

April 1999

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Recommended Citation

Minna Schrag; Kenneth Roth; Penny Venetis; John S. Martin, Jr.; and Ruth Wedgewood, *The United States: Human Rights Leader or Laggard?*, 11 Pace Int'l L. Rev. 261 (1999)

Available at: <http://digitalcommons.pace.edu/pilr/vol11/iss1/9>

**THE UNITED STATES:
HUMAN RIGHTS LEADER OR LAGGARD?**

Moderator

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Panelists

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INTRODUCTION

MS. SCHRAG:

Welcome to the final panel discussion of this extraordinary commemoration weekend. I am Minna Schrag, Chair of the International Law Committee at the New York City Bar Association.

Our discussion is concerned with the application of the Universal Declaration, especially here in the United States. We are shifting the focus somewhat from the more theoretical discussions that we had in yesterday's panels to a more concrete level.

Ken Roth will begin by rehearsing for you the history, both longstanding and recent, of the United States' reluctance to endorse international human rights instruments that give effect

to the Universal Declaration and its other failings with regard to international institutions. I think that this discussion will shed some light on how attitudes in the United States towards international human rights issues might be changing and might be changed.

I would like to make a personal observation in exactly this regard before I introduce the panel. Earlier this week, I was speaking with some colleagues, experienced and very sophisticated lawyers in New York, leaders in the Bar here in New York City, on the issue of this conference commemorating the Universal Declaration, and I am sad to say that not one of them had ever read it. One of them had a dim sense that it had something to do with Eleanor Roosevelt.

Now, perhaps you will conclude that I am simply hanging around with the wrong people. My conclusion is a different one, and that is that both the American public and, particularly, the legal profession have to become much, much better informed about the principles of international human rights. This is certainly a formidable task, but it is an essential one if the fundamental attitudes in the United States that we all deplore are ever going to be changed.

Now to the panel. Ken Roth is Executive Director of Human Rights Watch, one of the preeminent human rights organizations in the world, with extraordinary presence and authority worldwide. Ken, as most of you already know, is a forceful and eloquent advocate for human rights issues.

Penny Venetis teaches at Rutgers University Law School, where she runs the Constitutional Litigation Workshop. More to the point of this morning's panel, she represents several people who had sought political asylum in the United States and had been detained under outrageous conditions by the INS. Last month, the United States District Court for the District of New Jersey found that it had jurisdiction under the Alien Tort Claims Act to hear claims for damages from those detainees, and the substance of the claims is based, not on domestic United States law, but on principles of international human rights law.

I suggest that there are many who would have thought that such a claim and the arguments on which it is based are unthinkable in the United States courts. Plainly, they are not.

Plainly, there are more chapters to be written in this particular lawsuit and in the development of this area of law. But it is an extraordinary accomplishment.

John Martin has had a distinguished career in public service as well as in private practice. He has served as an Assistant U.S. Attorney in the U.S. Civil Solicitor General's Office, as U.S. Attorney here in the Southern District of New York, and as U.S. District Court Judge in the District of New York.

A couple of years ago, he was confronted with a case brought under the Alien Tort Claims Act, the Torture Victim Protection Act, and the national law of Rwanda against a former Rwandan official. The case was brought by several people who had lost family members in the recent genocide. In upholding the claims and in assessing damages on a default judgment, Judge Martin seriously applied international prohibitions against genocide and torture.

To say that Ruth Wedgwood is Professor of International Law at Yale and a Senior Fellow at the Council on International Relations does not begin to describe her formidable intellect and ability. She has followed events at the United Nations with great insight, and her recent piece in the current issue of *Foreign Affairs* on the Rome negotiations for the International Criminal Court is one of the most astute that I have seen. She will be addressing, in particular, issues arising from the Pinochet matter.

With that, I turn to the panel.

Kenneth Roth,
Executive Director, Human Rights Watch

I think, if one made a fair assessment of human rights practices in the United States, one would have to say that, all things considered, overall we are pretty fortunate. I am going to say some pretty critical things about the United States in a moment, but I do not anticipate being arrested at the end of this conference. I expect Ruth and I will get into a rather heated debate, and if that somehow comes to blows and I am arrested on criminal charges, I expect due process. So in that sense, in some of the basic ways, we do have broad respect for human rights here in the United States.

You would think that our government could be proud of its overall record, with the exceptions that I will get into in a moment. But ironically, the U.S. Government's attitude toward international human rights law has been one of utter distrust. You see this first in how the United States has gone about ratifying — or not ratifying — the leading human rights treaties. Many of them have not been ratified at all. The treaty dealing with the rights of women,¹ the treaty dealing with the rights of children,² the treaty dealing with economic, social, and cultural rights,³ the leading treaty dealing with humanitarian law or the laws of war⁴ — these the United States has not gotten around to ratifying and, in some cases, there is no prospect of ratification.

¹ Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1981, U.N.T.S. No. 20378 Vol. 1249.

² Convention on the Rights of the Child, Nov. 20, 1989, U.N. GA Doc. A/Res/44/25 (Dec. 12, 1989).

³ International Covenant on Economic, Social and Cultural Rights, opened for signature Dec. 16 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

⁴ Protocol Additional to the Geneva Conventions of Aug. 12 1949, Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Dec. 12 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1291).

Even in the case of the ones that have been ratified, such as the International Covenant on Civil and Political Rights,⁵ the one that in many ways is most like the U.S. Constitution, the U.S. Government goes about ratification in a rather odd way.

The first thing it does is it sends Justice Department lawyers to comb through the treaty and to carefully figure out where the treaty might require the United States to do something more than U.S. constitutional and statutory law requires. If there is any greater burden on the United States, the U.S. government enters what is known as a "Declaration, Reservation, or Understanding," so that the United States does not have to change its practices in any way, despite the higher demands of international human rights law.

Then, in case the Justice Department lawyers made a mistake, the U.S. government goes one step further and declares the treaty "non-self-executing," which means that you cannot simply go into court and state a claim under the treaty; what is needed is further implementing legislation on the part of Congress in order to give you that formal right to file a lawsuit under the treaty. But then, Congress never gets around to enacting the implementing legislation because the Administration says, "We already comply with the treaty, so there is no need."

So at the end of this process, ratification turns into a purely cosmetic gesture, something that says to the rest of the world: "Yes, we are willing to be part of the international human rights system;" but that says to Americans, "But, sorry, not for you. This is not meant to make any difference at all in your rights."

Now, is this just an academic point or does it matter? I think it matters for two broad sets of reasons.

One is that human rights law, as articulated in international treaties, actually gives us greater protection in certain areas than U.S. constitutional and statutory law. Let me just give you a few examples here, and then we can discuss at greater length during the questions.

One clear example is that the International Covenant on Civil and Political Rights prohibits the execution of anyone who was under eighteen at the time that he or she commits an of-

⁵ International Covenant on Civil and Political Rights, U.N.T.S. No. 14668, Vol 999, (1976) G.A. Res. 2200A (XXI), 21 I.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171.

fense, usually murder. The United States, as you know, is one of the tiny handful of governments around the world that still executes child offenders. In fact, there have been a few such executions just in the last year. This is one of those areas where the U.S. government carved out an exception and said we would not be bound by the Covenant. But if the United States took a more embracing attitude toward human rights treaties, it would have changed its practice rather than simply shunting the international standards aside.

Similarly, international human rights law on the question of discrimination prohibits not only discrimination with discriminatory intent, but also discrimination with discriminatory effect, obviously a big step beyond U.S. law as it is currently understood.

To just give you one example where that might make a difference if the United States were willing to be bound by the stronger international standards, Human Rights Watch recently put out a study looking at the effect of the law that says that if you commit a felony, you are disenfranchised, you do not get to vote. The effect of that law, which is in fact not widely followed around the world but has become accepted practice in the United States, has led to the disenfranchisement of up to one-third of the black male population in several states. Now, was this intended? You can debate that. Some say actually it was, but let's leave that aside for a moment.

Clearly, the discriminatory effect, the impact, is so severe that this practice bears scrutiny. Can you really justify disenfranchising one-third of the black male population? I would argue that this presents a serious human rights problem that we are ignoring because we are not following the international standards and are simply relying on domestic standards.

Similarly, international standards prohibit not only cruel and unusual punishment, the standard we are used to thinking about in our Constitution, but also degrading treatment. What does that mean? It would have to be litigated, but it means something less severe than cruel and unusual punishment. Perhaps that would give us a better tool to examine things like the sexual abuse of male and female prisoners that is so pervasive in the United States today; or the use of super-maximum security facilities with prolonged isolation, and inmates locked

down twenty-three out of twenty-four hours each day. Things like that might well be seen as degrading treatment. But under the “cruel and unusual punishment” test, these practices have not been deemed abusive.

Now, there are some cases which, even when international standards use basically the same language as U.S. constitutional or statutory law, there is the possibility that, in an era of judicial retrenchment, the international standards may actually provide better protection for Americans than the way the Supreme Court has interpreted U.S. standards.

Again, I come back to the prison context, where the Supreme Court has largely abdicated Eighth Amendment “cruel and unusual” analysis when it comes to prison conditions. There is very little prospect these days of getting any prison condition deemed to be cruel and unusual.

As the Supreme Court has been cutting back, wouldn't it have been great if we could look to international jurisprudence — the way in which similar language has been interpreted by the Human Rights Committee, or by other national or international courts — as a backstop, something that we could fall back on, insofar as our domestic remedies became insufficient? This, particularly in the area of prison conditions, is hardly an academic point.

Now, let me take a moment and look not only at classic human rights law as we would think of it as applying to normal times here in the United States, but also to three developments in human rights standards and institutions more broadly. Here, the United States, rather than being a pioneer, has turned into the principal obstacle to the development of international standards and institutions on human rights.

One, which I think you are pretty familiar with, is the issue of anti-personnel land mines, where the Pentagon simply refused to contemplate banning a weapon system on humanitarian grounds. It was terrified at the “slippery slope” that would be created, this scary precedent of these humanists coming in and saying, “No, this weapon system is so awful, it must be banned. It routinely kills women, children, ordinary civilians, who innocently step into the woods or their fields, and the mine in the ground has no idea that it is not an enemy soldier and

blows the person up.” This happens hourly around the world, causing tens of thousands of casualties.

Despite this, the Pentagon would not even think of banning anti-personnel mines. It tried to create an exception for Korea, but of course its exception would have been followed by everybody else’s exception.

In the end, the United States stood virtually alone in opposing this treaty. Today, out of all of NATO, the United States is alone with Turkey in not having ratified the treaty. Out of the entire European Union, it is alone with Finland. In this entire hemisphere, it is alone with Cuba in not having ratified this treaty.

The generals like to talk about, “Oh, if there is an invasion of Korea, we would need to quickly air-drop a million mines.” But when you talk to generals who are no longer in the Pentagon, they scoff at that; they say that is the last thing you would waste your time doing in the event of an invasion, particularly with the U.S. force dependent on rapid mobility and air power, that these land mines are old-fashioned tools that clearly could be given up in the name of the tremendous humanitarian benefit that would result. But no, this would require a change in U.S. conduct, and the United States does not like to change its conduct in response to evolving — let alone existing — human rights standards.

We saw something similar with the International Criminal Court this summer, which was overwhelmingly endorsed at a diplomatic conference in Rome by a vote of 120 to seven. You know where the United States was on that, along with Iraq, Libya, China — those longtime defenders of human rights.

The bottom line for the United States was that it did not want a court that had any possibility, even theoretical, no matter how remote it might be, of prosecuting an American. It opposes a court insofar as that theoretical possibility exists — despite the fact that the court was explicitly designed to complement, rather than supersede, national jurisdictions. And so, if an American airman, for example, committed a war crime by targeting civilians, or dropping a bomb indiscriminately, there would be no need for the International Criminal Court to step in because we would expect the very strong U.S. judiciary to prose-

cute that person, since such war crimes are contrary to U.S. policy.

The ICC would step in only if a national jurisdiction were unable or unwilling to proceed against its own war criminals, genocidaires, or those responsible for crimes against humanity. But even given that strong guarantee against the unjust prosecution of an American, the United States opposed the court, and did it through various schemes, each of which was designed to preclude even the theoretical possibility of an American being prosecuted.

It proposed that the Security Council have to authorize any prosecution, which would have allowed the United States to veto any prosecution.

It objected to an independent prosecutor who could bring cases on his or her own. States of course are very reluctant to charge other states, particularly a superpower, with a crime. The United States feared that an independent prosecutor might be more willing to do that.

It objected to the International Criminal Court assuming jurisdiction over any citizen whose government had not ratified the ICC. Since Jesse Helms has made clear that the United States will never ratify the ICC so long as he is around, it was pretty clear that the United States would be able to avoid jurisdiction if the Rome delegates had accepted the U.S. objection. Fortunately, they did not.

The bottom line, as far as most of the world was concerned, is that justice that only reaches some states is not justice. But the United States, because it could not exempt its own nationals, vowed to actively oppose the court.

The final area that I will note is the issue of child soldiers. There is a campaign right now trying to raise the age at which people can be used in any military force to eighteen. The Convention on the Rights of the Child treats eighteen as the age of majority for everything else except for service in armed forces. There is an effort to add a protocol to that convention that would raise military service age to eighteen as well.

This is a widely popular move because it would help deal with a huge problem, the roughly 300,000 children — sometimes as young as eight, ten, eleven — who are serving in armed forces around the world. These kids not only get killed

very quickly, but they also get utterly destroyed psychologically, if they happen to survive physically. And they are a terror to anybody who encounters them. The last thing you want to do is run into a ten-year-old with an AK-47. They just do not have the judgment to refrain from committing atrocities that, at least theoretically, more mature individuals might have.

The United States, though, does not want this proposed ban on child soldiers because the Pentagon recruits and wants to continue recruiting seventeen-year-olds. It likes to do this just as kids are graduating from high school, when some are not yet eighteen. And even though only 4 percent of the active-duty recruits are seventeen-year-olds at any given time, the Pentagon is unwilling to give up that minor recruitment advantage to build a strong norm that would help attack the severe humanitarian problem of the use of children as soldiers around the world. Indeed, the U. S. government is actually blocking anybody else from adopting this norm for fear that it will make the United States look bad.

And so, even though the Convention on the Rights of the Child has been ratified by every government in the world, but for two — Somalia, which has no government, and the United States — the U.S. government is preventing the rest of the world from adopting this protocol to their treaty because it fears political embarrassment. The tool the U.S. government is using is the U.N. rule of “consensus,” which basically gives any country a veto.

That, once more, shows the lengths to which the U.S. Government will go to avoid changing its conduct in the face of evolving international standards. It is very similar to the attitude that has prevented the U.S. government from subjecting itself to existing human rights treaties here at home.

Penny Venetis
Rutgers University

The title of this panel, as you all know, is “United States: Human Rights Leader or Laggard?” Well, you just heard the bad news.

I just want to echo what Ken said, which is we actually do have a pretty good deal here, in the fact that we can actually discuss these things and that we do have a judicial system that respects the rule of law. That is really what I would like to focus on.

Ken told you about the bad news and the United States’ failure to take a lead on a political level and enact these very important treaties. Well, our independent judiciary may be the counterweight to our politicians failing to take the lead.

Minna mentioned a case that I have worked on, and am still working on, that I would like to focus on. I would like to focus on the legal principles that we used in that case to discuss why I do feel hopeful that the judiciary is a leader, and may continue to be a leader, in recognizing international human rights.

For the past three years, the Constitutional Litigation Clinic at Rutgers Law School has been representing a group of political asylum seekers who were detained by the INS in Elizabeth, New Jersey, in deplorable conditions. My clients are primarily people of color, mostly of African descent, who fled from their countries fearing for their lives. They were stopped at the U.S. border because they did not have proper documentation and were immediately put into jail. But I ask who would have proper documentation if they were fleeing from their country, escaping with their lives.

Now, this is supposed to be administrative segregation, someplace they are detained while they can actually process their political asylum claims. Well, it was not administrative segregation; it was not even jail. It was really atrocious and horrendous conditions that they endured for eleven months, until they rebelled against those conditions.

I just want to summarize some of the abuses to which they were subjected:

- They were given dirty, used underwear and clothing that one of my clients described as “looking as if it had been taken from the hospital from a dead person.”
- They were denied basic amenities, such as toilet paper. They were given one roll and it had to last for several weeks — and if they ran out, well, that was just too bad.
- The women were denied sanitary napkins. They were given one sanitary napkin per day — and, well, if it ran out, they just had to wait until a guard was kind enough to maybe take pity on them and give them a new one.
- They were subjected to a constant barrage of racial and ethnic epithets and curses, the most common of which was “African monkey.”
- They were housed in filthy, overcrowded rooms, where the beds were adjacent to toilets and the showers were never cleaned, so the entire room stank of human waste.
- They were served rotten food and curdled milk next to the toilets. The eating areas were inches away from the toilets.
- They were beaten and thrown into solitary confinement at the whim of abusive and poorly trained guards.
- They were strip searched at random, often they were intimidated with police dogs, and sometimes the searches and the intimidations with the dogs were videotaped.

The Constitutional Litigation Center sued the INS, INS officials, and a private company that was under contract with the INS to run the detention center.¹ This goes back to comments that were made earlier about corporate responsibility and whether or not corporations could be held liable for human rights violations when they are working in concert with government violators.

Of course, the defendants in the case all said, “You can’t sue us under international human rights law. The United States has refused to sign all these wonderful treaties; the Interna-

¹ The Company is Correctional Services Corporation, Inc., which was then known as the Esmor Correctional Services, Inc.

tional Covenant on Civil and Political Rights,² even though the United States ratified it, is not actually a valid legal document that advocates could use because there was never enabling legislation enacted, so it really is just a showpiece and a public relations gesture on behalf of the United States.”

The third thing that all the defendants argued was that, because U.S. law existed that provided remedies for the abuses that I alleged, that the U.S. law superseded any international law that might protect my clients.

Well, the defendants lost on almost all of these counts and we won. It was very, very exciting. This happened in October. I want to talk about the law that we used in the case, which I think actually can be applied by other advocates in future cases.

There is something called Customary International Law—also known as the Law of Nations. This is body of law that the United States is obligated to follow. All countries are obligated to follow Customary International Law - not because they have signed treaties obliging them to do so, but because nations and courts have determined that there are certain norms of law that are so universal and so basic to civilized nations that they need not be codified by any specific treaty.

Of course, it actually helps if there are treaties that embody the principles that you are advocating, and we cited to many, many treaties that embodied the norms that we wanted the court to recognize. But it is not required that the human rights norms be embodied in a particular treaty or that the nation against whom you are seeking to enforce the norm ratified any of the treaties.

U.S. courts have recognized Customary International Law since the founding of our nation. Actually, this was out of necessity. When our country was founded, well before we were a superpower, we needed to establish legitimacy in the world. One of the ways we did this was to adopt Customary International Law into our federal law. This was an effort to gain the trust of other nations, to ensure that the United States would be recognized as a legitimate actor in business transactions or other transactions that we had with other nations.

² International Covenant on Civil and Political Rights, U.N.T.S. No. 14668, Vol 999, (1976) G.A. Res. 2200A (XXI), 21 IN.GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 [hereinafter ICCPR].

Customary International Law has been applied in the human rights context since 1980, when the Second Circuit decided a landmark case, called *Filartiga v. Peña-Irala*.³ In that case, the Second Circuit recognized torture as a norm of Customary International Law and permitted the parents of a Paraguayan man who had been killed by the military in Paraguay to sue the torturers and the killers of their son in U.S. federal court. The statute under which that was brought was the Alien Tort Claims Act,⁴ which has been mentioned so far and I will talk a little bit about in a while.

Since the *Filartiga* case in 1980, there have been twenty or so cases in the United States that have reiterated that Customary International Law is part of our federal law, and have also recognized that one could sue in the United States for violations of Customary International Law. There are several noteworthy cases that I would like to talk about.

One of them is a case called *Kadic v. Karadzic*,⁵ which was decided again by the Second Circuit. This is a case where the Second Circuit permitted women who had been raped in Bosnia by the Government of Radovan Karadi to sue in U.S. federal court for the sexual abuse. The Second Circuit equated mass rape with a form of torture. This was an extension of the definition of torture as it is iterated in various human rights instruments.

Another noteworthy case is a case that has already been discussed, called *Doe v. Unocal*.⁶ You heard Richard Dicker talk about that case. That is a case pending in California in federal district court, where the United States holds that a corporation under a contract with the Burmese Government could be sued for enslaving Burmese laborers in the construction of a pipeline.

There are several noteworthy aspects of all of the cases that discuss Customary International Human Rights Law and incorporate it into our law, and these are actually very, very significant facts. One is that all of the plaintiffs in these cases are non-U.S. citizens; the human rights violations all occurred

³ *Filartiga v. Pena-Irala*, 630 F.2d 876 (2nd Cir. 1980).

⁴ 28 U.S.C. § 1350 (1994).

⁵ *Kadic v. Karadzic*, 70 F. 3d 232 (2nd Cir. 1996).

⁶ *Doe v. Unocal*, 27 F. Supp. 2d. 1174 (C. D. Cal. 1998).

abroad; and all of the victims who sued suffered torture or severe bodily harm. That is a common thread running through all of these cases.

In a way, it is easy for the U.S. Government and the U.S. judicial system to say, “Well, wait a second. There are abuses going on in other countries. This is really awful that people are being tortured and are being harmed. We will be noble and give a forum for these claims to be brought.”

Our case was different in several respects. One difference was this was happening on our soil. Another difference was the people we were suing were U.S. governmental officials as well as corporations that were under contract with the government to administer an important U.S. function—the detention of political asylum seekers and other aliens. The third difference is that we did not allege that our clients suffered torture or severe physical harm. Rather, we argued the conditions of confinement alone were enough to violate international law.

So we had quite a hurdle. We had to convince the court that it had to take the law one step further and had to find that Customary International Human Rights Law is not just something that we apply to violators of human rights in other countries, that we can actually use it as a tool for violations that exist in this country.

In our arguments to the court we started with cases dating back to 1795. There is wonderful language in these early cases dealing with Customary International Law. It is not in the human rights context; it is just generally in the context of how this fits into the law of the United States. As I mentioned, Customary International Law was incorporated into U.S. law really out of necessity in the early days of our country so that we could be recognized as a legitimate actor and an actor that respects the rule of law. The other thing about these early cases, and other cases, including the *Filartiga* case and subsequent international human rights cases, is that they all say — and this comes from the early cases — that Customary International Law is not static, that it is forever evolving. That is really what enabled the Second Circuit to recognize rape as a form of torture and to continue to see that this is a vital, living area of the law. It makes perfect sense, because certainly the world is not the same as it was in the 18th century. It also means that Cus-

tomary International Law takes into account the changes that occur in the world and also the interrelatedness of various countries.

We also cited some treaties that embodied the norms that we were trying to establish. We also cited cases from the European Commission and courts of human rights that actually are obliged by treaty to follow and adopt these norms. By doing so we wanted to show that the principles we espoused in our lawsuit exist in treaties, and the actual litigants in other countries were using these treaties as the basis of lawsuits to protect their human rights.

We also cited to several cases, including *Filartiga* and a wonderful opinion by Judge Weinstein, called *Mojica v. Reno*,⁷ which was just affirmed by the Second Circuit. They argued that the Universal Declaration of Human Rights, which we are celebrating today, has evolved from a Utopian model into an accepted recitation of customary international human rights norms to which all nations abide.

Judge Debevoise of the U.S. District Court for the District of New Jersey accepted our arguments. The decision⁸ is novel in a few ways. One is that, as I said, we sued U.S. entities, U.S. government officials, and a U.S. corporation. But also, all of the cases that I mentioned earlier dealt with torture or severe bodily harm, and the court in our case recognized that the right to be free from inhuman and degrading treatment had another element to it, the degrading element, which I think Ken mentioned before. You do not have to be maimed, you do not have to be killed, in order to be protected by this norm; if you are subjected to degrading treatment, you also are protected by this customary international human rights norm.

The *Jama* court was the first to actually articulate this in the United States. So, when I think about the future implications of this decision, I really think about that aspect of the decision that says that you do not need to have someone killed in order to be protected, or tortured to be protected, by international human rights in this country.

⁷ *Mojica v. Reno*, 970 F. Supp. 130 (E.D.N.Y. 1997) *affd.* 157 F. 3d 106 (2nd Cir. 1998).

⁸ *Hawa Abdi Jama et al. v. United States INS et al.*, 22 F.Supp 2d 353 (D. N.J. 1998).

There are some unanswered questions, though. As I say, I am very hopeful. But there is one thing that I want to come back to, that all of the plaintiffs in these other cases were all foreign nationals. There is something called the Alien Tort Claims Act, which was enacted in 1789.⁹ It specifically gives federal courts jurisdiction to hear claims of Customary International Law violations or violations of treaties in U.S. courts.

So even though there is all this wonderful language dating back to the 18th century saying that Customary International Law is part of our federal law, the courts — and the argument that I made, and that every other advocate has made — is, “Well, if that is the case, then there is federal question jurisdiction for these cases under 28 U.S.C. § 1331.” This is important because if there is general federal question jurisdiction for these cases, independent of the Alien Tort Claims Act, then you can take this decision and use it on behalf of people in the United States, U.S. citizens (who are not aliens), whose rights are being violated in the United States. Without that hook, then courts can say, “The case is not applicable because the Alien Tort Claims Act only applies to aliens, it does not apply to U.S. citizens.”

So another step is necessary in order for international human rights law to become even more of a vital component to expanding individual rights in this country. That step is to have courts say that there is Section 1331 jurisdiction.

Some courts actually have said that, but it was more of an aside. They said, “We are not deciding this issue.” The Second Circuit has done it. Judge Debevoise, who decided our case, also said, “We do not have to reach this issue because we have jurisdiction under the Alien Tort Claims Act.” And some courts have said, “We think we have jurisdiction under both, but because the Alien Tort Claims Act applies, we will use that as the jurisdictional hook.” So that is the next step. I hope that other advocates or the Constitutional Litigation Clinic will take this next step.

There is actually one case that I wanted to mention that is a slight disappointment, and that is out of the District of Washington. It was decided before our case was decided. But it

⁹ 28 U.S.C § 1350 (1994).

would have been a perfect case for a court to take the lead and to say that indeed, international human rights law could be used in the United States not only for aliens but also for U.S. citizens.

This was a case brought by inmates who were detained in Washington State who were the subject of nonconsensual medical experiments while they were detailed. They were injected with infectious diseases, including syphilis. Such government activity is clearly prohibited under various international human rights norms.

But the court threw their case out and said it did not have jurisdiction over the international human rights claim under federal question jurisdiction Section 1331. So that is a disappointing case, but that is just one judge.

The next step is to bring a case with equally compelling facts in a jurisdiction that has recognized norms of Customary Human Rights Law but has passed on deciding this issue of whether the court has both jurisdiction under the Alien Tort Claims Act and Section 1331 federal question jurisdiction for such claims. So that is the plan for the future.

I want to make one closing remark. That is that these cases really demonstrate the beauty of our legal system, which is the independent judiciary. The *Jama* case shows that the independent judiciary is willing to go farther than our political leaders in recognizing international human rights law and incorporating it into our own.

Honorable John S. Martin, Jr.
United States District Court, S.D.N.Y.

MS. SCHRAG:

I hope that as you are hearing these comments, particularly some of the very stimulating comments that I certainly heard from Penny's discussion of her litigation, one might question the degree to which the judiciary in this country is taking the lead; or, rather, it is applying what is well-established and clearly before them applicable law. To that end, before Judge Martin speaks, I would like to read to you a ringing first paragraph from the decision that I hope he will discuss with you. He says:

Presently before the court is a motion for a default judgment in which the plaintiffs have overwhelmingly established that the defendant has engaged in conduct so inhuman that it is difficult to conceive of any civil remedy which can begin to compensate the plaintiffs for their loss or adequately express society's outrage at the defendant's actions.¹

JUDGE MARTIN:

I am happy to be here today, and probably happier than those of you who came expecting to hear Judge Newman and find you have to listen to me. All I can do is offer you an apology and state you are the perfect example of a right without a remedy. While clearly you could maintain a cause of action for negligent misrepresentation against the organizers of this event, you would be limited to recovering the price of admission.

When I was asked to pinch-hit for Jon Newman, I said I was reluctant to appear because I had very little experience with human rights law. I realized that that was a misstatement because 40 percent of the docket of the federal courts might legitimately be considered human rights law. Cases involving conditions of confinement, police and prison guard brutality, civil rights violations by the police, and discrimination

¹ *Mushikiwabo v. Barayagwiza*, 1996 WL 164496 (S.D.N.Y. 1996).

claims are human rights claims. Twenty-two percent of the docket of our court is pro se cases in which individuals are seeking to vindicate their human rights.

While I recognize that these are not the human rights cases that are the subject of this conference, I mention them because I think they give a context to what we are discussing today. We are a nation that cares deeply about human rights and we devote a substantial portion of our judicial resources to the enforcement of human rights. The question is: Will our executive, legislative, and judicial branches be as willing to make a similar commitment to the enforcement of international human rights?

Judge Newman would clearly be an appropriate person to address that issue, since his opinion in *Kadic v. Karadzic*,² which Penny referred to, is one of the most important opinions in this area. Indeed, without his opinion in that case, and the opinion of Judge Kaufman in *Filartiga*,³ the victims of international human rights violations attempting to sue in the United States may find themselves, like you, the possessors of a right without a remedy.

Judge Kaufman and Judge Newman breathe life into the Alien Tort Act.⁴ As Judge Friendly noted in 1975: "This old, but little used, section is a kind of legal Lohengrin. Although it has been with us since the first Judiciary Act, no one seems to know whence it came."⁵

In their cases, Judges Newman and Kaufman did two important things. First, they held that the court must interpret international law, not as it was in 1789, but as it has evolved and existed among the nations of the world today. Second, they held that Section 1350 provided both jurisdiction and a cause of action.

While the Second Circuit's opinions in these two cases appear to open wide our courts for private actions for violations of the Law of Nations, it is not at all clear how far our courts will - and perhaps should - go in expanding these precedents. For those interested in the enforcement of international human

² *Kadic v. Karadzic*, 70 F. 3d 232 (2nd Cir. 1996).

³ *Filartiga v. Pena-Irala*, 630 F.2d 876 (2nd Cir. 1980).

⁴ 28 U.S.C § 1350 (1994).

⁵ *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2nd Cir. 1975).

rights in our courts, it may be said that easy cases make good law.

The atrocities committed by the Karadi regime called out for the remedy which Judge Newman found, as did the cold-blooded murder of Dr. Filartiga's son.

But those cases pose difficult issues for the judiciary, as is demonstrated by the three separate opinions of the judges of the District of Columbia Circuit in the case of *Tel-Oren v. The Libyan Arab Republic*,⁶ which involved a suit by families of people killed in a terrorist attack on a bus by the PLO. Judge Edwards agreed with the basic principles of *Filartiga*, but viewed customary norms of international law as proscribing only actions of a state and not an organization, such as the PLO. Judge Robb affirmed the dismissal of plaintiff's claim for prudential reasons because he believed they presented nonjusticiable political questions which would entangle the court in foreign policy issues. Judge Bork expressed similar fears that the court's involvement in such a claim could interfere with American diplomacy, but he also disagreed with the Second Circuit's decision that the Alien Tort Act created a private right of action. To him, the only possible private claims under that Act would be those that would have existed in 1789 - claims of piracy, violation of the rights of ambassadors, and violations of the laws of safe conduct.

There is not time today to get into the merits of the dispute between the Second and District of Columbia Circuits, but it should be noted that the issues have not yet been resolved by the Supreme Court. How the Supreme Court will resolve those questions may well depend upon the factual context in which they have been raised.

For example, Minna has told you about the case I had involving the massacre of Tutsi in Rwanda. That was an easy case. Again, the conduct cried out for a remedy, and there was no objection to it by the State Department or the Executive Branch of government.

The only other case I had in this area I dismissed, a claim of Jewish former residents of Egypt who claimed that Coca-Cola

⁶ *Tel-Oren v. The Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984).

had illegally leased property expropriated from them as part of an anti-Semitic campaign of the Egyptian Government.⁷

In that case, I was not satisfied that the taking of a citizen's property was such a clear violation of the Law of Nations that it was actionable under the Alien Tort Act. In addition, I found that the plaintiff's claim was barred by the act of state doctrine that prohibits a court of the United States from reviewing the legality of the official acts of a foreign nation taken within its borders.

The interplay of the act of state and the political question doctrines will continue to play an important role as the courts struggle to define their role in the enforcement of international human rights.

Filartiga and *Kadic* were easy cases because the crimes were abhorrent and there was no apparent conflict with our foreign policy. As Judge Kaufman noted in *Filartiga*:

For purposes of civil liability, the torturer has become like the pirate and the slave trader before him, *hostis humani generis*, an enemy of all mankind. Our holding today, giving effect to a jurisdictional provision enacted by our first Congress, is a small, but important, step in the fulfillment of the ageless dream to free all people from brutal violence. How far the courts will go to fulfill that dream remains to be seen.

Before I conclude, I would like to bring your attention to an important issue presently *sub judiciale* before my colleague, John Koeltl. The question is whether someone whose extradition is sought while in this country may defend upon the grounds that if extradited he will be subjected to the violation of the Law of Nations, that is, extrajudicial execution and torture. The case involves man named Sandu, a Sikh whose extradition is being sought by India.

Magistrate Judge Francis, sitting as the Committee Magistrate, noted that there was in fact reason to believe that he might be subjected to torture and extrajudicial murder if returned, but said that, under the leading precedent from the Second Circuit, the non-inquiry doctrine prohibited him from looking into that question. He noted the anomaly that, under *Kadic*, Sandu's family would have a right to bring a civil action

⁷ *Bigio v. Coca-Cola Company*, 1998 WL 293990 (S.D.N.Y.).

in this country if in fact he was extradited and was tortured and murdered, but he found that the Second Circuit did not allow him to consider that issue.

The issue is presently before my colleague, John Koeltl. Since there is no direct appeal from an extradition order, you have to proceed by habeas corpus and then you can take the appeal. I called him yesterday and he refused to give me a hint of how he was coming out. It will be very interesting to see what the Second Circuit does with this issue when *Sandu* gets there, particularly if Judge Newman is on the panel.

Ruth Wedgwood
Yale Law School

Pinochet and International Law

The Pinochet case has important lessons for how national courts can be used in prosecution of international human rights violations. The Pinochet case rocketed to international attention shortly after the conclusion of the Rome negotiations for a permanent international criminal court. The complaint filed against General Augusto Pinochet by Spanish prosecutor Baltasar Garzón in October 1998, seeking the former dictator's extradition from the United Kingdom for the murder of Spaniards and others in Chile, is an ambitious undertaking. The potential difficulties surrounding the attempt to extradite the Chilean leader should be self-evident. Pinochet's Chile was a close ally of the United Kingdom in its war in 1982 with Argentina over the Malvinas or Falkland Islands. Many still disdain the political agenda of Salvador Allende, overthrown by Pinochet in 1973. But the United Kingdom has also sought in the last several years to be a leader in the negotiations for a permanent international criminal court. Throughout the Rome process in 1998, Prime Minister Tony Blair and Foreign Minister Robin Cook supported creation of a standing structure for the international prosecution of serious violations of the laws of war and crimes against humanity. And the Rome statute repeats a principle already enunciated in the Security Council resolutions establishing ad hoc tribunals for Rwanda and the former Yugoslavia — that office-holding, even as head of state, does not immunize criminal action.

Pinochet reigned for seventeen years as Chilean head of state, from 1973 to 1990, following his coup against Salvador Allende. The Pinochet regime resorted to more than 2,000 extra-legal executions and disappearances, according to the estimates of Chile's own truth commission.¹ Pinochet's tactics were

¹ See Ministerio Secretaría General de Gobierno, Secretaría de Comunicación y Cultura, Informe de la Comisión Nacional de Verdad y Reconciliación I, II, III (Santiago, February 1991). See also Gisela von Muhlenbrock, Reconciliation in

over the top, in the measure of modern human rights law. Even for a committed conservative who thinks that the policies of Salvador Allende were anathema to a constitutional free market regime, Pinochet's methods went well beyond the prerogatives of sovereignty and decency — using torture and disappearances to stabilize his regime and eliminate political opposition.

These practices were used against Chileans, but also against foreign nationals and on foreign territory. Pinochet's regime authorized the murder of an American citizen, Ronnie Moffit, who was secretary to the former Chilean foreign minister Orlando Letelier, in broad daylight in downtown Washington, D.C., and the extrajudicial execution of an American in Santiago, Charles Horman. There were extraterritorial killings in Argentina and Madrid. In Chile, foreign students at the University of Santiago were killed or disappeared, including Ecuadorians, Mexicans, and a host of Europeans. Victims included numerous dual nationals, who were not simply of technical dual citizenship from some claim rising up through their great-grandmothers, but who were participating citizens in other polities. Pinochet is in a peculiar position to question the assertion of extraterritorial jurisdiction, since he was acting offshore and against foreign nationals in his prosecution of a lawless war.

Five years after the coup, an amnesty was instituted in Chile by the military regime. Yet many of the extrajudicial executions and disappearances occurred even after the 1978 amnesty. In 1988, Pinochet, in his puzzling mixture of qualities, showed he had some more admirable parts and conducted a democratic plebiscite to declare whether he should continue in power. He lost the plebiscite and then stepped down as President in 1990, but chose to retain his position as Commander in Chief. Thus, until recently, Pinochet had effective control on how far the Chilean government could proceed in the resolution of human rights complaints and prosecution of earlier acts. Pinochet retired in March 1998 as Commander in Chief, and

Chile: Politics and Policies, Feb. 1995 (paper presented at the International Studies Association); Priscilla B. Hayner, *Fifteen Truth Commissions - 1974 to 1994: A Comparative Study*, 16 HUM. RTS. Q. 597 (1994); Mark Ensalcó, *Truth Commissions for Chile and El Salvador: A Report and Assessment*, 16 HUM. RTS. Q. 656 (1994).

under the 1980 constitution instituted by his military regime, became Senator for Life — enjoying a variant of speech-and-debate clause privilege against arrest in Chile as a consequence.

In September 1998, Pinochet flew to London on a visit, seeking treatment for a bad back. Prosecutions often arise from serendipitous circumstances, and there are two competing stories of how Spanish prosecutors were alerted to his presence in London. One story says that an international news network mistakenly broadcast an account of Pinochet's passing in two news cycles. A reporter from *The Guardian*, an English newspaper, phoned London hospitals to see where the event had occurred, and discovered Pinochet was alive and well.² A biographical sketch of Pinochet published by *The New Yorker* in October 1998 may also have given the tip-off to Spain. An enterprising free-lance reporter went out to gather the elegiac reminiscences of Pinochet as an old man,³ and this exposed his trips to London.

In any event, an extradition warrant was filed by Spain under the European Convention on Extradition.⁴ The European Community has become deeply integrated, with many Community-wide conventions, and one country's conduct under a convention sets a standard for the rest of Europe. So England had at stake here not only the particular allegations of murder, torture, and hostage-taking, but also the future of general international judicial assistance in criminal cases.

² See Owen Bowcott, *Surgery for Chile's Ex-Dictator*, *The Guardian* (U.K.), Oct. 10, 1998 (Pinochet "reported to be recovering in a London hospital after undergoing surgery."); Matthew Norman, *Comment: Diary*, *The Guardian* (U.K.), Oct. 14, 1998 ("If anyone should know the General's whereabouts, please give us a call."); Hugh O'Shaughnessy, *Comment: A Murderer Among Us*, *The Guardian* (U.K.), Oct. 15, 1998 ("[H]e slipped through the net on previous visits to this country. . . . If this man escapes from Britain once again, a great many people will want to know why. Irresponsible commentators will cast doubt on the idea of an ethical foreign policy"); Duncan Campbell, *News in Brief: Call to Detain Pinochet*, *The Guardian* (U.K.), Oct. 15, 1998 ("The Spanish branch of Interpol has asked its London counterpart for assistance in locating Pinochet, who is having treatment for a herniated disc. It is understood the request has been passed to the organized crime branch of the Metropolitan Police.")

³ Jon Lee Anderson, *Profile: The Dictator — Augusto Pinochet ruled Chile ruthlessly, but he left behind a democracy. Now he wants history's blessing*, *THE NEW YORKER*, Oct. 19, 1998, at 44 (with photograph of Pinochet in London on Sept. 25, 1998).

⁴ European Convention on Extradition, Dec. 13, 1957, *Europ. TS No. 24*, 359 U.N.T.S. 273.

After the warrant was filed for Pinochet's extradition, a challenge was mounted in the British High Court of Justice, arguing that Pinochet was immune as a former head of state from arrest or extradition.⁵ The High Court ruled that although there had been a great deal of development in human rights law since World War Two, the United Kingdom's State Immunity Act⁶ did not permit the arrest and prosecution of a former head of state. Many would concede, that in the present state of the law, *current* heads of state are immune from arrest in most circumstances, even though there is no underlying immunity for the criminal behavior itself. Heads of state are likened to ambassadors who enjoy absolute immunity under the Vienna Convention on Diplomatic Relations.⁷ Ambassadorial protection from arrest is not meant to cosset crime, indeed, ambassadors are required to follow the law of their host country. But immunity during the pendency of a diplomatic posting is designed to allow the effective conduct of international negotiations and communication. So too, said the British court, former heads of state should be immune from the act of arrest. Though former ambassadors are only entitled to immunity for official acts, the High Court ruled that the "official acts" of a former head of state could include even acts that violated the most serious norms of international human rights law.

In one sense, this was a rather technical holding. It was the construction of a British statute, which in turn was based on an analogy to the Vienna Convention on Diplomatic Relations. Neither side should exaggerate the precedential effect of the case, since it treated the meaning of a statute and nothing more. But the principle used to aid construction of the statute

⁵ In the Matter of an Application for a Writ of Habeas Corpus ad Subjicendum, re: Augusto Pinochet Ugarte; and In the Matter of an Application for leave to move for Judicial Review Between: The Queen v. Nicholas Evans, Metropolitan Stipendiary Magistrate, Ronald Bartle, Metropolitan Stipendiary Magistrate, and the Secretary of State for the Home Department, Ex parte Augusto Pinochet Ugarte, High Court of Justice, Queen's Bench Division, CO/4074/98, CO/4083/98, Oct. 28, 1998.

⁶ State Immunity Act 1978, ch. 33, § 20(1), *reprinted in* 17 I.L.M. 1123, 1128-29 (1978) ("Subject to the provisions of this section and to any necessary modifications, the Diplomatic Privileges Act 1964 shall apply to — (a) sovereign or other head of State; . . . as it applies to the head of a diplomatic mission . . .").

⁷ Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 UST 3227, TIAS No. 7,502, 500 UNTS 95.

may have startled some, when the Lord Chief Justice sanguinely stated “[A] former head of state is clearly entitled to immunity in relation to criminal acts performed in the course of exercising public functions. . . . [H]istory shows that it has indeed on occasions been state policy to exterminate or to oppress particular groups. . . . There is in my judgment no justification for reading any limitation based on the nature of the crimes committed into the immunity which exists.”⁸

And then, of course, the appeal came to the House of Lords, to the Law Lords, no longer wearing wigs, no costume at all, announcing their decision to an apparently empty chamber. The Law Lords split in a way that few anticipated — certainly I did not. Some people supposed that Lord Steyn and Lord Hoffmann, as emigrés from South Africa who knew what repressive regimes were like, might rule against immunity, although South Africa did have a Truth Commission instead of criminal prosecutions as the vehicle of its own transition. Others supposed that Lord Slynn of Hadley might also rule in favor of the prosecution of Pinochet. Lord Slynn has served as an Advocate General before the European Court of Justice and is the head of the British International Law Association — a scholarly international law association with branches in every country, which engages in long, compendious deliberations to suggest rules for maritime neutrality and the like, and which is taken very seriously by courts. But, based on his own analysis of the state of the law, Lord Slynn ruled in favor of immunity.

Instead, it was Lord Nicholls of Birkenhead who joined with Lords Steyn and Hoffmann to provide the swing vote against immunity. By a 3-2 vote, the Law Lords overruled the High Court of Justice, holding that Pinochet could be returned to Spain for prosecution on the crimes of torture and hostage taking.⁹ Lord Nicholls noted succinctly that

“some acts of a Head of State may fall beyond even the most enlarged meaning of official acts performed in the exercise of the

⁸ *Id.*, at ¶¶ 48, 65.

⁹ Judgments — *Regina v. Bartle and the Commissioner of Police for the Metropolis and others, Ex parte Pinochet* (on appeal from a Divisional Court of the Queen’s Bench Division); *Regina v. Evans and another and the Commissioner of Police for the Metropolis and others, ex parte Pinochet* (on appeal from a Divisional Court of the Queen’s Bench Division), House of Lords, Nov. 25, 1998.

functions of a Head of State. . . . [W]hy should what was allegedly done in secret in the torture chambers of Santiago on the orders of General Pinochet be regarded as official acts? Similarly, why should the murders and disappearances allegedly perpetrated by the DINA [Direction de Inteligencia Nacional] in secret on the orders of General Pinochet be regarded as official acts? . . . The normative principles of international law do not require that such high crimes should be classified as acts performed in the exercise of the functions of a Head of State.”¹⁰

By the time of that decision, other European countries had joined the effort seeking Pinochet's extradition — France, Belgium, Luxembourg, Sweden, Switzerland — for each country had become the home of victims of the Pinochet regime, and was willing to implement universal jurisdiction to vindicate their claims. Jack Straw, the British Home Secretary, rather pointedly took no position before the Law Lords and declined the opportunity to have his advocate suggest what the legal ruling should be. Tony Blair's ethical foreign policy became very silent within the court, deeming the question to be purely a legal one. Nonetheless, Jack Straw also declined to relieve Pinochet's extradition on humanitarian grounds of health or old age.

There followed a messy little *dénouement* in which the initial ruling of the Law Lords was challenged on the ground that Lord Hoffmann had not disclosed that he had some outside affiliation with Amnesty International. The Law Lords voted to vacate the decision. But on rehearing of the merits, a new panel reaffirmed crucially that a former head of state does not enjoy immunity from arrest.¹¹ The number of charges that could be brought against Pinochet was limited under the extradition doctrine of “mirror offenses” — a criminal charge must be prosecutable under the law of the requested country (here, the United Kingdom), as well as the requesting country (Spain), including its jurisdictional elements. Hence, the charges on which Pinochet could be extradited to Spain were limited to those arising after the United Kingdom created extraterritorial

¹⁰ *Id.*

¹¹ *Judgments - Regina v. Bartle and the Commissioner of Police for the Metropolis and others, Ex parte Pinochet* (on appeal from a Divisional Court of the Queen's Bench Division); *Regina v. Evans and another and the Commissioner of Police for the Metropolis and others, ex parte Pinochet* (on appeal from a Divisional Court of the Queen's Bench Division), House of Lords, Mar. 24, 1999.

jurisdiction over hostage-taking and torture within its own law. But the key principle was reaffirmed without hesitation — a former head of state does not enjoy immunity under international law or under British law from extradition and prosecution for violations of the international law standards against hostage-taking and torture.

In legal and political terms, there are several other interesting sides to the Pinochet case. The events show the political effect of a “human rights diaspora.” Pinochet created his own counter-constituency, by causing over 11 percent of the Chilean population to emigrate abroad from 1973 to 1990. Over a million people were in exile — the equivalent, if it was the United States, of 20 million people. Those exiles put down roots, participated in their new states, and whatever Europe’s attitude might otherwise have been, the Chilean diaspora sustained a voice throughout Europe in favor of Pinochet’s prosecution. Dictators of the future may take heed that they should not be so brutal as to cause a widespread migration.

Second, if one looks carefully, the capacity to prosecute Pinochet in national courts is not commonplace. There are relatively few countries that have enacted national law provisions for universal jurisdiction. A handful of countries — Switzerland, Austria, Germany, and Denmark — have prosecuted offenders from the Bosnian war,¹² and Switzerland has prosecuted a genocidaire from the Rwandan conflict.¹³ But relatively few countries, including the United States, have implemented in their national law the full-wingspan of universal jurisdiction permitted under international law.

In the United States, under the War Crimes Implementation Act¹⁴ and the Genocide Implementation Act,¹⁵ only where there is a U.S. victim or a U.S. offender or where the events took

¹² The cases are collected in Ruth Wedgwood, *National Courts and the Prosecution of War Crimes*, in *SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW: THE EXPERIENCE OF INTERNATIONAL AND NATIONAL COURTS* (Gabrielle Kirk MacDonald & Olivia Swaak-Goldman, eds., forthcoming).

¹³ See *Rwanda: Ex-Mayor Gets Life*, *The New York Times*, May 1, 1999, at A6 (Associated Press Report) (Rwandan mayor Fulgence Niyonteze convicted by Swiss military court for murder, attempted murder, incitement to murder, and war crimes in the 1994 Rwanda genocide, after seeking asylum in Switzerland).

¹⁴ 18 U.S.C. § 2441 (1998).

¹⁵ 18 U.S.C. § 1091(d) (1998).

place in the United States can a prosecution be brought in federal courts. U.S. law has not kept pace to allow full implementation of the jurisdictional principle of universal jurisdiction. If we caught Pinochet, we could not try him, except for involvement in the deaths of Americans. A number of countries will want to take a critical look at their national laws.

And some of the countries that have enacted universal jurisdiction have not done an effective job. For example, Canada passed a statute in 1987 to allow Canadian courts to prosecute any war crimes case permitted under the jurisdictional limits of international law.¹⁶ In the *Finta*¹⁷ case, seven years later, the statute was hobbled. In *Finta*, charges were brought against a Hungarian gendarme who deported Hungarian Jews to Auschwitz. The Canadian Supreme Court set an unworkable standard for the proof of international crimes, requiring that the offender must have specific intent to violate international law. As trial lawyers well know, state of mind is elusive and an offender will rarely have international law provably in mind.

The Canadian court also allowed the jury to be presented with extraordinary defense arguments about the supposed "good faith" belief of Hungarian political actors at the time — claiming that Finta could have reasonably believed that Jews were a national security threat and should be harshly treated.¹⁸ If you allow that kind of extreme jury argument, you are gutting the efficacy of international human rights law. One upshot of the Pinochet case is to ask all countries to look critically at how they have implemented universal jurisdiction in their own laws.

Universal jurisdiction in national courts provides a form of parallel processing — a horizontal model for the trial of systematic human rights violations. The "vertical" model of a perma-

¹⁶ Revised Statutes of Canada, 1985, ch. 30, § 1, Sept. 16, 1987 (3d Supp. 1989) (allowing trial of war crimes or crimes against humanity wherever, at the time of the culpable act or omission, Canada "could, in conformity with international law, exercise jurisdiction over the person . . .").

¹⁷ *Regina v. Finta*, [1994] S.C.R. 701, 812 (Can.).

¹⁸ See Judith Hippler Bello, *Case Report on Regina v. Finta*, 90 AM. J. INT'L L. 467, 473 (1996) (Court "may, however inadvertently, have mischaracterized the requisite elements of international crimes" and "sterilized whatever prosecutorial value remained" by allowing Finta to present defense based on claimed belief that Hungarian Jews "were subversive and disloyal to the war efforts of Hungary.").

nent international criminal court or ad hoc international tribunals will be strengthened by this alternative. There is sufficient development in the implementation of human rights treaties and anti-terrorism treaties through national courts that one can recognize this alternative modality of prosecuting human rights violations.

The third interesting feature of the Pinochet case is the problem of amnesties and transition. Most political observers of Chile believe that the country is stable enough to withstand a prosecution that takes place abroad. The military no longer seeks a prominent role in politics; there have been many retirements in the officer corps, and participation in international peacekeeping has liberalized the general attitudes of the Chilean military.¹⁹ The danger of the Chilean armed forces acting against the current democratic regime is minimal. Chile's long-term economic prosperity has also bolstered democracy. Any destabilization would sour economic growth, just as Paraguay's commercial ambitions within MERCOSUR were used to persuade the Paraguayan military to avoid a barracks coup several years ago. There can be a civilizing effect of commerce.

But one must take the danger of instability as a serious issue in each case. If proceeding against Pinochet might uproot Chilean democracy and cause a reversion to military rule, that is a profound consideration for any foreign court and any international criminal court. One cannot be blind to competing equities. The United Nations Security Council does not act to guarantee the stability of all democratic regimes. The competition between justice and peace requires a prudent judgment in each and every case.

The fourth lesson of the Pinochet affair is the vagary of politics — that you have to do politics to implement the law. The Pinochet case was touch and go. Former Prime Minister Margaret Thatcher does have tea with Pinochet. Britain does owe Chile a debt of gratitude, from Britain's point of view, for its assistance in the Malvinas War in 1982. Chile reportedly shared intelligence information on troop movements and maritime movements. Helicopters operated by the British in Argen-

¹⁹ *But see* Brian Loveman, *Antipolitics in Chile, 1973-94*, in *THE POLITICS OF ANTIPOLITICS-THE MILITARY IN LATIN AMERICA* 268 (Brian Loveman & Thomas M. Davies, Jr., eds., 1994).

tina were refueled in Chile before they went back to the Falklands. The more recent history of cooperation between Britain and Chile has included military affairs, as well as prosperous trade relations.

Some in Chile have felt that a prosecution such as this would not be mounted against the leader of a larger country, and thus, whatever Pinochet's sins, the case represents an aspersion against Chilean sovereignty. Others judge that the issues of transition are solely for Chile to handle. Decisions are going to be hard. And indeed, were it not for some of the events of the moment, I am not sure how the Pinochet matter would have come out. As it happens, the United Kingdom has been eager to participate in the leadership of Europe and to champion the "like-minded" states' interest in the ethical elements of foreign policy.

But if you look at the case of Abdullah Ocalan, the Kurdish terrorist arrested in Nairobi, one can see the possible constraining effects of politics. Ocalan was first arrested in Italy, and his extradition was requested by Turkey for the murder of Turkish civilians. Any sympathy for Kurdish political claims does not change the legal significance of Ocalan's acts against civilians. Italy ruled that it could not extradite Ocalan to Turkey as a country that might impose the death penalty. Next, Germany refused to request the extradition of Ocalan, arguing that his arrest would cause internal instability. Germany has hundreds of thousands of Kurds and Turks within its borders as guest workers and citizens, and the prospect of internal violence was unnerving.²⁰

Ocalan was finally arrested in Kenya, in an operation whose sponsorship was left deliberately vague. There were demonstrations across Europe, and some incidents of violence. Ocalan's transcontinental trek reminds us that there are real problems of politics, concerns about domestic tranquility, even

²⁰ See *Schroeder Tells Italy Germany Won't Take Ocalan*, Reuters, Nov. 27, 1998 (German Chancellor Gerhard Schroeder stated "I have asked the Italian Prime Minister for his understanding that we will not make a request for extradition. This is because we are the country in Europe with the most Kurds — often refugees — and Turkish citizens who live here. We are interested in protect[ing] the peace in Germany."); compare Tom Buerkle, *German Aide Hails Arrest of Pinochet*, Int'l Herald Trib. Oct. 30, 1998 (Foreign Minister Joschka Fischer stated that Pinochet arrest "has set a cornerstone of international law.").

concerns about commercial ties, that will be weighed against war crimes prosecutions. One will have to hand-tailor every case.

The final issue is the most technical, but perhaps the most profound. This is the need for sage judgment in how fast to push the development of the law. Customary law is based on state practice as well as legal opinion. The *gymnasium* scholars who write compendious treatises on international law may seem uncharismatic to some American academics. But the purpose of having these rather clinical assessments — old-fashioned works of encyclopedaic *wissenschaft* — is to take objective account of state practice, to see where state practice has gotten to in relation to reformist aspirations. If international law does not ground itself in state consent, it will just be a form of preaching.

There is a need to be careful in how one elides from “ought” to “is” in pronouncements of new international law. In Pinochet, of course, the Law Lords were merely construing a British jurisdictional statute. But their interpretation of the statute was informed by a reading of international law. One needs to maintain a rigorous split sensibility: taking account of where one wants to get to, but also recognizing the limits of current state practice. Otherwise, customary law will lose its claim of legitimacy, founded on state consent. One wants to be able to say to people who brandish state sovereignty that customary law is as surely footed on state consent as is treaty law. But that requires a self-denying judgment about what states have done and are willing to do.

If you read the majority opinions of the Law Lords, what they say is, “Yes, the whole trend of international law is in this direction. Holding office, even as a head of state, does not sanitize or immunize a criminal act.” But if you read the High Court opinion of Chief Justice Bingham or the dissenting Law Lords, they make an equally conscientious argument, saying essentially that the circle is not yet squared, that the treaties with universal jurisdiction do not provide for withdrawal of immunity from heads of state or former heads of state. And treaties withdrawing immunity from heads of state do not provide for universal jurisdiction.’ In the view of the dissenters in the Pinochet adjudication, there are tortoise-and-hare races in inter-

national human rights law and international jurisdiction that have not yet been won.

There is a virtue in taking matters deliberately — with principled “ad hoc’ery” — to create the political culture to sustain human rights claims. One cannot look at this simply as technical questions of law; one has to take account of real-life problems — the concerns of facilitating international relations by allowing free travel by heads of state, and encouraging autocrats to step down from power through the possibility of a safe *dénouement*. It may be that there is an “optimal” rate of prosecution — targeting enough defendants so that human rights violators think twice about the future, but at a pace that also allows dictators to suppose that peaceful retirement is a possibility.

Still and all, the Pinochet case, from the prosecutor’s point of view, provides a powerful record of salient facts. Spain can proceed on a conservative as well as innovative theory of prosecution, vindicating the deaths of its own nationals as well as Chileans. The events of the regime were famous and the doctrine of command responsibility is settled in the law. If divine providence is recognized as an active element in historical and legal evolution, the occurrence of Pinochet’s bad back is a chiro-practic god’s delight.

QUESTIONS AND COMMENTS

Q [Prof. Sohn]:

I would like to make two comments on things that could have been mentioned perhaps today but were not.

The first one is the consequence that the states have now for quite a number of years applied in the treatment of prisoners the United Nations Rules on the Treatment of Prisoners.

People do not know perhaps that there is a United Nations conference meeting every two years on international criminal law, that has been very active in the decision in Rome. They go very carefully through the laws of various countries and try to establish the basic principles. They are not conventions; they are not even declarations. They are simply guiding principles for people who deal with prisoners.

Some American lawyers discovered those things and started relying on them, especially in the courts of the states — I do not think there have been federal cases, but there are state cases — in which the attorneys were smart enough to say, “The treatment of these prisoners by the state has been far below international standards.” The judge says, “Where are those international standards?” “Here is something that was adopted, usually in a place in Sicily or other places in Italy, by an international group, was approved then by the General Assembly, and at least recommended to the states to apply.” The judge says, “It is reasonable; I am going to apply it.” One judge did not. Other judges have done in quite a number of cases.

So this is another good example of international legislation simply by writing reasonable rules, if you like. People then decide, “Yes, this has become by now Customary International Law that everybody can apply for treatment.” That is one point.

The second point, I would like to come to a little defense of the United States Government, in particular to President Eisenhower, who was maligned yesterday by saying that he ended abruptly the career of Mrs. Roosevelt by saying that she was no longer going to be the United States representative on the Human Rights Committee. But he had to appoint somebody

else, and he appointed Mrs. Osgood Lord, and, to make it even worse, asked her on her first visit to the United Nations Committee to announce that the United States from now on is not going to work on the covenants, the covenants are not necessary, the Universal Declaration is sufficient, and therefore the United States should not waste the time of its officials to participate in any further drafting of covenants.

After going to the United Nations, the poor lady goes back home and says, "We have to do something to change the atmosphere at the Human Rights Commission. What are we going to do?" She said, "Let's recommend that all states should report to the United Nations how they apply the Declaration, because we agreed that the Declaration is an effective document, even if it is not really binding, and therefore the states should apply it."

As a result, she came to the United States saying that every state should annually report what they have done to implement the Declaration in their countries. Of course, there was some opposition, like from the Soviet Union in particular, but, after two years' discussion, it was agreed. Therefore, the Commission in effect would have reports on the Declaration from its members.

Some twenty-seven out of thirty-seven states actually complied, including the United States. And what is fascinating for me, because I am interested in economic and social rights, is the United States reported not only on the first five articles of the Declaration, but on all articles of the Declaration. That was the first thing.

The Commission appointed a working group and presented a report saying that quite a number of states complied, but their replies were quite different. They established certain rules which should be observed by states in those reports.

The second time, fifty-one states presented, again the United States, and so on. And then, we had to appoint a Special Committee, meeting for several weeks before the Human Rights Committee, to look through those reports and give some conclusions that then the Commission could adopt, and they then sent it over to the Economic and Social Council and they adopted it.

It is fascinating that the United States for all those years was sending reports on the subject, very meticulously. They are good reports, not only as it relates to the basic document and

the citations, but the summary of those reports in general. You might like to go look at them. In those files are the reports by the United States.

A crisis came when the Covenants finally, in 1976, came into effect. Some smart person in the Justice Department said, "Of course the United States is going to ratify the Covenants, although it did not participate in their drafting, because they are simply implementations of the Declaration." Therefore, they discontinued those annual reports, and they suggested to the General Assembly that it was reasonable that the reports should be stopped.

If I had had time yesterday — which I limited myself only to twenty minutes, as everybody was supposed to — I would have proposed that the United States can repeat what they have done before. I would suggest that countries that do present reports to the United Nations on the Covenants should present reports on the Declaration. A very simple proposal. Maybe somebody might print it.

MS. SCHRAG:

Thank you, Professor Sohn. I must say you have once again demonstrated what someone — I can't remember; perhaps it was Professor Meron — said yesterday, that you have been the teacher of us all. Thank you for that provocative idea.

I would also like to add one comment, if I can be permitted the privilege as moderator, to your first comment. That is, I am aware of domestic advocacy organizations. At the one with which I am particularly associated, the NOW Legal Defense and Education Fund, our staff is now preparing itself in its arguments on domestic litigations to cite to international law as a means to persuade the courts. It is my sense that this is just the beginning of what may become much more widespread.

Q [Prof. Nagan]:

Just a comment and a few questions, [first, with respect to] Ruth Wedgwood's assessment of the Pinochet problem. Let me say, quite bluntly, I take objection to some of the points that she holds strongly.

You used the words on several occasions, "dirty war." It is not a neutral term, and it reflects some of the problems in Uru-

guay and some of the problems in Argentina, where the justifications for using these unrestrained methods of repression were tied to the notion that the other side was vicious.

In the context of Chile, you had destabilization of a democratically elected regime. This is quite different from the particular context. More than that, there was the rather sordid role of the United States involved in the destabilization of the economy of Chile. I remind all of you of Henry Kissinger's own famous statement, that "it was a really terrible thing and quite irresponsible for the Chilean people to have elected a socialist regime."

So really the circumstances are quite different, and one has to be very cautious about the morality one attaches to statecraft in these kinds of contexts. It is not neutral. It does put a contextual gloss on what has been put forward.

With respect to Mr. Roth, I must say *mea culpa*. He made a comment on the question of self-executing of human rights treaties. I was the character that negotiated the Torture Convention and the related components of the Civil and Political Rights Convention.

My colleagues took a very strong stand on the same principle as you did. I did not. I actually still think, at least in theory, that bringing the full weight of the Congress to bear on implementing legislation strengthens, rather than weakens, the framework of human rights culture in American society. The flaw lies in the unwillingness of NGOs to follow through on that process. The history of human rights in the Congress has shown far more promise in the full Congress of the United States than in trying to get a two-thirds blocking majority in the Senate.

Regrettably, the story behind this is a bit of an accident, because when we got the chance to stick the Torture Convention onto the agenda, it came on as a tag onto aid to the Soviet Union. There was a boycott of the Republicans on the aid to the Soviet Union because they did not get enough notice. When they finished that, they said, "What else is there on the agenda?" We said, "The Torture Convention." So they voted it up with no mark-up, so none of us knew exactly what it is that went through. None of us had the courage to go and say: "You didn't mark this thing up. Let's go muck around with it after-

wards.” We had a greater concern getting it through, even if it was not exactly an ideal package. Regrettably, it was by some degree of accident, I am sorry to say, so I make a bit of *mea culpa* here.

My question to the Judge is with respect to the Judge Walker-issue of the notion that one has to look at the Alien Tort Claims Act in terms of the law of 1789. I wonder if you would answer the question as to how the Rules of Civil Procedure have effected the interpretation of substantive causes of action over time. I am referring, of course, to the fact that in 1789 we have forms of action; later, through the influence of the Field Code, we had the code system of pleadings. Then, afterwards, during the 1930s, we had the Federal Rules of Civil Procedure with a very different conception of “a claim upon which relief can be granted.” My sense is that both are standard procedure, but I would like your comment.

JUDGE MARTIN:

I do not think it is a procedural question; I think it is a substantive question. Remember that treaties are not self-executing — somehow, somebody has got to create the right to sue. Judge Kaufman I think took a big leap.

Now you have that same debate going on in our own constitutional debates as to whether we are stuck with what the Founders wanted in the Constitution; or are they living documents that will be interpreted, the Brennan approach.

Q [Prof. Nagan]:

But they come through route *ex culpe*. They have to meet the standards of the rules.

JUDGE MARTIN:

But the pleading has to set forth the facts that establish that you have a cause of action that has been established by Congress, if you are dealing with the federal law. Judge Bork’s issue was it is not because that was not the time. It was Judge Friendly who said, “This is an Act that has never been used.” All of a sudden, Irving Kaufman grabbed it and did something with it.

I am not objecting to what he did, but I think it is important to keep in mind, as this area of litigation goes forward, that you've got to be careful how far it gets pushed, particularly before it gets reviewed by the Supreme Court.

I spent two years in the Solicitor General's office, where we were very careful about trying to decide what cases went to the Supreme Court so you got the right case to decide the facts. A great book I recommend to everybody is *Simple Justice*, the story of the whole background of *Brown v. Board of Education*,¹ which shows how carefully crafted those cases were to keep building on one another so that you could keep making good law.

I think there is a danger in some of this as it gets litigated if the wrong case gets to the Supreme Court. Then, perhaps, Bork and not Kaufman will prevail.

PROF. VENETIS:

I just want to comment also on the comment that you made. Actually, the Judge Bork opinion has been discredited by every single court since then. In addition, the U.S. Congress has also discredited it. When the U.S. Congress enacted the Torture Victim Protection Act, which basically gives U.S. citizens abroad the same rights that the *Filartiga*² cases gave to aliens, the U.S. Congress specifically said, "We do not follow Judge Bork's decision in *Tel-Oren*.³ We incorporate *Filartiga* and its progeny in the interpretation of the Torture Victim Protection Act." So you have the U.S. Congress recognizing that Customary International Law evolves.

It is kind of interesting that our government takes a dual position, because our government has submitted various amicus briefs saying that Customary International Law exists and is alive and well, in the case *United States v. Iran*. And then, in these cases that are now being brought domestically, where the U.S. Government is submitting amicus briefs, or actually is a litigant in the case, it is saying, "Well, wait a second. This doesn't apply to us." So you can actually use the U.S. Govern-

¹ RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (1977).

² *Filartiga v. Pena-Irala*, 630 F.2d. 876 (2nd Cir. 1980).

³ *Tel-Oren v. The Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984).

ment's own words that have been made in these foreign cases against them domestically.

Again, the courts have to figure out what to do with it. I think several people have commented how quickly should this move, how do courts recognize international norms, and does that at all dilute the concept of what a norm is if you have too many courts commenting on it.

MS. SCHRAG:

I think we have time for one more question.

Q: Two particular things I would like to comment on.

No one mentioned how in Europe — [whether] in France, Britain, wherever — if you are in one of those courts and your human rights are abrogated in any way, you are out of that domestic court system and into the European Commission on Human Rights. If that does not resolve it, then you have access to a court, the European Human Rights Court. In this country we have no such avenue. Their experience with Nazi Germany put them in that position, where that is how they deal with abrogation of their rights in the court.

I guess what I am trying to say is judges are put into place, very much in the same way that our politicians are put into place, by campaign finance.

JUDGE MARTIN: I never contributed a nickel.

Q: Well, the point is that you have corruption in these courts.

What I also suggest is that it is just a little bit too academic. I think you need to have an assistant who is very nondescript, send them into these courts. If you go in yourself, the judge is going to follow the Constitution, et cetera. But from what I can see, you are speaking about human rights, and we do not have constitutional courts. So I suggest that we get someone that would sort of blend in to go to these courts and see what is really going on. Some of the things under the Pataki and Giuliani administration[s], where they are placing the judges, they are atrocious.

Families are being abducted, there is torture, there is murder, on the behalf of landlords. There are 50,000 children

through the ACS getting foster care, and that is essentially an extortion system.

My question to you is to comment on what Europe does in terms of protecting human rights.

And also, no one has mentioned the Inter-American Commission on Human Rights. Reagan was the only President, if I am correct, who ratified the Convention on the Rights and Duties of Man. So there is some recourse in terms of the Inter-American Commission on Costa Rica, the human rights courts, the State Department notified, and then of course the Congress had to respond, where I am not sure there is any teeth into that.

MS. SCHRAG:

Thank you for those comments. I think one implicit response already to part of your question has been the kind of litigation that Penny described that she brought. Again, it is the theme of this weekend, which is importing the principles of the Universal Declaration into our domestic arena.

Does anyone else on the panel want to respond to those questions?

PROF. ROTH:

I can respond quickly. You are right, the United States has not allowed itself to be subject to any international jurisdiction comparable to the European Court. We have not allowed claims to be stated by individuals before the Human Rights Committee, which is what enforces the international Covenant on Civil and Political Rights. We have not submitted to the compulsory jurisdiction of the Inter-American Court on Human Rights. So it is just more of the same.

I mean, we do not even allow our own judges to apply international human rights law. The best that can be done, as somebody over here argued — Professor Sohn said that yes, of course you can cite treaties as persuasive authority. You can say, “The European Court interpreted this provision this way. Why don’t you interpret a U.S. provision similarly?” Those arguments are certainly worth making, but that is very different from being to state a claim under the treaty that any judge, American or otherwise, could then look at. That you cannot do right now.

PROF. VENETIS:

Also, the points that you make are precisely the reason that we need to import international law into our own. I think Ken commented on this as well. Our Constitution, in the way it has been interpreted, no longer deals with a lot of problems that exist in society. [Further], if we inject into our system this new body of Customary International Law, then perhaps in interpreting those provisions where the courts are not bound by bad Supreme Court precedent they can create new, more protective law.

MS. SCHRAG: Ruth, do you want to have the last word?

MS. WEDGWOOD:

Just an old prosecutor's joke, since we all lived through the transition from John Martin to Rudy Giuliani as U.S. Attorney in the Southern District of New York. I am not sure that international law is going to be what makes any particular difference in the mayoral powers in New York City.

But on a serious note, the theory of the U.S. Constitution is every court is a constitutional court. There is not a separation between courts of law and courts of constitution, so every court should be applying the federal and state constitution in applicable cases.

Where I do think, though, we may be impatient is that as much can be done through comparative constitutional law as through direct application of international law. In a way, this is an interesting epiphenomenon of our parochial law reporting system. Heretofore there has not really been a trans-European, Euro-Atlantic, Euro-Asian constitutional law reporting system. One court is not really aware of what another country's courts are doing.

As that changes, with the Internet and database and translation —and, frankly, as English becomes the culturally hegemonic language throughout Europe — American courts will become much more aware of what the Hungarian constitutional court is doing or the German constitutional court is doing. Then [it] doesn't have to think about it as a hierarchical subordination to international law, but simply best practices —looking at what other countries' constitutional courts have done and

choosing voluntarily to do likewise in the interpretation of our Constitution.

The signal case for all of us, and it is at the beginning of Louis Sohn's great red casebook on international human rights law — which should be reprinted sometime — are the California *Fuji* cases. [They are] the Japanese land law cases, where the California Supreme Court did not want to suppose that the U.N. Charter would be directly self-executing, but did radically reinterpret the Fourteenth Amendment to forbid alien land discrimination to allow Japanese immigrants and nationals to own land in California.

That political object lesson from the early 1950s might be taken by us all that even though it is less observable, it is more sinuous. But the incentive for reinterpretation of domestic law in light of international law and other countries' constitutional practice is something that I think will reward us an alternative form of argument.

MS. SCHRAG: Thank you very much.