

Possibilities for Prosecuting Abuses of Economic and Social Rights

Peter Weiss¹

Thank You, Bob. I would like to make three points to you. The first, that universal jurisdiction was not discovered within the last 50 years. The second, that in our emphasis on the efforts to create an international criminal court and bring criminal prosecutions, we should not overlook the need that victims have for civil litigation. And the third, to speculate a little bit about how this whole exciting new area of law can be expanded to deal with social and economic human rights violations.

The first point I will make very briefly. As you probably all know, Antigone, the Rosa Parks of Thebes, when told by Creon that she couldn't bury her brother, told him to get lost. And she said "I go by the unwritten and unfailing statutes of heaven for their life is not of today or yesterday but from all time and no man knows when they were first put forth." That's about as eloquent a statement about universal jurisdiction as you could ask for. And if I had the rest of the afternoon, I could give you very similar stuff from Plato, Aristotle, Marcus Aurelius, Cicero, Vattel, Suarez, Grotius and so forth.

The point I'm making simply is that while the Pinochet case was an absolutely giant step forward, it was also at the same time an awakening of a slumbering giant. By that I mean that the principle of universal jurisdiction has been with us for at least three millenia and it took Joan Garcés and his colleagues to bring it to life, and for that we are all grateful. But we should also at times go back and view the whole thing in its philosophical / historical context.

The second point is really the most important of the three. It relates to something that Reed Brody said this morning. He said that when the government steps in, it's usually a step backwards. And you were corrected a little bit because Jack Straw's first step was a step forward but his final step was a step backwards. I think it would be a terrible mistake to rely only on criminal prosecutions, whether they be at the national level or at the regional level or at the level of the International Criminal Court, which we all support in principle, despite some of its shortcomings. It would be a terrible mistake to think that criminal prosecutions are going to be a sufficient answer to the enormous human rights violations that we see all around us.

When we did the *Filartiga* case, which Shawn told you about, we were told we were being foolhardy; they laughed when we sat down at the keyboard. The most important thing about the *Filartiga* case, in addition to the recognition of the principle of universal jurisdiction by U.S. courts, is the fact that it provides access to the justice system for

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victims of human rights violations in a direct unmediated manner. Now we have a very paradoxical situation. On the one hand, the United States is for all practical purposes the only country where that kind of access is possible. There are a few odd flickers of the same kind of jurisprudence abroad - in the United Kingdom and Germany-but this is the only country in which seven federal circuits have recognized the validity, the constitutionality of the Alien Tort Claims Act and thereby provided direct access to American courts in a perfectly universal jurisdiction mode; that is, one without any nexus to domestic law other than the presence of defendant in the jurisdiction. As far as I'm concerned, this is an illustration of what I call the Weiss principle of historical dysfunctionality. Which is going forward and backward with respect to the same issue at the same time. As has been adequately demonstrated this morning, the position of the U.S. on the International Criminal Court and on universal criminal jurisdiction is beneath contempt. And yet at the same time our courts are open to aliens to prosecute civilly and get judgments against gross violators of human rights.

My colleague Beth Stevens is in the process of writing a very interesting article about this. It's called "Translating Filartiga" and in it she talks about why the Filartiga principle is not accepted throughout the world. She has a few theories about that, some of which I share. For instance, that in many other judicial systems, including the Hispanic one, in Spain and in Latin America, there is a merger of civil and criminal litigation and you can't even bring a civil case until the criminal case is completed. Furthermore, in Spain, for instance, courts have discretion to accept or not to accept a "denuncio", so there is no guaranteed access through the system.

Europeans are sometimes heard to say that they don't need Filartiga because they have the European Court of Human Rights. But in that court, you can only bring cases against governments, not against individuals. The Filartiga type of litigation enables you, as you heard this morning, first of all to lay the facts before the public and before the courts and also to obtain huge financial awards. None of which, I regret to say, we have been able to collect so far. But after the Karadzic case, we are up to about \$ 4.8 billion (with a b). We're looking for those assets, but we're not holding our breath about collecting them.

The point simply is that civil litigation, the Filartiga kind, is the most democratic, popular, progressive way for human rights victims to seek justice without having to rely on what Claudio Grossman this morning called the politicizing of human rights.

My last point is two-fold, and I'll mention the two aspects briefly. One is that in recent years, in the last three to four years, it has become possible to extend the Filartiga principle to human rights violations by corporations. We have the Unocal case which started out very well because we got a favorable judge. He has unfortunately been elevated to the circuit, and now we have an unfavorable judge who granted summary judgment to Unocal on the ground that while Unocal was aware of the human rights violations being committed by the government of Burma for its benefit in the construction of the pipeline which it had contracted to build with the Burmese government, it was not directly responsible for those human rights violations. That is up on appeal and even if we lose that appeal we may stay alive in state court.

Another major case, of the four or five now pending, is Saro-Wiwa, in which we are suing Shell which is domiciled in London and Amsterdam. We lost that in the first instance on lack of personal jurisdiction, but won that point on appeal. It is now up on a petition for cert to the Supreme Court. I am grateful to Beth Van Schaak for the happy news that the Supreme Court this morning declined to take the case (that's what you get for not having a mobile phone on you).

In the cert petition, the Shell lawyers also pulled out of nowhere an attack on the whole Filartiga jurisprudence, based on a very minor school of academic thought that says that the Alien Tort Claims Act is unconstitutional because under *Erie v Tompkins*, customary law is not the law of U.S. Courts. Frankly, we were a little worried about that. But Harold Koh wrote a beautiful response on that point.

These cases against corporations are going to continue, and CCR and CJA are by no means the only organization bringing them. There are all kinds of private lawyers joining the fray who see the possibility of huge contingency fees, and that's going to be a very interesting extension of the Filartiga principle.

The other thing, which I guess I have thirty seconds to mention right now, is that violations of social and economic rights are frequently as brutal if not more brutal than the kind of violations we have been talking about here. As Reed said you kill one person you go to jail, you kill 20 you go to an insane asylum, you kill 20,000 you go to a peace conference. But what happens if you let millions of people die of AIDS because they can't afford the outrageous prices for the drugs? What happens if, although there's enough food to go around, millions of people die of hunger?

We actually have a case like that. I will have to be very brief about it because I can't say much in the presence of a member of the Inter-American Human Rights Commission, where it is pending. The complainants are the Kensington Welfare Rights Union and about 12 other poor people's and homeless people's organizations in the United States, who are charging the US with violating their right to an adequate standard of living. It's another one of those foolhardy cases that may or may not change the course of law.

One very brief quote to end with. It's from St. Augustine: "What are kingdoms but great robberies? For what are robberies themselves, but little kingdoms?"

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