PRO BONO PUBLICO, PRO BONO MUNDI

by Steven Schneebaum

It has often been remarked that one of the most dramatic changes in the international legal landscape in the second half of the twentieth century is the acknowledgment that international law can reach across and through national boundaries, and can be the source of real rights of real individuals. The international human rights regime, as it has been defined and developed over the last 50 years, recognizes that the rights that people have simply by virtue of our common humanity are legal in character, and carry with them correlative legal obligations. These entitlements are enforceable against governments and other international legal persons through the traditional mechanisms of the law, including tribunals both domestic and international tasked with protecting and defending the rights of individuals.

This breakthrough has not, of course, come about without controversy, or without resistance. Nor is the acknowledgment of the legal nature of human rights universally accepted: indeed, the current American administration has waged an impassioned war against the very notion that international law has anything whatever to say to national legal systems (or, at least, to our own). That cause has been a lonely one for the President and his acolytes, and, like the war being conducted in Iraq, it does not enjoy the support of the vast majority of the world.

One of the consequences of this paradigm shift in thinking about international law has been the increased opportunity for lawyers committed to the development of human rights to use their energies and their expertise to defend those whose legal rights are trampled. For those of us in private practice, there are expanding opportunities to work *pro bono publico* on a truly international scope: *pro bono mundi*, or for the good of the world.

Law firms in the United States generally are great supporters of pro bono work, for very many reasons. Pro bono engagements, especially by young lawyers, are wonderful opportunities to bring a sense of personal commitment and passion to the professional environment. They are unrivalled training devices, and they permit all connected with the firm to share a pride in contributing to the communities in which we live and work. Studies invariably show that a healthy investment in pro bono work is good for a firm's "bottom line" as well, since it acts as a motivator, a teacher, and a reminder of why we have chosen a life at the Bar.

Most larger firms, especially in such cities as New York, Washington, Boston, and Chicago, routinely endorse their members' engagement in pro bono work. Many have created efficient systems for intake, quality control, and mentoring, and they reward participation in various ways. Yet, few have firmly grasped the opportunity to broaden their sincere pro bono commitments to embrace the emerging area of international human rights law.

There are at least two different contexts in which international pro bono work can and should be pursued. First, there are increasing volumes of cases in domestic tribunals that raise international law issues. These arise in the obvious areas, such as immigration, in which, for example, there is no end of need for lawyers to represent asylum applicants in need of support for their contention that they have a reasonable fear of persecution were they forced to return to their countries of origin. But recent years have witnessed a proliferation of municipal cases implicating international law, under such statutory schemes as the Alien Tort Statute, 28 U.S.C. § 1350, and the Torture Victims Protection Act, 28 U.S.C. § 1350 and note. Moreover, there is often an international law angle to be pursued even in domestic cases that do not appear to have an international dimension, as, for example, when Justice Kennedy found support for the condemnation of executing juveniles in the emerging international consensus that such a practice is barbaric. *Roper v. Simmons*, 543 U.S. 551 (2005).

While U.S. and other national legal systems are increasingly being reminded of the relevance to their work of treaties and international customary law, we have also witnessed a rapid growth of international tribunals competent to hear complaints brought by or against individuals. These include the Inter-American and European Courts of Human Rights, of course, as well as the ad hoc criminal courts created by the United

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Nations, and now the permanent International Criminal Court. In these arenas as well, there is a general need for lawyers ready and willing to represent the victims of human rights abuses, who, like "ordinary" pro bono clients, are often destitute, uneducated, and certainly incapable of knowing about, much less pursuing, the legal rights to which they are entitled. Often, if they are not represented pro bono, they will not be represented at all.

Three objections to firms undertaking international pro bono work are often heard, but all three are easily rebuttable. The first is that international cases are expensive. In some instances, that is true, but many kinds of pro bono work are expensive. Indeed, while the need far exceeds the supply, many firms voluntarily take on representation of inmates on death rows across the United States, and when they make that kind of commitment, they know that they have signed on for heavy costs connected with travel, with investigations, and with expert witnesses. International work need not be outside the norms for acceptable expenditures.

A second basis for the resistance of some firms to get involved is that international law is a field in which they feel uncomfortable claiming expertise. Such a proposition may once have been defensible, but in our era, every law school promotes the teaching of international law, and rare is the student who has not been introduced to at least its fundamentals. Moreover, such organizations as the International Law Students Association, and the American Society of International Law, have demonstrated over the decades that there is nothing obscure or exotic about the field in which we international lawyers practice. International law is no more a "specialty" than is civil procedure: it is a tool of the trade, and it would be a great embarrassment for a law firm to confess to its paying clients that it cannot help them once their goods, services, or people propose to cross national borders.

The final argument against making a substantial commitment to international pro bono work – one rarely articulated, but frequently encountered – is more serious. It is that the use of international law is somehow reflective of a political ideology, usually a liberal one, rather than something more purely legal in character. International law is seen as vague, imprecise, and subject to interpretation according to rules that are nowhere codified. That the current administration in Washington has so intensely opposed the emergence of international law as relevant to the rights and obligations of individuals has given this argument a semblance of acceptability.

In fact, the truly conservative view is the opposite one: it is that, as Mr. Justice Gray famously wrote in The Paquete Habana over a century ago, "international law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."

But this position, no matter how much political power may be enjoyed by its proponents, is fundamentally flawed. In fact, the truly conservative view is the opposite one: it is that, as Mr. Justice Gray famously wrote in *The Paquete Habana* over a century ago, "international law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." 175 U.S. 677, 700 (1900). Surely that role of international law in the law of our country, and a concomitant recognition of the participation of this and every sovereign nation in the formation of international law, was what the Framers had in mind, and lay behind Thomas Jefferson's invocation, in our Declaration of Independence, of a "decent respect to the opinions of mankind."

The United States for over five decades was the world's champion in the promotion of international human rights. There should be nothing controversial in the defense of the proposition that human rights law is law, and that it speaks to individuals' legal rights

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and legal obligations. The Supreme Court has said as much, in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), upholding the rule of law over executive branch objections.

Before *Sosa* was decided, it was fashionable to argue that the exercise by U.S. courts of subject-matter jurisdiction in cases alleging human rights abuses would mean the end of the constructive engagement of this country in the world. No country would welcome American investment, it was said, if with it came the possibility that, some day, a government policy might subject its perpetrator to trial in the United States. No one would trade with the United States if that minimum contact could be used to justify the assertion of jurisdiction over individuals who violate ill-defined norms of international law.

Some of us (although, sadly, probably few readers of this *Newsletter*) are old enough to remember hearing this argument. Before the enactment of the Civil Rights Act of 1964, many voices declared that the creation of legal mechanisms for enforcing the nation's commitment to equality of the races and sexes in education, employment, and public accommodation would cause the economy to grind to a halt, while resources were diverted from productive uses to the defense of groundless lawsuits.

There should be nothing controversial in the defense of the proposition that human rights law is law, and that it speaks to individuals' legal rights and legal obligations.

It did not happen then, and it will not happen now. The promotion of international human rights law, and the aggressive defense of the victims of violation of that law, will improve the world and promote the rule of law for us all. The challenge is to accomplish these goals using our legal training, in a measured, professional manner, in the best traditions of the pro bono Bar.

Young lawyers, and others not so young, should embrace the opportunity to accept this challenge. Organizations such as the Center for Justice and Accountability and Human Rights First (previously the Lawyers Committee for Human Rights) are most willing to help potential volunteers to find areas interesting to them and to their firms.

A very wise former President of the District of Columbia Bar, John Payton, speaking at a pro bono event in Washington not long ago, said something memorable about the importance of pro bono legal work. He challenged the audience to ask as many lawyers as they could, of all ages and stages of their careers, to name the single most important, most memorable legal matter on which they had ever worked. More than nine times out of ten, he suggested, the answer would be a pro bono case.

Try doing that. My own admittedly unscientific survey shows that John Payton was right. And for those of us deeply interested in international law, who believe that our common humanity is best served through the promotion of an international legal regime that shares with domestic legal systems the language of rights and responsibilities, the chance to serve in a pro bono capacity that indulges our belief in such a regime is the best of all worlds.

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