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Originally Published by H-Diplo/ISSF on 15 April 2011
Reissued on 1 October 2015
[https://issforum.org/articlereviews/8-commerce-and-complicity](https://issforum.org/articlereviews/8-commerce-and-complicity)

In “Commerce and Complicity,” Elizabeth Borgwardt exhumes the elided history, distorted memory, and unpredictable legal legacy of the Nuremberg trials. By tracing the evolution of three critical principles long associated with those trials—universal jurisdiction, crimes against humanity, and individual status within the international community—she provides a nuanced explanation for Nuremberg’s relevance to the emergence of postwar human rights that helps explain why postwar human rights were both so attenuated and so unexpectedly resilient. Her essay begins to provide an answer to the question of how historians should evaluate human rights efforts that “seem simultaneously to be losing the battle but winning the war” (639).

This is the kind of question that diplomatic historians need to take seriously if they hope to move the field in fundamentally new directions. The United States devoted its prestige and international political capital to normative initiatives such as Nuremberg and the Fourth Geneva
Convention in an environment of realpolitik that birthed the Cold War world. Much later, the Filártiga and Sosa cases established that the prosecution of human rights abuses could form the basis for good law, despite their application to non-citizens whose crimes and victimization had occurred well beyond U.S. borders. (635-637) These cases secured these important principles despite the concerted opposition of the George W. Bush administration, exercised as part of its broader systematic initiative to demolish the institutions and principles on which international law and human rights had rested for decades. In the dark years of the 1940s and the 2000s, unlikely norms founded on human rights ideals wormed their way into institutions of power despite—or perhaps because of—an environment defined by overweening realism and power politics. This apparent incommensurability must be the reason why diplomatic and political historians, as well as political scientists, have so thoroughly neglected and discounted human rights for so long. It is easier to write off human rights norms as failed idealism, or as fig leaves for power, than it is to explore the puzzle of their persistence amid the cynicism and crushing force of great power politics.

Borgwardt’s subtle methods allow her to address such difficult questions. Using the tools of intellectual, cultural, and legal history within a chronological frame of causation that hops across the centuries to take up widely disparate episodes, she provides a convincing demonstration of how norms matter, providing a hard constraint on power. Much of this demonstration proceeds through an ingenious kind of negative proof, in which failures clear the ground for subsequent successes. The original mandate to prosecute crimes of aggressive war, and the political economy on which they depended, fell to the side as legal strategies and incipient Cold War calculations pushed individual rights and universalism to the fore at the expense of the anti-imperial and anti-trust traditions that had originally made the case against the likes of Krupp, I.G. Farben, and Flick. (Here, as in her masterful A New Deal for the World, she shows how the practical demands of war and peace transformed New Dealers’ social democratic idealism from the inside out.)¹ Krupp et. al. got off the hook by 1953, as the concerns of men like Robert La Follette, Harold Ickes, and Robert Jackson assumed the aspect of ancient history.

While the thwarted agenda of “the outlawry of aggressive war” (628) may have marked the limits, even the fatal compromise of the Nuremberg trials, it proved to be the beginning, not the end, of the Nuremberg idea. As prosecutors abandoned charges of corporate criminal liability, or were deflected from pursuing conspiracy liability, the longer tradition of prosecuting “enemies of all mankind” came to the fore, by the 1970s and 1980s bringing a law from the late eighteenth century, the Alien Tort Claims Act (ATCA), along with it. In this analytical move, as in her larger argument about the variegated development of the Nuremberg idea, Borgwardt breaks out of the ineluctably cumulative, linear, and ultimately Whiggish conceptions that so often limit treatments of “precedent.” ATCA claims in the last thirty years have given teeth to the Nuremberg norms, even as those norms have allowed the expansion of ATCA beyond the bounds of its original application. Recent cases involving Alcoa, Unocal and Caterpillar appear to have brought ATCA full-circle back to its original application to the special problems of trade and diplomacy, after the expansive rulings in Filártiga and Sosa that drew on the Nuremberg idea to make American courts jurisdictions for human rights crimes around the world, thereby realizing a version of universal jurisdiction that nevertheless did not abandon American exceptionalism (638-639). With this expanded meaning, ATCA can now be used to establish corporate complicity in a way that the Nuremberg trials were not able to, despite their charges of corporate

liability and conspiracy. This is a far richer and more complicated approach to legal precedent than is ordinarily found in legal or human rights histories.

Borgwardt also enriches our understanding of human rights history by providing an antidote to understandable suspicions that human rights lacked any historical integrity, but instead were “really” just surrogates to prop up the waning cosmopolitanism of the senescent empires that had received similar relief from the League of Nations—or, conversely, that they were not “really” important (or even properly existent) until relatively recent developments in international civil society provided them with a material and institutional base independent from the national sovereignty on which the inter-state system was based. The story Borgwardt tells of ATCA jurisprudence in *Sosa* and subsequent cases runs counter to what one would expect in the age of American empire, when human rights and international law were routinely presumed to impede national security and freedom of action in fighting terrorism. Yet ATCA’s role as enabling legislation grounded in more than 200 years of American law—and tort law, at that—reveals that human rights are not the exclusive preserve of international civil society and cosmopolitan right. (Although clearly the litigants in these cases benefitted enormously, even decisively, from the ideological, organizational, and political work of transnational human rights activists.)

With this project, as in *A New Deal for the World*, Borgwardt has provided a model for how to give norms their due within a scholarship on international relations that ordinarily cannot see beyond the calculations of realism. Simply because these norms have been fragile and uneven does not mean that they have lacked durability or salience. On the contrary, their survival and institutionalization against all odds is significant, and requires explanation. The history of human rights norms in international relations is neither continuous nor triumphant but rather ephemeral, counter-intuitive, and surprising, like the broader history of ideas. As with other ideas, the conceptual connections and institutional developments that enabled human rights norms to emerge took place over a variegated timescape, sometimes requiring decades or centuries to unfold, at other times jumping the rails onto a new historical track in a matter of months and years.

This chronological leaping about suggests that the scope of analysis required to capture human rights norms differs drastically from the usual framework for tracing developments in war and diplomacy. Causation, when it can be established, is rarely proximate. Many subtle and unanticipated developments unfolding across many events often matter at least as much as dramatic symbolic breakthroughs marking a single watershed. Consequently, new meanings on which alternate political agendas may be built often proceed by multiplying and articulating multiple layers of meaning, rather than by simply introducing novel concepts or asserting newly rigorous standards of justice. This explains why unanticipated consequences—in this essay, the shifting meaning of piracy and “enemy of mankind” from a logistical challenge to national sovereignty to a moral category transcending it—so often mark the best histories of human rights.

Borgwardt’s aim to explain how human rights advocates lost most battles yet somehow “won the war” by the end of the twentieth century requires a new way of thinking about norms in history that will take some time and further conceptual development to realize. The explanatory gaps in this necessarily brief lecture suggest some of the areas in which this development must proceed. First and foremost among these gaps is the need to link Borgwardt’s account of the “parables” (628) of Nuremberg to the literature on historical memory that is by now quite well-developed, indeed too numerous to cite. Nowhere is this work on memory cited in Borgwardt’s essay,
despite the provocatively worded concluding section, “rescuing human rights from memory” (639-40).

The disengagement is substantive as well, for only half of the demolition-work required by memory is accomplished. The reader benefits from learning the negative point of how thoroughly today’s anachronistic projections on Nuremberg have distorted the true history of its limited accomplishments in the 1940s and its tortuous legacy in the decades thereafter, but little of the analysis explicitly engages the positive question of why certain aspects of the Nuremberg idea were resurrected at particular moments, or how they were related to broader trends in politicized memory. Why did it take until the 1970s for ATCA to be re-appropriated by human rights litigants, and until the 1980s for judges to begin working this reinterpretation into good law? A more extended analysis of the cases probing the ways in which Nuremberg was referenced would do much to suggest an answer—something a book-length study can accomplish to greater satisfaction than a relatively brief lecture. By suggesting that Irving Kaufman’s ruling in *Filártiga* ran counter to his earlier role in the Rosenberg case (636), Borgwardt hints at the critical role that politicized memory played in allowing human rights norms to morph and gain purchase at key moments. Yet how the process of memory differed from that of legal precedent, or from simple political appropriation, is never specified.

Another missing part of this story involves political economy, to which Borgwardt nods without fully engaging. The Nuremberg Prosecutors’ varying determination to infuse anti-imperial and anti-trust ideas into the legal constructs of conspiracy and corporate liability are arresting in their powerful continuity with the New Deal, despite their eventual failure. Implicit in this story of how corporate accountability fell out of the Nuremberg trials in favor of individual liability is the larger trajectory of the evisceration of New Deal political economy in World War II and the Cold War (630-631). Also arresting is the observation that ATCA, bolstered by Nuremberg-infused jurisprudence, has brought a circumspect return to this principle by way of corporate complicity in human rights violations (632, 638-9). However, no account is given of how the globalized political economy, with the virtual sovereignty, if not impunity, it has granted to multinational corporations, might have made this possible. As with the particular twists and turns taken by the politics of memory, so too might the structural transformations in the political economy of global capitalism account for the timing that marked the halting emergence of the Nuremberg idea.

This closer attention to structural factors, such as political economy, and to political contingencies, whether of memory or of electoral balance, would provide an explanatory glue to a narrative that necessarily jumps around in time. Might there be affinities between the late enlightenment context of ATCA’s original enactment, the global cataclysm of World War II and the early Cold War that brought forth Nuremberg, and the destabilizations of late capitalism in recent times, that required a new set of rules to stabilize and systematize the balance between sovereign power and individual rights? Such speculations may prove elusive, but some larger interpretive framework is nonetheless necessary to link together these norms that poke their heads above the topsoil of history at irregular intervals. Without such a framework it becomes difficult to discern what accounts for the abeyance of human rights norms as well as their survival.

A model with special salience here might be found in Paul Halliday’s pathbreaking work on *habeas corpus*, which traces the venerable writ from its initial implementation as a judicial arrogation of power over the King’s subjects, out into its various permutations within Britain and its imperial possessions, where the extension of central power over five hundred years required a
system of right that ultimately broke free of its origins as a power grab by the King’s Court and evolved into a limited but universal and distinctively powerful writ of liberty.²

The Nuremberg idea did not arrive at some arbitrary time in history. It came together in the founding moment of American globalism, precisely when the structures and ideals of the interwar great powers had been shaken to their core. Likewise, the bulk of the progressive expansion of ATCA took place only after the fall of the Berlin Wall and during the War on Terrorism, when the search for a new world order gave way to making the world safe for Americans. Such deep structural transformations cannot have been coincidental. Rather than looking for an antithesis between realism and idealism, great power politics and human rights, perhaps we should look instead to their interpenetration within newly forming modalities of rule.

James T. Sparrow is Assistant Professor of History and the College at the University of Chicago. His book, Warfare State: World War II Americans and the Age of Big Government, will be published by Oxford University Press in July of 2011. He is currently working on a book project titled The New Leviathan: Sovereign America and the Foundations of Rule in the Atomic Age. Both books are part of a larger study of the problem of legitimacy and the warfare state in twentieth-century America.

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