AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON LAW AND NATIONAL SECURITY
SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE
YOUNG LAWYERS DIVISION
STANDING COMMITTEE ON ARMED FORCES LAW
JUDGE ADVOCATES ASSOCIATION
BAR ASSOCIATION OF METROPOLITAN ST. LOUIS (MO)

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

RESOLVED, that the American Bar Association opposes the pursuit in the courts of one nation of war crimes charges against the uniformed military personnel or government officials of another nation where there is no international consensus that the conduct alleged, even if proven, would constitute a crime justifying universal jurisdiction under international law, and where such other nation possesses and has demonstrated a willingness to employ a bona fide procedure to investigate and prosecute war crimes within its own system of justice.

FURTHER RESOLVED, that, because the United States has adequate procedures for investigating and prosecuting war crimes under the Uniform Military Code of Justice and federal criminal law, the American Bar Association urges the United States government to work with the governments of other nations to take all reasonable steps to prevent the misuse of foreign courts to assert universal jurisdiction over and pursue such charges against US uniformed military personnel or government officials.

REPORT

I. Introduction

On May 14, 2003, within days of the fall of Baghdad, a complaint was filed in Belgian courts on behalf of 19 Iraqis charging the commander of U.S. forces in Iraq, General Tommy Franks, with war crimes.[1] The complaint was filed by a lawyer and politician who was a candidate in the Belgian parliamentary elections held May 18, 2003. It accuses Gen. Franks of liability on the basis of command responsibility for 17 separate incidents, including firing on ambulances, dropping cluster bombs that injured civilians, bombing a marketplace in Baghdad, and failure to prevent looting. Later that month, a lawsuit was filed in Spanish courts accusing a U.S. tank crew with war crimes for firing a round at the Baghdad hotel used by international journalists, killing a Spanish and a Ukrainian cameraman. U.S. military sources have said that the crew had reason to believe that it was taking fire from the hotel.

The recent Iraq war was more heavily reported than any in history, and the reporting made plain the extraordinary care taken by U.S. forces to avoid civilian casualties. This occurred despite the efforts of Saddam Hussein's regime to maximize the risk to civilians by sending many of its forces into battle wearing civilian garb and by using schools and hospitals to hide weapons. The filing of war crimes charges in foreign courts in this war does not reflect a decline in U.S. efforts to avoid civilian harm during wartime. Instead, it more likely reflects the unpopularity of the war against Saddam Hussein in Europe, combined with a longstanding effort on the part of some nations and NGOs to expand both the definition of war crimes and the scope of national courts to exercise "universal" jurisdiction over such crimes Unfortunately, the U.S. military is a particularly attractive target for these efforts..

Such suits, however, have no basis in law or policy. Universal jurisdiction is an extraordinary derogation from the usual principle that nation states can exercise criminal jurisdiction only over events occurring within their territory or, in some circumstances, over events connected to that state that occur outside their territory. It applies to extraordinary crimes that the international community has *clearly determined* merit and require the assertion of jurisdiction by any state on behalf of the entire community, regardless of any connection between the state and the offense. This reflects the same fundamental principles of fairness embodied in the US criminal justice system, which require that new criminal offenses be codified in statute and defined with sufficient clarity that a reasonable person would be on notice that the activity risked criminal liability. Thus, other than the historic assertion of universal jurisdiction over slavery and piracy, most states exercise universal jurisdiction only over offenses clearly defined by international treaty. In contrast, the Belgian and Spanish suits depend on highly controversial notions of what the "law of war" requires – notions that are not accepted by the United States or by a broad consensus of states that actually engage in military operations.

Moreover, the U.S. military justice system (in particular, the Uniform Code of Military Justice), as well as the federal courts and other laws of the United States, are fully adequate to investigate and prosecute charges against members of the U.S. military or government officials.

[1] Since the Belgian suit was filed, the Belgian government has referred it to the United States, and the attorney for the plaintiffs has announced plans to appeal the referral.

The United States has a better record of investigating and prosecuting such crimes by members of its military than any other country. The U.S. is also the world's leader in inculcating respect for rules governing the conduct of war and has consistently fostered a high compliance culture. Lawyers are embedded at every level of the U.S. military, and formal legal input is sought for every military decision, including weapons development, procurement and deployment, all combat and targeting decisions and all matters bearing upon the treatment of captured enemy combatants.

This resolution condemns the use of foreign courts to charge our military members with legally dubious war crimes through the principle of universal jurisdiction. The resolution does not take a position in cases where there is clear violation of the widely adhered 1949 Geneva Conventions. It also does not address the use of international tribunals, nor does it address or conflict with the ABA's past position favoring U.S. membership in the International Criminal Court. The purpose of the International Criminal Court is to provide a supranational forum for war crimes prosecutions. Both supporters and opponents of such a forum can agree with the view that it is unwise to allow war crimes lawsuits in the courts of foreign nations, or claims of universal jurisdiction over those alleged crimes by individual states, absent explicit treaty authorization. Such suits are too prone to diplomatic misunderstanding, political and diplomatic manipulation, and misuse of the law to be acceptable. In addition, the International Criminal Court recognizes the principle of complementarity, which defers to jurisdictions capable of and in the process of conducting their own investigations and prosecutions of war crimes. This resolution urges that all nations honor the principle of complementarity when faced with war crimes charges against the nationals of other countries.

II. Background on Belgian Law

Belgium has a remarkably broad statute creating jurisdiction to try perpetrators of war crimes, crimes against humanity and genocide, no matter where the offense took place, regardless of the perpetrators' or victims' connection to Belgium and even without treaty agreement. The law under which General Franks is charged was adopted in 1993 in reaction to atrocities in Rwanda, a former Belgian colony.[2] The 1993 law detailed offenses under the law of armed conflict that could be tried in Belgium and corresponding penal sanctions.[3] In 1999, the Belgian Parliament amended the law to include genocide and crimes against humanity as international crimes over which Belgium can assert universal jurisdiction.[4]

---

[2] Luc Reydams, Universal Criminal Jurisdiction: The Belgian State of Affairs, 11 Crim. L.F. 183 (2000) (describing the development of universal jurisdiction under Belgian law, the background on the 1993 law, and concluding Belgium has taken the lead "albeit rashly and haphazardly in the development of international criminal law").

[3] Act of 16 June 1993 concerning the punishment of grave breaches of the Geneva Conventions of 12 August 1949 and their Additional Protocols I and II of 18 June 1977 (Official Journal, 5 August 1993).

[4] Act of 10 February 1999 concerning the punishment of grave breaches of international humanitarian law (Official Journal, 23 March 1999); see also Belgium: Act Concerning the Punishment of Grave Breaches of International Humanitarian Law, 38 I.L.M. 918 (1999).

Since this law was passed, a number of complaints have been filed against at least 30 world leaders, including a complaint filed in March 2003 against former President Bush, Vice President Cheney, Secretary of State Colin Powell and General Norman Schwarzkopf for alleged war crimes committed during the first Gulf War in 1991. To date the law has resulted in convictions of four Rwandan nationals for their involvement in the genocide in Rwanda. They were sentenced to up to 15 years in prison in June 2001.[5]

In addition to General Franks and the other U.S. officials named earlier, others who have been charged under Belgian law include Mauritanian President Maaouya ould Sid'Ahmed Taya, former Iraqi President Saddam Hussein, Ivory Coast President Laurent Gbagbo, Rwandan President Paul Kagame, Cuban President Fidel Castro, Central African Republic President Ange-Feliz Patasse, Republic of Congo President, Denis Sassou Nguesso, Palestinian Authority President Yassir Arafat, former Chadian President Hissene Habre, former Chilean President Gen. Augusto Pinchet, former Iranian President Hashemi Rafsanjani, former Moroccan Interior Minister Driss Basri, former Foreign Minister Abdoulaye Yerodia Ndombasi of the Democratic Republic of Congo, former Cambodian heads of state and government Khieu Samphan and Nuon Chea, Ieng Sary, Foreign Minister of Cambodia's Khmer Rouge regime, as well as Israeli Prime Minister Ariel Sharon for actions as the Defense Minister in the early 1980s. [6]

In April 2003, the Belgian law was amended to provide a process to filter out certain complaints and to give Belgian prosecutors more discretion to reject claims with no connection to Belgium. A complaint may be referred if the crime was committed in Belgium, the suspect is a Belgian citizen, the suspect is present in Belgium or the victim is a Belgian citizen or is an alien who has lived in Belgium for at least three years. If none of the above criteria are met, the prosecutor also has discretion to reject a complaint if the complaint is manifestly unfounded or the facts do not constitute an offense as defined by law or if it would be more appropriate to bring the case in the courts of the country where the accused is found or where the accused is a national of a country whose courts are deemed independent. Finally, the Belgian courts may refer the case to the country where the crime was committed, or the accused is found, on the condition that the national court exercises jurisdiction over the accused.[7]

These amendments are a positive step, but they still leave considerable discretion in the hands of the Belgian prosecutors. The amendments allow the prosecutor to reject certain cases, but do not appear to require dismissal. The amendments provide for referral of cases to the accused's home country, but only if that country's judicial system is judged fair and impartial by Belgian prosecutors. The Belgian lawyer/politician who made the charges against General Franks has argued that the U.S. judicial system does not meet this test, and when the Belgian government referred the case to U.S. authorities, he accused the Belgian government of capitulating to U.S. pressure and vowed to challenge the referral on appeal.

---

[5] Raf Casert, Belgium's lower house approves amendments to genocide law that drew international criticism, The Associated Press, Apr. 2, 2003.

[6] Human Rights Watch Questions and Answers on the Anti-Atrocity Law, Human Rights Watch Backgrounder, January 2003, available at http://www.hrw.org; see also Marwaan Macan-Marka, Rights: Lawsuit Against Israel's Sharon Could Set Precedent, Inter Press Service (June 19, 2001) available at 2001 WL 4804322.

[7] Act of April 23, 2003 (Official Journal, 7 May 2003).

The U.S. State Department has cautioned that the Belgian law "show[s] the danger of a judicial system that's open to politically motivated charges," and has urged "the Belgian government…to be diligent in taking steps to prevent abuse of the legal system for political ends."

The Belgian law has already resulted in several confrontations. Israel recalled its ambassador and Prime Minister Sharon declined to visit the European Commission headquarters in response to the charges filed against him. In addition to diplomatic objections, Belgium's universal jurisdiction law was challenged in the International Court of Justice in early 2002.[8]

In that case, Belgium, in April 2000, had issued an international arrest warrant against the then Minister for Foreign Affairs of the Democratic Republic of Congo, Mr. Abdulaye Yerodia Ndombasi, for crimes against humanity. The International Court of Justice ruled that Belgium's issuance of the arrest warrant violated customary international law concerning the diplomatic immunity of incumbent foreign ministers. While the ICJ did not reach the merits of Belgium's universal jurisdiction arguments, the court's immunity-related discussion featured considerable deference to state practice as a source of customary international law. Given that state practice has not reflected a general assertion of universal jurisdiction for non-treaty based offenses such as those charged in the Franks case, one can fairly infer from this analysis that Belgium's expansive universal jurisdiction claims would not have found favor with many members of the court.

III. Universal Jurisdiction

International law provides four possible bases for the exercise by a nation state of criminal jurisdiction for events that occur outside its borders but still have some connection to the state. These are territorial jurisdiction (where the offense occurred), nationality jurisdiction (the nationality of the alleged offender), passive personality jurisdiction (the victim's nationality), and protective jurisdiction (where the offense poses a concrete threat to a state's security.) "Universal jurisdiction" is a principle of international law whereby a state claims jurisdiction over an individual, even absent any connection to that state, for especially heinous conduct that is clearly defined by the international community as being a universal crime against any and all nations. Thus, any state may punish such conduct since it is acting on behalf of the global community. The fact that a particular crime is widely abhorred does not, however, in and of itself, justify the exercise of universal jurisdiction in criminal cases. Traditionally, it extended over only two types of offenses – piracy and slave trade – practitioners of which were usually captured on the high seas, beyond the territorial jurisdiction of any sovereign. Since then, it has been extended to cover some treaty-based crimes such as genocide and grave breaches of the law of armed conflict. In addition, some advocates have urged the application of universal jurisdiction to a wide range of offenses based on customary international law rather than treaties.

[8] More information on Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) (Feb. 14, 2002) is available at http://www.icj-cij.org.

IV. Defining War Crimes Under International Law

The Belgian and Spanish suits against member of the US Armed Forces claim that the actions alleged constitute war crimes justifying the assertion of universal jurisdiction. Yet, there is not an adequate international consensus that the kinds of activities alleged constitute war crimes meriting such prosecutions.

War by its very nature includes killing, wounding, and destruction of property. Despite this, combatants have often been governed by a sense that each is – or should be– observing certain limits in the course of waging war. There is thus a long tradition of trying to define a law of war and of punishing violations of that law as war crimes. In many cases, however, defining the limits that each side is willing to recognize has proven difficult. Consensus has proven particularly difficult when seeking to give content to subjective principles, such as the principle of proportionality, which provides that soldiers should avoid collateral damage to civilians when that damage would outweigh the military advantage to be gained. It is easy to subscribe to this principle in the abstract, and even easier to disagree about its application to a particular combat operation. The U.S. and several other military powers have traditionally interpreted this principle in a broad perspective, and with reference to deliberate plans and rules of engagement; they have opposed efforts to use proportionality as a principle to secondguess real-time decisions made by a military commander who has followed the appropriate rules of engagement.

By contrast, some countries – and particularly those that are no longer willing or able to conduct military operations – subscribe to a much more restrictive views of what this principle requires. For example, they argue that it creates a binding legal obligation, as distinct from a policy imperative, to minimize collateral damage in combat at all costs. In fact, some proponents of proportionality adopt a virtually zero collateral damage principle, precluding, for example, an attack on even vital military targets when defended by human shields.[9] This view is not broadly accepted by countries that actually fight wars, in part because it incentivizes states to use human shields – a plain violation of the law of war that jeopardizes the innocent civilians the law is designed to protect – and penalizes law-abiding nations. Proportionality in its most extreme form can also descend into a "bullet by bullet" analysis of every battle, asking after the fact which shots fired by an embattled squad of soldiers constitute war crimes and which pass muster. But there are no perfect wars, and no wars in which every shell, every bullet, every bomb is used with perfect knowledge of the consequences. If those who fight actual wars can be prosecuted with the luxury of hindsight for every tactic that does not turn out as expected, war crimes prosecutions can be launched more or less at will, since error and uncertainty is the natural condition of war.

For this reason, among others, the principle of universal jurisdiction has limited applicability to war crimes.[10] It is generally accepted that genocide and grave breaches of the law of armed conflict as defined under the 1949 Geneva Conventions are war crimes subject to

[9] See Amnesty International, NATO/Federal Republic of Yugoslavia "Collateral Damage" or Unlawful Killings? Violation of the Laws of War by NATO During Operation Allied Force, EUR 70/18/00 at 2:3, June 2000.

[10] This report does not offer views on the jurisdiction of the International Criminal Court, but rather, the use of the principal of universal jurisdiction by a particular state.

universal jurisdiction. These grave breaches include willful killing, torture or inhuman treatment of wounded persons, prisoners of war, and civilians; compelling service in the armed forces of an enemy; and willfully depriving a captive of the rights of fair trial. Other violations of the 1949 Geneva Conventions are also considered war crimes, but do not constitute grave breaches that are subject to the universal jurisdiction provisions of the Geneva Conventions.

There is no basis for invoking universal jurisdiction in support of extreme interpretations of the proportionality principle, or in support of controversial claims that the use of specific weapons constitutes a war crime. The United States and several of its major allies subscribe to agreements restricting weapons such as dum-dum bullets and chemical and biological munitions. Other countries and many NGOs, however, would treat as criminal a large and ever–growing list of weapons, including landmines, depleted uranium munitions, cluster bombs, lasers and charged particle weapons.[11] The lack of doctrinal uniformity regarding international norms in this area, by itself, is sufficient to rule out any application of universal jurisdiction. Even if there were no danger of politicization of universal jurisdiction-based prosecutions, it would be fundamentally incompatible with fairness and due process to subject military and government officials to prosecution for offenses that are so ill defined and controversial.

V. The U.S. Justice System

There is no need to bring war crimes prosecutions against the U.S. military in foreign courts. The United States already has legal remedies for war crimes committed by its officials and members of the military. U.S. law allows the prosecution of genocide (18 U.S.C. § 1091); war crimes (18 U.S.C. § 2441); use of biological, nuclear, chemical or other weapons of mass destruction (18 U.S.C. §§ 175, 831, 2332c, 2332a), and torture (18 U.S.C. § 2340A).

In addition, U.S. military courts have jurisdiction over war crimes committed by members of the U.S. military.[12] The Uniform Code of Military Justice (UCMJ), which was codified in 1951, is viewed as a model military justice system by governments around the world. Military law experts from the United States armed forces are regularly dispatched to assist with the development of fair and effective military justice systems in other nations. The purpose of military law under the UCMJ is to "promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby strengthen the national security of the United States."[13] Under the UCMJ, the United States regularly prosecutes members of its armed forces for military and civilian offenses in an adversarial system with a jury and at least two levels of appellate review.

During wartime, the military courts have sole jurisdiction over armed forces members whether in friendly or hostile territory outside the United States. This principle is firmly established in the Supreme Court's decision in Coleman v. Tennessee.[14] This system of military

[11] See, e.g., 1997 Ottawa Landmines Treaty.

[12] 10 U.S.C. § 801 et. seq. (2003).

[13] See Manual for Courts Martial, Preamble, United States (1998 ed.).

[14] 97 U.S. 509, 517 (1878).

justice has an established record of bringing those suspected of perpetrating war crimes and crimes against humanity to justice in a fair and dispassionate manner. The prosecution of those responsible for the incidents during the Vietnam era at My Lai and Son Thang illustrate the effectiveness of the UCMJ in holding members of the United States military responsible for war crimes.

On March 16, 1968 in the Vietnamese village of My Lai, a U.S. patrol massacred as many as 500 unarmed civilians. The investigation of My Lai led to the prosecution by court-martial of Army Lieutenant William Calley and his officer-in-charge, Captain Ernest Medina. Medina was charged with murder of 102 Vietnamese civilians based on the theory that if Medina knew or should have known that a massacre was taking place and did nothing to stop it, he should be found guilty of murder. After an instruction from the trial judge requiring that Medina have actual knowledge of the massacre before he could be held culpable, he was acquitted. Lt. William Calley, the officer in charge of the patrol that actually participated in the My Lai incident, was found guilty of murder in a jury trial.

In the Son Thang incident, on February 19, 1970, a Marine unit entered a Vietnamese village and killed sixteen women and children. In response to this incident, a formal pre-trial investigation or grand jury type investigation was conducted and members of the unit were ultimately charged with murder. The subsequent trials resulted in two convictions and two acquittals.

The prosecutions resulting from the incidents at My Lai and Son Thang demonstrate that the UCMJ provides an effective mechanism for addressing war crimes allegations against members of the United States military. This system has proven itself to be fair, impartial and effective. Given the unique global responsibilities and deployments of U.S. military personnel, it is possible that allegations of war crimes will arise, but the UCMJ continues to be the most appropriate vehicle to address such allegations.

VI. Conclusion

In light of the foregoing, the Standing Committee on Law and National Security strongly urges that the accompanying resolution be favorably voted upon by the House of Delegates and become the official position of the American Bar Association.

Respectfully Submitted,

Suzanne E. Spaulding
Chair
Standing Committee on Law and National Security
August, 2003