of a subjacent state. Since right to intercept includes forcing the aircraft to land, arbitrary application of the principle may lead to conflict and controversy between state of registration of the aircraft and the subjacent state. (Krisch, 2022).

One explanation can be that as the act of hijacking necessarily involves hostage taking, therefore, the principle can be relied upon by a subjacent state to intercept the aircraft if the hijacker demands such a state to do a thing in return for release of hostages. However, this can only be a remote possibility because the scope of the convention is not limited to hijacking and all offences and acts on board an aircraft can trigger jurisdiction. (Fitzgerald, 1988).

Article 4(b) while granting right of interception to the state of the nationality of the offender or victim also proceeds to grant this right to the state of permanent residence of the victim and offender. Once again this is an unusual ground, keeping in view the fact that passive personality principle is itself disputed so it is questionable how far it can be stretched under the national laws. Similarly, although right of interception as

granted under article 4(c) is based on widely accepted protective principle, no limits are prescribed to narrow down the concept of aircraft security.

While Article 4(d) gives right of interception to a state whose safety rules have been violated by a crime in the aircraft, article 4(e) on the other hand recognizes this right if the interception is necessary for giving effect to an international obligation. (Gutierrez Lopez, 1965).

According to Mendelsohn, 'instead of expanding the scope of state laws these new bases have in effect placed a limit on hitherto unrestricted right of territorial states to intercept a flight.' (Mendelsohn, 1967). Nonetheless, the question arises when did the states have unrestricted right of interference with the aircraft in flight as this situation would have rendered the international air travelling nearly impossible. Moreover, it appears doubtful whether a subjacent state would be willing to exercise jurisdiction over a crime committed in a foreign aircraft having no nexus to them in terms of nationality of the offender or victim. Horlick suggests that instead of providing for these innovative bases of jurisdiction in favour of over-flown states it would have been much more effective had the principle of *extradite or prosecute* been incorporated in the convention.

Hence it can be argued that the jurisdictional bases provided under article 4 of the Tokyo convention are expansive and some of them are based on novel concepts bearing no connection with the traditional linking factors. For that reason, the jurisdictional bases provided under article 4 can be placed on the spectrum at a point farthest from principle of territoriality.

The Tokyo Convention's inability to establish jurisdiction over political offenses is another drawback. The Tokyo Convention's Article 2 states that political and religious offenses are exempt from its application. As hijacking by its very nature is a political offence, this provision by barring such offences has significantly constrained the scope of national implementing laws.

The Hague Convention 1970 (Mankiewicz (1971)

Introduction

The objective of the Tokyo convention 1963 was to establish state jurisdiction over the offences and acts affecting safety and security of aircrafts and its passengers. To this effect, it has laid down rules of jurisdiction. However, as it was not the aim of Tokyo convention to define the offences hence its provisions are general in nature leaving the task of defining offences to national laws. In parallel, the Hague Convention follows an entirely different approach; First off, it defines the crime of hijacking in article 1 as the takeover of an aircraft by an offender while on board the aircraft. Next, each state party is required under article 2 to add harsh sanctions to its domestic laws as a means of punishing the offense. Lastly, under rare situations, it requires state parties to show their jurisdiction over the offense under article 4.

Overview of article 4

The state of registration, the state of landing, and the state of the lessee's primary residence or place of business all have concurrent jurisdiction over the offense of seizure of the aircraft under Article 4(1). From the article:

1. In the following situations, each contracting state must take the appropriate steps to establish its jurisdiction over the offense and any additional act of violence against passengers or crew perpetrated by the accused offender in connection with the offense:
   a) When the crime is committed while the aircraft is flying over ground that is registered there.
   b) If the suspected perpetrator is still on the plane when it lands in the country where the crime was committed.

c) When the crime is committed on board an aircraft that has been leased without a crew to a lessee who resides permanently in that state and has his major place of business there.

2. If the accused perpetrator is on its territory and the contracting state does not extradite him in accordance with article 8 to any of the states listed in paragraph 1 of this article, it must also establish its jurisdiction over the crime.
3. Any criminal jurisdiction that is exercised in conformity with national law is not disallowed by this convention.

Jurisdiction of the state of registration and its validity under customary law

Article 4 subparagraph (1) (a) requires State Parties to establish jurisdiction over crimes committed aboard an aircraft registered in those States. This jurisdiction remains valid no matter where the offence takes place and by whom it is committed. Hence, the jurisdiction of state of registration may be invoked for conduct occurring within its own airspace or within the airspace of another contracting party or even outside the airspace of a contracting party. *(Implementation Kits for the International Counter-Terrorism Conventions Criminal Law Section Legal and Constitutional Affairs Division Commonwealth Secretariat Marlborough House Pall Mall London SW1Y 5HX United Kingdom*, n.d.)

Clearly, therefore, the provision establishes extraterritorial jurisdiction of the state of registration. It does not, however, create a new principle of jurisdiction and merely extends the application of customary rule of nationality to aircrafts. As stated by Sami Shubber, “The Hague Convention states that the "principle of nationality as a basis for the exercise of jurisdiction is declaratory of international customary law." States can claim jurisdiction on this basis in regard to ships, aircrafts and natural persons having their nationality. (Shubber, 1973). In any case, the Hague Convention does not create priority in favour of the state of registration and accords equal competence to all states mentioned in article 4 to establish jurisdiction. In the opinion of Abramovsky, “it is appealing to note that the jurisdiction of the state of registration of aircraft is equal to that of other states...and in no way pre-empts their jurisdiction.” (Abramovsky, 1974) It can, therefore, be argued that jurisdiction established under this provision is derived from traditional linking factor of nationality.

Jurisdiction of state of landing and its compatibility with customary law

Article 4 subparagraph1 (b) gives entitlement to state of landing to apply its laws to the crime committed on board aircraft when the aircraft lands in its territory with the hijacker still on board. According to Counter-Terrorism Implementation Kit, the state of landing is competent to apply its laws regardless of the place of the aircraft at the time of commission of the prohibited act. (Counter-Terrorism Implementation Kits) The only thing required is landing of aircraft in such state with the offender still on board. It can be argued that in the absence of any link with the aircraft, crime, offender or the victim this provision sets out a new basis of jurisdiction unrecognised in customary law and is fairly broad in its scope.

This basis was contested by some delegates at the Hague Conference as they were opposed to the idea of prosecuting an offender merely for the aircraft carrying him having landed in their territory. (Abramovsky, 1974) Furthermore, the jurisdiction was likely to pose practical difficulties in the enforcement of law. For instance, state of first landing might not want to adversely affect its commercial interests by prosecuting a crime having no nexus with it. Lastly, it seemed improbable that the hijacker would take the plane to a state sensitive to its international obligations and would prosecute him forthwith, instead of giving him shelter.

That being said, it can be argued that albeit its shortcomings, jurisdiction of the landing state appears justifiable keeping in view the nature of the offence. To illustrate, it recognizes legal competence of such contracting parties to prosecute the crime which after the occurrence represents the place of first contact of the offender and his victims with any legal system. Since the function of the convention is to prevent hijacking, it is the duty of all states, including state of first landing to apply their laws to the crimes.

Moreover, landing state's jurisdiction is expedient considering the fact that it would be easier to conduct investigation when the offender and witnesses are present in the territory of a state having competence to prosecute. (Counter-Terrorism Implementation kits).

Besides this, the connection of landing state with the offence of hijacking may also be established under the continuing offence theory as the offence does not terminate when the passengers are taken as hostages rather it continues so long as the offender and his victims are not disembarked from the aircraft. (Abramovsky, 1974) Hence, it can be suggested that although the jurisdiction of landing state is broad, yet it appears necessary in the cases of hijacking specifically. On the spectrum of customary bases of jurisdiction, the position of landing state may be considered close to the principle of territoriality as the offence of hijacking continues in the territory of the landing state.

Competence of the state of lessee's permanent residence or place of business and its compatibility with customary law

Article 4 (1) (c) sets forth another new basis of jurisdiction; "a state where the lessee of an aircraft has his place of business or his permanent residence. Such a state may as well apply its laws to the offence of hijacking committed on-board an aircraft. This sub clause deals with a situation where the aircraft is registered in one state but leased to a lessee in another. Thus, Regardless of where the crime was committed, a contracting state must take the necessary steps to establish its jurisdiction over the crime if it occurs in an aircraft registered in a contracting or non-contracting state but leased to a lessee with his head office or permanent residence there".

This provision bears resemblance with article 4(b) of the Tokyo convention 1963 and article 4(1)(c) of the Hague convention. All these provisions accord recognition to permanent residence as the basis of jurisdiction. Thus, article 4(1)(c) of the Hague convention gives jurisdiction to a state where the lessee of an aircraft has permanent residence and article 4(b) of the Tokyo convention gives right of interception to a subjacent state if the offender or victim is its permanent resident. It can be said that as a result of these provisions, the customary rule of nationality has been expanded to make permanent residence as a new ground for establishing jurisdiction.

Even though this provision like the previous ones allows extraterritorial jurisdiction on previously unrecognized basis, yet the jurisdictional link of the state of lessee's permanent residence with the aircraft appears much stronger as compared with the other unusual bases, such as permanent residence of victims and effects on territory. Moreover, this jurisdictional ground can also be justified for the great frequency of lease agreements in modern times and the threat of offenders going unpunished for lack of jurisdiction in case of leased aircrafts. (Shubber, 1973) Against this background, it should be placed at a point near active nationality principle on the spectrum of customary bases of jurisdiction.

Jurisdiction of state of custody of the offender and its compatibility with customary basis

Any state party whose territory the perpetrator is discovered must take the appropriate steps to establish its jurisdiction over the offense, according to Article 4(2) of the convention. The provision is meant to deny 'safe heavens' to the offenders and obliges the state having custody of the accused to establish jurisdiction even if the crime is committed outside its own territory or territory of any other state party. .(Counter-Terrorism Implementation Kits) .The provision sets forth two conditions for establishment of jurisdiction. First, the offender should be present within state territory and second, such a state should refuse to extradite him to other states mentioned in article 4(1). Because there is no requirement of any link among the offender and the state of custody, the extraterritorial reach of this provision is quite broad. For example, it extends to a crime of hijacking committed by any person anywhere in the world. According to Sami Shubber, jurisdiction of custodial state and that of the landing state is distinguishable. In case of the latter, the hijacker must arrive in the landing state's territory on-board the aircraft subject to crime. Contrastingly,

with reference to the former, a state where the hijacker is found may apply its laws to the crime, regardless of how he is brought to such a state. . (Shubber, 1973).

That said, there is no denying that custodial state's jurisdiction to prosecute the crime looks unreasonably broad. Apparently, it is evolved from highly controversial rule of *male captus bene detentus* i.e., justifying unlawful arrest on the basis of lawful trial. An appropriate detention or trial conducted in accordance with due process will not be affected by a person's possible unjust or incorrect arrest. (Wilske & Schiller, 1998) The provision has been denounced for establishing jurisdiction over a crime occurring in the territory of a non-party state, and thereby violating the law of treaties by creating an obligation for states not party to the convention (Counter-Terrorism Implementation kits).

Arguably, however, the critique may be misfounded as the sub clause only binds state parties to the convention by requiring them to establish jurisdiction over the crime committed by the offender present in their territory and clearly nothing in this article requires a non-party state to perform an obligation. Nonetheless, because of its extraordinary breadth, the provision can be credited for establishing a jurisdictional basis akin to 'quasi universality.' (Lee, 2019).

Though the sub clause creates expansive jurisdiction, keeping in view seriousness of the crime and collective duty of all state parties to punish the same, it should not be termed unreasonable. Quite the reverse, the provision gives an effective legal tool to custodial states to establish jurisdiction over the offender and prevent his escape. With this in mind, on the spectrum of customary bases of jurisdiction, this provision may be placed at a point near universal jurisdiction.

Preservation of existing jurisdictional bases

Article 4(3) of the agreement reiterates that any criminal jurisdiction created in conformity with national law is not excluded, which is consistent with article 3(3) of the Tokyo treaty. Nevertheless, the difference between the two provisions is that article 3(3) of Tokyo Convention appears somewhat restrictive being primarily concerned with state of registration. In contrast, article 4(3) of the Hague convention seems broader as it relates to all competent states. As stated earlier, this residual provision can be used to justify unusually broad bases of jurisdiction disconnected with customary law.

Concurrent jurisdictional model

Hague Convention can be said to establish a regime of concurrent jurisdiction. Accordingly, as opposed to assigning priority to a certain state, such as state of territoriality or nationality, it gives equal right to each state party impacted by the crime to establish jurisdiction. Besides this, unlike Tokyo Convention which only requires states to create jurisdiction, Hague Convention goes a step further by obliging them to exercise it, if the need be .(Tokyo Convention stipulates in Article 16(2)).

Most importantly, through Hague convention an effort has been made to establish a form of universal jurisdiction by requiring any state where the offender is found, if it does not extradite him, to prosecute in accordance with its national law, regardless of any link of the offender or the crime with such a state. . (Hague Convention Art-4(2)) However, the effect of the provision has been mitigated by not obliging state parties to actually prosecute the offender but to initiate an inquiry against him and submitting the case before competent national authorities. (Hague Convention Art-7)

The Montreal Convention 1971

(Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (with Final Act of the Interna Tional Conference on Air Law Held under the Auspices of the International Civil Aviation Organization at Montreal in September 1971). Concl, 2006)

Introduction

1 The Tokyo Convention 1963 concerns the offences and acts against good order and security of on-board aircraft. By contrast, the 1970 Hague convention relates to unlawful seizure of the aircraft on board. (Hague Convention Art -1) At the same time, the 1971 Montreal convention deals with sabotage of aircraft from ground as well as in-flight.(The Montreal Convention 1999, Article I (b) and (c))
2 Besides it, the Montreal Protocol 1988 pertains to safety of airports and air navigation facilities.

Overview of Article 5

Article 5(1) of the convention requires each contracting party to ascertain jurisdiction over the offence of sabotage of aircraft in these cases:

a) If the offence is committed on the territory of such a state.
b) If the offence is committed on board an aircraft registered in such a state.
c) If the aircraft lands in the territory of such a state with the offender still on board.
d) If the offence is committed on board aircraft leased to a lessee and the lessee has place of business or permanent residence in such state.

Article 5 (2) obliges every contracting state to take actions essential to set up its jurisdiction over the offence mentioned in Article 1, Para a, b, c and in article 1 Para 2 in case the offender is present in its territory and such state does not hand over him.

Article 5 (3) reiterates that the convention does not exclude any criminal jurisdiction exercised in accordance with the national law.

Jurisdiction of territorial state

The jurisdictional provisions of the Montreal Convention 1971 are like to those of the Hague Convention 1970 with one notable exception that under article 5(1) (a) of the former, the state of territory has also been obliged to establish jurisdiction. The provision codifies and reaffirms the customary linking factor of territoriality. (Abeyratne, 1996) The requirement to establish jurisdiction over the offences taking place on state territory was deemed necessary because in addition to the offence committed on-board aircraft, the convention also covered the offences perpetrated when the aircraft was parked.

Competence of state of registration, landing and lessee's permanent residence

Consistent with article 3 of the Tokyo convention and article 4 of the Hague Convention, article 5 (1) (b) of the Montreal convention requires a state of registration of the aircraft in which the offence is committed to establish jurisdiction. Likewise, article 5(1) (c) requires a state to establish jurisdiction if the aircraft lands in it with the offender still on board. This provision corresponds with article 4 of the Hague convention with the distinction that under the Hague convention, the offender should necessarily be on board while under the Montreal convention jurisdiction may as well be established even if the offender is not on-board. According to Abramovsky, the offences contemplated by article 5(1)(c) of the Montreal Convention need not be on-board as the convention equally applies to the offences committed when the aircraft is parked. (Abramovsky, 1974)

Article 5(1)(d) of the Montreal Convention replicates article 4(1)(c) of the Hague convention by requiring the state of lessee's permanent residence or place of business to establish jurisdiction in case the aircraft is leased to an operator based in a country other than the country of registration.

Obligation of the state party within whose territory the offender is found

Article 5(2) of the Montreal convention requires all contracting states to indict the offender present in their territory or to extradite him to a party willing to prosecute, in spite of the place of the commission of the offence or nationality of the offender or victims. (Libya Arab Jamhuria v. United States of America) This provision reproduces article 4(2) of the Hague Convention with the modification that the relevant provision in The Hague convention applies to all offences mentioned in therein. Contrarily, the Montreal convention limits its application to certain selected offences. It has been argued that by requiring each state party to *extradite or prosecute* the offender, the provision has established a type of conditional universality in virtue of which neither of the state party will be in a position to offer sanctuary to the offender.

Several delegates at the Montreal Conference favored the adoption of universality principle in regard to the offences set forth by the convention. However, some states, including France fiercely opposed the idea. Therefore, a compromise formula was espoused pursuant to which state parties were required to prosecute the offender present in their territory provided that the offences in question were serious and constituted a threat to lives of the persons on board an aircraft. (Abramovsky, 1974).

Resultantly, the principle was made applicable to three of the five offences defined by the convention i.e., article 1 sub clauses (a) (b) and (c). At the same time, the remaining offences article 1 sub clauses (d) and (e) were excluded from its operation. (Abramovsky, 1974)

To illustrate, article 1 (a) related to the acts of violence on board an aircraft if it endangered safety of aircraft, article 1(b) concerned destruction of an aircraft on ground and 1 (c) dealt with placing a device in aircraft for destroying it. However, this distinction was subsequently done away with by article III of the Montreal Protocol 1988 which extended the application of custodial state's laws to all offences mentioned in article 1 of the 1971 Montreal convention. (The Montreal protocol 1988)

Preservation of existing jurisdictional bases

According to Article 5(3), the convention does not disallow any criminal jurisdiction that is recognized by the national laws of the convention's parties. As previously mentioned, this residuary phrase offers one of the broadest bases for the exercise of legislative jurisdiction. It correlates with articles 3(3) of the Tokyo Convention and article 4(3) of the Hague Convention.

Conclusions

The International conventions pertaining to aviation security lay down multiple bases of jurisdiction to spread out extraterritorial reach of national laws. (Doyles, 2023) Since border crossing represents an essential feature of the crimes recognized by these conventions, extraterritoriality of national laws is indispensable to prosecute and punish them (Colangelo, 2007).

In other words, without expanding the extraterritorial reach of the national laws, this type of criminality cannot be suppressed. (Blakesley, 2004) Although international law allows a state to enlarge extraterritorial reach of its national laws on any ground unless expressly prohibited, SS Lotus (Fr v Turk). Customary law prescribes five bases against which reasonableness of an extraterritorial claim may be assessed. . Dickinson. (1935).

Notwithstanding international law's requirement to make national laws with extraterritorial reach, it strictly prohibits enforcement of such laws in the territory of another state. (O'Keefe, 2004) Therefore, states may be at liberty to apply their laws to events, acts and conduct taking place abroad, the enforcement of such law will be literally confined to state territory. To illustrate, if a person, after committing a treaty crime in the territory of state A, escapes to state B, state A would not be permitted to chase after him in state B's

territory. On the contrary, state A shall have to wait for the offender to return willingly or through extradition to enforce its laws or to punish or prosecute the fugitive.

Owing to the drastic increase in extraterritorial criminality over the past few years as a result of rapid movement of persons and goods across borders, it is now imperative for states to maximize extraterritorial reach of national laws. (Boister, 2009) .Nevertheless, it must be assured that extraterritoriality accorded to national laws is based on reasonable grounds. To determine reasonableness, customary international law provides certain guidelines. Dickinson. (1935) .If extraterritoriality of a national law is consistent with these customary rules, it will be considered reasonable. If not, the unusual claims of extraterritorial jurisdiction can be renounced by the international community.

Significantly, all three conventions under consideration encourage state parties to apply their laws extraterritorially on multiple bases of jurisdiction. While some of these bases represent consensual rules of customary international law, such as territoriality and nationality, the others incorporate controversial principles like passive nationality, effects doctrine and universality. (Jennings, 1957). Comparably, a number of these bases reflect logical expansion of the customary rules; a few of them exemplify a radical departure from these rules.

Despite everything, a total departure from customary rules may only be justifiable if a new basis is necessitated keeping in view the extraordinary nature of the offence. In the absence of any such requirement, a novel claim of jurisdiction should be discouraged, lest it be made a precedent to apply national laws abroad on fanciful grounds.

The rules of international law are very clear for determining the validity of a jurisdictional claim as they require only two things from a state purporting to apply its laws abroad. First, there must be a factor linking the state with crime, such as offender's nationality, and second availability of a domestic law prohibiting the crime, for example, a law punishing the act of hijacking carried out by a state national.

If this yardstick is applied to assess reasonableness (Gans, 1985) of the bases of jurisdiction set forth by Tokyo, Hague and Montreal Conventions, it can be concluded that jurisdiction of the state of registration, landing and state of permanent residence of lessee represent fair extension of the rules of customary law. By contrast, the right of the subjacent state under the "Tokyo Convention" to intercept an aircraft on the basis of effects doctrine or eternal residence of the victims might appear too far-fetched and ambitious considering the controversial nature of these claims under customary law. Similarly, a common provision in all three conventions relating to preservation of existing national bases can be misused to justify imaginative claims of jurisdiction. In sum, the farther a basis of jurisdiction goes from consensual customary rules, the more likely it is that the basis will be challenged.

In the same line, although though it is commonly believed that governments have the authority to apply their laws to violators who are on their territory, this power is sometimes referred to as a type of quasi universality, the impact of this vital provision has been negligible so far. The reason being it does not oblige a custodial state to extradite the offender, in case it decides not to prosecute.

The disagreement among state parties regarding recognition of an extraterritorial basis of jurisdiction may cause impediments in state cooperation. Since the crimes recognized by the conventions under consideration spread across national frontiers, their suppression calls for state assistance in law enforcement. As the modalities of law enforcement, including extradition and mutual legal assistance are reciprocal in nature requiring similarity of jurisdiction in the requesting and requested state; its absence may lead to non-cooperation. If state cooperation is not facilitated by multilateral treaties, states will continue to rely on bilateral treaties as the basis of cooperation. This will defeat the very purpose of having multilateral treaties requiring extraterritorial reach of national laws. . (Gardocki, 1993).

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