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WAR CRIMES AND INTERNATIONAL CRIMINAL LAW

by

STUART H. DEMING¹

My remarks will focus on three particular areas relating to war crimes and international criminal law.² These will include the prospect of an international criminal court, my experience with war crimes issues in Ethiopia, and how traditional practitioners can become involved with these issues.

I. AN INTERNATIONAL CRIMINAL COURT

With respect to the prospect of an international criminal court, the idea is not new.³ It was seriously considered at the time of the League of Nations years ago.⁴ Other than being promoted by human rights-oriented organizations, it has largely been of academic interest. As a practical matter, everyone supports the concept of an international criminal court. The real issue is how it will work. For it is the effectiveness and the manner of operation of an international criminal court that will bear upon the support that it ultimately receives.

1. Chair, American Bar Association's Committee on International Criminal Law. B.A., 1973, University of Michigan; J.D., 1977, University of Michigan; M.B.A., 1978, University of Michigan. This article is derived from the remarks of Mr. Deming at the Symposium on Hot Spots in International Criminal Law.

2. As an aside at the beginning of his remarks, it was noted that military lawyers have an unusually unique perspective on the issue of international criminal law. There are few attorneys who have the opportunity to practice public international law. There are even fewer who have the opportunity to practice public international law in the criminal context. The lawyers in the military are uniquely suited since they have the benefit of having to try cases as both prosecutors and criminal defense attorneys. That is extremely helpful when you are negotiating or providing advice on international agreements on international criminal law issues. International lawyers frequently lack trial experience, and trial lawyers frequently are unfamiliar with international legal issues. So the lawyers at the Pentagon are truly unique in understanding how the two come together and why certain facets are particularly important.

3. Indeed the first *ad hoc* international criminal court may have been established in 1474 in Breisach, Germany, where 27 judges of the Holy Roman Empire judged and condemned Peter von Hagenbach for his violations of the "laws of God and Man" by allowing his troops to rape and kill innocent civilians and pillage their property. M. Cherif Bassiouni, *The Time Has Come for an International Criminal Court*, 1 IND. INT'L & COMP. L. REV. (1991).

4. Most commentators believe that the first effort to establish an international criminal tribunal is represented by Articles 227-229 of the Treaty of Versailles (1919), "to prosecute Kaiser Wilhem II for 'Crimes Against Peace' German Military Personnel for 'War Crimes'; and Turkish Officials for 'Crimes Against Humanity.'" M. Cherif Bassiouni, *A Comprehensive Strategic Approach on International Cooperation for the Prevention, Control and Suppression of International and Transnational Criminality, including the Establishment of an International Criminal Court*, 15 NOVA L. REV. 353 (1991).

The end of the Cold War brought about a number of changes in terms of attitudes and political dynamics not experienced since the creation of the United Nations at the end of World War II. The multilateral effort in the Persian Gulf served as a catalyst to a renewed interest in an international criminal court. This dynamic was further aided by Saddam Hussein being a war criminal in a similar sense as Hitler. These factors led to greater receptivity in the Bush administration to the idea.⁵ With the particular influence of the U.S. Ambassador to the United Nations, Madeleine Albright, the Clinton administration has taken a more supportive position.⁶

We now have the situation in the former Yugoslavia and Rwanda. An international tribunal was established for the former Yugoslavia, and the tribunal established for Rwanda is essentially an extension of the one for the former Yugoslavia. The structure of each tribunal is similar. Moreover, while the trial chambers and prosecutorial staffs will be independent, the same chief prosecutor will oversee the work of the two prosecutorial staffs and the same appellate chamber will review the decisions of both sets of trial chambers.

Now there are discussions taking place relative to pursuing those responsible for the atrocities in Cambodia. In 1994, Congress adopted the Cambodian Genocide Act and appropriated funds for the establishment of an office to support efforts to bring to justice members of the Khmer Rouge.⁷ However, developments are highly dependent on whether and, to what degree, the political situation stabilizes. Similarly, war crimes associated with Saddam Hussein and his regime continue to be a source of debate.

These developments, combined with the end of the Cold War, have led to a political climate internationally whereby the establishment of a permanent international criminal court is being given serious consideration. The focus now is on the draft statute proposed by the forty-sixth session of the International Law Commission in 1994.⁸ Serious negotiations are expected to commence in 1995. The structure of these proposals will have considerable similarity to what was done with respect to the tribunals for the former Yugoslavia and Rwanda.

Of particular import are the development of rules of procedure and evidence. While much has been written about an international criminal court,

5. See 136 CONG. REC. 518160-01 (1990) (Statement of Sen. Specter) (citing remarks of Secretary of State James A. Baker and Undersecretary of State Robert M. Kimmitt before the House Foreign Affairs Committee).

6. See, e.g., Statement of Conrad K. Harper, Legal Adviser, U.S. Department of State, (Oct. 25, 1994), USUN Press Release #149-(94).

7. The Cambodian Genocide Justice Act, 22 U.S.C.A. § 2656 (West 1994).

8. Report of the International Law Commission on the work of its Forty-Sixth Session, U.N. GAOR, 49th Sess., Supp. No. 10, U.N. Doc. A/49/10 (1994).

these writings have generally failed to address the issue of rules of procedure and evidence. Sufficiently detailed rules of evidence and procedure are fundamental to the integrity of any system of criminal justice. They are also necessary to ensure the rights of the accused and the victim and to prevent the politicization of a tribunal.

Much of the debate concerning an international criminal court is associated with the breadth of its subject-matter jurisdiction. There are a number of countervailing considerations. There is the obvious desire to have it available to address a broad range of crimes. However, broad subject-matter jurisdiction can present serious problems. The inclusion of drug trafficking could lead to it serving as what might be described as a "dumping ground" for drug cases. This not only poses a serious problem in financing such a body, it provides an easy way out for those countries that are not prepared to press for the development of an effective criminal justice system in their own countries.

A more limited subject-matter jurisdiction had the advantage in terms of finances and in terms of enabling an international criminal court to evolve into a credible and respected body. This appears to be the position of the Clinton administration.⁹ Expectations would be lower and many problems associated with the development of a new institution could be worked out before its consensual jurisdiction is expanded. Well-defined and generally-accepted crimes would serve as the essence of the subject-matter jurisdiction. For example, these could include the unlawful seizure of aircraft,¹⁰ crimes against internationally-protected persons,¹¹ hostage-taking,¹² and the crime of torture.¹³ On the other hand, the crime of "aggression," apartheid, and the Code of Crimes Against the Peace and Security of Mankind are not supported for a variety of reasons.¹⁴

9. Statement of Conrad K. Harper, *supra* note 6, at 2-3.

10. Hague Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, art. 1, 22 U.S.T. 1641, 10 I.L.M. 133 (1971).

11. Convention of the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, art. 2, 28 U.S.T. 1975, 13 I.L.M. 43 (1973).

12. Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, art. 1 24 U.S.T. 564, T.I.A.S. No. 7570, 10 I.L.M. 1151 (1971).

13. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Dec. 10, 1984, art. 4, *reprinted in* 23 I.L.M. 1027 (1984), *substantive changes noted in* 24 I.L.M. 535 (1985).

14. *See, e.g.*, ABA House of Delegates' Recommendation and report on Improving the Effectiveness of the United Nations, Aug. 1994, at 8. The report provides, in pertinent part:

The ABA recommends against inclusion of the crime of "aggression," which is not defined in any international convention. The only officially adopted definition of

There is a second component that deals with the classic war crimes situation in the Bosnia-Rwanda sense. The U.N. Security Council would establish jurisdiction on a case-by-case basis. If a situation similar to what occurred in Rwanda were to arise again, a new tribunal would not have to be established. The permanent court would be empowered to look into war crimes under terms and conditions prescribed by the Security Council. While not a perfect solution, this also provides a mechanism to maintain control over what could become the most politicized aspect of the work of the international criminal court.

II. WAR CRIMES IN ETHIOPIA

Little known to most of the world is the onset of war crimes trials in Ethiopia. In 1991, at the conclusion of a lengthy civil war with what was known as the Dergue regime of Mengistu Haile Mariam, nearly 2,000 officials of the Dergue were detained by the Transitional Government of Ethiopia (TGE). In August of 1992, the TGE created the Special Prosecutor's Office (SPO) to investigate and prosecute "any person having committed or responsible for the commission of an offense by abusing his position in the party, the government or mass organizations under the Dergue-WPE regime."¹⁵ The SPO was also charged with creating an historical record of human rights violations.

In February of 1994, I travelled to Addis Ababa, Ethiopia with Robert S. Mueller, III, on behalf of the American Bar Association (ABA). Now in private practice, Mr. Mueller was the Assistant Attorney General for the Criminal Division of the U.S. Department of Justice during much of the Bush administration. There was concern as to whether the ABA should become involved in providing technical assistance if show trials were really what was involved. However, in only a matter of hours after our arrival, we were well satisfied as to the validity of the work of the SPO. The evidence was overwhelming. This was further confirmed in our meetings with representatives of various human rights organizations.

aggression is that contained in General Assembly Resolution 3314, adopted in 1974, which though considered by many as a generally accepted interpretation of the U.N. Charter, it is considered by others as intended only as a political guide and not a suitable definition for purposes of prosecution. In a similar regard, apartheid is another issue which may have more political than legal content and raise the risk of politicization of the court. Finally, the Section recommends against reference to the Code of Crimes Against the Peace and Security of Mankind in Article 21 of the ILC's draft statute as a possible addition to the list. This code has engendered strongly negative reactions.

15. A Proclamation to Provide for the Establishment of the Special Public Prosecutor's Office, Proc. No. 22/1992, Transitional Government of Ethiopia.

The evidence is far stronger than what has been encountered to date relative to the former Yugoslavia. Not since Nuremberg has such documentary evidence been assembled in which the degree of complicity is demonstrated on the part of senior government officials. There are over 200 volumes of verbatim transcripts of critical meeting in addition to many audio tapes of these meetings. There are also records of implementing orders being passed down through the chain of command. In short, the evidence supports previous claims of respected human rights organizations and publications.¹⁶

Though certain sectors of the human rights community have been critical of the delay in bringing charges, there were *habeas corpus* hearings in July of 1993 and charges began to be brought in the fall of 1994. The trials are expected to begin in 1995. In most instances, the application of the basic provisions of the Ethiopian Penal Code will be applied. However, there will be situations where there will be evidentiary problems. These problems will generally relate to the absence of witnesses or the relative paucity of identifiable remains of victims. This is because the atrocities often took place in secret or in settings where there were few if any survivors. From a strategic standpoint, many of these proof problems can be overcome by applying customary international law. In this regard, the international provisions incorporated into the Ethiopian Penal Code will be the basis of a number of charges.¹⁷

16. See, e.g., AFRICA WATCH REPORT, *EVIL DAYS: THIRTY YEARS OF WAR AND FAMINE IN ETHIOPIA* (1991); Mary A. Weaver, *Burying the Martyrs*, 68 *THE NEW YORKER*, Dec. 28, 1992, at 106.

17. See Penal Code of the Empire of Ethiopia, Proc. No. 158 of 1957, arts. 281-282, which provide, in pertinent part:

Art. 281 — *Genocide; Crimes against Humanity.*

Whosoever, with intent to destroy, in whole or in part, a national, ethnic, racial, religious or political group, organizes, orders or engages in, be it in time of war or in time of peace;

(a) killings, bodily harm or serious injury to the physical or mental health of members of the group, in any way whatsoever; or

(b) measures to prevent the propagation or continued survival of its members or their progeny; or

(c) the compulsory movement or dispersion of peoples or children, or their placing under living conditions calculated to result in their death or disappearance,

is punishable with rigorous imprisonment from five years to life, or in case of exceptional gravity, with death.

Art. 282 — *War crimes against the Civilian Population.*

Whosoever, in time of war, armed conflict or occupation, organizes, orders or engages in, against the civilian population and in violation of the rules of public international law and of international humanitarian conventions:

When due consideration is given to all the circumstances, so far, the manner in which Ethiopia is proceeding to bring to justice those accused of atrocities is quite remarkable. It is being addressed domestically with relative little assistance from the outside world. A staff of approximately 40 lawyers with no more than two vehicles has been given the task of bringing to trial as many as 2,000 people. This includes shifting through thousands of documents. Ethiopia is one of the poorer countries of the world in which there are over 50 million people and not many more than 1000 formally-trained lawyers. While sizable numbers were and continue to be detained for a lengthy period, the restraint demonstrated on the part of the current government and populace is commendable when one considers the scope and nature of the atrocities committed.

From the perspective of a former federal prosecutor what was fascinating was having the opportunity to become familiar with the practical aspects of these international provisions. What frequently happens in war crimes situations is that there are few witnesses despite massive evidence of intent. This is because the killings either take place in a secretive manner or the witnesses are frequently killed. People simply disappear and never return. This presents great difficulties when traditional charges of murder are used. While intent can be well established, it is often difficult to tie the intent with an act and the actual death of a person.

One of the interesting things that came to light was the strategic advantage that the use of international provisions can provide. In the Ethiopian

(a) killings, torture or inhuman treatment, including biological experiments, or any other acts involving dire suffering or bodily harm, or injury to mental or physical health; or

(b) wilful reduction to starvation, destitution or general ruination through the depreciation, counterfeiting or systematic debasement of the currency; or

(c) the compulsory movement or dispersion of the population, its systematic deportation, transfer or detention in concentration camps or forced labor camps; or

(d) forcible enlistment in the enemy's armed forces, intelligence services or administration; or

(e) denationalization or forcible religious conversion; or

(f) compulsion to acts of prostitution, debauchery or rape; or

(g) measures of intimidation or terror, the taking of hostages or the imposition of collective punishments or reprisals; or

(h) the confiscation of estates, the destruction or appropriation of property, the imposition of unlawful or arbitrary taxes or levies, or of taxes or levies disproportionate to the requirements of strict military necessity,

is punishable with rigorous imprisonment from five years to life or, in cases of exceptional gravity, with death.

context, “organizes” or “orders” in its incorporation of crimes against humanity and war crimes against civilian population enables the proofs to correspond to the massive evidence of intent. The records of the meetings, the records of the decisions, and the records of the implementing orders all could fulfill the criteria of “organize” or “order.” And, as opposed to a traditional murder charge, the proof of the link to a particular act and person is not so circumscribed. It provides the prosecutor with much more flexibility and allows the prosecutor to focus more on intent than the traditional elements of a murder case.

Despite the strategic advantages offered by the use of these international provisions, great care must be exercised to ensure that the breadth of these statutes are not used in an inappropriate manner. These provisions can be abused. A broad interpretation of “organizes” can inculcate a wide range of people. Aside from the proof of organizational efforts, what is critical is that there be a clear link in establishing intent and the proscribed result. The powerful dissenting opinions of Justices Murphy and Rutledge in the *Yamashita* case arising out of the Tokyo trials at the end of World War II point to the need to assure that war crimes trials are handled in such a way as to stand the test of time.¹⁸

III. OPPORTUNITIES FOR TRADITIONAL PRACTITIONERS

The last subject to be addressed is how a traditional practitioner can become involved with war crimes issues. When I was in your shoes too many years ago, I had a great interest in this subject. My interest was prompted by my father’s experience opening up some of the concentration camps on the German border during World War II. His description of that experience is something that I will never forget. So, if you have an interest today, you will more than likely have that same interest years from now. In addition to human rights groups, there are organizations like the ABA, the American Society of International Law, and state bar organizations that increasingly offer opportunities for experienced and inexperienced lawyers.

While these issues are often perceived as falling within the domain of academics and international lawyers, the reality is that traditional trial practitioners can play a critical role. Trial attorneys, and especially criminal practitioners, we understand the difference between theory and practice. Moreover, from a procedural perspective, the U.S. criminal justice system is increasingly the model being followed by the human rights community and other nations.¹⁹ As a result, whether from an advisory or training perspective,

18. *In re Yamashita*, 327 U.S. 1 (1946).

19. See, e.g., Craig M. Bradley, *The Emerging International Consensus as to Criminal Procedure Rules*, 14 MICH. J. INT’L L. 171 (1993).

the assistance of more traditional U.S. practitioners can play an important and constructive role.

While you are still in law school, you should take every opportunity to learn as much as possible about international law and other legal systems. Even within your own ranks, you have people who come from different countries and different cultural backgrounds. Whether it be issues relating to an international criminal court or war crimes issues in a particular setting, the context will be a situation in which an amalgam of legal systems will be involved. You should take this opportunity to learn from your colleagues about these other legal systems. This background will not only make the experience more interesting, it enhances one's ability to play an important role.