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The Pitfalls of Universal Jurisdiction

Henry A. Kissinger

RISKING JUDICIAL TYRANNY

IN LESS THAN a decade, an unprecedented movement has emerged to submit international politics to judicial procedures. It has spread with extraordinary speed and has not been subjected to systematic debate, partly because of the intimidating passion of its advocates. To be sure, human rights violations, war crimes, genocide, and torture have so disgraced the modern age and in such a variety of places that the effort to interpose legal norms to prevent or punish such outrages does credit to its advocates. The danger lies in pushing the effort to extremes that risk substituting the tyranny of judges for that of governments; historically, the dictatorship of the virtuous has often led to inquisitions and even witch-hunts.

The doctrine of universal jurisdiction asserts that some crimes are so heinous that their perpetrators should not escape justice by invoking doctrines of sovereign immunity or the sacrosanct nature of national frontiers. Two specific approaches to achieve this goal have emerged recently. The first seeks to apply the procedures of domestic criminal justice to violations of universal standards, some of which are embodied in United Nations conventions, by authorizing national prosecutors to bring offenders into their jurisdictions through extradition from third countries. The second approach is the International Criminal

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Court (ICC), the founding treaty for which was created by a conference in Rome in July 1998 and signed by 95 states, including most European countries. It has already been ratified by 30 nations and will go into effect when the total reaches 60. On December 31, 2000, President Bill Clinton signed the ICC treaty with only hours to spare before the cutoff date. But he indicated that he would neither submit it for Senate approval nor recommend that his successor do so while the treaty remains in its present form.

The very concept of universal jurisdiction is of recent vintage. The sixth edition of *Black's Law Dictionary,* published in 1990, does not contain even an entry for the term. The closest analogous concept listed is *hostes humani generis* ("enemies of the human race"). Until recently, the latter term has been applied to pirates, hijackers, and similar outlaws whose crimes were typically committed outside the territory of any state. The notion that heads of state and senior public officials should have the same standing as outlaws before the bar of justice is quite new.

In the aftermath of the Holocaust and the many atrocities committed since, major efforts have been made to find a judicial standard to deal with such catastrophes: the Nuremberg trials of 1945–46, the Universal Declaration of Human Rights of 1948, the genocide convention of 1948, and the antitorture convention of 1988. The Final Act of the Conference on Security and Cooperation in Europe, signed in Helsinki in 1975 by President Gerald Ford on behalf of the United States, obligated the 35 signatory nations to observe certain stated human rights, subjecting violators to the pressures by which foreign policy commitments are generally sustained. In the hands of courageous groups in Eastern Europe, the Final Act became one of several weapons by which communist rule was delegitimized and eventually undermined. In the 1990s, international tribunals to punish crimes committed in the former Yugoslavia and Rwanda, established ad hoc by the U.N. Security Council, have sought to provide a system of accountability for specific regions ravaged by arbitrary violence.

But none of these steps was conceived at the time as instituting a "universal jurisdiction." It is unlikely that any of the signatories of either the U.N. conventions or the Helsinki Final Act thought it

possible that national judges would use them as a basis for extradition requests regarding alleged crimes committed outside their jurisdictions. The drafters almost certainly believed that they were stating general principles, not laws that would be enforced by national courts. For example, Eleanor Roosevelt, one of the drafters of the Universal Declaration of Human Rights, referred to it as a "common standard." As one of the negotiators of the Final Act of the Helsinki conference, I can affirm that the administration I represented considered it primarily a diplomatic weapon to use to thwart the communists' attempts to pressure the Soviet and captive peoples. Even with respect to binding undertakings such as the genocide convention, it was never thought that they would subject past and future leaders of one nation to prosecution by the national magistrates of another state where the violations had not occurred. Nor, until recently, was it argued that the various U.N. declarations subjected past and future leaders to the possibility of prosecution by national magistrates of third countries without either due process safeguards or institutional restraints.

Yet this is in essence the precedent that was set by the 1998 British detention of former Chilean President Augusto Pinochet as the result of an extradition request by a Spanish judge seeking to try Pinochet for crimes committed against Spaniards on Chilean soil. For advocates of universal jurisdiction, that detention—lasting more than 16 months—was a landmark establishing a just principle. But any universal system should contain procedures not only to punish the wicked but also to constrain the righteous. It must not allow legal principles to be used as weapons to settle political scores. Questions such as these must therefore be answered: What legal norms are being applied? What are the rules of evidence? What safeguards exist for the defendant? And how will prosecutions affect other fundamental foreign policy objectives and interests?

A DANGEROUS PRECEDENT

It is decidedly unfashionable to express any degree of skepticism about the way the Pinochet case was handled. For almost all the parties of the European left, Augusto Pinochet is the incarnation of a right-wing assault on democracy because he led a coup d'état against an elected leader. At the time, others, including the leaders

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Trial or error?
General Augusto Pinochet, Santiago, Chile, May 24, 2000

of Chile's democratic parties, viewed Salvador Allende as a radical Marxist ideologue bent on imposing a Castro-style dictatorship with the aid of Cuban-trained militias and Cuban weapons. This was why the leaders of Chile's democratic parties publicly welcomed—yes, welcomed—Allende's overthrow. (They changed their attitude only after the junta brutally maintained its autocratic rule far longer than was warranted by the invocation of an emergency.)

Disapproval of the Allende regime does not exonerate those who perpetrated systematic human rights abuses after it was overthrown. But neither should the applicability of universal jurisdiction as a policy be determined by one's view of the political history of Chile.

The appropriate solution was arrived at in August 2000 when the Chilean Supreme Court withdrew Pinochet's senatorial immunity, making it possible to deal with the charges against him in the courts of the country most competent to judge this history and to relate its decisions to the stability and vitality of its democratic institutions.

On November 25, 1998, the judiciary committee of the British House of Lords (the United Kingdom's supreme court) concluded that "international law has made it plain that certain types of conduct ... are not acceptable conduct on the part of anyone." But that principle did not oblige the lords to endow a Spanish magistrate—and presumably other magistrates elsewhere in the world—with the authority to enforce it in a country where the accused had committed no crime, and then to cause the restraint of the accused for 16 months in yet another country in which he was equally a stranger. It could have held that Chile, or an international tribunal specifically established for crimes committed in Chile on the model of the courts set up for heinous crimes in the former Yugoslavia and Rwanda, was the appropriate forum.

The world must respect Chile's own attempt to come to terms with its brutal past.

The unprecedented and sweeping interpretation of international law in *Ex parte Pinochet* would arm any magistrate anywhere in the world with the power to demand extradition, substituting the magistrate's own judgment for the reconciliation procedures of even incontestably democratic societies where alleged violations of human rights may have occurred. It would also subject the accused to the criminal procedures of the magistrate's country, with a legal system that may be unfamiliar to the defendant and that would force the defendant to bring evidence and witnesses from long distances. Such a system goes far beyond the explicit and limited mandates established by the U.N. Security Council for the tribunals covering war crimes in the former Yugoslavia and Rwanda as well as the one being negotiated for Cambodia.

Perhaps the most important issue is the relationship of universal jurisdiction to national reconciliation procedures set up by new democratic governments to deal with their countries' questionable pasts. One would have thought that a Spanish magistrate would have

been sensitive to the incongruity of a request by Spain, itself haunted by transgressions committed during the Spanish Civil War and the regime of General Francisco Franco, to try in Spanish courts alleged crimes against humanity committed elsewhere.

The decision of post-Franco Spain to avoid wholesale criminal trials for the human rights violations of the recent past was designed explicitly to foster a process of national reconciliation that undoubtedly contributed much to the present vigor of Spanish democracy. Why should Chile's attempt at national reconciliation not have been given the same opportunity? Should any outside group dissatisfied with the reconciliation procedures of, say, South Africa be free to challenge them in their own national courts or those of third countries?

It is an important principle that those who commit war crimes or systematically violate human rights should be held accountable. But the consolidation of law, domestic peace, and representative government in a nation struggling to come to terms with a brutal past has a claim as well. The instinct to punish must be related, as in every constitutional democratic political structure, to a system of checks and balances that includes other elements critical to the survival and expansion of democracy.

Another grave issue is the use in such cases of extradition procedures designed for ordinary criminals. If the Pinochet case becomes a precedent, magistrates anywhere will be in a position to put forward an extradition request without warning to the accused and regardless of the policies the accused's country might already have in place for dealing with the charges. The country from which extradition is requested then faces a seemingly technical legal decision that, in fact, amounts to the exercise of political discretion—whether to entertain the claim or not.

Once extradition procedures are in train, they develop a momentum of their own. The accused is not allowed to challenge the substantive merit of the case and instead is confined to procedural issues: that there was, say, some technical flaw in the extradition request, that the judicial system of the requesting country is incapable of providing a fair hearing, or that the crime for which the extradition is sought is not treated as a crime in the country from which extradition has been requested—thereby conceding much of the merit of the charge. Meanwhile, while these claims are being considered by the judicial

sys. . of the country from which extradition is sought, the accused remains in some form of detention, possibly for years. Such procedures provide an opportunity for political harassment long before the accused is in a position to present any defense. It would be ironic if a doctrine designed to transcend the political process turns into a means to pursue political enemies rather than universal justice.

The Pinochet precedent, if literally applied, would permit the two sides in the Arab-Israeli conflict, or those in any other passionate international controversy, to project their battles into the various national courts by pursuing adversaries with extradition requests. When discretion on what crimes are subject to universal jurisdiction and whom to prosecute is left to national prosecutors, the scope for arbitrariness is wide indeed. So far, universal jurisdiction has involved the prosecution of one fashionably reviled man of the right while scores of East European communist leaders—not to speak of Caribbean, Middle Eastern, or African leaders who inflicted their own full measures of torture and suffering—have not had to face similar prosecutions.

Some will argue that a double standard does not excuse violations of international law and that it is better to bring one malefactor to justice than to grant immunity to all. This is not an argument permitted in the domestic jurisdictions of many democracies—in Canada, for example, a charge can be thrown out of court merely by showing that a prosecution has been selective enough to amount to an abuse of process. In any case, a universal standard of justice should not be based on the proposition that a just end warrants unjust means, or that political fashion trumps fair judicial procedures.

AN INDISCRIMINATE COURT

THE IDEOLOGICAL supporters of universal jurisdiction also provide much of the intellectual compass for the emerging International Criminal Court. Their goal is to criminalize certain types of military and political actions and thereby bring about a more humane conduct of international relations. To the extent that the ICC replaces the claim of national judges to universal jurisdiction, it greatly improves the state of international law. And, in time, it may be possible to negotiate

modifications of the present statute to make the ICC more co... ...tible with U.S. constitutional practice. But in its present form of assigning the ultimate dilemmas of international politics to unelected jurists—and to an international judiciary at that—it represents such a fundamental change in U.S. constitutional practice that a full national debate and the full participation of Congress are imperative. Such a momentous revolution should not come about by tacit acquiescence in the decision of the House of Lords or by dealing with the ICC issue through a strategy of improving specific clauses rather than as a fundamental issue of principle.

At any future time, U.S. officials involved in the NATO air campaign in Kosovo could face international prosecution.

The doctrine of universal jurisdiction is based on the proposition that the individuals or cases subject to it have been clearly identified. In some instances, especially those based on Nuremberg precedents, the definition of who can be prosecuted in an international court and in what circumstances is self-evident. But many issues are much more vague and depend on an understanding of the historical and political context. It is this fuzziness that risks arbitrariness on the part of prosecutors and judges years after the event and that became apparent with respect to existing tribunals.

For example, can any leader of the United States or of another country be hauled before international tribunals established for other purposes? This is precisely what Amnesty International implied when, in the summer of 1999, it supported a "complaint" by a group of European and Canadian law professors to Louise Arbour, then the prosecutor of the International Criminal Tribunal for the Former Yugoslavia (ICTY). The complaint alleged that crimes against humanity had been committed during the NATO air campaign in Kosovo. Arbour ordered an internal staff review, thereby implying that she did have jurisdiction if such violations could, in fact, be demonstrated. Her successor, Carla Del Ponte, in the end declined to indict any NATO official because of a general inability "to pinpoint individual responsibilities," thereby implying anew that the court had jurisdiction over NATO and American leaders in the Balkans and would have issued an indictment had it been able to identify the particular leaders allegedly involved.

Most Americans would be amazed to learn that the ICTY, created at U.S. behest in 1993 to deal with Balkan war criminals, had asserted a right to investigate U.S. political and military leaders for allegedly criminal conduct—and for the indefinite future, since no statute of limitations applies. Though the ICTY prosecutor chose not to pursue the charge—on the ambiguous ground of an inability to collect evidence—some national prosecutor may wish later to take up the matter as a valid subject for universal jurisdiction.

The pressures to achieve the widest scope for the doctrine of universal jurisdiction were demonstrated as well by a suit before the European Court of Human Rights in June 2000 by families of Argentine sailors who died in the sinking of the Argentine cruiser *General Belgano* during the Falklands War. The concept of universal jurisdiction has moved from judging alleged political crimes against humanity to second-guessing, 18 years after the event, military operations in which neither civilians nor civilian targets were involved.

Distrusting national governments, many of the advocates of universal jurisdiction seek to place politicians under the supervision of magistrates and the judicial system. But prosecutorial discretion without accountability is precisely one of the flaws of the International Criminal Court. Definitions of the relevant crimes are vague and highly susceptible to politicized application. Defendants will not enjoy due process as understood in the United States. Any signatory state has the right to trigger an investigation. As the U.S. experience with the special prosecutors investigating the executive branch shows, such a procedure is likely to develop its own momentum without time limits and can turn into an instrument of political warfare. And the extraordinary attempt of the ICC to assert jurisdiction over Americans even in the absence of U.S. accession to the treaty has already triggered legislation in Congress to resist it.

The independent prosecutor of the ICC has the power to issue indictments, subject to review only by a panel of three judges. According to the Rome statute, the Security Council has the right to quash any indictment. But since revoking an indictment is subject to the veto of any permanent Security Council member, and since the

prosecutor is unlikely to issue an indictment without the backing of at least one permanent member of the Security Council, he or she has virtually unlimited discretion in practice. Another provision permits the country whose citizen is accused to take over the investigation and trial. But the ICC retains the ultimate authority on whether that function has been adequately exercised and, if it finds it has not, the ICC can reassert jurisdiction. While these procedures are taking place, which may take years, the accused will be under some restraint and certainly under grave public shadow.

The advocates of universal jurisdiction argue that the state is the basic cause of war and cannot be trusted to deliver justice. If law replaced politics, peace and justice would prevail. But even a cursory examination of history shows that there is no evidence to support such a theory. The role of the statesman is to choose the best option when seeking to advance peace and justice, realizing that there is frequently a tension between the two and that any reconciliation is likely to be partial. The choice, however, is not simply between universal and national jurisdictions.

MODEST PROPOSALS

THE PRECEDENTS SET by international tribunals established to deal with situations where the enormity of the crime is evident and the local judicial system is clearly incapable of administering justice, as in the former Yugoslavia and Rwanda, have shown that it is possible to punish without removing from the process all political judgment and experience. In time, it may be possible to renegotiate the ICC statute to avoid its shortcomings and dangers. Until then, the United States should go no further toward a more formal system than one containing the following three provisions. First, the U.N. Security Council would create a Human Rights Commission or a special subcommittee to report whenever systematic human rights violations seem to warrant judicial action. Second, when the government under which the alleged crime occurred is not authentically representative, or where the domestic judicial system is incapable of sitting in judgment on the crime, the Security Council would set up an ad hoc international tribunal on the model of those

ot the former Yugoslavia or Rwanda. And third, the procedures for these international tribunals as well as the scope of the prosecution should be precisely defined by the Security Council, and the accused should be entitled to the due process safeguards accorded in common jurisdictions.

In this manner, internationally agreed procedures to deal with war crimes, genocide, or other crimes against humanity could become institutionalized. Furthermore, the one-sidedness of the current pursuit of universal jurisdiction would be avoided. This pursuit could threaten the very purpose for which the concept has been developed. In the end, an excessive reliance on universal jurisdiction may undermine the political will to sustain the humane norms of international behavior so necessary to temper the violent times in which we live.