THE SUBSTANCE, PROCEDURE, AND LIMITED UTILITY OF UNIVERSAL JURISDICTION

An Essay With Included Material

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EPIGRAPH

Thoughts on universal norms, from J.C. Squire, anent World War I:

> God heard the embattled nations sing and shout
> 'Gott strafe England!' and 'God save the King!'
> God this, God that, and God the other thing –
> 'Good God,' said God, 'I've got my work cut out.'

APOLOGIA

This essay brings together thoughts and earlier work, and was originally written for the April 7, 2014 "universal jurisdiction" program at The University of Texas School of Law, with presentations by me, my comrade Juan Garcés, and Professor Karen Engle.

The ideas you find in this essay have benefitted from my work with Richard Wilson at WCL, my law partner Sam Buffone, my wife Jane B. Tigar, and hundreds of law students, clients and other colleagues. I thank Karen Engle for editorial comments. Some of the quoted material comes directly form my earlier writings. In this, my eighth decade of life, I see more than ever the need to renew and revisit my assumptions. At the same time, I want to share what I hope are some hard-won lessons from the struggle for human liberation. This duality was well expressed by another Texan, the author Trevanian:

> You gain experience, if you are careful to avoid empty redundancy. Do not fall into the error of the artisan who boasts of twenty years of experience in his craft while in fact he has had only one year of experience – twenty times. And never resent the advantage of experience your elders have. Recall that they have paid for this experience in the coin of life and have emptied a purse that cannot be refilled. . . . Recall also that the old must make much of their experience. It is all they have left.

In this discussion, I often use – interchangeably -- examples from domestic tribunals hearing cases involving activity distant from their own geographical area, from domestic tribunals judging events from the distant past, from transnational tribunals such as the ICTY, and from other sorts of transnational tribunals. I believe that these examples from different kinds of forums may be used to make my points, because all legal institutions share some relevant common characteristics. What we call "law" is a form of ideology, which I have in other writing called "legal ideology." The specific forms of legal rules may in fact have different content, and be applied for different purposes, under different systems of social relations. This was the insight of Karl Renner, in his The Institutions of Private Law and Their Social Functions, which I discuss at length in Law and the Rise of Capitalism. Moreover, an ostensibly neutral legal rule may in fact have been fashioned, or may in fact be applied, to achieve the goal of some holder of state power; that goal may not be evident from reading the text of the legal rule, and not acknowledged in its operation.

I have not revised any of the excerpts from my earlier work. You may therefore find statements that I would today not make, or that I would revise.

INTRODUCTION

"What is your opinion of universal jurisdiction?" I consider this as I would: "What is your opinion of salad forks?" or "What is your opinion of the doctrine of minimum contacts?"

A properly designed salad fork is useful, though perhaps not indispensable. It is one of the four or five tools that should adorn one's placemat at dinner. And, one should not try to eat chicken broth with it.

The doctrine of minimum contacts has been pushed and pulled into a shape that its progenitor, Chief Justice Stone, might find hard to recognize. However, it has been a useful doctrine in accommodating the powers of courts and the rights of litigants to a truly national economy in which state borders no longer have the significance they did in 1789, when the Alien Tort Claims Act was enacted as part of the Judiciary Act.

And, as every first year law student quickly learns, the doctrine provides only a partial answer to complex litigation in which the parties, issues, evidence and legal rules touch different states of the United States and even other countries. Think of *Piper Aircraft v. Reyno*, 454 U.S. 235 (1981). An airplane manufactured in Ohio by Piper crashed in Scotland. The airplane propeller was manufactured by Hartzell in Pennsylvania. The five passengers, all of whom perished, were Scottish. A Los Angeles lawyer had his secretary, Ms. Reyno, appointed administratrix of the passengers' estates in the Los Angeles Superior Court. Mr. Reyno sued Piper and Hartzell. The defendants removed the case to the United States District Court for the Northern District of California. The defendants denied minimum contacts, and in the alternative moved to transfer the case to the federal court in Pennsylvania under 28 U.S.C. §1404(a), for the convenience of parties and witnesses. The district court transferred the case.

Once the case was in Pennsylvania, the defendants moved to dismiss on the ground of *forum non conveniens*, saying that the litigation should properly take place in Scotland. The district court granted the motion, the court of appeals reversed, and the Supreme Court reversed the court of appeals. The Court held that Scotland was the most logical place for this lawsuit to be heard, even though the substantive law might be less favorable to the plaintiffs and the procedures less adapted to the need for discovery.

This lengthy recitation has only one lesson to teach us: no single procedural device should be regarded as an end in itself. Professor Engle has wisely reminded us that a great deal of money and energy has been expended in pushing the limits of universal jurisdiction, and that at least some of this effort diverts attention and resources from important human rights struggles. Put another way, some have regarded universal jurisdiction as a goal and not a device.

The doctrine of universal jurisdiction represents a step in the development of legal institutions. It is deployed in argument before domestic and international tribunals. Before a domestic tribunal, the question is whether the court where one is litigating has power. Before an international tribunal, the argument might be about what domestic court ought to be hearing the case.

The contours of universal jurisdiction are uncertain. The Roman philosopher Epictetus imagined himself talking to a circus performer. "See my dumbbells," the performer said. "Your dumbbells are your affair," said the philosopher. "I want to see their effect."

For myself, I salute the struggles that have led to a robust and articulate body of human rights principles, and to a sense that human rights violators should be held

accountable. However, I decry the appropriation of human rights and humanitarian law rhetoric as a cover for aggressive war, vindictive prosecution, and unfair trials. I regret that some movements seeking accountability for past transgressions do so in ways that harm the search for progressive and forward-looking change. Jerome Frank reminded us:

> A legal system is not what it says, but what it does. Our "criminal law," then, cannot be described accurately in terms merely of substantive prohibitions; the description must also include the methods by which those prohibitions operate in practice . . . .

The concept of universal jurisdiction – considered as an ideal -- rests upon two foundations. First, that there exist norms that are clear enough for all to understand, and the violation of which is so repugnant and potentially harmful that they are an offense under any and every system of substantive law on the planet. This very broad formulation may sweep aside objections to imposition of punishment under statutes or rules published after the conduct occurred, and to denial of any defense based on limitations or prescription. Moreover, these rules so fundamental that no one is immune from liability regardless of his or her political position or office.

Second, with respect to norms so defined, all states have a duty – or, at least the right -- to investigate alleged offenses and try alleged offenders, and that any state or properly-constituted international tribunal presumptively has the right to try an alleged offender in a criminal or civil process.

UNIVERSAL NORMS – THE BACKGROUND

Let us begin with a short description of ostensibly universal norms in historical perspective. Here is an edited excerpt from Law & the Rise of Capitalism, 2d edition:

> Bourgeois victories were accomplished in the context of nation-states, in which state power is, by definition, limited as to area and population. So a victory that installed bourgeois legal ideology as state legal ideology—that is, as law—was confined within given borders. Yet, as we have seen, the bourgeoisie claimed a global reach for its ideology. And, as we have also seen, the basic norms of bourgeois legal ideology, are, in their most abstract form, of a universal character. One can see the use of purportedly universal themes in the works of influential French jurists Domat, Loyseau, and Loisel. The work of Lord Coke in England illustrates the same tendencies. These writers were, however, concerned mainly with transnational principles of so-called private law: the principles of obligation and property that governed commercial transactions. To the extent they considered public law, they addressed mainly the proper relation of their own sovereigns to the people within a given nation-state.
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> In the same period, however, other writers were also formulating universal theories of legal ideology that more broadly addressed issues of public international law. Such writers considered the proper relation of sovereigns to one another, but also posited universal norms that bound even sovereigns in their treatment of individuals. Today's legal ideology of human rights can be traced back to this context.
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> This ideology had its beginnings in the contradictory aspirations of bourgeois legal ideology on the eve of the bourgeois revolutions in Europe. Bourgeois legal ideology found both historical and divine support for its proclaimed universals of contract and property right. Yet, the bourgeoisie had come to recognize that its desire to see these allegedly universal principles put into practical application depended on the existence of

a state apparatus that would enforce them. Legitimating these claims in this way meant—in that time and place—securing their adoption as the legal ideology of a nation-state in which the bourgeoisie controlled state power.

Yet therein lay a serious contradiction—once thus codified, the principles were no longer universal, they were simply the law of a particular place. They were not principles of a transnational class, but rules established to protect a particular group. That group needed protection against its erstwhile feudal opponents, and against those within the nation-state whose interests were in opposition to the newly victorious bourgeoisie. Among the latter were the peasants forcibly displaced from the land in order to create an urban work force, and to destroy customary barriers to the unfettered right of property by eliminating peasants' use-rights.

But the bourgeoisie of one nation-state also looked to the state for protection against the bourgeoisie of other states. The contradictions between different national groupings triumphed over their common interest in establishing and defending transnational principles favorable to commerce.

These contradictions had, of course, begun to appear even as the bourgeoisie was beginning to form alliances with royal power. Colonial conflicts began shortly after the voyages of discovery and conquest in the fifteenth
century, and international conflict was of course a continuous feature of European life.

By 1600, the Spanish and Portuguese (united at that time under a single monarch) had colonized large parts of the Americas, and monopolized the rich trade between Europe and Asia around the Cape of Good Hope. The King of Spain and Portugal claimed sovereignty (awarded originally by the Pope) over large expanses of the seas, and therefore the right to interdict and seize, or to tax and license, vessels flying other flags. Spain claimed the Pacific Ocean and the Gulf of Mexico, and Portugal the Atlantic south of Morocco and the Indian Ocean. The Dutch, having thwarted the reconquest of their homeland by the Hapsburg monarch of Spain and Portugal (with whom they were still at war), began to send fleets around the Cape of Good Hope to tap the rich trade of the Indies. The fleets returned with stupendous cargoes, bringing great wealth to the investors who had sent them out. England and France had just made peace with the Spanish King, and pressure was building upon the Dutch to do likewise. But the ministers of the Spanish King insisted most vehemently on the right to control trade in the oceans over which he claimed sovereignty, and the issue was certain to be at the heart of peace negotiations between the Dutch and the Hapsburgs. Into this controversy, and on behalf of the Dutch East India Company, strode young Hugo Grotius, with a tract entitled *Mare Liberum*, or "Freedom of the Seas," and subtitled, "The Right which Belongs to the Dutch to Take Part in the East Indian Trade."

Grotius's tract was published in Leiden in 1609 (the year that the Dutch first negotiated a truce with Spain that recognized their independence), but not conclusively attributed to him for centuries. Grotius' argument was that the seas cannot by their nature be anyone's property, nor subject to anyone's sovereign power. By amassing authorities from ancient times down to his own day, Grotius argued that the seas—beyond a narrow territorial area adjacent to a sovereign's land-based holdings—were never subject to capture or to acquisition by possession. Even adjacent seas were

subject to a right of free passage. Grotius' tract was thus progressive in that it opposed the early colonial powers dividing up the waters as well as the land, and argued on the basis of transnational universal norms.

As a young lawyer, Grotius was involved in litigation as lawyer for the Dutch East India Company, in a celebrated case concerning capture of a Portuguese vessel in the Indian Ocean by a Dutch vessel. The case involved significant questions under the law of nations, in a time of colonial conflict between various seaborne powers. From this early experience, Grotius took an active interest first in the law of the sea and then in the larger questions to which his masterwork, *Of the Law of War and Peace*, is dedicated. In this work, which first appeared in 1625, Grotius brought together diverse streams of authority in a single treatise that purported to state universal principles applicable not only within states but among them. It was an effort to restate a general theory of law beginning with the basic question whether "law" as such could be said to exist, and what was its essential nature and function. That is, Grotius well understood the operation of state power within nation-states, but insisted that the exercise of such power was mediated by norms originating outside of the state.

While Grotius took aim (anonymously) at the Portuguese claims to sovereignty over the Indian Ocean, he struck a target of equal economic importance closer to home. The North Sea was the site of the great herring fishery, the economic base of Dutch prosperity. The Dutch claimed the right not only to trade anywhere, but, of equal importance, to fish anywhere (including off the coast of Scotland and England). As long as Scotland was independent and of little significance as a naval power, the Dutch could ignore its claims. But in 1603 James VI of Scotland became, in addition, James I of England.

The year 1609 also marked the start of a determined British campaign to license boats engaged in the herring fishery, the great majority of which were Dutch. John Selden, a lawyer s lawyer and in domestic English constitutional matters a determined opponent of the Stuart monarchs, took on the job of crafting the argument for the British case in the fisheries dispute.

Selden's celebrated response to *Mare Liberum* (and Selden had no doubt as to the identity of Grotius as the anonymous author) was entitled *Mare Clausum*, or "Closed Seas," written first in 1619, though the version known to us was not published until 1635 when the fisheries issue was again a hot dispute.

Selden argued, on behalf of the English Crown, "that the sea, by the law or nature or nations, is not common to all men, but capable of private dominion or property as well as the land," and "that the King of Great Britain is lord of the sea flowing about, as an inseparable and perpetual appendant of the British Empire." That is, Selden argued that just as land can become subjected to the property norm discussed in Chapter 16 by purchase or conquest, so can the seas. Selden's argument was yet more historical than that of Grotius, detailing the actual domination of largely enclosed seas— like the North Sea—such as that of the Adriatic by Venice, the Baltic by the Scandinavian states, and back to the first historical dominion of the seas, the Minoan Cretan domination of the eastern Mediterranean. Notably Selden ignored the question of the unenclosed ocean, for the English also had a prosperous East Indies Company.

Grotius never answered Selden. By the time of the 1635 publication of Marc Clausum he was in the employ of Sweden, which claimed sovereignty over the Baltic. It is not necessary to trace the details of the debate in any detail. Selden's views did not prevail overall, even in Great Britain. The principles of equality of states and of freedom of the seas were an integral part of victorious bourgeois legal ideology, and so the analogy to the property norm that was employed to justify colonization was deemed irrelevant.

Grotius' major work, *Of the Law of War and Peace*, was the first systematic attempt to take account of the conflicts between universal principle and narrow state interest based on the accepted categories of private law, and to harmonize the asserted universality of bourgeois legal ideology with the particularism of nation-states. If we are to grasp the subsequent development of this relation of universal aspiration and nationally specific jurisdiction, it is worth reconstructing his argument more fully. His work differed from legal theorists such as Domat by the breadth of his discussion: He purported to deal with the general principles that transcended national boundaries and the barriers between fields of law. He differed from political philosophers such as Hobbes, Locke, and Montesquieu by going well beyond political theory to set out with precision the way in which state power should be organized and administered. He is the first eminent figure in an unbroken line of jurists whose work has dominated transnational law. The influence of Grotius and his followers is particularly marked because *opinio juris*, the opinion of jurists, is regarded as persuasive authority before international tribunals.

Grotius' work is ostensibly devoted to "the law of nations," "the body of law which is maintained between states," rather than to domestic law or the "natural" basis of law in general. Yet the structure of his argument assumes the validity of Roman-law-based concepts of legal ideology, and the text itself contains detailed consideration of property, contract, and penal law in a domestic law setting. He understood that the nation-state was becoming the dominant form of political organization in Europe, and sought a basis from which to argue that even national sovereigns were subject to overarching norms of conduct respecting the earth and the human condition.

Grotius begins by asking whether "law" exists, as distinct from a reflexive series of principles based upon a supposed human tendency to pursue self- interest. He answers “yes" based upon two sets of arguments. One of these arguments is essentially religious—law exists because God wills it so, and because God has created people with an innate sense of social life, with the gift of speech to express themselves, and with an innate sense of justice that tempers self-interest.

This branch of the argument is not, however, Grotius' first or main justification. He denies that "every animal is impelled by nature to seek only its own good," based on the evidence of social organization that he observes. That is, "even if we should concede ... that there is no God, one can observe that people have a strong bent towards social life," the power of speech, and "a power of discrimination which enables [them] to decide what things are agreeable or harmful (as to both things present and things to come)." He opposes this view to that of philosophers who argued that law is only a set of arbitrary principles, and that for any such principle an opposite one can as easily be

invented and defended. As he acknowledges, this way of arriving at conclusions owes much to the work of Aristotle.

Grotius' argument suggests that people have these tendencies and capacities, yet he does not assert that these are innate and eternal. That is, although he does not explicitly say it, his argument is consistent with the fact that social existence, speech, and a power to make ideological choices are themselves the products of a certain stage of human development. As he says, "History in relation to our subject is useful in two ways: it supplies both illustrations and judgments."

Grotius underscores the historical character of his argument by noting the sources of secular authority on which he relies, to varying extents, in deriving the principles of Roman law on which his work is largely based. He places "great weight" upon the codification of Justinian and related writings from antiquity. Of the twelfth and thirteenth century commentators upon the Roman texts, whose explications were often supplemented with references to canon law principles, Grotius says they paid "no heed to divine law or to ancient history," and were hampered by a lack of historical knowledge and understanding. He also rejects those more contemporary writers who "confine themselves within the limits of Roman law"

Grotius does, however, acknowledge that French legal scholars such as Bodin—upon whom Loyseau relied—have valuable insights because they "have tried rather to introduce history into their study of laws." In short, Grotius claimed to stand at a vantage point of recorded history, and to have derived from that history, as well as from the teaching of his religious faith, the fundamental lessons of world social order. His method resembles that of Lord Coke, but takes a broader perspective than a single country. Grotius argues that "the source of law properly so called" is the maintenance of a social order "consonant with human intelligence," and that this implies "abstaining from that which is another's, the restoration to another of anything of his which we may have, together with any gain we have received from it; the obligation to fulfill promises, and making good of a loss incurred through our own fault, and the inflicting of penalties upon me according to their deserts." There is a distinctly non-idealistic edge to this mode of argument. Grotius is seeking to justify ostensibly moral choices in terms that permit rational argument.

Grotius insists that rules of law and justice are applicable among nations as well as within nations. Indeed, he says, "Least of all should that be admitted which some people imagine, that in war all laws are in abeyance." That is, there is a law of nations that should be observed in times of war and peace, contrary even to that maxim attributed to Cicero—*silent enim leges inter arma*, in time of war the laws are silent. Much of *Of* the Law of *War and Peace* deals with the obligations of states in time of war, with respect to such things as the right of capturing enemy vessels, the conditions under which war may be undertaken, and the limits on permissible hostilities, for example, against noncombatants.

The influence of Grotius and those who followed him was at its height toward the end of the 1700s. We can now begin to see how the division into nation-states helped to submerge the idea of "human" rights, that is, of claims for justice based on "dialectical arguments that have their roots in experience, to a definite view of human flourishing

and good human functioning," that is, upon the view that humans have needs for such things as political rights, money, shelter, and respect. The nation-state, by claiming the right to a monopoly of force within its borders, as extended by its colonial claims, asserted that the only valid claims for such things were those that it recognized as such.

This departure from the theory of universal and natural right was not completely surprising. Although Grotius traced the details, Jean Bodin had foretold it in his 1576 treatise on sovereignty, arguing that "all men are linked to one another and participate marvelously in the universal Republic," while at the same time acknowledging that this "empire of reason" has been weakened in such a way that "one cannot know how to bring together all nations in one single republic." Instead their relations are governed by "arms and treaties."

From here we can trace the ways in which Grotius' universal norms were traduced by the victorious bourgeoisie. This discussion is a necessary prelude to showing how the human rights movements of our own day seek to transcend such contradictions in a new synthesis of new and old ideology.

The political victory of the bourgeoisie was embodied in the nation-state, a particular constellation of political power. The nation-state, in its typical bourgeois form, perpetuated a legal ideology based on the ostensibly universal principles of freedom that were part of the bourgeois program. In seeking to displace predecessor forms of state power, bourgeois ideologists proclaimed the theory that rights "belong" to each person, and that the content of this packet of rights may be deduced from reason. Bourgeois legal scholars continued to reassert such claims as a matter of rhetoric, even after the bourgeois state had undermined them as a matter of fact.

Bourgeois legal ideology began, as we have seen, as transnational: in the service of a class whose activities did not respect frontiers. There is not now, and has not been, any reason why a market should be coterminous with a political frontier. To take a modern example, today's multinational corporations use their simultaneous presence in many countries to outflank the effort of any individual sovereign to control their fraud, pollution, and exploitation. In the earliest centuries of merchant activity, the bourgeoisie accepted political frontiers as efficient mechanisms for obtaining access to state power. Their shifting alliances with temporal and ecclesiastical authorities show just how little they scrupled over the particular form of state power with which they were allied. Only in later centuries did bourgeois political economy unite political and economic liberty into a consistent theory. The nation-state was a logical expression of that theory. It was an instrument to crush the bourgeoisie's opponents by using the state's monopoly of organized violence.

But what of this idea of individual self-realization, of "natural rights," and of a transcendent natural law or "right reason" justification for such a view? In the domestic realm, these principles provided a basis for claims for justice against state power, of which the American struggles for civil rights and civil liberties are a modern example. Such claims share a characteristic with those made by the bourgeoisie as it battled for access to state power, and that is their duality: On the one hand, these claims are based on principles of justice deduced from principles that are independent of any given arrangement of state power. On the other hand, these claims are addressed to the

wielders of state power, and claimed to be guaranteed by the dominant legal ideology; in this form, the claims for justice might be phrased as arguments about "legal rights."

The claim of bourgeois ideologists, at least from Grotius' time forward, was that individuals possess rights as a consequence of simply "being," or could be considered by historical materialist arguments as entitled to justice, personal security, and kindred benefits. To put matters in older language, there was a true "*jus gentium*," in the literal sense of those words, a "law of all peoples."

The bourgeois nation-states moved quickly to dispel any such theory. In the late eighteenth century, Sir William Blackstone, in his influential *Commentaries on the Laws of England*, had spoken of the "law of nations" as a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world; in order to decide all disputes, to regulate all ceremonies and civilities, and to ensure the observance of justice and good faith, in that intercourse which must frequently occur between two or more independent states, and the individuals belonging to each.

For Blackstone, the "law of nations" included provisions relating to individual rights, at least with respect to mercantile transactions and the rights of hostages. Moreover, Blackstone wrote that the law of nations had been incorporated into the law of England, and was therefore part of "the law of the land," to be applied by English courts in deciding cases between individuals. That is, there were certain transcendent norms that a legitimate sovereign was bound to respect.

In a sense, Blackstone s definition was true when he wrote it, and continued to be true. British courts did apply general principles of transnational law in deciding certain private law questions, and in admiralty cases, as did courts of most other countries. In the nineteenth century, judges and legal scholars continued to think of mercantile law principles as transnational in character, and to look to the old merchant law sources.

But the dominant themes of nineteenth century legal writing were that the nation-state was the exclusive source of rights, and that any transnational or supranational rules were the product of consent given by treaty or custom. In 1776, the English legal philosopher Jeremy Bentham penned an influential statement of this view. Indeed, Bentham is credited with having coined the word "international," in discussing the law of nations in his book *Principles of Morals and Legislation*. Two brief passages from that book summarize Bentham s view, which was also the dominant theme of international law for more than a century. Bentham acknowledged that the word "international" was "a new one; though, it is hoped, sufficiently analogous and intelligible" to describe "in a more significant way, the branch of the law which goes commonly under the name of the law of nations."

Bentham makes his point again by saying that dealings between individuals from different states are a matter of the internal law of one or the other of those states, as indeed are dealings between sovereigns in their private capacity. Then, he says, "[t]here remain then the mutual transactions between sovereigns as such, for the subject of that branch of jurisprudence which may be properly and exclusively termed international."

Lest one mistake Bentham s intention, one can look at the writings of d'Aguesseau on which he relies. D'Aguesseau wrote that the terms "law of nations," "law of all

peoples," and "*jus gentium*" were misleading, for they did not describe the legal relationships involved. One should rather speak of "law among peoples," because the legal relationships were between nation and nation, rather than involving the rights of individuals as such.

Bentham had prefigured his views in an essay he wrote between 1774 and 1776, criticizing lectures given at Oxford by Sir William Blackstone, whose *Commentaries on the Laws of England* were part of English and American lawyers' staple diet. The young Bentham concluded that, in great measure, the "law of nations" "isn't law at all." In a further discussion of Blackstone's views, John Lind, Bentham's collaborator in a systematic critique of Blackstone, wrote in a passage reviewed and probably approved by Bentham:

> The fact is, the term, law of nations, however allowable in common conversation, should never find a place in a philosophical discussion of law: and that for this plain reason, that nations have no common superior upon earth, from whom they can receive a law. 'Tis strange how this confusion of terms disfigures even arguments which would otherwise have merit. Even Montesquieu falls into the same error as our Author [Blackstone] in confounding compacts and principles with Laws. There is a difference, however: the mistakes of Montesquieu are the mistakes of a man of genius: whilst those of our Author speak only of the servile copyist.

The theory of "international law" made clear that sovereigns were arbiters of their own conduct within their borders, and that no individual had rights against any sovereign except as the sovereign should decide to accord. Relations among sovereigns were to be regulated by treaties and other instruments, by observance of customary law norms based on tacit consent of states as shown by their consistent practice, and by warfare as a sanction or as an instrument of policy.

In such a system, there was no basis for speaking of "international human rights" except as any particular sovereign chose to interpret and apply them. As we shall see, this method of analysis effectively fettered all progress toward enforcing rights within the framework of bourgeois legal institutions, as that framework was established by the great powers that had amassed colonial empires.

U.S. CONSTITUTIONALISM AND ITS ANOMALIES

Let us examine these principles in operation, first to see their details, and then to discuss the sovereign behavior they were used to justify. The most dramatic example was the international concern about slavery. The American Constitution of 1787 had expressly recognized the slave-owners' interests. The federal Congress was forbidden by article 1, section 9 from interfering with the slave trade until 1808. Article 4, section 2, in effect obliged each state to deliver fugitive slaves, at least absent federal legislation. And in article 1, section 2, slaves and Indians were counted as three-fifths of a person.

While federal fugitive slave laws persisted until the Civil War, despite efforts by some states to prevent their enforcement, United States law after 1808 forbade American citizens from engaging in the slave trade and even termed such action piracy. The slave trade had also been condemned by a number of other countries. There matters stood in 1825, when the United States Supreme Court decided a case called *The*

Antelope, that being the name of a slave-carrying ship found off the Georgia coast and brought into port by a U.S. naval vessel.

On board were 225 Africans who had been captured for sale as slaves. Some of these men and women had originally been taken from the shores of Africa by Spanish and Portuguese slave traders. The Supreme Court convened to decide who, if anyone, had a property right to these people.

The Spanish and Portuguese consuls argued that their respective countries should receive the slaves. For the slaves, it was argued that the slave trade was an offense to the law of nations and that they should be freed. After all, the United States, while maintaining the institution of slavery, had declared the slave trade as such to be "contrary to the principles of humanity and justice," that is, against universal principles binding on all states. Great Britain had also forbidden slavery and the slave trade, after a public campaign that exposed its horrors.

The Supreme Court was not moved by these arguments. Chief Justice Marshall's decision shows just how far the Bentham view expressed the tenor of bourgeois thought. Marshall began by noting that the case presented "the sacred rights of liberty and of property ... in conflict with each other"— the slaves' liberty and the slave traders' property. Having said that, Marshall —a Virginia slave-owner—cautioned that "the Court must not yield to feelings which might seduce it from the path of duty."

Marshall conceded that "the opinion is extensively, if not universally entertained, that this unnatural traffic ought to be suppressed." In addition, one could turn to ancient texts and find condemnation of slavery save in limited circumstances such as the aftermath of war. Indeed, the institution was itself at war with some fundamental premises of capitalist social relations. Yet Spain and Portugal had continued the trade. From all of this, Marshall concluded:

> That the course of opinion on the slave trade should be unsettled, ought to excite no surprise. The Christian and civilized nations of the world, with which we have most intercourse, have all been engaged in it. However abhorrent this traffic may be to a mind whose original feelings are not blunted by familiarity with the practice, it has been sanctioned in modern times by the laws of all nations who possess distant colonies, each of whom has engaged in it as a common commercial business which no other could rightly interrupt. It has claimed all the sanction which could be derived from long usage and general acquiescence. That trade could not be considered as contrary to the law of nations which was authorized and protected by the laws of all commercial nations; the right to carry on which was claimed by each, and allowed by each.

Marshall's argument thus rejected the overwhelming public outcry against the slave trade, the developing consensus among sovereign states that it was wrong, and the mounting evidence of its fundamental inhumanity. He even acknowledged that slavery was "contrary to the law of nature."

He also ignored that fact that those states that had abolished the slave trade had termed it "piracy." Piracy was, by the eighteenth century, generally regarded not simply as a crime against the country whose ships were attacked and the people and goods on board. It was a crime against all humanity. Hence, any nation who acquired jurisdiction

of a pirate might, indeed was obliged to, try him for that crime regardless of the nationality of the pirate's victims. In an important precedent for our own day, piracy was a crime as to which there was "universal jurisdiction." As to most crimes, a nation-state would try an offender only if the offense was committed in its territory, or by or against its nationals.

Marshall turned away from this impressive body of evidence. Rather, he found "international law" in the past practices of "Christian and civilized," that is bourgeois, states, and in the fact that a few of those states still continued the trade. In his view, all states are equal. "It results from this equality, that no one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone. . . . [T]his trade, in which all have participated, must remain lawful to those who cannot be induced to relinquish it."

Under this view, international law is a race to the bottom. Whatever discredited practice may persist in one state cannot be contradicted by any other state. Marshall extended this principle so far that even in the United States, where the slave trade was a crime, the Supreme Court yielded to the legal rules of Spain and Portugal. This is Bentham's theory with a vengeance.

In addition, Marshall's theory turns Grotius' theory on its head. Universal principles, said Grotius, dictate freedom of the seas. Grotius would have argued that the same universal principles forbid the form of chattel slavery practiced by the United States, Spain, and Portugal—or at least that a developing international consensus could establish such principles. For Marshall, however, freedom of the seas meant the freedom of each seaborne power to do as it wishes, based on a particularistic idea of individual national sovereignty.

Only when Spain had itself abolished the slave trade, and declared all slaves setting foot on Spanish territory to be free, was the Supreme Court able to hold that slaves captured by Spanish traders had the right to be free.

Another nineteenth century "international law" issue of note concerned the status of Native Americans. When European settlers arrived in the Western Hemisphere, they encountered groups of Native Americans organized into civil societies. The relations between the invaders and the native peoples have been chronicled. I wish simply to signal the kind of legal ideology that United States courts constructed to characterize those relations.

The respective rights of occupiers and natives were established in a series of treaties. The tribes were to retain sovereignty over their land and people, as there defined. In a series of decisions, again under the leadership of Chief Justice John Marshall, the Supreme Court eviscerated treaty rights and relegated tribal sovereignty to the status of historical curiosity.

In 1823, the Supreme Court decided *Johnson v. Mcintosh*, a case involving disputed title to land. One party claimed through deeds given by the Piankeshaw tribe during the Revolutionary War era. The other party claimed under a deed issued by the United States government, after the war and after the government had forced the Piankeshaw off the land.

Chief Justice Marshall again sought a principle of "international law" and found it in something called "the doctrine of discovery." Under this doctrine, the occupying European powers acquired "the exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest." Thus, the Native Americans did not have title to their land, such that they could sell or otherwise dispose of it as they chose. They could validly convey it only to the occupying power.

This invented principle of international law, an "exception" to the principle expressed in the Antelope that nation-states had equal rights, has several interesting aspects. First, it is based on the consensus of colonial powers. Unlike the slave trade rules, there is no dissent among the metropolitan countries. Here then is a reaffirmation that international law is not only based on consent but that the only relevant givers of consent are bourgeois states. Neither the opinions of individuals, nor of other nations, matter.

Second, the doctrine of discovery, considered as a part of legal ideology, reflects the bourgeois property norm. The Native Americans occupied and used land; they did not "own" it in the bourgeois fashion. They were in this sense like persons who exercise customary use rights. As [I discussed in earlier chapters], the rising bourgeoisie had sundered all claims to customary rights of use in favor of establishing the exclusive right to possess and use property. Indeed, in Native American legal ideology, the idea that any person or group of people could "own" a portion of the earth was thought absurd. Considered in this way, the fate of Native Americans was but a more extreme and deadly case of that of peasant groups in England and elsewhere who held out against the bourgeois effort to drive them from land where they had been accustomed to hunt and pasture.

Some Native Americans fought back, invoking "legal" rules to defend their rights. The Cherokee Nation of Georgia adopted a written constitution and asserted sovereignty over its land. The Georgia legislature responded by declaring Cherokee laws and customs void and opening Cherokee land to settlement. The federal Congress, at the urging of President Andrew Jackson, passed legislation seeking to compel Native Americans to give up and move westward. Georgia authorities arrested, tried, and hanged a Cherokee for an offense allegedly committed on Cherokee territory.

The Cherokee Nation sought relief in the courts. They were, after all, a nation. They sought to restrain the enforcement of Georgia laws which "go directly to annihilate the Cherokees as a political society, and to seize, for the use of Georgia, the lands of the nation which have been assured to them by the United States in solemn treaties reportedly made and still in force." The Cherokees' lawyer invoked the Supreme Court's power, saying that the lawsuit was between a foreign nation—the Cherokee—and the state of Georgia. Under the United States Constitution, the Supreme Court could exercise its original jurisdiction over such a lawsuit without waiting for lower courts to decide it and then hearing the case on appeal.

Chief Justice Marshall looked to the constitutional grant to Congress of the power to regulate commerce with "foreign nations, and among the several states, and with the Indian tribes." He found the Cherokee to be "a domestic, dependent nation" that was "in a state of pupilage," like "that of a ward to his guardian." It was not, he said, for the

Court a true "foreign nation." Thus, the Cherokee Nation had no legal existence. It could not even come to a federal court to vindicate its treaty rights.

The Supreme Court decided Cherokee Nation v. Georgia in 1830, over the dissents of Justices Story and Thompson. Two years later, in Worcester v. Georgia, Chief Justice Marshall retreated a bit, and held that Georgia did not have the right to regulate activities on the Cherokee lands. He did not reach this result by recognizing the position of the Cherokee Nation, but by denying the right of a state such as Georgia to interfere in matters that are essentially federal. That is, the national government had the constitutional power to deal with Native Americans and the states had only a limited role to play.

The Cherokee Nation case prefigured another discreditable event in American constitutional development. In 1857, the Supreme Court decided the infamous Dred Scott case. Scott, a former slave who claimed his freedom, sued his former master for assaulting him, his wife, and his child. The Supreme Court held that Scott could not bring a suit in federal court because he was not, and, as a black, could never be, a "citizen" of the United States. The Court, in an opinion by Chief Justice Roger Taney, held that the United States Constitution had enshrined the principle of black inferiority. In Taney's notorious words describing "the Negro race":

> They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit.

Not only did the American Constitution afford Scott no protection; this conclusion was said to follow from universal historical experience. Taney's opinion was undone by the Fourteenth Amendment, adopted in the wake of the Civil War. But it is remarkable for its breadth and audacity. No African-American could ever claim justice in a federal court, because they were not "citizens" of any state and could never be. Supreme Court Justice Grier leaked advance news of the impending Dred Scott decision to President-elect Buchanan, who used this knowledge to assure Americans in his inaugural address that the issue of slavery was about to be resolved by the Supreme Court.

These brief accounts illustrate the way in which positivist doctrine swamped all pretension of progressive, popular, and universal principle. Claims for justice were to be judged by positive national law, and the United States courts would even yield to inhumane claims of other sovereigns. This was the story of international law in the nineteenth century. It was made by great powers in their interest. It conferred rights on such powers, and not on individuals, smaller states, or colonized peoples.

For nineteenth century judges, finding norms of "international law" did not involve much of a search. They paid little attention to the aspirational words of natural law scholars; some judges, such as Joseph Story, railed against such limitations, but to little effect. The judges did not engage in any of the historical analysis that characterized the work of Grotius. Rather their judgments were based on examining the practices of the "Christian and civilized states" with which the United States dealt. That is, the so-called

great powers dictated international law by their common practices and by their mutual agreement.

Under this system, nineteenth century legal ideology built a systematic justification for colonialism, and the great powers divided up the world. Even when the colonies were accorded nominal independence, their political and economic affairs were in fact controlled from Europe or North America. And, as students of economic history know, financial means of dominance were at least as important to imperialism as political ones.

In this essentially positivist climate of legal reasoning, even purely domestic claims about rights fared poorly. The courts were hostile to freedom of speech, freedom to organize, and the equality promised by the constitutional Civil War amendments.

ENFORCING HUMAN RIGHTS INTERNATIONALLY: FROM NUREMBURG TO PINOCHET

Against this backdrop, one must ask how in this century one could develop and advance a progressive legal ideology. The answer comes in two parts: one dealing with transnational legal principles and the other with American domestic law.

The Russian Revolution signaled a major shift in world power. The Soviet government insisted on the equality of states, and that protection of private property was not a fundamental principle of international law. That is, each nation-state might or might not have a system based on private ownership of means of production, but no state or group of states could impose that system on others. The Soviets and capitalist powers debated for nearly two decades over whether socialist expropriations gave rise to claims under "international law." The Soviet insistence on equality contrasts with Chief Justice Marshall's "equality" analysis in *The Antelope*. Marshall invoked equality to protect slavery against the demands of progressive legal ideology. The Soviets invoked it to defend the legal ideology of revolutionary change. It is important to say that equality as a norm is valueless unless one asks what must be equivalent to what.

The Second World War and its aftermath saw another major leap forward. First, the victorious powers adopted treaties that codified the principle of crimes against humanity. This was not a new concept. That is, launching aggressive war, using force against civilian populations, and genocide had been termed international crimes at least since the early 1900s. None of the great powers had done much to punish such behavior, however.

The trials of Nazi perpetrators changed that. From those trials onwards, a steady stream of events has undermined the Bentham formulation of "international" law, including treaties defining international crimes such as genocide and torture, and large-scale adoption by individual states of internal penal laws permitting punishment of such crimes by domestic tribunals.

At the same time, colonial liberation has brought more than one hundred new voices to the deliberations of international bodies. Thus, the expressed will of the global community has a different character. The United Nations, through its various organs, has been responsible for formulating sets of human rights norms, of which the most influential has been the Universal Declaration of Human Rights.

No longer can it be said that a nation-state is the final arbiter of what happens within its borders. Apartheid, genocide, and torture can be condemned and punished by

legitimate international institutions. Nor can a nation-state's leaders proclaim that they, like the sovereigns of old, are immune from prosecution and punishment. From 1945 onwards, it has been recognized more and more that even heads of state can be found guilty of crimes against humanity. Moreover, there is increasing recognition that the "race to the bottom" analysis that Chief Justice Marshall used to justify the slave trade no longer holds. That is, there are peremptory norms of international law binding on nation-states even without their consent. This view owes a great deal to Soviet theorists such as G. I. Tunkin, and even more to the work of human rights activists in the former colonies.

Finally, and perhaps most important, it is now clear that international law is no longer "inter-national" in the sense of being only rules that govern relations between and among states. Individuals are recognized as possessing international rights, enforceable against their own sovereigns. In former days, an individual's claims could be heard by an international tribunal only if sponsored by that person's sovereign, or by some other sovereign who would sponsor the individual's claim. Today, there are even multinational forums, such as the European Court of Human Rights, in which individuals can sue their own sovereigns for violations of international human rights. Among the European Court's accomplishments has been denunciation of British torture of Irish prisoners and forced relocations carried out by the Turkish government. The United States has campaigned against the creation and operation of such forums, not wishing to have its own actions judged by "outsiders," but its opposition has only slowed progress, not halted it.

This perceptual shift opens up avenues of struggle for justice. Of course, struggle remains the operative word. The great powers continue to manipulate principles of international law in their own interest. For example, the North Atlantic Treaty Organization states conducted a brutal bombing campaign against Yugoslavia in 1999. This campaign—which cost thousands of civilian lives and destroyed Yugoslavia's economic infrastructure—was undertaken ostensibly to protect the rights of ethnic Albanians in the province of Kosovo. It is clear that Yugoslav Serb troops and militias had engaged in brutal acts in Kosovo. However, the NATO powers had themselves recognized Yugoslav sovereignty over the province when it was in their strategic interest to do so. Hypocrisy aside, NATO deliberately bypassed the truly transnational United Nations mechanisms for resolving the conflict, thus violating the NATO members' treaty obligations. The bombing campaign triggered waves of violence, and created scenes of destruction, more widespread than would have occurred if an alternative and truly transnational solution were to have been sought. As the atrocity propaganda smoke clears it now appears quite possible that more civilians have been slaughtered by NATO bombing and Albanian nationalist armed groups than by Serbian troops and militia. Thus claims that "human rights violations" override "outdated" notions of sovereignty or the binding nature of multilateral treaties can be used to prettify policies of the most powerful states, based on the old-fashioned dictum that might makes right.

In short, the term "universal" can and has been appropriated by powerful countries to achieve decidedly non-universal ends. It taxes credulity to term NATO bombing raids as an "enforcement mechanism" of the "international legal community." No trial in any

> fair forum ever decided that such a thing should happen. The findings of alleged fact that preceded the raid were sharply contested from many reliable quarters, and the military response was incompatible with the basic objectives of an international legal system— which is to preserve and protect life and not to take it.
>
> This contradiction lies at the heart of our present struggle for international human rights. We are at times drawn into a Faustian bargain. We take our claims to national tribunals, which may later convert our expressions of principle into results that are not consistent with human rights.
>
> We do not want for examples of how claims for justice may be presented based on the rediscovered norms of human rights. In assessing these stories, one must keep in mind that using legal ideology to present claims for justice is not an end in itself. That is, the claims are made by and on behalf of a movement for change, and the purely "legal" maneuvers are but one element of the movement's activity. To see matters otherwise puts law and lawyers too much in the center of things, and risks both reification of the norms and trivialization of die movement's popular base.

If you have read this excerpt carefully, you may see that it requires some deconstruction. Grotius and Selden were both making false claims of universality. They were lawyers in the same mold as the great University of Texas law graduate, Vinson & Elkins partner Harry Reasoner, who said: "I don't know what I think about that social issue. I haven't been retained yet." In order to foster your skepticism, I offer the following observations.

Bodin at least spoke truthfully about the practical limits on universality. Universality of application was a claim made by many religious groups during many centuries. But we may rightly say that from the late 1500s onwards, and until about 1800, many secular movements for social change proclaimed that their new system of government, and the system of social relations that it was to enforce, was based on formulations of universal norms backed with state power. Without exception, these assertions were false. Even under Louis XIV, a leading jurist was authorized in the late 1600s to say that there were "immutable laws" that no sovereign had the right or power to change.

The boldest such statements accompanied the French Revolution. The National Assembly wasted little time in sweeping away all limits on child labor and in forbidding workers to organize. Thus, the Loi Le Chapelier of 1791:

> The elimination of all sorts of corporate organizations of the same class or profession being one of the bases of the Constitution, it is prohibited to reestablish them under any pretext whatever. . . . The citizens of the same status or profession, the assistants or workers in any craft whatever, may not, when they find themselves assembled together, name a president or secretary, or bargaining agent, keep records or membership lists, enact rules, or formulate demands concerning their supposed common interests.

The Loi Le Chapelier was abrogated in two installments: in 1864, labor organizing was decriminalized by the Loi Olivier, and in 1884 the Loi Waldeck-Rousseau fully recognized trade unionism.

The National Assembly's lurch to the right was marked by other denials of universality. Another excerpt:

There was a moment, Regine Pernoud relates, when women radicals united to call for the expulsion of the conservative forces in the National Assembly, and on May 10, 1793, a Society of Revolutionary Republican Women was formed. An influential male, Fabre d'Eglantine, wrote:

> I have well and truly observed that these societies are not composed of mothers, of girls of breeding, of sisters occupied with their younger siblings, but rather of a sort of adventurer, of lady knights-errant, emancipated girls, and female bomb-throwers.

The society was outlawed in November 1793, with the following justification:
Since when has it been permissible for women to abandon their sex, and to make themselves into men? Since when is it seemly to see women abandon the pious cares of housekeeping, the cradle of their children, to come into the public square, to ascend the platform and harangue passers by, to take up the duties which nature has confided to men only?

This attitude was not surprising. When Mirabeau, the most baroque orator of the Assembly, wished to bestow a high compliment upon Marie-Antoinette for her courage and ability, he said, "She is the only man at the court."
And, in the French version of the story told in The Antelope:

On August 29, 1793, following slave uprisings at Santo Domingo, a radical National Assembly abolished slavery and the slave trade. The decree was never enforced. Montesquieu, in an attempt to harmonize his vision of natural rights with the observed success of the India Company of which he was shareholder, had written:

> It must be said that slavery is against nature, though in certain countries it is founded upon natural reason. One must distinguish between such countries and those in which natural reasons reject it. One must therefore limit slavery to certain portions of the earth.

He added: "Sugar would be too expensive if one did not use slave labor."

Prior to abolition—on paper—in 1793, the Assembly (again Le Chapelier had a role in the drafting) adopted the following policy statement:

> Considering the colonies as a part of the French empire, and wishing to make them part of the salutary work of national renewal, the Assembly had nonetheless never thought to include them in the constitution which it has decreed for the kingdom, thereby to subject them to laws which could be incompatible with their special needs. . . . The National Assembly declares that it does not intend any innovation in any branch of commerce . . . with the colonies. It places the colonial subjects and their property under the safeguard of the nation, and declares criminal anyone who seeks to incite uprising against them.

The Assembly had listened to the requests of the bourgeoisie, such as a supplication from Rouen:

> Listen to the voices of three million Frenchmen who tremble for their properties, their subsistence, their lives. . . . From the noble desire to pay honor to philosophy, do not in any way undo the happiness of the fatherland.

Napoleon saw to the enactment, in 1802, of a thirty-four word statute restoring all laws relating to the slave trade "in conformity with the laws . . . existing prior to 1789."

The inconsistency – not to say hypocrisy – of the French National Assembly was echoed in the deliberations that produced the United States Constitution, with its frank acknowledgement of slavery.

Let us return to the 20th Century narrative. From Nuremberg onwards, individual nation-states adopted legislation penalizing human rights crimes. Here is an excerpt from an article I co-authored in 1995.

> The 1945 London Treaty that established the Nuremberg Tribunal also defined, in an annexed Charter, the crime against humanity. As Ms. Finkelstein notes, the Charter empowered the Tribunal to "try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any" of a number of crimes, including "crimes against humanity." The crime against humanity was defined as "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."
>
> The quoted portions of the Charter actually deal with four separate concepts which have been mixed up in later discussion. The first idea is the "competence," or jurisdiction, of the Tribunal in relation to persons: the Tribunal has power only over those persons who acted in the interest of the Axis powers during a certain time period. This power is *292 termed competence *ratione personae*. A similar definitional exercise can be found in the U.N. Security Council resolution establishing the international criminal court for trial of human rights violations in the former Yugoslavia.
>
> Second, the Charter defines the Tribunal's subject matter jurisdiction, or competence *ratione materiae*. This competence extends to crimes against humanity, crimes against the peace, and war crimes.
>
> Third, the Charter provides a definition of specific offenses. This task is obviously essential given that no international legislative body had passed statutes criminalizing the potential defendants' conduct. That is, there was no written norm in existence that defined a "crime against humanity" when the Nazis took power in Germany. There were treaty provisions to which one might refer, but those provisions dealt primarily with war crimes and to a lesser extent with crimes against the peace. The norms described in the Charter were not, however, drawn from thin air. They could be justified by international consensus as norms of customary international law, and perhaps as peremptory norms. The drafters of the United Nations resolution on the former Yugoslavia faced a similar task of definition. That resolution speaks expressly of the principle *nullum crimen sine lege*, and the consequent need to "apply rules of international humanitarian law which are beyond any doubt part of customary law."
>
> Fourth, in defining the crime against humanity, the Charter authorizes prosecution whether or not the conduct violated the domestic law of the place where it occurred. This principle has since been expanded. For example, the Yugoslavia resolution rejects the defense of superior orders for subordinates except in mitigation of punishment, and rejects any defense of official position or compliance with local law on the part of an official. There is, of course, extensive literature on these issues in

domestic and international criminal law. For present purposes, however, it is important to note that the role of "official action" or "official policy" is defined by these "superior orders" provisions.

THE FRENCH PENAL CODE

In 1964, as the result of agitation led by Holocaust survivors and Resistance groups, the crime against humanity was added to the French Penal Code and made imprescriptible--that is, not subject to the statute of limitations. The 1964 statute did not "create" the crime as a matter of French law; rather, it simply recognized that "crimes against humanity" had been created and defined in the United Nations resolution of February 13, 1946 and in the Charter of the Nuremberg Tribunal. In fact, since 1810, French law had provided that torture and barbarity were aggravating circumstances in the commission of any offense.

The offense definition of the 1964 statute was clarified in 1992. Its most pertinent provisions are as follows:

> Article 211-1. Genocide is an action, according to a concerted plan, directed at the total or partial destruction of a national, ethnic, racial or religious group, or of any particular group defined according to any other arbitrary criteria, through commission or causing others to commit, towards the members of such group, any of the following acts:
>
> - an intentional attempt against human life;
> - grave assault against physical or psychic integrity;
> - submission to conditions of existence of such a nature as to cause the total or partial destruction of the group;
> - measures designed to prevent births;
> - forced transportation of children.
>
> Genocide is punishable by life imprisonment .
>
> Article 212-1. Deportation, enslavement, or massive and systematic summary executions, kidnapping of persons followed by their disappearance, torture or inhuman acts, inspired by political, philosophical, racial or religious reasons, and organized according to a concerted plan against a group within the civilian population, are punished by life imprisonment .
>
> Article 212-2. When committed in time of war, according to a concerted plan, against those who fight the ideological system in the name of which crimes against humanity are perpetrated, acts included within Article 212-1 are punishable by life imprisonment .
>
> Article 212-3. Participation in a group formed or in an association established in order to prepare for commission of the crimes defined by Articles 211-1, 212-1 and 212-2, when such participation is manifested by commission of one or more material facts, is punishable by life imprisonment .
>
> Article 213-5. Public action relative to the crimes defined in the present article, as well as any penalties duly imposed, are not subject to any statute of limitation.

Both natural and juridical persons may be prosecuted for these offenses. The imprescriptibility provision means not only that prosecution is not barred by a statute of

limitations, but also that a judgment of conviction will not lapse if the defendant is a fugitive. Under French law, most criminal judgments lapse if not carried out within twenty years.

The United States War Crimes Act is reproduced in Appendix B. Like most other such statutes, it applies to any offender who commits the illegal conduct anywhere. That is, to put the matter in traditional criminal law terms, neither territoriality, nor nationality of perpetrator or victim (active and passive personality) limit the sovereign power to try and punish.

As another example of legislative drafting, Appendix A contains a brief overview of the substantive provisions governing the International Criminal Tribunal for Yugoslavia.

Since Nuremburg, the list of transnational offenses has grown. In his judgment authorizing extradition of Augusto Pinochet, Magistrate Roland Bartle referred to this trend. His words and sentiments came as a surprise to many, for he was thought to be firm supporter of Margaret Thatcher, and indeed there were rumors that she had communicated her views to him.

> The Spanish request is made under the terms of the European Convention on Extradition, entered into by a number of states, mostly though not entirely, European, for the purpose of simplifying and expediting the process of the return of fugitive offenders. Both Spain and the United Kingdom are signatories to the Convention and both have embodied its terms, with few reservations, into their own domestic law. In the case of this country the relevant law is contained in the Extradition Act 1989 and in The European Convention on Extradition Order 1990. The purpose of the Convention would appear to be to expedite and streamline the extradition process and so avoid the previous situation under which fugitives from justice, by taking every conceivable technicality, were able to delay, in some instances for years, their return to the requesting state. The purpose of such Conventions is to assist the forces of law and order to counter the ever increasing sophistication with which international criminals, be they terrorists, drug traffickers, perpetrators of fraud on an international scale and such like, exploit advanced technology and communications to commit their crimes and avoid detection and subsequent apprehension. In recent years a number of such agreements between states have been entered into, including one which has been an important factor in this case, namely the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the United Nations General Assembly on 10th December 1984, referred to for convenience as "The Torture Convention".
>
> These Conventions represent the growing trend of the international community to combine together to outlaw crimes which are abhorrent to civilised society whether they be offences of the kind to which I have referred or crimes of cruelty and violence which may be committed by individuals, by terrorist groups seeking to influence or overthrow democratic governments or by undemocratic governments against their own citizens. This development may be said to presage the day when, for the purposes of extradition, there will be one law for one world.

SO WHAT COULD POSSIBLY GO WRONG?

What indeed? Universal principles had been devised, written into resolutions and statutes, interpreted by judges. What could go wrong was: everything that can always go wrong with any system of penal law enforcement of norms. Some of these wrongs have to do with interpretation, and some with procedure. Studying both kinds of wrongs can lead us to see that universal jurisdiction may or may not be a suitable device in some settings. We may conclude that universal jurisdiction is just that – a device – and not a goal unto itself. Remember, we are talking about procedure. As Representative John Dingell said at a Congressional hearing, "I'll let you write the substance . . . and you let me write the procedure, and I'll screw you every time." So let us count the ways, or some of them.

Some of the examples below do not involve universal jurisdiction as such. But all of them point up relevant issues. To the extent that some of these issues arise in the broader study of criminal law – the general part – and criminal procedure, Appendix C has a list of some relevant writings – by me and others.

THE ISSUE OF GRUDGING INTERPRETATION

The "torture memos" of John Yoo and Jay Bybee, in the George W. Bush administration, gave so narrow a definition of torture as to exclude from criminal liability most of the harsh interrogation methods that the CIA was using every day. In the Obama administration, lawyers from that same Office of Legal Policy have been summoned to justify the use of drone strikes – in the territories of sovereign states, based on vague assertions of culpability and with civilian deaths in the range of 11% to 22%.

Remember what St. Augustine wrote:

> *Kingdoms without justice are similar to robber barons.* And so if justice is left out, what are kingdoms except great robber bands? For what are robber bands except little kingdoms? The band also is a group of men governed by the orders of a leader, bound by a social compact, and its booty is divided according to a law agreed upon. If by repeatedly adding desperate men this plague grows to the point where it holds territory and establishes a fixed seat, seizes cities and subdues peoples, then it more conspicuously assumes the name of kingdom, and this name is now openly granted to it, not for any subtraction of cupidity, but by addition of impunity. For it was an elegant and true reply that was made to Alexander the Great by a certain pirate whom he had captured. When the king asked him what he was thinking of, that he should molest the sea, he said with defiant independence: "The same as you when you molest the world! Since I do this with a little ship I am called a pirate. You do it with a great fleet and are called an emperor."

St. Augustine 2 *The City of God Against the Pagans* 17 (Harvard 1963).

One can see the same sort of interpretive legerdemain in the French courts' discussions of the Touvier case. Paul Touvier had been a loyal servant of the Vichy France regime and had ordered the assassination of Jews. When he was prosecuted under the ostensibly "universal" language of the French Penal Code, the French courts interpreted those penal law provisions as saying that only those who had served as agents of a "hegemonic regime" – that is, Nazi Germany – could be guilty. Those who merely served the puppet Vichy regime – which the judges termed "a constellation of good intentions" – were not guilty. Thus, the prosecution had to prove, and eventually did, that Touvier was acting beyond his duties as a loyal Vichy persecutor.

The absurd limitation on the statutory text was propounded by judges who, in the French judicial tradition, are required to seek and express "the will of the legislator." The

evident purpose of this obliquity was to shield from liability the thousands who had collaborated with the Vichy regime, and thus to perpetuate the myth that the great majority of French people were brave opponents of racism and xenophobia. The grudging interpretation thus served to obscure the lessons of World War II history.

To be fair, the case of Maurice Papon provided a partial corrective. The effect of Papon's arrest and trial was manifest. I wrote this summary around that time:

> When I first began to lecture in France on the crime against humanity and the French trials, some of my French colleagues reproached me, and the French legal system, for digging up the past in this way. "Law and history do not make good bedfellows," one French law professor declaimed. I thought him wrong in general and specifically. Law and history are, or ought to be, not only bedfellows but intimately connected. One principal theme of this book is that ignoring the lessons of history inflicts a great social price.
>
> The Papon case dredged up enough history, even fairly recent history, that it provoked a shift in attitudes. The January 1997 Cour de Cassation opinion signaled a different judicial attitude towards the Vichy government. The trial itself caused a change in the attitudes of many people who had been holding on to old illusions. I recall that after giving a lecture on the crime against humanity shortly after the trial court judgment against Papon in early 1998, one of my French colleagues took the podium to say, "J'aveu. La France, elle etait collaboratrice" – "I confess. France was a collaborator."
>
> Papon had a distinguished law school record and had, in the 1930s read Hitler's works and understood their meaning and menace. During World War II, joined the Vichy France government and was an official in its Ministry of the Interior. In February 1941, he became sub-prefect of the Gironde, based in Bordeaux, which was part of Vichy France. He also, as part of his responsibilities, assumed the position of Secretary for Jewish Questions, and was in charge of the police, gendarmerie and detention facilities.
>
> At some point during the War, Papon also assisted the French Resistance. After the War, his political career continued. He became a mayor, a prefect of police in Paris, and then a minister in the government of President Valéry Giscard d'Estaing. Powerful figures in French politics tried to derail any potential prosecution. On the side of prosecuting, however, there were the powerful voices of deportee organizations – the same ones that had lobbied for passage of the 1964 amendments to the French Penal Code and for the Touvier prosecution.
>
> On October 17, 1961, then-prefect of police Papon ordered suppression of a mass demonstration being held by people agitating for Algerian independence from France. This was in the final months of the French occupation of Algeria, and the Algerians were to win independence fairly early in 1962. The police, acting on Papon's orders, rounded up thousands of demonstrators, who were then held in deplorable conditions. In addition, the police opened fire and killed between one hundred and three hundred demonstrators. After the event, Papon was instrumental in covering up the facts. However, eventually he was not prosecuted for any of the 1961 events,

although the vivid memory of those events lent fuel to the demands that he be prosecuted for his role in World War II events.

In 1981, while the French presidential election was underway, a French newspaper published an expose of Papon's wartime role in signing orders sending Jews to concentration camps. The publicity is said to have rallied some voters to victorious candidate François Mitterand. From that point, the prospect of Papon being tried for crimes against humanity was often debated in the press and in political councils. However, the official investigation of his role proceeded fitfully.

Finally, in September 1996, a set of charges was filed in Bordeaux, in the prefecture of the Gironde, based on a detailed set of factual allegations. These allegations were in turn based on a lengthy investigation phase conducted under the supervision of magistrates. The indictment charged Papon with crimes against humanity committed between July 1942 and May 1944, during his service as subprefect of the Gironde. The formal charge was based on documents and witness statements, many of which were produced before the juge d'instruction. Thus, the defense and the reviewing court had a detailed factual context within which to discuss the legal issues.)

Papon challenged the charges in the Cour de Cassation, which rejected all his legal claims. That court noted that the crime against humanity is not subject to any statute of limitation, and it rejected that Papon's claim of excessive delay in bringing the case. Turning to the merits, the court held that the prosecution would have to prove that somebody responsible for the deportations and deaths was acting as agent of a hegemonic regime. This element was clearly satisfied by the proposed proofs, because of the involvement of German Nazi police officials in designating who was to be rounded up, when, and where. However, in order to be complicit in the crimes of such people, Papon did not have to share their ideology or their direct subservience to that regime. He did not have to be a member of the unlawful organization.

The German authorities demanded roundups of Jews. Papon was in charge of a list of Jews, drawn up under Vichy government guidelines as that government brought its policies more and more in line with Nazi wishes. He signed orders for searches, seizures and detentions of Jews. He therefore became an accomplice of the Nazi regime and its ideology.

Papon acted with knowledge of the Nazis' actions and motivations. He could therefore be an accomplice even though he did not share the Nazi ideology and was not a member of any Nazi organization. This holding did not differ greatly from the analysis used in Touvier's case, and is consistent with accomplice law in most legal systems.

There was, however, a second conclusion that followed from applying this accomplice analysis to Papon's conduct and position. Touvier was a foot soldier, a murderer, a petty thief and a Gestapo wannabe. He spent his post-war life on the run, sheltered by far-right clerics. He was charged with a single act: rounding up seven Jews to serve a distinct Nazi purpose towards the end of the War.

Papon acted from a position of authority in the Vichy government, and over nearly two years. The *cour de cassation* opinion cast significant doubt on the claim that Vichy France was truly an independent state. It used evidence of Papon's power and influence, and of his continuing contact with Nazi agents and officials, as central to its

argument that the indictment charged an offense. If a man who systematically ordered deportations of Jews served as Vichy interior minister and as a prefectural official, the Touvier case description of the Vichy France as disorganized, somewhat well-intentioned and pragmatic hardly bore examination. In setting the stage for Touvier's prosecution, the court of cassation insisted on proof that he served the Nazi cause, and dismissed all efforts to characterize the Vichy government in any particular way. The judges who decided Papon's case did not forthrightly declare themselves. However, they cast doubt on Papon's claim of innocent intent by saying given his service in the Vichy France Interior Ministry he surely knew of the "anti-Jewish policy" of the Vichy government, and his acceptance of a job entitled "Jewish Questions" added more proof of his culpable mental state. These references characterize the explicit policy of the Vichy government as pro-Nazi and collaborationist in a way that the Touvier court did not.

Papon was convicted of complicity in the deportations, but acquitted of complicity in the eventual deaths of the detainees in concentration camps. He was sentenced to ten years in prison. While his appeal was pending, he left France for Switzerland and lived there under an assumed name. The French courts dismissed his appeal because of a French law that deprives a fugitive of the right to appeal. The European Court of Human Rights in Strasbourg held that dismissal of the appeal is too harsh a sanction. The French courts then reviewed the merits and affirmed.

In the meantime, influential French politicians secured passage of a law that allowed an aged and infirm person to be set free from prison. Papon, who was at that time over 90 years old and in ill health, was liberated.

What do the Touvier and Papon cases tell us about national courts applying transnational law to punish state-sponsored terrorists? It is a mixed lesson, and provides little cause for optimism. The amendments to the French penal code that permitted prosecutions for crimes against humanity were not added until 1964, nearly two decades after the end of World War II. A broad-based political campaign was necessary to secure this change. Once the penal code permitted prosecutions, it was 1983 before Barbie was brought to trial, and almost ten years before Touvier's trial began. French officials' reluctance to confront the widespread complicity with the Nazis was the principal reason for the delay.

There has never been a prosecution under French law for crimes against humanity committed by French soldiers or commanders for actions in Indochina, Algeria, Tunisia and other outposts of empire, nor for brutal police actions such as the 1961 killings in Paris when Papon was prefect of police. Such prosecutions would be deterrent and educational, just as were the Papon and Touvier cases. But there is a significant right-wing element in French politics whose power is sufficient to deter authorities from pursuing any such cases. This element organizes around racial and ethnic issues, including the alleged "surrenders" in Algeria and Indochina. The uprisings in French Muslim communities in late 2005, and the public and political reaction to them, shows that racism and ethnic prejudice run deep in French society. This fact is both an explanation of why politicians do not care to examine the history of French

colonial power, and in some measure a result of the state not having addressed the issue.

Perhaps as a result of the Papon case, French President Jacques Chirac said, during a speech on July 16, 1995:

> There are moments in the life of a nation that hurt the memory and the idea one has of his country. It is difficult to evoke them, because those dark hours tarnish forever our history, and are an insult to our past and our traditions. Yes, the criminal folly of the occupier was assisted by French, by the French state. France, homeland of the Enlightenment and of human rights, land of welcome and asylum, France, on that very day, accomplished the irreparable. Failing her promise, she delivered those she was to protect to their murderers.

THE ISSUE OF THE PURPORTED UNIVERSALITY OF LANGUAGE

When we represent someone in court, we are seeking to bridge several gaps. The first is that between our own life experiences and those of our client. The second is that between our client and the process itself. The third is that between the client and those who will decide his or her fate.

In some meaningful sense, human rights norms are "universal" in the sense that they are generally understood and at least nominally accepted. But the language in which the norms – the forbidden acts, if you will -- are couched is inevitably subject to interpretation. The mental elements of charged offenses are famously opaque, and therefore open to meanings that a tribunal may ascribe to them but which have nothing to do with the way that the accused thinks or decides.

In short, the purported universality breaks down at the moment when real people meet in a real tribunal. The trials, and particularly those of lower-level defendants – those who were not in command or in policy-making roles -- exemplify what Roland Barthes discussed in his essay, *Domenici, or the Triumph of Literature*, in the collection entitled *Mythologies* – same word in English and French:

The French essayist Roland Barthes has written brilliantly about this objectification of the defendant. The criminal law system "judges man as a 'conscience' without being embarrassed by previously having described him as an object." Or, more tellingly:

> Periodically, a trial, and not necessarily a fictional one as in Camus' The Stranger, reminds you that Justice is always ready to lend you a spare brain, in order to condemn you without remorse, or in the manner of Corneille, to paint you not as you are but as you must be.
>
> Or in the original:
>
> Périodiquement, quelque procès, et pas forcement fictif comme celui de l'Étranger, vient vous rappeler qu'elle est toujours disposée à vous prêter un cerveau de rechange pour vous condamner sans remords. . . .

I have discussed this issue at some length in the "Crime Talk" essay and the essay *Narratives of Oppression*, both cited in Appendix C.

Put another way, the creation of international norms and institutions does not transform all wielders of power into citizens of the world, who shed their previous set of interests and loyalties and assume new ones. This is perhaps the central thesis of all that I

have assembled in this discussion, and the principal problem that must be solved if universal jurisdiction is to have any real legitimacy.

Moreover, in the jurisprudence of the international tribunals, we see for example a great hesitancy to recognize defenses based on diminished capacity, which a capable forensic psychiatrist might well see as related to cultural factors that predispose the defendant to commit certain kinds of acts. I have personally presented – or tried to present – such defenses. The point is not that the court should ignore harmful conduct, but that the power to attach criminal penalties to conduct requires intelligent consideration of the defendant's actual mental state. In the essay on juvenile injustice, and the one entitled "Crime Talk, Rights-Talk and Doubletalk," also cited in Appendix C, I devote more attention to this general topic. In the latter essay, see particularly the discussion of mens rea, 65 Tex. L. Rev. 147-50.

Defendants who carried out policies set by others, and who acted based on centuries-old attitudes and ideas that were bred into them from childhood, cannot be said to have made the same kind of deliberate choices as their leaders made. They fail to make the same benefit v. harm – or even right v. wrong – calculus that others might make. They do not share or appreciate the assertedly universal ideas in the same way as do the prosecutors and judges. Evidence to this effect may not exonerate, but it surely is relevant to the degree of culpability.

The point I am making will be familiar to those of you who care about racial injustice in capital sentencing. I was an expert witness before the Inter-American Commission on Human Rights in the case of Orlando Cordia Hall. Mr. Hall is an African-American convicted in federal court in Fort Worth, Texas. One ineffective assistance of counsel issue in the case is trial counsel's failure to investigate and present mitigating evidence of Mr. Hall's upbringing in Southern Arkansas. In a supplemental affidavit, I wrote:

> The prosecutor, as I noted, is trying to convince the jury that this defendant is the "other," unfit to live in human society. Defense counsel must present evidence and argument that makes the human connection between the jurors and the accused. The lawyer representing Orlando Hall – or any "Orlando Hall" – must convey both the universal message that the jury and the defendant share a common humanity, while painting the particular struggle of this black American who grew up in this particular way, in this particular place, under these specific conditions. Only thus can counsel help the jury avoid what Du Bois described a century ago: the majority society's reflexive tendency to measure the African-American soul "by the tape of a world that looks on in amused contempt and pity." W.E.B. Du Bois, *The Souls of Black Folk* (1903).
>
> For millennia, lawyers have understood how different cultures and experiences shape expectations and conduct. One important thread of legal development in the West is how to accommodate the strands of continuity, diversity, and change. The Roman legal tradition, and later the canon law, sought such accommodation through restatements, "institutes" and collections of commentary. Indeed, Roman law in the classical period sought to accommodate the differing legal traditions of the various peoples within the Empire as part of a *ius gentium*, or law of all peoples, administered by a *praetor peregrinus* appointed to that task. The common law tradition moved differently, but faced the same challenges. Such institutions as the "personality of

laws," which prevailed in Europe for centuries, reflected this aspect of lawyers' work. The competing secular, religious, feudal and royal jurisdictions also showed us how social, cultural and political differences may operate in civil society. This historic role of lawyers forms an important shared tradition. I have discussed this at some length in my book *Law and the Rise of Capitalism* (1977).

And then there is the issue of forum and court composition. Charles Taylor was tried in The Hague by a special-purpose tribunal that needed all the help it could get to maintain its perceived legitimacy. What? Was there not an available courtroom in, say, Capetown, South Africa? He was tried before the "Special Court for Sierra Leone," which has premises in Freetown, Sierra Leone. When it was decided to move the Taylor prosecution away from Freetown, The Hague was chosen. There was no question of "jurors" being chosen from a "vicinage," as the trial court consisted of judges. But moving the case to Western Europe, and to a city in a former colonial power, is astoundingly insensitive.

It is not only that the law is what it "does," but what it is seen by people to do. Respect for and compliance with these assertedly universal norms requires that they be applied in ways that command respect. It is the peculiar conceit of our age that those in power use labels in ways that mask what is really going on.

Thus, in the United States we have a Foreign Intelligence Surveillance Court that does not behave at all like a real court, but like an ex parte bureaucracy that rubber stamps orders directing great intrusions into our private lives. We have a Department-that-calls-itself-Justice.

In the days of the guillotine, the blade descended and an official cried out "In the name of the French people, Justice is done." This was justice-as-a-name.

THE ISSUE OF SELECTIVE ENFORCEMENT

We know that selective prosecution and vindictive prosecution are wrong. Law students in the United States read that old case in which San Francisco tried to shut down all the Chinese laundries by employing a purportedly race-neutral criterion. In the history of criminal law, the displacement of private interest by public prosecution has been the trend. Today in most common law countries, prosecutorial decisions are exclusively in the hands of public authorities, and even in countries that allow private prosecution, the complainant's interest and power is mediated and reviewed by public authority.

In the international arena, selective and vindictive prosecution may be accomplished in several ways. First, many have noted that the International Criminal Tribunal for Yugoslavia seems to have a skewed selection of defendants, and that these choices mirror the geopolitical goals of the United States and other NATO powers. I do not express a view on these criticisms, but simply state the issue. There is some evidence that the prosecutors go easy on Croatians. More significantly, however, NATO bombings killed thousands of civilians, and there has been o accountability at all for that conduct.

Second, "courts" are established that simply carry out the vengeful goals of first world occupiers. The trial of Saddam Hussein had a foreordained conclusion and was an extension of the illegal war that brought it about. The impending trials in Libya are cut from the same cloth.

Third, the United States – and some other countries – have excluded themselves from international instruments and tribunals in ways that prevent prosecutors from

addressing illegal conduct by powerful first world countries. That is, obedience to human rights norms is for the others. Those in power in the metropolitan countries call to mind a paraphrase of what Samuel Butler said about the comfortable Christianity of Victorian England:

> They would have been equally horrified at hearing the universal human rights norms doubted, and at seeing them practiced.

Like Papon, these leaders have educational backgrounds that belie any assertion that they do not understand the norms, and the danger that attends systematic violation. Their transgressions are the most serious that one can imagine, for they have the most power to inflict harm and are the most likely to be recidivists. It may seem that speaking to them of human rights is like explaining a sundial to a bat, but theirs is a failure of will and not of perception.

Then again, I may have spoken too quickly. Here is an anecdote:

> In 1971, I had lunch in the House of Lords Guest Dining Room with Lord Fenner Brockway. Lady Wootton joined us for coffee, having come from the Peers' Dining Room. She explained that in that room, one was expected to take any empty seat even if it meant sitting next to some peer whom one despised. So, she said, she wound up sitting next to this Tory dinosaur. The Lords had been debating Rhodesia, and Lady Wootton reported (with perfect mimicry of his accent) that her colleague remarked "Well, you know it is the white people of Rhodesia who must decide what is to happen. After all, they are the ones who have to live there."

Excluding oneself from norms applicable to all others similarly situated is not a new tactic.

> When Page Keeton was Dean of The University of Texas Law School, he would agree to university-wide rules that he did not like only if the words "except in The School of Law" were inserted. This became so famous a tactic that the Daily Texan weather reports would – and still may – print weather forecasts saying, for example "Cloudy with occasional showers, except in the School of Law."

And Molly Ivins told me a story that she insists is true.

> The old Texas Penal Code prohibition on the crime against nature was invalidated as being unduly vague. So the legislature drafted a statute punishing "carnal knowledge of any cow, sheep, goat," and so on. On the second reading, a legislator from a rural county rose and asked "Now Mr. Speaker, this doesn't apply to a man's own flock, does it?"

We tend, when discussing human rights and humanitarian law norms, to focus upon the more violent and obvious violations and violators. Arguably, however, the most dangerous and widespread violations are crimes against working people and environmental crimes. Pollution of the air, ground and waters is inevitably transnational, in the sense that it is not bounded by borders. And yet, few if any forums are addressing it.

In Bangladesh, two fires at two clothing factories took 1,200 lives and injured 1,800 workers. Yet no American company whose garments were being manufactured there has done anything to assist with a remedy. And after the Supreme Court's decision in *Kiobel*, the number of potential forums for redress has shrunk. The Bangladesh fires are just one example of systematic violations of worker rights practiced at the behest of first world companies in developing countries. The magnitude of this problem may be grasped when

we consider that between 1980 and 2007, the number of wage workers grew from 1.9 billion to 3.1 billion, and that the percentage of such workers in developing countries grew from 50% to 72%. This profound shift is the result and motive force of "globalization" or "outsourcing," and reflects capital flight to areas where worker rights are most fragile. Few if any discussions of universal jurisdiction deal with this issue.

To illustrate the issue, here is my April 20, 2013, blog post on Kiobel v. Royal Dutch Petroleum, 133 S.Ct. 1659 2013):

> On April 17, 2013, five Supreme Court Justices held that victims of human rights violations committed by a subsidiary of Shell Oil had no right to sue in federal court in the United States. In the 1990s, in Nigeria's Ogoniland, residents protested the environmental harm being done by a subsidiary of Royal Dutch Shell of the Netherlands and its English affiliate during exploration and production of oil. The Nigerian government reacted against these demonstrations by plundering villages, and raping and killing protesters. The Shell subsidiary encouraged these actions, and provided financial and logistical support. These were crimes against fundamental principles of human rights. The plaintiffs reside in the United States. A private person or entity who aids and abets a state actor in wrongful conduct shares the liability. Under U.S. law, this would be true of a Ku Klux member helping a sheriff's deputy brutalize a civil rights worker, and the Supreme Court has so held.
>
> The conduct described in the plaintiffs' case amounts to state-sponsored terrorism, and one had thought that there arose a duty on the part of all branches of government to address and remedy it.
>
> The Court's majority opinion was for five Justices, although Justice Kennedy's concurrence provides a possibly limiting caveat. And even Justice Roberts' opinion for the majority contains a double-edge caveat: some claims that arise in foreign countries camn perhaps be heard, but on the other hand some claims that "touch" the United States may not do so with sufficient force. Four Justices concurred in the result, and on a different theory than the majority; their votes, plus that of Justice Kennedy, might signal that there is yet an opportunity to fashion a judicial remedy for the kinds of human rights violations at issue in this case.
>
> That said, the majority opinion is a mess. It mixes up subject matter jurisdiction, forum selection and choice of law. This folly is all in the service of saying that a venerable federal statute, enacted in 1791 to protect human rights, is now made nearly useless to serve that intended and laudable purpose. . . .
>
> The Majority's Tortured Rationales
>
> The Alien Tort Claims Act, or ATCA, has been a formidable weapon in the struggle to get redress for victims of human rights crimes. For a good brief overview, see http://en.wikipedia.org/wiki/Fil%C3%A1rtiga_v._Pe%C3%B1a-Irala. ATCA, which was part of the Judiciary Act of 1789, says that the "district courts shall have original jurisdiction of any civil action by an alien for a tort only committed in violation of the law of nations." The Court held that this statute permit a court to hear any lawsuit involving a wrongful act committed outside the United States. The Court said that allowing a court to hear and decide such a case might interfere with the executive branch and Congressional control over foreign and military policy, and therefore the

statute must be presumed not to have extraterritorial application. Besides, the Court said, "United States law governs domestically but does not rule the world." This rationale is contrary to the statutory text and the evident intent of those who wrote it. It mixes up subject matter jurisdiction with forum selection and choice of law in ways that should horrify students of civil procedure. It is out of step with a basic tenet of international law about the responsibility of national courts. And finally, in light of United States military and paramilitary acts around the world, it is just plain silly. I address these issues in turn. (For a more detailed treatment of the basic issues, see my book Thinking About Terrorism (2007). Lord Justice Stephen Sedley's book Ashes & Sparks (2011) also has a good essay on the general subject of human rights norms.)

Text and Meaning of the Alien Tort Statute

Those who drafted the ATCA knew and understood the issues that a new nation faced. They were conscious of the imperial power being exercised by Spain, Portugal, France, the Netherlands and England. They wrote a statute that gave United States courts power to interpret and apply "the law of nations." These words were those that Blackstone had used in his Oxford lectures. They echoed the writings of Hugo Grotius and other 17th Century writers, who had a broad and historically-rooted understanding of the limits on permissible sovereign conduct.

The 1789 authors might have said instead "international law," for that phrase had also come into use around 1776 in an essay by Jeremy Bentham, who credited a French legal writer for first using the word "international." Bentham sharply rebuked the Blackstone formulation of "law of nations," and argued that there could be no such law that stood any higher than the will of a particular sovereign. That is, if the Spanish wanted to sponsor piracy, or the Portuguese wanted to indulge in torture or the slave trade or any such iniquity, neither the world community nor any other sovereign state had any right to say anything about it.

Thus, by choosing the words "law of nations," the Congress intended to give the courts power to do what the *Kiobel* court says they may not do: to consider whether the conduct of a foreign sovereign might be subject to suit in the United States courts.

Note that I say "might." As we shall see, there are many and sometimes good reasons that such a power should not be exercised in a particular case. But to construe this statute as barring all such exercises is contrary to its text and history.

In addition to ignoring text and history, the Court's stated rationale also performs a peculiar sleight of hand. It speaks of deference to foreign policy in the treatment of foreign sovereigns. It is true that the Executive branch has great responsibility in that field, and its actions are entitled to deference crom the coordinate branches. But in the *Kiobel* case, the government of Nigeria was not a defendant. No foreign sovereign's interest was involved, except perhaps the reputational harm that might be done when the evidence showed what had been done to the victims. United States policy towards Nigeria could not possibly be affected by the trial of this lawsuit.

No, the Court accorded the deference due sovereigns to a multinational oil company. Multinationals notoriously seek to avoid accountability by "outsourcing" jobs that can be exported, and making deals with complicit governments for activities such as agriculture, mining and oil production that must be done where the goods are grown

or found. It is therefore essential that the courts in metropolitan countries where the multinationals have their headquarters to take a role in defining and policing illegal conduct. In past times, the Supreme Court has recognized the power of great corporations to do great harm, and has wisely interpreted statutes to make them accountable. See Tigar, It Does the Crime But Not the Time, 17 Am. J. Crim. L. 211 (1990), citing NY Central RR v. US, 212 US 481 (1909). And we have recently been taught that corporations are persons at least to the extent of having free speech rights. (The Court had asked for briefing on whether corporations are liable under the ATCA, but did not decide the question. While corporate criminal liability in US law is “only” 104 years old, civil liability has been recognized in Western legal systems for at almost two millenia.)

Jurisdiction, Immunity, Forum Selection and Choice of Law

The ATCA confers subject matter jurisdiction, that is the power to hear a case. It does not interfere with other provisions of law that permit a court to dismiss or transfer the case. In this sense, the Court’s Kiobel holding is grossly overbroad, for it uses a flawed interpretation of a jurisdictional statute to achieve goals that could be met with other, narrower, procedural devices.

Sovereigns are amply protected by a broad though not unlimited immunity from suit. Thus, all of the Court’s expressed concerns are met by the Foreign Sovereign Immunities Act, under which the Kiobel plaintiffs could not have added Nigeria as a defendant even if they wanted to. This point simply emphasizes that all the Kiobel majority has done is put the mantle of protection normally accorded to sovereigns around the shoulders of Shell Oil.

The doctrine of immunity is powerful. It can and sometimes should be interposed to prevent the courts of one sovereign from imposing their views on another sovereign or its officers. The doctrine has contours and limits that judicial tribunals are busy defining and refining. When Spain sought to extradite Augusto Pinochet for trial on charges of torture and genocide, his admitted claim to immunity as former President of Chile did not reach far enough to insulate him from liability for those crimes. http://en.wikipedia.org/wiki/Augusto_Pinochet. In the Yerodia case, the International Court of Justice spoke cautiously about the immunity doctrine and its reach. You can read about the case by following this link: http://en.wikipedia.org/wiki/Abdoulaye_Yerodia_Ndombasi. Be sure to read the Congolese judge’s opinion.

Second, a court with subject matter jurisdiction can hold that a lawsuit that arises in a foreign country, and as to which the evidence may be found there, should be tried in that country. That is the doctrine of forum non conveniens.

Third, United States courts can express deference to the legal regimes of other countries by applying foreign law when that is appropriate – the choice of law issue. I reiterate, however, that the Congressional purpose for using the phrase “law of nations” was to signal that conduct that might be tolerated in a foreign state might nonetheless be held to be a basis for liability in the courts of the United States. Again, I stress that the U.S. courts would not be confronting the sovereign state of Nigeria about its legal rules; they would be saying that when a multinational corporation does business there,

it may be held to the standards expected by the metropolitan countries where it is headquartered.

The Duties of National Courts

Where are the *Kiobel* plaintiffs to do for redress? Surely not back to the place where the killings, rapes and plundering took place, to ask for a hearing from those responsible for the harm that was done. Are they then to wait for a decade or two or three until some transnational court is set up to address these issues. We know from recent examples that such courts might try the local offenders on criminal charges, but none of those courts has or exercises the power to hold the metropolitan country sponsors of terror accountable.

Under the law of nations as it has developed since Nuremburg, national courts have primary responsibility for addressing human rights violations. The obligations of temporary or permanent transnational courts are secondary. This principle has been elaborated in recent years, but it well antedates the ATCA and has been applied by the United States Supreme Court in the past.

The Unregulated Superpower

Kiobel is not the Court's first decision that limits the power of US courts to address state-sponsored terrorism. Other notions, such as "non-self-executing treaties," "political question," and "state secrets" have also been used as building blocks for a system of rights without remedies.

However, its expressed concerns leave one wondering where the Justices have been living for the past 60 years. Deference to foreign sovereigns? Letting other countries devise and enforce their own legal rules? The CIA participated in overthrowing the governments of Guatemala, Iran, Chile and the Dominican Republic. American military power invaded Grenada, Afghanistan, Iraq. American aircraft bombed the former Yugoslavia and Libya. The United States has military bases in 63 countries. It has at least 700 military bases and installations worldwide. United States military personnel are working in more than 150 countries. Our drones are in the sky in many places. The United States supplies arms and military assistance to dozens of countries worldwide.

Assume, for purposes of argument, that this governmental presence and consequent influence is entitled to some deference from judicial examination. Even such deference does not create a zone of impunity for corporations who decide to surf the wave of US influence for their shareholders' profit.

To repeat, Shell Oil is not a government. I have been to Shell's headquarters. They can't be a government. They don't have a duty-free shop.

THE ISSUE OF UNSEEMLY FORUM

I have said that universal jurisdiction is merely a device. It is a starting point. Let us assume that an official of the Democratic Republic of the Congo has allegedly committed crimes against humanity. As a first principle, he can be put to trial in any forum where penal law provisions allow such a trial. However, that first principle may yield to considerations of convenience, or to a view that trying him in Europe sends the wrong message, or to a decent regard for the sovereignty and territorial integrity of the Democratic Republic of the Congo – in short for any of the reasons that were discussed in *Piper Aircraft v. Reyno*, and more besides.

I am not saying that universal jurisdiction is a bad idea. I am only saying that we should not draw more from it salutary principles than they can logically teach us. As Mark Twain reminded us:

> We should be careful to get out of an experience only the wisdom that is in it -- and stop there; lest we be like the cat that sits down on a hot stove lid. She will never sit down on a hot stove-lid again -- and that is well; but she will never sit down on a cold one any more.

And here is an excerpt from *Thinking About Terrorism*:

> Even where a domestic tribunal is willing to act, its power may be limited by international law rules concerning immunity. In 1998, Abdoulaye Yerodia, the foreign minister of the Democratic Republic of the Congo, publicly urged citizens to kill opponents of the government who were mostly ethnic Tutsis. At that time, Belgian law asserted universal jurisdiction over genocide and crimes against humanity, and a Belgian court issued an arrest warrant for Yerodia. The Democratic Republic of the Congo sued Belgium in the International Court of Justice in The Hague, claiming that under international law a serving foreign minister was immune from the criminal judicial jurisdiction of a foreign country. On February 14, 2002, the ICJ ruled in the Congo's favor and ordered the arrest warrant withdrawn. There was disagreement among the ICJ justices, three of whom dissented on the immunity question, and six on the question of remedy.
>
> The ICJ decision can be regarded as a setback for the idea of universal jurisdiction. Before joining any such chorus, one should read the opinion written by Judge Bula-Bula, the Congolese member of the tribunal. Under ICJ procedures, one judge each from the Congo and Belgium sat as ad hoc members of the Court. Judge Bula-Bula's opinion can be characterized as exclaiming: "What! Belgium is to give lessons on humanitarianism to the Congo?" The ICJ ruling means that as a practical matter, Minister Yerodia will never be tried anywhere for his actions, unless the new International Criminal Court takes up his case.
>
> The result might well have been different if Yerodia was no longer in a governmental position, as the Court based its decision on his position as an "incumbent Minister" exempt from criminal process, and not upon a broader ground of exemption from criminal jurisdiction. Some judges expressed the wish that the court had gone on to discuss these broader issues, but they were a minority. Therefore, the idea of a core national power to try people for committing crimes against humanity, regardless of victim and defendant nationality and venue, remains viable. Sovereign states hesitate to exercise such power, however, for fear of jeopardizing their own foreign relations concerns.

This was the issue that Jacques Vergès explored in his defense of Klaus Barbie. I posted these words on my blog:

> Jacques Vergès died August 15, 2013. He was a French trial lawyer best known for defending Klaus Barbie, Carlos the Jackal, and Algerian freedom fighters. A documentary of his life appeared several years ago under the French title "L'avocat de la terreur" and the English title "Terror's Advocate." See also http://www.imdb.com/title/tt1032854/. Neither title did Vergès nor the film

justice. One can read brief biographies of Vergès on Wikipedia in French, http://fr.wikipedia.org/wiki/Jacques_Verg%C3%A8sand in English, http://en.wikipedia.org/wiki/Jacques_Verg%C3%A8s.

For this tribute to a brave and skilled advocate, I single out only one of his cases – the defense of Barbie, the Nazi "butcher of Lyon." That defense has been chronicled in my own work and in a brilliant essay by Guyora Binder, Representing Nazism: Advocacy and Identity at the Trial of Klaus Barbie, 98 Yale L.J. 1321, 1325 (1989). Barbie was tried before a French court applying provisions of the penal code that made complicity in crimes against humanity a crime regardless of when the offense was committed.

It was clear that Barbie had committed the acts with which he was charged. The trial was therefore to be a public consideration of what ought to be done to him. Vergès introduced a second issue: Whatever punishment Barbie was to receive, who was competent to impose it? Vergès sought to introduce evidence of colonial France's genocidal policies in Algeria, Indochina and elsewhere. He had procedural arguments as to the admissibility of such evidence, but his main theme was painted on a broader canvas. His argument brilliantly anticipated the current debate about factitious human rights and humanitarian law rationales for military intervention, and even the discussions of universal jurisdiction. What right did France have to sit in judgment on Barbie? He was a Nazi butcher, but he had escaped to Bolivia at the end of the war with the assistance of the United States. He had assisted right-wing governments in South America, all allies of the United States. More broadly, the United States, England, France and West Germany had all welcomed officials, and intelligence officers of the defeated Hitler regime, to enlist them into service in the Cold War.

Vergès raised the fundamental question of "who is competent to judge?" The French political scientist reminded those of us who were undergraduates in his university course fifty years ago that sometimes in our desire to see a particular decision made, we forget our most cherished convictions about who is competent to make it.

Vergès argued that whatever the horrors of the Holocaust, and whatever the wrongs committed by its individual perpetrators, no judgment assessing liability could be legitimate unless those who sat in judgment did not themselves represent a judging power free from the taint of Holocaust complicity. And the French government surely did not meet that test.

See generally Jean Bricmont's book, *Humanitarian Imperialism*, [which documents the thousands of civilian casualties from NATO bombardments in the name of humanitarian principles].

I return to this issue later.

THE ISSUE OF PROSECUTORIAL OVERREACHING

One trouble with universal truths is that the people who proclaim them tend to think that they, rather than the truths, are infallible. In the criminal law, we see this sort of thing all the time. Horrendous crimes disturb the community. Police and prosecutors respond with speedy investigation and arrest. They become impatient with limits on their powers. By a peculiar inversion of logic, the criminal cases in which the most is at stake are

the very ones in which police and prosecutorial misconduct, exacerbated by judicial indolence or hostility, create the greatest risks of injustice.

A Sixth Circuit judge once asked me why the prosecutors would have behaved as we claimed they did. I replied that we simply wanted a hearing to determine exactly *how* they behaved, and with what effect. As for "why," I suggested the words of Ruskin:

> No more dangerous snare is set by the fiends for human frailty than the belief that our own enemies are also the enemies of God.

Above, I quoted Jerome Frank on the semiotics of criminal law enforcement. One might also consider Justice Sutherland's well-known remark:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all . . . .

That is, there is a linkage between fairness and legitimacy. Yet, in the international tribunals – as in the domestic ones -- the right to effective assistance of counsel is not well-respected. There is not the "equality of arms" that is the hallmark of a fair adversary system. Richard Wilson has spoken eloquently of this. *Procedural Safeguards for the Defense in International Human Rights Law*, in Bohlander, Boed & Wilson, *Defense in International Criminal Proceedings* (2006) (a superb volume of materials and essays)

Then, there are the decisions allowing the prosecution to present the testimony of anonymous witnesses, thus hampering the right of effective cross examination. In the *Tadic* case before the ICTY, the prosecution obtained an order allowing an extensive use of such witnesses. The tribunal rejected arguments based on the United States constitution confrontation clause and on the fairly uniform practice of European and common law countries. Justice Ninian Stephen's dissenting opinion ably collects the relevant authorities; you can find it on the ICTY website. I find it regrettable that Justice McDonald favored the use of anonymous witnesses. She had been a United States District Judge in Houston and her background in civil rights litigation should warn her against dispensing with fundamental rights. Justice Stephen's career is also of interest. He was general counsel of Mobil Oil Australia, a Justice of the Australian Supreme Court and Governor General of Australia. His opinion expresses truly "conservative" values. Of course, being from Australia, he knows a kangaroo court when he sees one.

Of course, The fact that prosecutorial discretion may be abused is not, in itself, a reason not to have prosecutors. It is simply a fact that warns us against putting undue faith in them.

TOWARDS AN EVALUATION OF UNIVERSAL JURSIDICTION

We can understand the movement from particular to general. We can understand that markets, ideologies, and systems of social relations transcend national borders. With that understanding we can envision a system of social relations that is global; we may call it "universal" if we remember that this is a sort of conceit because we occupy only a small corner of the "universe." When we have taken this intellectual journey, we can then ask what sorts of actions, organizations and institutions are suitable instruments for changing what we have now into what must replace it. And we will also ask whether this change can happen before somebody blows up the world or the planet becomes uninhabitable. It is a simple idea: If you don't know where you are going, it will be hard to know when you have arrived. And, you might lose your way.

The focus on universal jurisdiction, and therefore upon criminal cases as a means of vindicating human rights norms, can restrict our vision. Early in Thomas Jefferson's presidency, members of his party voted articles of impeachment against the infamous Chief Justice Chase. Jefferson wondered whether this was a good idea: "Now that we have caught the whale," he remarked, "let us have an eye to the boat."

Of course we want accountability, and if we get it some years after the fact, it may nonetheless do some good. But our goal is not to fill the prisons with tired old dictators and their accomplices, nor to put all or even most of our resources and energy into judicial proceedings that take place at some distance from the day-to-day struggle for change. This is an important lesson for lawyers to learn. It is not about us. It is about the clients. In my play *Haymarket: Whose Name the Few Still Say With Tears*, I imagine a confrontation between the labor activist Lucy Parsons – widow of Haymarket defendant Albert Parsons – and Clarence Darrow. Here are two of their imagined exchanges:

> *Darrow:* Lucy, I'm sorry I'm late. The train from Springfield was delayed. Governor Small has pardoned the Communist Labor defendants.
>
> *Lucy Parsons:* Another victory for civil liberty, Clarence. Another supplication to the state.
>
> *Darrow:* Another victory for the law.
>
> *Lucy Parsons:* Wrong! A victory, perhaps, for the lawyers. Your lawyers' victories, Clarence, are like fireflies. You catch them and put them in a jar. By morning, their light has gone out. And your bugs are dead. As dead as my husband Albert Parsons and the others. At least Albert, in death, inspires the people's movement. All the law does with his case is to look to the court's decision, to justify some infamy of today with the infamy of yesterday. The law shows its *a posteriori* to the people, as God to his servant Moses.
>
> * * * * *
>
> *Lucy Parsons:* Your lawyer's ego wants you to think you stand at the center of every event by which the world is changed. Your right to stand there is only because some brave soul has risked death or prison in the people's cause and you are called to defend him--or her. When you put law and lawyers at the center of things, you are only getting in the people's way, and doing proxy for the image of the law the state wants us to have. The law is a mask that the state puts on when it wants to commit some indecency upon the oppressed.
>
> *Darrow:* (Angry.) If I believed that, I would still be lawyer for the railroad, and not making do with the fees the union can pay. Lucy, the law is a fence built around the people and their rights.
>
> *Lucy Parsons:* (Kindly.) What an image! And you, Clarence, are a fierce old dog, set to bark and warn off intruders. Maybe so. I wish it so. We are all on trial in this life we have chosen, Clarence. All we can know is that none of us will live to see the verdict.

The law that we lawyers can use has relatively few tools. They are useful tools, but we must recognize their limits and also make sure that we are using them in ways that serve our clients' interests and not simply the vindication of our own way of doing and seeing. Universal jurisdiction, like any other tool, cannot be an end in itself.

In 1989, I sat in Capetown with Dullah Omar – one of Nelson Mandela's lawyers – as he outlined the push that the ANC and its not-yet-banned affiliate the Mass Democratic Movement would make to get Mandela released and end apartheid. The universal condemnation of apartheid in many international forums had not and would not bring about change. People power – by the majority nonwhite population – could and would. I was reminded of a Robin Williams sketch.

> P.W. Botha to a white courtesy telephone please. P.W. Botha to a white courtesy telephone.
>
> "Say, P.W., this is George Wallace. How ya doin'? Say, P.W. have you noticed that two-thirds of the people in your country are black? Does the name 'Custer' mean anything to you?"

Putting the matter more broadly, no state power, or transnational constellation of the power of states, can be counted on to make the needed progress towards human rights. Holders of state power are often too distant from people's concerns, and as we have seen may have conflicting agendas. My comrade Juan Garcés says that this is "the permanent battle, which we neither lose nor win." In this as in any other battle, we need to choose our allies and our tactics well. Universal jurisdiction has the inherent limit that it invokes state power, or a constellation of such power. Often, even that invocation is mediated by the discretion of state actors to bring or not bring claims to court.

My law partner Sam Buffone was in Chile a couple of years ago. He did not see a single public space named for Pinochet, nor any mention of his name except in the human rights museum. He has been erased from much of the visible national consciousness, although his misdeeds have not been forgotten. Judicial judgments did not do this. A popular movement did.

And one must recall that for all the fine words and noble ambitions of the new South African constitution, the most significant human rights news out of South Africa in recent times is not the doings of its courts but the strike by 80,000 miners and the post-apartheid police forces shooting and killing 34 strikers at the Marikana mine in 2012.

HOMAGE TO JUAN GARCÉS

On September 21, 1976, Orlando Letelier and Ronni Moffitt were murdered in Washington, D.C. with a bomb placed in Orlando's car. The murder was planned by Michael Vernon Townley, an American citizen who had lived in Chile for many years and who was an agent of the Chilean secret police. He had recruited Cuban émigrés to help him prepare the car bomb he used for the murder. Secret police head Contreras and Pinochet himself were implicated in the killing.

My partner Sam Buffone and I sued the Republic of Chile, Townley and the other perpetrators. We relied on the Foreign Sovereign Immunities Act, which had been enacted in 1976. We obtained a civil judgment that we eventually collected. The story is told in an article cited in Appendix C. The FBI investigated the case for two years, often wrongly targeting Orlando's colleagues and friends. Finally, the Department of Justice obtained indictments against the Cuban émigrés, but gave Townley immunity and put him in the Witness Protection Program where he remains. During the Clinton administration, the FBI developed evidence sufficient to indict Pinochet for complicity in the murder, but the Justice Department declined to proceed. We later obtained evidence that during the

Pinochet era, the FBI cooperated with Chilean intelligence agents to target refugees from the coup that brought Pinochet to power.

This brings the tale to the brilliant and courageous work of Juan Garcés. As you know, Juan brought the proceedings in Spain that resulted in Pinochet being charged with complicity in more than 4,000 cases of torture and disappearance. Pinochet was arrested in London in 1998. I received a telephone call in my office at Washington College of Law from the British barristers who had been briefed by the UK Treasury Solicitor. Yes, I said, I was counsel in the Letelier litigation, and yes I know something about immunity.

So my colleague Jane Tigar and I went to London to assist in the extradition litigation. Once there, we observed the legal lineup. The extradition proceeding was in the name of the "Kingdom of Spain." Juan Garcés had some but not complete control over the legal strategy to be pursued, as he was lawyer for the victims' families and a private prosecutor under Spanish law.

Jane and I wanted to know whether the pursuit of this extradition, with the prospect of Pinochet being tried in Spain, was truly in the interest of the movement in Chile for restoration of democracy. We called Juan Pablo Letelier, Orlando's son and a leader of that movement. He and some of his colleagues came to London and we met and talked far into the night. All were agreed.

And indeed, the Pinochet litigation teaches an important lesson. Yes, Pinochet was allowed to return to Chile. The UK government would not enforce an extradition order, assertedly on grounds of Pinochet's ill health. But the proceedings had exposed Pinochet's role in a public way. They had damaged his credibility and perceived authority. Back in Chile, people were empowered to pursue cases, claims and issues arising from the coup. So it was not some abstract idea of universal jurisdiction that was vindicated, but rather the use of a legal strategy in the service of social change and in ways that empowered rather than disempowered a movement for change.

APPENDIX A
UPDATED STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (2004) (EXCERPT)

Having been established by the Security Council acting under Chapter VII of the Charter of the United Nations, the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (hereinafter referred to as "the International Tribunal") shall function in accordance with the provisions of the present Statute.

Article 1

Competence of the International Tribunal

The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.

Article 2

Grave breaches of the Geneva Conventions of 1949

The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(a) willful killing;
(b) torture or inhuman treatment, including biological experiments;
(c) willfully causing great suffering or serious injury to body or health;
(d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
(e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
(f) willfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
(g) unlawful deportation or transfer or unlawful confinement of a civilian;
(h) taking civilians as hostages.

Article 3

Violations of the laws or customs of war

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
(b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
(c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or
buildings;
(d) seizure of, destruction or willful damage done to institutions dedicated to religion, charity and
education, the arts and sciences, historic monuments and works of art and science;
(e) plunder of public or private property.

Article 4

Genocide

1. The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) killing members of the group;
(b) causing serious bodily or mental harm to members of the group;
(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) imposing measures intended to prevent births within the group;
(e) forcibly transferring children of the group to another group.

3. The following acts shall be punishable:

(a) genocide;
(b) conspiracy to commit genocide;
(c) direct and public incitement to commit genocide;
(d) attempt to commit genocide;
(e) complicity in genocide.

Article 5

Crimes against humanity

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

(a) murder;
(b) extermination;
(c) enslavement;
(d) deportation;
(e) imprisonment;
(f) torture;
(g) rape;
(h) persecutions on political, racial and religious grounds;
(i) other inhumane acts.

Article 6

Personal jurisdiction

The International Tribunal shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.

Article 7

Individual criminal responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he

knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.
4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.
Article 8
Territorial and temporal jurisdiction
The territorial jurisdiction of the International Tribunal shall extend to the territory of the former
Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters. The temporal jurisdiction of the International Tribunal shall extend to a period beginning on 1 January 1991.
Article 9
Concurrent jurisdiction
1. The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.
2. The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.
Article 10
Non-bis-in-idem
1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal.
2. A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if:

(a) the act for which he or she was tried was characterized as an ordinary crime; or
(b) the national court proceedings were not impartial or independent, were designed to shield the
accused from international criminal responsibility, or the case was not diligently prosecuted.

3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.
Article 11
Organization of the International Tribunal
The International Tribunal shall consist of the following organs:
(a) the Chambers, comprising three Trial Chambers and an Appeals Chamber;
(b) the Prosecutor; and
(c) a Registry, servicing both the Chambers and the Prosecutor.

APPENDIX B

WAR CRIMES ACT

18 U.S.C. §2441 (Eff. November 26, 1997)

(a) Offense.--Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.

(b) Circumstances.--The circumstances referred to in subsection (a) are that the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States (as defined in section 101 of the Immigration and Nationality Act).

(c) Definition.--As used in this section the term 'war crime' means any conduct--

(1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;

(2) prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;

(3) which constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict; or

(4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.

APPENDIX C

This is a list of some of my earlier work that is relevant to the issues we are considering.

- What Are We Doing to the Children: An Essay in Juvenile (In)justice, given as the David H. Bodiker Lecture, Ohio State University Moritz College of Law, September 24, 2009, published 7 Ohio State Journal of Criminal Law 849 (2010) (international and domestic standards for treatment of juveniles)
- Narratives of Oppression, 17 Human Rights Brief 34 (2009) (clash of cultures)
- What Lawyers? What Edge?, 36 Hofstra L. Rev. 521 (2007) (discussion of John Yoo)
- THINKING ABOUT TERRORISM: The Threat to Civil Liberties in a Time of National Emergency (2007) (much discussion of international tribunals, universal jurisdiction, amnesty)
- Universal Rights & Wrongs: Roper v. Simmons, Torture and Judge Posner (a paper presented as the 2006 Will E. Orgain Lecture at The University of Texas School of Law, April 6, 2006 initial publication at monthlyreview.org website, http://www.monthlyreview.org/0506tiger.htm, and online at the UT law website.
- LAW AND THE RISE OF CAPITALISM (new edition 2000).
- The Power of Myth: Justice, Signs & Symbols in Criminal Trials, Litigation, Fall 1999, p. 25
- Defending: an essay. 74 Tex. L. Rev. 101 (1995)
- Paul Touvier and the Crime Against Humanity, 30 Tex. Int'l L. J. 286 (1995)[with Casey, Giordani & Mardemootoo]
- Intending, Knowing and Desiring: The Mental Element in Federal Criminal Law, Lecture, Cleveland-Marshall College of Law, October 27, 1988, published as "Willfullness" and "Ignorance" in Federal Criminal Law, 37 Cleveland State Law Review 525 (1990)
- *Haymarket: Whose Name the Few Still Say with Tears*, a play in eleven scenes, first performed by Remains Theater, Chicago, Illinois, October 1987
- Essay, "Crime-Talk, Rights-Talk and Doubletalk," 65 Tex. L. Rev. 101 (1986)
- The Right of Property and the Law of Theft, 62 Tex. L. Rev. 1443 (1984)
- Book Review, Law and Revolution: The Formation of the Western Legal Tradition, 17 U.C. Davis L. Rev. 1035 (1984) (discussing Professor Harold Berman's thesis about the path towards "universal" norms, I offer my own view of this process; much discussion of 12th and 13th Century relevant history)
- The Foreign Sovereign Immunities Act And The Pursued Refugee: Lessons From Letelier v. Chile, 1982 Michigan Yearbook of International Legal Studies 421