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## A Nuremberg Prosecutor's Response to Henry Kissinger's essay "The Pitfalls of Universal Jurisdiction".

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Henry Kissinger's essay on "The Pitfalls of Universal Jurisdiction" (Foreign Affairs July/August 2001) perceives danger in allowing international legal norms to interfere with political actions by national governments. The former U.S. Secretary of State in the administration of President Richard Nixon warns that current efforts to deter genocide and other crimes against humanity by creating an international criminal court (ICC) run the risk of becoming a "tyranny of judges" or a "dictatorship of the virtuous." He refers to "inquisitions and even witch-hunts." Kissinger's focus on the past exaggerates the dangers of the present and ignores the needs of the future. If we are to have a more peaceful and humane world, international law must play a greater and not a lesser role.

Dr. Kissinger challenges the basic concept of universal jurisdiction. He argues, incorrectly, that the notion is of recent vintage. He gives scant weight to ancient doctrines designed to curb piracy or to a plethora of international conventions following the First World War. He fails to recognize that international law is found not only in treaties but also in general principles of justice and in customs which gradually obtain universal recognition. International law is not static but advances to meet the needs of a changing world.

Over half a century ago, Robert M. Jackson, on leave from the U.S. Supreme Court to become Chief U.S. Prosecutor before the International Military Tribunal at Nuremberg, declared: "To pass these defendants a poisoned chalice is to put it to our own lips as well. We must summon such detachment and intellectual integrity to our task that this trial will commend itself to posterity as fulfilling humanity's aspirations to do justice." The learned judges reviewed the law on which the trials were based and concluded that it was "not an arbitrary exercise of power on the part of victorious nations" but "the expression of international law existing at the time of its creation..." The Nuremberg principles were affirmed by the United Nations in 1946 and became binding legal precedents for war crimes trials in Tokyo and elsewhere. Justice Jackson and Telford Taylor, his successor for a dozen subsequent trials at Nuremberg, repeatedly made plain that the law being mobilized to maintain peace in the future would apply to all nations equally.

The United States inspired the world when it proclaimed at Nuremberg and elsewhere that aggression, genocide and other crimes against humanity were universally prohibited by international law. It was recognized that states can act only through individuals and thus those leaders responsible for the crimes could be held to account in a court of law. Crimes like aggression, genocide and similar large-scale atrocities are almost invariably committed by or with the connivance of a national government and it thus becomes imperative to have available an international tribunal that could bring them to justice.

For over half a century, United Nations committees struggled in vain to reach consensus on a code of international crimes that would be punished in an international court. Cold war politics stymied all U.N. efforts to create an international criminal jurisdiction. Powerful nations remained unwilling to yield their sovereign rights to kill as they alone saw fit. After years of meticulous argumentation at the U.N., a breakthrough finally came in Rome in 1998 where 120 nations voted in favor of an ICC to curb the incessant murders and persecution of millions of innocent people. The U.S. was one of 7 nations that voted No. Mr. Kissinger now argues that because of "the intimidating passion of its advocates", the judicial procedures designed to punish and deter new crimes against humanity are being "spread with extraordinary speed and has not been subjected to systematic debate". It is not the passion of its advocates that is moving nations toward the rule of law - it is the passion of those who have been victims of politics as usual.

The tribunals set up by the Security Council of the United Nations in the 1990's, with strong U.S. support, to punish massive war crimes committed in former Yugoslavia and Rwanda, are belittled by Dr. Kissinger's argument that "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". None of these arguments are convincing. Kissinger scorns the judgment of Great Britain's esteemed Law Lords who confirmed the legal validity of the detention in England of Chile's former

Head of State, Augusto Pinochet, who was accused of crimes committed against Spanish nationals in Chile. He ignores, for example, the widely hailed prosecution of Adolf Eichman by Israel, for Holocaust crimes committed in Europe at a time when the state of Israel didn't even exist. He fails to recognize that these advances in international jurisprudence also reflect the changing needs of contemporary world society.

In 1776, the Declaration of Independence declared that "governments derive their just powers from the consent of the governed." The United Nations Charter speaks in the name of "We the Peoples...? The Universal Declaration of Human Rights, adopted in 1948 refers to 'the equal and unalienable rights of all members of the human family...' and declares that it is essential "that human rights should be protected by the rule of law." These and many other international human rights instruments reflect the growing realization that true sovereignty lies in the people and not the state. Today, no nation and no person can be above the law. No one should oppose the creation of new institutions being created to help realize the dreams of suffering humanity.

Professor Kissinger is quite right to insist on due process protection and fair trials for every accused but his assumption that the ICC will flout these rights is completely unfounded. Quite the contrary, the best way to be sure that law will not be abused as a weapon to settle political disputes is to create a competent international court composed of highly qualified judges from many nations bound by rules that guarantee a fair trial under internationally approved standards and scrutiny. As of July 1, 2001, 36 states, including some of our staunchest allies, have completed the ratification process thereby confirming their unconditional acceptance of the Court. U.S. insistence upon complete immunity for all U.S. nationals is viewed by many of our friends as a repudiation of vaunted U.S. ideals and an unacceptable affront to the rule of law that must apply equally to everyone.

The ICC seeks to usher in a new regime of increased respect for international law. The court will have no jurisdiction over crimes committed before the court comes into existence. There is no retroactivity. Only crimes of concern to the international community as a whole, such as genocide, crimes against humanity and major war crimes, can be tried. The supreme international crime - aggressive war - can only be considered later - if there is a near-unanimous amendment. Furthermore, it must not be forgotten that national courts are given priority and the ICC will have jurisdiction only where the national courts are unable or unwilling to provide the accused with a fair trial. The Security Council can block prosecutions indefinitely if needed for reconciliation or peace. Administrative and budgetary controls are clearly defined. Without its own police force, the court must depend upon the Security Council to enforce its decisions. Enforcement can be vetoed by any of the five privileged Permanent Members, including the U.S. Kissinger's reference to the "unlimited discretion" of the prosecutor is unfounded. Many safeguards are written into the statute. A court that acts arbitrarily or seeks to abuse its limited powers will soon cease to exist.

Kissinger argues that the International Criminal Tribunal for Yugoslavia (ICTY), created at U.S. behest in 1993, had the effrontery to receive a "complaint" alleging that punishable crimes against humanity had been committed during the NATO air campaign in Kosovo in 1999. He should have stressed that in this instance the ICTY Prosecutor properly dismissed the complaint and refused to issue an indictment. The statute that governs the ICTY was approved by the United States and the United Nations for the purpose of bringing to justice those leaders responsible for crimes against humanity committed since 1991 in that particular region. It made no exceptions for U.S. nationals or others. The burden is always on the prosecutor to prove beyond doubt that the law has been violated. It must be shown that the accused knew or should have known that the deeds were criminal and that the defendant had the obligation and ability to prevent the crimes from happening. Despite initial difficulties and occasional shortcomings the ICTY has earned respect for its very fair treatment of the accused and its development of international criminal law. It is a new-born babe that must be helped and encouraged and not disparaged.

The innocent need not fear the rule of law. Kissinger's misperceptions about current international law lead him to the erroneous conclusion that if the U.S. does not ratify the ICC treaty Americans will be outside its reach and hence protected from malicious accusations. He fails to notice that without the protective shield of binding international law and institutions to enforce it, the military captive is completely at the mercy of his captors. In every democratic society it is unavoidable that some unjustified complaints may be lodged for political or other nefarious purposes. It is also inevitable that

some judgments may go awry and some judges may be incompetent or worse. That is no reason to abolish courts or to refuse to accept new courts where needed. Outstanding American international legal experts, including ten former Presidents of the American Society of International Law and the American Bar Association have, after careful study, concluded that it would be in the best interests of the United States and its military personnel for the United States to accept the proposed ICC as quickly as possible. The same conclusion was reached in 2000 by outstanding professors of the Harvard law School after a careful study by leading military and legal experts assembled by the venerated American Academy of Arts and Sciences.

A politically conservative constituency in the United States argues for the protection of American sovereignty as though we were still in the Middle Ages. Senator Jesse Helms of North Carolina has been a leading opponent of the ICC. Even though the U.S. Constitution vests the President with the power to negotiate and sign treaties, the distinguished Senator did not wait for the President to submit the ICC treaty to the Senate for its needed advice and consent but intruded into Presidential prerogatives by proclaiming that it would be "dead on arrival." The wily Senator also introduced legislation deceptively named "The Servicemembers Protection Act" designed to abort the ICC by imposing economic and military sanctions against states that support the court. He managed to have its submission endorsed by Henry Kissinger and several other distinguished former public servants, whose signature seemed more an act of political fealty than considered legal judgment since it relied on many arguments that were demonstrably false. Opponents of the ICC refuse to recognize that in today's interdependent world all major problems are global and require global solutions. Binding international rules have become necessary and are accepted universally to protect the common interest. The prevention of massive crimes against humanity deserves equal protection of universal law.

Mr. Kissinger makes an argument that, when needed, the Security Council can create additional ad hoc tribunals. Until the ICC is fully functional ad hoc courts may prove to be unavoidable to curb some of the more outrageous cases of impunity. But a bevy of independent courts is hardly an adequate deterrent to universal crimes. Justice regarding the most serious crimes in the world cannot depend upon the political whim of those who control the United Nations. The crimes must be spelled out in advance and not condemned only retroactively. Temporary courts created a la carte are very costly and lack the uniformity required by an international legal system. It is understandable that a former Secretary of State should not be eager to place national politicians under the supervision of an international judicial system. He accuses the ICTY of allowing "prosecutorial discretion without accountability" - ignoring all the controls that exist to prevent abuse. He makes the unfounded allegation that the "definitions of the relevant crimes are vague and highly susceptible to politicized application." His statement that "defendants will not enjoy due process as understood in the United States" is refuted by a host of prominent international lawyers, including a former Legal Adviser to both the Defense and State Departments. (See 95 American Journal of International Law (Jan. 2001) 124).

In concluding, Kissinger, the constant diplomat, makes three "Modest Proposals". He suggests that the Security Council appoint a committee to monitor human rights violations and report when judicial action appears necessary. If the local government has not been democratically elected or seems incapable of sitting in fair judgment, the Council may set up additional ad hoc tribunals. But the Council must specify the scope of prosecutions and provide for due process. He fears "one-sidedness" of the pursuit of universal jurisdiction which "may undermine the political will to sustain the humane norms of international behavior so necessary to temper the violent times in which we live." He ignores the reality that other states will demand the same rights that the U.S. wishes to reserve for itself. What it boils down to in the end is that Henry Kissinger says he agrees with the goals of the international criminal court, and even gives some credit to its advocates, but he fails to recognize that the safeguards he seeks from an ICC are already in place. He remains uncomfortable with what he perceives to be the speed and vigor with which the idea of universal crimes punishable in an international court is now moving forward. His call for a public debate is fully justified. Let an informed public study the facts and then let the politicians know whether they prefer politics as usual to law.

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