Ubi Jus, Ibi Remedium

The champions of the developments in the law that Professor Davis celebrates would no doubt chafe at his description of them as "revolutionaries." That is not what they were, or what they are. They are lawyers, acting in the best tradition of what lawyers do. Understanding the significance of this distinction requires starting with some basic principles about the interplay between domestic and international law.

I. Public Rights and Private Rights

Legal rights may be held by individuals, by groups, or by societies as a whole. Individual rights comprise those that are mine simply by virtue of my citizenship, or my humanity (I have, for instance, the right to write, or to read, this article, without fear that its content may provoke an official reaction). Group rights are the ones that inhere in collectivities, but are different from the aggregate of the rights of the individual members (the right of self-determination is an example). And societal or public rights are those to which the state has laid claim through its own constitutional procedures, to protect its own values, traditions, and moral convictions (as when the state, on behalf of its members, requires that a person be properly licensed before holding herself out as qualified to offer legal advice).

Public rights and private ones are essentially different, not just in who owns them, but in the means provided to address violations, and in the remedies that may be ordered when such violations are proved. The invocation of the rights of the state as a whole against an alleged offender is the province of the criminal law, through whose offices an offender may be subjected to a penalty to be paid to society, designed at once to reflect the magnitude of societal disapproval of the illegal conduct and to deter its repetition. Private rights, meanwhile, are vindicated through civil legal procedures, which authorize bilateral transactions permitting the alleged victim of an illegal act to achieve some measure of recompense, usually financial, from its perpetrator. This system may employ crude methods of measurement, but its goal is to achieve justice by putting the victim where he would have been had the wrongdoing not occurred, while depriving the perpetrator of any advantage he may have garnered from his bad conduct.

That specific events may constitute infringements of both public and private rights does not collapse the fundamental distinction between them, which is critical to a study of any legal system's architecture. Certainly my reckless driving may simultaneously violate the right of the city (and of its citizens at large) to good order and safety (requiring me to pay a fine to the municipality, and perhaps to suffer a temporary loss of liberty), and a certain pedestrian's right to cross the street without injury (resulting in the award of money damages, which must be remitted to the hapless plaintiff). But the offense against the public—the crime—justifies the pursuit of remedies not just by those it directly harmed, but by officials asserting authority to bring prosecution in the name of "the People," for it is they whose collective right (if I am guilty as charged) has been abused.

The state itself is the appropriate prosecutor of criminal acts, because it is their notional victim. It follows from this that an individual state is generally permitted the right to outlaw or to punish conduct only when it takes place within the state's legitimate sphere of operations. Of course, that is not quite the same as restricting a state's jurisdiction to proscribe criminal activity to its own borders. Territoriality may be the first rule and guiding principle of such jurisdiction, but were the analysis to stop there, many kinds of behavior whose prohibition is of proper concern to a state, and whose

perpetration threatens the state with great harm, would be outside its reach. Significant exceptions ensure that jurisdiction to proscribe is not coterminous with geographical boundaries.

International law countenances, for example, a state's extraterritorial extension of criminal laws to protect nationals abroad by criminalizing acts that target them. It allows a state to restrict conduct that, although not occurring on its territory, foreseeably causes direct effects there. And, in some cases, it authorizes domestic enforcement officers to apprehend and to bind over for trial individuals who have committed certain kinds of actions deemed to be offenses against all nations, separately and together.

This last exception to the territorial restrictions on the power of a national legal system to proscribe and to punish conduct is the one generally called "universal jurisdiction." In certain instances, universal jurisdiction is a matter of logical necessity: when criminality, such as piracy, by its very definition takes place outside the boundaries of any state, it follows that no state has a greater claim than any other to assert the right to deter it, and all may apprehend, try, and punish its perpetrators. Universal jurisdiction may be justified also when the threat posed by the prohibited conduct is to the international legal regime itself, rather than to the laws of any local jurisdiction. Or, the right of states to arrest, prosecute, and punish under the doctrine of universal jurisdiction may reflect the unanimity with which certain conduct is deemed by customary international law itself to be unacceptable and reprehensible. People who commit such acts—slave traders, torturers, *génocidaires*—are punishable without regard to national borders or to the vagaries of national legal systems, because they are "*hostes humani generis*": enemies of all mankind.

In modern democracies, legislatures make the laws that permit the judicial enforcement of these exceptions to the principle of territorial jurisdiction. Courts, whose powers are delineated by constitutions, do not. In the United States, for example, Congress has deemed it a violation of national law to hijack a civil aircraft in another country's skies, if an American "is on board, or would have been on board" (18 U.S.C. § 32(b)). The US, the European Union, Japan, and many other developed national legal systems regulate the behavior of businesses outside their territories in order to defend economic regimes, such as the antitrust laws aimed at protecting freedom of competition. Their right to do so is in no way restricted by the emergence of international bodies, such as the World Trade Organization, which promote multinational governance of other aspects of global commerce. Indeed, if anything, the existence of such institutions is an endorsement of the notion that even the regulation of trade could not be conducted efficiently were it restricted to national frontiers.

Our Constitution itself authorizes Congress by legislation "to define and punish offenses . . . against the law of nations" (Article I, § 8, cl. 10), and this authorization has been found to be a sufficient basis for US criminal laws, for instance, against piracy. No constitutional constraint would stop our legislature from expanding its interpretation of the reach of international law to address other extraterritorial violations of public rights. And, in recent times, precisely this has happened. For example, Congress has enacted legislation defining torture as a violation of US law, and providing punishment for torturers found on our shores, no matter where the offense may have been committed (18 U.S.C. § 2340A). Under this authority, "Chuckie" Taylor, son of the former Liberian leader who himself faces trial before the United Nations special criminal tribunal for Sierra Leone, was sentenced in January 2009 to ninety-seven years in a US federal penitentiary for atrocities

committed in Liberia, against Liberians: the first case in which a defendant has been convicted in the United States of committing such an offense far from our shores. And although the younger Taylor has US citizenship, it was his presence here, not the color of his passport, which gave the court its authority to proceed.

To read these exceptions to the principle of territorial jurisdiction too broadly, however, would encroach upon traditional as well as contemporary concepts of sovereignty, which still underpin the international legal regime, including most importantly the United Nations Charter. Such an expansion would also defy the underlying logic of public rights, since the state prosecuting an offense cannot generally bear the burden of proving that the alleged criminal conduct violated its own legitimately protectable interests, as opposed to those of the polity in which the acts occurred.

It is not, for example, a violation of US law for a Paraguayan to murder another Paraguayan in Paraguay, because such an act, however outrageous, poses no threat to the public order of the United States. Even if the offender can be found in this country, he is not generally subject to criminal prosecution here. If there is a treaty in place, the United States may be obligated to hand the alleged perpetrator over to Paraguay to stand trial. But the sovereignty of each member of the community of nations entails the right to assert its own interests in establishing judicially-enforceable regulation of the conduct of those subject to its laws, and generally mandates that other countries refrain from arrogating to themselves a similar right. It is not open to Country A to tell Country B that an act committed by one B national against another on its own soil, which act is acceptable under the latter's legal system, offends against the sensibilities of the former, thus justifying the right to prosecute the Country B national if she may be found physically present in A.

So while a murder in the United States can be said to be a crime against the vested interest of American society in defending its domestic tranquility, a homicide in another country unconnected to us through nationality of perpetrator or victim, and without direct effect here, simply does not infringe this nation's right to preserve law and order. The state in which the act occurred would have a legitimate grievance if one of its citizens were to be criminally tried elsewhere for a purely local offense, however heinous the act, and however arrogant the offender in claiming to have defeated apprehension through flight. For these reasons, it is unlikely in the extreme that a national legislature would attempt to exercise jurisdiction to proscribe such an act, or would empower the judicial branch to conduct proceedings seeking to punish the accused actor. And were it to do so, it would risk diplomatic (and perhaps legal) denunciation that it has overstepped its sphere of legitimate regulation.

In exploring the extraterritorial reach of civil jurisprudence, however, in which individual and not collective rights are asserted, entirely different considerations come into play. There is no reason a municipal court in Detroit may not hear a lawsuit between two parties properly before it to determine whether the defendant is liable to the plaintiff for damages resulting from a traffic accident at the other end of the tunnel in Windsor, Ontario. No one should be offended by this: it does not involve an encroachment on Canadian sovereignty. The State of Michigan neither portrays itself as the victim of an actionable injury nor seeks to vindicate a public right of its own. No claim is asserted either on behalf of the Canadian nation or some other foreign entity alleging a sufficient interest in the outcome to justify extraterritorial reach. Nor is it necessary for the legislative branch to enact laws declaring the poor driving that caused the accident to be illegal in Michigan, since its

legality is not the issue: negligence is the issue, which is to say the existence and the breach of a duty of care owed by one private party to another.

Professor Davis repeatedly asserts that there is some kind of common law principle by which courts are constrained to hear only matters that arise within their own territorial jurisdiction. But that is simply wrong. There is nothing new or radical about the proposition that domestic courts can and do open their doors to civil litigants seeking to protect private legal rights allegedly violated in other countries. Indeed, there is nothing in principle requiring justification or reconciliation of such jurisdiction with notions of sovereignty. That concept is implicated only when the state places itself in the role of the offended party, claiming that it, and not some individual, suffered legally cognizable and compensable injury by virtue of acts committed outside its borders.

This detour through basic concepts of jurisprudence and sovereignty is necessary in order to dissipate a confusion that seems to have enshrouded efforts to develop international human rights law as a means of pursuing justice in domestic courts. In particular, the significance of the US Alien Tort Statute, 28 U.S.C. § 1350, as a device for the enforcement of emerging legal norms has given rise to misunderstandings that are neatly, albeit probably inadvertently, demonstrated in Professor Davis's book.

II. What the ATS Is, and What It Isn't

The language of the Alien Tort Statute, enacted by the first Congress as part of the Judiciary Act of 1789, is deceptively straightforward. The Statute grants to the federal district courts "original jurisdiction over 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."

Many of those who collaborated in the construction of the Judiciary Act were among the authors of the Constitution, ratified only two years earlier. They were well-versed in the common law. As they staked out the metes and bounds for the jurisdiction of the federal court system they were creating, they were aware of certain basic propositions to be kept in mind by anyone trying to make sense of their legislative bequest to us.

First, the founders understood that torts against the person have always been seen by the common law as transitory actions, meaning that the defendant may be held liable to answer for his deeds wherever he may be located. As Lord Mansfield wrote for the English High Court before the War of Independence began, in *Mostyn v. Fabrigas*, 1 Cowp. 161 (1774), "there is not a color of doubt but that any action which is transitory may be laid in any county in England, though the matter arises beyond the seas." Thus federal civil jurisdiction over torts that may arise outside its territory gave rise to no suspicion that the new nation was arrogating to itself power that it did not deserve, or to which it was not entitled by the international law of the day.

Second, the drafters of the Judiciary Act were surely aware that the Constitution itself (in Article III, § 2) had established federal court jurisdiction over civil actions between citizens and aliens. So they knew that they had already opened the doors of the federal courts to foreigners, in their civil pursuit of American citizen defendants. Since tort suits brought by aliens against citizens could already be brought in federal courts here, there was nothing radical about providing that a tort case

initiated by an alien could be resolved in these same courts of special jurisdiction, even if it was against another foreigner, so long as the defendant had sufficient legal presence in the United States.

Finally, the failed experiment of the Articles of Confederation had made the drafters keenly conscious of the need to concentrate in the federal institutions, rather than those of the States, all matters that might have implications for the new country's foreign policy, which was to be national and uniform in character. One of the causes of the demise of the Articles, indeed, had been precisely their failure to centralize foreign policy, treating each of the constituent members of the union as itself possessing what we today would call international legal personality.

Section 9 of the Judiciary Act expanded the jurisdiction of the federal courts beyond what the Constitution had specifically provided, by empowering those courts to hear a case between aliens: that is, one in which both plaintiff and defendant were foreign and there was therefore no jurisdiction based solely on diversity of citizenship. Such jurisdiction depends only on the special circumstances that the case sound in tort (thus avoiding throwing the courts open to a flood of commercial litigation between foreigners), and that it require a judicial determination whether the law of nations has been violated. The latter was considered a question far too sensitive to consign to the mercies of State judges who had no obligation, and had sworn no oath, to serve the interests of the nation first.

It has frequently been suggested that, since the only violations of the law of nations that could have given rise to tort actions in 1789 were piracy and the interference with the privileges of internationally-protected persons (such as ambassadors, ministers, and consuls), the legislative intent behind the Alien Tort Statute limits its scope to those few cases. The statute, however, is unambiguous. As Justice Scalia and his fellow conservatives—the very ones so keen to restrict the ATS—routinely and correctly point out, an elementary canon of statutory interpretation precludes recourse to extrinsic sources when an enacted text is clear. The authors of the statute must be presumed to have known that the contents of the law of nations would change over time. Just as we routinely apply the Interstate Commerce Clause of the Constitution (Article I, § 8(3)) to means of transportation and communication that could not have been imagined two centuries ago, so we must take the language of the venerable statute as we find it, applying it to modern causes and institutions. To the extent that what the drafters called "the law of nations" has come to include norms of human rights and their protection, then the Judiciary Act gives the federal courts jurisdiction over tort suits, brought by aliens, alleging violations of those rights, unless and until Congress declares otherwise.

This is exactly what Justice Souter held in the only case to provide the Supreme Court's guidance on the meaning of the Statute, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). He declined the invitation of the Bush Administration to eviscerate the legislation, unsurprisingly holding—to the chagrin of many on both sides of the issue—that it means exactly what it says.

That is, the Alien Tort Statute opens the doors of the federal courts to certain types of civil litigation that would otherwise be relegated to State tribunals. It is not the source of any causes of action, and it is ungrammatical to say that human rights abuses "violate" the act. In short, the ATS is not normative. It is jurisdictional. As the *Sosa* Court put it, the Statute "address[ed] the power of the courts to entertain cases concerned with a certain subject," *Sosa*, 542 U.S. at 714, *to wit*: torts alleged

to have been committed in violation of international law, as that body of law may be understood from time to time.

But that is the strength and potential utility of the Alien Tort Statute as a vehicle for vindicating private rights, without the arrogation of extraterritorial jurisdiction. The ATS provides great opportunities to those who would use it wisely, and judiciously, to bring cases before domestic courts to defend rights protected by international law.

III. Why ATS Cases Matter

Every tort suit requires the court to determine whether the defendant owed the plaintiff a duty of care, whether the duty was violated, and whether the violation caused compensable injury. As in any other civil litigation, however, before reviewing these substantive matters, the court must decide such preliminary issues as jurisdiction, over both the subject matter of the suit and the person of the defendant. If the forum is a federal one, it must also determine that entertaining the action does not transgress any of the special constitutional and statutory rules (as well as the equitable and comity constraints) that circumscribe the authority of the federal courts.

The ATS expressly lays down two specific jurisdictional prerequisites, in addition to those applicable to all actions that sound in tort. First, the plaintiff must be an alien: a matter rarely in serious dispute. The second requirement is the focus of nearly all of the reported ATS jurisprudence: can commission of the tort alleged in the complaint correctly be characterized as "in violation of the law of nations or a treaty of the United States"?

The issue before the court is not whether to "convict" the defendant. Rather, the court must determine whether the complaint, assuming that its well-pleaded allegations are true, asserts a transgression of international law. The ATS was revived from nearly two centuries of slumber in the landmark case of *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). In that case, the two plaintiffs were the father and sister of a young man who was allegedly tortured to death by the chief of police of Asuncion, Paraguay, in retaliation for his father's political activities opposed to the regime of Alfredo Stroessner. The defendant was found within the jurisdiction of the United States District Court for the Eastern District of New York. In the complaint against him, brought under the ATS, the plaintiffs were surely aliens, and the action sounded in tort. The question for decision—that is, the question that would determine whether the federal court had jurisdiction over the subject matter of the case—was whether allegations of torture were sufficient to implicate "the law of nations."

In his unpublished decision in *Filartiga* at first instance, Judge Eugene Nickerson of the US District Court for the Eastern District of New York, considering himself constrained by precedent, reluctantly concluded that for violation of the law of nations to have occurred, perpetrator and victim must be of different nationalities. The precedential significance of the decision by the Second Circuit on appeal—which reversed the district court and remanded the case for trial—lay in the proposition that this is no longer an accurate statement of the law, even if it ever was. Rather, in the latter half of the twentieth century, the way in which a state and its agents treat its own nationals had come to be recognized as a proper matter for concern of the international legal regime. Every individual is the owner of private rights recognized in international law, and therefore in principle

enforceable in the United States, even against those acting in the name of his or her own government.

As Justice Horace Gray (not, as Professor Davis writes at page 32, Justice Oliver Wendell Holmes) famously held for the Supreme Court in *The Paquete Habana*, 175 U.S. 677, 700 (1900), international law is part of our national legal system, "to 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." And the ATS does precisely this: it requires the courts to decide the meaning and reach of the law of nations when adjudicating cases before them (and in this particular statutory context, deciding at the door of the courthouse whether their power reaches the issues presented).

In this sense, what the ATS asks courts to do is what they have always done, in a manner fully consistent with our constitutional structure and the separation of powers. It requires judges assigned the judicial power of the United States in conformity with Article III of the Constitution to determine whether the allegations of the complaint they are called upon to adjudicate disclose an action arising under the laws of the land. Formulating the legal issue this way does not, of course, underestimate the difficulty of resolving it, or applying that issue to the facts, in any given case. But the vindication of private rights under the law of torts does not require the extension of universal jurisdiction merely because it asks the courts to determine whether customary international law prohibits the conduct of which the defendant stands accused. The question is always whether the plaintiff's rights were violated, not whether the state's were. Neither the legislature nor the courts are asked to assert or to defend the interests of society as a whole.

Yet, as a practical matter, the ATS does take the concept of transitory torts one step beyond its traditional formulation. The *Filartiga* case could have been brought, and would have been heard, before a New York State court, and its proceedings would have been unremarkable. Before the court would have stood an individual defendant, found on the streets of Jackson Heights, New York, and alleged to have committed a brutal assault, resulting in the death of the plaintiffs' decedent, in Paraguay. The defendant was entitled to no personal immunity from suit, and the nation in whose name he claimed to have acted refused to assert the act of state doctrine in his defense. Assuming that service of process had been effected properly, the State court could have tried the *Filartiga* case before a courtroom empty of spectators.

But when the same case was brought before a United States district court under the ATS, before it could be concluded that these plaintiffs were potentially entitled to a remedy in tort against this defendant, the court had first to determine that the conduct alleged—torture under color of national authority, resulting in death—in fact constituted a violation of international law. Judge Irving Kaufman found that it did, observing that torture is forbidden not only by a host of instruments binding on Paraguay, but also by that nation's own constitution, as well as by the evolved norms of customary international law. The fact that the victim and the offender were both Paraguayan, and the situs of the offense Paraguay, did not affect the legitimate assertion of private rights guaranteed, and protected, by international law.

The enormous significance of this holding derives from the fact that, for the first time, a United States court expressly concluded that the international law of human rights imposed obligations on individuals, which duties would be violated by such acts as torture. This has absolutely nothing to do

with any extraterritorial expansion of US federal court jurisdiction: *Filartiga* was a tort suit, and the rights the plaintiffs sought to vindicate were their own private rights, not public rights whose defense is the role of the state.

IV. "*Pas Aux Armes, Citoyens!*" Dismantle the Barricades!

If international law is part of our domestic law, then asking judges to decide whether an act of torture allegedly conducted under the at least apparent authority of a state (or an extrajudicial killing, or complicity with the apartheid regime of South Africa) is or is not consistent with the law of nations, is a classic invocation of "the province and duty of the judicial department," as defined by Chief Justice John Marshall in *Marbury v. Madison*, 1 Cranch (5 U.S.) 137 (1803), which is "to say what the law is." This is not a "revolutionary" notion. Nor is it sensible to describe as "revolutionary," almost a quarter of a millennium later, a strict reading of legislative language expressly enacted by the First Congress, in 1789.

Is it possible that determining whether a particular act, undertaken by an agent of a foreign state, is "a violation of the law of nations or a treaty of the United States," may require the courts to assay information outside the scope of their usual dockets? Of course it is, but the canon permits (sometimes it even compels) courts in such circumstances to defer to the political branches. Is it possible that an ATS case may be brought against a defendant who is entitled to immunity under the Foreign Sovereign Immunities Act, or who may legitimately ask the courts to stay their hand by appeal to the act of state doctrine? Again, of course it is, and the interpretation of that Act and that doctrine are familiar exercises for the judiciary. Is it possible that an ATS plaintiff may ask the courts to expand the theretofore recognized boundaries of international law, arguing that a particular act of which she was a victim has, through metamorphosis of the legal regime, become a violation today although its status yesterday was less certain? Once more, it most certainly is, but the scope of the law has always been subject to the pulls and pushes of advocacy. Were it not so, a Constitution written in large measure by men who purported to own other men as chattels could hardly have been transformed, just two centuries later, into a beacon of hope for the world's oppressed.

Filartiga was not, seen in retrospect, a hard case. Later litigation has raised far more nuanced and vexing questions concerning whether, in fact, defendants' alleged conduct did constitute torts in violation of international law at the time of commission, and even if it did, whether the court should nonetheless abstain from hearing the case out of deference to equitable principles, or to the authority of the other, coequal branches of government.

Yet United States judges have found numerous torturers and abusers who sought refuge and anonymity on our shores to be liable to their victims, depriving the perpetrators of safe haven (Professor Davis recounts the particular facts of many of these cases). The courts have held that the depredations of the Philippine people by their deposed President Marcos infringed their private rights, and were actionable under the ATS because they were also violations of international law (in *In re Estate of Marcos Human Rights Litigation*, 978 F.2d 493 (9th Cir. 1993). They have concluded that rape and forced pregnancy, used as weapons of war, violate the law of nations, and for such violations the leader of the Republika Srpska, Radovan Karadzic, may be held legally responsible (in

Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995)). They have denied to corporations the excuse of willful ignorance when their government joint venture partners abused the rights of ethnic minorities (in *Doe v. UNOCAL*, 395 F.3d 932 (9th Cir. 2002)).

Many factors have come into play in judicial review of those issues: whether the asserted international norm has actually become customary law by accretion of state practice supported by *opinio juris*; whether, even assuming the existence of an unambiguous customary norm, it is addressed to this defendant and contains this plaintiff within its scope of protection; whether the defendant is entitled to the immunity from suit that the United States extends as a matter of law (not, as Professor Davis seems to suggest, out of comity or custom) to sovereigns and their agencies and instrumentalities; and whether, even assuming that the statutory jurisdictional prerequisites have been satisfied, separation of powers doctrine suggests that the court should nevertheless decline to proceed.

And many questions remain to be addressed. The extent to which private actors, particularly corporations, may be liable in tort for human rights violations committed by their public joint venture collaborators remains unsettled, and is certain to be the subject matter of litigation over the next few years. The precise degree of involvement by a state to be required before an act of simple thuggery may properly be portrayed as a violation of the law of nations has not yet been resolved by the courts. Cases brought to vindicate even well-established rights may continue to founder on evidentiary reefs. And, of course, plaintiffs' counsel—those from NGOs whose missions center on the promotion of human rights, as well as those whose fees depend on litigation success—will continue to prod, to probe, and to push the limits of those international law violations deemed sufficiently "specific, universal, and obligatory" to justify invocation of federal jurisdiction under the ATS after *Sosa* (*see* 542 U.S. at 732).

The hurdles that an Alien Tort Statute plaintiff must overcome are high and numerous. Insistence that these hurdles be cleared cleanly, however, does not imply a concealed hostility to international law in general, or to the law of human rights in particular. To the contrary, history has taught that rights thrive best when their roots in the traditions of our common law system are deepest, and when their development is carefully nurtured within those traditions. The recognition that international law today embraces rights and obligations addressed to individuals requires no reliance on anything beyond what our Constitution ordains and what our founders, in Congress assembled, handed down to us over two centuries ago.

A legal system founded on precedent often does not readily accept the engrafting of rights foreign to its original roots, and frequently rejects them as artificial political intrusions rather than natural legal developments. Such efforts, however well-intentioned, invite legislative tinkering to undo what may be seen as judicial activism irreconcilable with the common law. When part of the aim of the exercise is to defend the proposition that international human rights law is law, and that the rights it vouchsafes are legal in nature, it seems particularly unwise to risk denunciation of the entire project by describing it as "revolutionary" when it manifestly is anything but.

To say this is in no way to undermine the creativity of the lawyers whose vision made the *Filartiga* line of cases possible. Their invaluable contribution was precisely the realization that human rights law, toward the end of the twentieth century, had taken its place in the international legal pantheon: it was the source and protector of rights as well as obligations, and could be the basis for

the imposition of remedies. That was an epochal step in the realization of the ambitions of those who wrote, for example, the Universal Declaration of Human Rights, and ultimately, provides all of us with the comfort of knowing that there is domestic jurisdiction over—and, therefore, the prospect of judicial relief from—at the very least, what Justice David Souter called "settled violations of the law of nations" (*Sosa*, 542 U.S. at 729-30).

Yet calling this a "revolution" is as misleading as were the predictions of the Bush Administration (in its briefs before the Court) and its apologists (in the mainstream media) that, if the Supreme Court did not take the opportunity presented by *Sosa* to overrule all of the private litigation brought since *Filartiga*, the threats posed to US economic interests would cause massive disinvestment, upheaval, and catastrophe. In common law systems, truly "revolutionary" judicial decisions are nearly an oxymoron: decisions must be drawn from history and reconciled with what other courts and judges have done, and in this respect the Second Circuit's *Filartiga* opinion differed in neither form nor jurisprudential approach from our standard common law heritage. Nor did the courts, after *Filartiga* or because of it, even proclaim that they were adopting a new approach to the Alien Tort Statute. What they said they were doing, on the contrary, was applying the standard adjudicatory tools to standard disputes to be resolved, albeit with a heightened sense that the incorporation of international law (and the international law of human rights in particular) into the law of this nation had practical consequences, and was not merely a matter of aspirational moralizing.

The caselaw that Professor Davis chronicles, beginning with *Filartiga*, amply demonstrates this very lesson. There has been nothing radical about its maturation. It has not been thrown off stride by sudden or unexplained turns in the road, nor has it seen rejection of the premises of the law of torts in order to justify a result that a judge considered to be wise albeit not easily reconcilable with precedent. This is not to defend every ATS outcome—whether expansive or narrow in its interpretation of the statute's reach—as correctly decided. There is no empirical evidence to suggest that judges in these cases (even Supreme Court justices!) are any more or less prone to human error, or to ideological influence, than are judges who rule on cases with lower profiles.

Yes, the courts have been conservative in their interpretation of the scope of the ATS, but courts are by nature conservative in their construction of statutory language. Therein lies the challenge for human rights advocates. It is neither helpful nor accurate to proclaim, as Professor Davis hints, that every case in which it is concluded that the plaintiff did not carry his burden is a defeat for human rights law as such (if not another avatar of the vast conspiracy to undermine the development of international law more generally). Nor may each instance in which an ATS plaintiff succeeds in obtaining a judgment be proclaimed a victory or vindication for human rights in gross.

"The struggle for human rights in U.S. courts" (this is the subtitle of Professor Davis's volume) has had many iterations in our nation's history. All things considered, the handful of cases brought under the venerable Alien Tort Statute hardly constitutes the vanguard of that "struggle." Not in a country within whose judicial system *Plessy v. Ferguson*, 163 U.S. 537 (1896) gave way, after less than six decades, to *Brown v. Board of Education*, 347 U.S. 483 (1954), concluding that state-sponsored segregation in public facilities could not be reconciled with constitutional guarantees of equal protection.

Here, "the struggle for human rights" has had many dimensions, few inspired by international law at all, because of our liberal tradition of constitutional interpretation. Many advocates are trying hard to change that, believing that developments in international law have now overtaken, and therefore may serve as progressive influences on, our constitutional jurisprudence. They see victories in cases like *Roper v. Simmons*, 543 U.S. 551 (2005), in which the Supreme Court looked *inter alia* to international law to inform the decision that the judicial execution of individuals aged under eighteen at the time of their offenses is "cruel and unusual punishment," thereby prohibited by our Constitution. They derive inspiration from *Lawrence v. Texas*, 539 U.S. 558 (2003), overruling a precedent from only seventeen years earlier, and finding that international law, among other things, has helped to define a legally-cognizable right not to have consensual, adult homosexual acts criminalized by the state. And they find their governing statement of principle in the words of Judge Eugene Nickerson, writing in *Filartiga* on remand and rejecting the decision of the Magistrate Judge from which Professor Davis quotes extensively: international law is law, not "a mere set of benevolent yearnings, never to be given effect"(*Filartiga v. Pena*, 577 F. Supp. 860, 863 (E.D.N.Y. 1983)).

Perhaps any proclamation of victory is premature. Perhaps the jingoistic backlash against even the modest gains that have been made in recognizing international law as a source of individual rights—motivating bills before the last several Congresses that would prevent or prohibit the courts even from citing international sources in their decisions, much less relying on such sources—will yet prevail. There are battles yet to be fought, and territory hard won yet to be defended, in the struggle to make contemporary international law truly "part of our law." Yet *Sosa* shows us that, far from revolutionary, the notion that US judges may determine questions of the meaning and reach of international law is fully consistent with our contemporary, constitutional system of governance.

V. Conclusion

It is certainly true that, through the creative use of the ATS by non-government organizations (notably the Center for Constitutional Rights, the Center for Justice and Accountability, and Human Rights First), numerous victims of human rights abuses have found some measure of vindication in courtrooms in the United States. These victims have seen their abusers shamed and speechless: powerless and scorned, just as the plaintiffs themselves once were at the hands of their tormentors. While those are laudable accomplishments, however, they do not justify an otherwise impermissible extension of jurisdiction over cases, or over defendants, beyond that which the Constitution and the laws of this country provide.

So Professor Davis's extensive and anecdotal reports of the emotional responses of ATS plaintiffs and their lawyers, and of counsel for defendants as well, provides interesting historical context, but little by way of legal analysis. It simply does not follow that because the outcome of a lawsuit warms the heart, it is legally correct. His elaborate quotations from Bush Administration officials who openly disdained the ATS, as they undermined the efforts of human rights abuse victims to use the Statute to their advantage even after the Supreme Court concluded that such use was entirely constitutional, shows how far supposedly "conservative" lawyers are wont to stray from established law when it serves their ideological purposes to do so, but it reveals little of use to a legal analysis of the accomplishments of ATS litigation, or to its future.

All of this, in the end, casts little light on the real struggle: a battle over whether this country will live up to the goal declared for it by Thomas Jefferson, that in formulating its laws and in conducting its relations with other states, it would seek to demonstrate "a Decent Respect to the Opinions of Mankind."

Customary international law reflects those "Opinions," and in the contemporary world that law includes the rights of individuals to be free from certain kind of abuses, wherever in the world those abuses may occur. To recognize this, and to embrace the power of the courts of the United States to provide remedies in appropriate circumstances, requires no extension of "universal jurisdiction," and no aggressive expansion of traditional notions of the common law.

Indeed, the real "revolutionaries" here are not those heroic lawyers whose accomplishments Professor Davis rightly extols, who have defended and seek to expand the body of US law that would enshrine the international law of human rights. Their position is entirely of a piece with the conceptions of this Nation's founders. No, the real "revolutionaries" are those who would restrain or reverse the incorporation of international law into our national legal system, and who would place this country outside—they would probably say "above," but such a term only compounds legal and historical errors with arrogance—the march of progress toward ensuring that all human beings are entitled to fundamental rights as a matter of law.

The United States of America, true to its aspiration of offering open access to its courts, permits those who seek to vindicate those private, personal rights to do so in our judicial system. The goal is not—or is not only—accountability, although greater accountability for human rights violations will inevitably result. It is certainly not vengeance, although these cases permit, and sometimes even bring about, the imposition of serious penalties against those who have cruelly abused the most vulnerable. Nor is it vindication, however sweet it may be for those who have been mercilessly abused.

The objective is, quite simply, justice, not only "across borders," but also here at home.

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