

—5—

## The Dangerous Myth of Universal Jurisdiction

*Lee A. Casey and  
David B. Rivkin Jr.*

### Introduction

Over the last forty years, activists in the United States, mostly on the left, have used the courts unashamedly to achieve social and political change. This was, perhaps, not surprising in a nation that is largely defined by its constitution and laws, rather than by ethnicity, religion, or race. As early as the 1830s, Alexis de Tocqueville remarked that “[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.”<sup>1</sup> Nevertheless, the late twentieth century marks a distinct period in American legal history, in which social activists consciously worked to advance a political agenda through litigation, and, in many areas, succeeded. Issues such as abortion, birth control, and public manifestations of religious belief, which before had been dealt with, for good or ill, by elected legislatures, were drawn within the ultimate authority of the courts.

A similar strategy is now being applied on the international

1. Alexis de Tocqueville, *Democracy in America* (Knopf ed. 1951).

level in an effort to achieve substantive policy results (some laudable and some not so laudable) that could not otherwise be obtained through the ordinary political processes of national governments in general, and of the United States in particular. Of course, the tactics are necessarily different from those employed by judicial activists in the United States, since there is no established international court system. The efforts to create such a system, however, are well under way—most notably with the establishment, in July 2002, of an International Criminal Court (ICC) in The Hague. That institution has the authority to investigate, prosecute, and punish the elected leaders of its member states for the criminal offenses defined in its founding statute (the “Rome Statute,” having been originally agreed upon at the city of Rome in 1998), including “aggression,” war crimes, crimes against humanity, and genocide. In addition, the ICC asserts jurisdiction over the officials and citizens of nonstate-parties in certain circumstances (when the alleged offense took place on the territory of a state-party)—a claim inconsistent with the international law of treaties and repudiated by the United States under both the Clinton and George W. Bush administrations.

Besides making this unprecedented effort to manufacture and impose a “universal” form of jurisdiction on countries that have not ratified the Rome Statute, activists have turned to the principle of “universal jurisdiction” in national courts to achieve their ends. That doctrine—which first appeared as a means of combating piracy in the seventeenth and eighteenth centuries—suggests that any state can define and punish certain “international” criminal offenses, regardless of where the relevant conduct took place or what the nationality of the perpetrators or victims may be. One commentator described the logic of universal jurisdiction as follows: “Since each sovereign power stands in the position of a guardian of international law, and is equally interested in upholding it, any state has the legal right to try war crimes, even though the

crimes have been committed against the nationals of another power and in a conflict in which that state is not a party.”<sup>2</sup>

From an activist’s perspective, the attraction of universality is obvious, particularly in view of concomitant claims (largely based on the Nuremberg Trials following World War II) that government officials enjoy no immunity from prosecution for such offenses. For example, universality would allow a “human rights” lawyer, who opposed the recent war to depose Saddam Hussein, to initiate a criminal prosecution against the American general who commanded that campaign, so long as a cooperative state—in that instance, Belgium—could be found. Although that particular case was dropped, after causing a severe strain on U.S.-Belgian relations and after the consequent repeal of the universality component of Belgium’s Law on the Punishment of Serious Violations of International Humanitarian Law, universal jurisdiction remains something like the Holy Grail for international activists, who—without so much as a blush—assert that it is a well established and binding norm of international law. It is, in fact, nothing of the sort.

Although innumerable claims have been made for universal jurisdiction, by activists, academics, and even state officials, even a cursory examination of the actual practice of states—which is what ultimately determines the scope and content of international law—reveals that the doctrine remains an aspiration rather than an established fact. This much is admitted by the most knowledgeable and candid commentators. For example, as Professor Cherif Bassiouni, who was elected as the Chairman of the Drafting Committee of the United Nations Diplomatic Conference on the Establishment of an International Criminal Court, has written:

Universal jurisdiction is not as well established in conventional and customary international law as its ardent proponents, including major human rights organizations, profess it to be. These

2. Morris Greenspan, *The Modern Law of Land Warfare* 420 (1959).

organizations have listed countries, which they claim rely on universal jurisdiction; in fact, the legal provisions they cite do not stand for that proposition, or at least not as unequivocally as represented.<sup>3</sup>

If universal jurisdiction did exist, one would expect to find dozens of cases, from every corner of the globe, in which the citizens and state officials of one country had been prosecuted and punished by a second country, for offenses on the territory, or against the citizens, of a third. Yet no such body of precedent exists. At most, there are a handful of isolated instances in which universal jurisdiction principles have been cited, although almost never relied upon, by the courts.

Nevertheless, activists continue to invoke the doctrine as a regular aspect of their political or polemical discourse, and many are clearly determined, by any means, to make universal jurisdiction a reality. As a result, the most frequently claimed legal bases for the doctrine of universal jurisdiction, as well as the likely consequences should such a principle become part of international law, deserve examination.

### The Enemies of All Mankind

The origins of universal jurisdiction are invariably traced to the law of piracy.<sup>4</sup> At least in Great Britain, claims to a universal criminal jurisdiction over pirates were made as early as the seventeenth century. Pirates, the theory went, were the common enemy of mankind (*hostis humani generis* in Latin), and consequently, all states were lawfully entitled to punish the offense. As British Admiralty

3. M. Cherif Bassiouni, "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice," 42 *Va. J. Int'l L.* 81, 83 (2001).

4. See, e.g., Ian Brownlie, *Principles of Public International Law* 304–305 (4th ed. 1990).

Judge Sir Charles Hedges famously instructed the grand jury in *Rex v. Dawson*:

The king of England hath not only an empire and sovereignty over the British seas, but also an undoubted jurisdiction and power, in concurrency with other princes and states, for the punishment of all piracies and robberies at sea, in the most remote parts of the world; so that if any person whatsoever, native or foreigner, Christian or Infidel, Turk or Pagan, with whose country we have no war, with whom we hold trade and correspondence, and are in amity, shall be robbed or spoiled in the Narrow Seas, the Mediterranean, Atlantic, Southern, or any other seas, or the branches thereof, either on this or the other side of the line, it is piracy within the limits of your enquiry, and the cognizance of this court.<sup>5</sup>

However, the extent to which these claims ever evolved into accepted principles of international (as opposed to Anglo-American domestic) law can be, and has been, seriously questioned.

The development of a tangible, as opposed to rhetorical, international law norm supporting universal jurisdiction in piracy cases would have required, as it would for other alleged criminal offenses against international law, a substantial body of precedent in actual state practice. That is, it would require real prosecutions brought by one state against the citizens of another for offenses, otherwise beyond its recognized territorial jurisdiction, against the nationals of a third. This body of law simply does not exist, even with respect to piracy. Indeed, some four years after Sir Charles Hedges charged the jury in *Rex v. Dawson*, King William III took care to inquire whether Louis XIV (with whom he was unusually, and momentarily, at peace), would rather deal with several score of French pirates, who had been captured off the Virginia coast and were

5. The Trial of Joseph Dawson, Edward Forseith, William May, William Bishop, James Lewis and John Sparkes, at the Old-Bailey, for Felony and Piracy, 8 William III, A.D. 1696, 13 How. St. Tr. 452, 456 (1816) (hereinafter *Rex v. Dawson*).

then awaiting trial in England. Louis declined, suggesting that such “vermin” were entitled to no favors and that English justice was as good as any.<sup>6</sup> That the question was asked, however, suggests a far more ambivalent state practice than might be supposed from Hedges’ assertions, taken in isolation.

As the leading authority on the subject, Professor Alfred Rubin, points out in his magisterial *The Law of Piracy*, since the year 1705 there have been only three cases “of jurisdiction over accused ‘pirates’ being exercised in the absence of a link to some traditional basis for jurisdiction” other than universal jurisdiction.<sup>7</sup> At most, there was a largely nineteenth-century effort, principally by Great Britain but to a lesser extent by the United States, to use universal jurisdiction claims as a way of justifying claims to police the seas. As explained by Professor Rubin:

It may be concluded that “universal jurisdiction” when extended beyond the bounds of jurisdiction to prescribe and applied to notions of enforcement and adjudication under national criminal laws, was at best a rule of international law only for a limited period of time [largely in the 19th century] and under political circumstances that no longer apply; at worst, it was merely a hobby horse of Joseph Story and some other learned Americans, and a British attribution to the international legal order of substantive rules forbidding “piracy” and authorizing all nations to apply their municipal laws against it on the high sea, based on a model of imperial Rome, and British racial and commercial ambitions that never did reflect deeper realities, as part of the rationalization of imperialism never really persuasive outside of England and some equally race-proud Europeans and Americans alone.<sup>8</sup>

6. See Richard Zacks, *The Pirate Hunter* 333 (2002) (citing contemporary diarist Narcissus Luttrell, *A Brief Relation of State Affairs . . . from September 1678 to April 1714* [1857]).

7. Alfred P. Rubin, *The Law of Piracy* 345 (2d ed. 1998).

8. *Id.* at 390–391.

In short, even in the area where it is supposedly best accepted, universal jurisdiction, as an established legal principle, is a phantom.

Moreover, the universal jurisdiction so often claimed for piracy was more narrow by far than the principles asserted for, and necessary to, the broad universality claims made for national universal jurisdiction laws, like those of Belgium or of institutions such as the ICC. In this regard, there were three essential characteristics attributable to the pirates who were said to be the subject of universal jurisdiction. First, they were recognized as individuals who, by their own acts and choice, had put themselves beyond the authority, allegiance, or protection of any state—including and especially their own. Such men sailed against all flags. Second, by definition, pirates acted privately, with the purpose and intent of private gain (*animo furandi*, i.e., with the intent to steal) without the benefit of state authority. They were, by definition, not state actors.<sup>9</sup> Finally, their offenses took place largely beyond the territory (including the territorial sea) of any state.

In these circumstances, a universal authority in states to prescribe the activities of pirates, and to bring them to book when possible, can be maintained more or less consistently with the fundamental principles of the international system—the sovereignty and equality of nation-states. The assertion of jurisdiction over essentially stateless men operating on the high seas does not interfere with the rights of any other sovereign state to protect its nationals or interests. Emphatically, this is not the case for the universality principles claimed by the ICC and its proponents or by the proponents of universal jurisdiction laws like those of Belgium. This form of universality posits the right (and some would even argue the obligation) of states or international institutions both

9. Privateers who acted under a commission issued by a sovereign state were not considered “pirates” in law, however much their actual activities may have resembled piracy in practice.

to prescribe certain conduct and to prosecute and adjudicate allegations brought against the nationals of a state, regardless of where the alleged offense may have taken place and of whether the accused was acting under the color of state authority.

The right to prosecute and punish state officials is, of course, a crucial aspect of this universality. The ordinary rule of international law is that government officials are immune from the legal processes of foreign countries because of the fundamental principle that equals cannot judge each other, as described in the maxim *par in parem non habet jurisdictionem*.<sup>10</sup> Universal jurisdiction posits that government officials are not only subject to the relevant substantive legal norms but also that they can be prosecuted for violating those norms, even if the violation took place in the execution of their official duties and even if it was otherwise consistent with the constitution and laws of their own country. The Nuremberg Trials, through which the surviving Nazi leadership was punished after World War II, are usually cited in support of this principle—as it happens, incorrectly.

### The Nuremberg Legacy

When the twentieth century began, the city of Nuremberg had a long and honored history. An independent, prosperous, and politically important town during the Middle Ages (joined to the neighboring kingdom of Bavaria only during the Napoleonic wars), it was a favorite of nineteenth-century German romantics, including Richard Wagner, who wrote “Die Meistersinger” in the city’s honor. Unfortunately, Nuremberg’s rich history also attracted one

10. See Brownlie, *supra* note 4, at 324. As Professor Brownlie also notes, governmental immunity also is based on the principle of “non-intervention in the internal affairs of other states.” Both of these principles were restated in Article 2 of the United Nations Charter. See U.N. Charter, Ch. I, Art. 2, reprinted in Ian Brownlie, *Basic Documents in International Law* 1, 3 (4th ed. 1995).

particularly zealous, and infamous, Wagner fan—Adolph Hitler—who used the city as something of an unofficial capital for the Nazi Party. It was here that the massive party rallies of the 1930s took place and that the odious “Nuremberg Laws,” depriving Germany’s Jews of citizenship and civil rights, were promulgated. Also an armaments manufacturing center, Nuremberg was 90 percent destroyed by Allied bombing during World War II. Its close connection to Nazi pageantry and its location in the American occupation zone made Nuremberg an obvious choice for the trials by which it is best known today.

The Nuremberg Trials—actually the proceedings of the International Military Tribunal (IMT) which convened in the city’s only partly destroyed “palais de justice” from 1945 to 1946—are often cited, certainly by casual commentators and sometimes even by courts, as the foundation of modern “universal” jurisdiction.<sup>11</sup> Nothing, however, could be further from the truth. Despite the efforts by many proponents of universality to use the Nuremberg Trials as a precedent for that principle, both in practice and theory the IMT’s authority was far less sweeping. It never claimed to act under the principles of universal jurisdiction but represented an ad hoc institution created by the victorious Allies to punish men who could not be permitted to go free.

Like much during and after World War II, the Nuremberg Trials were the result of a compromise. Winston Churchill wanted simply to shoot the defeated Nazi leadership—within six hours of capture, after proper identification.<sup>12</sup> This became the principal position of the British government, which maintained that, although “[l]esser war criminals might be tried within the limits of established law on war crimes . . . a Hitler trial would require new laws to be made up to match the crimes, and this was not only legally

11. See *Demjanjuk v. Petrovsky*, 776 F.2d 571, 582 (6th Cir. 1985).

12. Richard Overy, *Interrogations: The Nazi Elite in Allied Hands, 1945* 6–7 (2001).

dubious, but would give the defence endless opportunities to argue so.”<sup>13</sup>

Ironically, it was the Soviet Union that insisted most strongly on a “trial.” From Stalin’s perspective, it would be the grandest of his show trials,<sup>14</sup> an open statement to the world of Communism’s triumph over National Socialism, and of his personal triumph over Hitler. The Roosevelt administration was divided, with Secretary of the Treasury Henry Morgenthau Jr. supporting Churchill’s view, and Secretary of War Henry Stimson arguing for due process of law consistent with the Bill of Rights. Ultimately, the matter was in Stimson’s portfolio, and he prevailed, relying, as one author notes, “on a strange alliance with a Soviet system almost entirely at odds with American conceptions of justice.”<sup>15</sup>

With both the United States and the Soviet Union, for their very different reasons, insisting on a trial, the British Government acceded—perhaps not coincidentally after Hitler committed suicide, since giving the fallen dictator yet another “platform” was one of Churchill’s principal objections to a trial. However, the fundamental legal issues pointed out by the British remained. Although there was a long and accessible tradition for punishing violations of the laws and customs of war, there was no obvious legal basis for reaching beyond the Third Reich’s military leadership into the Nazi Party hierarchy itself. Limiting postwar justice to the German high command would have pulled in a number of the chief surviving culprits, including Hermann Goering, but would not have reached men such as Albert Speer, Hitler’s armament minister, Joachim von Ribbentrop, Hitler’s foreign minister, and Robert Ley, head of the Nazi “labor front” who, along with Speer, oversaw one of the most brutal and widespread forced-labor systems in history.

As the British government anticipated, the Nuremberg defen-

13. *Id.* at 7.

14. *Id.* at 8.

15. *Id.* at 10.

dants challenged the IMT's authority, as well as the legality of charges, particularly "crimes against peace," that had not been recognized as criminal offenses before the war. In response to the first claim, the court did not rely on some generalized legal authority inherent in the "international community," nor did it cite principles of "universal jurisdiction." Instead, it openly and unequivocally relied on the rights of Germany's conquerors to legislate for that defeated state. In this regard, the court noted as follows:

The jurisdiction of the Tribunal is defined in the Agreement and Charter, and the crimes coming within the jurisdiction of the Tribunal, for which there shall be individual responsibility, are set out in Article 6. The law of the Charter is decisive, and binding upon the Tribunal.

The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world.<sup>16</sup>

Indeed, the authority of the Nuremberg Trials as precedent for any legal proposition is doubtful. The two most important "innovations" claimed for the IMT were the principles, stated in Article 6 and 7 of its Charter, that individuals could be tried and punished for criminal offenses against international law, even though those offenses had not also been properly enacted into national legal codes and regardless of the immunity traditionally recognized for high government officials. Neither has been borne out in the ensuing years by actual state practice.

The most controversial aspect of the Nuremberg Trials was the arraignment of individuals on a charge of waging, and conspiring to wage, an aggressive war. This charge did not exist in the German criminal code before the war, nor did it figure in the criminal codes

16. *The Nurnberg Trial*, 6 F.R.D. 69, 107.

of the other Great Powers. To justify the charge against the Nazis, the IMT cited the Kellogg-Briand Pact of 1928, under which the parties (including Germany and the Allied powers), had renounced war as an instrument of policy. This treaty, however, had none of the normal characteristics of criminal law, such as a definition of the elements of the “offense” or an established range of punishments.<sup>17</sup>

In response to the claim that the charge would violate the maxim *nullum crimen sine lege* (no crime without a law), the tribunal first noted that it was not bound by such principles: “The law of the Charter is decisive, and binding upon the Tribunal. . . . The Charter makes the planning or waging of a war of aggression or a war in violation of international treaties a crime; and it is therefore not strictly necessary to consider whether and to what extent aggressive war was a crime before the execution of the London Agreement.”<sup>18</sup> This was obviously a strange claim to make for a tribunal then engaged in trying individuals for having themselves recognized no authority higher than their own will, but, nevertheless, it was the actual “holding” of the court. In addition, the court noted that this rule, which is enshrined in the United States Constitution as the injunction against *ex post facto* laws, is on the international level simply a “general principle of justice” and not an actual “limitation on sovereignty.”<sup>19</sup>

Second, the IMT ruled that individual state officials could not

17. When faced with this undeniable fact, the IMT merely suggested that the Hague Convention, which codified many of the offenses most commonly known as “war crimes,” such as the mistreatment of prisoners of war and the misuse of flags of truce, also did not contain specific criminal charges. *Id.* at 108. Of course, these offenses were based on long-standing state practice, and already were specifically accepted as criminal acts in at least some of the military codes extant at the time. This simply was not the case for “waging aggressive war.”

18. *Id.* at 107.

19. *Id.* This was a significant observation on the IMT’s part, effectively emphasizing its character as a tribunal established as an exercise of the German sovereignty, then held by the Allies, rather than as a body established under international law.

claim “immunity.” In this regard, the court noted: “He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state authorizing action moves outside its competence under International law.”<sup>20</sup> It further noted: “The provisions of this article are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defense to such act of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment.”<sup>21</sup>

This reasoning, of course, merely suggests that government officials are not above the law and that their actions may constitute criminal violations. It does not answer the far more difficult question of under what circumstances, and by what authority, a government official may be tried and punished for such violations. The International Court of Justice (ICJ) noted this important distinction in its 2002 opinion in *Congo v. Belgium*.<sup>22</sup> As will be discussed below in detail, that case involved an assertion of universal jurisdiction by Belgium against the Congolese foreign minister, who was accused of war crimes and crimes against humanity in the Congo. After examining state practice in this area, the court concluded that the Congolese foreign minister was immune from Belgium’s criminal jurisdiction. It noted, however:

The *immunity* from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy *impunity* in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. . . .

Accordingly, the immunities enjoyed under international law

20. *Id.* at 110.

21. *Id.* at 111.

22. Case Concerning the Arrest Warrant of Apr. 11, 2000 (*Democratic Republic of the Congo v. Belgium*), 41 I.L.M. 536 (I.C.J. Feb. 14, 2002), at International Court of Justice, [http://www.icj-cij.org/icjwww/idochat/icobejudgment/icobe\\_ijudgment\\_20020214.pdf](http://www.icj-cij.org/icjwww/idochat/icobejudgment/icobe_ijudgment_20020214.pdf).

by an incumbent or former Minister of Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances.

First, such persons enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries' courts in accordance with the relevant rules of domestic law.

Secondly, they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity.<sup>23</sup>

And, in fact, the ultimate basis of the IMT's refusal to recognize any immunity for the accused Nazis was very much in accord with these principles.

As noted above, the IMT justified itself with reference to its Charter. Article 7 of that Charter stated plainly that "[t]he official position of defendants, whether as heads of state, or responsible officials in government departments, shall not be considered as freeing them from responsibility, or mitigating punishment."<sup>24</sup> The Charter, as the court also stated, was lawful as an exercise of the Allies' "undoubted right . . . recognized by the civilized world" to legislate for a defeated Germany. It was an exercise of German sovereignty and, as a consequence, whatever immunity the Nuremberg defendants might have been entitled to claim in a foreign court, they could assert no such immunity before the IMT.<sup>25</sup> Stated

23. *Id.* at par. 60–61.

24. 6 F.R.D. at 110.

25. Like Germany, Japan also surrendered unconditionally in 1945. A tribunal, sitting in Tokyo, was established to try war crimes offenses in the Far East. The charter of this court was adopted by General Douglas McArthur in his capacity as the Supreme Commander for the Allied Powers in Japan, under authority acknowledged in the Japanese Instrument of Surrender, dated September 2, 1945. This document indicated the assent of the Japanese emperor and government to the Potsdam Declaration (July 26, 1945), which made clear that war criminals would be punished. The Potsdam Declaration was made by the United States, Great Britain, and the Nationalist Government of China and stated: "[w]e do not intend that the Japanese shall be enslaved as a race or destroyed as a nation, but stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners."

differently, because their immunity as state officials under international law belonged to the German state, and not to the individual defendants themselves, that immunity could be, and was, lawfully waived by the Allies who were then exercising Germany's sovereignty.

### The Trial of Adolph Eichmann

The IMT, of course, did not try all the top Nazis. A number of the men who were the most important cogs in Hitler's murder machine escaped after the war, many to South America. The most notorious and culpable of these was Adolph Eichmann. His prosecution and execution by Israel may well be the only instance in which a truly universal jurisdiction was exercised over the offenses—war crimes, crimes against humanity, and genocide—for which that jurisdiction is most often asserted by its proponents. It was, however, by no means a clear case.

Although reared in Austria, Eichmann was German by birth and trained for a time at least as an engineer; however, he was working as a traveling salesman when he joined the Nazi Party in 1932. By 1934 Eichmann had joined Heinrich Himmler's SS and was working in Berlin as an SD (SS security service) official with expertise in "Jewish issues." In 1939 he became head of the RSHA (Reich Main Security Office) section dealing with Jewish "evacuation" and "resettlement" (euphemisms for deportation and murder) under the authority of Reinhard Heydrich (known, before he was successfully targeted by British-backed Czech partisans, as the Butcher of Prague, or Hangman Heydrich). In that capacity, Eichmann attended the 1942 Wannsee Conference at which the extermination of Europe's Jews was mapped out. He was, in short, the official responsible for the day-to-day implementation of the Final Solution.

For fifteen years after Germany's defeat, Eichmann remained

one of the world's most wanted men. Israeli agents finally located him in Argentina, and on May 11, 1960, he was seized by the Israeli Secret Service and taken to trial in Israel. There, he was charged under the Nazis and Nazi Collaborators (Punishment) Law, and his case presented the Israeli courts with a substantial problem of jurisdiction. All Eichmann's offenses had been committed in the territory of countries other than Israel, against citizens of countries other than Israel, at a time when Israel did not exist. In other words, under the normal rules governing the exercise of judicial authority, national and international, the state of Israel had no right to try Adolph Eichmann who was not an Israeli national.

In addressing this question both the Israeli trial court and the Israeli Supreme Court on appeal referred to principles of universal jurisdiction. There was little question that, as the courts observed, Eichmann's offenses had been universally condemned or that, as the Israeli Supreme Court noted, "their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations."<sup>26</sup> However, neither the trial court nor the Israeli Supreme Court was content to rest its decision on universal jurisdiction. Like the IMT at Nuremberg, the courts' actual holdings rested on the relevant statutory authority, rather than on international law. In this respect, both courts ruled inadmissible the argument, raised by Eichmann's lawyers, that the Nazis and Nazi Collaborators (Punishment) Law was inconsistent with international law because "it conflict[ed] . . . with the principle of territorial sovereignty, which postulates that only the country within whose territory the offense was committed or to which the offender belongs—in this case Germany—has the right to punish therefore."<sup>27</sup> Both courts concluded that they were bound to apply that law whether or not it was inconsistent with international law principles. The Israeli Supreme Court noted that

26. *Eichmann Case*, 36 I.L.R. 1, 304 (1968) [hereinafter *Eichmann Case*].

27. *Id.* at 279.

where such a conflict [between international and municipal law] does exist, it is the duty of the Court to give preference to and apply the laws of the local Legislature . . . True, the presumption must be that the Legislature strives to adjust its laws to the principles of international law which have received general recognition. But where a contrary intention clearly emerges from the statute itself, that presumption loses its force and the Court is enjoined to disregard it.<sup>28</sup>

In other words, whatever the correct answer under international law might be, the courts of Israel were bound to apply the municipal law of Israel as enacted by the Knesset, and arguments suggesting that the law was beyond the Knesset's authority under international law were inherently insufficient to defeat the courts' jurisdiction.

Moreover, even in the courts' dicta, discussing universality at great length, neither body was content to rest on universal jurisdiction alone. Both also invoked the somewhat less controversial "protective" principle, as well as ideas of passive personality jurisdiction.<sup>29</sup> Here, the trial court reasoned that

[i]f an effective link (not necessarily an identity) existed between the State of Israel and the Jewish people, then a crime intended to exterminate the Jewish people has an indubitable connection with the State of Israel [presumably sufficient to justify protective jurisdiction].

The connection between the State of Israel and the Jewish

28. *Id.* at 280–281.

29. Under the "protective" principle of international criminal jurisdiction, states assert jurisdiction over individuals acting abroad to attack or undercut the state's security. As noted by Professor Brownlie, "[n]early all states assume jurisdiction over aliens for acts done abroad which affect the security of the state, a concept which takes in a variety of political offenses, but is not necessarily confined to political acts." Brownlie, *supra* note 4, at 304. The "passive personality" principle permits a state to punish acts beyond its territory that harm its own nationals. Although there is more state practice supporting these forms of jurisdiction than universality, common law jurisdictions have been dubious of both, preferring the relative certainties of territorial jurisdiction. *See generally, id.* at 303–304.

people needs no explanation. The State of Israel was established and recognized as the State of the Jews.<sup>30</sup>

On this point, the Israeli Supreme Court noted that “we fully agree with every word said by the [trial] Court on this subject.”<sup>31</sup>

Thus, the actual metes and bounds of the Eichmann decision severely undercut its value as a precedent for universal jurisdiction. That value is further reduced because Germany appears, at least tacitly, to have consented to Eichmann’s prosecution in Israel. As noted above, the decisive test of the universal jurisdiction principle is not the assertion of power by one or more states but its vindication over the objections of the defendant’s own state of citizenship. Eichmann was a German national, at least at the time his offenses were committed. Germany, however, chose neither to contest his prosecution nor to champion his case. In fact, Germany’s refusal to assert authority over Eichmann (by rejecting his demand to be extradited to the Federal Republic of Germany for trial), or otherwise to intervene, was noted as significant by the Israeli Supreme Court in its conclusion that his trial in Israel would not violate the territoriality principle of international law.<sup>32</sup>

30. *Eichmann Case*, *supra* note 26, at 52.

31. *Id.* at 304.

32. *Id.* at 287. Argentina also did not champion Eichmann because of his “nationality,” although it did strenuously object to his seizure by Israeli agents on its territory. Ultimately, this issue was worked out diplomatically between the two nations. *Id.* at 5–7.

In another case involving Israel’s Nazi and Nazi Collaborators (Punishment) Law, the United States Court of Appeals for the Sixth Circuit also accepted universal jurisdiction as an established fact—largely based on claims made in the Restatement (Third) of the Foreign Relations Law of the United States, rather than on any effort to examine the actual practice of states. *See Demjanjuk v. Petrovsky*, 776 F. 2d 571, 579–583 (6th Cir. 1985). This case was, in fact, not a criminal prosecution but involved the extradition, to Israel, of a man accused of having been an especially brutal guard (“Ivan the Terrible”) at the Treblinka death camp. The court concluded that he was accused of offenses within Israel’s jurisdiction based on the universality principle and duly certified his extradition. The Israeli courts ultimately concluded that Demjanjuk had not been proven to be Ivan the Terrible, and acquitted.

### The Attempted Extradition of Augusto Pinochet

Besides the Eichmann case, the effort by Spanish investigating magistrate Balthazar Garzon to extradite, for trial in Spain, former Chilean dictator Augusto Pinochet is also usually cited as support for universal jurisdiction. As an instance of state practice, however, the Pinochet case stands for just the opposite proposition.

Augusto Pinochet Ugarte seized power in 1973, deposing Chile's leftist government, led by Salvador Allende. At the time, Pinochet was commander-in-chief of Chile's armed forces. He was named president in 1974, after having shut down Chile's parliament. He finally surrendered power in 1990, when a democratic government was elected, although he remained as military commander-in-chief until 1998. He then became a "senator for life" and effectively enjoyed immunity from prosecution in Chile. He remains a highly controversial figure in Chile and elsewhere.

There is little doubt that, during Pinochet's dictatorship, the Chilean government engaged in torture, murder, and other forms of political repression on a large scale. In addition, a portion of Pinochet's rule corresponded to years of military dictatorship in neighboring Argentina, including the so-called Dirty War from 1976 to 1983—in which he allegedly cooperated. Thousands of people disappeared during the Dirty War, in an effort by the Argentine military to eliminate left-wing dissent. Some were thrown out of aircraft flying over the South Atlantic Ocean. Although the Argentine military junta relinquished power in 1983, after its humiliating defeat by Great Britain in the Falklands War, a general amnesty was granted in 1991, at a time when Argentina's president feared a new military coup.

Beginning in the 1990s Balthazar Garzon, an investigating magistrate working for Spain's highest criminal court, the National Court, initiated an investigation into Argentina's Dirty War—in

which a number of Spanish citizens had been killed. Garzon, a socialist who has served as a junior minister in the Spanish government, first made his name pursuing Basque separatists. His Argentine investigation led him to Pinochet's role in the so-called Operation Condor, a program under which various South American security services, including those of Chile and Argentina, cooperated to eliminate left-wing opponents. (One target of Operation Condor was Orlando Letelier, former Chilean ambassador to the United States, who was murdered in Washington, D.C., in 1976.)

When Pinochet traveled to Britain in 1998 seeking medical treatment, Garzon issued an international arrest warrant and a request for extradition. This led to a seventeen-month drama, during which Pinochet was held under house arrest in Britain while his ultimate fate was debated in the courts. In the end, his case was heard by the House of Lords, which ruled that he could be extradited to Spain. As in previous supposed universal jurisdiction cases, however, that doctrine was not the basis of the court's decision. Although a number of the judges discussed universal jurisdiction in their opinions and even concluded that it was an accepted principle of international law, like the Israeli Supreme Court in the Eichmann case, they looked to national law—and to the law of treaties—for a rule of decision.

In this regard, a majority of the lords reached two conclusions. First, Pinochet could be extradited from Britain but only for offenses cognizable under legislation passed to implement the International Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment of 1984 ("Torture Convention"), that is, after September 29, 1988. Second, Pinochet could not claim immunity from prosecution for offenses alleged to have taken place after that date because the Torture Convention implied a waiver of such immunity, or because, after the conven-

tion's effective date, torture was no longer viewed as an official act covered by immunity.<sup>33</sup>

The fundamental linkage to the Torture Convention is, of course, highly significant. Although more than one of the judges suggested that torture constituted an international crime well before the Torture Convention took effect, the panel nevertheless concluded that Pinochet was extraditable to Spain *only* for offenses after that time. Thus, to the extent that there was a "universal" jurisdiction in this case, it was based on a treaty—to which both Britain and Chile were parties—and not on a customary international law that would, or could, bind nonparties. In such instances, all treaty parties are, at least in theory, permitted to enforce the treaty's terms. This, however, is based on the consent of the relevant states, and not on some legal or judicial authority otherwise inherent in the international community as a whole. Moreover, even with respect to these instruments, there is little state practice actually supporting the right of an otherwise uninvolved state-party to take judicial action against the citizens or officials of another state-party for violations against a third, with the targeted state accepting its right to do so. If, as universal jurisdiction proponents claim, the doctrine is so very well established, there should be many such cases.

In the end, however, even the Pinochet matter did not provide such an example. Chile strongly objected to Spain's efforts to extradite Pinochet and, after all of the legal wrangling was over, with the House of Lords concluding that Pinochet was subject to extradition, the British government still did not consider itself *legally compelled* to make the transfer. The responsible official, British Secretary of State for Home Affairs Jack Straw, acknowl-

33. *R. v. Bow Street Magistrates*, 1 App. Cas. 147, 2 All Eng. Rep. 97 (1999).

edged his own belief that “universal jurisdiction against persons charged with international crimes should be effective” but nevertheless concluded that Pinochet was medically unfit to stand trial, and released him.<sup>34</sup> This was, of course, a diplomatic rather than a legal solution. Shortly after his release, Pinochet was awarded legal costs of £500,000, paid by the British taxpayer.<sup>35</sup>

### Belgian Weltmacht

In setting Pinochet at liberty in March 2000, Secretary Straw also declined to extradite him to at least three other European states, France, Switzerland, and Belgium, which had made requests similar to that of Spain.<sup>36</sup> The last, Belgium, has clearly been the most aggressive universal jurisdiction aspirant in the past decade, and the rise, decline, and fall of its universal jurisdiction law reveals, perhaps better than anything else, how dubious and flawed is the universal jurisdiction doctrine.

Belgium’s Law of June 16, 1993, on the Punishment of Serious Violations of International Humanitarian Law, as amended in 1999, purported to vest jurisdiction in the Belgian courts over a series of international criminal offenses (including war crimes), regardless of the nationality of the defendants, the victims, or where the offenses took place. The law also provided that official governmental immunity “shall not prevent the application of the present Law.”<sup>37</sup> Before the 2003 Iraq war, when the law was finally invoked against the United States, its most spectacular application

34. See Statement of Secretary of State for the Home Department to the House of Commons (Mar. 2, 2000), at [http://www.publications.parliament.uk/pa/cm199900/cmhansrd/vo000302/debtext/00302-10.htm#00302-10\\_spmi0](http://www.publications.parliament.uk/pa/cm199900/cmhansrd/vo000302/debtext/00302-10.htm#00302-10_spmi0).

35. See BBC News, “Pinochet Wins Legal Costs” (Mar. 6, 2000), at [http://news.bbc.co.uk/2/hi/uk\\_news/667982.stm](http://news.bbc.co.uk/2/hi/uk_news/667982.stm).

36. See Home Office, *Extradition Proceedings Against Senator Pinochet* (Sept. 12, 2000), at <http://www.homeoffice.gov.uk/docs/pinochet.html>.

37. See *Congo v. Belgium*, *supra* note 22, at 9.

was against the Democratic Republic of the Congo's foreign minister, Abdulaye Yerodia Ndombasi. Because of allegations forwarded by a number of private citizens, an international arrest warrant was issued for this man, to which his government took the gravest exception. As noted above, the Congo challenged Belgium's jurisdictional claims, as well as its right to initiate prosecutions against foreign government officials, in the ICJ. On the question of universal jurisdiction, its Application noted that Belgium's law was in "[v]iolation of the principle that a State may not exercise its authority on the territory of another State and of the principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations."<sup>38</sup>

The ICJ chose not to address the universal jurisdiction question so presented but ruled instead that Belgium's arrest warrant violated international law by ignoring the well-settled immunity of high-level government officials from criminal prosecution while in office. This ruling, however, was significant in and of itself, since this rule of immunity had been considered by many to have been fatally undercut across the board by the Nuremberg and Tokyo tribunal trials. In that regard, the ICJ stated, citing both national efforts to prosecute foreign officials and the Nuremberg and Tokyo military tribunals:

The Court has carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords or the French Court of Cassation. It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers of Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.

38. *Id.*

The Court has also examined the rules concerning the immunity or criminal responsibility of persons having an official capacity contained in the legal instruments creating international criminal tribunals [including the Nuremberg, Tokyo, and U.N. ad hoc tribunals for the former Yugoslavia and Rwanda]. It finds that these rules likewise do not enable it to conclude that any such exception exists in customary international law in regard to national courts.<sup>39</sup>

Despite this rebuke, Belgium's efforts to impose its own version of worldwide justice continued. By the spring of 2003, more than two dozen allegations had been lodged under its universal jurisdiction law, including complaints against Israeli Prime Minister Ariel Sharon, former President George H. W. Bush, former Secretary of Defense and current Vice President Dick Cheney, Secretary of State Colin Powell, and General Tommy Franks, all related to the 1991 or 2003 Iraqi wars.

Visiting Brussels in June 2003, Secretary of Defense Donald Rumsfeld delivered a blunt message. United States officials could not be expected to travel to a country where they might be the target of frivolous, politically motivated charges. American support for the continuing presence of NATO headquarters in Belgium, he made clear, was at issue. With this, Belgium backed off. The law had, in fact, been turned against its own foreign minister, Louis Michel, who was accused of international violations because of an arms sale to Nepal. In August 2003 the law was amended to restrict its reach to cases involving Belgian nationals or residents as perpetrators or victims.<sup>40</sup>

Although the checkered history of Belgium's "universal jurisdiction" law presents more than a few elements of the theater of the absurd, from an international law perspective, its rise and fall

39. *Id.* at 21.

40. Glenn Frankel, "Belgian War Crimes Law Undone by Its Reach," *Wash. Post*, A1 (Sept. 30, 2002).

are highly significant. As suggested above, international law is first and foremost a form of customary law, and it is made by state practice. With Belgium's retreat—in the face of serious objections from the accused persons' own countries—the whole concept of universal jurisdiction was dealt a serious, and well-deserved, blow. As a Belgian senator who supported the law correctly noted of its revision, “[w]e didn't lose everything, but we lost a lot. . . . we moved backward rather than forward.”<sup>41</sup>

#### Poor Relations: The Alien Tort Claims Act

The United States' Alien Tort Claims Act (ATCA) is sometimes also cited as an example of the exercise of universal jurisdiction.<sup>42</sup> In fact, there are important distinctions between efforts to invoke a universal criminal jurisdiction, permitting any state to prosecute and punish the citizens and officials of any other state for international “offenses,” and efforts to sue government officials in tort for alleged violations of international law. First, of course, is the criminal nature of one kind of proceeding, and the civil nature of the other. Second, the Supreme Court has made clear that the ATCA is subject to the constraints of foreign sovereign immunities, as recognized in the United States under the Foreign Sovereign Immunities Act of 1976 (FSIA).<sup>43</sup> In addition, while universal criminal jurisdiction suggests that authority can be exercised over an accused anywhere in the world, through an international arrest warrant, the ATCA can be invoked only if the defendant can be found in the United States itself. Nevertheless, to the extent that the courts of the United States have, in a handful of cases, adjudicated claims for tortious violations of international law, the

41. *Id.*

42. 28 U.S.C. sec. 1350.

43. 28 U.S.C. secs. 1602–1611.

ATCA raises many of the same policy concerns as does criminal universal jurisdiction.

### *The Forgotten Statute*

The ATCA is nothing if not an enigma. Enacted as part of the Judiciary Act of 1789 (which established the federal court system in accordance with the newly adopted United States Constitution), its purpose and meaning are utterly obscure. The law provides that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>44</sup> No legislative history dealing with the provision has been found, and before 2004 it had never been construed by the United States Supreme Court. For nearly two hundred years after the ATCA became law, it was effectively dormant. In 1980, however, the family of a murdered Paraguayan youth invoked the law to sue his alleged killer, a former Paraguayan police official, in a New York federal court. The victim had been tortured. All the parties were citizens of Paraguay, but all were in the United States at the time the action was brought.

Although the trial court dismissed the case for lack of jurisdiction, in *Filartiga v. Pena*,<sup>45</sup> the United States Court of Appeals for the Second Circuit reversed, concluding that the suit could be maintained under the ATCA. The judges reasoned that the general injunction against state-sponsored torture had become so widely accepted that the court could properly conclude that “official torture is now prohibited by the law of nations.”<sup>46</sup> The court failed, however, to identify a specific cause of action that would permit a tort claim to be based on official torture and suggested that the law of Paraguay might well apply to the case. The court dealt with the

44. 28 U.S.C. sec. 1350.

45. 630 F. 2d 876 (2d Cir. 1980).

46. *Id.* at 884.

question of the United States' right to adjudicate the case as follows:

Common law courts of general jurisdiction regularly adjudicate transitory tort claims between individuals over whom they exercise personal jurisdiction, wherever the tort occurred. . . .

It is not extraordinary for a court to adjudicate a tort claim arising outside of its territorial jurisdiction. A state or nation has a legitimate interest in the orderly resolution of disputes among those within its borders, and where the *lex loci delicti commissi* is applied, it is an expression of comity to give effect to the laws of the state where the wrong occurred. . . .

. . . Here, where in personum jurisdiction has been obtained over the defendant, the parties agree that the acts alleged would violate Paraguayan law, and the policies of the forum are consistent with the foreign law, state court jurisdiction would be proper. Indeed, appellees conceded as much at oral argument.<sup>47</sup>

The court further concluded that the federal courts could properly hear such a claim in light of the Constitution's limitation on federal court jurisdiction, because the law of nations was considered part of "federal common law."

Four years later, in *Tel-Oren v. Libya*, the United States Court of Appeals for the District of Columbia Circuit also addressed the ATCA.<sup>48</sup> In that case, a group of mostly Israeli citizens sought damages from Libya, the Palestine Liberation Organization (PLO), and various affiliated groups, arising out of a 1978 terrorist attack on an Israeli civilian bus. The trial court had dismissed the action, concluding that it lacked subject matter jurisdiction.

A three-judge panel of the District of Columbia Circuit affirmed that decision but suggested three separate reasons for so doing. Judge Harry Edwards accepted the reasoning of the court in *Filartiga*, but concluded that it was inapplicable to this case since

47. *Id.* at 885.

48. 726 F. 2d 774 (D.C. Cir. 1984).

the principal defendants, that is, the PLO, were private individuals rather than state actors. He discerned no right under international law to be free of attacks by private individuals in the circumstances presented. Judge Robert H. Bork rejected the reasoning in *Filar-tiga*, correctly noting that the Second Circuit had distinctly failed to identify any actual cause of action, recognized by international law, that could be enforced in a suit under the ATCA. He concluded that the court should not imply such an action in an area, foreign affairs, otherwise committed by the Constitution to the political branches. Finally, Judge Roger Robb agreed that the case must be dismissed, but because the entire area presented a political question, involving American foreign policy and “standards that defy judicial application.” The matter was, in short, nonjusticiable in the first instance. The result, as Judge Bork stated at the close of his opinion, was that “it is impossible to say even what the law of this circuit is” with respect to the ATCA.<sup>49</sup>

### *Rights as Opposed to Rights of Action*

The situation improved little in the twenty years after *Tel-Oren* was decided—although an increasing number of ATCA cases were brought, some attempting to expand the statute beyond the limits suggested by Judge Edwards, to reach private entities.<sup>50</sup> The Supreme Court first addressed the ATCA, albeit tangentially, in

49. *Id.* at 823. Congress, at least, took Judge Bork’s criticisms seriously and later passed the Torture Victims Protection Act, Pub. L. No. 102-256, 106 Stat. 73, in 1992. This statute does create a cause of action for official torture and its detailed provisions are an excellent example of the elements that, in other areas, the courts would be required to improvise. In addition, and significantly, Congress imposed a requirement that the plaintiff have exhausted “adequate and available remedies in the place in which the conduct giving rise to the claim occurred.”

50. See, e.g., *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (jurisdiction found under ATCA over claim against leader of Bosnian Serb faction); *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997) (suit against oil company allegedly involved in state-sponsored human rights violations in Burma).

*Argentine Republic v. Amerada Hess Shipping Corp.*,<sup>51</sup> in which it made clear that actions brought under the ATCA are subject to the requirements of the FSIA.<sup>52</sup>

In that case, the owner and lessee of an oil tanker sued the Argentine government for damage done to the vessel during the 1982 Falklands War between Argentina and Great Britain. The ship had been attacked by Argentine forces and, as a result, later had to be scuttled. The Supreme Court held that the action, which had been brought under the ATCA, as well as the general admiralty and maritime jurisdiction of the United States and “universal jurisdiction,” was properly dismissed because the FSIA provided Argentina immunity in these circumstances.

Significantly, however, in rejecting the plaintiff’s claim that various international agreements, binding on both Argentina and the United States, created an exception to the FSIA in this instance, the Court emphasized the critical distinction between a substantive violation and the right to sue. It noted that there is an exception to the FSIA’s general recognition of foreign state sovereign immunity, in which the law’s provisions would “expressly conflict” with an international agreement to which the United States was a party when the statute was enacted. The Court went on to point out, however, that the relevant conventions in this case “only set forth substantive rules of conduct and state that compensation shall be paid for certain wrongs. They do not create private rights of action for foreign corporations to recover compensation from foreign states in United States courts.”<sup>53</sup>

This, of course, was the critical problem, correctly identified by Judge Bork in *Tel-Oren*, with the Second Circuit’s analysis in *Filartiga*, and with theories of universal jurisdiction generally. Although the ATCA permits the federal courts to hear cases for

51. 488 U.S. 428 (1980).

52. 28 U.S.C. secs. 1602–1611.

53. 488 U.S. at 442.

torts “in violation of the law of nations or a treaty of the United States,” it does not create or identify any specific cause of action, such as battery or negligence in domestic tort law, on which a private plaintiff can actually sue. That is, the law does not set forth the circumstances in which an injured alien would be entitled to a judgment in court—specifying what substantive elements (the offensive or impermissible conduct, level of intent, and kind of physical or mental harm) he or she must prove in order to recover. Similarly, it does not set forth the burden of proof the plaintiff must carry. Must the plaintiff prove the necessary elements by a preponderance of the evidence, by clear and convincing evidence, or even by the highest standard of beyond a reasonable doubt, normally reserved for criminal cases? Further, the ATCA does not address the question whether there might be affirmative defenses, or mitigating factors, that a defendant would be entitled to plead in justification or what the proper measure of damages would be in any particular case. Is a recovery to be limited to compensatory damages, or are punitive damages also to be awarded and, if so, at what level? Are compensatory damages to be limited to economic interests?

The court in *Filartiga* suggested that these questions were not jurisdictional but “choice of law” issues, to be resolved later. This was a neat answer but not sufficient when the relevant jurisdictional statute is predicated on the existence of a “tort” in the first instance. In 1789, as today, a tort was more than merely a bad act. It was, and remains, a legally cognizable wrong, for which the law provides a remedy. Although international law, by custom, by treaty, or by both, may well impose certain duties on nation-states (and arguably on individuals in certain limited circumstances), it simply does not provide the balance of the equation; and it did not do so in 1789.

In *Tel-Oren*, Judge Edwards disagreed. He conceded this fundamental difficulty with the court’s approach in *Filartiga*, sug-

gesting that it “is consistent with the language of section 1350, [but] places an awesome duty on federal district courts to derive from an amorphous entity—i.e., the ‘law of nations’—standards of liability applicable in concrete situations.”<sup>54</sup> This, he noted, was not impossible, but he concluded that “the formidable research task involved gives pause, and suggests consideration of a quite plausible alternative construction of section 1350.”<sup>55</sup> That alternative was to refer to the domestic tort law of the United States for the necessary cause of action. Leaving aside the obvious question of which U.S. tort law should be applied (there being at least fifty possible models, as well as the District of Columbia, the Commonwealth of Puerto Rico, the Virginia Islands, Guam, or some indeterminate federal version to choose from), Judge Edwards’ suggestion of an alternative approach based on a desire to avoid a formidable—and probably impossible—research task reveals most clearly that the ATCA, as interpreted by the Second Circuit in *Filartiga*, is an invitation to the courts to make up the law as they go along.

This probably was not Congress’s intention. However, what Congress did intend remains so obscure that it is impossible to say with any certainty. Judge Bork attempted to make sense of the law by suggesting that Congress had in mind the three violations of the law of nations then generally recognized: (1) violation of safe-conducts, (2) infringement of ambassadorial rights, and (3) piracy. This certainly is plausible and, more to the point, was the approach taken by the Supreme Court when it finally did address the ATCA, on the merits, in the spring of 2004.

54. *Id.* at 781.

55. *Id.* at 782.

*The “Law of Nations”—Paradigms of 1789*

*Sosa v. Alvarez-Machain* was the latest in a long line of decisions arising out of the 1985 torture and murder of Enrique Camerena-Salazar.<sup>56</sup> Salazar was a U.S. Drug Enforcement Administration agent who was working in Mexico at the time he was killed. American officials came to believe that Alvarez-Machain, a Mexican physician, had participated in Salazar’s torture—specifically by keeping the man alive during his “interrogation.” Alvarez-Machain was indicted and, after efforts to secure his extradition from Mexico failed, U.S. officials hired several Mexican nationals (including Mr. José Sosa) to seize Alvarez-Machain and bring him to the United States. This led to the Supreme Court’s ruling in *United States v. Alvarez-Machain*,<sup>57</sup> in which it decided that the federal courts could exercise jurisdiction over a defendant in these circumstances, even if he had been brought to the United States by “forcible abduction.”

In the trial, Alvarez-Machain was acquitted. In 1993 he brought civil actions against the United States, under the Federal Tort Claims Act (FTCA),<sup>58</sup> and against the persons who seized him in Mexico (including Sosa), under the ATCA. The Supreme Court dismissed both claims, concluding that the FTCA’s waiver of sovereign immunity did not apply in these circumstances, and that the ATCA was far too narrow in scope to support the action against Sosa.

In addressing the ATCA, the Court recognized that—on its face—the statute was merely jurisdictional. Nevertheless, it also concluded that “at the time of enactment the jurisdiction enabled federal courts to hear claims in a very limited category defined by

56. 124 S. Ct. 2739.

57. 504 U.S. 655 (1992).

58. 28 U.S.C. sec. 1346(b)(1), secs. 2671–2680.

the law of nations and recognized at common law.”<sup>59</sup> As Judge Bork had suggested in his *Tel-Oren* opinion twenty years before, the Court concluded that there were only three such claims:

We think it is correct, then, to assume that the First Congress understood that the district courts would recognize private causes of action for certain torts in violation of the law of nations, though we have found no basis to suspect Congress had any examples in mind beyond those torts corresponding to Blackstone’s three primary offenses: violation of safe conducts, infringement of the rights of ambassadors, and piracy.<sup>60</sup>

The Court conceded that it was possible that new torts, cognizable under the ATCA, could develop over time but cautioned that “[w]e think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.”<sup>61</sup> It was this requirement that the Court held to be “fatal to Alvarez’s claim.”<sup>62</sup> Although there are a number of international instruments, such as the United Nations Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, that recognize a right against arbitrary arrest or detention, the Court concluded that neither document imposed binding legal obligations that were “self-executing,” that is, enforceable in court without further congressional action. Further, although there was some evidence of a generalized consensus among states against arbitrary detention, this was insufficient to establish a binding norm of customary international law.<sup>63</sup> Alvarez-Machain’s ACTA claim was, therefore, dismissed.

59. 124 S. Ct. at 2754.

60. *Id.* at 2761.

61. *Id.* at 2761–2762.

62. *Id.* at 2762.

63. *Id.* at 2769.

This aspect of the Court's ruling met instant criticism—first in Justice Antonin Scalia's opinion (joined by Justice Clarence Thomas and Chief Justice William Rehnquist), concurring in part and in the judgment. Scalia noted that the Court's formulation, that no development since the ACTA was enacted in 1789 had “categorically *precluded* federal courts from recognizing a claim under the law of nations as an element of common law,” effectively turned the established rule regarding federal common law “on its head.”<sup>64</sup> Since *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), he noted, federal courts cannot create “federal common law” without some affirmative congressional authorization. “In holding open the possibility that judges may create rights when Congress has not authorized them to do so, the Court countenances judicial occupation of a domain that belongs to the people's representatives.”<sup>65</sup>

The Court's suggestion in *Sosa*, that new causes of action cognizable under the ATCA may develop as the law of nations develops, opened a door that should have been left closed. This is true even though, assuming the lower federal courts will heed the Supreme Court's clear directions that no claims be recognized that enjoy “less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATCA] was enacted,” the opportunities for judicial mischief should be comparatively limited. Widespread state practice demanding respect for safe conducts and diplomatic personnel did exist in 1789, and piracy was widely assumed to be a “universal” offense, even if there was little practice supporting a right to both prescribe *and* prosecute that offense on the international level. Because of the lack of widespread and consistent state practice supporting even core portions of contemporary human rights law, and the inherently controversial nature of binding norms that regulate a state's rela-

64. *Id.* at 2772 (Scalia, J., concurring in part and in the judgment).

65. *Id.* at 2774.

tionship to its own citizens, it is unlikely that more modern norms will achieve the status of these three in the near future. Indeed, in *Sosa v. Alvarez-Machain*, the Supreme Court took an appropriately skeptical approach to such claims.

Nevertheless, the Court has inserted the judiciary into an area uniquely reserved to the political branches, and particularly to the president. Although circumstances arise when the courts are properly called on to interpret or apply treaties to which the United States is party,<sup>66</sup> on the international level it is the president who must construe the United States' legal obligations—whether in treaties or customary international law. He is, as John Marshall noted while serving in the House of Representatives:

[T]he sole organ of the nation in its external relations, and its sole representative with foreign nations. Of consequence, the demand of a foreign nation can only be made on him. He possesses the whole Executive power. He holds and directs the force of the nation. Of consequence, any act to be performed by the force of the nation is to be performed through him.<sup>67</sup>

The power to interpret American international law obligations is a critical authority. Nation-states often disagree over the content and meaning of international law, whether in treaties or custom, and the view of one state (or grouping of states) is inherently no better or worse than that of others. The right of every state to interpret and apply international law for itself is an essential attribute of sovereignty and, although that right may be subordinated by consent, as when a state has agreed to accept the ruling of an

66. See, e.g., *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 33 (2d Cir. 1975), cert. denied, 429 U.S. 890 (1976) (interpreting provisions of the “Warsaw Convention” dealing with air transport). And, as Justice Scalia pointed out in his *Sosa* opinion, it is the prerogative of Congress and the president to create and define any private causes of action that may arise from treaties to which the United States is a party. Slip op., *supra* note 64, at 11–12.

67. 10 Annals of Congress 596, 613–614 (1800).

international arbitral body like the ICJ, it cannot be extinguished. When American courts recognize and vindicate claims based on an interpretation of international law that is inconsistent with the executive branch's position, they both trench on the president's constitutional authority and undercut the United States' ability to "speak with one voice" in foreign affairs.

In the process, they may very possibly put the United States in an impossible position relative to other powers. Although, all things being equal, the Court's cautious language about the possibility that new ATCA claims can develop may well lessen the potential for interbranch conflicts over the meaning and content of international law, it does not rule them out. It is also important to recall that assertions of jurisdiction by the United States over events overseas can no more make international law, in and of themselves, than can Belgium's ill-starred foray as an international prosecutor. However, the potential damage to the foreign relations of the United States, and to the operation of the international system itself, by such assertions remains substantial.

### The Future

Although those who claim that universal jurisdiction is an established fact are asserting far more than they can prove based on the actual practice of states, doubtless a determined effort is under way to create such authority. As noted above, the appeal of "universality" to international activists is obvious, as is its attraction for states who wish to increase their stature in a world where the ability to project military power is increasingly beyond their material means. Moreover, as this effort to substitute what foreign policy wonks call "soft" power for military might is dressed in the language of reason and law—the creation of an international system governed by law and not by force—dissension begins to sound positively seditious.

Basing such a system on universal jurisdiction principles, however, is a short route not to the elysian fields but to international anarchy. Universality presupposes the right of a single state to act on behalf of all in punishing conduct that all consider criminal, regardless of the citizenship or official capacity of the victims and perpetrators. Even if there were agreement among all nations on what conduct that might be (and there is not), the interpretation of even the most well-established international norms differs from state to state. Take, for example, the United Nations Convention on the Prevention and Punishment of the Crime of Genocide. This widely accepted treaty defines genocide to include “[c]ausing serious bodily or mental harm to members of [a protected] group.” In ratifying this convention, the United States noted an understanding to the effect that “the term ‘mental harm’ . . . means permanent impairment of mental faculties through drugs, torture or similar techniques.”<sup>68</sup> It was the only state to note such a limitation. Similarly, the United States also noted a reservation providing that “nothing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.”<sup>69</sup> Other states may interpret the convention more broadly (to include causing anguish or depression, for instance) and, in fact, the U.S. reservation on authorizing legislation prohibited by its Constitution was questioned or rejected by as many as thirteen other state-parties. These included Germany, the United Kingdom, Spain, Sweden, Norway, the Netherlands, Mexico, Italy, Ireland, Greece, Finland, Estonia, and Denmark.<sup>70</sup> Under universal jurisdiction theories, these differing views could be imposed on the

68. See Declarations and Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, at U.N. High Commissioner for Human Rights, <http://www.unhchr.ch/html/menu3/b/treaty1gen.htm>.

69. *Id.*

70. *Id.*

United States, despite its objections, through prosecutions against American citizens or officials.

Similarly, although it is widely accepted that the laws of war prohibit indiscriminate attacks that result in disproportionate damage to civilians, there is wide disagreement over what constitutes such an attack. This issue is raised nearly anytime the United States chooses to use force overseas. It was raised during the 1990–1991 Persian Gulf War, the 1999 NATO campaign against Slobodan Milosevic’s Serbia, and, most recently, in Afghanistan and Iraq. Although the United States follows the traditional formulation, that collateral damage to civilians cannot be disproportionate to the military advantage sought to be gained, many of its allies have accepted an arguably far more restrictive standard, based on the 1977 Protocol I Additional to the 1949 Geneva Conventions. The United States has refused to become a party to that protocol.

In fact, under the doctrine of universal jurisdiction, each and every state would be perfectly entitled to interpret the requirements of international law in accord with its own values, traditions, and national interests and then to impose that interpretation on any other state through the device of a criminal prosecution. Thus, for example, if Saddam Hussein’s Iraq (or Libya, or China, or the Principality of Monaco) had concluded that the United States and its NATO allies had violated the laws of war by attacking (over the issue of Kosovo) the Federal Republic of Yugoslavia in 1999, it would have been perfectly entitled to indict President Clinton, Secretary of State Madeleine Albright, General Wesley Clark, and any other potentially responsible official, as well as their counterparts in NATO’s other member states, and demand their extradition for trial in Baghdad. The Allies would have had no choice but to comply. That, of course, is not the law, and this is precisely and exactly why it is not. Universality cannot work in a system of independent and equal states, in which all may interpret and

enforce the law with equal authority—unless it is limited to stateless persons, as pirates once were considered to be.

*The International Criminal Court*

The lack of such a universal imperium, in which states are subordinate to an international judicial authority, has not stopped determined efforts to create a new international criminal judicial system, based on principles of universality. A little over four months after the ICJ held Belgium's universal jurisdiction experiment to violate international law, the first permanent international criminal court was established (July 1, 2002) at The Hague. Unlike the two United Nations' ad hoc criminal tribunals, for the former Yugoslavia and Rwanda, which have a limited territorial and temporal jurisdiction based ultimately on state consent (under the U.N. Charter all members agree to carry out Security Council resolutions adopted, as these were, under Chapter VII), the ICC asserts a worldwide jurisdiction.<sup>71</sup>

Created in accord with the 1998 Rome Statute, under which the court was not actually established until sixty countries had deposited instruments of ratification, the ICC has competence to investigate, try, and punish dozens of offenses falling into four broad categories: (1) genocide, (2) crimes against humanity, (3) war crimes, and (4) aggression. Under Article 12 of the Statute, the ICC claims the right to exercise this authority with respect to the citizens of state-parties, and of nonstate-parties when an offense has allegedly taken place on the territory of a state-party. This claim violates international law.

Despite its grandiose title of "statute," the ICC's founding doc-

71. Under the United Nations Charter, all member states agree to carry out Security Council resolutions adopted under Chapter VII, "to maintain or restore international peace and security." The Yugoslav and Rwandan tribunals were established under such resolutions in 1993 and 1994, respectively.

ument is nothing more than a treaty. Like all other treaties, it cannot regulate the rights and obligations of third-party states unless they have ratified the instrument through their own constitutional processes. The Rome Statute's effort to upset this long-settled rule is one of the fundamental reasons why the United States has rejected the ICC project. It was noted both by President Clinton, who cited this aspect of the Rome Statute in urging President Bush not to submit the treaty for the Senate's consideration, and by the Bush Administration in explaining why the United States was formally rejecting or "de-signing" the Rome Statute: "We believe that in order to be bound by a treaty, a state must be party to that treaty. The ICC asserts jurisdiction over citizens of states that have not ratified the treaty. This threatens US sovereignty."<sup>72</sup>

### *A New Sovereignty*

The United States' participation in the ICC regime, or even acceptance of a "universal" criminal jurisdiction like that asserted by Belgium, would not merely threaten U.S. sovereignty; it would require a revolution in the very conception of "sovereignty," or self-government, as Americans have understood it for the past two and a quarter centuries. When thirteen of Britain's American colonies established a political union and declared their independence in 1776, they claimed the right to "assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them." That claim was vindicated by war and accepted by Great Britain in the 1783 Treaty of Paris. Since that time, all the other "powers of the earth" have accepted American independence. Among the attributes of sovereignty that came along with this separate and equal station was the right to interpret and apply international law, or the "Law of

72. Remarks of Marc Grossman, Under Secretary of State for Political Affairs, to the Center for Strategic and International Studies, Washington, D.C., May 6, 2002.

Nations” as the Republic’s founders would have known it, by and through American institutions, established by and accountable to the American people.

Universality, of course, posits that there is some authority higher than the individual nation-state, an authority capable of second-guessing any particular country’s conclusions about what international law requires, what conduct it condemns as criminal, and who may have committed violations. No such authority has been recognized, either spiritual or temporal, since the Peace of Westphalia in 1648, when the Holy Roman Emperor effectively surrendered his claims to a universal authority over central Europe. Today, no single state, or collection of states, can legitimately claim such power. This includes modern, multilateral organizations such as the United Nations (whose Charter plainly reaffirms the “principle of the sovereign equality of all its members”), the ICJ (or the “World Court”), and the World Trade Organization. The legal authority of these institutions rests not on some generalized law-making power embodied in the “international community” but solely on the consent of states—a consent that could be withdrawn in appropriate circumstances.

As an institution, the ICC is different from these others in quality and kind. As noted above, the court has asserted jurisdiction over the citizens and public officials of all states, with or without consent. The circumstances in which this claim would apply are as follows. If an offense, otherwise subject to the ICC’s authority, is alleged to have been committed on the territory of an ICC member state by the citizen of a nonmember, under the Rome Statute the court would be free to investigate, prosecute, try, and punish that person—regardless of his or her citizenship. Moreover, the court also would be able to reach the citizens and officials of nonparty-states in such circumstances, who may have never set foot in the territory of a member state, on theories of intended consequences and command responsibility. This goes far beyond any

territorial or extraterritorial jurisdiction recognized by modern international law. It ignores a number of fundamental limits that international law has traditionally imposed on the ability of one state to prosecute the citizens and officials of another, limits that apply even to prosecutions for offenses committed on a state's own territory.<sup>73</sup>

The ICC's pretensions in this respect are entirely unprecedented, because they involve a kind of criminal enforcement power never before claimed, or conceded, by the community of nations. Unlike traditional "universal" jurisdiction claims, which involve individual states enforcing international norms through national judicial authority, the ICC wields a supernational authority that is exercised in contravention of ordinary state power. Under the doctrine of "complementarity" set forth in Article 17 of the Rome Statute, the court can generally take a case only if national institutions fail to pursue the matter in an impartial manner.<sup>74</sup> The court, of course, is the sole judge (under Rome Statute Article 119) of whether this standard is met. Therefore, in most circumstances, when the ICC goes forward with a case, it will do so in contravention of decisions already made by competent national authorities. The ICC is not, in short, the agent of its member states; it is the principal. This is a fundamentally different kind of international judicial authority than that acknowledged, and exercised, by multilateral institutions in the past.

Not only does this revolutionary institution, as a new species

73. See Lee A. Casey and David B. Rivkin Jr., "The Limits of Legitimacy: The Rome Statute's Unlawful Application to Non-State Parties," 44 *Va. J. Int'l L.* 63 (2003).

74. In this regard, Article 17 provides that the ICC must consider a case "inadmissible" in the court unless the state with jurisdiction over the matter is "unwilling or unable genuinely to carry out the investigation or prosecution." Rome Statute of the International Criminal Court, art. 17 (July 17, 1998), at United Nations, <http://www.un.org/law/icc/statute/romefra.htm>. Cases can also be referred to the court by a state, or by the U.N. Security Council.

of judicial authority, challenge traditional notions of sovereignty and self-government, it also constitutes a new and dangerous form of executive or prosecutorial power. The ICC, of course, does not merely act as a court. Its judicial bench is only one of the ICC's organs. The others are the registrar—who handles administrative matters—and the prosecutor. The power of the ICC prosecutor is enormous and, for all practical purposes, unchecked. Under the Rome Statute, prosecutors may initiate investigations on their own authority, and the court's judges must permit an investigation to proceed if it has a "reasonable basis." Although a prosecutor may be removed from office for "serious misconduct or a serious breach of his or her duties,"<sup>75</sup> these terms have been defined in relation to personal misconduct or attempting to obstruct the course of justice.<sup>76</sup> How he exercises his office, his agenda, is entirely up to the prosecutor.

Powerful prosecutors, of course, are nothing new. As Justice Robert Jackson (then serving as U.S. Attorney General) explained about federal prosecutors:

The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. Or the prosecutor may choose a more subtle course and simply have a citizen's friends interviewed. The prosecutor can order arrests, present cases to the grand jury in secret session, and on the basis of his one-sided presentation of the facts, can cause the citizen to be indicted and held for trial. He may dismiss the cases before trial, in which case the defense never has a chance to be heard. Or he may go on with a public trial. If he obtains a conviction, the prosecutor can still make recommendations as to sentence, as to whether the prisoner should get probation or a suspended sentence, and after he is put

75. Rome Statute of the International Criminal Court, art. 46.

76. Rules of Procedure and Evidence, Rule 24.

away, as to whether he is a fit subject for parole. While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst.<sup>77</sup>

In the United States, however, this power is tempered by democratic accountability. State prosecutors are generally elected officials—often the most important local elected officials. United States Attorneys are appointed by the president, but only by and with the Senate’s advice and consent. As Jackson further explained:

Because of this immense power to strike at citizens, not with mere individual strength, but with all the force of government itself, the post of Federal District Attorney from the very beginning has been safeguarded by presidential appointment, requiring confirmation of the Senate of the United States. You are thus required to win an expression of confidence in your character by both the legislative and the executive branches of the government before assuming the responsibilities of a federal prosecutor.<sup>78</sup>

Moreover, in actual practice, the enforcement policies and decisions of individual United States Attorneys are subject to the president’s direction and to oversight by Congress.

Perhaps more to the point, even assuming that a prosecutor is acting from good and honorable motives, he exercises some of the most fundamental powers of government—and this must be accomplished in the context of his or her own body politic. The essence of prosecutorial discretion is balancing the necessity of punishing an individual against broader societal interests. At one level, it entails examining the accused’s genuine culpability—whether the alleged violation was willful and deliberate, whether the person involved was a repeat offender, and how serious the offense was

77. Robert H. Jackson, *The Federal Prosecutor*, “Speech to Second Annual Conference of United States Attorneys,” Apr. 1, 1940, at <http://www.roberthjackson.org/theman2-7-6-1.asp>.

78. *Id.*

compared with other offenses that might merit expending prosecutorial resources. The answers to these questions are often highly localized, and this is particularly true of resource allocation questions. One area may have significant problems with street crime, while another may be plagued by organized crime, and still another by a corrupt local political system. In exercising his discretion, a democratically accountable prosecutor must address the needs of the community he serves. From this grows legitimacy.

International prosecutors, of course, do not serve any particular community to which they are accountable. They suffer a corresponding lack of very basic legitimacy. The ICC prosecutor's detachment from the politics over which he exercises authority exacerbates another of the potential abuses of prosecutorial power highlighted by Jackson. In choosing his or her cases, a prosecutor can also choose his or her defendants: "Therein is the most dangerous power of the prosecutor; that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted."<sup>79</sup> This danger is real enough in the national or domestic context but is at least checked by the systemic limitations on a prosecutor's authority. In the end, he must live in the community where he operates and where he can expect that another will one day exercise his power. The ICC prosecutor may be, almost certainly will be, entirely detached from the countries and localities where he exercises his authority. For example, the current ICC prosecutor is a citizen of Argentina. His first investigations, however, will involve actions in Africa, specifically in Uganda and the Democratic Republic of the Congo. Both states have actually requested the prosecutor's intervention, evidently having concluded that they are unable to handle the cases themselves.<sup>80</sup> Nevertheless,

79. *Id.*

80. See "President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC" (Jan. 29, 2004), at International Criminal Court, <http://www.icc-cpi.int/newspoint/articles/29.html>; "Prosecutor receives referral of the situ-

in investigating and prosecuting persons in these countries, the prosecutor will bring with him his own national and professional perspectives and assumptions, which may or may not have much in common with those of the accused or of their alleged victims.

It must be emphasized, of course, that the potential for abuse here does not depend on the ICC prosecutor's acting in bad faith; far from it. America's own experience, in the 1980s and 1990s, with the now justly discredited Independent Counsel Statute establishes beyond doubt that a prosecutorial authority that has deliberately been separated from the normal institutions of national justice, and that exercises jurisdiction over a particular category of people—can lead to abuses—regardless of how dedicated and honorable individual prosecutors may be. This comparison is not far-fetched if we consider that prosecutors of the U.N. tribunals have seen their *raison d'être* as the prosecution of senior government officials of sovereign states who, in their view, have committed serious violations of international law and gotten away with it.<sup>81</sup> There is little reason to expect that the ICC prosecutor will see his mission differently.

### *A European Project*

Because of these very troubling aspects of the ICC as an institution, the United States has not ratified the Rome Statute and is not likely

---

ation in the Democratic Republic of Congo" (Apr. 19, 2004), at International Criminal Court, <http://www.icc-cip.int/newspoint/pressreleases/19.html>.

81. Canadian Justice Louise Arbour, during her tenure as prosecutor for both the ad hoc U.N. international criminal tribunals, the International Criminal Tribunal for the Former Yugoslavia, and the International Criminal Tribunal for Rwanda, viewed her role as, at least in part, teaching the relevant populations that they had chosen the wrong leaders through democratic processes: "It's important to permit these people to recognize that they made a very serious error in judgment. In electing these people, they have to let go of them as national heroic figures." Frontline, "The World's Most Wanted Man," interview with Louise Arbour, at <http://www.pbs.org/wgbh/pages/frontline/shows/karadzic/interviews/arbours.html>.

to become a state-party in the foreseeable future. Although the United States was involved in the original negotiations leading up to the ICC's creation (seeking all along some effective means of limiting the court's power), today the ICC's primary backers are the states of the European Union (EU). The EU's twenty-five members represent the largest voting bloc in the Rome Statute's Assembly of States Parties, and eight of the ICC's eighteen judges are from EU countries. Perhaps not surprisingly, the EU has made ICC "universality" a priority.<sup>82</sup>

To that end, it has embarked on a worldwide political campaign with the "crucial objective with regard to third States [being] to maximize the political will for the ratification and implementation of the Statute to achieve the desired universality."<sup>83</sup> Among other things, the EU has funded pro-ICC groups in the United States, such as the Coalition for the International Criminal Court, seeking to influence American policy. In addition, it has vigorously opposed the United States' efforts to obtain a series of "Article 98" agreements, which are designed to protect American citizens from the ICC's reach unless the Rome Statute is ratified in accord with our own constitutional processes. The EU has also made ICC membership a requirement for new EU member states—going so far as to rebuke Romania, when it was an EU aspirant, for entering an Article 98 agreement with the United States.<sup>84</sup>

82. *See, e.g.*, "EU Statement on the Inauguration of the International Criminal Court" (Mar. 13, 2003), at European Union, [http://europa.eu.int/comm/external\\_relations/osce/stment/icc120303.htm](http://europa.eu.int/comm/external_relations/osce/stment/icc120303.htm). Ironically, of course, the very fact that ICC state parties established the court's jurisdiction through a treaty is itself an acknowledgment that no such authority exists separate and apart from the consent of individual states. It cannot be universal in character until it has been accepted by all.

83. "EU Action Plan to Follow-up on the Common Position on the International Criminal Court" (May 15, 2002), at European Union, [http://europa.eu.int/comm/external\\_relations/human\\_rights/doc/icc05\\_02.htm](http://europa.eu.int/comm/external_relations/human_rights/doc/icc05_02.htm).

84. *See* "U.S. Military Aid Tied to Court Immunity" (Aug 14, 2002), at Cable News Network, <http://www.cnn.com/2002/ALLPOLITICS/08/14/aid.criminalcourts/>.

Regrettably, many of the ICC's proponents, including the states of the EU who know better, claim that the United States is somehow seeking "impunity" under international law by its efforts to protect its citizens from the ICC's unwarranted and illegal claims.<sup>85</sup> Such statements, which suggest that the United States is somehow inherently subject to the ICC's authority and is attempting to repudiate legally binding obligations, reveal either a cynical strategy to mislead the general public or an appalling ignorance of the actual record of universal jurisdiction as an international law doctrine—perhaps both. Far from the United States' seeking immunity, or impunity, under international law, its position on the ICC's jurisdictional claims is far better grounded than that of its opponents.

For states, such as the members of the EU, who already have accepted the subordination of their national institutions and interests to a supernational body, an ICC jurisdiction that can be applied on a uniform and efficient basis may well be acceptable. For the United States, however, whose national existence is justified only by a long-ago claim to the right of self-government, "laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness,"<sup>86</sup> the acceptance of such a supernational authority would be revolutionary.

It would require the American people to accept that they no longer hold the ultimate authority over their own destiny but that they and their elected representatives must answer to a foreign power over which they have no control and precious little influence. It may be that in the future, a time will come when the

85. See, e.g., "Human Rights Watch, EU Commitment to Criminal Court Facing Test" (Aug. 28, 2002) at Human Rights Watch, <http://www.hrw.org/press/2002/08/article98-0828.htm>.

86. Declaration of Independence, par. 2.

## THE DANGEROUS MYTH OF UNIVERSAL JURISDICTION

183

peoples of the world do share the same values, interests, and concepts of justice and due process, to an extent that America's claim to self-government will become superfluous. Judging by present circumstances, however, that day has not yet dawned—and it promises to be a long time in coming.