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Keynote: The Rights of the Underclass in 2015

Peter Weiss

KEYNOTE: THE RIGHTS OF THE UNDERCLASS IN 2015

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It gives me great pleasure to be here in the company of two old and dear friends: Ved Nanda, distinguished laborer in the vineyards of international law and my fellow traveler on the road to a nuclear weapons free world, and George Shepherd, who worked with me in the early days of the American Committee on Africa when he returned to teach at the university here after helping to set up rural cooperatives in Uganda. They invited me to give a talk to a non-legal audience at the School of International Studies in 1990. I called it "The Rights of the Underclass", which accounts for the peculiar title of my paper today. After twenty-three years, it is still relevant.

I don't suppose there is any doubt that good development needs good law, but, just to reinforce the point, let me quote from what Helen Clark, the current administrator of the United Nations Development Program ("UNDP"), said in a speech she gave a year ago in Kampala at the Assembly of States Parties to the International Criminal Court: "The rule of law underpins the UN's mission to advance peace, development and human rights and, as such, is central to the mandate of UNDP."[1]

Now if you will permit me, I will begin with a personal note concerning some connections between my background and the theme of this conference. My first full time job was as a translator/investigator on the staff of the Decartelization Branch of the United States Office of Military Government in Berlin in 1946-47. The head of this agency was James Stewart Martin, a brilliant young man – he was thirty-two at the time – whom I had met when he was a professor and I was a student at St. John's College in Annapolis. Nobody talks about cartels any more, but our job at the time was to break up the German cartels that had financed Hitler's rise to power. After Jim resigned from his assignment when it had become increasingly difficult to carry out, he wrote a book titled *All Honorable Men*, which dealt with the collaboration between Wall Street and German industry and

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1. Helen Clark, UNDP Administrator, Speech at the 11th Session of the Assembly of States Parties to the International Criminal Court: Human Development and International Justice (Nov. 19, 2012), *available at* http://www.undp.org/content/undp/en/home/presscenter/speeches/2012/11/19/helen-clark-human-development-and-international-justice-/ (referencing her speech at Kampala).

banks during the pre-war period of the Third Reich.[2] As an example of the phoenix like quality of certain literary works, I can tell you that I recently heard from a professor at a leading university who specializes in the republication of important out-of-print books and who is interested in republishing *All Honorable Men*.

Fast forward, but not too fast. Five years after Berlin, upon graduating from Yale Law School, I received an offer too good to refuse. The President and Dean of St. John's, Stringfellow Barr and Scott Buchanan, had retired from the college after an exhausting and ultimately successful battle with the Naval Academy across the street, which had come up with the quaint notion that most of the space occupied by the college could be better used by the Academy. They created the Foundation for World Government with a one million dollar grant, which was a lot of money in those days, from Anita McCormick Blaine, the International Harvester heiress. It soon became clear to them that, given the huge economic disparity between what were then called developed and underdeveloped countries, talk of world government was baying at the moon. They therefore focused their efforts on ideas and institutions aimed at bridging the gap between rich and poor countries. Barr had written a pamphlet called "Let's Join the Human Race," from which I can remember only one statistic, namely that the annual budget of the United Nations for technical assistance to underdeveloped countries was twenty million dollars, the same as that of New York City's s sanitation department.[3]

One of the creations of the Foundation for World Government was IDPA, for International Development Placement Association, the mission of which was to send young Americans with technical and professional skills to underdeveloped countries to work for local wages. I was asked to run IDPA and I did so for two years, during which we placed a fair number of doctors, engineers, city planners, community development workers and others as employees of local institutions in Asia, Africa, and Latin America. Eventually we had to fold our tents because the two ultraconservative ladies running the Charitable Organizations Section of the Internal Revenue Service decided that, while IDPA was in a real sense, a precursor of the Peace Corps, it was just an employment agency and therefore not entitled to operate on tax exempt foundation funds.

Having established my competence to deal with the subject of today's conference on the basis of two short jobs I had about sixty years ago, let's get serious . . . I have a few short suggestions for Development 2015 at the end of this paper, but in essence I will leave that task to the experts you heard this morning and will hear this afternoon. For now, I will simply state the obvious: the challenge in and after 2015 will be to bring up the rear in accomplishing the eight millennium development goals ("MGDs") on which some progress, but not nearly enough, has been made.

That said, let me turn to what I would like to see as MDG number nine: reining in the power of multinational corporations to do harm to the underclass,

2. JAMES STEWART MARTIN, ALL HONORABLE MEN (1950).

3. STRINGFELLOW BARR, LET'S JOIN THE HUMAN RACE (1950).

which makes up most of the world's population, or, for that matter, the middle class, where there is one. Let me be clear about this: I do not hate corporations. I worked for quite a few of them, including some pretty big ones, during the part of my legal career devoted to intellectual property. In the course of doing so I met some very nice people. I even felt sorry for some of them, who might have liked doing some pro bono human rights work, but felt strapped into a modus operandi which put profit for shareholders above every ethical consideration.

2012 saw the publication of a remarkable legal tome consisting of forty-seven essays by legal scholars recruited by Antonio Cassese, the eminent Italian international law professor who died shortly before the publication of this, his last work.[4] He contributed the introduction and the conclusion, as well as a number of interior pieces assigned to other authors who failed to meet their deadlines, an occurrence not unusual in circles of academic literature.

What makes the book remarkable is that despite its title, *Realizing Utopia*, and its obvious dedication to ideas about how in the next ten to twenty years the law might be used to bring about a more just and efficient world, one comes away from its pages without much optimism about achieving that objective. Indeed, Cassese himself quotes Aldous Huxley, anno 1925, as saying that utopians "are much too preoccupied with what ought to be to pay any serious attention to what is."[5]

Cassese argues that states are, and will remain for the foreseeable future, the main players in the game of international law. It is not easy to disagree with that proposition when one considers, for instance, how the nuclear weapons states are flouting the unanimous mandate of the International Court of Justice to negotiate in good faith for a nuclear weapons free world, or how states fail to take any serious steps to deal collaboratively with climate change, or how the millennium goal of eliminating poverty is treated by states as a matter of entitlement rather than rights.

But then there is another recent book, this one by Ruti Teitel of New York Law School, felicitously titled *Humanity's Law*, which largely succeeds in demonstrating that over the last half century international law has moved from a state-centric to a person-centric system.[6] Cassese might even agree with that, since he admits that one of the bright spots in the current development of international law is transnational litigation. i.e. individuals bringing suits in one country based on events which occurred in another. This is happening not only in human rights but also in financial matters. Recently, for instance, JP Morgan settled with the U.S. government for thirteen billion dollars just before it was about to be sued in connection with transactions which occurred in London.[7]

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4. REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW (Antonio Cassese ed 2012).

5. *Id.* at xvii (quoting Aldous Huxley).

6. RUTI TEITEL, HUMANITY'S LAW 35-36, 55-56 (2011).

7. Aruna Viswanatha et. al, *JPMorgan Says 'Mea Cupla' in $13 Billion Settlement With U.S.*, REUTERS (Nov. 19, 2013), http://www.reuters.com/article/2013/11/19/us-jpmorgan-settlement-idUSBRE9AI0OA20131119.

What does all this have to do with development after 2015? Only this: That multinational corporations, which are in many respects more powerful actors on the world scene than even states, are basically unregulated in their activities in the developing world. They are poachers on the terrain of the underclass. Some of their offenses are direct, such as pollution of land and water by Texaco in Ecuador[8] or pharmaceutical testing violating accepted standards by Pfizer in Nigeria.[9] Frequently the alleged tort or crime consists of aiding and abetting or actively participating with repressive governments in murdering union officials (Mercedes Benz in Argentina)[10] or making slave labor available by repressive governments to corporations (Unocal in Burma).[11]

A great deal of anti-corporate transnational litigation has taken place in recent years, with indifferent results. I would like to tell you about one case which illustrates what the victims of corporate behavior in the developing world are up against in their search for justice.

A decision rendered by the Court of Appeals for the Second Circuit in New York in 1980 brought back to life a long neglected law dating back to the first Judiciary Act of the United States adopted by the Congress in 1789.[12] Known as the Alien Tort Claims Act, or Alien Tort Statute ("ATS"), it gave an alien the right to sue in a U.S. court for a tort in violation of the law of nations, as international law was called at that time. It did not say whether the tort had to be committed in the United States, nor whether the defendant had to be a US citizen or could be another alien. The 1980 case, *Filartiga v. Peña-Irala*,[13] in which I happened to be lead counsel, was brought by the sister of a Paraguayan teenager against a Paraguayan police official then living in the United States, who had tortured her brother to death in Paraguay.[14] It was a shot across the bow aimed at their father, who was a leading opponent of General Stroessner, the long running dictator of Paraguay.[15] The Second Circuit, taking the broad language of ATS literally, held

8. *See* Juan Forero, *Rain Forest Residents, Texaco Face Off in Ecuador*, NPR (Apr. 30, 2009), http://www.npr.org/templates/story/story.php?storyId=103233560.

9. *Pfizer: Nigeria Drug Trial Victims Get Compensation*, BBC NEWS AFRICA (Aug. 11, 2011) http://www.bbc.co.uk/news/world-africa-14493277.

10. Lawrence Hurley, *U.S. Top Court Rules for Daimler in Argentina Human Rights Case*, REUTERS (Jan. 14, 2014), http://www.reuters.com/article/2014/01/14/us-usa-court-rights-idUSBREA0D0YF20140114.

11. Doe I v. Unocal Corp., 395 F.3d 932, 936-37 (9th Cir. 2002).

12. 28 U.S.C. § 1350 (2006) ("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 or a treaty of the United States.").

13. Filartiga v. Peña-Irala, 630 F.2d 876, 876 (2d Cir. 1980).

14. Id. at 878.

15. *E.g.*, Mark Philip Bradley, *Introduction* to HUMAN RIGHTS AND REVOLUTIONS, at vii, vii (Jeffrey N. Wasserstrom et al, eds., 2007); *Filártiga v. Peña-Irala*, CENTER FOR CONST. RTS., http://ccrjustice.org/ourcases/past-cases/fil%C3%A1rtiga-v.-pe%C3%B1-irala (last visited June 7, 2014) [hereinafter *Filártiga Summary*].

for the plaintiffs—the father, living in Paraguay, was also a plaintiff—awarding them 10.5 million dollars, which has never been collected.[16]

The *Filartiga* precedent opened the door to a steady stream of transnational litigation, against both individuals and corporations.[17] It was followed for thirty years in several other circuits. But then, in 2010, came a totally unexpected decision from the Second Circuit, dismissing a corporate ATS case on the highly questionable ground that there is no such thing as corporate liability under international law. The case was *Kiobel v. Royal Dutch Petroleum*.[18] It arose from the company's activities in prospecting for and extracting oil in the Ogoni region of Nigeria, which had triggered a strong protest movement from the local people.[19] The complaint alleged that the company had requested and received the assistance of the Nigerian army and police in quashing the protest movement, which they had accomplished through rape, beating, killings and other gross human rights violations, all of which were aided and abetted by the company.[20]

On appeal to the Supreme Court, the first hearing went reasonably well, with the U.S. government chiming in in support of the plaintiffs, arguing that if the ATS was good enough for individuals it should be equally good for corporations.[21] But then, a few days after the hearing, came the second thunderbolt from Olympus, an order from Chief Justice Roberts for rehearing and rebriefing on a questions which neither side had raised in the litigation below, i.e. "Whether and under what circumstances the Alien Tort Statute . . . allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States."[22] As a result, the court was inundated by a new slew of briefs and amicus briefs from governments, chambers of commerce and other business organizations arguing for dismissal, as well as human rights

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16. Filartiga v. Peña-Irala, 577 F. Supp. 860, 867 (E.D.N.Y. 1984); *Filártiga Summary*, *supra* note 15.

17. For example, Sosa v. Alavarez-Machain, 542 U.S. 692 (2004) where, while rejecting the claim at hand, the Supreme Court affirmed an individual's right to bring a claim under the ATS; Wiwa v. Shell Petroleum Dev. Co. of Nigeria Ltd., 355 Fed. Appx. 81 (2d Cir. 2009). This case ended with Shell agreeing to pay the Wiwa family $15.5 million. *Wiwa et al v. Royal Dutch Petroleum et al*, CENTER FOR CONST. RTS., http://ccrjustice.org/ourcases/current-cases/wiwa-v.-royal-dutch-petroleum (last visisted July 30, 2014).

18. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010), *aff'd*, 133 S. Ct. 1659 (2013) (affirmed on different grounds).

> Together, those authorities demonstrate that imposing liability on corporations for violations of customary international law has not attained a discernible, much less universal, acceptance among nations of the world in their relations *inter se*. Because corporate liability is not recognized as a "specific, universal, and obligatory" norm, it is not a rule of customary international law that we may apply under the ATS.

Id. at 145 (citation omitted).

19. *Id.* at 123.

20. *Id.*

21. Brief for the United States as Amicus Curiae Supporting Petitioners, Kiobel v. Royal Dutch Petroleum Co., 132 S. Ct. 1738 (2012) (No. 10-1491).

22. Kiobel v. Royal Dutch Petroleum Co., 132 S. Ct. 1738 (2012) (memorandum restoring case to calendar for reargument).

organizations and some legal organizations, taking the opposite view. In the event, business won and, disappointingly, by a unanimous decision.[23]

The five conservative justices declined to answer the question of corporate liability, which had brought the case to them in the first place.[24] Instead, they opted for a presumption against extraterritoriality,[25] which sounds to quite a few lawyers like something the cat dragged in. Indeed, it was not endorsed by the four liberal justices, who, in a concurring opinion by Justice Breyer, based their agreement with the result on the lack of a United States national interest in the fact situation of the case.[26]

What could that national interest have been?

First, the often proclaimed interest of the U.S. government in promoting human rights throughout the world, as evidenced, inter alia, by the State Department's annual country by country report on the state of human rights.[27]

Second, the fact that Shell, a subsidiary of Royal Dutch, carried out extensive operations in the United States and that it was not in the national interest of the U.S. to allow a company belonging to a corporate family that engaged in gross human rights violations to operate in the United States, Justice Breyer's opinion took it for granted that the United States should not be a haven for foreign torturers, but failed to extend that principle to corporations.[28]

Third, that U.S. companies, which presumably could be enjoined from committing gross human rights violations in foreign countries, should not be deprived of a handy mechanism for leveling the playing field with their foreign competitors.

And fourth, that the *Kiobel* case was wending its way through US courts at a time when the new principle of universal jurisdiction, which holds that certain practices are so heinous that they should be subject to criminal and civil

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23. *See Kiobel v. Royal Dutch Petroleum*, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/kiobel-v-royal-dutch-petroleum (last visited July 30, 2014) (listing amicus briefs filed after Mar. 5. 2012 order for rehearing and the unanimous decision on April 17, 2013).

24. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1664 (2013) ("The question here is not whether petitioners have stated a proper claim under the ATS, but whether a claim may reach conduct occurring in the territory of a foreign sovereign.").

25. *Id.* at 1669 ("We therefore conclude that the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption.").

26. *Id.* at 1670-71.

> Unlike the Court, I would not invoke the presumption against extraterritoriality. Rather, guided in part by principles and practices of foreign relations law, I would find jurisdiction under this statute where (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.

Id. at 1671 (citation omitted).

27. *See Human Rights Reports*, U.S. DEP'T. OF STATE, http://www.state.gov/j/drl/rls/hrrpt (last visited July 30, 2014).

28. *Kiobel*, 133 S. Ct. at 1671 (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004)).

prosecution anywhere in the world, was gaining acceptance in a number of foreign countries.[29] Thus the *Kiobel* decision, undoing thirty years of transnational litigation under ATS, stands as another example of negative American exceptionalism.

It is, indeed, a giant step backward in American jurisprudence. But all is not lost. Lower courts, many of which regard international law with suspicion if not outright animosity, have lost no time in throwing out pending ATS cases, giving the *Kiobel* decision an absolutist interpretation which can be summarized as "if it happened abroad, fagettaboutit". [30] That interpretation, however, is not justified by a close reading of the decision. Not only the four liberals, but also the Chief Justice and Justice Kennedy, who knows more international law than any of his Supreme colleagues, made clear that, presumption against extraterritoriality or not, the door was not completely closed to ATS cases.[31] Even more significantly, two of the most conservative justices, Alito and Thomas, but interestingly not Scalia, took their three conservative brethren to task for not having gone far enough in making the presumption an absolute rule.[32] Appeals being taken from some of the dismissed ATS cases may provide guidance on how to structure a case that may make it through the ATS' slightly ajar door.[33]

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29. See, for example, Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3 (Feb. 14) for a demonstration of Beligum's universal jurisdiction statute; see also Naomi Roht-Arriaza, *The Pinochet Precedent and Universal Jurisdiction*, 35 NEW ENG. L. REV. 311, (2001) for a discussion of universal jurisdiction cases from Spain and the United Kingdom. "The court found that the lack of express authorization for universal jurisdiction in the 1948 Genocide Convention did not mean such jurisdiction was barred, as it was consistent with the intent of the drafters." *Id.* at 313 (citation omitted).

30. *See, e.g.*, Roger Alford, *Lower Courts Narrowly Interpet* Kiobel, OPINIO JURIS, http://opiniojuris.org/2013/09/23/lower-courts-narrowly-interpret-kiobel (last visited July 30, 2014).

31. *See Kiobel*, 133 S. Ct. at 1669 (Chief Justice Robert's majority opinion stating that "[o]n these facts, all the relevant conduct took place outside the United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application") (Justice Kennedy, in his concurrence, stating "[t]he opinion for the Court is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute").

32. *Id.* at 1169-70.

33. Two courts have already ruled that ATS claims should proceed on fact situations distinguishable from those in *Kiobel*, 133 S. Ct. at 1669. The first concerns a case pending at the U.S. District Court of Massachusetts, Sexual Minorities Uganda v. Lively, 960 F.Supp.2d 304 (Mass. Dist. Ct. 2013), in which plaintiffs allege that defendant, an American pastor, aided and abetted persons in Uganda in persecuting members of the LGBTI community in that country. *Id.* at 310. Defendant's motion for dismissal based on the *Kiobel* holding on extraterritoriality was denied on August 14, 2013, on the ground that he was an American citizen and that his aiding and abetting was carried out both in Uganda and in the United States from his office in Massachusetts. *Id.* at 335. The second case, Al Shimari v. CACI Intern., Inc., 679 F.3d 205 (4th Cir. 2012), in which the Fourth Circuit, on May 12, 2012, also rejected a *Kiobel* defense. Plaintiffs, former detainees at Abu Ghraib, Iraq, alleged torture and other abuse by defendant corporation and one of its employees. *Id.* at 209. The court distinguished the fact situation from that in *Kiobel* on multiple grounds, including that defendant, a military contractor, was incorporated in Delaware and domiciled in Virginia, that the torturers were also U.S. citizens, and that the contract between CACI and the U.S. Department of Interior was executed in Iowa and administered in Colorado. *Id.* at 227.

A word now about universal jurisdiction. You can think of it as the legal regime to which Antonio Cassese and his contributors aspire, but which they despair of seeing realized in their lifetimes. A regime, if you will, in which legal positivism, in which the law is no more than what lawmakers in each country prescribe, is replaced by a global system based on certain intransgressible fundamental principles. And what is more and relatively new, a regime in which gross violations of fundamental universal norms do, or at least should, give rise to jurisdiction over such violations even if committed in another country. Universal jurisdiction is usually thought of in terms of human rights violations, but it need not be so restricted. *Lex mercatoria*, the merchant law, was used to facilitate trade throughout medieval Europe according to a set of agreed upon principles.[34] It survives today, albeit inadequately, under different names through a network of international commercial and financial agreements.[35]

It is not difficult to imagine how a regime efficiently based on an updated *lex mercatoria* and the Universal Declaration of Human Rights,[36] and its many offspring, would make for a more orderly and more just global society, one that would promote development and prevent conflict rather than perpetually busy itself with conflict resolution.

I think I am supposed to make some concrete suggestions about bridging the gap between rich and poor countries after 2015. Here are a few:

1. Stop calling economic and social rights aspirational and start treating them as real. The failure to be free from hunger is just as harmful as the failure to be free from torture, if not more so.
2. Stop calling rights entitlements. A decent standard of living is a right that nobody can take away from you. An entitlement can be taken away by any number of political organs. Like, for instance, the Tea Party.
3. The Tobin tax, 0.01 percent on financial transactions, could, according to some calculations, wipe out the deficit. Does anybody seriously believe it would stop the financial markets from functioning?
4. Since corporations of a certain size are such powerful actors on the world scene, should they be internationally incorporated and internationally regulated?

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34. Abul F.M. Maniruzzaman, *The* Lex Mercatoria *and International Contracts: A Challenge for International Commercial Aribitration?*, 14 AM. U. INT'L L. REV. 657, 658 (1999).

35. *See, e.g.*, INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW, UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACT, Art. 1.6 (2010). "These Principles set forth general rules for international commercial contracts. . . . They may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like." *Id.* pmbl. SISU, THE PRINCIPLES OF EUROPEAN CONTRACT LAW 2002, PART I, II, AND III, art. 1:101 ("These Principles are intended to be applied as general rules of contract law in the European Communities. . . . These Principles may be applied when the parties . . . have agreed that their contract is to be governed by 'general principles of law,' the 'lex mercatoria' or the like.")

36. *See* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

5. I am not a great fan of the prison system as currently administered, but until somebody invents a more humane and restorative form of punishment, isn't it time that financial crooks other than inside traders and Ponzi schemers go to jail? After all, even thirteen billion is only money, particularly if it comes out of corporate funds rather than personal ones.
6. Now that those two ladies are no longer running the charity section of the Internal Revenue Service, let's bring back IDPA and send idealistic and competent technicians and professionals to work as employees of local agencies at local wages in developing countries.
7. Last, but no way least, let us devise a more efficient system for insuring corporate accountability. Corporations should be free to devote their full energy to providing the world's people with goods and services, without becoming bogged down in corruption and human rights violations.

I am jumping around quite a bit here, so let me end with this: I have a friend who likes to needle me by saying "law is the dead hand of the past laid upon the present." To which I usually reply "law is the burning vision of the future leading us onward." Of course we are both wrong. But I still prefer my version.