

FOREIGN “WAR CRIMES” LAWSUITS AGAINST AMERICAN SOLDIERS THREATEN NATIONAL SECURITY

by

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On May 14, 2003, Belgian lawyer Jan Fermon caused an international uproar when he filed a criminal case in a Belgian court against U.S. General Tommy Franks, the commander of U.S. forces in Afghanistan and Iraq, accusing Franks and another American officer of war crimes. Fermon, who represents seventeen Iraqi and two Jordanian plaintiffs, admitted readily that the alleged crimes had no connection to Belgium or its citizens. He argued, however, that Belgian courts had the ability to try the case under the concept of “universal jurisdiction” for violations of international law. Fermon’s lawsuit reflects a growing trend of such cases worldwide: Similar suits have been filed against former U.S. President George H.W. Bush, U.S. Secretary of State Colin Powell, retired General H. Norman Schwarzkopf, and British Prime Minister Tony Blair.

Fermon stated that General Franks had committed “crimes against humanity,” which every country in the world is required to prosecute. According to the lawsuit, Franks had authorized the use of illegal weapons against civilians and had allowed American soldiers to fire on ambulances. Fermon said that he would have filed his case before the International Criminal Court, but because the United States is not a signatory to the ICC treaty, he was forced to file his case in Belgium. After vigorous US diplomatic protests, Fermon’s suit was dismissed, but many international legal scholars expressed approval for his tactics, opining that while Belgium had succumbed to U.S. political pressure, others will not. Americans should expect many such future cases to be brought against American citizens.

Fermon’s case was filed under a Belgian law that allows war crimes trials to proceed in Belgian courts under the concept of “universal jurisdiction.” Under this theory, a country can try a criminal defendant for an “international” crime, even if the country pursuing the prosecution has no connection whatsoever to the crime, the alleged victim, or the defendant. Human rights groups regularly call on countries to exercise this type of jurisdiction over defendants who are charged with committing crimes against humanity, genocide, or other violations of international law.

In a recent *Wall Street Journal* op-ed article, Robert H. Bork said that Americans should be “rightly amused” by the Belgian law. To soldiers who have sworn an oath to uphold the United States Constitution,

however, Belgium's action is not at all amusing, for "universal jurisdiction" threatens to become a Damoclean sword. The dramatic growth in the popularity of "universal jurisdiction" not only threatens American soldiers, who are carrying out military operations in more than a hundred countries around the world, but also threatens the rule of law.

Almost unknown prior to World War II, the principle of universal jurisdiction has taken on a life of its own in recent decades. First used to punish war criminals at Nuremberg and Tokyo, the concept was later used by the Israelis to try Adolf Eichmann. More recently, Spain asked Great Britain to extradite General Augusto Pinochet, the former Chilean dictator, to stand trial in Spain on charges that he had committed international crimes in Chile. Spain wasn't the only country that wanted to try Pinochet for his Chilean crimes under a "universal jurisdiction" concept; so did France, Switzerland, and Belgium.

Belgium passed its "universal jurisdiction" law in 1993. Initially, the Belgian law allowed Belgian courts to prosecute anyone in the world for genocide, war crimes, and crimes against humanity — without regard to where the crime was committed, the citizenship of the victim or accused, or the presence of the victim or accused in Belgium. The law also recognized no statute of limitations, and no immunity for heads of state. Realizing that such an overbroad law was probably itself illegal under international law, Belgium later amended the law to allow for limited immunity for heads of state and certain diplomats. Even the amended law violated international law, which makes it a violation for a state to enforce a law that it does not have jurisdiction to enforce, and Belgium finally agreed to require a link to Belgium be identified before someone could be prosecuted in a Belgian court.

Activists argue that universal jurisdiction is an acceptable means to bring to trial those who are accused of international crimes, because every country has a duty to enforce international law. They further argue that "universal jurisdiction" must be invoked lest the guilty go unpunished. Their automatic acceptance of universal jurisdiction is more than a bit surprising, however, because careful examination of the use of the principle shows that "universal jurisdiction" is usually not necessary for the guilty to be punished. Additionally, the overuse of this type of jurisdiction has the perverse effect of undercutting the rule of law.

The lack of any pressing need for universal jurisdiction is obvious in the case of American defendants. American war crimes defendants would not go unpunished in the absence of "universal jurisdiction." America has a fully functioning legal system that is the model for the world. American domestic law, both military and civilian, incorporates the international humanitarian law provisions of the Geneva and Hague Conventions. If an American citizen commits a war crime, he can expect to be prosecuted by American authorities. U.S. military and civilian prosecutors are not shy about bringing war crimes prosecutions, and the U.S. has an exemplary record — better than Belgium's — of prosecuting its own war criminals.

So what are we to make of the growth in cases being brought against Americans under the principle of "universal jurisdiction"? The plain and simple fact is that such cases are not principled — instead, they are politically motivated, a fact that proponents make little effort to hide. Lawyer Jan Fermon does not really have a war crimes case against General Franks; rather, he wants to make a political statement that he does not like the policies of the American government. The political nature of the case is obvious from Fermon's statements. For example, Fermon has said that General Franks is a "war criminal" because American troops in Iraq fired on an ambulance. He has little appreciation for the actual laws of war, which clearly allow American soldiers to fire on ambulances when the ambulances contain enemy soldiers who are firing at the Americans. Additionally, Fermon has also stated that he filed his case in Belgium so that the alleged victims — seventeen Iraqis and two Jordanians — could get a fair trial; Fermon apparently had no interest in whether the American defendants got a fair trial.

Despite the dismissal of Fermon's obviously frivolous lawsuit, the question remains: Why isn't "universal jurisdiction" a good idea? First, the concept allows any country to prosecute anyone for a crime, even if that country has no connection to the crime. This is akin to allowing the French to arrest American parents who abuse their children; yes, the crime is heinous, but what business is it of the French, when American courts are capable of prosecuting? Second, "universal jurisdiction" is a "forum shopping" provision that can be applied in a way that guarantees that a defendant will not receive a fair trial. The plaintiff who files a case under a "universal jurisdiction" statute is going to file it where he thinks the factfinder will be most biased against the defendant, not where he thinks the defendant will get a fair trial.

"Universal jurisdiction" does have a small place in international law: It is an acceptable form of jurisdiction where no country with a functioning legal system has jurisdiction over a crime that clearly and unequivocally violates internationally accepted legal principles. When a stateless pirate on the high seas, for example, attacks a private yacht and kills the crew in international waters, it makes sense to have a concept that allows the pirate to be tried for murder.

Where there exists a country with a clear connection to a crime, however, and that country has a functioning legal system that can prosecute the accused, allowing other countries to exercise "universal jurisdiction" threatens the rule of law. Rule of law, at its most basic level, requires that those subject to it be able to determine what the law is, so they can follow it. Imagine a world in which every country is free to prosecute every crime, even if the victims and the defendant have no connection to that country. How will any potential defendant know what the law is? Must an American soldier follow the orders of his superior officers, or the imagined orders of a future Belgian judge? Where every country in the world can create its own law, interpret its own law, and then subject everyone else in the world to that law, there is no rule of law — there is legal anarchy.

Why should Americans care if other countries want to allow "universal jurisdiction" for war crimes? Obviously, the Belgian law posed an immediate problem for high-ranking U.S. military officers who might face arrest by Belgian authorities if they attended NATO meetings in Brussels. But more importantly, the arguments Fermon made against General Franks could be extended to any member of the U.S. military. In fact, the threat to high-level officials is less grave than the threat to ordinary American soldiers, who might not have as ready a recourse to high-level diplomatic threats.

To understand why, imagine yourself as an American soldier, sent by your government to fight against Saddam Hussein and restore democracy to Iraq. You've sworn an oath to uphold the United States Constitution, and to follow the lawful orders of your superiors. Prior to being sent overseas, you've endured hours of briefings and exercises on the law of war. You know that the American government can prosecute you under the Uniform Code of Military Justice if you commit war crimes anywhere in the world. You are very familiar with the Geneva and Hague Conventions, and you know when you are allowed to fire your weapons and when you are not. You've been given Rules of Engagement, drafted by the best legal minds in the US military. You have faith in your commanders and your ability to carry out the lawful orders of your superiors. Imagine further that you are caught in an ambush in a dusty Iraqi city on a hot August night. Following the Rules of Engagement, you return fire against your ambushers, who have just blown up your vehicle and killed your Iraqi translator and your driver. After the chaos of the attack fades, you discover that the bullets you fired have hit a small child, who now lies dying in the street. There's an investigation, and your American superiors clear you of any wrongdoing. For the rest of your life, however, you can face criminal prosecution under the principle of "universal jurisdiction." Any country in the world, for any reason, can decide to arrest you and try you for "war crimes." On vacation in Paris twenty years later, you can find yourself facing criminal charges, languishing in a European jail while your spouse tries frantically to get assistance at the U.S. embassy, where State Department employees tell you to hire your own attorney, because they don't have anyone to help you out.

A fictitious scenario? Hardly. Mexico recently arrested and extradited to Spain an Argentinian naval lieutenant, Ricardo Miguel Cavallo, who had been accused by Spain of committing “crimes against humanity” in Argentina. The crimes that Cavallo allegedly committed are truly heinous, but the fact that he may be a criminal is no excuse for allowing him to be prosecuted in a place that has no connection to his alleged crimes. Argentina has a functioning legal system and could have prosecuted Cavallo, but chose not to do so because of its democratically-enacted amnesty laws. Spain’s act of invoking “universal jurisdiction” to prosecute Cavallo may appear laudable on its surface, but it actually undercuts the rule of law in Argentina. Cavallo, who may never even have been to Spain or harmed a Spanish citizen, is now forced to defend himself in a foreign land with no connection whatsoever to the alleged crime.

Some have argued that Americans bear some responsibility for the growth of “universal jurisdiction” as a principle of international law. After all, the United States is a haven for lawsuits with no connection to the United States, because our Alien Tort Claims Act allows an alien to sue in United States court for money damages for certain violations of international law. The Alien Tort Claims Act, however, simply allows suits for money damages — it does not allow for a defendant to be arrested and jailed and tried for a crime *in absentia*.

It’s not only Americans who might someday harbor dreams of spending a romantic weekend in Paris who should fear “universal jurisdiction.” The invocation of “universal jurisdiction,” far from being a high-minded invocation of principle, is most often simply an attempt by certain legal elites to reign in nations whose politics they dislike. The use of the concept against Americans is part and parcel of the “broad ideological gap” between Americans and Europeans that commentators like Robert Kagan have noted recently. Many Europeans — Jan Fermon among them, no doubt — want to outlaw war altogether and live in a Kantian world of perpetual peace. To them, any war-making violates international law. “Universal jurisdiction” is part of their utopian effort to eliminate war, or at least threaten those who engage in it. And ironically, as these advocates dress up politically motivated prosecutions in the guise of principle, their invocation of universal jurisdiction has the effect of hampering the evolution of international law, discouraging trade and travel, and making it less likely that countries will cooperate in the prosecution of persons who truly should be subject to universal jurisdiction.

American soldiers are well aware that they can — and will — be prosecuted for war crimes by the United States Government, a government that has the best record in the world for prosecuting its own for such behavior. A basic principle of international law is the principle that each country has the right and duty to prosecute its own citizens for crimes, and other countries should not interfere with such prosecutions. Applying “universal jurisdiction” to persons whose alleged crimes can already be prosecuted by their native countries does nothing to advance the rule of law, and usually violates international law. Rather than simply being amused by it, Americans should vigorously oppose the application of “universal jurisdiction” to Americans.