

**\*TRANSCRIPT\***

**Confronting Challenges to the Pinochet Precedent  
And the Globalization of Justice**

**A roundtable discussion sponsored by the American University Washington  
College of Law Center for Human Rights and Humanitarian Law  
and the Institute for Policy Studies**

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**American University Washington College of Law, Rm. 603  
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*For more information on the Washington College of Law or  
the Institute for Policy Studies' Pinochet Case Project, see:*  
<[www.wcl.american.edu](http://www.wcl.american.edu)>, <[www.tni.org/pinochet](http://www.tni.org/pinochet)>, <[www.ips-dc.org](http://www.ips-dc.org)>

## PARTICIPANT BIOS

**Reed Brody, Esq.:** Reed Brody is Special Counsel for Prosecutions at Human Rights Watch. He initiated and coordinates the prosecution in Senegal of the former dictator of Chad, Hissène Habré. He directed HRW's intervention in the case of Augusto Pinochet in Britain's House of Lords. Mr. Brody teaches a class on accountability for atrocities at Columbia Law School. He is co-editor of *The Pinochet Papers: The Case of Augusto Pinochet in the British and Spanish Courts* (Kluwer, 2000) and author of HRW's *The Pinochet Precedent: How Victims Can Pursue Human Rights Criminals Abroad* (2000). Previously, he led United Nations teams investigating massacres in the Democratic Republic of Congo and observing human rights in El Salvador. In 1995-1996, he coordinated an international legal team convened by President Aristide to prosecute human rights crimes in Haiti. He was Director of the International Human Rights Law Group and Executive Secretary of the International Commission of Jurists.

**Joan E. Garcés:** Joan Garcés is the legal team coordinator for the Spanish case against former Chilean dictator Augusto Pinochet. Garcés is an expert in International Relations and was an advisor to the late Chilean President Dr. Salvador Allende. He holds a degree in Political/Economic Sciences and Law from the University of Madrid and a PhD in Political Science from the Sorbonne. He has taught at a number of universities in Latin America and Europe and is the author of several books and articles on Chile, political and economic development, and the history of the Cold War. Garcés is the founder and director of Garcés and Prada, Attorneys at Law in Madrid; he has also worked as a consultant to UNESCO and was a visiting fellow at the Institute for Policy Studies. In 1999, Garcés was awarded the Right Livelihood Award, also known as the alternative Nobel Prize, for his work on the Pinochet case.

**Stacie Jonas:** From 1999-2001, Stacie Jonas was organizer and director of the Institute for Policy Studies' Bring Pinochet to Justice Campaign, which was committed to mobilizing U.S. support for a trial of former Chilean dictator Pinochet and the declassification of U.S. documents on human rights abuses in Chile. She currently oversees an IPS research project on lessons from the Pinochet case. Ms. Jonas was a contributor to the book *Light Among Shadows: A Tribute to Orlando Letelier, Ronni Karpen Moffitt, and Heroes of the Human Rights Movement* (2001). Prior to joining IPS, Ms. Jonas worked with community and economic development projects in Nicaragua, Chile, and the United States.

**Diane F. Orentlicher:** Diane F. Orentlicher is professor of law and faculty director of the War Crimes Research Office at American University. She has written extensively on issues of international criminal law, including universal jurisdiction.

**Peter Weiss:** Peter Weiss is a Vice President and cooperating attorney of the Center for Constitutional Rights. He was lead counsel in *Filartiga v. Pena Irala*, which established the right of aliens to sue in US courts for violations of human rights committed abroad. He was co-counsel in *Horman v. Kissinger*, based on the torture and assassination of U.S. citizen Charles Horman in the Santiago stadium in 1973. He has lectured and written widely on human rights in the United States and abroad and is currently counsel to Joyce Horman, widow of Charles Horman, in her case against General Pinochet and others, pending in Judge Zepeda's court in Chile.

**Richard Wilson:** Richard Wilson is Professor of Law and Director of the International Human Rights Law Clinic at American University's Washington College of Law. He was the director of the law school's summer study program in Chile in 1995 and 1996. He has served as Legal Advisor to the Consulate of the Republic of Colombia in Washington. His scholarly interests focus on access to justice, pedagogical innovations in legal education, and comparative legal practice. He is a co-editor of two textbooks on international human rights, and on international criminal law and procedure.

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**Hadar Harris:** My name is Hadar Harris, and I'm the Executive Director of the Center for Human Rights and Humanitarian Law at the Washington College of Law at American University. I would like to welcome all of you to this roundtable on the Pinochet Precedent and the Globalization of Justice. This is the second event in several years that we have co-sponsored with the Institute for Policy Studies on the implications of the Pinochet precedent and the issues and concepts of universal jurisdiction. Others will speak about the law school's connection and commitment to the events in Chile and to the arrest of Augusto Pinochet. Students in our international human rights law clinic submitted a memo to Judge Garzón on the application of international criminal law and human rights law, which was referred to by the court in their paper. In addition to this, students were able work with Michael Tigar to help the Crown Prosecutor to put together the response to Pinochet's lawyers following the extradition request. Members of our faculty, who are sitting on the panel today, Professor Rick Wilson and Professor Diane Orentlicher, have been integrally involved, not only in this case, but also in the ongoing debate about applications of universal jurisdiction around the globe. In addition, our Dean has a small connection to the events in Chile in 1973, and he sends his regrets that he was not able to be here today. We look forward to a rich discussion today. We are gratified that so many people are interested in this subject and braved the bad weather to join us today. Our phone started ringing off the hook at 8 o'clock this morning with people checking in to make sure that we were still having the event. I would also like to thank the First Secretary from the Chilean Embassy that is here today, as well as a variety of other people who have come down from New York, flown in from Spain, and joined us in sickness and in health to participate in today's panel. I would also like to just thank the Institute for Policy Studies for their collaboration on this project. We look forward to a wonderful discussion and further collaborations with them. I would now like to introduce John Cavanagh, the Executive Director of IPS, who will say a few words of welcome to our guests today. Thanks again for coming.

**John Cavanagh:** Thank you very much. It's a great pleasure to be here. It is a tribute to this wonderful panel that all of you have come in through this bad weather to join us today. I am the director of the Institute for Policy Studies. We are, for those of you who don't know, a center of ideas linked to action and activism around justice and peace. 27 years ago, we lost two of our colleagues, former Chilean diplomat Orlando Letelier and 25-year-old American Ronni Karpen Moffitt to a terror campaign led by General Augusto Pinochet. Orlando and Ronni were killed in Washington, D.C. by a car bomb set by agents of Pinochet's secret police. After their murder, we joined thousands of others, including many in this room--Joan Garcés, Peter Weiss, Veronica De Negri, Joe Eldridge, everyone on this panel, and countless others --in a three decade struggle for justice.

Today's panel is the result of a year long inquiry at the Institute for Policy Studies headed up by Stacie Jonas, who will be the moderator of this roundtable, to learn the lessons of this 30 year battle for justice for Pinochet's crimes. And we are thrilled, once again, to join the Washington College of Law at American University as a co-sponsor in this inquiry. So, thank you all for coming. I hope that you will stay for a reception following this event, and it is my pleasure to introduce Stacie Jonas, who is the director of the Pinochet Lessons Project at the Institute for Policy Studies.

**Stacie Jonas:** I want to thank everyone again for joining us in reflecting on recent challenges to the Pinochet precedent and the globalization of justice.

I think it's fair to say that Pinochet's 1998 arrest came as a surprise to everyone, even those on today's panel who helped bring it about. The arrest and 16-month detention created a lot of hope that existing principles of international law, including universal jurisdiction, could finally be put into practice to punish individuals, even former heads of state, who commit systematic violations of human rights.

Three years ago, in March 2001, all of today's panelists sat in this same room to discuss the precedent set by the Pinochet case. By that point, some of the optimism generated by Pinochet's arrest had been slightly tempered by his release and a few setbacks in other cases that had grown out of what was being called the "Pinochet precedent," but overall, the case was still hailed as a major groundbreaking event in the efforts against impunity. Since then, however, there have been more setbacks in the efforts to pursue a more "globalized" system of justice. At the same time, though, there have also been new victories and signs of hope.

Today we have several distinguished panelists who will share their perspective on these new developments and how human rights advocates continue to build on the precedent set by the case against Pinochet.

As many of you know, **Joan Garcés** was the legal mastermind behind the Pinochet case in Spain, leading the prosecution team there. **Rick Wilson**, who is a professor here at the Washington College of Law, took a team of students to Spain to help Joan with the case even before Pinochet's arrest. Rick has written extensively on international criminal law, including the Spanish cases against Chilean and Argentine human rights violators. **Reed Brody** is Special Counsel on Prosecutions at Human Rights Watch. He was at the center of action during the extradition proceedings against Pinochet in London and has been heavily involved in the efforts to bring former Chadian dictator Hissène Habré to justice. **Diane Orentlicher** is another Washington College of Law professor renowned for her work on international criminal law and universal jurisdiction. She is also the director of the War Crimes Research Office at American. **Peter Weiss** is a pioneer in the efforts to hold both foreign and American rights violators accountable for their crimes. He put the Alien Tort Claims Act on the map in the U.S. as counsel in the *Filartiga* case. He also has served as counsel to Joyce Horman in both a case against Pinochet in Chile and also in a civil suit brought against former U.S. Secretary of State Henry Kissinger for the 1973 murder of Joyce's husband, Charles.

I want to say a few words about how today's event will be structured. I'm going to start off by summing up some of the recent developments in cases that grew out of the Pinochet precedent and other international justice efforts. Our panelists will then discuss these developments, responding to a series of questions. We'll then take questions from the audience. Also, I should just say that Diane Orentlicher can only be here for the first hour of the event, so we'll try to make sure she gets to talk at the beginning.

Now for a little background on recent developments. Let's start with the example of the Spanish courts, the courts responsible for the arrest of Pinochet. After the U.K. ended the extradition proceedings against Pinochet, Spanish Judge Baltasar Garzón continued to investigate crimes committed by the Chilean and Argentine military dictatorships. There was a big victory in the Argentine case when an Argentine naval officer, Ricardo Cavallo, was arrested in Mexico and held on a warrant and extradition order issued by Judge Garzón. And then in June 2003, there was another breakthrough when the Mexican Supreme Court agreed to extradite Cavallo to Spain. Cavallo and one other Argentine naval officer are now expected to face an oral trial by a bench of Spain's National Criminal Court, the *Audencia Nacional*, later this year. Then, in August 2003, an Argentine judge

actually ordered the arrest of nearly 40 military officers on the basis of Garzón's warrant. When the Argentine Congress, in turn, annulled that country's amnesty laws, the Spanish government stepped in to stop the extradition, saying that now the Argentine courts could and should handle the trials. So while the Cavallo extradition was a huge victory, and there is some concern, I believe, that the Cavallo trial could possibly be prevented on the same grounds, and Rick and Joan will certainly have more to say on this.

At the same time, there have been setbacks in other universal jurisdiction cases in Spain. In February 2003, the Supreme Court ruled that Spain only had jurisdiction to try Guatemalan military officers for crimes committed in Guatemala against Spanish citizens, and that it did not have jurisdiction to try them for crimes committed against Guatemalan citizens. Keep in mind that this is different from what happened in the Pinochet case—though there were Spanish victims involved in the that case, the case largely dealt with crimes against Chilean citizens committed in Chile. A few months later, the Spanish Supreme court also denied jurisdiction to try former Peruvian dictator Alberto Fujimori, arguing that the Peruvian courts were able and willing to handle the trial in Peru.

These setbacks have not been confined to Spain, either. We also have the recent developments in Belgium. When Pinochet was under arrest in London, Belgium was one of four countries that requested his extradition. The case was brought on the basis of an extremely progressive Belgian universal jurisdiction law that allowed victims of crimes against humanity to file cases in the Belgian courts for atrocities committed abroad, regardless of the nationality of the victim or perpetrator. And victims of human rights violations from many countries really took them up on that law. In 2001, four Rwandans were convicted in the Belgian courts for their role in the Rwandan genocide. When the Belgian courts attempted to try the Foreign Minister of the Congo, however, Congo brought the case to the International Court of Justice and in 2003, the ICJ ruled against Belgium arguing that the defendant was, in fact, protected from prosecution as a sitting Minister of State. And as cases continued to mount in the Belgian courts and especially after charges were filed against Israeli Prime Minister Ariel Sharon and U.S. officials for crimes committed in Iraq, you saw a backlash. First the universal jurisdiction law was amended and then the Bush Administration threatened to move NATO headquarters if Belgium didn't repeal the law altogether. And that's essentially what they did. In August of last year, the law was repealed. Fortunately, however, at least one case survived the gutting of the law, and that was a case filed against Chadian dictator Hissène Habré, and I'm sure Reed will have more to say about that.

And there have been new breakthroughs and backlash in the U.S., as well. On a positive note, in October of 2003, a Miami jury held Chilean military officer Armando Fernandez Larios liable for the murder of Winston Cabello, who was killed in Chile in 1973. That case also marked the first U.S. jury verdict for crimes against humanity. The case was based, in part, on the Alien Tort Claims Act, the 1789 U.S. law that allows victims to sue human rights violators in the U.S. courts for crimes committed abroad. But the Alien Tort Claims Act has come under new fire, as well. The U.S. Justice Department has filed a series of amicus briefs essentially seeking to roll back the law by arguing, among other things, that cases brought under the Act interfere with foreign policy and the war on terrorism.

And these are just a few examples of the developments of the past couple years. The ICC is about to open its first investigations, but the court is also facing challenges by the U.S. government. Other countries in Europe have pursued less publicized universal jurisdiction cases. And we now have an entirely new debate on how to hold dictators accountable opened up by the capture of Saddam Hussein.

So, in light of all of these developments, I want to start off the discussion by asking our panelists two general questions. I also, of course, invite them to add their comments and corrections to my summary.

I've mentioned setbacks and challenges to the precedent set by the Pinochet case, but I'd like to start off by asking you first to comment a bit on the positive. Overall, five years after Pinochet's arrest, I wonder what you think has been the most enduring, positive impact of that case and if you could comment on where you see signs of hope and momentum, cases gaining ground. Diane, perhaps we could start with you, since you have to leave?

**Diane Orentlicher:** First of all, I plan to speak very briefly because my fellow panelists are really the people on the front lines and so I don't want to take up too much of our collective time.

I'm sure that there will be a lot of discussion today about the backlash to which Stacie alluded. I'm very happy to talk first, however, about the positive and enduring contributions of the *Pinochet* case. Stacie has alluded in her really helpful and comprehensive introduction to one important consequence of the proceedings against Pinochet in Europe, and that's the ricochet effect of the proceedings in London and Spain back home in Chile. The question of where universal jurisdiction is and should be heading raises quite difficult and vexing issues, and is hotly debated among human rights professionals. But I think the one point on which everyone agrees is that the proceedings against Pinochet outside of Chile had an extremely positive, dynamic and catalytic effect in Chile in a way that was not entirely foreseen (I certainly hadn't predicted this effect). And this outcome suggests one of the strongest "arguments" in support of universal jurisdiction. As Stacie indicated, what happened as a result of Pinochet's arrest in London is that countries, including Chile, that had felt that they had gone as far as they politically could in bringing perpetrators of past atrocities to justice realized that they had to go further and were able, in fact, to overcome what had previously appeared to be impregnable barriers to prosecution. Again, I'll leave it to the pros on the front lines to talk about the details of what's happened in Chile (as well as Argentina), but I do think it is fair to say that the prosecutions abroad opened up more political space for accountability in both of those countries.

The reason I believe this development represents a powerful argument in support of universal jurisdiction is that it presents a persuasive response to one of the central challenges to universal jurisdiction raised in recent years. Some commentators have questioned whether universal jurisdiction is—to oversimplify their claim—anti-democratic. And I think this is a legitimate issue to debate. The claim that universal jurisdiction is "anti-democratic" rests in part on the view that its exercise removes questions of punishment from the country where prosecutions should take place, if they should occur all. What victims say in response, quite simply, is that they don't seek justice abroad if they can find it at home. What I think is a powerful answer to critics' argument (and it's a serious argument) is, "let's look at what actually happens": Far from undermining Chile's democracy, the attempted prosecution abroad helped revitalize Chile's democracy and gave Chileans leverage in their efforts to seek justice at home. They could say, in effect, to their own government: "If we don't render justice here, it will happen abroad". I think that's been a very powerful dynamic.

Let me quickly say that there will be a decision imminently from the Special Court for Sierra Leone, which is a joint UN and Sierra Leone tribunal, in a case brought against former Liberian President Charles Taylor, and I am sure the *Pinochet* precedent will be one of the central precedents cited in that case. Beyond its effect in Chile itself, the Pinochet case created an important precedent for bringing prosecutions against a former leader of a state for human rights violations.

**Stacie Jonas:** Any other thoughts on signs of hope and positive developments that have come out of the Pinochet case?

**Reed Brody:** I have laryngitis; please tell me if you can hear me.

I think that the greatest effect of the Pinochet case is the inspiration to victims. We described the Pinochet arrest as a wake-up call to tyrants around the world, but in fact it really had the effect of giving hope to victims all over the world. I think that in Guatemala, El Salvador, and Argentina, people saw that you could actually do something. Dictators who seemed out of the reach of justice could actually be brought to justice. Throughout Latin America, we had what was called the “Garzón effect”. In country after country, victims started to call into question the transitional arrangements that had been made 10 to 15 years earlier that had left the perpetrators of atrocities not only unpunished, but in many cases, in power. I think that the Pinochet case was a genie that you can’t put back in the bottle. Now, any time there is a transition, any time a dictator falls, the question of justice is on the table, whether it’s Charles Taylor or Saddam Hussein.

I remember a few years ago, I went to Panama after Vladimiro Montesinos had fled Peru and was seeking asylum in Panama. Panama was like the dumping ground for dictators. Raul Cedras of Haiti is there, Bucaram of Ecuador is there, Serrano of Guatemala is there, Juan Peron had been there, the Shah of Iran had gone there. It was really the place you went. In the post-Pinochet world, however, the governor of Panama felt that it would not be decent to grant asylum to Montesinos. Peruvian NGO’s had gone to Panama and stated their case, and eventually Montesinos was rebuffed and forced back to Peru, where he is now on trial. So I think really, more than anything else, the Pinochet precedent is an idea--an idea that justice is possible if you do the work.

**Stacie Jonas:** Thanks, Reed, for your effort.

**Rick Wilson:** That is a great technique, I’m going to start using it in class. You can really keep the attention of everyone if you are whispering.

I absolutely agree, I think that’s one of the most significant impacts, and probably the single greatest is that idea of justice. To be more concrete about some of the outcomes, I think if we look back at what was expected when the litigation was started, and some of the goals of the lawyers and activists in Spain at the time, when there was only a dream of the possibility of an actual arrest or trial, those goals, I think, have been vindicated and continue to be vindicated. Those goals had to do with allowing the victims voice to tell their stories. The process of being able to document their stories, to tell them publicly, and to speak to the press in a place that would listen to their stories was, in itself, a legitimate objective that was met and exceeded in those cases. The documentation and the building of a body of jurisprudence that articulates a set of standards on the way that international law approaches these questions is another one of the legitimate objectives that I think was met and exceeded and continues to be met in many ongoing cases that are the positive outcome of this sense of empowerment of the victims stepping forward. So, an arrest without a conviction is something we need to keep in perspective, although I think many of us felt that every day that Pinochet spent in custody in London was a victory for justice in itself, as well, whatever may have been the ultimate outcome of that case. I think all of these things are enduring legacies of that case.

**Joan Garcés<sup>1</sup>:** Estoy encantado de encontrarme entre Uds. una vez más. Es un placer y un honor.

Obviamente, no puedo estar en desacuerdo con mis colegas en cuanto a lo que acaban de decir. Yo quisiera simplemente indicar que, cuando yo interpuse esta acción penal el 4 de julio 1997, el objetivo que tenía era luchar contra la impunidad existente en aquel momento en Chile.

Siempre dijimos que era en Chile donde Pinochet debía haber sido juzgado. Y solamente en la medida en que los tribunales de Chile no podían, o no querían, juzgarlo es que ejercitamos las acciones que la ley española permite bajo los principios de jurisdicción universal. Desde este punto de vista, el legado de este caso es, sin duda, positivo, en la medida que ha estimulado el desarrollo universal de la conciencia de la lucha contra la impunidad.

Pero es un legado que no puede fijarse en el tiempo de una manera estable, porque esa lucha entre la impunidad y quienes combaten la impunidad no se resolverá nunca de una forma definitiva. Es una lucha que va a continuar presente durante décadas y siglos, como lo ha estado anteriormente, de modo que nadie espere una resolución, digamos, definitiva, porque es imposible. Esta lucha es una interacción dialéctica que va a continuar.

Pero, desde un punto de vista práctico, sí quisiera llamar la atención sobre la responsabilidad de la lucha contra la impunidad en la medida que los abogados, en particular, y las víctimas, también, tienen que tener presente la interacción entre, por un lado, aspectos técnico-jurídicos internos de los Tribunales donde se ejercita la acción penal -que tienen estructuras específicas en cada país, y, por otro lado, la interrelación con fenómenos externos a los Tribunales, como son los diplomáticos, los políticos o geopolíticos, que condicionan el propio desarrollo de la acción penal cuando ésta va dirigida contra los mayores responsables de crímenes, que son quienes han ocupado altos puestos en el Estado.

Y en ese sentido yo tengo mi experiencia particular. Cuando Pinochet llegó al Ecuador en marzo de 1998, seis meses antes de su detención en Londres, yo me abstuve de instar el envío de ninguna petición de extradición a Ecuador. No moví ni un dedo en relación con la presencia de Pinochet en Ecuador. En cambio, en cuanto supe que estaba en Londres, inmediatamente puse en acción la iniciativa para conseguir su extradición a España. ¿Por qué estuve totalmente pasivo en marzo de 1998 e hiperactivo en octubre de 1998? La respuesta es sencilla desde el punto de vista práctico. Porque, según mi análisis, las posibilidades de que el sistema legal de Ecuador, políticamente hablando, fuera capaz de gestionar una solicitud de extradición semejante, era cero. En cambio, en mi análisis, las posibilidades de que en Inglaterra, en el año 1998, pudiera prosperar, eran superiores al 50%. Nunca un 100%, pero sí de al menos un 50%.

Visto reactivamente, si yo hubiera tomado la iniciativa respecto al Ecuador en marzo del 1998, no hubiera habido un viaje de Pinochet a Londres en octubre de 1998. Por consiguiente, no estaríamos hablando hoy de un “caso Pinochet”. Este es un ejemplo práctico de las opciones que se ofrecen.

Otro ejemplo: en marzo de 1999, ante el tribunal español en que yo estoy actuando, llegó una petición de una persona muy conocida, que deseaba que se iniciaran acciones legales contra Henry Kissinger ante el tribunal español. El tribunal dio traslado a las partes en el proceso para que dieran una opinión sobre esa solicitud. Las partes eran el Ministerio Público y los abogados de las víctimas. Yo informé al

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<sup>1</sup> Spanish to English interpretation was provided at the event. For an unofficial English translation of Dr. Garcés' remarks, please contact Stacie Jonas: <stacie@ips-dc.org>.



Juzgado en contra de que se iniciaran en Madrid acciones contra Henry Kissinger. Ese Informe, que fue acogido por el Tribunal, estaba basado en consideraciones de derecho interno español, de derecho internacional e, igualmente, de política internacional. Yo entendía que las acciones judiciales contra Henry Kissinger debían ser interpuestas ante los tribunales de los Estados Unidos. Por una pluralidad de razones que no puedo explicar ahora.

Son dos ejemplos de iniciativas que pasaron por mis manos, en las que tuve que tomar decisiones. Y las tomé de manera diferente a como hubieran podido tomarse, pues tenían consecuencias sobre el desarrollo del procedimiento judicial, al que podían ayudar o perjudicar.

En este momento, lo que yo puedo observar es que en España el sistema legal español sigue intacto respecto al que había en 1998 en cuanto a competencia en delitos sometidos a la jurisdicción universal. Ha resistido las presiones que se han sucedido, en el campo político, para modificarlo.

En España está planteado en términos similares a otros países el tema sobre el modo más conveniente de avanzar para perseguir la impunidad, sobre la mejor manera de que se articulen los sistemas nacionales entre sí para lograrlo. Es decir, la aplicación del principio de la complementariedad entre los Tribunales de Estado.

En ese sentido, durante los últimos cinco años ha habido progresos, en particular en la Comunidad Europea de la que forma parte España, para establecer la necesaria cooperación entre los Tribunales, en una especie de pirámide que tiene su cúspide en la Corte Penal Internacional, a fin de aplicar los principios de complementariedad. Bajo la premisa de que la primera responsabilidad para perseguir estos crímenes recae en los Tribunales del territorio donde se cometieron. Y solamente en la medida que estos Tribunales no pueden, o no quieren, perseguir esos crímenes, corresponde que los Tribunales de otro Estado, que tengan jurisdicción de acuerdo con sus normas internas, ejerciten la competencia extraterritorial. Bien sea bajo el principio de la “passive personality”, la competencia personal pasiva, bien bajo el principio de la competencia universal. El progreso en ese sentido es manifiesto en muchos países de Europa occidental.

Evidentemente, ese desarrollo está en evolución. Entiendo que hay que verlo en una perspectiva dinámica, la de una batalla que va a ser permanente y que va a exigir constantemente nuevas respuestas, nuevas iniciativas. Siempre buscando ajustarse al marco específico de esta batalla, que es fundamentalmente jurídico-procesal, pero también sin perder de vista el contexto político nacional e internacional, porque, como en todos asuntos penales, se entrecruza la dimensión política.

**Peter Weiss:** Well, I certainly agree with Joan that we are facing a very long process before we can assess exactly what the Pinochet precedent has produced in international law. One reason is that it is going to take a long time before Kissinger or somebody like Kissinger gets tried in an American court. I agree in principle that is where Kissinger should be tried. But since it is inconceivable that an American court in the foreseeable future will try Kissinger, why shouldn't he be tried in a court that is willing to take jurisdiction?

I think that the importance of the Pinochet case has to be seen in the context of the development of human rights law and the principle of accountability that was established in a very dramatic form at the Nuremberg trials. It was continued by the Universal Declaration of Human Rights, by various constitutions adopted after colonialism ended, some of which included the principle of accountability. So there is a gathering process leading towards the incorporation in international and domestic law of the principle of no impunity for gross violations of human rights. What the Pinochet case did was

dramatize this in the most unexpected and dramatic form. It was like Shakespeare coming along and telling the world what a playwright could do, or like Mozart and music, or like the Williams sisters in tennis. You ask someone, "universal jurisdiction, have you heard of it?" and people's eyes glaze over. And then you say "the Pinochet case" and they say, "Oh yeah, the Pinochet case." It put flesh on those bones.

I am not that pessimistic about our ability to retain the gains of the Pinochet precedent. Let me just give one example. Right now, there are people in perhaps a dozen countries who are getting ready to hold war crimes tribunals about the Iraq war, thanks to an initiative started in Istanbul some months ago. There will be one in New York the first week in May and there has already been one in Hiroshima, Brussels, and in London, with a view to having a great war crimes tribunal in Istanbul sometime in 2005. I think it is unlikely that that process would be taking place were it not for the fact that people had seen what the Pinochet case did. Of course, these are not official tribunals, but they are tribunals in which people have incorporated for themselves and for their communities the principle of accountability without impunity. Actually, the British group has gone beyond that. They have presented a case against Tony Blair to the prosecutor of the International Criminal Court. Where will all of this end up? There I agree with my friend Joan, whom I admire tremendously for his courage and the creative approach to using the law that he has demonstrated in his intervention; I agree with Joan that we are in for the long haul. We will lose some, we will win some. But I think that the principle of universal jurisdiction is here to stay.

**Stacie Jonas:** Ok, speaking of losing some and winning some, let's talk a little bit about the ones that we have lost and some of the ground that we have lost in certain areas. Diane, since you were perhaps more critical of universal jurisdiction, and since you have to leave, maybe we can start with you. Given that there have been setbacks in some of these universal jurisdiction cases and given that there have been efforts to stop the trend towards greater globalization of justice, I am interested in what you think are the factors that have led to these setbacks. In particular, how much do you think that the political climate that grew out of September 11, 2001 and the policies of the Bush administration have contributed to the more recent setbacks?

**Diane Orentlicher:** Sure. I want to first clarify that I didn't think I was criticizing universal jurisdiction; I was summarizing an argument that has been made against it. I was talking in shorthand, and sometimes you lose nuance when you do that. Let me be clear: what I said was that there has been a critique which I take seriously and think should be taken seriously and I believe that we have to have good answers to that critique. I think some of the questions about universal jurisdiction that have been raised are serious, and I take them seriously. So I was not quite putting the critique in my own voice, though I understand the nuance is a subtle one.

Let me just generally say, if I may, by way of background: I am just now finishing a study I was commissioned to write for the United Nations which will be presented to the upcoming session of the Commission on Human Rights. Part of my mandate for this study was to assess recent developments in combating impunity. And the hardest part of this assessment to write was a concise overview of what has happened with universal jurisdiction since 1997, the period covered in the study. Of course, that period covers the *Pinochet* case forward. As I indicated earlier, the post-*Pinochet* debate has revealed a broad range of views about when universal jurisdiction is legitimate. And the extreme positions on that question have become more extreme, perhaps, in the past few years. There has been a strong backlash, coming from the U.S. in particular, especially in the last year. This polarization of views makes it difficult to predict what lies ahead for universal jurisdiction.

On the question of how to address the challenges presented by this backlash, I find myself moving between two visions, one of which I think of as “the Peter Weiss vision.” By way of explanation, when I was a first-year law student, a friend of mine who was also a very close friend of Peter’s reported to me that Peter had just successfully gotten a stay of deportation of Mr. Peña Irala, the defendant in the *Filartiga* case. And our mutual friend was very excited. And because I was a first-year law student who knew everything there was to know about how law really works, I thought to myself, “Yeah, right, we’ll see how long that will last”. I thought, “This is not going anywhere, this judge’s order is so far out on a limb”. Of course, we know that *Filartiga* became an amazing precedent, which is widely cited by international tribunals and other national courts all over the world. It is probably the American opinion that is most widely cited abroad, and it’s cited in the jurisprudence of international criminal tribunals as well as in decisions by foreign courts. So that taught me a lesson—that sometimes it takes a visionary to advance the law. And if you had left strategic decisions to me as a know-it-all first-year law student, *Filartiga* never would have happened. Fortunately, Peter had the wisdom and vision to think better. I frequently cite Peter’s example to my students as a model; I have done so many times over the 20-plus years since the arrest of Peña Irala.

The alternative vision is a cautious one, which tends to capture my own inclination. This approach recognizes that there is only so much that the political market can bear—Peter, I know that you agree with that too—and that we need to make incremental progress and take care that we don’t push progress beyond what is *possible*.

I think that the *Pinochet* case pushed opinion beyond where it *was* at the time, and transformed expectations, and it transformed expectations palpably in England. The day that Pinochet was arrested, all the experts were predicting, “This won’t last”. And I believe that the very fact that Pinochet was arrested made it psychologically possible and plausible that he *could* be lawfully arrested. And even the opinions of judges in London changed in a short period, so that what had been impossible now was both possible and, ultimately, judged to be lawful.

So I think we need to be pushing forward in trying to broaden the space for victims of atrocious crimes, a goal that I believe we all share. But I believe that we need to be very careful about how far we can go at each stage in the process. And I think that some legal initiatives involving universal jurisdiction in recent years went beyond what could be sustained, particularly in the post 9/11 climate, but not just in that climate. The vexing question is how we move ahead from here.

In closing, let me say that my own preference in this regard is to work toward identifying principles that address some of the concerns that many people have about the exercise of universal jurisdiction, not just government officials. I think that some of the hesitation about its use that we’ve seen lately comes from a fear that, now that the proverbial floodgates have been opened, who knows where this is going to lead? I believe that it is possible to identify principles concerning the exercise of universal jurisdiction on which people can agree, and which can then be expanded.

**Stacie Jonas:** Anyone else on setbacks that have taken place in particular cases in Spain or Belgium? Or ideas about what’s behind some of these challenges?

**Reed Brody:** As Stacie mentioned, Belgium had adopted a universal jurisdiction law that essentially allowed any atrocity that was committed anywhere to be prosecuted in Belgium, whether or not there was any connection with Belgium at all, whether or not the defendant was in Belgium. So you could have somebody that committed a war crime in Fiji, against another Fijian, be prosecuted in Belgium. Now, I come from the same school as Joan Garcés--the chess player’s school--that tries to figure out

incrementally how you move the law forward. There was a very interesting article in the *New York Times* the other day, about Elaine Jones, who is stepping down as head of the NAACP Legal Defense Fund. It described, in essence, how she and the NAACP Legal Defense Fund was trying to get the best affirmative action case before the Supreme Court. She went around to everybody else trying to get them to withdraw their affirmative action case so that the case that has the best facts went to the Supreme Court. The NAACP had the big advantage of essentially being the acknowledged leader in the field. We tried to do the same thing with the Belgian law. We tried to convince people not to sue everyone in Belgium. But, lawyers being what they are, and victims being who they are, there was a remedy, and people took advantage of it. By the time we were finished, there were some 25 heads of state being prosecuted in Belgium. Obviously, the political traffic in Belgium could not bear that. Now, most of these cases were not going anywhere, and we were trying to de-dramatize the situation and explain that these cases were not actually going to be prosecuted. But ultimately, Belgium became, in essence, too fat of a pitch for the United States to resist.

On another point that Stacie mentioned, the United States is opposed to universal jurisdiction and to the International Criminal Court for a very simple reason. The United States and, particularly, the policymakers in the Pentagon, feel that universal jurisdiction and any possibility that an independent court will look at the legitimacy of U.S. military actions, is somehow a threat to U.S. hegemony. So the United States is on a warpath against the ICC. And because Belgium was such an outrageous example of the possibilities of universal jurisdiction, the U.S. was able to make that a very easy target. As Stacie said, Donald Rumsfeld, the Secretary of Defense, went to Belgium and said that if Belgium didn't repeal this law, we were going to push to move NATO out of Belgium. Well, I was in Belgium, and there was no way that Belgium was going to stand up to that. So I think that we see the confluence of basically bad strategic lawyering together with the U.S. campaign against international justice resulting in the demise of the Belgian law. I think that as lawyers we have to be dreamers like Peter Weiss, but we also have to be pragmatists like Joan Garcés. We have to look at those cases in which the political landscape is such that the case could possibly succeed. I think that a lot of the cases that have not succeeded, have not succeeded because there was never any way politically that they were going to succeed.

**Rick Wilson:** Two observations, I think, to follow on Reed's comments on the United States. There is no doubt that we are opposed to universal jurisdiction when it comes to applying it to our soldiers, but we clearly invoke it when it's in our national interest to do so. If you think about the situation of the detainees at Guantanamo Bay, what is universal jurisdiction if it isn't the invocation of the power of US military commissions to try combatants in Cuba for crimes they committed in Afghanistan or elsewhere? It is seen as being in our national interests to prosecute those cases, and I believe that the same principles of universal jurisdiction are being invoked by the United States government, because those cases are serious security threats and are terrorist actions against the United States. The same principles might be invoked by other countries against the United States, although I think, in fairness to the U.S. government, the exceptionalism of the United States doesn't only apply to our interpretation of law. We also are exceptional in the number of circumstances in which we send our troops abroad, compared to many other nations, for peacekeeping purposes and for other purposes. And there are legitimate and humanitarian reasons why we do that, so there are competing priorities.

In terms of the pragmatism versus dreaming issue, I recall this playing out in the early stages of these cases. It is almost impossible to imagine that the criminal justice system within a country will operate in a classically "neutral" way to invoke universal jurisdiction without taking into account the political realities of the system of which it is a part. So the pressures that can be brought to bear and that are real pressures that exist between countries, when a national from one country is brought before a court

in another country to be tried for what we all agree are the worst crimes imaginable, will have obvious political effects and fallout. And one of the costs, Stacie, in response to your question, is that the relations between these countries -- grounded as they are in these classic, traditional views of sovereignty -- are strained. And many countries will invoke their sovereign prerogatives when their nationals are going to be tried in another country. That country is going to bring to bear some pressure, asserting that "we're sovereign, and we have the strongest interest in assuring the correct handling of this prosecution, not you, in some other territory where these crimes did not occur." So, there are competing priorities at play here that have to do with this conflict between sovereignty and the dream we all have that the worst crimes imaginable can be tried anywhere.

**Peter Weiss:** Since I am being typed as the dreamer here, I just want you to know that we won the *Filartiga* case, and a whole bunch of cases after the *Filartiga* case! So I think that Joan and I are on the same page here about dreaming of the objective and being very technical and very astute about how to get there.

Just a note about what happened in Belgium. I think there was something to be said about opposition to the Belgian law because it provided for trial in absentia. If the Belgian law had been restricted to trials against defendants over whom there was jurisdiction *in personam* in Belgium, I don't think it would have gone quite the same way. A lot of these cases were brought against people who were not there.

[Muffled exchange between Reed Brody, Rick Wilson, and Peter Weiss about whether the Pinochet case was filed while Pinochet wasn't in Spain, whether it would have been allowed to proceed if Pinochet wasn't eventually present on Spanish soil]

Let me make point based on the *Filartiga* case. There is a puzzling passage in Judge Kaufman's decision in the Second Circuit, where he talked about moving from matters of several concern to matters of mutual concern. It was, perhaps, not the most felicitous way to phrase it. I think it is clear, in retrospect, that what he was saying was that torture, by that time, was something that was considered so universally abhorrent that it was a matter of concern or should have been a matter of concern to every court in the world. I think that is what Kaufman meant by "matters of mutual versus several concern". That is the principle underlying universal jurisdiction.

**Stacie Jonas:** Joan, I was wondering if, in your remarks, you might also comment on what is going on now in the Spanish courts with the Cavallo case and if you're worried that the other recent rulings of the Spanish Supreme Court do present a challenge to that case moving forward.

**Joan Garcés:** Permítanme indicar, antes de responder a su pregunta, que yo participo de la opinión de que el ejercicio de la jurisdicción universal tiene que tener una base muy sólida. Tanto en cuanto se refiere a sus fundamentos legales dentro del país en el que se ejercita, como en su relación con el Derecho Internacional. Y si no es muy sólida, las posibilidades de desarrollo son nulas, inclusive con efectos negativos.

Un ejemplo: yo he dicho antes que cuando iniciamos el caso en España, en julio de 1997, luchábamos contra la impunidad. Pero teníamos una base legal, tanto en derecho interno español -- la jurisdicción universal establecida en la ley española- como por la existencia de un Tratado bilateral entre España y Chile de asistencia en materia penal y extradición, uno de cuyos artículos dispone que cuando un país pide la colaboración judicial del otro, si la extradición no es concedida este último tiene que abrir un procedimiento penal dentro del propio país para sancionar el delito.

De modo que una de las posibilidades hipotéticas que en julio de 1997 existía era que la investigación judicial en España pudiera dar lugar, en su desarrollo, a una acción judicial dentro de Chile contra Pinochet a petición de la justicia española. Esa posibilidad siempre fue contemplada. No se concretó en ese momento porque sobrevino el viaje a Inglaterra. Pero esa posibilidad sigue hoy abierta en relación con otros inculcados en España, generales que formaron parte del alto mando de Pinochet, ministros civiles del gobierno de Pinochet, con responsabilidades en los crímenes que en España siguen, en estos momentos, bajo investigación judicial. Y en la medida que dentro de Chile se han abierto en los últimos años procedimientos contra ellos, los abogados que ejercen la acusación en España desisten de perseguirles ante el tribunal español. Porque esperan, y desean, que sea en los Tribunales de Chile donde las investigaciones se lleven adelante y sean juzgados. Solamente en la medida en que alguna de esas personas no pueda ser juzgada todavía en Chile, por razones internas de Chile, es que se mantiene la acusación en España. Es una manera práctica de combinar los mecanismos internos y bilaterales existentes.

Pero hay otro hecho importante a tener presente: ¿por qué en España no se ha producido la reacción que se produjo en Bélgica contra la ley interna que establece la jurisdicción universal? En parte, ha sido gracias a un principio jurídico elemental, consistente en que los tribunales españoles han aplicado el principio del derecho internacional consuetudinario según cual el tribunal de un Estado no puede juzgar a un Jefe de otro Estado mientras se encuentra en ejercicio. Este es un principio de derecho consuetudinario que los tribunales españoles han aplicado a rajatabla. En España ha habido querellas contra Gadafi, contra Fidel Castro, contra Hugo Chavez, contra el Rey Hassan II de Maruecos, contra el presidente de Guinea Ecuatorial, y no ha pasado nada. Los tribunales españoles han dicho no hay jurisdicción porque son Jefes de Estado en ejercicio. Y esa simple aplicación dentro de España de un principio de derecho internacional ha evitado determinada, digamos, sobrecarga emocional o política en los tribunales españoles.

Ahí se ve un ejemplo de cómo el derecho internacional puede también ayudar a evitar que se inicien acciones penales contraproducentes. Porque son, por último, contrarias al derecho.

El momento actual en España, en respuesta a la pregunta de Stacie, estamos viviendo el desarrollo del caso Pinochet en términos positivos. En el sentido de que la investigación penal en el caso de Argentina está basada en los mismos principios de jurisdicción universal, la investigación ha sido ya concluida. El “investigating magistrate”, el Juez de Instrucción, ha remitido todo el expediente al Tribunal encargado de juzgar al Señor Cavallo y al Señor Scilingo. Se espera que el juicio oral se abra este año.

Es en este sentido que no hay ningún cambio, sino simplemente el desarrollo normal de la ley interna española y de ley internacional.

Tampoco hay ningún cambio en la postura del Gobierno español, del Ejecutivo, que sigue siendo hoy tan contrario como lo era hace cinco años al desarrollo de la jurisdicción universal en España. Y está usando, en ese combate interno en España, como instrumento el “public prosecutors office”, el Ministerio Fiscal, que está defendiendo las posiciones del Gobierno. Les he traído aquí un escrito, que se halla en estos momentos sometido a la consideración de la Corte Suprema de España, en el que se observan las posiciones del Ministerio Público contrarias a los principios de jurisdicción universal. Estamos pendientes de la respuesta de la Corte Suprema española, pero lo que es indudable es que la Ley en España es la misma hoy que hace cinco años, desde este punto de vista la ley respalda a nuestras posiciones. Y, por consiguiente, en el caso argentino, el juicio oral se va a abrir normalmente

este año. Los otros casos vinculados a Pinochet, que tienen relación con Chile, siguen abiertos, con ordenes internacionales de detención que se ejecutaran en el momento oportuno.

Para concluir, la batalla judicial sigue abierta, con resultados nunca anticipables como es propio de una batalla ante tribunales independientes donde los abogados nunca saben cuál va a ser, al final, la última decisión.

[*Veronica De Negri speaks from the audience; because she is not at a microphone, her remarks cannot be transcribed*]

**Stacie Jonas:** I would imagine that a lot of people on this panel would agree with a lot of what you have said and I think that Peter wanted to mention something about that.

**Peter Weiss:** For those of you who don't know Veronica De Negri, she is the mother of a seventeen-year-old boy who was burned to death by Pinochet's thugs. We brought a case for Veronica against the government of Chile because we didn't have information about the actual individual murderers. That case was brought here in the DC District and was dismissed on the basis of sovereign immunity. I could not agree with you more that we need better law. We need a law that transcends head of state immunity; we need a law that transcends sovereign immunity when governments commit the crimes. I don't think, Veronica, you are alone when you make the connection between United States culpability for what happened in Chile. One of the reasons Joyce Horman is bringing her case in Chile right now is precisely to try to discover what the culpability of the American government was in her husband's murder. So we are with you on that.

**Stacie Jonas:** And I think that Veronica also brings up a good point that although there have been advances and there have been great things that grown out of the “Pinochet precedent”, we do see a lot of people still getting away with these crimes. Pinochet is still a free man in Chile today. And we also see setbacks, for example, and challenges to cases people are bringing here in the U.S. I was hoping that we could at least touch on the recent challenges to the Alien Tort Claims Act, which has allowed victims to file suit here in the U.S. against human rights violators. I know that Peter, you've worked on this, I don't know if anyone else has followed the recent developments closely. Perhaps you could comment on how serious these challenges are and what is being done to counter them?

**Rick Wilson:** Just so everyone is on the same page here, there are two cases pending now in the U.S. Supreme Court on the question of the application of the Alien Tort Claims Act, this statute that Peter used in the *Filartiga* case. The cases arise out of same set of facts as those of a previous case that went to the U.S. Supreme Court on the question of kidnapping an individual from Mexico into the United States. The very same person, Alvarez Machain, is the plaintiff in the ATCA case that grew out of his kidnapping into the U.S. The question pending before the Supreme Court is the jurisdiction and scope of the Alien Tort Claims statute. It is really under siege. It's fair to say, I think, that this administration, consistent with its views about international law, has taken a very restrictive view about the scope of that particular statute and has argued quite zealously to the Court that it should be applied in the most narrow way possible, in such a way that would effectively prevent its further use by victims for vindication of human rights claims such as the *Filartiga* case and the many, many other cases that been decided since *Filartiga*. It's a case that is worth your watching when the Court decides it before the end of June. So, those are two cases which are on the Supreme Court's docket now that, for the first time, address this question about the application of the Alien Tort Claims statute.

**Peter Weiss:** I just want to add that the human rights community is mobilized to try to get a good decision out of the Supreme Court in Alvarez. There is a brilliant legal team consisting of Paul Hoffman and Ralph Steinhardt of Georgetown. And about half a dozen amicus briefs are in the process of being prepared by academics, by foreign judges, by victims, like Veronica, who will testify towards what the Alien Tort Claims Act has meant to them. It remains to be seen what will happen with that.

I want to correct something that I said before: I don't mean to pre-judge the outcome of the Kissinger case that is being done so creatively out of this building. Maybe I should have put it in the conditional mode: *if* you don't nail Kissinger in this suit, I don't see why he shouldn't be tried somewhere else.

**Joan Garcés:** Permítame de nuevo a referirme a uno de los substratos de mi análisis, y que Reed ha mencionado indirectamente. Hablando de derecho penal, la dimensión política, pública, está integrada --el derecho penal es el más político de todos derechos. De forma que las condiciones políticas son indispensables para explicar la génesis de una norma penal y, también, de su aplicación. En el caso de la jurisdicción universal, evidentemente, hay que tener muy presente las condiciones políticas nacionales e internacionales, lo he dicho antes.

El ejemplo de Bélgica de nuevo nos puede servir de referencia. Bélgica llevó adelante una modificación legislativa, en cierto modo, en vanguardia. Sin embargo, no fue seguida por el conjunto de países de la Unión Europea. Y cuando se encontró con la amenaza de la Administración Bush, de represalias si no modificaba la legislación interna, nos encontramos con un caso claro de una acción política, por parte de una potencia extranjera, para influir en el Poder Legislativo y en el Ejecutivo de un Estado soberano como es el Reino de Bélgica.

Sin embargo, lo cierto es que ningún país de la Unión Europea hizo causa común con Bélgica en ese diálogo entre la Administración Bush y el Reino de Bélgica. Y, evidentemente, las cosas fueron de la forma que ustedes conocen: el Gobierno de Bélgica cambió su ley interna para acceder a las presiones norteamericanas. ¿Qué hubiera pasado si el conjunto de la Unión Europea hubiera adoptado una postura crítica respecto a las presiones norteamericana, en ese momento? ¿O hubiera desarrollado en sus respectivos Parlamentos leyes equivalentes a las de Bélgica? No sabemos lo que hubiera pasado, pero posiblemente Bélgica no hubiera cambiado su ley. Es una posibilidad ¿verdad?

Eso muestra cómo el progreso hacia el desarrollo de los principios en contra la impunidad, de los instrumentos jurídicos y políticos, tienen que ir combinados. En ese sentido, en Europa occidental, a pesar de lo que ha pasado en Bélgica, el progreso yo creo que es evidente. Tanto en Alemania como en Italia, como en Francia, como en España, como en otros países, se están desarrollando los mecanismos legales para cooperar con el Tribunal Penal Internacional en la persecución de los crímenes contra la humanidad, contra la impunidad. Y, a su vez, están teniendo lugar conversaciones en el ámbito de la Unión Europea para coordinar iniciativas legales entre los distintos Estados que van a desarrollar los principios de jurisdicción universal.

Pero las posibilidades de desarrollo práctico y de progreso están en función, precisamente, de esa capacidad para actuar de manera conjunta y avanzar progresivamente, no de manera aislada. Evidentemente, el peso y la influencia de los Estados Unidos en este campo, no hace falta que lo enfatice, es decisiva. Human Rights Watch ha dicho de forma muy clara, desde hace varios meses, que la actual Administración norteamericana está en guerra contra los principios de jurisdicción universal. Esto no es algo, digamos, que no tenga consecuencias prácticas. Indudablemente que las tiene. Espero y deseo que la sociedad norteamericana imponga pronto, lo mas pronto posible, una reorientación en



ese sentido de las políticas norteamericanas. Creo que eso va a ser bueno para Estados Unidos y, también, para el resto del Mundo.

### **\*\*\*Audience Questions\*\*\***

**Audience Question #1:** I'd like to thank all of you for your comments, they've been very helpful to me as a political scientist looking at the question of universal jurisdiction and the Pinochet case in particular. My question to you is, given that we have some international law such as the torture convention, which specifically precludes the possibility of immunity for heads of state, how is it that we still have jurisprudence that affords immunity to sitting heads of state?

**Audience Question #2** Thank you all for coming, this has been phenomenal. My question is about the United States' role in the development of human rights law. It seems that, particularly, in the recent past, the United States has been the biggest threat to international criminal law. It's been signing international agreements with countries that have ratified the International Criminal Court treaty so that they won't extradite American citizens. It has been passing things like the "Hague Invasion Act" that have really been trying to stop the development of international law. I was wondering how far you think that the American threat is going to go and how much damage it can do to the development of international law. And then on the other side, what can be done to stop that threat and continue with the progress that international law has made?

**Audience Question #3** I was just wondering if anyone of you could expand on the Kissinger case and what exactly the legal basis is for that case. I know that there is a lot going on in Indonesia and Chile, and if you could specify which case you're talking about and the legal foundations for that case.

**Audience Question #4** The Attorney General of New York, Elliot Spitzer, has brought a lot of prosecutions and investigations in the area of financial malfeasance that has traditionally been the area of federal government jurisdiction. What kinds of possibilities might there be for states in the United States to pursue any of these kinds of prosecutions or investigations?

*[Students are invited by Rick Wilson to respond to Kissinger Case question]*

**Answer by WCL students Brittany Benowitz (3L), Karen Corrie (2L), and Courtney Nogar (2L):** We work with the clinic at WCL that has brought two cases against former Secretary of State Henry Kissinger, and against the United States government. The first case concerns the assassination of General René Schneider in 1970, which was intended to instigate a coup. The second, on behalf of 11 Chilean families who are all direct victims of torture, extra judicial killing, and disappearance, again, against Kissinger and the United States, largely for his support of DINA, the Chilean security apparatus. The government has sought to substitute itself for Henry Kissinger saying that his acts were on behalf of the sovereign, and hence both Henry Kissinger and the United States are entitled to absolute immunity. There are motions to dismiss those cases pending before two different district court judges in the District of Columbia. They have scheduled oral argument in the Gonzalez-Vera case on the issue of the motion to dismiss [a week from Friday]. We're right in the middle of preparing for that. If I could say one more thing to Ms. De Negri, from my perspective as a law student, it is very hard to go up against the challenge that we know that we could lose, there is a good chance that we could lose. We went to Chile at the beginning of the year to meet with the victims of torture in Chile, and I had the unfortunate task of telling them that we are not likely to win, given the current political context. All of them were uniform in insisting that we proceed no matter what, at all

costs. And I'd just like, if I could, be a vocal piece for them to extend their desire to bring this to case so that they can have their stories heard.

*[Veronica De Negri responds from the audience; because she is not at a microphone, her remarks cannot be transcribed]*

**Joan Garcés:** Simplemente dicho. Quiero agregar, en relación de la pregunta sobre la tortura y el Convenio Contra la Tortura, que, efectivamente, una de las cosas que el caso Pinochet ha confirmado es que un antiguo Jefe de Estado puede ser inculcado por los crímenes de tortura cometidos por sus subordinados. Y hoy Pinochet, en efecto, dentro de su país está en las circunstancias que se acaban de describir. Pero también es cierto que no puede viajar fuera de su país. Hay una orden internacional todavía vigente para detenerlo si sale de Chile. Es una orden internacional de la Justicia de Francia, de la Justicia española y de otros países. De forma que está en una situación comparable a la de Karadzic en la antigua Yugoslavia. Con una diferencia, que a Karadzic lo están buscando las tropas de la OTAN desde hace varios años, decenas de miles de soldados, y no lo han encontrado, está libre. En cambio, Pinochet no puede salir de su país sin necesidad de haber movilizadado ningún soldado, ni haber gastado un sólo dólar en armas, simplemente con la acción de la cooperación judicial internacional. Es decir, es mucho más barato en ese sentido, y más económico. Es un ejemplo.

Pero el problema que planteaba está en relación con los Jefes de Estado todavía en ejercicio. Lo que sí está reconocido en el Derecho Internacional es que un Jefe de Estado en ejercicio puede ser perseguido por crímenes de tortura, por supuesto, en su propio país --en la medida en que el sistema judicial sea suficientemente independiente. En todo caso, el conformidad con el Derecho internacional el Tribunal Penal Internacional, que ha entrado en funciones hace dos años, efectivamente, tiene competencia para enjuiciar a Jefes de Estado en activo por crímenes de tortura cometidos después de 1 julio de 2002. Y hay otro Tribunal Internacional que está juzgando, en estos momentos, a un Jefe de Estado que fue detenido en activo, el Presidente de la antigua Yugoslavia. De modo que en el ámbito de los tribunales internacionales, en ese sentido, se ha avanzado. Se está avanzando.

En el ámbito de los Tribunales de Estado es diferente. Aquí se aplica el principio consuetudinario de que un Tribunal de Estado no puede juzgar a un Jefe de Estado en ejercicio de otro Estado. Este principio ha sido desafiado por algunos países. Por ejemplo, en Francia, hace dos años se presentó una demanda judicial contra el Presidente en ejercicio de Libia, Khadafi, y en la primera instancia el juez francés declaró que Francia tenía jurisdicción para conocer de esta acusación contra un Jefe de Estado en ejercicio. Sin embargo, en la apelación posterior, la Corte Suprema francesa aplicó el principio de derecho consuetudinario que antes indicaba y estableció que, mientras sea un Jefe de Estado en ejercicio, los Tribunales franceses no tienen jurisdicción para enjuiciarle.

**Reed Brody:** I want to make two points, first in terms of the states. There is a man who lives a few miles from me named Emmanuel Constant, who was the head of a paramilitary death squad in Haiti from 1991-1994, who lives in Queens, New York, and who the Haitian government is trying to get back to Haiti to prosecute. Because the U.S. government, in fact, paid Emmanuel Constant and protected him, they are not going to send him back to Haiti. We went to Elliott Spitzer, together with the Center for Constitutional Rights. We built a theory that New York state had criminal jurisdiction over Emmanuel Constant based on the effects that his crimes caused in the Haitian community. We didn't get it. On the other hand, even if the Alien Tort Claims Act is thrown out, which I hope that it won't be, there's a very long standing theory of tort law, that the tort follows the tort feaser like a monkey on his back, So even without the ATCA, you can bring a case for battery against somebody in

a state court. There are jurisdictional difficulties that you may have and you also may find yourself, under traditional tort law, applying the law and the statute of limitations of Paraguay.

I won't go into a long exegesis about the immunity of former heads of state except to say that I think the case that went to the International Court of Justice was another example of unstrategic lawyering. In 1998 and 1999, we had these wonderful decisions in the Pinochet case. The law was evolving in our direction. It looked like the days of impunity were over. All of a sudden, Congo and Belgium go to the ICJ on a case that has the worst set of facts possible, no connection to Belgium at all. Like the Fiji example I gave before, somebody in the Congo who had done things to people in the Congo, who had never left the Congo, who had no connection to Belgium, and who was a sitting official in the Congo. And people like me were trying to get Belgium to withdraw the warrant. Not only that, they went to one of the most conservative courts in the world, the International Court of Justice. On that court, you had two former Foreign Ministers, and this was case against a Foreign Minister. You had a former Attorneys General. This was not the court to move law along. In fact, we got a case that set international law back. We can argue what customary international law was at the time, but today, it certainly is that sitting heads of state have immunity in courts of another country. It's because bad lawyering allowed a bad case to go before a bad court.

**Audience Question #5** I was wondering how you file or have a hearing for a human rights case within the U.S. It doesn't have to be against a government official, but if there is a human rights case in the United States, you don't seem to be able to go through human rights organizations like Amnesty International or HRW, from what I've heard, you have to be in another country in order to say that something has happened to you in this country. Another thing, I had heard Sandra Day O'Connor speak about the Pinochet case. She had said it was ridiculous, that she had never heard of anything like this before, imagine someone from Spain trying to arrest a head of state from Chile. And she was very much against it. I was just wondering if you're worried about the administration, what about the Supreme Court? And I thought she was our savior in the Supreme Court.

**Peter Weiss<sup>2</sup>:** Did you mean a human rights case with no foreign connections or a human rights case that involves a foreign defendant? You can sue Americans under the Alien Tort Claims Act for human rights violations in a foreign country, if you can get the plaintiff here from a foreign country. There are at least half a dozen cases pending right now against American corporations. There is someone here who is handing out information about the case against Coca-Cola in Colombia. The Coke distributor in Colombia was accused of complicity in the murder of a union organizer. That case, as far as I know, is still alive. So that's possible. Can an American sue a foreign torturer in an American court? Not unless there is jurisdiction over the person, over the foreigner, unless the foreigner is here this country. One of the basic principles of litigation is that the defendant has to be in the jurisdiction of the court. Under American jurisprudence, we don't try people in absentia.

As far as Justice O'Connor is concerned, I am rather worried about her. I don't mean that in a totally negative way, because, on the one hand, she, more than any other justice on the Supreme Court, has taken an interest in international law in recent years. She has gone all over the world to talk to foreign judges. Then she has come back here and has given speeches about the importance of international

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<sup>2</sup> After reviewing this transcript, Mr. Weiss noted that he had misheard the question. If he had heard the question correctly, his response would have been the following: "Suits based on human rights violations within the United States are brought all the time by the ACLU, the Center for Constitutional Rights and many other organizations and individuals. They are based primarily on statutory and constitutional law, but increasingly international human rights norms are also being thrown into the pleadings, and sometimes even considered by the judges."

law. But at one point, she had a clerk named Curtis Bradley, and he convinced her, I think, that international law should not be applied, say, to a Pinochet case or an Alien Tort Claims case. She said in a speech to the American Society of International Law two years ago that the ATCA cases have developed into a cottage industry and that people who bring them aren't aware of the effect that they're having on the President's power over foreign affairs. So on the one hand, she's interested in international law and trying to promote it. On the other hand, I'm afraid she's pretty weak on what we're calling universal jurisdiction.

**Rick Wilson:** Just to add to that, I think you've identified the key actor on the Supreme Court. I think that she can be persuaded, given the signals she gave in the Atkins case, the case about the execution of mentally retarded people, where the courts struck down the death penalty and took into consideration international law in reaching that conclusion.. And there were a couple of cases last term, too, where the court relied specifically on international human rights law and international human rights norms in which she was in the majority. So I think she's right on the cusp, and the key vote on probably all the cases that are coming before the court in increasing numbers that have to do with international human rights. I hope, on a positive note, we might say that when you asked the question about how we defend human rights at home, we know that lawyers here do that every day. I think we tend to take too narrow of a view of what human rights defense is all about. Reed spent some time talking about Elaine Jones and the work of the NAACP, and what we call civil rights work is human rights work. What we call public defense is human rights work. What we call legal aid is human rights work. I think there is all kinds of good human rights law work that goes on in courts in the United States, both by our graduates and by a lot of other people who are in this room and elsewhere who are concerned with these issues. I know our graduates will take the new vision of human rights work out into the world when they graduate.

**Joan Garcés:** Yo no puedo opinar, naturalmente, sobre las declaraciones dentro de Estados Unidos de una Magistrado del Tribunal Supremo que no conozco en detalle. Pero sí que puedo indicar que los principios de jurisdicción universal tienen que desarrollarse y aplicarse de una forma racional y coherente, dentro de un espíritu de cooperación judicial internacional para perseguir la impunidad. Porque es un tema que está preocupando a los tribunales de muchos países. En Europa occidental en particular, al tribunal español, por ejemplo.

Se plantea la condición de una conexión entre la jurisdicción de ese Estado y los hechos que están siendo investigados en otro país. Y esa pregunta, qué conexión hay, tiene varias respuestas, según los sistemas judiciales de que se trate. Pero los tribunales están buscando cierto tipo de relación para la aplicación de la jurisdicción universal. En el caso Pinochet, la conexión era múltiple. Por un lado, había víctimas españolas también en Chile durante la dictadura de Pinochet. Y por otro, hay una comunidad lingüística y cultural en el Mundo Hispánico que hace que en España lo que pasa en América Latina es sentido de una forma muy directa. Si se planteara un caso en España en relación con Birmania, o con un país de Asia Central, culturalmente la opinión pública española no lo podría sentir de la misma manera que un asunto que está relacionado con el mundo hispánico. Son factores que cuentan, también, en el momento de entender por qué una sociedad se preocupa de los crímenes que ocurren en ese país más que de los crímenes que ocurren en otro. Son fenómenos culturales.

Ahora bien, hay otras dimensiones que también podríamos verlas desde un punto de vista diferente. ¿Qué ocurriría, en teoría, si un país influyente en el Mundo quisiera utilizar la jurisdicción universal como un instrumento político? Esto no se ha dado hasta el momento, pero imagínense un país importante que tuviera establecida la jurisdicción universal que la utilizara como instrumento de política exterior, subordinada a criterios políticos. Eso no se ha dado hasta el momento, por fortuna,

pero no puede excluirse que mañana pueda darse en algún país. Entonces, nosotros tendríamos que tomar posición al respecto y decir que eso no es lo que nosotros estamos pidiendo. Nuestra acción está basada en el Derecho y en la lucha contra la impunidad, al margen de las consideraciones políticas, a pesar de las consideraciones políticas. Pero, llevando ese razonamiento más allá, algunos dicen, bueno, pero podría ocurrir que un mismo hecho criminal estuviera siendo investigado por varios tribunales simultáneamente, y eso podría producir una especie de caos. Bueno, el argumento ad absurdum siempre es posible. Ese escenario todavía no se ha dado en la historia, y si se diera, estoy seguro que se encontrarían fórmulas para evitar el caos. Aunque es preferible un caos en la lucha contra la impunidad al caos actual de complicidad en la impunidad.

**Stacie Jonas:** Thanks again to everyone for coming and thanks to Heather Maurer and the Special Events Office here at the Washington College of Law for their help in setting up the event.