

The Case for Universal Jurisdiction

Kenneth Roth

Behind much of the savagery of modern history lies impunity. Tyrants commit atrocities, including genocide, when they calculate they can get away with them. Too often, dictators use violence and intimidation to shut down any prospect of domestic prosecution. Over the past decade, however, a slowly emerging system of international justice has begun to break this pattern of impunity in national courts.

The United Nations Security Council established international war crimes tribunals for the former Yugoslavia in 1993 and Rwanda in 1994 and is now negotiating the creation of mixed national-international tribunals for Cambodia and Sierra Leone. In 1998, the world's governments gathered in Rome to adopt a treaty for an International Criminal Court (ICC) with potentially global jurisdiction over genocide, war crimes, and crimes against humanity.

With growing frequency, national courts operating under the doctrine of universal jurisdiction are prosecuting despots in their custody for atrocities

committed abroad. Impunity may still be the norm in many domestic courts, but international justice is an increasingly viable option, promising a measure of solace to victims and their families and raising the possibility that would-be tyrants will begin to think twice before embarking on a barbarous path.

In "The Pitfalls of Universal Jurisdiction" (July/August 2001), former Secretary of State Henry Kissinger catalogues a list of grievances against the juridical concept that people who commit the most severe human rights crimes can be tried wherever they are found. But his objections are misplaced, and the alternative he proposes is little better than a return to impunity.

Kissinger begins by suggesting that universal jurisdiction is a new idea, at least as applied to heads of state and senior public officials. However, the exercise by U.S. courts of jurisdiction over certain heinous crimes committed overseas is an accepted part of American jurisprudence, reflected in treaties on terrorism and aircraft hijacking dating from 1970. Universal jurisdiction was also the concept that

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allowed Israel to try Adolf Eichmann in Jerusalem in 1961.

Kissinger says that the drafters of the Helsinki Accords—the basic human rights principles adopted by the Conference on Security and Cooperation in Europe in 1975—and the U.N.'s 1948 Universal Declaration of Human Rights never intended to authorize universal jurisdiction. But this argument is irrelevant, because these hortatory declarations are not legally binding treaties of the sort that could grant such powers.

As for the many formal treaties on human rights, Kissinger believes it “unlikely” that their signatories “thought it possible that national judges would use them as a basis for extradition requests regarding alleged crimes committed outside their jurisdictions.” To the contrary, the Torture Convention of 1984, ratified by 124 governments including the United States, requires states either to prosecute any suspected torturer found on their territory, regardless of where the torture took place, or to extradite the suspect to a country that will do so. Similarly, the Geneva Conventions of 1949 on the conduct of war, ratified by 189 countries including the United States, require each participating state to “search for” persons who have committed grave breaches of the conventions and to “bring such persons, regardless of nationality, before its own courts.” What is new is not the concept of extraterritorial jurisdiction but the willingness of some governments to fulfill this duty against those in high places.

ORDER AND THE COURT

Kissinger's critique of universal jurisdiction has two principal targets: the soon-to-be-formed International Criminal Court

and the exercise of universal jurisdiction by national courts. (Strictly speaking, the ICC will use not universal jurisdiction but, rather, a delegation of states' traditional power to try crimes committed on their own territory.) Kissinger claims that the crimes detailed in the ICC treaty are “vague and highly susceptible to politicized application.” But the treaty's definition of war crimes closely resembles that found in the Pentagon's own military manuals and is derived from the widely ratified Geneva Conventions and their Additional Protocols adopted in 1977. Similarly, the ICC treaty's definition of genocide is borrowed directly from the Genocide Convention of 1948, which the United States and 131 other governments have ratified and pledged to uphold, including by prosecuting offenders. The definition of crimes against humanity is derived from the Nuremberg Charter, which, as Kissinger acknowledges, proscribes conduct that is “self-evident[ly]” wrong.

Kissinger further asserts that the ICC prosecutor will have “discretion without accountability,” going so far as to raise the specter of Independent Counsel Kenneth Starr and to decry “the tyranny of judges.” In fact, the prosecutor can be removed for misconduct by a simple majority of the governments that ratify the ICC treaty, and a two-thirds vote can remove a judge. Because joining the court means giving it jurisdiction over crimes committed on the signatory's territory, the vast majority of member states will be democracies, not the abusive governments that self-protectively flock to U.N. human rights bodies, where membership bears no cost.

Kissinger criticizes the “extraordinary attempt of the ICC to assert jurisdiction over Americans even in the absence of

U.S. accession to the treaty." But the United States itself asserts such jurisdiction over others' citizens when it prosecutes terrorists or drug traffickers, such as Panamanian dictator Manuel Noriega, without the consent of the suspect's government. Moreover, the ICC will assert such power only if an American commits a specified atrocity on the territory of a government that has joined the ICC and has thus delegated its prosecutorial authority to the court.

Kissinger claims that ICC defendants "will not enjoy due process as understood in the United States"—an apparent allusion to the lack of a jury trial in a court that will blend civil and common law traditions. But U.S. courts martial also do not provide trials by jury. Moreover, U.S. civilian courts routinely approve the constitutionality of extradition to countries that lack jury trials, so long as their courts otherwise observe basic due process. The ICC clearly will provide such due process, since its treaty requires adherence to the full complement of international fair-trial standards.

Of course, any court's regard for due process is only as good as the quality and temperament of its judges. The ICC's judges will be chosen by the governments that join the court, most of which, as noted, will be democracies. Even without ratifying the ICC treaty, the U.S. government could help shape a culture of respect for due process by quietly working with the court, as it has done successfully with the international war crimes tribunals for Rwanda and the former Yugoslavia. Regrettably, ICC opponents in Washington are pushing legislation—the misnamed American Servicemembers Protection Act—that would preclude such cooperation.

The experience of the Yugoslav and Rwandan tribunals, of which Kissinger speaks favorably, suggests that international jurists, when forced to decide the fate of a particular criminal suspect, do so with scrupulous regard for fair trial standards. Kissinger's only stated objection to these tribunals concerns the decision of the prosecutor of the tribunal for the former Yugoslavia to pursue a brief inquiry into how NATO conducted its air war against the new Yugoslavia—an inquiry that led her to exonerate NATO.

It should be noted, in addition, that the jurisdiction of the Yugoslav tribunal was set not by the prosecutor but by the U.N. Security Council, with U.S. consent. The council chose to grant jurisdiction without prospective time limit, over serious human rights crimes within the territory of the former Yugoslavia committed by anyone—not just Serbs, Croats, and Bosnian Muslims. In light of that mandate, the prosecutor would have been derelict in her duties not to consider NATO's conduct; according to an extensive field investigation by Human Rights Watch, roughly half of the approximately 500 civilian deaths caused by NATO's bombs could be attributed to NATO's failure, albeit not criminal, to abide by international humanitarian law.

Kissinger claims that the ICC would violate the U.S. Constitution if it asserted jurisdiction over an American. But the court is unlikely to prosecute an American because the Rome treaty deprives the ICC of jurisdiction if, after the court gives required notice of its intention to examine a suspect, the suspect's government conducts its own good-faith investigation and, if appropriate, prosecution. It is the stated policy of the U.S. government

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to investigate and prosecute its own war criminals.

Moreover, the ICC's assertion of jurisdiction over an American for a crime committed abroad poses no greater constitutional problem than the routine practice under status-of-forces agreements of allowing foreign prosecution of American military personnel for crimes committed overseas, such as Japan's arrest in July of a U.S. Air Force sergeant for an alleged rape on Okinawa. An unconstitutional delegation of U.S. judicial power would arguably take place only if the United States ratified the ICC treaty; then an American committed genocide, war crimes, or crimes against humanity on U.S. soil; and then U.S. authorities did not prosecute the offender. Yet that remote possibility would signal a constitutional crisis far graver than one spawned by an ICC prosecution.

NO PLACE TO HIDE

National courts come under Kissinger's fire for selectively applying universal jurisdiction. He characterizes the extradition request by a Spanish judge seeking to try former Chilean President Augusto Pinochet for crimes against Spanish citizens on Chilean soil as singling out a "fashionably reviled man of the right." But Pinochet was sought not, as Kissinger writes, "because he led a coup d'état against an elected leader" who was a favorite of the left. Rather, Pinochet was targeted because security forces under his command murdered and forcibly "disappeared" some 3,000 people and tortured thousands more.

Furthermore, in recent years national courts have exercised universal jurisdiction against a wide range of suspects: Bosnian war criminals, Rwandan *génocidaires*,

Argentine torturers, and Chad's former dictator. It has come to the point where the main limit on national courts empowered to exercise universal jurisdiction is the availability of the defendant, not questions of ideology.

Kissinger also cites the Pinochet case to argue that international justice interferes with the choice by democratic governments to forgive rather than prosecute past offenders. In fact, Pinochet's imposition of a self-amnesty at the height of his dictatorship limited Chile's democratic options. Only after 16 months of detention in the United Kingdom diminished his power was Chilean democracy able to begin prosecution. Such imposed impunity is far more common than democratically chosen impunity.

Kissinger would have had a better case had prosecutors sought, for example, to overturn the compromise negotiated by South Africa's Nelson Mandela, widely recognized at the time as the legitimate representative of the victims of apartheid. Mandela agreed to grant abusers immunity from prosecution if they gave detailed testimony about their crimes. In an appropriate exercise of prosecutorial discretion, no prosecutor has challenged this arrangement, and no government would likely countenance such a challenge.

Kissinger legitimately worries that the nations exercising universal jurisdiction could include governments with less-entrenched traditions of due process than the United Kingdom's. But his fear of governments robotically extraditing suspects for sham or counterproductive trials is overblown. Governments regularly deny extradition to courts that are unable to ensure high standards of due process. And foreign ministries, including the U.S.

State Department, routinely deny extradition requests for reasons of public policy.

If an American faced prosecution by an untrustworthy foreign court, the United States undoubtedly would apply pressure for his or her release. If that failed, however, it might prove useful to offer the prosecuting government the face-saving alternative of transferring the suspect to the ICC, with its extensive procedural protections, including deference to good-faith investigations and prosecutions by a suspect's own government. Unfortunately, the legislation being pushed by ICC opponents in Washington would preclude that option.

Until the ICC treaty is renegotiated to avoid what Kissinger sees as its "shortcomings and dangers," he recommends that the U.N. Security Council determine which cases warrant an international tribunal. That option was rejected during the Rome negotiations on the ICC because it would allow the council's five permanent members, including Russia and China as well as the United States, to exempt their nationals and those of their allies by exercising their vetoes.

As a nation committed to human rights and the rule of law, the United States should be embracing an international system of justice, even if it means that Americans, like everyone else, might sometimes be scrutinized. 🌐

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