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Sabbatino, Sosa, and Supernorms

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LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW
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Chapter 30

Sabbatino, Sosa, and "Supernorms"

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In this essay in honor of our former teacher, W. Michael Reisman, we explore how the New Haven School helps to explain and define the contribution to world public order of U.S. civil jurisdiction over certain international law claims. We suggest that the U.S. Supreme Court's foundational decisions in *Banco Nacional de Cuba v. Sabbatino*[1] and, forty years later, *Sosa v. Alvarez-Machain*[2] demonstrate the Court's application of a consistent, overarching principle of restraint: a U.S. court should adjudicate only claims involving what we call "supernorms." In short, a supernorm is an international legal prohibition that has become so crystallized and entrenched as to be effectively unquestionable and inviolable either by sovereign entities or by individuals, particularly those acting under color of state authority.

This subject is significant in view of the substantial increase in the number of civil lawsuits involving international law brought in U.S. courts. These suits invoke various jurisdictional provisions, foremost among them, the Alien Tort Claims Act (ATCA);[3] the Foreign Sovereign Immunities Act (FSIA);[4] the Torture Victim Protection Act;[5] the Anti-Terrorism Act;[6] and general federal-question jurisdiction.[7] Many of those cases involve claims for suffering caused by human rights violations, international criminal law violations, and terrorist attacks. Legal scholars are increasingly paying attention to the various issues raised by these cases, and U.S. law school curricula today include new course offerings devoted to the adjudication of international law disputes in domestic courts.

Given the nature of this volume, we assume the reader has some familiarity with the recent case law involving attempts by private plaintiffs to bring civil claims in

1 Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

2 Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

3 Alien Tort Claims Act, 28 U.S.C. § 1350 (2006).

4 Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1604 (2006).

5 Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992).

6 Anti-Terrorism and Effective Death Penalty Act (AEDPA), 8 U.S.C. § 1189 (2006).

7 28 U.S.C. § 1331 (2006).

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U.S. courts for violations of international law. So instead of providing a case-by-case primer, we offer an analytical overview. Because it is natural for jurists to view international issues through a domestic lens, our discussion of supernorms initially, and later, will refer to U.S. constitutional law. Furthermore, public international law and domestic constitutional law both allocate and limit public authority by recognizing individual rights. The New Haven School foregrounds the role of law in systematizing such allocations of authority, with the ultimate goal of protecting human dignity.

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In U.S. constitutional law, it is common to draw a conceptual distinction between "facial" cases, that is, constitutional challenges to laws in the abstract, and "as applied" cases, that is, challenges to laws that may be unconstitutional, not in every case, but "as applied" to the facts of a particular dispute. Facial cases thus challenge the very existence of a norm. Within the category of facial cases, constitutional law also distinguishes between "structural" and "individual rights" disputes. Structural disputes challenge the defendant's authority to perform a specific function. The plaintiff claims that, on its face, the Constitution does not allocate the necessary authority to the defendant. A dormant Commerce Clause challenge to state action is an example. In individual rights disputes, facial cases address whether a constitutional norm limits the defendant's accepted authority. If, for example, the Bill of Rights affords individuals a right to privacy that protects private, consensual sexual behavior, the government may not punish a private sexual encounter by *any* consenting adults.

As-applied constitutional cases, in contrast, presume that an accepted norm authorizes the defendant's behavior, which would (or might) ordinarily be lawful. As-applied challenges instead argue that the application of an otherwise legitimate norm or process is nonetheless illegitimate as applied to the plaintiff's *specific case*. A Fourteenth Amendment claim that the death penalty has been inconsistently applied and unequally imposed upon a particular criminal defendant, for reasons unrelated to the underlying offense, is an example.

A constitutional lawsuit may involve both facial and as-applied challenges. But the former logically precedes the latter. Facial challenges also have greater systemic implications than do as-applied challenges, for they presumptively render sovereign behavior illegitimate in related matters beyond the plaintiff's case.

Within this framework, by analogy, much of the public international law litigation in U.S. courts turns on—and effectively ends with—a facial analysis. As we will see, the U.S. Supreme Court's jurisprudence sets a very high facial threshold for identifying the international norms that merit adjudication. Trying the facts of the case, in *application* of the law, may not be the greatest obstacle for the plaintiff. Instead, in international law disputes, the plaintiff often must establish that an international norm (1) prohibits the defendant's behavior; (2) provides legal protection to the plaintiff; and (3) constitutes the type of international legal norm that justifies domestic adjudicatory jurisdiction.

Much of the recent international law litigation in U.S. courts involves the individual rights class of facial challenges. But because defendants typically challenge, in the first place, the invocation of federal jurisdiction, these cases also impact structural norms. By requiring that individual claims in international law disputes involve highly defined norms, U.S. courts help define their own role within the domestic and global legal systems.

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Since 1976, the FSIA has codified the circumstances under which U.S. courts may adjudicate claims against foreign states. Scholars and jurists often trace the assertion of domestic jurisdiction over individual, as opposed to state, defendants for violations of international law to the Second Circuit's landmark decision in *Filártiga v. Peña-Irala*, decided in 1980.[8] In *Filártiga*, the court assumed domestic jurisdiction over extraterritorial torture carried out by a foreigner under color of (foreign) state law. The court famously compared torturers to the pirates and slave traders of an earlier era, describing them as the modern incarnation of *hostis humani generis*, the enemy of humankind.

Despite the proliferation of, and occasional plaintiff's victory in, these federal cases, many international law claims have been dismissed on various grounds before reaching a trial on the merits. The judiciary's cautious exercise of jurisdiction over these cases harkens back to the Supreme Court's 1964 opinion in *Sabbatino*, which examined the act-of-state doctrine in the context of a nationalization by the recently established regime of Fidel Castro. The act-of-state doctrine allocates authority between the judicial and political branches of government in certain cases involving foreign affairs. It prudentially precludes courts from examining the legality of a foreign sovereign's acts on its own territory where these acts do not clearly violate a well-established norm of international law. *Sabbatino* emphasized, however, that the act-of-state doctrine is not categorically applicable to cases involving foreign affairs or international law; rather, it depends on the particular norm at issue in a case:

> [T]he greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice.[9]

We could refer to *Sabbatino* as establishing a jurisprudence of "supernorms." As a general matter, articulating and enforcing international norms vis-à-vis foreign actors falls within the purview of the political branches of government. Under *Sabbatino*,

8 Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980).

9 Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964).

however, an exception to that arrangement may arise if a case involves a norm at the top of the hierarchy of international legal norms—that is, a norm so undisputed, or so fundamental, that its enforcement transcends the ordinary allocation of competence among the domestic branches of government and overrides the usual presumption that the judiciary will not interfere with the acts of sovereign states taken within their own borders. In *Sabbatino*, the Supreme Court held that the international legal norm at issue—the international prohibition on expropriation without compensation—did not meet the foregoing standard for adjudication on the merits. The Court described the international law on expropriation at the time as "a battleground for conflicting ideologies" among members of the international community—the exact opposite of a supernorm.[10]

Forty years later, in *Sosa*, the Supreme Court addressed the jurisdictional framework governing tort actions by aliens asserting international law violations under the ATCA. Congress enacted the ATCA as part of the Judiciary Act of 1789,[11] the original statute vesting the federal courts with jurisdiction. Blackstone's Commentaries, the prevailing legal treatise at that time, enumerated three universally recognized violations of international law that gave rise to individual liability: piracy, violations of safe conduct, and offenses against ambassadors. This three-offense paradigm figured prominently in the *Sosa* court's analysis.

In *Sosa*, the Supreme Court articulated a jurisdictional threshold for ATCA cases reminiscent of its approach to the act-of-state doctrine in *Sabbatino*. For federal courts to exercise adjudicatory jurisdiction over these international law cases, "courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."[12] *Sosa* concluded that the alleged arbitrary arrest and brief detention of a Mexican national in Mexico by Mexicans hired by the U.S. Drug Enforcement Agency did not meet that standard.

Under *Sosa*, like *Sabbatino*, U.S. courts will not adjudicate claims for violations of an international norm unless that norm is virtually incontrovertible. Litigants may not advance to as-applied analyses unless they can survive facial challenges based on the *Sosa* standard. The *Sosa* standard brings together both the structural and individual rights strands of facial analysis. Structurally, if only supernorms justify domestic jurisdiction over individual claims for international law violations, then the judiciary is less likely to intrude on the authority of its coordinate branches. The judiciary is also less likely to trigger an adverse reaction within the global order when adjudicating only those norms that every political system recognizes as binding. From an individual rights perspective, *Sosa* affirmed that certain conduct could rise to the level of an actionable violation under the ATCA.

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10 *See id.* at 430.

11 Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77.

12 Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004).

In short, then, U.S. domestic courts will adjudicate claims for international law violations only when adjudication is institutionally sound. Although, technically, *Sabbatino* articulated a prudential doctrine that restricts the *exercise* of jurisdiction by courts, whereas *Sosa* built prudential concerns into the very *availability* of jurisdiction in the first instance, both cases seek to define the parameters of the domestic judiciary's legitimate assumption of authority in the form of jurisdiction. Though decided forty years apart, *Sabbatino* and *Sosa* are cut from the same jurisprudential cloth. From a New Haven perspective, *Sabbatino* and *Sosa* both affirm and circumscribe the role of domestic courts in protecting a core of human dignity, with that core defined by a high degree of substantive international agreement.

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The principle of judicial restraint based on supernorms finds an analogy in U.S. constitutional law, which also recognizes a hierarchy of norms. Not only is that hierarchy explicit in the Supremacy Clause; it is also present in cases in which constitutional norms themselves collide, and one must take precedence over the other. There can even be a hierarchy of claims within a single constitutional provision. For example, under the Equal Protection Clause, certain fundamental rights trigger heightened scrutiny; rights that trigger "strict scrutiny" resemble supernorms. Similarly, plaintiffs whose normative claims merit special recognition receive extra protection.

A normative hierarchy also exists in judge-made constitutional or federal common law. Some longstanding precedents that are engrained in societal structures should not be overturned even if they were originally decided on dubious grounds, and, eventually, statutes may codify them.

So certain norms of both the domestic and international orders are more authoritative than others. Prescriptive processes produce norms of varying levels of societal acceptance. The stronger the norm, the more able or likely it is to trump other norms and the more appropriate it may be to invoke domestic adjudicatory authority in order to enforce it. In international law cases, the Supreme Court requires norms to be so clear and strong that they can supersede even hallmark conceptualizations of sovereignty.

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In establishing that, on its face, an international law claim involves a supernorm, a plaintiff focuses on the traditional *sources* of international law: treaties, customary law, and general principles being the primary sources; and scholarship and judicial precedent serving as secondary sources to help identify and interpret the primary sources. Federal court opinions during the past several decades demonstrate the judiciary's difficulty in construing those sources. Such problems stem from applying

traditionally public norms to private actors; from the relative inexperience of domestic courts dealing with less positivist international norms as opposed to domestic legal norms; and ultimately from the judiciary's debate over its appropriate role in international cases vis-à-vis both the national and international legal orders.

Treaties should be the most straightforward international legal source for courts to apply because, among international sources, they bear the greatest resemblance to more familiar domestic statutes. But allegations that a defendant has violated norms codified by treaty often raise facial challenges over whether the treating is self-executing—that is, whether the treaty itself provides a judicially enforceable norm or requires implementing legislation before it may be enforced in a court. Unless a treaty is deemed self-executing, it cannot provide a privately enforceable right under the treaty prong of the ATCA. Moreover, even self-executing treaties do not automatically confer individually enforceable rights, as recent cases involving the consular notification provision of the Vienna Convention on Consular Relations have demonstrated.[13]

The facial analysis becomes even more complex when plaintiffs allege violations of customary international law norms. Jurists debate what "metric" demonstrates the existence of a customary norm, while being mindful of the quantity and quality of practice and *opinio juris* that give rise to customary international law. Even when plaintiffs satisfy the relevant standard, they must also bear the burden of showing that the legal norm, on its face, protects individuals, and not just sovereigns. The facial dilemma in alleging a violation of either treaty or customary law often is expressed in terms of whether the norm provides a private cause or right of action.

The third primary source of international law, general principles, similarly poses difficult facial challenges to plaintiffs in federal court. As a source of law, general principles themselves have a "twilight existence."[14] The lack of an accepted definition or metric for this entire normative category supplies the backdrop for and exacerbates the difficulty plaintiffs face in trying to show that a specific legal principle prohibits the defendant's conduct. The *Sosa* methodology, as applied by lower courts, tends to collapse the category of general principles into that of customary international law. Under *Sosa*, general principles alone are unlikely ever to demonstrate a supernorm, even if they can buttress customary law. Scholarly works may help evidence general principles, as well as customary law. But because U.S. legal scholarship often involves advocacy and may exhibit nationalist tendencies, judges have questioned the objectivity of scholarship as a means to demonstrate or articulate general principles of international law, as well as the ability of scholars accurately to identify international custom.[15]

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13 *See* Chimène I. Keitner & Kenneth C. Randall, *Introductory Note to* Cornejo v. San Diego, 46 I.L.M. 1158 (2007).

14 Oscar Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 AM. J. INT'L L. 296 (1977).

15 *See e.g.*, José A. Cabranes, *International Law by Consent of the Governed*, 42 VAL. U. L. REV. 119, 135-36 (2007) (discussing the problem of scholars who "view their role as advocates").

In short, although the docket of international law cases continues to grow and diversify in U.S. federal courts, most plaintiffs cannot satisfy the threshold burden of establishing the existence of a supernorm that warrants domestic adjudication. Absent a supernorm, they cannot move their cases past the summary judgment stage. Dismissal at this stage is not about the scope of the law and how it applies to a particular case. Instead, it is about showing that the treaties, customs, or general principles, on their face, establish not just a norm but a supernorm that prohibits the defendant's behavior and entails a private cause of action.

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How should we assess the Supreme Court's continuing use of supernorms to delineate the judiciary's authority with respect to both the coordinate branches of the U.S. federal government and foreign sovereigns? Consistency in Supreme Court jurisprudence is ordinarily a virtue. In theory, legal consistency means predictability. Individuals and other actors can keep their behavior within the confines of such defined parameters. At the same time, the *Sabbatino-Sosa* standard is sufficiently open-ended to accommodate normative change. Neither *Sabbatino* nor *Sosa* identifies a static list of norms. Over time, different norms can meet the Supreme Court's jurisdictional threshold.

The Supreme Court's jurisprudence, however, is not without potential problems. The *Sabbatino* and *Sosa* holdings reflect a concern for the allocation of authority among the branches of the U.S. government, as well for delineating the appropriate scope of domestic adjudicative authority within the international legal order. Those institutional concerns give rise to a jurisdictional gate-keeping function for federal courts. But it is important that judicial caution in this regard does not make a rigorous facial scrutiny of international law norms "strict in theory but fatal in fact."[16]

In implementing Supreme Court precedent, some federal courts have required plaintiffs to allege a norm that is even *more* crystallized than a supernorm. That is, they have limited the supernorm category to a normative level that virtually no international law can satisfy. For example, in *Aldana v. Del Monte Fresh Produce*,[17] the Eleventh Circuit found no ATCA jurisdiction over claims for cruel, inhuman, or degrading treatment or punishment (CIDT) in a cursory paragraph that gave the false impression that the only legal source for a norm against CIDT is the International Covenant on Civil and Political Rights. Judge Barkett dissented from the Eleventh Circuit's subsequent denial of plaintiffs' motion for rehearing en banc on the grounds that the panel did not properly apply the *Sosa* standard. Judge Barkett recognized a

> When one looks to the sources of international law identified in *Sosa*—treaties, judicial decisions, the practice of governments, and the opinions of international law scholars—it is clear that there exists a universal, definable, and obligatory prohibition against cruel, inhuman, or degrading treatment or punishment, which is therefore actionable under the ATCA.[18]

Although the precise outer contours of this norm may be subject to different interpretations, that does not negate the existence of a core prohibition on CIDT that may be enforceable by domestic courts. We do not argue against the practice of federal courts proceeding with caution in this area of the law. Many of the cases involve extraterritorial behavior and parties with little or no connection to the United States, and federal courts cannot function as open-ended global tribunals. But various prudential doctrines enable judges to decline to adjudicate cases where appropriate. Misusing the *Sosa* standard as a substitute for these mechanisms skews the analysis of customary international law sources and risks setting the jurisdictional bar higher that is warranted.

The ATCA itself does not compel a more restrictive approach. There is some irony when avowedly textualist judges reject the very statutory premise of authority accorded them by Congress in these international cases, or at least limit that authority to norms that existed in the eighteenth century. It can be curious that a jurist who might otherwise strictly construe a statute would impose extrajudicial limits on the plain statutory language of the statute. The ATCA, on its face, simply requires that the plaintiff be an alien, that the defendant have committed a tort, and that this tort have violated a U.S. treaty or the law of nations. Rendering that statute as stillborn in the modern era—limiting it to the three offenses recognized by Blackstone in the eighteenth century—flies in the face of strict statutory construction. It may well be more appropriate for such judges to rule that prudential considerations properly limit the exercise of adjudicatory jurisdiction than to rule that a customary international legal norm does not exist.

The Supreme Court's ATCA jurisprudence should not be interpreted to limit jurisdiction to a normative category closer to *jus cogens* norms than supernorms—the former being even more rare, and subject to even more stringent requirements, than the latter. The tempting analogy between civil jurisdiction under the ATCA and universal criminal jurisdiction may be misleading in this context. The relatively lesser burden of a civil judgment as compared to the prospect of incarceration reduces the "threat" posed by domestic adjudication to individual defendants. As we emphasize below, other prudential considerations might well tilt the balance in favor of a court declining to exercise jurisdiction over a particular claim, but these considerations should not be understood to deprive U.S courts of jurisdiction in the first instance. So while we agree that domestic jurisdiction over international norms should, in this context, be restricted to those norms with the requisite level of clarity and consensus, we would not limit civil domestic jurisdiction to the bare handful of *jus cogens* norms.

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18 Aldana v. Del Monte Fresh Produce, 452 F.3d 1284, 1285 (11th Cir. 2006) (Barkett J., dissenting).

Some federal judges have interpreted *Sosa* as requiring international norms as clear as those rendered by a centralized domestic system. That threshold simply is unsuitable to analyzing the way international norms are created and the system that creates them. The international legal order, of course, is much less centralized than a domestic legal order (particularly that of the United States). As the Second Circuit correctly recognized in a pre-*Sosa* case, "customary international law—as the term itself implies—is created by the general customs and practices of nations, and therefore does not stem from any single, definitive, readily-identifiable source."[19] Moreover, a practice does not have to be perfectly uniform in order to support domestic jurisdiction; regrettably, the globally accepted prohibition on torture is often honored in the breach. But just as the occurrence of a domestic offense should not undercut the underlying norm, neither should its prevalence in the international context.

In ascertaining customary norms, generated from or codified by treaties, most of the relevant treaties, resolutions, and declarations are multilateral, rather than bilateral. In forging a document that many nations can sign, the terms of the treaty may be even less clear than those normally aspired to by domestic legislation. As such, customary international law cannot be defined in terms as positive in nature as those of domestic legislation, or even domestic common law. International custom develops through an evolutionary process. Its crystallization into a binding norm depends upon a variety of circumstances surrounding the custom. Requiring the type of clarity and authoritativeness of international norms that judges expect from domestic norms is misguided and simply unworkable. What matters is whether there is an identifiable core of prohibited conduct, even if disagreement and diverse perspectives persist at the periphery.

Sosa's progeny reveals confusion in judicial analysis between *having* jurisdiction and *exercising* it. The Court's enumeration of prudential considerations that support the need for "vigilant door keeping" at the jurisdictional stage explains why the Court did not interpret the ATCA as providing subject matter jurisdiction for just *any* alleged international law violation. These considerations, however, should not be used to create an additional jurisdictional hurdle for plaintiffs beyond that contained in the *Sosa* standard itself. By focusing too heavily on the prudential considerations, rather than the degree of consensus surrounding a particular norm, judges may articulate the conclusion that the norms alleged by plaintiffs are not sufficiently codified for adjudication, when what they really are saying is that they should not exercise jurisdiction because of concerns relevant to the act-of-state and political-question doctrines. By confusing prudential considerations with jurisdictional considerations, judges may offer faulty normative analyses, claiming that a norm is not a supernorm, when they really are uncomfortable adjudicating the norm at hand.

The New Haven School advanced a theory of the law as a communitarian, authoritative decision-making process. As Professor Reisman described in his tribute to his own teacher: "The Copernican Revolution in McDougal's jurisprudence was in unseating rules as the mechanism of decision and installing the human being—all human beings, to varying degrees—as deciders."[20] At the heart of all the categories and conceptions of the constitutive process of authoritative decision-making lies the value of human dignity. Professor Reisman's own scholarship so powerfully refined and employed that viewpoint that today it implicitly pervades all of international legal analysis. Reisman's work transformed the New Haven School from an *approach* to the law to a fundamentally new understanding of *what the law is*.

Adopting a New Haven School approach to evaluating whether a particular international law norm is sufficiently crystallized to warrant domestic adjudication (that is, whether it constitutes what we have called a supernorm) means, at a minimum, recognizing the role of multiple actors in constituting community norms of behavior. Assessing what weight to accord the practice and pronouncements of various actors is not unproblematic. The New Haven approach is not infinitely inclusive: only "decision-makers" make the law, even though a broader range of actors may *apply* the law, once made. In addition, arguments persist about the decisive weight that ought to be accorded to the United States' own legal proclamations and practice in determining whether plaintiffs in an ATCA case have alleged the violation of a norm that meets the *Sosa* standard. Traditionally, the New Haven School has tended to accord more weight to U.S. practice than some feel is warranted in a pluralistic international society. United States assent should not be the *sine qua non* of an accepted international law violation, but in practical terms, it is unlikely that U.S. courts will make themselves available to adjudicate violations of international norms that the United States itself does not recognize.

We are not advocating, nor would a New Haven approach support, unrestricted access to U.S. domestic courts for plaintiffs with grievances framed in terms of international law violations. Domestic courts, however, should not misconstrue *Sosa* to prevent them from adjudicating alleged violations of well-established international norms. Since World War II, international law has played an increasingly important role in protecting individual rights, irrespective of the victim's nationality. As the Supreme Court recognized in *Sosa*, those protections are not limited to the eighteenth-century norms enumerated by Blackstone. International law sources, on their face, clearly define an array of profoundly important rights that merit protection from sovereigns and sovereign actors, as well as private actors in certain instances. The implementation of these rights is consistent with the judiciary's responsibilities in both the domestic and world legal orders. Professor Reisman's work provides scholars, advocates, and judges with important tools for identifying these rights, thereby ensuring that domestic courts will play a key role in protecting human dignity by applying international standards in the decades ahead.

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20 W. Michael Reisman, *Theory About Law: Jurisprudence for a Free* Society, 108 YALE L.J. 935, 937 (1999).