

**TESTIMONY OF PROF. JEREMY RABKIN
HEARINGS ON "INTERNATIONAL JUSTICE"
COMMITTEE ON INTERNATIONAL RELATIONS
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Thank you for inviting me to testify on this matter. I should say at the outset that I have never had any official connection with international tribunals nor with American government policy toward these tribunals. I cannot even claim to have followed the operations of these tribunals in any great detail. My knowledge of their workings comes largely from what has appeared in public media. My sole claim to comment here is that, as a university professor, I have devoted a good deal of time to studying the history and theory of international law and I hope I can, on this basis, bring a somewhat wider perspective to the committee's inquiry.

I do understand that a congressional hearing cannot be an academic seminar. I want to talk about the general theory of international justice, but to show that this is really worth the committee's time, let me start by noting three obvious, practical problems with these tribunals which enthusiasts for international justice are sometimes prone to forget.

First, then, if there are international criminal tribunals, there will be constant risk of their asserting jurisdiction over Americans, including American military servicemen and policy making officials. We did not have this problem at Nuremberg in 1945, because the tribunal in that case was established by the occupying powers in Germany and, in the exercise of these powers, expressly limited the tribunal's jurisdiction to Axis criminals.

When we negotiated the establishment of a war crimes tribunal for the former Yugoslavia, however, we agreed that its jurisdiction would extend to all war crimes committed in the region -- including those by NATO forces. And after the air war over Kosovo, we indeed witnessed the spectacle of the prosecutor cross-examining top NATO officials to determine whether their choice of bombing targets constituted a "war crime," as Amnesty International and other advocacy groups had charged. There was no indictment in this case, but the question is whether we want international prosecutors looking over the shoulder of American decision makers in future wars. It is hard for us to urge international tribunals for others while resisting their application to our own people.

Second, the existence of these tribunals can complicate our diplomacy. In the mid-1990s, when attention was focused on the conflict in Bosnia, the United States (and our European allies) negotiated extensively with Serb President Milosevic and these negotiations produced the Dayton Accords which brought some measure of peace to Bosnia. I don't mean to endorse that negotiation or its

results but merely to remind you that it is hard to negotiate with someone when he is under indictment. The fact is that Milosevic was later indicted for crimes already well known at the time of the Dayton negotiations. If we wanted to negotiate with him then, we had reason to be glad that the war crimes prosecutor had not yet targeted Milosevic. But it is clearly a great difficulty to leave the decision about prosecution to an independent, international bureaucrat, with no responsibility for larger stakes in the region.

The third and most important practical point is that each tribunal risks becoming a precedent for the next. In Yugoslavia, the tribunal was imposed by the Security Council in the midst of an ongoing war, in which some of the participants were already independent states and the underlying ethnic conflicts threatened to spill over into other states in the region. In retrospect, the Hague tribunal does not seem to have been effective in limiting the ongoing conflict. But it was at least plausible, at the outset, to think the mission of the tribunal had something to do with international peace.

Only a year later, however, the Security Council established a second tribunal for Rwanda -- where there was no serious threat to international peace, because the regime that perpetrated such horrifying genocidal murders had already been overthrown (without help, by the way, from the United Nations or the "international community"). And then the UN became involved in drawing up plans for new tribunals in Sierra Leone and Cambodia -- again where there was no comparable danger of international conflict.

After several ad hoc tribunals were established (or planned), advocates insisted there must be a permanent criminal tribunal, so a UN sponsored conference in 1998 launched plans for such an institution -- the International Criminal Court. It has much wider authority than anything we had contemplated at the outset and no real connection to international peace. It is simply there to assure justice for the world, at least regarding the worst crimes. Its prosecutor is not accountable to any political authority and its charter gives it the right to act, even where national authorities have acquitted the accused in a prior trial or provided a pardon or amnesty. It is quite an extraordinary institution, but Europeans seem to be quite enthused it. And they can't see why the United States, having supported previous ventures in international justice, should now object to this one.

So let me now turn to general principles. The international tribunals established in the 1990s were a sharp departure from the practice that prevailed for several centuries. I can't pretend that any one deviation from this practice -- or from the doctrines behind it -- must always have terrible results. But we really should think more carefully about our general principles before getting engaged in detailed negotiations over new tribunals -- including a reformed ICC.

First, then, legal justice can't simply be reduced to punishing the guilty. If

it could be, we could save ourselves a lot of time and trouble and simply organize assassination squads to execute those who deserve capital punishment. I don't say this lightly. We have all seen movies in which victims of some atrocity track down the guilty party and exact revenge on their own -- and a good screen writer can always make us cheer for the revenge. We have all heard that Israeli intelligence tracked down all those responsible for the killing of Israeli athletes at the 1972 Munich Olympics and left their corpses in hotel rooms across Europe. I don't even say such acts of retaliation always deserve moral condemnation. We might think of them as necessary evils or acts of war. But we don't sanction them in public and we don't call them legal justice.

Who, then, is authorized to impose legal justice, in the sense of criminal liability? Before the 1990s, it was almost universally conceded that only sovereign states can impose criminal justice. And one reason is that only a sovereign state has the requisite legal institutions and wields the necessary force to ensure that criminal justice is enforced in a reliably systematic way. We would have chaos if everyone could take justice into his own hands and we would have lots of injustice, not only because mistakes would be made, but because justice would tend to fall on the weak while the strong escaped.

This points to one of the central problems with international tribunals. They do not have force to ensure anything like reliable enforcement. This was not the case in Nuremberg (or in simultaneous war crimes trials in Tokyo) where the homeland of the evil-doers was entirely occupied and controlled by the prosecuting powers, who were, in fact, exercising sovereign powers over their defeated enemies. But it is notorious that in Yugoslavia, the NATO powers, even while on the ground in Bosnia, did very little to apprehend suspects wanted by the tribunal in the Hague. And why? Because they did not want to risk their own troops in firefights with armed criminals, because they were not, in fact, committed to governing this territory fully and directly. The Rwanda tribunal has had a seemingly opposite problem, stemming from the same cause -- the perpetrators are all in custody but the tribunal has not had the resources to mount trials for more than a few of them because the same outside powers which created the tribunal do not care enough (or do not trust the tribunal sufficiently) to give it the necessary resources to administer full-scale justice.

So, international tribunals are bound to be exercises in symbolism rather than systematic justice. They will mount what are, in effect, show trials where one famous figure is meant to symbolize the evil done by others, since it is too much trouble or too dangerous to pursue those others, case by case. Prosecutors will be continually distracted by concerns about publicity and attention and scoring points, since their own legitimacy is so much more tenuous than that of a normal domestic prosecutor. They will have many of the problems associated with our "special prosecutors" -- who tend to become too special. Their incentive is to go after the most famous rather than the most guilty.

For somewhat related reasons, international criminal justice risks violating principles underlying the procedural norms of legal justice. Even when standards of criminal liability are spelled out in some detail in statutes, they derive much of their meaning and moral authority from the practices and expectations of the particular community where they apply. That is why, in our system, the accused has the right to a jury trial -- so the jury may reflect the expectations and understandings of the relevant community. The Sixth Amendment guarantees the right to a jury drawn from the same state and district in which the crime occurred -- on the assumption that the local perspective is highly relevant to the fair understanding of the crime or to understanding the actual facts of the particular case. I don't say our system is the only valid approach. But international justice goes to the opposite extreme -- purporting to apply the expectations and understandings, not of a particular community, but of the world at large. And in the case of the Yugoslav tribunal, to apply them retroactively.

Perhaps the underlying problem can be seen most clearly, however, if we focus on the alternate face of prosecutorial power -- the power to pardon. So let me elaborate this point at some length and apply it to our experience in Yugoslavia.

Every constitutional state makes provision for a pardon power in its criminal justice system. This is a frankly political prerogative, which is why it is vested in our elected president and in parliamentary systems, vested in an accountable political minister, such as the Home Secretary in Britain. Neither the ad hoc tribunals for Yugoslavia and Rwanda, nor the proposed International Criminal Court, makes any provision for a pardon power. In fact, they all are designed to circumvent pardons or amnesties that might be accorded by national authorities. The international tribunals can't have a pardon power because they must pretend that they are altogether aloof from political considerations.

But this is the heart of the matter. Legal justice is not and cannot be altogether aloof from political considerations. What we mean by legal justice is what a political community is prepared to enforce. And a political community has to concern itself with more than mere justice in the individual case. A normal government has to enforce its laws to show that they really are law and that a reliable government stands behind them. But a normal government must also concern itself with conditions of peace and order, as well as justice. So there must be some authoritative means for reconciling justice -- in the moral sense -- with other demands on the community.

Stated abstractly, this may sound rather crass. But it is not a matter of cynical realpolitik. You find exactly this argument in *The Federalist* No. 74, where Hamilton notes that both "humanity and good policy ... dictate that the benign prerogative of pardoning should be as little as possible fettered or

embarrassed." He then cites, as one example, the consideration that "in seasons of insurrection or rebellion, a well-timed offer of pardon to the insurgents or rebels may restore the tranquillity of the commonwealth."

If you think Alexander Hamilton is too tainted with realpolitik, let me cite the authority of Heinrich Rommen, who explains in his sober, neo-Thomist study, *The State in Catholic Thought* (1945) that "the object of political authority is ... the common good" and the "right of pardon and amnesty therefore belongs to political authority." So he says it "is an unmistakable token ... of true statehood [even among "the members of a federation"] that their highest executives retain the right of pardon."

American history offers striking illustrations of the principle. After the Civil War, for example, almost all Confederate officers and leaders were pardoned. This included officers accused of ordering the massacre of black troops in the Union army, rather than allowing them to be taken prisoners -- a horrifying aspect of Confederate policy, for which President Lincoln had rightly threatened the death penalty during the war. Perhaps the subsequent amnesty was too lenient. But we would have been rightly outraged at the suggestion that outside powers or some international authority could improve on what our own government had determined to do. At any rate, the same thing was done in almost every new democracy emerging from communist oppression or military rule -- or from racial apartheid -- in the past two decades. Everywhere, new democracies were launched with general amnesties, as a way of securing support from supporters of the previous government and allowing the new government to make a fresh start.

In Yugoslavia, however, we have done the opposite. Milosevic was overthrown and a new democracy established. We had every reason to encourage the new democracy. As it happens, the new leaders were prepared to conduct their own trial of Milosevic. Unlike other dictators, he did not give way voluntarily in a negotiated transition so there were no promises made to him of amnesty. But western countries -- including ours -- insisted that Milosevic must be tried in the Hague.

We brushed aside the fact that Serbia's own constitutional court held this was improper. We brushed aside the fact that Serbia's newly elected president, Vojislav Kostunica, the man who unseated Milosevic, a former constitutional law professor (and translator of *The Federalist Papers* into Serbo-Croatian), held the extradition to be improper. In fact, opponents of extradition were not just making excuses. Serbia, like Germany and Italy, has a long-standing law against extraditing its own nationals to foreign courts. In the summer of 1914, Serbia tried to accommodate Austrian demands following the assassination of Arch-duke Ferdinand, but one of the few demands Serbia felt bound to refuse was the extradition of suspects in the assassination plot. Serbia risked -- and got -- a world war, rather than give up on this principle. We brushed this aside, too, if we even bothered to notice it.

The new democracy in Serbia has not collapsed, so we have not paid the worst price -- yet. But surely we are not helping the new democracy by insisting that Serbia's former president be tried by foreigners in a distant location. Rather, we give credibility to the charge that the new government is simply a pawn of NATO, owing its very existence not to a people's movement in Serbia but to outside force. Meanwhile, for all our insistence on trying Milosevic in the Hague, we have let others, with perhaps more blood on their hands, continue to roam freely in Bosnia. Milosevic is our symbol.

But for whose benefit do we make this symbolic prosecution? It is hard to see any way in which this symbol strengthens prospects for peace and democracy in the Balkans. Rather, we seem most concerned to strengthen the prestige of the court in the Hague. Why is that a greater priority than working for future stability in the Balkans?

We do not pressure Saudi Arabia to extradite Idi Amin, the butcher of Uganda. We do not press the French to extradite former Haitian dictator Jean-Claude Duvalier. We are content to let many other former leaders live out comfortable retirements. Perhaps this is callous. Or perhaps it is prudent. But our very different approach in Yugoslavia suggests that the mere existence of an international tribunal makes us think that international justice, in that case, must trump every other consideration -- even if it is very partial justice which does little to secure peace and future respect for justice, where we should be trying to strengthen a new democracy.

Even putting the matter in terms of democracy may be a bit too pious -- or a bit too optimistic. We are now in the midst of a global effort to crush international terror networks. In that effort, we emphasize to every state that it must act as a responsible state -- it must assert control of its own territory and be responsible for those who plan or launch terrorist operations from that territory. We cannot possibly establish a global police force to inspect every state. We must rely on actual governments. In this context, more than ever, we need to strengthen the sense of state accountability -- that is, in old fashioned terms, the principles of state sovereignty. We do the opposite when we pretend that there is some hovering presence that will assure international justice through international institutions.

We can, of course, strengthen international cooperation in the fight against terrorism -- and other crimes -- through extradition treaties. We can provide assistance to developing states which do not have well developed judicial systems. But it is one thing to provide assistance and quite another to take over the role of the state in question. International institutions have no more obvious role in supplanting national courts than they do in supplanting national police. Everyone seems to recognize the difficulty in inserting outside policing forces into a sovereign state. It seems to me a fundamental misunderstanding to

think that inserting international courts is something easier or less threatening. It sends the same message of state incompetence and generates the false expectation that "justice" can be served from above and outside, as something that answers not to local necessities but to international ideals.

And if this is fine for a troubled state, why not for others? I said at the outset that a practical objection to international tribunals is that they risk extending their jurisdiction in ways that threaten the United States. Let me emphasize here that the challenge is one of principle, as well. If we talk ourselves into thinking that these tribunals are quite appropriate for some states, then why not for us? We would be safer -- and more honest -- if we acknowledged that legal justice necessarily implies a sovereign authority. If a state is thought to be so disordered that it can't administer its own justice, the remedy is not an outside court but a new government. And if no new government can be established, the remedy is colonial control. If we shrink from that, we should not fool ourselves that we have done something genuinely useful or effective by giving powers to international lawyers in the Hague.