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What Is This Case Doing Here? Human Rights Litigation in the Courts of the United States

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I.

In March 2001, I was a member of a team of lawyers who represented the plaintiffs in a case called *Doe v. Lumintang* before the U.S. District Court for the District of Columbia.[1] We put on evidence that an Indonesian major general, Johny Lumintang, had given direct orders in 1999, as the Indonesian military withdrew from the country now called Timor-Leste (East Timor), for the brutal massacre of civilians.[2] The defendant was Deputy Chief of Staff of the Army, and in later years rose to the rank of lieutenant general.[3] We argued that he was civilly liable, under the doctrine of command responsibility, for the torture and killing of eight individuals who were our clients or our clients' decedents.[4] Jurisdiction was invoked under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, enacted in 1789, under which the federal courts may hear tort cases brought by non-U.S. citizens alleging violations of international law.[5]

Most of our clients had never been off their home island before. They were illiterate and, by the time they arrived in Washington for trial, in deep culture shock. Their testimony was mostly given in Tetum, a language

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[1] Doe v. Lumintang, No. 00-674 (D.D.C. Sept. 13, 2001), *appeal dismissed*, 2005 U.S. App. LEXIS 13962, at *1 (D.C. Cir. 2005). The district court's decisions—the two in the plaintiffs' favor by Magistrate Judge Kay and the ultimate dismissal by Judge Kessler—are unreported.

[2] *See Lumintang*, No. 00-674, slip. op. at 29 ("It has been established by the default judgment and by testimony at trial that Lumintang had responsibility for the actions against plaintiffs and a larger pattern of gross human rights violations.").

[3] *Id.* at 4, 7.

[4] *Id.* at 6, 30.

[5] *Id.* at 1; Alien Tort Statute, 28 U.S.C. § 1350 (West 2011); *see also* CHARLES ALAN WRIGHT ET AL., 14A FEDERAL PRACTICE PROCEDURE: JURISDICTION § 3661.1 (3d ed. 2011) ("There is also federal court jurisdiction under Section 1350 of Title 28, which has its roots in the Judiciary Act of 1789.").

spoken by fewer than half a million people around the world.[6] The key documents, written in Bahasa Indonesia, were unintelligible in their original form to anyone in the courtroom.

Magistrate Judge Alan Kay listened as witnesses testified about East Timor's decades of struggle for independence from Indonesia. We produced aerial photographs, and had an expert explain the devastation that he could read in those pictures: something like 75% of the man-made structures on the island were destroyed as the Indonesian forces decamped, knowing that they could no longer govern what they considered a province of their country, but determined to leave behind such ruin and misery that no one else would be able—or would want—to do so either.[7]

We heard a mother testify about her futile efforts to keep her young son from fleeing their village to join pro-independence militias in the jungle. "All who stay in the village will be killed," explained the young man. His mother replied, "It does not matter. At least we will all die together." He left; she never saw him alive again. The testimony of this woman, barely four feet nine inches tall and terrified, like the eerie silence as she and then the interpreter spoke, was searing and unforgettable.

The other side of the courtroom was empty. Neither General Lumintang, who had been personally served with process at Washington Dulles International Airport while on a visit to the United States, nor the Government or Embassy of Indonesia, had entered an appearance in the litigation.

In the end, Judge Kay authored a denunciation both passionate and scholarly of the defendant's violation of numerous norms of international law, finding him liable for $66 million in damages.[8] At that stage, and in light of the limited but devastating press coverage of the decision, the Indonesian Embassy filed a petition for leave to answer the complaint, which was granted, followed by a motion to dismiss, which was denied.[9] The Embassy then, on behalf of General Lumintang, appealed from the judgment of the Magistrate Judge to District Judge Gladys Kessler, who reversed, albeit

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[6] *See* Paul M. Lewis, *Tetun*, ETHNOLOGUE: LANGUAGES OF THE WORLD, http://www.ethnologue.com/show_language.asp?code=tet (last visited Feb. 9, 2012) (Tetum is also known as Tetun, Tetung, and Belo, among others).

[7] *See World: Asia-Pacific UN Wants $200m for East Timor*, BBC NEWS (Oct. 27, 1999), http://news.bbc.co.uk/2/hi/asia-pacific/487181.stm ("The UN said that the scope of devastation in the territory was extraordinary, with 75% of its people displaced and 70% of the buildings destroyed in looting and attacks set off by the 30 August independence referendum.").

[8] *Lumintang*, No. 00-674, slip. op. at 42–43.

[9] Memorandum of Law in Support of the Motion to Set Aside Default Judgment and Order and Judgment on Damages at 36–37, Doe v. Lumintang, No. 00-674 (D.D.C. filed March 25, 2002); Report and Recommendation at 24, Doe v. Lumintang, No. 00-674 (D.D.C. filed March 3, 2004).

with open and declared reluctance: service of process had been affected outside of the District of Columbia, and was therefore invalid.[10] The case was dismissed for lack of personal jurisdiction over the defendant.[11] Given the wording of Rule 4 of the Federal Rules of Civil Procedure regarding territorial constraints on proper service, there was little basis for appeal.[12]

The case against Johny Lumintang was by no means my first foray into ATS litigation. I was counsel for three nongovernmental organizations (NGOs) as *amici curiae* in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), and sat at counsel table in New York City as Peter Weiss delivered the historic and powerful argument that led to the landmark Second Circuit decision.[13] I have appeared as counsel or have represented *amici* in numerous cases since then, have authored over a dozen law review articles, and have given countless speeches on this topic.

In this Symposium on "International Law in Crisis," and as part of the panel tasked with discussing "International Law in U.S. Courts," however, I want to raise a question that has not been widely discussed among human rights advocates (although it is frequently raised by our critics): is it *sensible*, and is it *right*, for a court in Washington, D.C., established under the United States Constitution and operating under laws enacted by the United States Congress, to use its limited time and resources to hear a case like *Doe v. Lumintang*? There is, after all, an undeniable backlash against the hearing of such cases. What do we say to a federal judge who asks, plaintively, "What is this case doing here?"

II.

If this question is understood simply as a legal one—i.e., is it proper as a matter of law for a U.S. court to exercise subject-matter and personal jurisdiction in a case like this?—then the answer is easy. No less than the United States Supreme Court, in *Sosa v. Alvarez-Machain*[14]—over the vehement protests of the Bush Administration then in power—unsurprisingly

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[10] Memorandum Setting Forth Objections of Defendant to the Report and Recommendation Issued by Magistrate Judge Alan Kay from Defendant Major General Johny Lumintang, Doe v. Lumintang, No. 00-674 (D.C. Cir. filed March 23, 2004); Memorandum Opinion, Doe v. Lumintang, No. 00-674 (D.C. Cir. filed Nov. 10, 2004).

[11] Judge Kessler noted that she was "constrained" to reach this result, and did so "with great regret." Memorandum Opinion at 1–2, 13, Doe v. Lumintang, No. 00-674 (D.C. Cir. filed Nov. 10, 2004).

[12] Fed. R. Civ. P. 4(k)(2) (establishing personal jurisdiction over defendant if he is not subject to jurisdiction in any other state's court of general jurisdiction).

[13] *See* Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (holding that jurisdiction is proper under the ATS when an alleged torturer is served with process by another alien within U.S. borders).

[14] Sosa v. Alvarez-Machain, 542 U.S. 692, 712 (2004).

concluded that the venerable ATS says what it means and means what it says. That is, the district courts *do* have subject-matter jurisdiction over any suit, brought "by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[15] The law of nations today includes norms of the international law of human rights. If personal jurisdiction can be obtained over a prospective defendant accused of violating those norms, there is no reason why such a suit cannot go forward.

Justice David Souter, speaking for the Court in *Sosa*, made clear that not just *any* alleged violation of international law—or even of fundamental human rights—will sustain the subject-matter jurisdiction of the federal courts under the ATS.[16] To prevail, an ATS plaintiff must allege, in a manner capable of surviving the standard challenges against vague, conclusory, or inadequately pleaded complaints,[17] and ultimately must show that the rule claimed to have been violated by the defendant was "specific, universal, and obligatory."[18] And, of course, as my team was reminded in *Lumintang*, like any civil plaintiff, an ATS claimant must properly obtain personal jurisdiction, must serve process within the rules, and must observe other procedural constraints, such as applicable statutes of limitations.

Moreover, other defenses normally available to civil defendants in cases spanning borders may be deployed here. In appropriate circumstances, for instance, a defendant may look for protection behind the doctrines of act of state,[19] forum non conveniens,[20] or political question (equitable abstention).[21] Or, he or she may claim entitlement to sovereign immunity under federal statute[22] or, after the Supreme Court's decision in *Samantar v. Yu-*

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[15] 28 U.S.C. § 1350.

[16] *See Sosa*, 542 U.S. at 738 ("It is enough to hold that a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arrangement, violates no norm of customary international law so well defined as to support the creation of a federal remedy.").

[17] *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) ("[A] complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'") (quoting Twombly v. Bell Atlantic Corp., 550 U.S. 544, 570 (2007)).

[18] *See Sosa*, 542 U.S. at 732 ("Actionable violations of international law must be of a norm that is specific, universal, and obligatory.") (quoting *In re* Estate of Marcos Human Rights Litigation, 25 F.3d 1467, 1475 (9th Cir. 1994)).

[19] *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 416 (1964) (explaining the origin and nature of the act of state doctrine).

[20] *See, e.g.*, Piper Aircraft Co. v. Reyno, 454 U.S. 251, 263 (1981) (discussing the rationale behind *forum non conveniens*).

[21] *See, e.g.*, Lane v. Halliburton, 529 F.3d 548, 559 (5th Cir. 2008) ("[T]he purpose of the political question doctrine is to bar claims that have the potential to undermine the separation-of-powers design of our federal government.").

[22] *See generally* 28 U.S.C. § 1330 (2006); 28 U.S.C. § 1350.

suf,[23] in appropriate circumstances according to a suggestion to that effect by the Department of State.[24]

However high the barriers to permission to proceed may be, certain principles of the law of nations have been deemed by the courts to be "specific, universal, and obligatory," and thus to permit federal jurisdiction over well-pleaded charges that their violation by named and served defendants have injured identifiable plaintiffs.[25] From a legal perspective, then, there is no reason for the courts to decline to exercise jurisdiction in these cases, which arise within the four corners of a statute that has been on the books very nearly as long as the United States has been an independent country.

When federal law establishes a basis for subject-matter jurisdiction, it is exceptional for courts to decline to exercise that jurisdiction because of foreign policy considerations. Our courts have long accepted in principle the notion—in the famous words of Mr. Justice Grey in *The Paquete Habana*[26]—that "[i]nternational 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."[27] Nor was that concept novel even at the threshold of the twentieth century: it may be found in the self-imposed obligation recorded by Thomas Jefferson in the Declaration of our Independence, not only to explain the colonists' revolutionary intentions to demonstrate a "decent respect to the opinions of mankind," but also to insist that the new Republic take its place as a coequal member of the community of sovereign nations.[28]

There are, of course, exceptional situations in which adjudication of a dispute before a court might actually damage the ability of the executive branch to conduct the foreign policy of the United States without interference from the judiciary.[29] But few are the ATS lawsuits in which the federal government has urged the courts to reject claims, or to abstain from hearing them, because of such concerns.[30] ATS cases, after all, usually involve alle-

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[23] Samantar v. Yousuf, 130 S.Ct. 2278 (2010) (holding that FSIA immunity does not apply to foreign officials sued in their individual capacity).

[24] *See id.*

[25] *Sosa*, 542 U.S. at 732 (citing *In re Estate of Marcos Human Rights Litigation*, 25 F.3d at 1475).

[26] The Paquete Habana, 175 U.S. 677 (1900).

[27] *Id.* at 700.

[28] THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

[29] The Supreme Court has held that only in very limited circumstances may a court decline to adjudicate a case because it raises "political questions." Baker v. Carr, 369 U.S. 186 (1962). While foreign affairs powers are generally granted to the Executive under the Constitution, Justice Brennan for the Court admonished that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Id.* at 211.

[30] *See, e.g.*, Dames & Moore v. Regan, 453 U.S. 654, 662 (1981) (referencing the "never-ending tension" between judicial and political branches in foreign affairs).

gations that a particular individual, in the course of carrying out a public commission, violated the victims' fundamental human rights, by ignoring a *jus cogens* norm such as the one forbidding torture. It is rarely in the interests of the United States to align itself with someone credibly accused of such conduct, in seeking to immunize him against individual liability.

And since the Supreme Court opined on the meaning of the ATS in *Sosa* for the first time in the more than two centuries the statute has been on the books, the lower courts have continued to declare certain ATS cases to be well within the four corners of the law. Thus, for example, a district court found jurisdiction in a case alleging that a program to eradicate cocaine planting in Colombia might have entailed the liability of a U.S.-based contractor for violating the law of nations.[31] Nigerian children were permitted to proceed in an action alleging that a drug company experimented on them without their knowledge or permission.[32] And a court in Miami ordered a former Honduran military intelligence chief to pay $47 million in damages to six survivors of torture, and to the families of individuals forcibly "disappeared" under his command.[33]

The statute is again before the Supreme Court during its current term, for a determination of whether and when corporations or other private actors, acting in partnership with public bodies, may be liable either for committing human rights abuses or for aiding and abetting abuses perpetrated by their joint venture partners.[34] But the efforts of those who would declare all of international law to be non-normative, to be nothing more than aspirational if that, have—for the moment at least—failed.

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[31] *See* Arias v. Dyncorp, 517 F. Supp. 2d 221 (D.D.C. 2007) (holding that Ecuadorian residents had a claim against a U.S. contractor under the ATS).

[32] Abdullahi v. Pfizer Corp., 562 F.3d 163 (2d Cir. 2009) (holding that the prohibition on nonconsensual medical experimentation on human beings was a universally accepted norm of customary international law, and therefore fell within the jurisdiction of the ATS), *cert. denied*, 130 S.Ct. 3541 (2010).

[33] *See* Reyes v. Grijalba, Case No. 02-22046 (S.D. Fla. 2007). For in-depth analysis of this and numerous other post-*Sosa* cases in which it represented the plaintiffs, see the website of the Center for Justice and Accountability, www.cja.org. I have served for several years on the Legal Advisory Council of CJA.

[34] This question has been answered affirmatively in a number of district and circuit court decisions. In *Kiobel v. Royal Dutch Petroleum Co.*, the Second Circuit became the only federal circuit to reject the principle that a corporation can be liable under the ATS for violating the law of nations. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010), *reh'g en banc denied*, 621 F.3d 111 (2011), *cert. granted*, 132 S. Ct. 472 (2011). *Contra* Romero v. Drummond Co., Inc., 552 F.3d 1303 (11th Cir. 2008) (permitting a plaintiff in an ATS case to pursue a corporate defendant on an "aiding and abetting" theory), *reh'g denied*, 343 Fed. Appx. 600 (2009); Flomo v. Firestone, 643 F.3d 1013, 1017 (2011) ("The factual premise of the majority opinion in the *Kiobel* case is incorrect."). For an update to *Kiobel*, see *infra* note 85.

As a matter of law, therefore, it was perfectly proper for Magistrate Judge Kay to hear and to decide the *Lumintang* matter. And it must—if grudgingly—be conceded that it was perfectly proper for Judge Kessler thereafter to apply standard rules pertinent to civil cases in general, and to decide on that basis that an irremediable error in service of process and establishing personal jurisdiction doomed the case. Those premises mandated reversal of its outcome.

That something happens to be consistent with a strict application of legal principles, however, does not necessarily mean that it is sensible. It certainly does not mean that it is right. Honest inquiry requires that we continue to pursue those questions.

III.

If I am correct so far, and there is no strictly legal impediment to U.S. courts hearing human rights cases arising overseas so long as the defendant can be found and the well-pleaded allegation against him or her involves a suitably clear prohibition, the remaining issue is whether this is a rational result. This question is not, of course, one for judges to resolve, in our system of separation of powers. It is up to the political branches to propose or to enact a change to the statute if, as written, it is incoherent, wasteful, or counterproductive.

I want to explore three kinds of arguments urging that cases like *Lumintang* should no longer be permitted to play out before the American judiciary. These three arguments rely on assertions of (A) imperialism, (B) indeterminacy, and (C) inefficiency. Each suggests that the practice of presenting allegations of human rights abuses to U.S. judges is fundamentally flawed and should be abandoned.

A. Imperialism

The argument regarding imperialism is simply stated. It contends that the U.S. has no right—indeed, that no country has the right—to impose its legal system, or its legal sensibilities, on any other nation without its consent. Imperialism is commonly defined, after all, as the domination by one nation of another against the will of the latter, forcing it to subordinate itself to the dominant power's economic, cultural, and/or political values.[35]

A stronger form of the argument objects to *any* extraterritorial reach of domestic legal rules.[36] A weaker form reserves its opposition to the ex-

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[35] Peter Hatton, *Imperialism*, *in* DICTIONARY OF MODERN POLITICAL IDEOLOGIES 121–22 (Michael A. Riff ed., 1987).

[36] *See, e.g.*, Morrison v. Nat'l Australia Bank Ltd., 130 S.Ct. 2869 (2010) (holding that the presumption that federal law is not meant to have extraterritorial effect is applicable in all cases, whenever a party seeks to give any federal legislation extraterritorial effect); George

tension of jurisdiction over disputes that do not directly implicate the interests of the forum state, according to whatever delineation of the outer limits of those interests is generally accepted at the time by the community of nations.[37]

Both versions of the argument, contending that U.S. human rights jurisprudence is a form of cultural imperialism, ignore legal and practical principles that have been established for centuries. Both also take a view of international law itself that is impossible to reconcile with most people's understanding of this country's role in the world, and the world's role in this country.

International law has never—despite what seem to be prevalent public perceptions to the contrary—required that the reach of a domestic legal system stop "at the water's edge."[38] The Permanent Court of International Justice (the League of Nations predecessor to the current International Court of Justice in The Hague) made clear that the international legal system prohibits a state from causing its laws to impinge on the legitimate sovereign interests of others, but so long as that pitfall is avoided, what is not forbidden is permitted.[39] Nor is this principle some narrow legal precedent of restricted applicability. International commercial law and practice (the ancient "*Lex Mercatoria*")[40] have acknowledged for centuries the need for a uniform system of legal rules transcending national boundaries.[41]

In the civil law context, it has long been internationally accepted that courts of one state may, and regularly do, apply the laws of another in adjudicating disputes properly before them, so long as the defendant and the

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P. Fletcher, *Against Universal Jurisdiction*, 1 J. INT'L CRIM. J. 580, 582 (2004) (arguing that universal jurisdiction will lead to the fundamental injustice of double jeopardy).

[37] *See* Gary Clyde Hufbauer & Nicholas K. Mitrokostas, *International Implications of the Alien Tort Statute*, 7 J. INT'L ECON. L. 245 (2004) (arguing that a broad interpretation of ATS will make federal courts instruments of judicial imperialism and damage international relations).

[38] *See generally* David Solan, *In the Wake of Citizens United, Do Foreign Politics Still Stop at the Water's Edge?*, 19 TUL. J. INT'L & COMP. L. 281, 312 (2010) (exploring the impact of foreign influences in the U.S. legal system in the wake of Citizens United); Stephen J. Wayne, *The Multiple Influences on U.S. Foreign Policy-Making*, 5 U.S. FOREIGN POL'Y AGENDA 25, 27 (2000) ("The distinction between foreign and domestic as well as the one between national and international has become blurred. As a consequence, the pressure and players have multiplied as has the politics.").

[39] *See* The S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7) (reasoning that, without an express prohibition, sovereign states may behave as they wish).

[40] Harold J. Berman & Colin Kaufman, *The Law of International Commercial Transactions* (Lex Mercatoria), 19 HARVARD INT'L L.J. 221, 274–77 (1978) (analyzing the role of international custom in international commercial law and the codification of *Lex Mercatoria*).

[41] *Id.* at 221.

subject matter are within the forum state's jurisdictional reach.[42] Again, disputes ranging from the most mundane to the geopolitical are regularly addressed in this way. No one would advocate limiting the scope of the international commercial regime, or effectively permitting the breacher of a contract, or the perpetrator of a tort, to evade liability simply by removing herself to foreign soil.

I am not limiting my reference here to universal jurisdiction, the theory under which states may use their criminal laws to punish the perpetrators of acts occurring far from their shores even absent any connection to their nationals, because it is alleged that those acts were, for example, significant violations of basic human rights. To accept my argument that there is nothing imperialistic about applying one state's law in the courtrooms of another does not require offering a warm embrace of the doctrine of universal jurisdiction. In the United States in particular, we reject the concept of "common law crimes," insisting on a criminal code enacted through our constitutional system of legislation, not derived from the statements of international organizations or the contents of unratified treaties, much less the vagaries of customary international law.[43] Here, in other words, international law may motivate Congress to outlaw certain behavior, or to make it criminal under U.S. law even absent any obvious connection with the U.S.,[44] but international law alone unaided by implementing legislation does not provide a sufficient basis for prosecution.[45]

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[42] *Compare* Hannah L. Buxbaum, *Forum Selection in International Contract Litigation: The Role of Judicial Discretion*, 12 WILLAMETTE J. INT'L L. & DISP. RES. 185 (2004) (claiming that increased cross-border judicial communication will increase transnational litigation), *with* Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481 (2011) (arguing that the forum shopping system of the United States no longer encourages foreign plaintiffs to file transnational suits in the United States).

[43] The Constitution expressly reserves to Congress the power "To define and punish . . . Offences against the Law of Nations." U.S. CONST. Art. I, § 8, cl. 10; *see also* United States v. Smith, 18 U.S. (5 Wheat.) 153 (1820) (finding that robbery upon the sea is piracy by the law of nations, and that it is constitutionally defined by an act of Congress).

[44] Thus, for example, in 2000 Congress passed and President Clinton signed into law the Torture Act, 18 U.S.C. § 2340 (2000), under which Charles "Chuckie" Taylor was then tried, convicted, and sentenced to prison for horrific crimes committed in Liberia. *See generally* Laura Richardson Brownlee, *Extraterritorial Jurisdiction in the United States: American Attitudes and Practices in the Prosecution of Charles Chuckie Taylor Jr.*, 9 WASH. U. GLOBAL STUD. L. REV. 331 (2010).

[45] There are, however, reported cases in which U.S. judges have deferred to foreign states' invocation of universal jurisdiction to order the deportation of persons accused of crimes against humanity. One of those was tried and argued right here in Cleveland: Demjanjuk v. Petrovsky, 518 F.Supp. 1362 (N.D. Ohio 1981), *aff'd*, 776 F.2d 571 (6th Cir. 1985), *vacated*, 10 F.3d 338 (6th Cir. 1993). The author served as counsel for the International Human Rights Law Group as *amicus curiae* in *Demjanjuk*, and presented oral argument to Chief Judge Frank Battisti.

ATS and other human rights cases—civil litigation, in which plaintiffs claiming to be victims bring suit against persons alleged to have been perpetrators of human rights abuses—do not masquerade as attempts to vindicate the rights of society as a whole. They do not share the indicia of criminal prosecutions, in which "the People" or "the State" is the notional plaintiff. These are private cases, and the assertion of jurisdiction over them no more threatens the sovereignty of the place where the acts occurred than does the consideration by an English court of a breach of contract between a Japanese shipper and a Panamanian ship owner, or by the interpretation of a Moroccan court of a divorce decree issued in Oklahoma.

To be sure, human rights cases may have in their sights the conduct or policies of a government. But in some such instances there are traditional ways for courts to limit themselves in deference to doctrines like act of state or equitable abstention. There is nothing imperialistic in holding a state official civilly liable for acts committed in contravention of international commitments solemnly and presumably voluntarily undertaken by the country of her or his nationality. After all, if adherence to a treaty gives rise to legal obligations, there should be no standing to complain that an individual who is meant to be the beneficiary of those obligations has the right to have the facts and law tested by a judge, applying legal norms of specific applicability, when it is alleged that an agent of the state has violated them.

There may be gray areas here, of course: the case in which, for example, a state has signed but not ratified the applicable treaty or has been a persistent objector to the emergence of a customary norm.[46] But these objections will not arise frequently. No state claims the right to torture detainees, or members of ethnic minorities, or political dissidents. Whether alleged abuse rose to the level of torture or was an acceptable use of coercion, whether it happened under the auspices of the state or was conducted by renegades not affiliated with public authority, or whether this individual defendant was the person who perpetrated or ordered the abuse or was himself or herself unable to alter it: all of these are subject to resolution in the normal course of judicial decision-making. They are fact questions, and judges and juries are paid to resolve such questions. There is no difference,

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[46] Holning Lau, Comment, *Rethinking the Persistent Objector Doctrine in International Human Rights Law*, 6 CHI. J. INT'L L. 495, 497–98 (2005).

> As one might gather, international norms develop over time; they do not simultaneously emerge and become law. During a norm's gradual emergence, some states may object to the norm attaining legal status. According to the persistent objector doctrine, these objectors shall be exempt from the norm after it becomes law, so long as the state can rebut the assumption that it acquiesced to the norm and prove that, instead, it exercised clear and consistent objections throughout the norm's emergence.

Id.

in principle, between asking a New York court to determine whether a contract for the sale of widgets between a Swiss seller and an American buyer, written in French and governed by Swiss law, was breached by the defendant's delivery of sub-standard goods, on the one hand, and asking that same court to decide whether the policy of ethnic cleansing embraced by the Republika Srpska and orchestrated by its leader, Radovan Karadzic, justifies holding him civilly liable to women raped by Bosnian Serb troops under his direction, on the other.[47]

B. Indeterminacy

It is sometimes argued that the problem with cases like *Doe v. Lumintang* is not that a foreign court asserting subject-matter jurisdiction is being arrogant, but rather that, once such jurisdiction is claimed, identifying the norms governing the defendant's liability is an impossible task for domestic judges. The asserted vagueness of international law has been one of the main contentions underlying legislative and other efforts to preclude its use in U.S. courts.

None less than Chief Justice John Roberts has written to the effect that some source of international law can be found to support almost any proposition.[48] When the Supreme Court concluded that the practices of other nations should inform this country's understanding of whether the execution of juvenile offenders is consistent with due process of law,[49] or whether homosexual acts between consenting adults may be punished as crimes against the state,[50] there were howls of protest, including some coming from dissenting Justices on the high court itself.[51] And this reaction was motivated by precisely the concern that international law is not a fixed body

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[47] Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995) *rev'g* Doe v. Karadzic, 866 F. Supp. 734 (S.D.N.Y. 1994) (concluding that Bosnian Serb militias bore sufficient resemblance to agents of a state, and reversed the district court, which had accepted the defendant's argument that the Republika Srpska, unrecognized by any disinterested state and certainly not recognized by the U.S., was therefore not a subject of international law at all).

[48] *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before S. Comm. on the Judiciary*, 109th Cong. 200–01 (2005) (statement of Judge John G. Roberts, Jr.) ("In foreign law you can find anything you want. . . . Looking at foreign law for support is like looking out over a crowd and picking out your friends. You can find them. They're there.").

[49] Roper v. Simmons, 543 U.S. 551 (2005).

[50] Lawrence v. Texas, 539 U.S. 558 (2003).

[51] Justice Antonin Scalia has expressed his views from the Bench, but also from the podium in many public forums, to the effect that foreign and international law has no business being used as a source of law by U.S. judges, except in cases in when necessary to interpret a treaty. *A Conversation Between U.S. Supreme Court Justices: The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT'L J. CONST. L. 519, 521 (2005)

of legal norms, but is instead a fluid amalgam of such vague and unreliable things as scholarly writings that cannot be filtered even to exclude improper content, open ethnic biases, and outright prejudice against certain states and their economic, political, or cultural values.[52]

But despite the protestations of those who consider international law not to be law at all, and who therefore find only confirmation of that view in its lack of "black letter" content, there are long-established procedures for distinguishing among *lex lata* (hard law, generally accepted as such in the international community), *lex ferenda* (propositions that may reflect law in the making, but that do not constitute definitive contents of international law as it stands today), and what Professor Ralph Steinhardt of George Washington University calls "*lex nada*" (aspirational statements that we all might wish were the law, but that bear none of the indicia even of being en route to general acceptance).[53]

Nor is it any kind of self-indulgence for the U.S. judiciary to develop a jurisprudence capable of making these distinctions. After all, in *The Paquete Habana*, Mr. Justice Gray's famous pronouncement was not only that "[i]nternational law is part of our law," but that it "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."[54] In other words, given the canonical interpretation of our Constitution handed down by Chief Justice John Marshall in *Marbury v. Madison*—"[i]t is emphatically the province and duty of the judicial branch to say what the law is"[55]—and given the premise that "international law is part of our law,"[56] there is nothing at all unusual in the notion that judges have the task of deciding what international law is as it may be applicable in any given situation properly before the judicial branch for resolution.

During the oral argument in *Sosa*, Justice Antonin Scalia—both on the bench and off a vocal opponent of the relevance of international law to the constitutional task of American judges—challenged counsel for the re-

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[52] *See* Benjamin Perryman, *Eve La Hay's War Crimes in Internal Armed Conflicts* 36 QUEEN'S L.J. 673, 680 (2008) ("Discerning what amounts to customary international law is at best an imprecise process.").

[53] Robert Cryer, *Superior Scholarship on Superior Orders an Appreciation of Yoram Dinstein's The Defence of 'Obedience to Superior Orders' in International Law*, 9 J. INT'L CRIM. JUST. 959, 972 (2011) (book review). E-mail from Ralph G. Steinhardt, Professor of Law, George Washington Univ. Law School, to Andrew Dorchak, Head of Reference and Foreign/International Law Specialist, Case Western Reserve Univ. Law Library (Oct. 12, 2011, 19:54 EST) (on file with Case Western Reserve Journal of International Law) (explaining that *lex nada* was coined as joking contrast to established law to the law in the process of evolution).

[54] *The Paquete Habana*, 175 U.S. at 700.

[55] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177–78 (1803).

[56] *The Paquete Habana*, 175 U.S. at 700.

spondent.[57] He said, "[t]he problem I have with your proposal is that it leaves it up to the courts to decide what the law of nations is."[58] This, apparently, was meant to suggest that there is some fatal flaw in the claim that human rights law is a *corpus juris* actually speaking the language of individual legal rights and individual legal obligations.

Yet that "problem" has never deterred the U.S. judiciary from doing its job. In *Filartiga*, and in every ATS case since, courts have had to decide whether torture,[59] extrajudicial killings,[60] arbitrary detention (as in *Sosa* itself),[61] transborder kidnapping (as in the first visit of the *Sosa* case to the Supreme Court thirteen years earlier),[62] or other alleged international human rights abuses are sufficient to constitute acts contrary to the law of nations.[63]

Overall, the courts have been—as they usually are—moderate and incremental in their approach to defining the law of human rights.[64] With the additional guidance provided by the decision in *Sosa*, they have continued on this path. Yes, determining the content of international law is not always easy. Yes, there is no statute book and there are no legislative pronouncements to consult, and no texts that all agree are definitive, even if occasionally opaque. Yes, there are instances in which competing parties are able to deploy competing authorities before the court, advocating competing outcomes, and yes, in some instances the authorities themselves may be in agreement about very little.

But common law judges are familiar with the task of deriving legal principles from stuff far murkier than printed compilations contained in codes. There is no end of authoritative guidance. The Statute of the International Court of Justice, for example, outlines the three primary sources of international law (treaties, custom, and "general principles of law recog-

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[57] *Sosa*, 542 U.S. at 739–51 (2004).

[58] Transcript of Oral Argument at 43–44, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (No. 03-339), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/03-339.pdf; Steven M. Schneebaum, The Paquete Habana *Sails On: International Law in U.S. Courts After* Sosa, 19 EMORY INT'L L. REV. 91, 94 (2005).

[59] *E.g.*, *Filartiga*, 630 F.2d 876.

[60] *E.g.*, *In re* S. Afr. Apartheid Litig., 617 F. Supp. 2d 228 (S.D.N.Y. 2009).

[61] *See generally Sosa*, 542 U.S. 692.

[62] United States v. Alvarez-Machain, 504 U.S. 655, 670 (1992) ("The fact of respondent's forcible abduction does not therefore prohibit his trial in a court in the United States for violations of the criminal laws of the United States.").

[63] Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 164 (5th Cir. 1999) ("The 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.").

[64] Jennifer Levine, *Alien Tort Claims Act Litigation: Adjudicating on "Foreign Territory,"* 30 SUFFOLK TRANSNAT'L L. REV. 101, 101–15 (detailing the progress of U.S. courts defining the law of human rights).

nized by civilized nations"),[65] and provides that the writings of jurists and scholars may be of service as a subsidiary source.[66] Identifying the sources of international law is not an exercise in charting a course through chaos.

In recent years, the Supreme Court and lower federal courts have had to determine the content and the applicability of international law in a number of cases. They have not shied from the task. They have considered whether, and to what extent, detainees at Guantanamo Bay are entitled to rights referenced in treaties signed by the United States, such as the Geneva Conventions.[67] They have been required to consider whether an individual may bring a claim against the U.S. Government for allegedly transferring him to the custody of a third state for interrogation that might have included torture.[68]

In short, confronting the alleged indeterminacy of the law—the difficulty of finding it, interpreting it, and applying it to cases at hand—comes with the job of judging. That the law may be elusive and difficult to identify provides no justification for judges who may prefer to decline to play the roles assigned to them by a constitutional structure.

C. *Inefficiency*

It is not arrogant for U.S. courts to hear cases alleging human rights violations in foreign countries. Nor does the difficulty in mapping the contours of the applicable law provide a rational basis for declining to decide hard cases.

But judicial resources are finite, and judges all over the world are notoriously overworked and underpaid. Why should Magistrate Judge Kay, or District Judge Kessler, have been required to put aside a full docket of local criminal and civil disputes to hear about something that allegedly happened on the other side of the planet, among foreigners who had no discernible connection with the United States?

This is a difficult question to answer. But it invites another question, which as a long-time trial lawyer I have often contemplated: why should the public authorities of our Government *ever* involve themselves in deciding the proper outcome of a dispute between private individuals? Why should eight citizens of Prince George's County, Maryland, for example, paid with public funds, have been asked to sit as a jury to decide whether my client Vincent P. Mona or his son Mark Mona was telling the truth in

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[65] Statute of the International Court of Justice art. 38, June 26, 1945.

[66] *Id.*

[67] *See, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557, 562–64 (2006) (considering the application of the Geneva Conventions to the detainees at Guantanamo).

[68] *See, e.g.*, Arar v. Ashcroft, 585 F.3d 559, 563–65 (2d Cir. 2009) (en banc).

their inconsistent renditions of the foundation, governance, and board decisions of Mona Electric Group, Inc., a private corporation?[69]

The answer, I believe, reflects a fundamental commitment of our society, and a fundamental role that we want the law and the courts to play in that society. The entire regime of civil (as opposed to criminal) jurisprudence is grounded in the idea that the enforcement of obligations owed by private citizens to one another is a legitimate matter of public cognizance.[70]

Courts thus exist not only to defend the rights of society as a collectivity: that is, public order, whose protection is the province of the criminal law. They are tasked with determining and enforcing private rights as well. Those rights may derive from many sources, including private agreements (i.e., contracts) between consenting individual participants often entered with no outside oversight at all. A contract that you and I form is a private legal regime, governing our conduct vis-à-vis each other, and subject to regulation by the public authorities should either of us contend that the other has acted inconsistently with his or her undertaking. To be sure, there are rules and procedures that must be observed by the party invoking judicial remedies. But if those rules are satisfied, then the state will dedicate its own resources, both human and financial, to helping us to resolve our dispute. The state does have an interest in the outcome, because predictability, certainty, fairness, and stability are values that the state regards as beneficial for the entire polity.[71]

Beyond this system of consensual private law—private regimes that delineate the rights we individual citizens agree to create and to recognize—the state also defines the duties and responsibilities that we all have with respect to each other even absent any agreement. If you have a license from the public authorities to operate a motor vehicle, you are under an obligation to the state to do so in a manner approved by and consistent with a code of laws.[72] If you drive too fast, or cross a double yellow line, the authorities may determine that you are posing a threat to public order, triggering the coercive power of the state itself to be deployed against you. You may be required to pay a fine, or to refrain from exercising the privilege of driving

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[69] Mona v. Mona Electric Group, Inc., 934 A.2d 450 (Md. Ct. Spec. App. 2007). I have selected this example from litigation in which I have been personally involved over the course of a career in the private practice of civil law.

[70] The state's commitment to use public resources to resolve civil disputes is guaranteed in the Constitution itself. *See* U.S. CONST. art. III, § 2 (giving courts jurisdiction to resolve civil disputes as well as criminal disputes); U.S. CONST. amend. VII (promising trial by jury in civil cases with more the twenty dollars in controversy).

[71] E.W. Thomas, *Fairness and Certainty in Adjudication: Formalism v Substantialism*, 9 OTAGO L. REV. 459, 464–65 (1999) (discussing the peoples' need for fairness and predictability in order to prepare their affairs in advance).

[72] *See, e.g.*, OHIO REV. CODE ANN. § 4511 (West 2011) (outlining the responsibilities, offenses and penalties for violating traffic laws).

for a defined period of time. If the offense is serious enough, you may even be deprived of your liberty.

But in addition to the obligations you owe to the state, and the right that the state may have to enforce those duties, you also owe something of a different nature to me: the guy crossing with the light and in the crosswalk (or driving in my own car just ahead of you, or just behind you). You owe me what the law of torts has come to call a "duty of care,"[73] and if you breach that duty to me and cause injury as a result, I may invoke the public authority of the law to seek a private remedy from you.[74] Your liability for that remedy is analytically quite separate from your guilt or innocence of charges that you have violated your obligations to the state.

My point in this meander through basic legal principles is simply to show something we all already know: that the civil law provides powerful and vital mechanisms for the protection of rights private individuals have against one another, despite the absence of any claim on the part of the state that public rights have been affected.

Adjudicating such matters, however, is always going to involve a substantial helping of inefficiency, for several reasons. First, given that the state itself is not a party to the dispute resolution procedure, the framing of issues and the presentation of evidence are going to require not only careful scrutiny of the kind that emerges naturally from robust, adversarial advocacy, but also procedures to promote fairness, and rules to deter and to punish cheating. Second, in a civil case, the very existence of the underlying duty, as well as the fact of the alleged breach, is likely to be in issue, broadening the scope of admissible evidence and legal argument. Third, the parties themselves will likely disagree on how to define the scope of the dispute, therefore potentially contesting the very boundaries of the territory they are asking the courts to explore and to demarcate.

Even the most straightforward negligence case requires courts to confront such questions. The key witness lives across the state line: how will his testimony at trial be compelled? The defendant is declining to respond to certain discovery requests: should we defer scheduled trial dates to decide whether her reasons are defensible? The plaintiff insists that his damages are exacerbated because he had a pre-existing health condition, but the medical records are ambiguous and the doctor who created them is unavailable: do we proceed without this evidence?

Sorting out rights that private citizens have—or claim to have—against one another is by its nature an inefficient, frustrating, but at the same time necessary, function of the courts. Over the years, of course, both the

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[73] David G. Owen, *The Five Elements of Negligence*, 35 HOFSTRA L. REV. 1671, 1674–76 (2007).

[74] *Id.*

legislative and the judicial branches of our government have adopted means of containing that inefficiency. Courts may dismiss civil actions when the party assigned the burden of proof cannot or will not show a prima facie case.[75] The party bearing that burden is given to understand, in the litigation process, that its ability to do so is determinative of the outcome, whatever may be the truth of the underlying allegations.

Litigation concerning facts arising elsewhere than the locale of the courthouse may suffer from inefficiency increased in quantity, but not in quality. Since time immemorial, it has been a feature of the common law that an individual defendant may be sued in a private cause of action wherever he can be found, and where he has a "presence" as that term may be defined by individual legal or constitutional systems.[76] Indeed, in his landmark decision for the Second Circuit Court of Appeals in *Filartiga*, Judge Irving Kaufman cited a 1774 decision of Lord Mansfield, in which the English High Court found "not a color of doubt but that any action that is transitory may be laid in any county in England, though the matter arises beyond the seas."[77] This has to be the case if the power of the courts to enforce private rights is not to be rendered illusory whenever the defendant adopts the simple expedient of decamping to another jurisdiction.

Our judicial branch has developed an entire toolkit for determining when it is simply without the ability to perform its fact-finding function with respect to a case which it otherwise would have the power to adjudicate. One such device is the doctrine of forum non conveniens, which permits courts to refrain from proceeding in certain cases on the grounds that they are thoroughly foreign and unconnected to the forum.[78] Such is our commitment to keeping the courthouse doors open to individuals who claim violations of their rights, however, that application of the doctrine depends on the defendant's ability to show not only the inefficiency of proceeding in the court chosen by the plaintiff, but the availability of an alternative location capable and competent to do justice.[79] If the remedy offered by the alternative forum is so clearly inadequate or unsatisfactory that it is in reality no remedy at all, the court must proceed to decide the case before it no mat-

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[75] George Nils Herlitz, *The Meaning of the Term "Prima Facie,"* 55 LA. L. REV. 391, 394–95 (1994) (discussing the English and American roots of the prima facie case).

[76] James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implication for Modern Doctrine*, 90 VA. L. REV. 169, 230–35 (2004) (describing the different standards for personal jurisdiction in state and federal courts).

[77] Mostyn v. Fabrigas, (1774) 98 Eng. Rep. 1021 (K.B.); *Filartiga*, 630 F.2d at 855.

[78] *See, e.g.*, Piper Aircraft Co. v. Reyno, 454 U.S. 235, 251–52 (1981) (holding that the *forum non conveniens* doctrine is designed to help courts avoid being mired in issues of comparative law and to disincentivize foreign plaintiffs from bringing suit in U.S. courts merely to seek more favorable civil litigation outcomes).

[79] *Id.* at 248–49.

ter how inconvenient it might be to do so (although of course, in these as in virtually all civil matters it is still the plaintiff's burden to prove prima facie entitlement to relief).[80]

It is not an accident or a coincidence that U.S. courts have only very rarely entertained motions to dismiss on forum non conveniens grounds in human rights litigation. The reason is that the states in which these cases arise, and whose officials stand accused of violations of basic human rights, are also characteristically unable to provide mechanisms in which the government and its agents can be held liable for their failure to abide by their commitments, whether deriving from treaty, custom, general principles, or any other source of law.

Plaintiffs such as those in *Lumintang*, in other words, have nowhere else to go. As their actions sound in tort, and they are seeking to vindicate private and not public rights, if they can find those accused in the United States, subject to the personal jurisdiction of our courts, they may rely on the ancient notion of transitory torts to file suit here, and to have their cases heard in our courts.[81]

International law is part of the law of this nation, and when the requirements of international law are "specific, universal, and obligatory," and the defendant is subject to personal jurisdiction here, there is no analytical difference between a case alleging torture in Paraguay by this defendant in violation of binding norms of both domestic and international jurisprudence, and others in which it is contended that the defendant breached a contract in Switzerland, or that he caused a traffic accident in Canada. None of these by its nature requires the courts to exceed the province assigned to them by our Constitution. In none are considerations of inefficiency allowed to displace the courts' constitutional mandate. All are consistent with this nation's adherence to its tradition of providing a safe place where a neutral judge or jury will evaluate the evidence and apply the law.

IV.

Whether judicial resources should be spent on human rights cases arising overseas is, of course, ultimately a matter for legislatures to address. But the change in the law demanded by those who would close the courthouse doors to such disputes would be radical. For one thing, there has never been a bar to bringing human rights abuse cases in state courts of general jurisdiction, which do not require the ATS to pave the way. In those courts, plaintiffs like the Filartigas, or the alleged victims of torture or

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[80] *Id.* at 254–55.

[81] 21 C.J.S. *Courts* § 29 (2011).

forced disappearances in Haiti,[82] could simply plead their cases, casting onto their defendants the challenge of attempting to justify human rights abuses in the face of the requirements of international and municipal law.

What is the logic that would exclude this category of cases from federal judicial cognizance? The assertion of subject-matter jurisdiction over such disputes is not imperialistic, nor does it require the courts to ascertain and to apply a body of jurisprudence that is indeterminate or inchoate. And while there is an element of inefficiency in attempting to perform fact-finding in Washington, D.C., regarding a massacre in Timor-Leste, it is not substantially different from trying to ascertain the facts of what happened in a corporate boardroom across town, or in the mind of a mother who absconds with her child in violation of a custody order. Fact-finding is always a frustrating process, for many reasons, some practical, and some built into the system itself. But if judges maintain courtroom discipline and enforce the rules—especially those relating to burdens of proof—those frustrations can be overcome and decisions can be made with relative confidence.

We live in a world in which virtually every aspect of the law—from contracts to environmental regulation, from taxation to family law—now bears international implications. The World Wide Web, by virtue simply of being worldwide, reminds us daily that the law and its subjects can no longer be contained neatly within national borders. In light of these developments, it would be irresponsible in the extreme for policy-makers now to move in the opposite direction.

That such a move would be irresponsible, however, does not mean that it would not be popular. In 2010, 70% of the voters in the State of Oklahoma voted to adopt an amendment to their Constitution, which reads in relevant part as follows:

> The Courts provided for [elsewhere in the Constitution], when exercising their judicial authority, shall uphold and adhere to the law as provided in the United States Constitution, the Oklahoma Constitution, the United States Code, federal regulations promulgated pursuant thereto, established common law, the Oklahoma Statutes and rules promulgated pursuant thereto, and if necessary the law of another state of the United States provided the law of the other state does not include Sharia Law, in making judicial decisions. *The courts shall not look to the legal precepts of other na-*

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[82] Jean v. Dorelien, 431 F.3d 776, 781 (11th Cir. 2005). In *Jean*, as in a number of other ATS cases, including the ones against former President Marcos, the plaintiffs actually collected a substantial monetary judgment. *Id.*

> *tions or cultures. Specifically, the courts shall not consider international* or Sharia *Law.*[83]

While it is easy to write off this effort as jingoistic or simply ignorant, it evidences a popular sentiment that may not be ignored. Within the last decade, the previous Administration in Washington attempted not only in such human rights litigation as *Sosa*, but more broadly in its effort to justify its own violations of international law, to persuade the courts that the international legal regime is not really law, and is not binding on the United States. These efforts were thwarted at every turn, albeit sometimes by a sharply-divided Supreme Court.

That these attempts have not abated provides, in my view, reason to agree that the title of this conference, "International Law in Crisis," is no panicked exaggeration. The crisis will require that those of us who are confident in the vitality and the necessity of international law—to guard, as domestic law does in its sphere, against the abuse of power—make sure that its roots in the U.S. legal system continue to be protected and respected. This will not be easy, but one is encouraged by the calm, professional, and deeply conservative approaches U.S. district court judges have taken toward ATS litigation brought before them, especially since *Sosa*. In these cases, as in all the cases they must decide every day, courts review the caselaw of precedential value, and apply time-honored and traditional methods for determining whether they have jurisdiction over the subject matter and the person of the defendant, and whether the plaintiff is able to muster sufficient evidence from which a reasonable finder of fact might conclude that she is entitled to a remedy.

Following this process is how our courts have functioned properly, according to the standards laid out in our Constitution, and that is how they should always function. Human rights litigation is of a piece with lawsuits brought since the founding of our country, and in England before that, in which individuals have sought to protect themselves against violations of their legal rights. It is the defenders of these traditions, not those who would uproot them, overturning centuries of tradition, who are the conservatives.

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[83] H.R.J. Res. 1056, 52nd Leg., 2nd Sess. State Question 755 (Okla. 2010). The "Save Our State Amendment" was presented to Oklahoma voters as State Question 755, and after they approved it was immediately held by a federal court to be unconstitutional. Awad v. Ziriax, 754 F. Supp. 2d 1298, 1303 (W.D. Okla. 2010), *aff'd*, 2012 WL 50636 (10th Cir. 2012). No serious constitutional law scholar would be willing to defend such a law, and efforts to revise it to avoid problems of facial unconstitutionality have so far been stymied in the State Legislature. But similar efforts have been mounted in other states, and legislation has been introduced in the last several U.S. Congresses to restrict the freedom of judges to apply, or even to reference, international law in deciding cases before them. *See* Aaron Fellmeth, *International and Foreign Laws in the U.S. State Legislatures*, AM. SOC'Y INT'L L. INSIGHTS (May 26, 2011), http://www.asil.org/pdfs/insights/insight110526.pdf.

To the question asked by a hypothetical judge about an ATS complaint—"What is this case doing here?"—then, the answer is this:

"Your Honor, federal jurisdiction here is guaranteed according to a statute as old as the Republic. The defendant is subject to the jurisdiction of the Court, and the plaintiff alleges the violation of rights arising under international law, which is and has always been part of the law of our land. The case now awaits your decision, which must be rendered in keeping with the oath of office you took upon your commissioning, to 'administer justice without respect to persons, and do equal right to the poor and to the rich, . . . faithfully and impartially [to] discharge and perform all the duties upon [you] as a federal judge under the Constitution and laws of the United States.' So help you God."[84]

That should be a satisfactory answer for any judge. And it should remind all of us that international law is law, providing *inter alia* for the rights of individuals wherever they may be located, simply by virtue of our common humanity.[85]

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[84] 28 U.S.C. § 453 (2011) (laying out the official language for the federal judicial oath).

[85] The case of *Kiobel v. Royal Dutch Petroleum* was argued before the United States Supreme Court on February 28, 2012. The issue presented concerned whether federal courts may obtain jurisdiction over corporations in ATS cases, on the grounds that they may validly be accused of having committed the "violations of the law of nations" that constitute a jurisdictional prerequisite under the statute. A week later, the Court *sua sponte* restored the *Kiobel* case to its docket for reargument, on the broader question of "[w]hether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States." Kiobel v. Royal Dutch Petroleum, No. 10-1491, 80 U.S.L.W. 3506 (Mar. 5, 2012). In other words, the Supreme Court has invited briefing and argument on precisely the question raised in this essay: "What is this case doing here?"