

Is Putin a War Criminal?

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President Joseph R. Biden caused a stir in the media last week when he called Russian President Vladimir Putin “a war criminal.” Biden’s statement was apparently made to capitalize on the government’s and the American media’s monolithic anti-Russian messaging.

Is Putin a war criminal? In a word: No.

Here is the backstory.

Criminals are persons who have been properly convicted by a court that has jurisdiction over them and the place of their alleged crime and where the crimes were written down and accepted prior to their alleged criminal behavior. Putin is not among them.

Yet Biden’s provocative statement is worth exploring from a historical and legal perspective as it has been tossed about as if it had lawful meaning. The term has been used politically to refer to unpopular government officials who directed the use of state force in what the media has portrayed as an illicit or disproportionate manner.

What is illicit and what is disproportionate are subjective and for the victor to decide. Victors are never war criminals, as by their victory, they control the apparatus of prosecution or other mechanisms that will insulate themselves from the reach of prosecutors.

If you measure human deaths of innocents per second, the greatest governmental mass killer in wartime was President Harry Truman when he ordered the use of atomic bombs on civilian targets in Japan in August 1945, after he knew from intelligence reports that the Japanese government was prepared to surrender in a matter of days. But because the U.S. won the war, Truman was never prosecuted.

The phrase “war criminal” entered our parlance from the Nuremberg trials of surviving high-

ranking Nazi officials after the conclusion of World War II. Those trials alleged that German government officials committed crimes against humanity.

The crimes alleged were invented *ex post facto* — a procedure expressly prohibited in the U.S. — and were accepted by the American, British and Soviet prosecutors and judges. In a bit of bitter irony, the phrase “crimes against humanity” was coined by Joseph Stalin’s hand-picked prosecutor.

Just imagine a court today where the prosecutors get to write retroactive laws to apply to the defendants they are about to try.

This is the culture out of which Nuremberg sprang and the jurisprudence it spawned. Notwithstanding the egregious unfairness of these trials, world opinion generally accepted them.

The chief American prosecutor at Nuremberg, Justice Robert Jackson, a former U.S. attorney general and, at the time, a sitting justice on the U.S. Supreme Court, became a celebrity. He apparently had no hesitation about applying principles in vanquished Germany that were prohibited by the U.S. Constitution he swore to uphold.

The concept that officials of a nation could be prosecuted for violating a body of unwritten laws stirred post-war academic and judicial interest in natural law theory, which teaches that our rights and our understanding of good and evil come from within us and are understood and identified by the exercise of human reason and bind all persons.

Because the natural law prohibits aggression, no government on the planet has felt bound by it. One of the natural law principles that animated Nuremberg and continues to animate contemporary international tribunals is the concept of the just war.

But the baseline natural law principle is the non-aggression principle (NAP). It teaches that all initiated or threatened aggression — including from government — is inherently wrong as a violation of the natural rights of the victim. Thus, only defensive wars are just.

Stated differently, a country — like a person — can defend itself from an invader and use violence to do so, but no more violence than is necessary to stop the invasion, lest the defender become the aggressor.

Now, back to Putin. Biden’s “war criminal” statement ignores American use of state violence. Biden himself, while a senator, supported President George W. Bush’s immoral invasion of Iraq, which slaughtered hundreds of thousands for the purpose of regime change. If Biden means what he says, Bush as well as Truman and himself are war criminals.

The International Criminal Court in The Hague, Netherlands — the creature of a treaty to which the United States, Russia and Ukraine are not signatories — is picking up where Nuremberg left off. This court claims universal jurisdiction, but its claim is fanciful.

The legal fiction of universal jurisdiction was created for political reasons by the U.S. Department of Justice during the presidency of Ronald Reagan to prosecute acts of terror committed overseas where the perpetrators were not likely to be prosecuted. It holds that American courts have jurisdiction over crimes against humanity committed by foreign persons in foreign countries.

Today, the fiction of universal jurisdiction is bilateral. Thus, foreign courts — in the European Union and at The Hague — claim jurisdiction over the entire globe, including America, Russia and Ukraine.

Justice by consensus or legal fiction is never just. Jurisdiction must be by consent of a proper authority. If a court lacks jurisdiction over the place of the alleged crime and the alleged perpetrator of it, any ruling is a fiction. Can a court in the Netherlands legally condemn Putin because its justices are repulsed by what they see on cable television? Of course not.

The history of human freedom is paying careful attention to procedure and protection of rights. Don't look at recent history for this, as every post-World War II president — including Biden — has unlawfully killed foreign innocents; and they have lived free to boast about it.

But victors' justice presumes that an unaccountable court possesses lawful authority to choose whatever wrongs it can find wherever it can find them and then prosecute them by applying laws and rules that suit its goals, just as American prosecutors have done. This is aggression by judges, no matter the target, and it violates NAP.

Joe Biden should be careful what he asks for.

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