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Universal Criminal Jurisdiction

By Douglass Cassel

Editor's Note: Portions of this article are adapted from a report on universal criminal jurisdiction cosponsored by the American Bar Association's (ABA) Section of Individual Rights and Responsibilities and coauthored by this writer. The views expressed in this article, however, are solely those of the author.

Universal criminal jurisdiction is an important tool in the worldwide struggle to end impunity for serious international crimes. Together with other ABA entities, the Section on Individual Rights and Responsibilities is sponsoring a Recommendation on universal criminal jurisdiction for consideration at the February 2004 ABA Midyear Meeting of the House of Delegates. The Recommendation recognizes universal criminal jurisdiction as essential and suggests safeguards against its potential abuse.

Universal Jurisdiction in International and American Law

Universal criminal jurisdiction is the principle of international law that permits any nation to prosecute certain serious international crimes, regardless

of where they are committed, by whom or against whom, or any other unique tie to the prosecuting nation. The Recommendation applies whether or not an accused is in custody and does not address the separate topics of universal jurisdiction in civil cases or the immunities of senior government officials before foreign national courts.

long been recognized by customary international law over piracy, slavery, slave trading, and, more recently, genocide. In the last half-century, an expanding series of treaties has recognized universal jurisdiction over such serious international crimes as "grave breaches" of the 1949 Geneva Conventions and the 1977 Geneva Protocol I and over certain acts of international terrorism such as hijacking aircraft and torture. The most recent treaties, ratified by the United States in 2002, authorize universal jurisdiction over terrorist bombings and financing of terrorism. International Convention for the Suppression of Terrorist Bombings, 37 I.L.M. 249, art. 6.4 (1998); International Convention for the Suppression of Financing of Terrorism, 39 I.L.M. 270, art. 7.4 (2000).

Current federal law confers universal jurisdiction on federal civilian courts over at least the following crimes: piracy; torture; air hijacking, destruction of aircraft, and violence at international airports; violence against foreign officials, official guests, and internationally protected persons; hostage taking; violence against ships or fixed maritime platforms; financing of terrorism; and terrorist bombings. In addition, general courts-martial have universal jurisdiction over war crimes to the extent permitted by the law of war, which includes grave breaches of the Geneva Conventions and Protocol.

Need for Universal Criminal Jurisdiction

Universal criminal jurisdiction developed over time as a response to international recognition of serious crimes whose perpetrators were otherwise likely to escape prosecution. The first such

Other bases of jurisdiction frequently are inadequate to ensure that persons who perpetrate grave international crimes are brought to justice. The two main alternatives to universal jurisdiction are prosecutions of criminals by their national courts and prosecutions before international criminal courts. Neither to date has proved sufficient to bring the world's worst criminals to justice.

National courts are often incapable of prosecuting international crimes committed by their own citizens, although an increasing number of courts are recognizing their responsibility to do so under international law. Genocide and acts of state-sponsored terrorism, by nature, are committed by order of or with the tolerance of high-ranking military or civilian leaders, who then shield themselves and subordinates from prosecution by national courts. Friends in high places often shield war criminals and torturers as well. No Iraqi court, for example, could or did prosecute Saddam Hussein or the security officers who carried out his orders, at least while he remained in power. Similarly, certain governments often shelter international terrorists by refusing to prosecute them or extradite them to the countries whose peoples they victimized. The Taliban regime in Afghanistan, for example, sheltered Osama bin Laden despite his indictment in the United States.

International criminal courts have made valuable contributions to the rule of law within the last few decades. But they do not yet have universal jurisdiction or sufficient resources. Ad hoc tribunals such as Nuremberg and Tokyo and those recently established for Yugoslavia, Rwanda, Sierra Leone, and East Timor are limited to prosecuting only certain crimes committed in particular hostilities or countries.

In theory, the solution could be the permanent International Criminal Court (ICC) with global jurisdiction over the most serious international crimes, a concept previously endorsed by the ABA. But the ICC as currently configured lacks universal jurisdiction. For example, it has no jurisdiction over crimes committed before July 2002 and may prosecute crimes occurring after that date only with the consent of the country where the crime was committed or whose citizen is the suspect. To date,

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of where they are committed, by whom or against whom, or any other unique tie to the prosecuting nation. The Recommendation applies whether or not an accused is in custody and does not address the separate topics of universal jurisdiction in civil cases or the immunities of senior government officials before foreign national courts.

Universal criminal jurisdiction has

crime was piracy, which all nations were authorized to prosecute because of the nature of the crimes and the ease with which pirates might evade jurisdiction. Much the same dual rationale—heinous crimes otherwise left in impunity—has fueled the modern extension of universal jurisdiction over war crimes, genocide, torture, and acts of international terrorism.

only about half the world's nations (the United States not among them) have consented to ICC jurisdiction by joining its statute. Although the ICC can also act in situations referred by the UN Security Council, referrals may be vetoed by any of the five permanent powers.

The ICC currently has jurisdiction over only three crimes: genocide, war crimes, and crimes against humanity. It cannot prosecute other international crimes such as terrorism and torture, except insofar as they amount to one of the crimes over which it does have jurisdiction. Additionally, even where the ICC has jurisdiction, its resources are limited, and it can prosecute only a small fraction of the world's serious international crimes.

Neither the national courts of the perpetrators nor international courts, then, are as yet up to the job of curbing impunity for the world's worst crimes. Hence the need for an additional prosecutorial option: universal criminal jurisdiction exercised by courts of nations not directly involved in the crimes.

Limitations to Prevent Abuse

While universal criminal jurisdiction is needed to serve justice, safeguards must be designed so that it is not abused by prosecutions that are frivolous or politically motivated or that violate basic due process protections.

The proposed Recommendation adopts three safeguards against such abuses: the principles of legality, necessity, and due process of law. Only if all three are satisfied should universal jurisdiction be exercised. Similar safeguards have been proposed by three respected judges of the International Court of Justice (ICJ). *Democratic Republic of Congo v. Belgium*, ICJ Gen. List No. 121, Judgment of Feb. 2002, Separate Opinion of Judges Rosalyn Higgins, Pieter Koopmans, & Thomas Buergenthal. The full court did not reach the issue of universal jurisdiction. Issues of the proper reach of universal jurisdiction are now pending before the ICJ in the case of *Democratic Republic of Congo v. France*, ICJ, Gen. List No. 129, Order of July 11, 2003.

The principle of legality: Universal criminal jurisdiction should be exercised only over serious international crimes clearly recognized by treaty or customary international law authorizing

such jurisdiction. Many crimes already meet this test; however, not all international crimes are recognized as subject to universal criminal jurisdiction. Crimes in violation of customary international law were prosecuted by the United States at Nuremberg and, at the urging of the United States, by the International

Covenant on Civil and Political Rights, art. 14. This will limit significantly the number of nations that may exercise universal criminal jurisdiction because many do not in fact comply with these norms.

Nations also should not exercise universal jurisdiction in the absence of facts supporting a reasonable belief that a

Universal criminal jurisdiction should be exercised only over serious international crimes.

Criminal Tribunal for the Former Yugoslavia. Additional crimes may be added in the future by new treaties or by the evolution of customary international law based on the general practice of states.

The principle of legality also means that no person can be prosecuted under universal criminal jurisdiction for acts not clearly recognized by treaty or customary international law as crimes at the time they were committed. *E.g.*, International Covenant on Civil and Political Rights, art. 15. Crimes subject to universal jurisdiction also must be defined with sufficient clarity to provide fair notice to all concerned—a general principle of international law.

The principle of necessity: Universal jurisdiction should not be exercised by another nation where the nation whose citizen or lawful permanent resident is a suspect conducts a genuine investigation and, if warranted, prosecution, provided its procedures meet international human rights norms for fair criminal trials. National courts exercising universal jurisdiction, therefore, have only secondary jurisdiction. In this they are constrained in a manner similar to the ICC, which likewise may exercise jurisdiction only over matters not properly investigated or prosecuted by national courts. In the ICC context, this principle is called "complementarity"; the language of the proposed ABA Recommendation largely parallels the complementarity provision of article 17 of the ICC statute.

The principle of due process of law: A nation should not exercise universal criminal jurisdiction if its courts fail to comply with international norms on the protection of human rights in criminal proceedings, such as judicial independence and impartiality and the right to an adequate defense. *E.g.*, International

crime subject to universal jurisdiction may have been committed.

U.S. Military Personnel

The proposed Recommendation in effect would allow nations whose criminal justice systems meet international norms, including the United States, to preempt another nation from prosecuting their military personnel. It specifically recognizes that the United States has adequate procedures to investigate and prosecute its soldiers. If the Recommendation were followed by governments, then as long as the United States used those procedures in future cases to investigate reasonable allegations and, where warranted by the evidence, to prosecute them, the United States could in effect preempt other nations from prosecuting its soldiers under universal jurisdiction. Although European nations decline to extradite suspects without assurances that they will not face the death penalty, for example, *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (Series A) (1989), this is not a requirement of international law.

An issue could arise if the United States failed to investigate or, where warranted, to prosecute. The United States has an independent interest in avoiding such lapses. During the Vietnam War, for example, the United States successfully prosecuted more than twenty cases involving war crimes, including the My Lai massacre in 1968, for which Lieutenant William Calley, the officer in charge of the patrol that actually participated in the killing of as many as 500 Vietnamese civilians, was found guilty of murder.

The U.S. record has been far from perfect, however. For example, although a final judgment in the case should

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court declared the provisions of the McCarran-Walter Act unconstitutional and later held that immigrants and citizens have the same First Amendment rights, and that Immigration and Naturalization Service (INS) use of secret evidence violates due process. The Supreme Court reversed the First Amendment decision, ruling that the 1996 Illegal Immigration and Immigrant Responsibility Act had divested courts of jurisdiction over selective prosecution challenges.

- *Open Door Counselling, Ltd. v. Republic of Ireland* (a challenge under the European Convention on Human Rights to Ireland's constitutional prohibition on counseling about abortion): Ireland banned clinics from telling women about opportunities to obtain legal abortions outside of Ireland. The European Court of Human Rights held that the Irish ban violated Article 10 of the European Convention, guaranteeing freedom of expression and information.

- *Bullfrog Films, Inc. v. Wick* (a First Amendment challenge to U.S. Information Agency (USIA) regulations denying tax benefits to internationally distributed documentary films identified as propaganda): The Ninth Circuit held the regulations unconstitutional, and Congress subsequently enacted legislation barring USIA from issuing certificates based on the political viewpoints of films.

- *Martinez-Baca v. Suarez-Mason* (suits against an Argentine ex-general

alleging torture, arbitrary detention, and "disappearances," in violation of international human rights law): The district court in a related case, *Forti v. Suarez-Mason*, ruled that the "disappearances" were violations of customary international law and awarded a judgment of \$8 million; the district court in *Martinez-Baca* awarded a \$21 million judgment.

- *In re Randall; Randall v. Meese* (First Amendment litigation resisting the INS attempt to deport feminist author Margaret Randall for advocating "world communism"): The Board of Immigration Appeals reversed the order of deportation for political writings on the ground that Randall never lost her U.S. citizenship.

- *Wojnarowicz v. American Family Association* (the first lawsuit under the New York Artists' Authorship Rights Act): Artist David Wojnarowicz filed suit against Reverend Donald Wildmon and the American Family Association for a leaflet misrepresenting Wojnarowicz's works of art in a mailing to 6,000 people (including members of Congress) during the National Endowment for the Arts controversy. The district court enjoined mailing of the leaflet and required a corrective mailing.

- *Humanitarian Law Project v. Reno* (a First and Fifth Amendment challenge to a federal statute criminalizing material support to designated terrorist organizations without regard to the purpose or

effect of the support): The district court issued and the Ninth Circuit affirmed a preliminary injunction against enforcement of the prohibition on providing "training" and "personnel."

Almost two years after September 11 and the passage of the USA PATRIOT Act, Attorney General Ashcroft embarked upon a national public relations campaign to shore up sagging support for the USA PATRIOT Act and to lay groundwork for USA PATRIOT Act II. This tour, like much of the government's defense of the USA PATRIOT Act and other "antiterrorism" measures, reflects a growing awareness among the American public of the grave threats to liberty posed by post-September 11 law enforcement action.

Fortunately for those who believe in freedom, safety, and the U.S. Constitution, David Cole continues to speak truth to power.

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await further developments, *The Blade* of Toledo, Ohio, recently conducted an extensive investigation of alleged killings of unarmed civilians by the U.S. "Tiger Force" platoon during the Vietnam War. This case also had been extensively, albeit belatedly, investigated by the U.S. military; although military investigators reportedly substantiated war crimes and recommended prosecutions, commanding officers had declined to authorize prosecutions. Following *The Blade's* revelations, the military recently reopened the case—more than three decades after U.S. mili-

tary personnel first reported the allegations to their superiors. See Michael D. Sallah & Mitch Weiss, "Buried Secrets, Brutal Truths," *The Blade*, Oct. 2003, available at <http://www.toledoblade.com/apps/pbcs.dll/section?Category=SR> TIGERFORCE.

The potential exercise of universal jurisdiction by another nation would provide an additional incentive to ensure that such cases are not overlooked or ignored. At the same time, the proposed Recommendation would protect American soldiers against frivolous or politically motivated universal jurisdiction prosecutions abroad.

Conclusion

The proposed ABA Recommendation embraces a balanced approach. It recognizes universal criminal jurisdiction

as an important tool in the global effort to establish the rule of law, and also adopts principled limitations by which nations may preempt foreign trials of their own citizens and lawful permanent residents, including their military personnel, by investigating reasonable allegations and, where warranted, prosecuting in accordance with international human rights norms.

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